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10th
Anniversary issue

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L&S Corporate Amicus is **10 years** now. This monthly newsletter was introduced with a purpose to deliver regular insights to our readers on the latest developments in the Corporate law. Through Corporate Amicus, we at Lakshmikumaran and Sridharan Attorneys share our knowledge and experience in a broad array of laws relating to mergers & acquisitions, private equity, real estate, insolvency, arbitration, FEMA, infrastructure and project finance, and general corporate and commercial law.

It brings me great pleasure to commemorate the 10-year journey of this knowledge base. I take this opportunity to thank our professionals whose regular contributions have made this achievement possible. Most importantly, I am grateful for the pleasure of serving our growing number of readers and thank you, for your support and patronage. With a decade gone by, I look to the one ahead, with even more zeal and enthusiasm, to continue this unwavering commitment to knowledge sharing.

V. Lakshmikumaran

It gives me a great satisfaction to announce that L&S Corporate Amicus has served the corporate community for ten long years now, attempting to bring the law in its simplest form to all our readers, including our clients and attorneys, who are a part of the L&S family.

I am hopeful that it has managed to bridge some of the gap between the plain text of law and its implementation by practicing minds. Dedicating resources and running the press on a continuous basis was no easy task for us. Nevertheless, we propose to bring out more changes going forward, so that it can be more reader friendly and expansive in its approach. We would be more than happy to receive any suggestions/ feedback on the same.

L. Badri Narayanan

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Status of registration for arbitration under MSME Act, 2006

By **Rashi Srivastava and Aditya Thyagarajan**

Micro, Small and Medium Enterprises ('**MSMEs**') are considered as the engine of economic growth. With the object of facilitating promotion, development and enhancing the competitiveness of MSMEs, the Indian Parliament enacted The Micro Small and Medium Enterprises Development Act ('**Act**') in 2006. One of the key provisions of the Act is that it provides a forum and mechanism for speedy recovery of delayed payments to micro and small enterprises.

According to Chapter V of the Act, whenever any supplier, being a micro or small enterprise, supplies any goods and / or renders any services to any buyer, the buyer shall make payment on or before the agreed date which shall not be more than 45 days of acceptance. If the buyer fails to make such payments as agreed, then the buyer shall be liable to pay compound interest on monthly basis at three times the bank rates notified by the Reserve Bank. If any dispute arises with regard to any amount due and payable to the supplier, it can be settled by making a reference to the Micro and Small Enterprises Facilitation Council ('**Facilitation Council**') established under the Act.

Section 2(n) defines the term 'supplier' as a micro or small enterprise, which has filed a memorandum with the authority specified by the State Government and includes the National Small Industries Corporation, the Small Industries Development Corporation of a State or Union Territory, and any Company, Co-Operative Society, Trust or a Body, which is engaged in selling goods or rendering services produced by micro or small enterprises.

However, the Act does not specify whether registration under Section 8 of the Act is mandatory in order to avail the remedy of making a reference to the Facilitation Council. This issue has arisen from time to time and various High Courts have had the occasion to adjudicate the same.

Conflicting decisions

The Allahabad High Court, in *Hameed Leather Finishers* v. *Associated Chemical*[1], held that registration of a supplier as a micro / small enterprise is not relevant for initiating proceedings before the Facilitation Council. The Court held that the definition of a supplier under Section 2(n) uses the term 'includes' which clearly shows that the definition is inclusive and the legislature intended to enlarge the meaning of the term 'supplier'. In the case of *Indur District Cooperative Marketing Society Ltd.* v. *Microplex (India), Hyderabad and Ors.*[2], the Andhra Pradesh High Court made similar observations and held that the registration of the enterprise was not mandatory.

Similarly, in *GE T&D India ltd.* v. *Reliable Engineering Projects and Marketing*[3], the Delhi High Court held that, a unit which is not registered as a supplier can still be covered by

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[1] *Hameed Leather Finishers* v. *Associated Chemical* [2013 SCC OnLine ALL 9058]

[2] *Indur District Cooperative Marketting Society Ltd.* v. *Microplex (India), Hyderabad and Ors*. [2016 (3) ALD 588]

[3] *GE T&D India ltd*. v. *Reliable Engineering Projects and Marketing* [2017 SCC OnLine Del 6978]

the Act, if it fulfils the requirements thereof. The Delhi High Court, on the other hand, in *Ramky Infrastructure Pvt. Ltd.* v. *Micro and Small Enterprises Facilitation Council*[4], held that Section 18 enables 'any party' to make a reference to the Facilitation Council when the dispute is regarding any amount due and payable to a supplier. The Court observed that the definition of supplier under Section 2(n) is an exhaustive one. It is divided into two parts, the first part deals with a micro or small enterprise which has filed a memorandum with the authority and the second part includes three exceptions to this condition.

Whereas, the High Courts of Gujarat, Madhya Pradesh and Bombay, in *Nik San Engineering Co. Ltd* v. *Easun Reyrolle Ltd.*[5], *Frick India Ltd.* v. *Madhya Pradesh Micro And Small Enterprises Facilitation Council*[6] and *Scigen Biopharma Pvt. Ltd.* v. *Jagtap Horticulture Pvt. Ltd.*[7] Respectively, held that the unit must be registered under Section 8 of the Act on the date the transaction took place in order to qualify as a supplier under Section 2(n), and to take the advantage of the mechanism provided under Chapter V. It was held that, further, a subsequent registration also would not confer any benefit upon the unit.

Supreme Court clears confusion

Both these interpretations given by the High Courts, though seemingly plausible, gave rise to a conflicting and uncertain position. This debate was however recently settled by the Supreme Court in the case of *Silpi Industries* v. *Kerala State Road Transport Corporation*[8]. The Court held that the claimant was not entitled to relief prayed for, as on the date of supply of goods and services, the claimant did not have registration under the Act. According to the facts of the case, the claimant approached the District Industrial Centre for grant of memorandum only 4 days before raising the last invoice and the supplies were concluded prior to registration of the supplier. The Apex Court categorically stated that, in order to seek the benefit of the provisions under the Act, the seller should have been registered under the Act as on the date of entering into the concerned contract. Registration under the Act, if obtained, will only make the Act applicable prospectively. Further, merely by seeking a registration subsequent to entering into a contract and supply of goods and services, one cannot claim the benefit of the provisions of the Act retrospectively.

Points to ponder

Even though the judgment clears the confusion created by conflicting judgments of various High Courts, it may have far reaching unintended consequences. According to some surveys, a large proportion of micro and small enterprises are likely to shut down, scale down or sell their business by the end of 2021. The financial distress being faced by micro and small enterprises due to the Covid-19 pandemic is likely to lead to an increase in disputes. One of the main objectives of the Act was to provide a forum and mechanism for speedy recovery of delayed payments to micro and small enterprises. However, in light of this judgment, such entities would not be able to avail the benefit unless they had obtained registration under the Act prior to execution of the contract. Another aspect is that this interpretation may be treated as clarificatory and may be made

[4] *Ramky Infrastructure Pvt. Ltd.* v. *Micro and Small Enterprises Facilitation Council* [2018 SCC OnLine Del 9671]
[5] *Nik San Engineering Co. Ltd.* v. *Easun Reyrolle Limited* [2019 SCC OnLine Guj 2474]
[6] *Frick India Ltd*. v. *Madhya Pradesh Micro and Small Enterprises Facilitation Council* [2020 GLH (1) 636]
[7] *Scigen Biopharma Pvt. Ltd*. v. *Jagtap Horticulatuer Pvt. Ltd*., Bombay High Court Arbitration Appeal No. 23 of 2018
[8] *Silpi Industries* v. *Kerala State Road Transport Corporation* [2021 SCC OnLine SC 439]

applicable retrospectively which could affect several cases already pending before Facilitation Councils.

Keeping the objectives of the Act and the present economic climate in mind, a question does arise as to whether denying the benefits under Chapter V of the Act to micro and small enterprises, for want of registration on the date of the contract, is a case of throwing the baby out with the bathwater.

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Plastic Waste Management (Amendment) Rules, 2021: Wading through the Uncharted Territory of Plastic Waste Management

By **Vidhi Madan and Sudish Sharma**

'Of all the waste we generate, plastic bags are perhaps the greatest symbol of our throwaway society. They are used, then forgotten, and they leave a terrible legacy.'

- Zac Goldsmith

Introduction:

Plastic has numerous uses and its physical and chemical properties lead to economic success. However, our relationship with plastic is complicated, as the use of plastic impedes such commercial success in the long run, in terms of impacting the environment.

The social advantages of plastic are irrefutable, it has come to occupy a central position in our day-to-day lives. However, the unsystematic removal of plastic has become a significant danger to the environment.

Therefore, to address the issue of plastic waste management in India, the Government of India through its Ministry of Environment, Forests and Climate Change ('**Ministry**'), in exercise of its powers conferred under the Environment (Protection) Act, 1986, had notified the Plastic Waste Management Rules, 2016 ('**PWM Rules**') on 18 March 2016, which were subsequently amended in 2018.

Applicability:

- As per the PWM Rules, States, Union Territories, Pollution Control Boards (PCBs), Local Bodies and Panchayats are obligated to ensure effective plastic waste management.
- Further, every producer, importer and a brand owner that introduces any product into the market is primarily responsible for establishing a system for collecting back the plastic waste generated due to their products.
- A '***producer***' is defined under the PWM Rules to include industries or individuals using plastic sheets or like or covers made of plastic sheets or multi-layered packaging, for packaging or wrapping the commodity.

- A '***brand owner***' means a person or company who sells any commodity under a registered brand label.

As per the PWM Rules, Producers or brand owners of plastic waste are required to register with pollution control boards ('**PCBs**') and work out the modalities for waste collection system, based on Extended Producers Responsibility ('**EPR**') and involving State Urban Development Departments, either individually or collectively, through their own distribution channel or through the local body concerned.

With the introduction of the said PWM Rules, the Ministry has been on a spree to implement measures for effective management of plastic waste throughout the country, including effecting long-term improvements in waste management systems, promotion of alternative options, and effective awareness campaigns. In this regard, the Ministry, on 12 August 2021 *vide* Gazette Order G.S.R. 571(E) has formulated the Plastic Waste Management (Amendment) Rules, 2021 ('**Amendment Rules**'), for the effective implementation of PMW Rules.

Amendment Rules and its implications:

We discuss a few of the relevant amendments in the PWM Rules, as made *vide* the Amendment Rules, which can effectively reduce plastic waste generation and its effects on the environment:

1) Extended applicability; greater accountability[9]:

To implement the PWM Rules more effectively and to give a thrust to plastic waste minimization, source segregation, recycling, involvement of waste pickers, recyclers and waste processors in collection of plastic waste fraction either from households or any other source of its generation, or intermediate material recovery facility and to adopt polluter's pay principle for the sustainability of the waste management system, the Central Government applied the PWM Rules to every waste generator, local body, Gram Panchayat, manufacturer, importer and producer.

To expand the scope of PWM Rules, the Amendment Rules seek to include brand-owners, plastic waste processor (recycler, co-processor, etc) under the ambit of the PWM Rules.

Consequently, with the Amendment Rules coming forth, there will be a greater responsibility cast on brand owners and plastic waste processors for collection of plastic waste fraction, either from households or any other source of its generation or intermediate material recovery facility, and to adopt the polluter's pay principle for sustainability of the waste management system.

2) Definition of non-woven plastic bag[10]:

The Amendment Rules have introduced the definition of 'Non-woven plastic bag' which reads as, '*Non-woven plastic bag' means Non-woven plastic bag made up of plastic sheet or web structured fabric of entangled plastic fibers or filaments (and by perforating films) bonded together by mechanical or thermal or chemical means, and the 'non-woven fabric' means a flat or tufted porous sheet that is made directly from plastic fibres, molten plastic or plastic films;'*

The Madras High Court in *Chennai Non-Woven's Private Limited* v. *State of*

[9] Rule 2(1) of Amendment Rules.

[10] Rule 3(na) of Amendment Rules.

T.N.[11], dealt with the usage of non-woven plastic bag and provided that in general parlance, non-woven plastic is not biodegradable or compostable and may take many years to break down in the environment. The re-usability of these bags also carries with it the risk of pathogenic transmission.

Previously, entities dealing with non-woven plastic were not governed by the PWM Rules, however, vide the Amendment Rules, they are bound to fulfil the specific conditions imposed by the Amendment Rules. This new class of plastic has been brought within the scope of the Amendment Rules as non-woven carry bags are not a sustainable alternative to plastic.

3) **Definition of single-use plastic commodity**[12] **and phasing out the same**:

One of the revolutionary introductions, rather a significant addition, to the PWM Rules is the insertion of the definition of '*single-use plastic commodity'* and the obligations with respect to such commodities.

Single use plastic commodity means a plastic item intended to be used once for its purpose before being dispose of or recycled. In other words, single use plastic items have to be thrown away after one use, such as paper cups, plastic bags, straws etc. These items cannot be used multiple times.

The Ministry has earlier issued a letter bearing ref. No. D.O. No.: 17-2/2001-HSMD dated 21 January 2019 stating the concerns of single use plastic, which is often referred to as 'disposable plastic' to be used once before they are thrown away, and also stating the formulation of Standard Guidelines for single use plastic ('**Guidelines**') , and urging the State Government and UTs to adopt the Guidelines for effective management of plastic waste.

The Guidelines provide for legal options for phasing out the single-use plastic commodities from circulation and states that States or UT Administrations intending to introduce a prohibitive action on single use plastic products may identify a clear list of products that need to be targeted through this measure so that there is no ambiguity. Such products may *inter-alia* include plastic cutlery including plates, straws, stirrers.

Additionally, Starred Question Number 173 before the Lok Sabha relating to the '*ban on single use plastic*' was answered on 12 February 2021, wherein the Ministry stated that the it has issued the guidelines for waste management system improvements and legal options for States/UTs to prohibit single use plastic items through regulatory measures etc. The questions posed were with regard to whether the Government has formulated a roadmap to meet the 2022 deadline for eliminating single use plastic; and whether the guidelines issued by the Government mandate the States and Union Territories to phase-out single-use plastic by 2022; and more importantly, details of the steps taken by the

[11] 2019 SCC OnLine Mad 2308.
[12] Rule 3(va) of Amendment Rules.

Government to sensitize people against the use of single-use plastic leading to its gradual elimination. Now, in response to the guidelines, 32 States and Union Territories have issued notifications/orders introducing regulations pertaining to complete or partial ban on plastic carry bags and/or identified single-use plastic items.

Vide the Amendment Rules, now, the manufacture, import, stocking, distribution, sale and use of the following single-use plastic commodities, including polystyrene and expanded polystyrene, shall be prohibited with effect from 1 July 2022:

(a) ear buds with plastic sticks, plastic sticks for balloons, plastic flags, candy sticks, ice-cream sticks, polystyrene (Thermocol) for decoration;

(b) plates, cups, glasses, cutlery such as forks, spoons, knives, straw, trays, wrapping or packing films around sweet boxes, invitation cards, and cigarette packets, plastic or PVC banners less than 100 micron, stirrers.

It has been observed that the sustainable alternatives for the aforesaid items mentioned in (a), such as the decoration item options like paper lanterns, recycled bunting, fluid ear wash, bamboo cotton buds, organic cotton makeup pads etc., and for (b) such as stainless steel straws, bamboo straws, glass or porcelain plates and mugs, reusable bamboo utensils, a travel cutlery set etc., are easily available. And therefore, there is now a definite deadline to phase out the popular single use plastics in the market and increase the usage of alternative materials.

The Amendment Rules also intend to provide ample time to manufacturers, importers, producers, and brand-owners to arrange for sustainable alternatives of the abovementioned single-use plastic commodities and change their respective business models to align with the mandate of the new law of the land.

It may be noted that many challenges have been faced in the implementation of the abovementioned regulatory provisions introduced by States and UTs. It is in light of the same that the provisions relating to usage of 'single use plastic commodities' have been included to regulate single-use plastic items on a pan India basis.

4) Changes in marking or labelling:

The requirement of marking or labelling has been extended to 'plastic packaging' in addition to 'plastic carry bags' and 'multi-layered packaging', *vide* the Amendment Rules.[13]

i) Marking or labelling of carry bag and plastic packaging – Name, registration number of producer or brand owner and thickness of the carry bag and plastic packaging should now be clearly disclosed on the carry bag and plastic packaging.[14] Earlier, only the name and registration number of the manufacturer was required to be mentioned. With the effect of the

[13] Rule 11(1) of Amendment Rules.
[14] Rule 11(1)(a) of Amendment Rules.

Amendment Rules, brand owners or producers, as the case may be, will also have to mention the aforesaid information on the carry bag and plastic packaging.

ii) Marking or labelling of multi-layered packaging - The PWM Rules provide for the requirement of name and registration number of the manufacturer in case of multi-layered packaging. However, the Amendment Rules exclude the marking or labelling requirement of multi-layered packaging used for imported goods.[15]

iii) Marking or labelling of carry bags made from compostable plastic – The PWM Rules provide for marking and labelling requirements, such as name and certificate number, in case of carry bags made from compostable plastic. However, the Amendment Rules provide that the name and certificate number of the producer shall also be specified in case of carry bags made from compostable plastic.[16]

The marking and labelling requirements to be adhered to by the producer intend to impose an additional burden on such entity for ensuring collection of plastic waste generated through their products.

Conclusion:

On a concluding note, despite the PWM Rules in place since 2016, there is still an absence of systematic efforts in most parts of the country to reduce the risks associated with plastic waste.

With the advent of the Amendment Rules, there is now a more definitive approach for management of plastic waste generated in the country. Attention has been drawn towards the need for appropriate alternatives for single use plastic items and there is now a clear embargo on single use plastic commodities across the country. The additional marking and labelling requirements are all part of the plan to increase obligations and awareness on the multiple stakeholders to the plastic industry.

Entities engaged in business activities relating to plastic or plastic items will be required to decrease and subsequently, eliminate the production, sale, delivery etc, as the case may be, of single-use plastics items and implement different alternatives to packaging. In other words, a significant change in business model of the existing businesses will be required so as to be compliant with the Amendment Rules and avoid the penalties provided therein.

However, it is pertinent to note that though the Ministry intends to make plastic waste management laws uniform across India by way of the Amendment Rules, the position of industries to follow State specific rules is still not clear. Bearing in mind the intention behind the implementation of the Amendment Rules, this is positive development. It remains to be seen how beneficial the law shall be, with the passing of time, especially with regard to industries' adherence to the spirit of the legislation.

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[15] Rule 11(1)(b) of Amendment Rules.
[16] Rule 11(1)(c) of Amendment Rules.

Notifications and Circulars

Covid-19 vaccination of persons other than employees and their families an eligible CSR activity: The Ministry of Corporate Affairs ('**Ministry'**) recently issued a circular clarifying the usage of Corporate Social Responsibility ('**CSR'**) funds for combating Covid-19 challenges. The latest Circular further clarifies the Ministry's 23 March 2020 Circular, bearing ref. No. 10/2020, which had stated that spending of CSR funds for Covid-19 is an eligible CSR activity.

The latest General Circular No. 13/2021, dated 30 July 2021 states that spending CSR funds for Covid-19 vaccination, on persons apart from the employees and their families, would qualify as an eligible CSR activity under Schedule VII of the Companies Act, 2013. According to the Circular, '*vaccination for persons other than employees and their families, is an eligible activity under item no. (i) of Schedule VII … relating to promotion of health care including preventive health care and also under item no. (xii) of Schedule VII relating to disaster management*', subject to adherence to the Companies (CSR Policy) Rules, 2014 and related circulars issued by Ministry from time to time.

IRDAI introduces mandatory compliances for registration of Indian insurance company having foreign investment: In order to align the provisions of various regulations with the Insurance (Amendment) Act, 2021, read with the Indian Insurance Companies (Foreign Investment) Rules, 2015, the Insurance Regulatory Development Authority of India (IRDAI) has amended certain regulations through the Insurance Regulatory and Development Authority of India (Indian Insurance Companies) (Amendment) Regulations, 2021.

The most significant amendment has been made to the IRDAI (Registration of Indian Insurance Companies) Regulations, 2000. Under the new regulations, it is now mandatory that a majority of the directors and key management of an Indian Insurance Company, as well as at least one among the chairperson of the Board, its managing director, and its CEO, have to be a Resident Indian citizen.

The regulations also create additional compliances for companies which have financial investment of more than 49 per cent. In a financial year, where dividend is paid on equity shares and the solvency margin is less than 1.2 times the control level, 50 per cent of the net profit must be retained by such company in a general reserve. In addition to this, at least 50 per cent of the directors need to be independent directors unless the chairperson of the Board is an independent director, in which case at least one-third of the Board should be independent directors.

IFSC Authority (Issuance and Listing of Securities) Regulations, 2021 introduced: The International Financial Services Centres Authority ('**IFSCA**') has introduced a comprehensive framework of regulations for issuance and listing of securities in the form of the International Financial Services Centres Authority (Issuance and Listing of Securities) Regulations, 2021, in order to attract investment from foreign investors and non-resident Indians and get them listed.

These regulations specify the requirements and eligibility criteria of issuers for listing their companies on IFSC Exchanges. For instance, Chapter III of the regulations state that a company is eligible to make an Initial Public Offering (‘**IPO’**) if the issuer has an operating revenue of at least USD 20 million in the preceding financial year or have an average pre–tax profit, based on consolidated audited accounts, of at least USD one million during the preceding three financial years.

In case a start-up or SME company wants to list its specified securities with or without making a public offer, it needs to meet certain criteria. To start with, the offer document needs to be filed within 10 years from the date of incorporation of the company. Further, the annual turnover of the company should not be more than USD twenty million for any financial year since incorporation. Lastly, the company should be working towards innovation, development or improvement of products or processes or services, or should have a scalable business model with a high potential of employment generation or wealth creation.

On the other hand, a company listed on a recognised stock exchange may issue rights issues or preferential issues of specified securities, subject to compliance with the requirements that may be specified by the recognised stock exchange(s) and the IFSC Authority from time to time.

Companies (Incorporation) Fifth Amendment Rules, 2021 introduces new rule for giving a new name to existing company, in case of non-compliance: If a company has registered under a particular name and it is found subsequently that such name is similar or identical to that of another company that already exists, the company will be directed to change its name within three months of such knowledge. The MCA has inserted a new rule to the Companies (Incorporation) Rules, 2014, which imposes consequences, in case a company fails to change its name in accordance to the direction issued, within the stipulated time.

According to the new Rule (33A), the Registrar of Companies (‘**RoC**’) shall enter a new name of the Company in the register of companies, in case the company fails to do the needful, in the following format: ‘ORDNC’ (which stands for Order of Regional Director Not Complied) followed by the year of passing the direction, serial number, and existing Corporate Identity Number (‘**CIN**’). The RoC will issue a certificate of fresh incorporation to the company with this name.

Pre-Packaged Insolvency Resolution Process for MSMEs – MCA releases report of the Insolvency Law Committee: The Ministry of Corporate Affairs (‘**MCA**’) had created a framework for the pre-packaged insolvency resolution process considering the Covid-19 pandemic which suspended operation of the Code for one year. Many MSMEs needed quick and affordable resolution for stressed assets, as they did not have the access to the Code during this period. Therefore, the Central Government had made a special insolvency framework for MSMEs under the Section 240A of the Code. After the responses from public and taking the requirement of urgent need in consideration, the insolvency law committee set up by the MCA proposed the pre-packaged insolvency resolution process, which was cost-effective, time-saving, and semi-formal. This was introduced through the IBC (Amendment) Ordinance, 2021. The MCA released the report of the insolvency law committee on pre-packaged insolvency resolution process in July 2021 which, *inter alia*, discussed the following:

Eligibility and pre-initiation requirements

- This process will only be available to the MSMEs as per Section 7(1) of the MSME Act, in cases where the default is at least INR 1 lakh and at most INR 1 crore. The eligibility of the applicant shall be determined in terms of Section 29A of the Code.
- The pre-packaged process cannot be availed by a corporate debtor if they have undergone this process or the Corporate Insolvency Resolution Process (CIRP) in the last three years. The pre-packaged process also cannot be initiated if the liquidation order has been passed.
- Sixty-Six per cent approval is required from the financial creditors for the appointment of the Resolution Professional and for the initiation of pre-packaged process.

Initiation of pre-pack process

- After the initiation of the pre-packaged insolvency process, the Adjudicating Authority can either admit or reject the application and shall try to prevent delays in such process. A time limit of 14 days has been provided.
- The pre-packaged insolvency process must be completed within 120 days from the date of admission. The Committee of Creditors (‘**CoC**’) must approve or reject the plan by the 90th day of admission, and the Adjudicating Authority must pass the order within 30 days.

Consideration and approval of resolution plans

- Due regard to be given to the insolvency jurisprudence evolved for the consideration and approval of resolution plans under the pre-packaged insolvency process.
- While applying the procedure for consideration and approval, the decision of CoC shall fall within its own commercial wisdom, rather than being subjected to judicial interventions.
- A base resolution plan must be filed by the corporate debtor, prior to the initiation of the pre-packaged insolvency process.

Closure of pre-pack process

- The closure of pre-packaged insolvency process will take place after the approval of a resolution plan. A simpliciter termination of the process at different stages, termination of pre-packaged insolvency process and initiation of CIRP and liquidation shall be allowed in exceptional circumstances.
- The cost incurred in the termination process shall be borne by the Corporate Debtor.
- The CoC can initiate CIRP at any stage during the process of pre-packaged insolvency resolution.

Ratio Decidendi

Arbitral award based on no evidence or ignoring important evidence suffers from patent illegality

In an interesting dispute regarding the setting aside of an award under Section 34 of the Arbitration and Conciliation Act, 1996 (‘**Arbitration Act’**), the Supreme Court has stated that an arbitration award that disregards important evidence or is based on no evidence, or rewrites a contract, has to be set aside under Section 34 on the grounds of patent illegality.

Brief facts:

a. The respondent, Tuticorin Port Trust (‘**Trust’**), awarded the appellant (‘**Company’**) a tender for certain development and operation activities on a Build, Operate, and Transfer basis for 30 years.

b. The parties had business disagreements, especially over royalty/revenue sharing. The Company asked the Trust to change the concerned License Agreement (‘**License Agreement’**) to include a revenue sharing model instead of a royalty model which the Trust rejected.

c. The Company, thereafter, initiated arbitration proceedings under the License Agreement's arbitration clause. The Arbitral Tribunal ruled in the Company's favour, directing the transfer of the royalty model to a revenue sharing model. Following that, the Trust filed a petition under Section 34 of the Arbitration Act to have said arbitral award set aside. The District Judge dismissed said petition but appeal an against such dismissal was allowed by the Madras High Court. The Company took their grievances to the Supreme Court.

Submissions:

a. The Appellants argued that clause 14 of the License Agreement expressly states that if a change in law occurs after the Agreement’s effective date that materially and adversely affects the Licensee's rights under the Agreement, thereby affecting the project's commercial viability, the Licensee may request amendments to the terms of the Agreement by written notice. Clause 14.3 further states that the Licensee is not entitled to any compensation from the Licensor as a result of a change in law, subject to the terms of clause 15.3. The Appellants argued that if clause 14.3 is interpreted correctly, it will be clear that the Licensee is not entitled to compensation as a result of any change in law because relief could be provided to the Licensee by suitably amending the terms of the agreement when the change significantly and adversely affects the Licensee’s rights.

b. On behalf of the Respondent, it was argued that the Tribunal had permitted for complete substitution of the contract terms between the parties. The Tribunal had substituted the revenue sharing approach for the royalty method when the parties’ agreement was based on the royalty system. The Respondents claimed that was not legal and a party could not be forced to enter into a new contract against their will.

Decision:

a. The Supreme Court set aside the arbitral award, holding that the award was patently illegal. The Court observed that ‘*A decision which is perverse, though would not be a ground for challenge under ‘public policy of*

India', would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.'

b. Further, the Supreme Court found that the award in the case resulted in a new contract being constituted between the parties. The Court determined that the Arbitrator's powers are confined to the terms of the contract between the parties, which cannot be changed under any circumstances. It held that the Arbitrator was acting outside of his authority in the present instance.

[*PSA SICAL Terminals (P) Ltd.* v. *V.O. Chidambranar Port Trust* – Judgment dated 28 July 2021 in Civil appeal No. 36993700 of 2018 of 2021, Supreme Court of India]

Personal Guarantor cannot be prosecuted under IBC Section 95 where concerned corporate debtor is not under CIRP

The National Company Law Tribunal ('**NCLT**'), Mumbai, while dismissing an Interlocutory Application (IA) filed against a personal guarantor, has held that a personal guarantor cannot be prosecuted under Section 95 of the Insolvency and Bankruptcy Code' 2016 ('**Code**') in a situation where the Corporate Debtor with respect to whom a guarantee has been given is not under Corporate Insolvency Resolution Process.

Brief facts:

The Financial Creditor moved an IA before the NCLT, Mumbai under Section 95 of the Code against a personal guarantor for initiating the Corporate Insolvency Resolution Process (CIRP).

Decision:

a. Section 95 has been construed to be a crucial provision in ensuring that the objectives of the Code are met as an application to initiate corporate insolvency resolution process against a personal guarantor has to be filed under this section. However, an application against a personal guarantor can be filed under this section only if the concerned corporate debtor is under CIRP.

b. Therefore, the NCLT bench dismissed the interlocutory application filed against the personal guarantor on the grounds that the concerned corporate debtor is not under corporate insolvency resolution process as a result of which personal guarantor is not liable to be prosecuted under Section 95 of Code.

[*Altico Capital India Ltd.* v. *Rajesh Patel* – Judgment dated 9 July 2021 in I.A. No. 1062 of 2021, National Company Law Tribunal, Mumbai]

SEBI's consent not mandatory for compounding of offence under SEBI Act – SAT however must keep SEBI's view in mind when deciding a compounding application

An application by the accused for compounding of offences under the Securities and Exchange Board of India Act, 1992 ('**SEBI Act**') was rejected by the Delhi High Court under Section 24A of the SEBI Act, 1992 on the grounds that a compounding application requires the consent of SEBI. The Supreme Court has however held that SEBI's consent is not mandatory for compounding of offences and SEBI's opinion must be seen as only the regulator's opinion. The Court went on to observe that the Securities Appellate Tribunal (SAT) or the court before which such proceedings are pending must obtain the views of SEBI and such view, unless arbitrary or mala fide, must be regarded with a high degree of deference.

Brief facts:

a. The Petitioner was accused of manipulating the prices of the shares of the company. The Petitioner filed an application for compounding the offence under Section 24A of the SEBI Act, which was rejected by the trial court in Delhi by placing reliance to the Supreme Court decision in *JIK Industries Limited* v. *Amarlal Jumani*, (2012) 3 SCC 255. It was held that for compounding an offence, there needs to be consent from SEBI, who was the complainant.

b. The Petitioner thereafter filed an appeal before the Delhi High Court. The High Court reasoned that compounding should not be done at the final stage but at the initial stage, as it would not be fair to discharge an accused at the final stage without the consent of SEBI and the same will go against the objective of the SEBI Act.

Submissions:

a. The Appellant submitted that SEBI accepted the Appellant's proposal of buying the shares from shareholders at the rate of INR 12 per share which was higher than the issue price of INR 10. Therefore, no loss was incurred by the investors. The SAT and courts have adequate powers under Section 24A to compound the offence and the consent from SEBI is not necessary.

b. The Respondent, SEBI, submitted that the funds obtained and raised through the IPO were misused in buying back the shares. The six entities which were connected to the people of the company were provided the funds of the public issue to purchase the shares of the company.

Decision:

a. The Supreme Court held that Section 24A does not state that SEBI's consent is necessary while compounding an offence. Whenever the SEBI recommendations are necessary, the provisions for such requirement are made in the SEBI Act.

b. The Court stated that SEBI is an expert regulator whose opinion should be entitled to a degree of deference and must be taken into consideration while considering the compounding of offence.

c. The Supreme Court found that the tribunals are required to consider the gravity of the offence and consider the views of SEBI in compounding an offence, unless such views are manifestly mala fide or arbitrary.

[*Prakash Gupta* v. *SEBI* - Judgment dated 23 July 2021 in Criminal Appeal No. 569/2021, Supreme Court of India]

Consent of majority unit holders mandatory for trustees to wind up Mutual Fund scheme

The Supreme Court has held that when a majority of the trustees agree to wind up a mutual fund scheme, the trustees must first seek consent from the majority of the unit holders. Additionally, after publishing of the notice and explanation of the reasons for winding up, the consent of the majority of the unit holders must be obtained.

Brief facts:

a. A Special Leave Petition was filed by the mutual fund holders of the Franklin Templeton Trustee Services Private Limited ('**Franklin Templeton**'/ '**Corporation**'/ '**Trustees'**) to challenge the winding up decision, as well as the mechanism for winding up, of the Franklin Templeton Mutual Fund's six schemes, which was brought before the Apex Court.

b. Franklin Templeton also filed an appeal against a Karnataka High Court ruling prohibiting the Corporation from winding up its six credit-oriented mutual fund schemes without obtaining a simple majority of unit holders' approval ('**mutual fund holders'** or '**investors'**).

Submissions:

a. The Appellants, being the Trustees, , along with the Securities and Exchange Board of India (SEBI) and an asset management company ('**AMC**'), argued that when the Trustees and SEBI decide to wind up a scheme, the mutual fund holders' consent under Regulation 39(2) clauses (a) and (c) of the SEBI (Mutual Funds) Regulations, 1996 ('**MF Regulations**') is not required and, only according to Regulation 39(2)(c), a resolution passed by 75 percent of mutual fund holders is required to wound up a scheme. The Appellants have also challenged the constitutional validity of the MF Regulations.

b. The Respondents, being the mutual fund holders, contended that the Appellants' decision to wind up the plan was 'a smokescreen to cover misfeasance and wrongdoing.' They objected to the Appellants' argument and maintained their primary allegations, as made erstwhile vide the writ petitions filed before the Karnataka HC, which stated that they had been harassed and subjected to fraud, mismanagement, and breach of fiduciary duty by the AMC and the Trustees, resulting in a violation of the SEBI Act, 1992, and the MF Regulations. The Respondents filed a fraud finding against the AMC and the trustees, claiming that more than INR 15,000 crores had been taken out of the six schemes two weeks previous to the decision to wind them up. Some of the Respondents also maintained that consent could only be imposed on those who agreed to the mutual fund schemes' liquidation.

Decision:

The Supreme Court of India ordered the scheme to be wound up in the Respondents' best interests because it is the only way to enable liquidation and disbursement of funds/securities/assets to them. According to Regulation 18(15)(c) of the MF Regulations, the trustees must get the consent of mutual fund holders before winding up any mutual fund scheme. Also, after the notice is published, the permission of the majority of mutual fund holders shall be sought, together with the cause for the winding up. In addition, the Supreme Court declared that MF Regulations do not suffer from manifest arbitrariness with respect to the challenge on constitutional validity of MF Regulations. Major issues decided by the Court are as follows:

i. ***Mutual Fund Holders' consent mandatory:*** According to the Supreme Court, the phrase 'shall' in Regulation 18(15)(c) must be interpreted as a command. According to Regulation 18(15)(c), mutual fund holders' approval is a pre-requisite mandate for the trustees, who are entrusted with the ability to wind up the scheme under Regulation 39(2)(a), to wind up any mutual fund scheme.

ii. ***Consent to be obtained only after notice has been published:*** The approval of mutual fund investors is required for winding up, but it is sought after publication of notice by the trustees, and the investors must provide thought, which may or may not be positive to the winding up decision.

Regulation 39(3) further requires trustees to give appropriate reasons for the winding up of such schemes.

iii. ***Regulation 39(2)(a) does not confer trustees with arbitrary powers:*** In response to a claim, the court stated that Regulation 39(3) requires trustees to explain the reasons for the winding up. Regulation 39(2)(a) or any other element of the statute confers no excessive delegation on the trustees, allowing them to act on their own whims and fancies. The Regulation provides many measures that limit, safeguard, and guide the power of trustees to decide when a mutual fund scheme should be wound up.

[*Franklin Templeton Trustee Services (P) Ltd. & Ors.* v. *Amruta Garg & Ors.* – Judgment dated 14 July 2021 in Civil appeal No. 498-501 of 2021, Supreme Court of India]

News Nuggets

'Financial Debt' includes interest free loans advanced to finance business operations of a corporate body

The Supreme Court has held that a person who gives a term loan to a Corporate Person, as defined under the Insolvency and Bankruptcy Code, 2016 ("**Code**"), free of interest, on account of its working capital requirements is a Financial Creditor under the Code, and therefore, competent to initiate the Corporate Resolution Process under Section 7 of the Code. Setting aside the NCLT and NCLAT Orders on the issue, the Apex Court noted that the definition of 'financial debt' in Section 5(8) of the IBC cannot be read in isolation, without considering the definition of 'claim' in Section 3(6), 'corporate debtor' in Section 3(8), 'creditor' in Section 3(10), 'debt' in Section 3(11), 'default' in Section 3(12), 'financial creditor' in Section 5(7) as also the provisions, *inter alia*, of Sections 6 and 7 of the Code. Observing that the NCLT and NCLAT had overlooked the words 'if any' in the definition of 'financial debt', the Court was of the view that if there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. The Supreme Court in the said of *Orator Marketing Pvt. Ltd.* v. *Samtex Desinz Pvt. Ltd.* [Judgment dated 26 July 2021] also noted that clause (f) of Section 5(8) included any amount raised under any other transaction having the commercial effect of borrowing and that sub-clauses (a) to (i) of Section 5(8) are illustrative and not exhaustive.

Online gaming – Madras HC quashes law prohibiting games played for stake even if involving skill

The Madras High Court has quashed the amendment to the Tamil Nadu Gaming Act, 1930 ('**TNG Act'**), which prohibited all forms of games being conducted in cyberspace irrespective of the game involved being a game of mere skill, if such game is played for a wager, bet, money or other stake. The amendment was brought in by an Ordinance last year and was formalised by the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 recently.

The Court observed that the sweeping wording of Section 3-A of the TNG Act, coupled with the expansive definition of 'gaming' injected therein, eliminated any chance of display of skill in any game on the virtual mode if any stakes, however little, are involved. Highlighting various contradictions in the amended law, the Court also noted that after the amendments, even physical form of game of football or volleyball played for bragging rights between two teams or a tournament which awards any cash prize or even a trophy, would, by the legal fiction created by the definition, amount to gaming and thereby outlawed. The amendments were also held to be unreasonable and manifestly arbitrary. The Court noted that the State made no endeavour to demonstrate that any lesser form of curbs may not have sufficed.

The Court also held that betting cannot be divorced from gambling and treated as an additional field for the State to legislate on, apart from the betting involved in gambling. The High Court in the said case Junglee Games India Private Limited v. State of Tamil Nadu [Judgment dated 3 August 2021] was also of the view that both rummy and poker are games of skill as they involve considerable memory, working out of percentages, the ability to follow the cards on the table and constantly adjust to the changing possibilities of the unseen cards. It observed that though poker may not have been recognised in any previous judgment in India to be a game of skill, but the Law Commission in its 276th Report has accepted the poker as a game of skill.

Courts have no power to modify or vary an award under Section 34 of the Arbitration Act

On the question that whether the power of a Court to set aside arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act') also grants the Court the power to modify the award, the Supreme Court has observed that power to remit or modify an award passed does not exist under the said section. The said Appeals before the Supreme Court pertained to the notifications issued and awards passed under the National Highways Act, 1956, by the competent authority under the said Act. These awards were passed based on the specific guideline values of lands in question and not on the sale deeds for the said lands, which resulted in abysmally low amounts being granted by the competent authority, thus giving rise to several claims. The District Collector appointed as the arbitrator did not find any infirmity in the amounts awarded by the competent authority. While hearing the petitions challenging the award passed under Section 34 of the Arbitration Act, the District and Sessions Judge enhanced the compensation, thereby modifying the award. These modifications were upheld by a division bench of the Madras High Court which laid down that 'at least insofar as arbitral awards made under the National Highways Act, 1956, Section 34 of the Arbitration Act must be so read as to permit modification of an arbitral award made under the National Highways Act so as to enhance compensation awarded by a learned Arbitrator'. The Supreme Court however noted that Section 34 provided extremely limited grounds on which an arbitral award could be set aside. The Apex Court in the said case of

The Project Director, National Highways No.45 E And 220 National Highways Authority of Indiav. M. Hakeem & Ors referred to the earlier decision passed by it in McDermott International Inc. v. Burn Standard Co. Ltd. [(2006) 11 SCC 181], where it was held that the Arbitration Act makes provisions for supervisory role of the Courts for the review of the arbitral awards to ensure fairness, and that the Courts cannot correct the errors of the arbitrators, and if any such powers to modify an award is recognized under Section 34, then the Court will be acting no different from an appellate court which would be contrary to the legislative intent behind Section 34.

Emergency arbitrator's award is enforceable in India

Holding that an award passed by an Emergency Arbitrator is enforceable under the Arbitration and Conciliation Act, 1996 ('**Arbitration Act'**), the Supreme Court in a recent judgment has ruled in favour of Amazon.com NV Investment Holdings LLC ('**Amazon'**) in a dispute with Future Retail Limited. The Apex Curt held that the interim award passed by the Emergency Arbitrator appointed under the Rules of the Singapore International Arbitration Centre ('**SIAC**') is enforceable under the Arbitration Act. The appeal arose from the Division Bench of the Delhi High Court staying the order of the Single Judge. The Single Judge had decided in favour of Amazon, holding that the impugned award was maintainable. The Supreme Court in this regard held that '*full party autonomy is given by the Arbitration Act to have a dispute decided in accordance with institutional rules which can include Emergency Arbitrators delivering interim orders, described as 'awards'. Such orders are an important step in aid of decongesting the civil courts and affording expeditious interim relief to the parties. Such orders are referable to and are made under Section 17(1) of the Arbitration Act.*' The Court reiterated the importance of party autonomy in arbitration proceedings and stated that, by agreeing to the SIAC Rules and the award of the Emergency Arbitrator, '*… the parties to the contract, in the present case, … have not bypassed any mandatory provision of the Arbitration Act*' and that there is nothing in the Arbitration Act which prohibits contracting parties from agreeing to a provision providing for an award being made by an Emergency Arbitrator. The Court in the said case of *Amazon.com NV Investment Holdings LLC* v. *Future Retail Ltd.* [Judgement dated 6 August 2021] also held that no appeal lies under Section 37 of the Arbitration Act against an order of enforcement of an Emergency Arbitrator's order made under Section 17(2) of the Act.

No bar to amendment of pleadings or filing of additional documents in CIRP application under IBC Section 7

The Supreme Court has held that there is no bar in permitting amendment of pleadings or to filing of additional documents in an application under Section 7 of the Insolvency and Bankruptcy Code, 2016. The NCLT Bengaluru bench had permitted the applicant bank to file additional documents and also to amend the application rejecting the objection of the Corporate Debtor on the issue of limitation. This order was appealed against and the NCLAT held that the application was barred by limitation. In the present appeal before SC, the appellant relied on *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminium Industries Private Limited*, [(2020) 15 SCC 1] and contended that the subsequent improvement in pleadings, at the fag-end of the NCLT proceedings, ought not to have been allowed. The SC rejected this contention and held that *Babulal Vardharji Gurjar (Supra)* is not an authority with regard to amendment of pleadings at the fag-end of the NCLT proceedings, as in that case amendments were made within 2/3 months of their initiation, before admission of the petition under Section 7. The Court held, '… *there is no bar to the filing of documents at any time until a final order either admitting or dismissing the application has been passed.*' It also noted that the proposed amendments were not made at the fag-end and were rather in relative proximity to the application of admission; before the petition was admitted. The SC observed, '*In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority (NCLT) committed any illegality or error.*' The Apex Court in the said case of *Dena Bank (Now Bank of Baroda)* v. *C. Shivakumar Reddy and Anr.* [Judgment dated 4 August 2021] added that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order.

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