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Knowledge Management

Semi-Annual Finance and Insolvency Laws Compendium 2024

January – June 2024

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Introduction

This compendium consolidates all the key developments pertaining to the finance and insolvency laws in India which were circulated as a part of the JSA Prisms and Newsletters during the calendar period from January 2024 till June 2024.

Alternative Investment Funds

The ever-increasing regulatory oversight on Alternative Investment Funds

Increased regulatory oversight on Alternative Investment Funds ("**AIFs**") has been in the news in the recent past. In addition to direct regulatory oversight on the AIFs itself, AIFs are also indirectly impacted by various other statutory and regulatory restrictions or conditions that are applicable to the underlying legal form of the AIF, the investors in the AIF or the investment portfolio of the AIFs.

Some of the recent statutory and regulatory amendments affecting AIFs are discussed below.

1. **Significant beneficial ownership and AIFs**

Under the Securities and Exchange Board of India ("**SEBI**") (AIFs) Regulations, 2012 ("**AIF Regulations**"), an AIF can be established or incorporated in the form of a trust or a company or a Limited Liability Partnership ("**LLP**") or a body corporate.

After trusts, LLPs have been the most preferred legal form for an AIF, since LLPs are more beneficial from a tax perspective and with lesser compliance requirements than a company.

However, in the recent past, LLPs are also being subjected to additional compliance requirements.

One recent compliance/disclosure requirement imposed on the LLPs is pursuant to the LLP (Third Amendment) Rules, 2023 and the LLP (Significant Beneficial Owners ("**SBOs**")) Rules, 2023 (**"SBO Rules"**). As per the SBO Rules, an LLP is required to take necessary steps to find out if any individual qualifies as a 'SBO' in relation to the LLP. If such SBO has been identified, then the LLP must cause such individual to make a declaration in Form No. LLP BEN-1.

As per one of the exemptions available under the SBO Rules, the aforesaid requirements will not apply to the extent the contribution in the LLP is held by an investment vehicle registered with the SEBI, such as an AIF. Thus, if an AIF is a partner in the LLP, the SBO Rules will not apply in respect of such AIF partner.

However, where the AIF has itself been set up as an LLP, then the SBO Rules will apply in relation to such AIF.

Accordingly,

a) an AIF (set up as an LLP) is required to issue a notice to a non- individual partner in Form No. LLP BEN-4, seeking information in accordance with sub-section (5) of Section 90 of the Companies Act, 2013 ("**CA 2013**"), if such non-individual partner holds atleast 10% of such AIF's:

   i) contribution; or

   ii) voting rights; or

   iii) right to receive or participate in the distributable profits or any other distribution payable in a financial year;

b) every individual who is a SBO in the AIF, is required to file a declaration in Form No. LLP BEN-1 with the AIF within 90 (ninety) days from the date of commencement of the SBO Rules (i.e., November 9, 2023);

c) the SBO Rules define a "SBO" as an individual who acting alone or together or through one or more persons or trust, possesses one or more of the following rights or entitlements in the LLP:

   i) indirectly or together with any direct holdings, not less than 10% of the contribution;

   ii) indirectly or together with any direct holdings, not less than 10% of voting rights in respect of the management or policy decisions in such LLP;

   iii) right to receive or participate in not less than 10% of the total distributable profits, or any other distribution, in a financial year through indirect holdings alone or together with any direct holdings; and

   iv) right to exercise or actually exercises, significant influence or control, in any manner other than through direct-holdings alone;

   As per the explanation, if an individual does not hold any right or entitlement indirectly under sub-clauses (i), (ii), (iii) or (iv) above, he will not be considered an SBO. The SBO Rules further define what would be considered as holding any right or entitlement 'directly' and what would be considered as holding any right or entitlement 'indirectly'.

   As per the SBO Rules, if an individual (acting alone or together or through one or more persons or trust) is entitled to exercise or actually exercises, significant influence or control, in any manner other than through direct holdings alone, then such individual will be considered to be an SBO.

   The term "significant influence" has been defined to mean "the power to participate, directly or indirectly, <u>in the financial and operating policy decisions of the LLP</u> but is not control or joint control of those policies."

d) the SBO Rules mandate filing a declaration in Form No. LLP BEN-1 for individuals who become SBOs or change ownership. The AIF must also file a return in Form No. LLP BEN-2 within 30 (thirty) days of receipt of declaration in Form No. LLP BEN-1, along with prescribed fees. Additionally, the AIF must maintain a register of significant beneficial owners in Form No. LLP BEN-3, open for inspection during business hours;

   Until now, it was not common for information of 1 (one) investor to be made accessible to other investors of the AIF.

   Further, apart from the sponsors and managers of AIFs, the investors of the AIFs also undergo 'know your customer' verification. Given that AIFs are already regulated by SEBI, it is unclear whether applying the SBO Rules to AIFs was needed.

2. **Evergreening and AIFs**

The Reserve Bank of India ("**RBI**"), in circular dated December 19, 2023, seeks to restrict evergreening of debt by banks/NBFCs through investments in AIFs. While the intent behind this circular is well received, the implications seem far reaching;

3. **Dematerialisation of units issued by AIFs**

   a) in October 2018, dematerialisation of shares of unlisted public companies was mandated. In October 2023, dematerialisation of shares of private companies (that are not small companies) has also been mandated. SEBI, in its consultation paper dated February 3, 2023, proposed dematerialisation of units issued by the AIF. The consultation paper did acknowledge the concerns raised by the Alternative Investment Policy Advisory Committee in its meeting held on October 11, 2022. While in-principle agreeing with the proposal of dematerialisation of AIF units, the committee also raised certain concerns such as (i) administrative hassle/ burden for foreign investors to open demat account; and (ii) transferability of AIF units without the knowledge or control of the managers of AIFs;

   b) the AIF Regulations have been amended and notified on June 15, 2023, to include Regulation 10(aa) which requires AIFs to issue units in dematerialised form subject to the conditions specified by SEBI from time to time;

   c) this was followed by SEBI circular dated June 21, 2023, which stipulated the dates for dematerialisation of units already issued or to be issued;

   d) further, recognising the possibility of unauthorised transfer of dematerialised units, SEBI, in its circular dated June 21, 2023, has clarified that the terms of transfer of AIF units held by an investor will continue to be governed by the terms of fund documents. However, the transfer restrictions under the fund documents may not be adequate, and the managers of AIFs may consider putting in place adequate mechanisms that restrict unauthorised transfer of units; and

   e) a subsequent SEBI circular dated December 11, 2023, specifies process and stipulates timelines to be followed for crediting the existing units or new units that are to be issued, in demat form, in cases where investors are yet to provide their demat account details to AIFs and also in cases where investors have provided their demat account details to AIFs. The circular *inter alia* provides as under:

      i) units already issued by schemes of AIFs to existing investors who have not provided their demat account details, are required to be credited to a separate demat account named "Aggregate Escrow Demat Account". This account is permitted for the sole purpose of holding demat units of AIFs on behalf of investors. New units to be issued in demat form must be allotted to such investors and credited to the Aggregate Escrow Demat Account. As and when such investors provide their demat account details to the AIF, their units held in Aggregate Escrow Demat Account should be transferred to the respective investors' demat accounts within 5 (five) working days. No transfer of units of AIFs from/within Aggregate Escrow Demat Account will be allowed, except as above;

      ii) the last date for completion of credit of demat units to (i) demat accounts of investors who have provided demat account details, and (ii) Aggregate Escrow Demat Account, for those who have not provided demat account details is January 31, 2024 for schemes with corpus ≥ INR 500 crore (Indian Rupees five hundred crore) (as on October 31, 2023) and May 10, 2024 for schemes with corpus < INR 500 crore (Indian Rupees five hundred crore) (as on October 31, 2023);

      iii) units of AIFs held in the Aggregate Escrow Demat Account can be redeemed. The proceeds can be distributed to respective investors' bank accounts with full audit trail of such transaction;

      iv) the AIF industry and depositories are required to adopt implementation standards formulated for compliance with the circular, by the recently set up Standard Setting Forum for AIFs ("**SFA**"), along with the 2 (two) depositories jointly, in consultation with SEBI. Such standards will

include formats for information to be maintained by managers of AIFs with respect to holdings and transactions in the Aggregate Escrow Demat Account and reporting thereof to depositories and custodians. In this regard, Central Depository Services (India) Limited and the National Securities Depository Limited have already issued instructions in relation to opening of the Aggregate Escrow Demat Account in the month of December 2023; and

v) managers of AIFs are required to adhere to such implementation standards. Such standards are required to be published on websites of the depositories and the industry associations which are part of the SFA, i.e., Indian Venture and Alternate Capital Association (IVCA), PEVC CFO Association and Trustee Association of India, within 45 (forty-five) days of issuance of the aforesaid circular.

f) as per the aforementioned circulars, all existing and new investments in AIFs must be held in dematerialised form.

While demat of securities and units may not be a cumbersome process, opening of demat accounts by investors, especially by foreign investors or non-resident Indians can be time-consuming.

The process/implementation standards issued from time to time with respect to the Aggregate Escrow Demat Account and related matters should provide some relief and direction to the AIF industry.

4. **Dematerialisation of investments held by AIFs**

In its meeting held on November 25, 2023, SEBI required AIFs to hold their investments in dematerialised form. SEBI has *inter alia* approved the following amendments to be made to the SEBI (AIFs) Regulations, 2012 (the amendments are still to be made):

a) any fresh investment made by an AIF after September 2024 must be held in dematerialised form;

b) the existing investments made by AIFs made prior to September 2024 have been exempted from the aforesaid requirement, except in the following cases:

i) where the investee company has been mandated under applicable law to facilitate dematerialisation of its securities;

ii) given that all private companies (that are not small companies as per the audited financial statements of the period ended March 31, 2023) are also required to dematerialise their securities by September 2024, most of the existing investments made by the AIFs are likely to not benefit from this exemption; and

iii) where the AIF, on its own, or along with other SEBI registered intermediaries/entities which are mandated to hold their investment in dematerialised form, has control in the investee company.

c) the exemption will also apply to:

i) liquidation schemes of AIFs;

ii) schemes of an AIF whose tenure (not including permissible extension of tenure) ends within 1 (one) year from the date of this requirement is notified; and

iii) schemes of an AIF which are in extended tenure as on the date this requirement is notified;

5. **Appointment of custodian**

Previously, only Category I and II AIFs with a corpus of more than INR 500 crore (Indian Rupees five hundred crore) and Category III AIFs were required to appoint a custodian. However, in its meeting held on November 25, 2023, SEBI has mandated that all AIFs must appoint a custodian. In this regard, SEBI has permitted an associate of manager or sponsor of the AIF to act as a custodian, subject to conditions that are similar to those prescribed under the SEBI (Mutual Funds) Regulations, 1996 in relation to appointment of a related party of sponsor of a mutual fund as its custodian.

Conclusion

Some of these measures are aimed at digitisation and strengthening investor protection, which are welcome. However, it is hoped that such measures do not add to the ever-increasing operational costs of the AIFs, which ultimately get passed on to the investors.

Further, there is an urgent need to revisit the circular issued on December 19, 2023, in connection with evergreening as it has several unintended consequences and imposes an onerous compliance burden on fund managers.

Holding investments in dematerialised form and appointment of custodian

The SEBI, *vide* notification dated January 5, 2024, and circular dated January 12, 2024, has introduced changes aimed at refining the regulatory framework governing AIFs. Some of the key provisions are as follows:

1. the SEBI (AIF) Regulations, 2012 have been amended to provide that AIFs must hold their investments in dematerialised form. However, this does not apply to:
    a) investments by AIFs in such type of instruments which are not eligible for dematerialisation; and
    b) investments held by a liquidation scheme of the AIFs that are not available in the dematerialised form;

    In addition to the above, SEBI has further specified that investments made by an AIF on or after October 1, 2024, must be held in dematerialised form. The investments made prior to October 1, 2024, are exempted from the requirement of being held in dematerialised form, except where: (a) the investee company of the AIF has been mandated under applicable law to facilitate dematerialisation of its securities; and (b) the AIF, on its own, or along with other SEBI registered intermediaries/entities which are mandated to hold their investments in dematerialised form, exercises control over the investee company. These investments must be held in dematerialised form on or before January 31, 2025.
2. the SEBI (AIF) Regulations, 2012 have been amended to provide that the sponsor or manager of the AIF must appoint a custodian registered with SEBI for safekeeping of the securities of the AIF. The custodian for a scheme of an AIF must be appointed prior to the date of first investment of the scheme. Existing schemes of Category I and II AIFs having corpus of less than or equal to INR 500 crore (Indian rupee five hundred crore) and holding at least one investment as on January 12, 2024, must appoint custodian on or before January 31, 2025. The custodian which is an associate of the sponsor or manager can act as a custodian for that AIF only when all the following conditions are met on or before January 31, 2025:
    a) the sponsor or manager has a net worth of at least INR 20,000 crore (Indian rupees twenty thousand crore) at all points of time;
    b) 50% or more of the directors of the custodian do not represent the interest of the sponsor or manager or their associates;
    c) the custodian and the sponsor or manager of the AIF are not subsidiaries of each other and do not have common directors; and
    d) the custodian and the manager of the AIF have signed an undertaking that they will act independently of each other in their dealings of the schemes of the AIF.

Foreign investment in AIFs

SEBI, *vide* circular dated January 11, 2024, has revised the foreign investment provisions in the Master Circular for AIFs to incorporate that the manager of an AIF must ensure, at the time of on-boarding investors, that the investor, or its beneficial owner is not included in the sanctions list and is not a resident in the country identified in the public statement of Financial Action Task Force as:

1. a jurisdiction having a strategic anti-money laundering or combating the financing of terrorism deficiencies to which counter measures apply; or
2. a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

   Further, in case an investor, who has already been on-boarded to scheme of an AIF, does not meet the above condition, the manager of the AIF must not drawdown any further capital contribution from such investor for making investment, until the investor meets the said condition.

Investments in AIFs by regulated entities

To address the concerns relating to investments by Regulated Entities ("**REs**") and to ensure uniformity in implementation among REs, RBI, *vide* circular dated March 27, 2024, has advised the following:

1. downstream investments referred to in paragraph 2(i) of the circular dated December 19, 2023 ("**Circular**"), will exclude investments in equity shares of the debtor company of the RE, but will include all other investments, including investment in hybrid instruments;
2. provisioning in terms of paragraph 2(iii) of the Circular will be required only to the extent of investment by the RE in the AIF scheme which is further invested by the AIF in the debtor company, and not on the entire investment of the RE in the AIF scheme;
3. paragraph 3 of the Circular applies only to AIFs without downstream investment in debtor companies of the RE. If the RE has investment in subordinated units of an AIF scheme with downstream exposure, it must comply with paragraph 2 of the Circular. Further, the proposed deduction from capital in the Circular will be equally distributed across Tier-1 and Tier-2 capital, and the reference to investment in subordinated units of the AIF Scheme includes all forms of subordinated exposures, including investment in the nature of sponsor units; and
4. investments by REs in AIFs through intermediaries such as fund of funds or mutual funds are not included in the scope of the Circular.

AIF Regulations amended to ensure investor protection

SEBI, *vide* notification dated April 25, 2024, has issued the SEBI (AIFs) (Second Amendment) Regulations, 2024, amending the AIF Regulations. The key provisions are as follows:

1. Category I AIFs and Category II AIFs can create encumbrance on equity of investee company, which is in the business of development, operation or management of projects in any of the infrastructure sub-sectors listed in the Harmonised Master List of Infrastructure issued by the Central Government, only for the purpose of borrowing by such investee company and subject to the prescribed conditions by SEBI;
2. AIFs, manager of the AIFs and key management personnel of the manager must exercise specific due diligence, with respect to their investors and investments, to prevent facilitation of circumvention of laws specified by SEBI;
3. the liquidation period for a scheme of an AIF that has expired or is expiring within 3 (three) months, can be granted an additional liquidation period, subject to certain conditions as specified by SEBI;
4. AIFs cannot launch any new liquidation scheme after the notification of these amendments;
5. provisions relating to the dissolution period are inserted. The term 'dissolution period' is defined to mean the period following the expiry of the liquidation period of the scheme for the purpose of liquidating the unliquidated investments of the scheme of the AIF. The scheme entering into a dissolution period has to file an information memorandum with SEBI through a merchant banker. The dissolution period of a scheme of an AIF must not be more than the original tenure of the scheme and must not be extended in any manner upon expiry of the dissolution period. The scheme of the AIF must not accept any fresh commitment from any investor and must not make any new investment during the dissolution period; and

6. the unliquidated investments of the AIF scheme that are not sold by the expiry of the dissolution period will be mandatorily distributed in-specie to the investors, as specified by SEBI.

Changes in terms of private placement memorandum of AIFs

SEBI, *vide* circular dated April 29, 2024, has eased the requirement of intimation of changes in the terms of Private Placement Memorandum ("**PPM**") of AIFs through merchant bankers. Pursuant to the SEBI Master Circular for AIFs dated July 31, 2023, intimation with respect to any change in the terms of PPM of AIF was required to be submitted to SEBI through a merchant banker along with a due diligence certificate from the merchant banker. Now, certain changes in the terms of PPM, such as, changes made in the write-up on market opportunity/ Indian economy/ industry outlook, track record of investment manager, risk factors, legal regulatory and tax consideration, do not need to be submitted through a merchant banker and can be filed directly with SEBI. Similarly, changes with respect to:

1. information such as contact details (address, phone number etc.) of AIF, sponsor, manager, trustee or custodian; and
2. auditor, registrar and share transfer agents, legal advisor or tax advisor, size of the fund/scheme, information related to Affiliates, commitment period, key investment team, key management personnel (except if the changes are due to change in control of manager and sponsor), advisory boards, expenses, disclosures, and other factual and routine updates need not be filed through a merchant banker.

Further, large value funds for accredited investors are exempted from the requirement of intimating any changes in the terms of PPM through a merchant banker. They can directly file any changes in the terms of PPM with SEBI, along with a duly signed and stamped undertaking by chief executive officer of the manager of the AIF (or such other person with equivalent role/ position) and compliance officer of the manager of the AIF, in a pre-specified format.

Revised pricing methodology for privately placed Infrastructure Investment Trusts

SEBI, *vide* circular dated February 8, 2024 , has revised the pricing methodology for institutional placement by privately placed Infrastructure Investment Trusts ("**InvITs**"). The floor price for institutional placement for privately placed InvITs will be the net asset value per unit of such InvIT. The institutional placement by public InvIT will continue to be at a price not less than the average of the weekly high and low of the closing prices of the units of the same class quoted on the stock exchange during the 2 (two) weeks preceding the relevant date.

New guidelines for small and medium Real Estate Investment Trusts

SEBI, *vide* notification dated March 8, 2024, has introduced the SEBI (Real Estate Investment Trusts ("**REITs**")) (Amendment) Regulations, 2024 ("**Amended REIT Regulations**"), outlining provisions for Small and Medium ("**SM**") REITs. The key provisions are as follows:

1. **Amended definition of REIT**: The definition of 'REIT' is substituted to mean 'a person that pools INR 50 crores (Indian rupees fifty crores) or more for the purpose of issuing units to at least 200 (two hundred) investors so as to acquire and manage real estate asset(s) or property(ies), that would entitle such investors to receive the income generated therefrom without giving them the day-to-day control over the management and operation of such real estate asset(s) or property(ies)';

   An explanation is added to the definition of 'REIT' stating that a REIT will include a SM REIT. Further, it is clarified that, any company which acquires and

manages real estate asset(s) or property(ies) and offers or issues securities to the investors, will not be construed as a REIT;

2. **Eligibility criteria for formation of SM REITs**: The Amended REIT Regulations prescribe certain eligibility criteria for the formation of SM REITs. Some of the key eligibility criteria are: (a) the applicant for registration of a SM REIT must be the investment manager on behalf of the REIT;(b) separate persons must be designated as investment manager and trustee of the SM REIT, and they should not be associated with each other; (c) the investment manager must (i) be clearly identified in the application for grant of registration and offer document; (ii) have a net worth of at least INR 20,00,00,000 (Indian Rupees twenty crore), out of which at least INR 10,00,00,000 (Indian Rupees ten crore) must be in the form of positive liquid net worth; (iii) have experience of at least 2 (two) years in the real estate industry or real estate fund management. Alternatively, the investment manager can employ atleast 2 (two) key managerial personnel, each possessing at least 5 (five) years' experience in real estate industry or real estate fund management; (iv) clearly describe the proposed activities of SM REIT at the time of making the application for registration; (d) the SM REIT and the parties to the SM REIT are fit and proper persons in terms of the SEBI (Intermediary) Regulations, 2008; and (e) the rights of unit holders are pro rata and pari passu and no unit holder should enjoy superior voting rights;

3. **Conditions pertaining to initial offer of scheme by SM REIT**: The SM REIT must make an initial offer of a scheme within 3 (three) years from the date of registration. The Amended REIT Regulations also prescribe the conditions to be complied with for the initial offer of a scheme, such as: (a) the investment manager must identify the assets proposed to be acquired or disclose relevant details such as features of the real estate assets in the draft offer document; (b) the minimum price of each unit of the SM REIT must be INR 10,00,000 (Indian Rupees ten lakh) or such amount as may be prescribed by SEBI; (c) the value of the real estate assets proposed to be acquired in each scheme should be at least INR 50,00,00,000 (Indian Rupees fifty crore); (d) the investment manager must file the draft scheme with SEBI through a merchant banker; (e) the draft scheme filed with SEBI will be made public for inviting comments by hosting it on the website of SEBI, designated stock exchanges and merchant bankers associated with the issue, for not less than 21 (twenty-one) days.

4. **Investment Conditions**: The SM REIT's scheme is mandated to invest at least 95% of the value of its assets in completed and revenue-generating properties. It is prohibited from investing in under-construction or non-revenue-generating real estate assets. However, up to 5% in value of the scheme's assets can be invested in unencumbered liquid assets such as investment in mutual fund, fixed deposit;

5. **Mode of fund raising**: The SM REIT scheme may raise funds from any investor whether Indian or foreign by the way of issuance of units. However, the investment by foreign investors are subject to the guidelines of RBI and the Government of India;

6. **Minimum public unitholding and delisting**: The minimum offer and allotment to the public in each scheme of the SM REIT must be at least 25% of the total outstanding units of such scheme. The minimum public holding for the units of each scheme of SM REIT must be satisfied failing which action may be taken by SEBI and the designated stock exchange including delisting of units.

International Financial Services Centres

Financial services offered at International Financial Services Centres

The Ministry of Finance ("**MoF**"), *vide* notification dated January 18, 2024, has widened the scope of financial services offered in an International Financial Services Centre ("**IFSC**") to include:

1. book-keeping services;
2. accounting services;
3. taxation services; and
4. financial crime compliance services.

These financial services must be offered by units in an IFSC to non-residents whose business is not set up either by (a) splitting up of business already in existence in India; or (b) reconstructing of business

already in existence in India; or (c) reorganising of a business already in existence in India. Further, the units must not offer the services by way of transferring or receiving of existing contracts or work arrangements from their group entities in India.

Listing of equity shares by public companies on international exchanges

The Ministry of Corporate Affairs, *vide* notification dated January 24, 2024, has issued the Companies (Listing of Equity Shares in Permissible Jurisdictions) Rules, 2024 ("**LES Rules**") permitting certain public companies to list their equity shares directly on permitted stock exchanges in IFSCs in India. Some of the key provisions of the LES Rules are as follows:

1. the following companies can list their equity shares:
    a) unlisted public companies; and
    b) listed public companies, in accordance with regulations framed or directions issued in this regard by SEBI or the International Financial Services Centres Authority ("**IFSCA**");
2. the following companies are not eligible to list their equity shares in IFSC:
    a) it has been registered under Section 8 or declared as Nidhi under Section 406 of the CA 2013;
    c) it is a company limited by guarantee and also having share capital;
    d) it has any outstanding deposits accepted from the public as per Chapter V of the CA 2013 and rules made thereunder;
    e) it has a negative net worth;
    f) it has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holder or any other secured creditor, which has not been made good, and if made good a period of 2 (two) years has not lapsed since the date of making good the default;
    g) it has made any application for winding-up under the CA 2013 or for resolution or winding-up under the Insolvency and Bankruptcy Code, 2016 ("**IBC**") and in case any proceedings against the company for winding-up or for resolution or winding-up is pending;
    h) it has defaulted in filing of an annual return under Section 92 or financial statement under Section 137 of CA 2013; and
    i) an eligible unlisted public company, which has no partly paid-up shares.

Related provisions have also been incorporated in the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("**NDI Rules**"), *vide* notification dated January 24, 2024, issued by the MoF. Permissible holders can purchase or sell equity shares of public Indian companies which are listed or to be listed on an international exchange. A newly inserted Schedule XI provides the framework for the direct listing of equity shares of companies on international exchanges. It lays down provisions on eligibility of public companies, voting rights and pricing. The public Indian company must ensure that the aggregate of equity shares which may be issued or offered in a permissible jurisdiction, along with equity shares already held in India by persons resident outside India, does not exceed the limit on foreign holding prescribed under the NDI Rules.

Accredited investors in IFSCs

IFSCA, *vide* circular dated January 25, 2024, has specified the eligibility criteria for accredited investors in IFSCs and the modalities for accrediting the investors. Some of the key provisions of the circular are as follows:

1. Eligibility criteria for accredited investors: Detailed criteria for eligibility of individuals, one person companies, Hindu undivided families, partnership firms, body corporates and trusts are specified. Companies, including LLPs, must have a net worth of at least USD 5,000,000 (United States Dollars five million) or all the constituents of the body corporate must independently meet the applicable eligibility criteria of accredited investors. Further, (a) Government and government-related investors in India and foreign jurisdictions, including central banks, Sovereign Wealth Funds ("**SWFs**"), and agencies, controlled or at least 75% owned by such entities, (b) multilateral agencies, (c) venture capital schemes, exchange traded funds and investment trusts in

IFSCs (which are regulated in their jurisdiction and wherein no single investor holds more than 33% beneficial interest) and (d) family investment funds set up in IFSCs are deemed to be accredited investors.

2. Responsibilities of REs: The key responsibilities of REs accepting investors are detailed, such as: (a) laying down adequate procedures and policies for verifying and reviewing eligibility; (b) maintaining records of verification and confidentiality of investor information, and (c) informing investors of reduced investor protection measures for accredited investors and obtaining written confirmation of understanding the associated risks.
3. Withdrawal of consent: REs must establish a process for withdrawal of consent of an accredited investor, ensuring that previous transactions aren't affected by the change in status.

New regulations to govern payment services within IFSCs

IFSCA, *vide* notification dated January 29, 2024, notified the IFSCA (Payment Services) Regulations, 2024 ("**Payment Service Regulations**"). The key provisions are as follows:

1. any person seeking to provide payment services in or from an IFSC must require certificate of authorisation under the Payment Service Regulations;
2. an applicant seeking authorisation to provide payment services is required to be incorporated as a company with its registered office in an IFSC;
3. a payment service provider must, inter-alia, comply with the minimum net worth requirements, as specified in Schedule V of the Payment Service Regulations;
4. an applicant or a payment service provider must ensure that its directors, key managerial personnel and persons exercising control over it, satisfy the 'fit and proper requirements', specified in Schedule II of the Payment Service Regulations; and
5. the following 5 (five) services/activities have been currently permitted under the Payment Service Regulations. These are:
   a) account issuance service (including e-money account issuance service);
   b) e-money issuance service;
   c) escrow service;
   d) cross border money transfer service; and
   e) merchant acquisition service.

Maintenance of net worth by fund management entities

IFSCA, *vide* circular dated February 16, 2024, mandates an obligation on Fund Management Entities ("**FMEs**") to maintain specified net worth levels at all times, as stipulated under the IFSCA (Fund Management) Regulations, 2022, failing which such FME cannot (i) launch new schemes in IFSC; (ii) onboard new clients towards any of the activities; or (iii) undertake new business activities permitted under the IFSCA (Fund Management) Regulations, 2022 until the net worth is restored.

Application of the Banking Regulation Act, 1949 to financial products, services or institutions in IFSCs

MoF, *vide* notification dated February 28, 2024, has applied certain provisions of the Banking Regulation Act, 1949, with modifications, to financial products, financial services or financial institutions in IFSCs. The prescribed limits on holding shares in any company will not apply to an IFSC banking unit of a foreign bank for a transaction entered in the ordinary course of business where the shareholding is held by way of a security or if the shareholding or interest acquired or held in the course of satisfaction of debts due to it, is disposed of within 5 (five) years. Further, the restrictions to grant any loans or advances or entering

into any commitment for granting any loan or advances does not apply to those made by an IFSC banking unit of a foreign bank.

Clarifications in relation to FMEs and schemes set up in IFSCs by SWFs

IFSCA, *vide* circular dated March 11, 2024, has issued clarifications with respect to SWFs desirous of setting up FMEs and schemes in IFSC, wherein the SWF is the ultimate contributor and beneficiary. These clarifications are as follows:

1. the requirement of appointment of an independent custodian will not be applicable to open-ended restricted schemes and all other schemes with Assets Under Management ("**AUM**") above USD 70,000,000 (United States Dollars seventy million); and
2. the requirement of having the office space of the FME to be dedicated, secured and accessible only by authorised person(s) of the FME is relaxed to the extent that the FME and trustee of scheme(s) set up in the form of trust, may occupy the same office space if their services are not offered to any third-party.

Registration on FIU-IND FINNET 2.0 portal for compliance with IFSCA (Anti Money Laundering, Counter-Terrorist Financing and Know Your Customer) Guidelines, 2022

For compliance with relevant provisions of the guidelines and also with the provisions of the Prevention of Money-laundering Act, 2002 and Prevention of Money laundering (Maintenance of Records) Rules, 2005, IFSCA, *vide* circular dated March 14, 2024, has directed REs as follows:

1. to complete their registration on FIU-IND FINNET 2.0 portal. The non-registration with FIU-IND by any RE will be construed as contravention of the provisions of the respective IFSCA regulations or circulars or guidelines or directions or instructions issued thereunder;
2. the REs which have been granted more than 1 (one) license/ registration/ recognition/ authorisation by the IFSCA for different Line of Business ("LoB"), will have to mandatorily register all LoBs in FINNET 2.0 portal; and
3. the REs which have completed registration on FINNET 2.0 portal and have been granted more than 1 (one) license/ registration/ recognition/ authorisation by the IFSCA for different LoBs, must also update the same on FINNET 2.0 portal.

Issuance of derivative instruments against Indian securities by non-bank entities in GIFT-IFSCs

IFSCA, *vide* circular dated May 2, 2024, has permitted IFSCA registered non-bank entities, registered with SEBI as foreign portfolio investors, to issue derivative instruments with Indian securities as underlying in GIFT- IFSC. This is subject to certain conditions, such as:

1. the entity issuing such derivative instruments must ensure compliance with the requirements on issuance of overseas direct investments, issued by SEBI and IFSCA; and
2. the entity must furnish requisite information to the clearing corporations in GIFT-IFSC in the prescribed format, by the 10th day of every month.

Additional requirements for carrying out permissible activities under the Framework for Ship Leasing

IFSCA, *vide* circular dated May 8, 2024, has outlined additional requirements for carrying out permissible activities by a finance company under the Framework for Ship Leasing ("**SL Framework**"). An applicant under the SL Framework or a lessor, who has obtained a certificate of registration under Regulation 3 of the IFSCA (Finance Company) Regulations, 2021, must not undertake transactions which involves transfer of the ownership and/ or leasehold right of a ship or ocean vessel from a person resident in India to an entity set up in the IFSC, for the purpose of providing services solely to person resident in India. However, the applicant or lessor may acquire a new ship or ocean vessel or enter into a new leasehold right contract with person resident outside India so as to cater to person resident in India.

Special Economic Zone

Import, export, procurement or supply of aircraft engines by a unit in an IFSC

The Ministry of Commerce and Industry ("**MoCI**"), *vide* notification dated June 6, 2024, has issued the Special Economic Zones ("**SEZs**") (Third Amendment) Rules, 2024 amending the SEZ Rules, 2006. Rule 29A of the SEZ Rules, 2006 prescribes the procedure to be followed by a unit in an IFSC approved by IFSCA for the import or export or procurement from or supply to domestic tariff area of aircraft. This is amended to include aircraft engines. Consequently, units in an IFSC can now import, export, procure or supply aircraft engines to/from a domestic tariff area.

Amendment made to the consideration of proposals for setting up of unit in SEZ

MoCI, *vide* notification dated June 6, 2024, has issued the SEZ (Fourth Amendment) Rules, 2024 amending the SEZ Rules, 2006. While a proposal for import of other used goods for recycling is not permitted, reconditioning, repair and re-engineering may be permitted if the export has one-to-one correlation with imports and all the reconditioned or repaired or re-engineered products are exported. Non-hazardous metal and metal-alloy wastes in metallic, non-dispersible form having no contaminants generated from the reconditioning, repair or reengineering, may be allowed to be sold in the domestic tariff area on payment of applicable customs duty and will be treated as import.

Insolvency and Bankruptcy Board of India

Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2024

The Insolvency and Bankruptcy Board of India ("**IBBI**"), *vide* notification dated February 12, 2024, has issued the IBBI (Liquidation Process) (Amendment) Regulations, 2024, amending the IBBI (Liquidation Process) Regulations, 2016 ("**Principal Regulations**"). Some of the key amendments are as follows:

1. the consultation committee can advise the liquidator on matters relating to: (a) review of marketing strategy in case of failure of sale of corporate debtor as a going concern; (b) continuation or institution of any suits or legal proceedings by or against the corporate debtor; and (c) extension of payment of balance sale consideration;
2. in all cases where the liquidator proposes to continue or initiate any legal proceeding, he must, after presenting the economic rationale for the proposal, seek the advice of the consultation committee;
3. in every meeting, the liquidator must present to the consultation committee: (a) the actual liquidation cost along with reasons for exceeding the estimated cost, if any; (b) the consolidated status of all the legal proceedings; and (c) the progress made in the process;
4. where the liquidator is of the opinion that it is viable to run the corporate debtor as a going concern, he must consult the consultation committee and only on its advice he must run the affairs of the corporate debtor as a going concern to the extent approved;
5. where the liquidator is of the opinion that fresh valuation is required, the liquidator must facilitate a meeting wherein registered valuers must explain the methodology being adopted to arrive at valuation to the consultation committee before finalisation of valuation reports and the liquidator must share the valuation reports with the members of the consultation committee after obtaining an undertaking that they will maintain the confidentiality of such reports and will not use the reports to cause an undue gain or undue loss to itself or any other person;
6. if there is deviation of 25% in the valuation of an asset class under Regulation 35 (2) of the Principal Regulations from valuation under Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP**

Regulations"), the liquidator must facilitate a meeting wherein the registered valuers must explain the reasons for the difference to the consultation committee;

7. wherever the corporate debtor has given possession to an allottee in a real estate project, such asset will not form a part of the liquidation estate of the corporate debtor; and
8. Form A (Proforma for Reporting Consultations with Stakeholders) is inserted.

Withdrawal of unclaimed dividends and /or undistributed proceeds

IBBI, vide circular dated February 22, 2024, notified the procedure to be followed by the liquidator for release of unclaimed dividends/ undistributed proceeds from the Corporate Liquidation Account in favour of entitled stakeholders before the dissolution of the corporate debtor. For this purpose, the liquidator, after due verification, will apply to IBBI in the prescribed form, for the release of the amount for onward distribution to such stakeholder.

Enhancing transparency and stakeholder engagement in liquidation process

IBBI, *vide* circular dated February 22, 2024, mandates liquidators to (a) share their progress reports with the members of the stakeholders' consultation committee after receiving a confidential undertaking, (b) prepare the preliminary report after seeking the suggestions/observations of the members of the stakeholders' consultation committee and thereafter submit such preliminary report to the adjudicating authority, IBBI and the members of the stakeholders' consultation committee and (c) submit a copy of the Form H along with the final report and process closure/dissolution orders with IBBI.

IBBI (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2024

IBBI, *vide* notification dated February 15, 2024, has issued the IBBI (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2024, amending the CIRP Regulations. Some of the key amendments are as follows:

1. where the corporate debtor has any real estate project, the interim resolution professional or the Resolution Professional ("**RP**"), must operate a separate bank account for each real estate project;
2. a RP must convene a meeting of the committee before lapse of 30 (thirty) days from the last meeting;
3. the insolvency professional must place in each meeting of the committee, the operational status of the corporate debtor and must seek its approval for all costs, which are part of insolvency resolution process costs;
4. the information memorandum must contain the prescribed details of the corporate debtor including the fair value. However, the committee of creditors can decide not to disclose the fair value if it considers such non-disclosure to be beneficial for the resolution process;
5. the RP after the approval of the committee of creditors may invite a resolution plan for each real estate project or group of projects of the corporate debtor;
6. the committee of creditors may consider the requirement of a monitoring committee for the implementation of the resolution plan; and
7. with respect to the extension of the Corporate Insolvency Resolution Process ("**CIRP**") period, the RP must continue to discharge his responsibilities under the CIRP, till the application for such extension is decided by the adjudicating authority.

New forms for monitoring liquidation/ voluntary liquidation processes

IBBI, *vide* 2 (two) notifications dated June 28, 2024, introduced a set of electronic forms to capture the details of the liquidation/ voluntary liquidation process, as the case may be, under the IBC. The key benefits of these forms include:

1. enhancing the efficiency and effectiveness of the liquidation/ voluntary liquidation process;

2. allowing liquidators to easily access and submit forms online, reducing delays and improving efficiency; and
3. minimising the likelihood of errors and omissions, ensuring more accurate and reliable information.

Foreign Portfolio Investors

Additional disclosures by FPI

SEBI, *vide* notification dated March 20, 2024, has amended the criteria listed under Para 8 of the Circular dated August 24, 2023 ("**FPI Circular**") wherein it has been decided that an FPI having more than 50% of its Indian equity AUM in a corporate group will not be required to make the additional disclosures as specified in the FPI Circular, subject to compliance with all of the following conditions:

1. the apex company of such corporate group has no identified promoter;
2. the FPI holds not more than 50% of its Indian equity AUM in the corporate group, after disregarding its holding in the apex company (with no identified promoter); and
3. the composite holdings of all such FPIs (that meet the 50% concentration criteria excluding FPIs which are either exempted or have disclosed) in the apex company is less than 3% of the total equity share capital of the apex company.

Custodians and depositories must track the utilisation of this 3% limit for apex companies, without an identified promoter, at the end of each day. When the 3% limit is met or breached, depositories must make this information public before the start of trading on the next day. Thereafter, for any prospective investment in the apex company by FPIs, that meet the 50% concentration criteria in the corporate group, the FPIs will be required to either realign their investments below the 50% threshold within 10 (ten) trading days or make additional disclosures prescribed in the FPI Circular.

Limits for investment in debt and sale of credit default swaps by FPIs

RBI, *vide* its circular dated April 26, 2024, has set out the investment limits for the financial year 2024-25, which are *inter alia* as follows:

1. The limits for FPI investment in Government Securities ("G-Secs"), State Government Securities ("SGSs") and corporate bonds will remain unchanged at 6%, 2%, and 15%, respectively, of the outstanding stocks of securities for 2024-25.
2. All investments by eligible investors in the 'specified securities' must be reckoned under the fully accessible route.
3. The allocation of incremental changes in the G-Secs limit (in absolute terms) over the 2 (two) sub-categories – 'General' and 'Long-term' – is retained at 50:50 for 2024-25.
4. The entire increase in limits for SGSs (in absolute terms) has been added to the 'General' sub-category of SGSs.
5. The aggregate limit of the notional amount of credit default swaps sold by FPIs is 5% of the outstanding stock of corporate bonds. Accordingly, an additional limit of INR 2,54,500 crore is set out for 2024-25.

Flexibility in dealing with securities after expiry of registration and revised timelines for disclosure of material changes

SEBI, *vide* notification dated May 31, 2024, has issued the SEBI (Foreign Portfolio Investors ("**FPIs**")) (Amendment) Regulations, 2024 ("**FPI Amendment Regulations**") amending the SEBI (FPI) Regulations, 2019. The amendments provide flexibility to FPI in dealing with securities after expiry of registration and relax the timelines for disclosure of material changes/events. These amendments are incorporated in the Master Circular for FPI, Designated Depository

Participants ("**DDPs**") and Eligible Foreign Investors dated May 30, 2024 ("**FPI Master Circular**"), *vide* circular dated June 5, 2024. The key amendments are as follows:

1. **Dealing in securities post expiry of registration:**

   a) an FPI, whose certificate of registration is not valid as on the date of commencement of the FPI Amendment Regulations and is holding securities or derivatives in India, is allowed to sell such securities or wind up their open position in derivatives in India within 360 (three hundred and sixty) days from June 3, 2024;

   b) an FPI must pay the prescribed registration fees, for every block of 3 (three) years, before the beginning of such block. An extension can be granted if the FPI pays the registration fees along with the late fee, within a period of 30 (thirty) days from the date of expiry of the preceding block;

   c) if an FPI has not paid the registration fees and the late fees, if applicable, it can sell the securities or wind up their open position in derivatives in India within 360 (three hundred and sixty) days from the date of expiry of 30 (thirty) days mentioned above; and

   d) an FPI whose certificate of registration is not valid and has not sold off the securities or wound up their open position in derivatives in India will be deemed to have written off the securities;

2. **Timelines for disclosure of material changes/events:**

   The procedure for disclosing certain material changes/events is modified. Earlier, an FPI had to, within 7 (seven) working days, inform SEBI and/or the DDP in case:

   a) any previously submitted information was found to be false or misleading in any material respect;

   b) of a change in the information pertaining to its structure or ownership or control or investor group; and

   c) of any penalty, pending litigation or proceedings, findings of inspections or investigations for which action may have been taken or is in the process of being taken by an overseas regulator against it.

   Pursuant to the FPI Amendment Regulations, in the event of the occurrence of the material changes/events mentioned above, the FPI must inform SEBI/the DDP in writing, in the following manner:

   a) 'Type I' material changes, which include critical material changes that render the FPI ineligible for registration, require FPI to seek fresh registration, render FPI ineligible to make fresh purchase of securities or impact any privileges or exemptions granted to the FPI, must be notified within 7 (seven) working-days of the occurrence of the change and the supporting documents must be provided within 30 (thirty) days of such change; and

   b) 'Type II' material changes, which include any material changes other than those considered as 'Type I' material changes, must be notified and supporting documents must be provided within 30 (thirty) days of such change.

Changes to the eligibility criteria of FPIs

SEBI, *vide* notification dated June 26, 2024, has issued the SEBI (FPI) (Second Amendment) Regulations, 2024 ("**FPI Second Amendment**") amending the SEBI (FPI) Regulations, 2019. The amendment provide flexibility to Non-Resident Indians ("**NRIs**"), Overseas Citizens of India ("**OCIs**") and Resident Indian Individuals ("**RIIs**") in the amount of their contribution in the corpus of an FPI. These amendments are incorporated in the FPI Master Circular, *vide* circular dated June 27, 2024. NRIs or OCIs or RIIs may be constituents of the applicant subject to the following conditions:

1. the contribution of a single NRI or OCI or RII will be below 25% of the total contribution in the corpus of the applicant;

2. the aggregate contribution of NRIs, OCIs and RIIs in the corpus of the applicant will be below 50% of the total contribution in the corpus of the applicant. However, this does not apply to an applicant regulated by IFSCA and based in IFSCs in India. NRIs, OCIs and RIIs can have up to 100%

aggregate contribution in the corpus of an FPI based in IFSCs in India regulated by IFSCA subject to the conditions stipulated in the FPI Master Circular;

3. the contribution of RIIs will be made through the liberalised remittance scheme notified by RBI and will be in global funds whose Indian exposure is less than 50%; and
4. NRI, OCI and RII will not be in control of the applicant.

Omnibus framework for self-regulatory organisations in RBI REs

The regulatory landscape governing financial entities witnessed a significant evolution on March 21, 2024, with the RBI introducing the Omnibus Framework for recognising Self-Regulatory Organisations ("**SROs**") for REs of RBI ("**Omnibus Framework**"). This comprehensive framework marks a crucial milestone in the industry, offering a structured approach towards recognising SROs and enhancing regulatory oversight within the financial sector. Encompassing a wide array of parameters such as objectives, responsibilities, eligibility criteria, and governance standards, the Omnibus Framework is designed to foster collaboration, transparency, and growth while addressing critical industry concerns. The Omnibus Framework is broadly based on the draft framework issued for public feedback in December 2023 accommodating the industry feedback.

Salient Features:

1. **Objectives of an SRO**: The Omnibus Framework mandates that SROs establish overarching objectives aimed at enhancing the sector they represent, fostering progress and addressing critical industry concerns within the broader financial system. It outlines specific objectives for SROs, including promoting a culture of compliance among members, supporting smaller entities within the sector, serving as the collective voice of members in engagements with regulatory authorities, sharing sectoral information with RBI to aid policymaking and promoting a culture of research and development within the sector to encourage innovation.
2. **Members and membership**: The Omnibus Framework emphasises the importance of a diverse membership base for SROs to holistically represent the sector. RBI also reserves the right to prescribe membership criteria for SROs when inviting applications for SROs for each category or class of REs. Additionally, SRO applicants falling short of the minimum membership threshold will have a grace period of up to 2 (two) years from the date of recognition to meet the requirement. Membership in SROs will always remain voluntary and regulated through membership agreements.
3. **Responsibility towards members and the RBI**: The Omnibus Framework imposes several responsibilities on SROs, vis-à-vis its members and RBI. Some notable ones include developing a uniform, reasonable and non-discriminatory membership fee structure, disseminating sector-specific information from publicly available data, promoting knowledge of statutory or regulatory provisions and arranging skill development and awareness programs on contemporary issues (towards members), and submitting annual reports within 3 (three) months from completion of accounting year, providing necessary data sought by RBI, and engaging in periodic interactions and providing its views on the larger picture of the industry and providing its books of accounts (towards RBI).
4. **Eligibility criteria**: The Omnibus Framework outlines eligibility criteria for SRO recognition, including incorporation as a not-for-profit company (under Section 8 of the CA 2013), meeting prescribed net worth and membership requirements, demonstrating professional competence and a reputation of fairness and integrity (to the satisfaction of RBI) and non-involvement in any legal proceedings that may have an adverse impact on the interest of the sector. Notably, the Omnibus Framework also clarifies that the shareholding of the SRO should be sufficiently diversified such that no entity holds more than 10% of its paid-up share capital.
5. **Code of conduct, grievance redressal, and consequences for violation of rules**: The Omnibus Framework mandates SROs to have in place objective and consultative processes for formulating conduct rules and overseeing members' activities. Notably, while the Omnibus

Framework provides that an SRO should specify consequences for violation of agreed rules and/or codes (which may include counselling, cautioning, reprimanding, and expelling members) it expressly clarifies that such consequences must not, in any case, entail imposition of monetary penalties. Further, it requires SROs to establish a grievance redressal framework for its members and offer counselling on restrictive or unhealthy practices which may be detrimental to growth of the sector.

Additionally, while the Omnibus Framework sets out overarching requirements for all RBI-REs, RBI retains the authority to prescribe sector-specific additional conditions within the broad contours of the Omnibus Framework.

Conclusion

In our view, the Omnibus Framework is poised to enhance communication channels among industry players, stakeholders, and regulators, thereby fostering greater transparency and collaboration. Moreover, the framework will also offer vital support to small industry participants as it mandates SROs to provide them with guidance and assistance, thereby promoting their growth and development. Overall, we believe this framework sets a commendable precedent and holds the potential to positively impact the industry landscape, providing a more cohesive and structured framework for regulatory oversight and industry development.

In our view, Omnibus Framework represents a significant milestone for the industry, especially considering the previous regulatory uncertainties and overnight changes. It will also enable the extension of regulatory recognition to existing SROs such as the Digital Lenders Association of India, Merchant Payments Alliance of India, and Fintech Association for Consumer Empowerment, thereby solidifying their role in upholding industry standards and best practices.

Key facts statement for loans and advances

RBI, *vide* its circular dated April 15, 2024, has issued instructions on Key Facts Statement ("**KFS**") for loans and advances aimed at harmonising instructions related to KFS. The objective is to enhance transparency and mitigate information asymmetry concerning retail and micro, small and medium enterprises ("**MSME**") term loan products offered by commercial banks, primary urban cooperative banks, state cooperative banks, central cooperative banks, and all non-banking financial companies (including housing finance companies) (i.e., REs). All new retail and MSME term loans sanctioned on or after October 1, 2024, including fresh loans to existing customers, must comply with *inter alia* the following instructions:

1. REs must provide a KFS (in a language understood by the borrower), in the prescribed standardised format, to all prospective borrowers to help them take an informed view before executing the loan contract. The contents of KFS are to be explained to the borrower and an acknowledgement that he/she has understood the same is to be obtained.
2. the KFS must be provided with a unique proposal number which will have a validity period of at least 3 (three) working days for loans having tenor of 7 (seven) days or more, and a validity period of 1 (one) working day for loans having tenor of less than 7 (seven) days.
3. the KFS must include a computation sheet of annual percentage rate (including all charges being levied by the RE) and the amortisation schedule of the loan over the loan tenor.
4. charges recovered from the borrowers by the REs on behalf of third-party service providers on actual basis, such as insurance charges, legal charges, will also form part of the annual percentage rate and must be disclosed separately.
5. any fees and charges. which are not mentioned in the KFS, cannot be charged by the REs to the borrower at any stage during the term of the loan, without the explicit consent of the borrower.
6. credit card receivables are exempted from the provisions under this circular.

Guidance note on operational risk management and operational resilience

RBI, *vide* its notification dated April 30, 2024, published the Guidance Note on Operational Risk

Management and Operational Resilience ("**Guidance Note**"). The Guidance Note aims to help REs to:

1. promote and further improve the effectiveness of operational risk management; and
2. enhance operational resilience given the interconnections and interdependencies within the financial system that result from the complex and dynamic environment in which the REs operate.

The Guidance Note has been based on the Basel Committee on Banking Supervision principles documents issued in March 2021, viz., (a) 'Revisions to the Principles for the Sound Management of Operational Risk' and (b) 'Principles for Operational Resilience' as well as the some of the international best practices. The Guidance Note is applicable to all commercial banks, all cooperative banks, all-India financial institutions and non-banking financial companies (including housing finance companies). The updated guidance note repealed the existing 'Guidance Note on Management of Operational Risk dated October 14, 2005' which was only applicable to scheduled commercial banks.

Guidance Note has included separate principles for mapping of internal and external interconnections and interdependencies, incident management, information and communication technology, and disclosures. It has further introduced separate principles on "lessons learned exercise" and continuous feedback mechanism.

Master Direction on Bharat Bill Payment System

The RBI released the 'Master Direction – RBI (Bharat Bill Payment System ("BBPS")) Directions, 2024' on February 29, 2024 ("**BBPS Master Directions**"). With effect from April 1, 2024, the BBPS Master Directions supersedes the extant BBPS Guidelines and the applicable circulars. The BBPS Master Directions now govern the BBPS which regulates the payment system participants in the bill payments ecosystem involving payment and collection of bills through multiple channels using various forms of payment.

Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) (Amendment) Regulations, 2024

On April 19, 2024, RBI notified amendments to the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, *vide* the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) (Amendment) Regulations, 2024. The amendment sets forth the mode of payment, remittance of sale proceeds and reporting norms in relation to investments in Indian public companies listed on International Exchanges. The said amendment bridges the gap in the antecedent Foreign Exchange Management (Non-debt Instruments) Amendment Rules, 2024 which had enabled eligible holders to invest in the equity shares of a public Indian company that is or is to be listed on an International Exchange.

Safeguards to address the concerns of investors on transfer of securities in dematerialised mode

To address the concerns of the investors arising out of transfer of securities from the beneficial owner ("**BO**") accounts, SEBI, *vide* circular dated March 20, 2024, has put in place the following key safeguards:

1. depositories may advise the BOs not to leave "blank or signed" Delivery Instruction Slip ("**DIS**") with the Depository Participants ("**DPs**") or any other person/ entity. The DPs will not accept pre-signed DIS with blank columns from the BOs;
2. if the DIS booklet is lost/ stolen/ not traceable by the BO, the same must be intimated to the DP immediately by the BO in writing; and
3. DPs must put in place appropriate checks and balances with regard to the verification of signatures of the BOs while processing the DIS and the DPs must cross check with the BOs under exceptional circumstances before acting upon the DIS.

Arrangements with card networks for issue of credit cards

RBI, *vide* circular dated March 6, 2024, has issued the following directions to the authorised payment system providers/ participants (banks and non-banks):

1. card issuers must not enter into any arrangement or agreement with card networks that restrain them from availing the services of other card networks; and
2. card issuers must provide an option to their eligible customers to choose from multiple card networks at the time of issue. For existing cardholders, this option may be provided at the time of the next renewal (this direction is not applicable to credit card issuers with number of active cards issued by them being 10,00,000 (ten lakh) or less in number).

Further, card issuers who issue credit cards on their own authorised card network are excluded from the applicability of the circular.

Fair practices code for lenders – charging of interest

Taking cognisance of unfair practices adopted by lenders in charging of interest, RBI, *vide* its circular dated April 29, 2024, has directed REs (including banks and non-banking financial companies) to review some of their lending practices.

Some of the unfair practices observed by RBI include the charging of interest from the date of sanction of loan or the date of execution of loan agreement instead of charging it from the date of actual disbursement of funds, charging interest for the entire month instead of charging interest only for the period for which the loan was outstanding.

Considering the ongoing unfair practices, RBI has directed the lenders to review their practices regarding the mode of disbursal of loans, application of interest and other charges and take corrective action, including system-level changes to address the issues.

Amendments to the master directions on priority sector lending

The RBI Master Directions dated June 21, 2024, on Priority Sector Lending ("**PSL**") are updated to address regional disparities in credit flow. From financial year 2024-25, districts with lower PSL credit flow (per capita PSL less than INR 9,000 (Indian Rupees nine thousand)) will receive a higher weight of 125%, while those with higher credit flow (per capita PSL greater than INR 42,000 (Indian Rupees forty-two thousand)) will receive a lower weight of 90%, until financial year 2026-27.

Opening, holding and maintaining a foreign currency accounts outside India

RBI has notified amendments to the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015 vide the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) (Amendment) Regulations, 2024. Pursuant to this amendment, funds raised through direct listing of equity shares of companies incorporated in India on international exchanges, which are either pending their utilisation or repatriation to India, can be held in foreign currency accounts with a bank outside India, subject to compliance with the conditions regarding raising of funds and resources.

Unauthorised foreign exchange transactions

RBI, *vide* circular dated April 24, 2024, has advised the AD Category-I banks to be more vigilant and exercise

greater caution to prevent the misuse of banking channels in facilitating unauthorised forex trading. As and when AD Category-I banks come across an account being used to facilitate unauthorised forex trading, they must report the same to the Directorate of Enforcement, Government of India, for further action.

Authorised dealers permit non-residents to open and maintain interest-bearing accounts in Indian Rupees and/or foreign currency

RBI has issued the Foreign Exchange Management (Deposit) (Fourth Amendment) Regulations, 2024, dated May 6, 2024, and this amendment allows authorised dealers in India to permit non-residents to open and maintain interest-bearing accounts in Indian Rupees and/or foreign currency. These accounts are specifically for posting and collecting margin in India related to permitted derivative contracts, in accordance with specified regulations and RBI directions.

Opening of additional current account for settlement of import transactions

RBI, *vide* circular dated June 11, 2024, permits AD Category-I banks, maintaining Special Rupee Vostro Account, to open an additional special current account for its constituents for settlement of their import transactions in addition to their export transactions.

Amended definition of 'unit' under NDI Rules

MoF, *vide* notification dated March 14, 2024, has amended the definition of 'unit' under the NDI Rules. Rule 2(aq) defines the term 'unit' as the beneficial interest of an investor in an investment vehicle. An explanation is inserted to the definition that a unit will include a unit that has been partly paid up, which is permitted under the regulations framed by SEBI, in consultation with the Government of India.

Issuance of partly paid units to persons resident outside India by investment vehicles under NDI Rules

RBI, *vide* circular dated May 21, 2024, has amended the NDI Rules, allowing investment vehicles to issue partly paid units to non-residents. This follows the regularisation of previous issuances by AIFs to non-residents, which require compliance with reporting through the FIRMS Portal and potentially compounding under the Foreign Exchange Management Act, 1999. Under this circular, AD Category-I banks are instructed to notify their concerned customers and ensure all necessary administrative actions are completed accordingly.

Investments in other instruments of investment funds overseas

RBI, *vide* circular dated June 7, 2024, has amended the Foreign Exchange Management (Overseas Investment) Directions, 2022. The amendments are as follows:

1. the definition of Overseas Portfolio Investment ("OPI") is amended to include investment in any other instrument issued by an investment fund overseas. Prior to this amendment, investment was permitted only in units issued by an investment fund overseas. It is further clarified that the term 'investment fund overseas, duly regulated' also includes funds whose activities are regulated by financial sector regulator of host country or jurisdiction through a fund manager; and
2. a person resident in India, being an Indian entity or a resident individual, may invest any other instrument issued by an investment fund or vehicle set up in an IFSC, as OPI. Prior to this amendment, investment was permitted only in units issued by an investment fund or vehicle set up in an IFSC.

Voluntary transition of Small Finance Banks to Universal Banks

RBI, *vide* its circular dated April 26, 2024, has set out the updated eligibility criteria for Small Finance Banks ("**SFBs**") to transition into a Universal Banks ("**UBs**"). The eligibility criteria for an SFB to transition into a UB will, *inter alia,* be:

1. scheduled status with a satisfactory track record of performance for a minimum period of 5 (five) years;
2. shares of the bank should have been listed on a recognised stock exchange;
3. having a minimum net worth of INR 1,000 crore as at the end of the previous quarter (audited);
4. meeting the prescribed capital to risk weighted assets ratio requirements for SFBs;
5. having a net profit in the last 2 (two) financial years; and
6. having gross Non-Performing Asset ("**NPA**") and net NPA of less than or equal to 3%and 1%, respectively in the last 2 (two) financial years.

The eligible SFB must furnish a detailed rationale for such transition. The application for transition from SFB to UB will be assessed in accordance with the guidelines for 'on tap' Licensing of Universal Banks in the Private Sector dated August 1, 2016, and RBI (Acquisition and Holding of Shares or Voting Rights in Banking Companies) Directions, 2023. Further, on transition the bank will be subjected to all the norms including Non-Operative Financial Holding Company structure as per the said guidelines.

Portfolio Managers

Facilitating collective oversight of distributors for portfolio management services

SEBI has issued a circular on May 2, 2024, to facilitate collective oversight of distributors for Portfolio Management Services ("**PMS**"). Through this circular, portfolio managers are directed to ensure that any person or entity engaged in the distribution of PMS is registered with the Association of Portfolio Managers in India ("**APMI**"), in accordance with the criteria laid down by APMI. Additionally, portfolio managers are required to ensure that distributors abide by the code of conduct detailed in the circular. This circular will come into effect from January 1, 2025.

SEBI's digital onboarding initiative for client portfolio managers

SEBI has issued a circular dated May 2, 2024, facilitating the digital on-boarding process for clients and enhancing transparency through disclosures. Accordingly:

1. with effect from October 1, 2024, a portfolio manager must ensure that, while on-boarding a client, the client has understood the structure for fees and charges. The amendment requires for clients to sign an annexure confirming their understanding of the structure for fees and charges;
2. the above confirmation may be either handwritten for physical onboarding or electronically for digital onboarding;
3. the portfolio manager must also provide a fee calculation tool to all clients that highlights various fee options with multi-year fee calculations. The link to access the said tool will be provided in advance to all new clients, on-boarded on or after October 1, 2024;
4. additional fee disclosures will be integrated into the PMS-client agreement for new clients onboarded after October 1, 2024;
5. portfolio managers will provide a document covering the 'Most Important Terms and Conditions' for clients, outlining critical aspects of the manager-client relationship, for all clients on-boarded on or after October 1, 2024; and
6. portfolio managers are prohibited from levying additional fees beyond those specified in the PMS-client agreement annexure.

Amendments to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

SEBI, *vide* notification dated May 17, 2024, has issued the SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2024. Pursuant to the amendment, while determining the offer price (for acquiring shares under Regulation 3, Regulation 4, Regulation 5 or Regulation 6), the effect on the price of the equity shares of the target company due to material price movement and confirmation of reported event or information may be excluded as per the framework

specified under Regulation 30 (11) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Amendments to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

SEBI, *vide* circular May 17, 2024, has issued the SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2024. Some of the key amendments are as follows:

1. every recognised stock exchange must, at the end of the calendar year i.e., December 31, prepare a list of entities that have listed their specified securities ranking such entities on the basis of their average market capitalisation from July 1 to December 31 of that calendar year;
2. the relevant provisions will then become applicable to a listed entity that is required to comply with such requirements for the first time (or, if applicable, required to comply after any interim period) after a period of 3 (three) months from December 31 (i.e. April 1) or from the beginning of the immediate next financial year, whichever is later. Consequently, the listed entity will be required to put in place systems and processes for compliance as set out in the regulations;
3. the provisions of these regulations, which become applicable to a listed entity on the basis of the criteria of market capitalisation, will continue to apply to such an entity unless its ranking changes and such results in such listed entity remaining outside the applicable threshold for 3 (three) consecutive years;
4. if an entity is outside the applicable threshold for 3 (three) consecutive years, then the applicable provisions on the basis of market capitalisation will cease to apply at the end of the financial year following December 31st of the third consecutive year;
5. the meetings of the risk management committee must be conducted in such a manner that on a continuous basis not more than 210 (two hundred and ten) days (earlier this was 180 (one hundred and eighty) days) should elapse between any 2 (two) consecutive meetings;
6. where the listed entity is required to obtain approval of regulatory, government or statutory authorities to fill up a vacancy of chief executive officer, managing director, whole time director, manager or chief financial officer, then the vacancies must be filled up by the listed entity at the earliest and in any case not later than 6 (six) months from the date of vacancy;
7. if a placement is done according to the provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018, no intimation regarding the determination of issue price in a qualified institutions placement is required;
8. the listed entity will intimate the stock exchange for a board meeting within 2 (two) working days for all events prescribed under Regulation 29. Any prior intimation provided to the stock exchange under Regulation 29 will mention the date of the board meeting during which the proposals will be discussed; and
9. the promoter, director, key managerial personnel or senior management of a listed entity are obligated to provide adequate, accurate and timely response to queries raised or explanation sought by the listed entity for complying with the disclosure of market rumours, including prompt intimations with the stock exchange.

Derivative under the Securities Contracts (Regulation) Act, 1956

MoF, *vide* notification dated March 1, 2024, has notified that a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell in future, underlying goods, is as a derivative for the purposes of the Securities Contracts (Regulation) Act, 1956.

New Master Direction for non-centrally cleared derivative contracts

RBI issued new guidelines dated May 8, 2024, titled 'Master Direction – RBI (Margining for Non-Centrally Cleared OTC Derivatives) Directions, 2024' which is effective from November 8, 2024. These directions replace the previous guidelines and mandate the exchange of 'Variation Margin' and 'Initial Margin' for non-centrally cleared derivative contracts. The

directions aim to mitigate counterparty risk by ensuring collateralisation of potential future exposure and mark-to-market changes in derivative contracts, using specified collateral types and risk management practices.

Revised eligibility criteria for launching commodity futures contracts

SEBI, *vide* notification dated May 30, 2024, has revised the eligibility criteria for launching commodity futures contracts as prescribed under the Master Circular dated August 4, 2023 ("**CFC Master Circular**"). Some of the key provisions are as follows:

1. all derivative contracts approved by SEBI, are allowed to be traded in the respective stock exchange(s) on a continuous basis without requiring further approval unless SEBI advises/directs otherwise;
2. all proposals of stock exchange for launch of new contract must be accompanied by complete information covering all the points appended at Annexure P of the CFC Master Circular;
3. contract specifications on stock exchanges, except those allowed for modification at the exchange level, must not be altered without prior approval. Any changes in contract specifications require the stock exchange to notify market participants in advance. Once contracts have commenced, no terms can be changed without SEBI's prior approval;
4. stock exchanges must launch contracts within 6 (six) months of SEBI approval or apply for fresh approval if they fail to do so; and
5. contracts for continuous trading in agri-commodities must adhere to the lean month expiry policy and will be subject to SEBI's direction. The stock exchange must ensure that deposited commodities comply with regulations from other authorities such as Food Safety Standard Authority of India, Agmark, BIS, in addition to approved quality standards.

Enhanced anti-money laundering/terrorist financing compliance guidelines for registered intermediaries

SEBI, *vide* circular dated June 6, 2024, has issued the Guidelines on Anti-Money Laundering ("**AML**") Standards and Combating the Financing of Terrorism ("**CFT**")/Obligations of Securities Market Intermediaries under the Prevention of Money Laundering Act, 2002 ("**Guidelines**"), revising the 2023 guidelines with the same title. The Guidelines stipulate the essential principles for combating money laundering and terrorist financing and provide detailed procedures and obligations to be followed and complied with by all the registered intermediaries. The Guidelines will also apply to the branches of the stock exchanges, registered intermediaries, and their subsidiaries situated abroad, especially, in countries which do not apply or insufficiently apply the recommendations made by the Financial Action Task Force. Some of the key changes in the Guidelines are:

1. **Customer Due Diligence ("CDD"):** Intermediaries are required to conduct thorough CDD measures, including verifying the identity of clients and beneficial owners, understanding the nature and purpose of the business relationship, and monitoring transactions for suspicious activity. Whilst conducting the CDD, the intermediaries will take into account the money laundering and terrorist financing risks as well as the size of the business. Additionally, the intermediaries will establish policies, controls and procedures, approved by senior management, to enable the reporting entity to manage and mitigate the identified risks either by the registered intermediary or through national risk assessment.
2. **Client identification**: Enhanced due diligence measures are required for identifying and

verifying clients, especially for high-risk categories.

3. **Timeline**: Existing intermediaries are given a specified timeline to align their processes and systems with the new guidelines.

Market Infrastructure Institutions

SEBI introduces financial disincentives for surveillance lapses at Market Infrastructure Institutions

Market Infrastructure Institutions ("**MII**") (i.e. stock exchanges, clearing corporations and depositories) are systemically important institutions. The MIIs, supervise their members and need to be well equipped to detect market abuse, including new modus-operandi that could be adopted by unscrupulous elements and take suitable, prompt, effective and preventive action against such activities.

SEBI, *vide* notification dated June 6, 2024, has issued the Framework of Financial Disincentives for Surveillance Related Lapses ("**SRL**") at MIIs ("**Framework**"). Some of the key provisions of the Framework are as follows:

1. the various events constituting a surveillance related lapse is detailed;
2. the amount of financial disincentives will be determined on the basis of total annual revenue of the MII, as an indicator of the size and impact of the MII on the market ecosystem, during the previous financial year as per the latest audited consolidated annual financial statement and the number of instances of SRL during the financial year;
3. the financial disincentive(s), if imposed, will be credited by the MII within 15 (fifteen) working days, to the Investor Protection and Education Fund ("**IPEF**");
4. MIIs must report surveillance activities, including abnormal or suspicious activities, and promptly implement decisions from surveillance meetings. Non-compliance or delays can result in financial penalties;
5. MIIs will disclose on their websites (and in their respective annual reports) the details pertaining to financial disincentive(s) if any;
    a) the Framework will not be applicable to matters/instances wherein it has:
    b) made market wide impact;
    c) caused losses to a large number of investors;
    d) affected the integrity of the market; and
    e) any such matter will be subject to appropriate proceedings under the Securities Contracts (Regulation) Act, 1956 or SEBI Act, 1992 or Depositories Act, 1996; and
6. the Framework will be applicable for any surveillance related lapse occurring on or after July 1, 2024.

Statutory committees at MIIs

SEBI, *vide* circular dated June 25, 2024, has revised the functions, composition and terms of reference of the statutory committees of MIIs. The committees are divided into different categories, such as functional, oversight, and investment. The key revisions are as follows:

1. the statutory committees much include key managerial personnel, non-independent directors, Independent External Professionals ("**IEPs**") along with Public Interest Directors ("**PIDs**");
2. each committee must meet the specific required quorum requirements to ensure valid decision-making;
3. the chairperson of each statutory committee must be a PID, and the casting vote in the meetings of the statutory committee is with the chairperson of the committee;
4. IEPs must be individuals of integrity with no conflict of interest and should not be associated with the MII or its members in any capacity;
5. a newly recognised stock exchange, clearing corporation and depository must submit a confirmation to SEBI within 3 (three) months from the date of their recognition regarding the formation and composition of statutory committees; and
6. members of statutory committees must adhere to the applicable code of conduct as per the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018 and the

SEBI (Depositories and Participants) Regulations, 2018.

Special call auction mechanism for price discovery of scrips of listed investment companies and listed investment holding companies

SEBI, *vide* circular dated June 20, 2024, has put in a framework for 'special call auction with no price bands' for effective price discovery of scrips of Investment Companies ("**ICs**") and listed Investment Holding Companies ("**IHCs**"). Some of the key provisions are as follows:

1. the ICs or IHCs will be identified based on the uniform industry classifications provided by stock exchanges;
2. the scrip of ICs or IHCs should have been listed and available for trading for a period of at least 1 (one) year and the said scrips are not suspended for trading;
3. the total assets of the company invested in scrips of other listed companies will be at least 50%;
4. the 6 (six) month Volume Weighted Average Price ("**VWAP**") of the scrip must be less than 50% of the book value per share of such company based on present value of their investments in shares of other listed companies. If the scrip has not traded in the previous 6 (six) months, the VWAP will be considered as zero;
5. the stock exchanges will initiate special call auctions for eligible ICs or IHCs with no price bands, giving a 14 (fourteen) day notice. In case the company is listed on multiple stock exchanges, stock exchanges will co-ordinate amongst themselves and the date of the special call auction session will be uniform across the exchanges; and
6. a special call option mechanism:
   a) a call auction is successful if price discovery involves orders from at least 5 (five) PAN-based unique buyers and sellers;
   b) if the auction succeeds on any one exchange for a scrip listed on multiple exchanges, that exchange's price discovery sets the trading base;
   c) the special call auction mechanism will be provided only once in a year; and
   d) the first special call auction will be conducted in the month of October 2024 by stock exchanges based on the latest available audited financial statements of such companies.

Karnataka Stamp (Amendment) Act, 2023

The government of Karnataka issued a notification on February 3, 2024, regarding the Karnataka Stamp (Amendment) Act, 2023 which covers several articles of Schedule 1 of the Karnataka Stamp Act, 1957. The existing rate of stamp duties on many instruments have been revised with the intention of augmenting the revenue of the State.

Extension of time to complete CIRP will commence from the date on which the Adjudicating Authority passed the order for such extension

On February 21, 2024, the Hon'ble National Company Law Appellate Tribunal, Chennai ("**NCLAT**") in the case of ***Kiran Martin Gulla RP of Vardharaja Foods Pvt. Ltd***.[1] held that when an extension to complete the CIRP is granted by the Adjudicating Authority, then such period will be calculated form the date on which the Adjudicating Authority passes such an order.

Brief Facts

1. Varadharaja Foods Pvt. Ltd. ("**Corporate Debtor**") was admitted into CIRP *vide* an admission order dated November 9, 2022, passed by the Adjudicating Authority i.e. Hon'ble National Company Law Tribunal ("**NCLT**"), Chennai. Accordingly, the period of CIRP commenced and the same was to be completed with a period of 180 (one hundred and eighty) days from the date of admission i.e. November 9, 2022. The Committee

[1] 2024 SCC OnLine NCLAT 234

of Creditors ("**CoC**") of the Corporate Debtor appointed the Appellant as the RP of the Corporate Debtor and the Appellant took charge of the Corporate Debtor.

2. as the CIRP of the Corporate Debtor was ending on May 10, 2023, in terms of Section 12(1) of the IBC, on April 21, 2023 the CoC of the Corporate Debtor passed a resolution to extend the CIRP by a further period of 90 (ninety) days from the last date of CIRP i.e. May 10, 2023.

3. on May 9, 2023, the Appellant filed an application under Section 12(2) of the IBC read with Regulation 40 of the CIRP Regulations, seeking an extension of 90 (ninety) days to complete the CIRP of the Corporate Debtor. The Appellant in its application before the Adjudicating Authority urged that the extension of 90 (ninety) days is necessary as the Expression of Interest for submission of resolution plan ("**EoI**") in accordance with Section 25(2)(h) of the IBC was published on April 29, 2023 and the last date for submission of the resolution plan was June 30, 2023. The Appellant further appraised the Adjudicating Authority that the Appellant received few EoIs for the Corporate Debtor. Accordingly, the Appellant specifically sought relief of extension from the date of disposal of the application for extension.

4. thereafter, the Tribunal took up the application for hearing and *vide* the order dated July 27, 2023, the Adjudicating Authority granted the extension of 90 (ninety) days to the Appellant ("**Impugned Order**"). The tribunal further held that the same is to be computed from the last date of the CIRP i.e. May 10, 2023. The Impugned Order was made available to the Appellant on August 28, 2023, i.e. 111 (one hundred and eleven) days from the last date of CIRP.

5. being aggrieved by the observation passed by the Hon'ble NCLT, Chennai in the Impugned Order, the Appellant filed an appeal before the Hon'ble NCLAT seeking quashing of the NCLT, Chennai Order and praying for extension of 90 (ninety) days from the CIRP of the Corporate Debtor to be computed from the date of disposal of the appeal.

Issues

1. whether the period of 90 (ninety) days extended under Section 12(2) of the IBC to complete CIRP of the Corporate Debtor would commence from the last date of the CIRP of the Corporate Debtor or from the date on which the Adjudicating Authority passed the order of extension.

2. whether the time taken during the pendency of adjudication of the extension application should be excluded while computing the extension of CIRP.

Analysis and Findings of the NCLAT, Chennai

Whilst allowing the appeal, the Hon'ble NCLAT, Chennai held as follows:

1. the pendency of judicial proceedings before the Adjudicating Authority constitutes an "exceptional circumstance" and the time taken in legal proceedings cannot harm a litigant although the same may warrant a departure from the strict rigors of the IBC. Time is of essence under the IBC however, the litigant cannot be penalised for no fault of its own.

2. the meaning of the term 'extension' is the act of stretching out or elongating the ambit of something being the additional period of time given to a person, to meet ones end. However, the term exclusion is an example of leaving something or keeping out, eliminate, rule out etc.

3. when an extension for 90 (ninety) days to complete CIRP is granted by an Adjudicating Authority then such period will be computed from the date on which the Adjudicating Authority passed the order for such extension.

Conclusion

By way of the judgment, the Hon'ble NCLAT has reiterated that although time is of the essence of the IBC, a litigant or a CIRP cannot suffer for time taken in legal proceedings. Although, the extension of time limit in proceedings under the IBC may unsettle the time limit for completing CIRP of the Corporate Debtor, the same cannot be done at the cost of the litigant or CIRP itself.

The Hon'ble NCLAT reiterated the findings of the Hon'ble Supreme Court of India ("**Supreme Court**") in *'Committee of Creditors' of Essar Steel vs. Satish Kumar Gupta*[2] and held that although timely resolution of stressed assets is a key factor in the successful working of the IBC, the time taken in legal proceedings cannot possibly harm a litigant if the Adjudicating Authority itself cannot take up the litigant's case within the requisite period.

NCLT has inherent power to recall an order passed by it for approving a resolution plan

In the case of ***Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni and Anr.***[3], a 3 (three) judge bench of the Supreme Court, headed by Chief Justice of India, held that the NCLT has inherent powers to recall an order passed by it for approving a resolution plan for a corporate debtor in certain limited circumstances.

Brief Facts

Greater Noida Industrial Development Authority ("**Appellant**"), a statutory authority constituted under Section 3 of the U. P. Industrial Area Development Act, 1976 ("**UP Development Act**") had acquired several parcels of land for setting up an urban and industrial township. On October 28, 2010, a parcel of land was leased to M/s. JNC Construction (P) Ltd ("**Corporate Debtor**") for a period of 90 (ninety) years. As per Sections 13, 13A and 14 of the UP Development Act, the Appellant had a charge over the said land. As the Corporate Debtor defaulted on lease payments, a demand cum pre-cancellation notice was issued by the Appellant to the Corporate Debtor.

Subsequently, the Corporate Debtor was admitted into CIRP *vide* an order dated May 30, 2019, passed by the NCLT. In or around January 2020, the Appellant submitted a claim for an amount of Rs. 43,40,31,951/- (Indian Rupees forty three crore forty lakh thirty-one thousand nine hundred and fifty-one) for unpaid lease premiums. The said claim was filed by the Appellant claiming to be a 'financial creditor' under Form 'C', as it had a charge over the land which was leased to the Corporate Debtor. After verifying the claim filed by the Appellant, the RP classified the Appellant as an operational creditor and requested the Appellant to file its revised claim in Form 'B'. However, the Appellant failed to re-file its claim as an operational creditor.

Thereafter, the NCLT basis an application filed by the RP approved the resolution plan for the Corporate Debtor *vide* its order dated August 4, 2020 ("**Plan Approval Order**"). The Appellant on being made aware of the Plan Approval Order on October 6, 2020, filed 2 (two) applications before the NCLT, Principal Bench[4] (*one seeking recall of the Plan Approval Order and other impugning the action of the RP in classifying the Appellant as an operational creditor*). The main grounds for challenge were as follows: (a) there was gross error on the part of the RP in treating the Appellant as an operational creditor; (b) the resolution plan erroneously stated that the Appellant did not submit a claim, when, in fact, it was submitted; (c) Appellant being owner of the land with statutory charge over the assets of the Corporate Debtor ought to have been given top priority for its dues as a secured creditor; and (d) no opportunity of hearing was given by the CoC of the Corporate Debtor.

The above applications came to be dismissed by the NCLT on April 5, 2021, on the ground that for a period of 7 (seven) months (i.e. date from RP's decision to treat the Appellant as operational creditor till Plan Approval Order) the Appellant failed to take any action and that NCLT would not be able to decide the said application as the CIRP of the Corporate Debtor was completed. Being aggrieved by the dismissal, the Appellant filed an appeal before NCLAT. The said appeal was dismissed by the NCLAT on November 24,

[2] (2020) 8 SCC 531
[3] Civil Appeal Nos. 7590-7591 of 2023
[4] I.A.1380/2021; I.A.344/2021, (IB)-272(PB)/2019

2022 on the grounds that: (a) the Appellant is not a financial creditor of the Corporate Debtor; (b) the Appellant was not diligent in pursuing its right and accordingly its challenge was liable to be rejected; and (c) there was no material irregularity in the approval of the resolution plan, particularly when the commercial wisdom of the CoC is not justiciable.[5]

By way of a civil appeal, the Appellant assailed the order passed by the NCLAT.

Issues

1. whether the RP is required to consider claims submitted to him in improper 'form'[6];
2. whether NCLT has powers under Section 60(5) of the IBC to recall its order approving a resolution plan passed under Section 31(1) of the IBC; and
3. whether the resolution plan put forth by the resolution applicant met the requirements of the mandatory contents set out under Section 30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations.

Analysis and Findings of Supreme Court

After appreciating the submissions advanced by the parties, the Supreme Court allowed the civil appeals. Whilst allowing the civil appeal, the Supreme Court held as follows:

1. **Issue 1:**
    a) the RP is mandated by statute to compile data and prepare the information memorandum. Accordingly, resolution applicants submit plans based on this information. Therefore, even if a creditor's claim against the Corporate Debtor is not submitted in the specified form outlined in the CIRP Regulations it must be duly considered by the RP, provided it is verifiable either through evidence submitted by the creditor or records maintained by the Corporate Debtor. Additionally, if an operational creditor misidentifies itself as a financial creditor, its claim should still be assessed in the correct category if verifiable;
    b) the use of "*a person claiming to be an operational creditor*" in Regulation 7 and "*a person claiming to be a financial creditor*" in Regulation 8 of the CIRP Regulations indicates that a creditor has to submit its claims basis its own understanding;
    c) where a creditor (in good faith) filed its claim with proof, the same has to be verified by the RP regardless of its 'form'; and
    d) form in which a claim is to be submitted with the RP in terms of the CIRP Regulations is directory and not mandatory. Once a claim with proof is submitted to the RP, the same cannot be disregarded solely due to an incorrect 'form'.
2. **Issue 2:**
    a) a court or tribunal, in the absence of any provisions to the contrary, has inherent power to recall an order to secure the ends of justice. Neither the IBC nor its regulations prohibit the exercise of such inherent power by the NCLT. Section 60(5)(c) empowers the NCLT to address questions of priorities or law or facts arising out of or relating to insolvency resolution or liquidation proceedings. Rule 11 of NCLT Rules, 2016 preserves the inherent power of the NCLT to make orders for meeting the ends of justice or for preventing the abuse of the process of NCLT. Thus, even without explicit provisions, the NCLT has the authority to recall its order;
    b) such power should be used sparingly, and not as a tool to re-hear the matter. The Supreme Court has identified certain grounds on which a recall application is maintainable:
        i) the order is without jurisdiction;
        ii) the party aggrieved with the order is not served with notice of the proceedings in which the order under recall has been passed; and

[5] Company Appeal (AT) (Ins.) No. 867 of 2021

[6] This was not an issue which was specifically framed by the Supreme Court while deciding the matter. However, the Supreme Court has given important findings on this question.

iii) the order has been obtained by misrepresentation of facts or by playing fraud upon the tribunal resulting in gross failure of justice.

3. **Issue 3:**

a) the Supreme Court relied upon its judgment in *Jaypee Kensington Boulevard Apartments Welfare Association vs. NBCC (India) Ltd.*[7] and reiterated that whilst the commercial wisdom of the CoC in approving a resolution plan may not be reviewable judicially, the NCLT/ NCLAT can identify deficiencies in the plan based on Section 30(2) of the IBC and Regulations 37 and 38 of the CIRP Regulations. If such deficiencies are found, the plan may be sent back to the CoC for revision to meet specified parameters.

b) in the present matter, the Supreme Court observed that the resolution plan failed to adhere to the mandatory contents set out under Section 30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations on account of the following shortcomings:

i) the resolution plan did not acknowledge the claim of the Appellant as a creditor to the Corporate Debtor. The correct claim amount of the Appellant was also not specified in the resolution plan. This omission or error materially affected the resolution plan as it affected the total outlay owed to the Appellant;

ii) the resolution plan did not specifically acknowledge the Appellant as a secured creditor of the Corporate Debtor despite a charge being created on the assets of the Corporate Debtor in respect of the amounts payable to the Appellant under statute; and

iii) since the resolution plan conceived utilisation of land owned by the Appellant, which is a statutory body governed by its own regulations. This circumstance necessitated a thorough examination of the plan's feasibility, particularly the need for approvals from the relevant statutory authority and the timelines for the same. This was not addressed in the resolution plan.

The Supreme Court also noted the following facts: (a) the Appellant was not informed about the meetings of the CoC; (b) the proceedings up to the stage of approval of the resolution plan by the NCLT were *ex parte*; (c) the RP misrepresented that the Appellant had not submitted a claim when otherwise, a claim was submitted of an amount higher than what was shown outstanding towards the Appellant; (d) there was gross error on the part of the NCLT in approving a resolution plan which did not fulfil the mandatory contents of Section 30(2) of the IBC. Based on these it concluded that the present facts met the parameters set out above and would qualify for a recall order to be passed. In view of the above, the Supreme Court held that the recall application filed by the Appellant is maintainable even though the Appellant had a right of appeal before the NCLAT against the Plan Approval Order. The resolution plan was remanded to the CoC for resubmission and for adhering to the statutory parameters.

Conclusion

This judgment upholds that NCLT has inherent powers to recall an order passed by it to meet the ends of justice and to prevent abuse of court process. This opens up another avenue to challenge an order passed by the NCLT for approving a resolution plan which is in addition to preferring an appeal before the NCLAT. One of the substantive grounds identified by the Supreme Court for recalling an order is when an order has been obtained by misrepresentation of facts or by playing fraud upon the tribunal. This rule will have to be interpreted very strictly and has to be specific to the facts of the case at hand. The Supreme Court has also noted that this power available to the NCLT should be used sparingly and only in very limited circumstances and that too in order to ensure that there is no gross failure of justice. It will be interesting to see how the NCLT will interpret and act upon this ruling. The NCLT would have to ensure that this remedy is not used as a tool to engage in disruptive tactics by stakeholders to prolong proceedings which would lead to defeating the

[7] (2022) 1 SCC 401

very objective of IBC, i.e. time bound resolution of the corporate debtor.

This judgment also recognises that determining feasibility and viability of a resolution plan forms part of the domain of the CoC and such determination is not ordinarily subject to judicial review. However, based on the facts specific to this case, the Supreme Court has laid down additional parameters for the CoC to consider feasibility and viability, especially due to the involvement of a governmental authority as a stakeholder, whose approvals would be necessary for the successful implementation of the resolution plan. Accordingly, for corporate debtors where such facts would be relevant the CoC, the RP as well as the resolution applicants will have to keep in mind that feasibility and viability of a plan would also depend on the treatment that is being accorded to such governmental authority in the resolution plan and the manner in which its approval is proposed to be sought under the resolution plan. If such parameters are not adhered to then, one runs the risk of the NCLT not approving the resolution plan.

Creditors of erstwhile developer can initiate CIRP against the successful auction purchaser and such initiation does not preclude them from filing claims in the CIRP of the current developer

In the recent decision of the ***Anjani Kumar Prashar (Suspended Director of Grandstar Realty Pvt. Limited) vs. Manab Dutta***[8], the NCLAT has held that the auction purchaser would also be a financial creditor *vis-à-vis* the creditors of the entity whose assets were purchased by the auction purchaser. The NCLAT clarifies that the filing of a claim in the ongoing CIRP of the erstwhile developer does not preclude the initiation of fresh insolvency proceedings against the current developer.

Brief Facts

In 2012, one Akme Projects Limited ("**Akme**") started developing a parcel of land situated in Haryana. Akme executed 'Builder-Buyers Agreements' with various real estate allottees for the construction of flats. For this purpose, Akme had taken a loan from Yes Bank Limited ("**Yes Bank**"). Akme defaulted on its loan. Consequently, Yes Bank instituted proceedings under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest ("**SARFAESI**") Act, 2002 ("**SARFAESI Act**"). In 2016, Yes Bank issued an auction sale notice for the sale of the property.

One, Grand Star Realty Private Limited ("**Appellant**") was declared as the successful auction bidder and Yes Bank issued the sale certificate/sale confirmation advice in its favour. The sale certificate recorded, *inter alia*, that secured assets (the flats) are being sold to the Appellant on an "as is where is" and "as is what is" basis. It also recorded that the Appellant would be liable to honour all lawful allotments in favour of the allottees and abide by the terms of the existing arrangements between the allottees, the Yes Bank, and Akme and that the rights of the allottees would not undergo any change on account of the auction process.

Both Akme and the Appellant challenged the sale certificates separately before the Delhi High Court and the Debt Recovery Tribunal, respectively. Both sets of proceedings were dismissed.

In the meantime, Akme was admitted into CIRP. In 2018, the allottees of the project filed their claims against Akme.

Separately, in 2020, the allottees in the project also filed an application under Section 7 of the IBC seeking initiation of CIRP against the Appellant. The NCLT also admitted the Appellant into CIRP. Aggrieved, the Appellant challenged the admission before the NCLAT.

Issue

Whether the auction purchaser (under the SARFAESI Act) can be the financial creditor of the respondent allottees, who were issued allotment letters by the corporate debtor's predecessor?

Findings and Rationale

The NCLAT dismissed the appeal, found that there is a "financial debt" and upheld the NCLT's order admitting

[8] Company Appeal (AT) (Insolvency) No.1366 of 2023)

the Appellant into CIRP. The NCLAT made the following findings:

1. the Appellant (being the successful auction purchaser) was bound to honour the rights of the allottees under the Builder Buyers Agreements with Akme. The obligation of Akme towards the allottees has been continued and attached with the purchase of assets by the Appellant. The obligation under agreement(s) is an obligation to be discharged by the Appellant;
2. in the definition of "financial creditor", The crucial word in the definition is "any person to whom a financial debt is owed" becomes a Financial Creditor. Further, the expression "includes a person to whom such debt is legally assigned or transferred to" is only an incidence of further elaboration of the person to whom the financial debt is owed. In the facts of the present case, there can be no denying that the financial debt, which was owed by Akme to the allottees is now the debt owed by Grandstar Reality Pvt. Ltd;
3. a financial debt can be owed in more than one manner. The NCLAT drew an analogy to the transfer/vesting of liabilities pursuant to a merger or an amalgamation and held that in the present case, the Appellant, by virtue of having taken over the project from the original developer in the SARFAESI auction proceedings was a financial debtor *vis-à-vis* the allottees/home buyers under the IBC. The Appellant could not seek to escape the rigors of the IBC and defeat the rights of the allottees/home buyers; and
4. the NCLAT rejected the Appellant's submission that the allottees already filing claims against Akme would preclude them from instituting a fresh petition for initiation of CIRP against the Appellant.

Conclusion

This judgement helps us understand that the original disbursement of debt is only one of the many (factors) that constitute "financial debt" and emphasis lies on whom the "debt is owed". This decision is significant for its finding that an auction purchaser under the SARFAESI Act (and other akin assignees) has an ongoing and continuing obligation to satisfy the debts of the erstwhile debtor's creditors. This finding assures the creditors (particularly homebuyers/allottees) of their rights and remedies as a creditor (under the IBC) notwithstanding how many hands the debt changes.

Adjudicating Authority can extend payment timelines in a resolution plan without the concurrence of the CoC

In the recent decision of ***Ashok Dattatray Atre & Ors. vs. State Bank of India & Ors***.,[9] NCLAT has reiterated that the extension of payment timelines under a resolution plan does not constitute a modification thereof, and the NCLT has the power to grant such extension even without the express concurrence of the CoC.

Brief Facts

1. the resolution plan submitted by the appellant was approved by the CoC and by the Adjudicating Authority on April 16, 2021. The total amount under the resolution plan was to be paid in 6 (six) tranches. The period of implementation of the resolution plan was 3 (three) years, expiring on April 16, 2023 (from April 16, 2021);
2. the Successful Resolution Applicant ("**SRA**" / "**Appellant**") paid the first 3 (three) tranches in time. It, however, failed to make payment of the fourth tranche in April 2023 and the fifth tranche in October 2023;
3. the SRA filed an application for an extension of time for making the remaining payment. Separately, the CoC (through SBI) filed an application for liquidation of the corporate debtor based on the SRA's default. The SRA objected to SBI's liquidation application;
4. the Adjudicating Authority allowed the CoC's liquidation application and dismissed the SRA's application for extension on the ground that the Adjudicating Authority should refrain from modifying the terms of the approved resolution

[9] Company Appeal (AT) (Insolvency) Nos. 221 and 222 of 2024, NCLAT, New Delhi (judgement dated April 8, 2024)

plan unless the same is concurred by the CoC. Therefore, the Adjudicating Authority cannot consider the request for an extension given the CoC's express prayers for liquidation. The Adjudicating Authority further observed that the SRA should have looked at alternate sources of funding to make payments on the committed timelines under the resolution plan;

5. aggrieved, the SRA filed an appeal before the NCLAT, New Delhi; and
6. before the NCLAT, the Respondent argued, *inter alia*, that the extension of timelines would amount to a modification of the resolution plan which is prohibited in view of the decision of *Ebix Singapore.*[10]

Issue

Whether the Adjudicating Authority has the power to extend the payment timelines of a resolution plan without the concurrence from the CoC?

Findings and Rationale

The NCLAT allowed the appeal, set aside the orders of the Adjudicating Authority and allowed the SRA's application for extension of time, on the following basis:

1. the extension of timelines for complying with financial obligations under the resolution plan does not constitute a modification of the resolution plan. The NCLAT relied on its previous judgments in the cases of *Tricounty Premier Hearing Services*[11], *GP Global Energy Pvt. Ltd.*[12], and *Consortium of Jalan and Fritsch*[13] on the same point. Hence, once there is no modification of the resolution plan, the bar (on modification of plan) laid down by *Ebix Singapore* (supra) does not apply;
2. for the extension of payment timelines, it is not necessary that CoC should express its concurrence. The Adjudicating Authority has the power and jurisdiction to allow such extensions;
3. however, the NCLAT held that for any extension beyond the period of implementation (expiring on April 16, 2023), the SRA would be liable to payment of interest at the prevalent rates fixed by SBI; and
4. separately, the NCLAT also allowed the SRA to proceed to sell the (mortgaged) assets of the corporate debtor to make payment under the resolution plan since such sale was contemplated as an 'Alternate Source of Funding' under the resolution plan. The CoC's objection to such a sale was also rejected.

Conclusion

By this decision, the NCLAT eliminates common roadblocks faced by resolution applicants in the dynamic circumstances of the implementation phase of the resolution plan. These important clarifications regarding the non-requirement of the CoC's concurrence and the sale of assets for making payments under the resolution plan would go a long way in making plans more workable and secure investors' interests. It is judgements like these that advocate the need for the Adjudicating Authority to be involved even during the implementation of the resolution plan with a pro-implementation approach and to deter resorting to liquidation.

The classification of "financial debt" and "operational debt" under IBC can only be determined upon ascertaining the real nature of the transaction.

The Supreme Court in ***Global Credit Capital Limited & Anr. vs. SACH Marketing Pvt. Ltd & Anr.***, has established the following principles on classification of a debt under the IBC:

[10] Ebix Singapore Pvt. Ltd. vs. Committee of Creditors of Educomp Solutions Ltd. & Anr., (2022) 2 SCC 401
[11] Tricounty Premier Hearing Service Inc. vs. State Bank of India & Ors., in Company Appeal (AT) (Insolvency) No.1038 of 2021
[12] GP Global Energy Pvt. Ltd. vs. Mr. Sandeep Mahajan and Anr., Company Appeal (AT) (Insolvency) No.954 of 2021
[13] State Bank of India and Ors. vs. The Consortium of Mr. Murari Lal Jalan and Mr. Florian Fritsch and Anr., Company Appeal (AT) (Insolvency) No.129 & 130 of 2023

1. debt cannot exist without a corresponding "claim";
2. the true nature of the transaction under an agreement must be analysed to determine whether the debt is to be categorised as a "financial debt" or an "operational debt";
3. the test for determining whether a debt falls under the definition of "financial debt" within the IBC is based on the presence of a debt along with any interest disbursed for the time value of money; and
4. debt will be an "operational debt" in an "agreement relating to services" only if the "claim" has a correlation with the "service" of the transaction.

This judgement is a significant precedent for debt classification and creditor rights under the IBC. It particularly goes a long way in addressing the characterisation of financing agreements between closely associated entities as "service agreements", in case of insolvency claims.

Background

1. SACH Marketing Pvt. Ltd. ("**SMPL**") entered into agreements with Mount Shivalik Industries Limited ("**MSIL**"), on April 1, 2014, and April 1, 2015 ("**Agreements**"), whereby SMPL was appointed as "Sales Promotor" for promoting the beer manufactured by MSIL over 12 (twelve) months, for which INR 4,000 (Indian Rupees four thousand) per month was agreed to be paid to SMPL;
2. the terms of the Agreement dated April 1, 2014, were nearly identical to those of the Agreement dated April 1, 2015, except for an additional requirement of Security Deposit under the latter agreement;
3. under the Agreements, it was agreed that SMPL would deposit a minimum security of INR 53,15,000 (Indian Rupees fifty-three lakhs fifteen thousand) ("**Security Deposit**") with MSIL, which will carry interest @ 21% per annum for which MSIL would pay interest on INR 7,85,850 (Indian Rupees seven lakhs eighty-five thousand eight hundred and fifty) at the same rate;
4. in an independent proceeding, MSIL was admitted into CIRP by an order of the NCLT, Jaipur. Consequently, the NCLT, Jaipur imposed a moratorium, and appointed an Interim Resolution Professional ("**IRP**");
5. in the CIRP of MSIL, SMPL filed a claim for INR 1,58,341 (Indian Rupees one lakh fifty-eight thousand three hundred and forty-one) as "operational debt" (arising out of its monthly remuneration as a "sales promoter") and INR 1,41,39,410 (Indian Rupees one crore forty-one lakhs thirty-nine thousand four hundred and ten) as financial debt (arising out of the interest from the security deposit);
6. the RP reclassified the claim for "financial debt" as "operational debt", stating that SMPL could not be considered a "financial creditor";
7. challenging the said classification, SMPL filed an application before the NCLT, Jaipur ("**Application**");
8. during the pendency of the Application, the CoC of MSIL approved a resolution plan submitted by a bidder. Thereafter, the RP filed an application seeking approval of this resolution plan before the NCLT, Jaipur;
9. the NCLT, Jaipur rejected the Application filed by SMPL and allowed the application seeking approval of the resolution plan. SMPL filed an appeal before the NCLAT against the rejection. By judgment and order dated October 7, 2021 ("**Impugned Order**"), NCLAT held that SMPL was a financial creditor and not an operational creditor;
10. aggrieved by the Impugned Order, Global Credit Capital Limited and other members of the CoC ("**Appellants**") preferred an appeal before the Supreme Court on the following grounds (supported by the RP):
    a) SMPL's role was to provide services promoting MSIL's beer manufacturing. Therefore, the Security Deposit paid to MSIL constituted operational debt and not funds extended to MSIL for financial purposes; and
    b) MSIL had no intention of availing any financial facility. The mere payment or accrual of interest should not determine the classification of the debt as financial debt under the IBC;
11. SMPL contested the appeal on the following grounds:

a) the essence of the transaction needed to be scrutinised to determine the nature of the debt;

b) the criteria for defining financial debt—such as disbursement, time value of money, and the commercial impact of borrowing under the IBC were all met; and

c) the money was repayable under the Agreements without any deductions or provisions for forfeiture, and the interest rate of 21% per annum was the consideration for the time value of money.

Findings of the Supreme Court

1. The Supreme Court interpreted the words of "debt", "claim" and "financial debt" as defined under the IBC laid down as follows:

   a) both financial debt and operational debt must stem from a liability or obligation associated with a claim;

   b) cases falling within the categories outlined in the definition of financial debt must meet the criteria specified earlier in Section 5(8), namely, there must be a debt with any applicable interest disbursed as consideration for the time value of money;

   c) in situations where one party owes a debt to another party under a written agreement or arrangement involving the provision of 'service', the debt qualifies as an operational debt only if the claim (which is the subject matter of the debt) is connected with or correlated to the service (that is the subject matter of the transaction); and

   d) the wording of the written document cannot be taken at face value. Thus, it is essential to discern the true nature of the transaction by examining the agreements;

2. applying the above principles, the Supreme Court held the following as regards the clauses in the Agreement:

   a) a nominal amount of INR 4000 (Indian Rupees four thousand) per month was paid to SMPL for its role as a sales promoter, and this sum was the only correlation for the services provided;

   b) SMPL was not entitled to any commission based on sales volume;

   c) there was no provision for the forfeiture of the Security Deposit;

   d) the payment of the Security Deposit was unrelated to the performance of other conditions by SMPL; and

   e) funds were arranged to be transferred to SMPL, resembling a form of commercial borrowing, given the treatment of interest on the Security Deposit as long-term loans/liabilities and interest revenues in the financial statements of MSIL and SMPL.

Consequently, the Supreme Court determined that the Security Deposit specified in the Agreements constitutes a financial debt owed to MSIL, classifying SMPL as a financial creditor under the provisions of the IBC.

Conclusion

The principles laid down by the Supreme Court on classification of a debt highlights the criticality of the Adjudicating Authority ascertaining the true nature of the underlying transaction as well as provides guidance on the reference, interpretation, and reliance on the contractual terms to determine the qualification of "financial debt" or "operational debt" under the IBC.

A corporate guarantor cannot be absolved from its liability only because the guarantee is not invoked

In the case of ***Iskon Infra Engineering Private Limited vs. Central Bank of India***[14], NCLAT rejected the dissolution of a company undergoing voluntary liquidation on the ground that such a company had

[14] Company Appeal (AT) (Insolvency) No.323 of 2024, NCLAT, New Delhi

extended corporate guarantees of substantial amounts for a principal borrower, and even though the guarantee has not been invoked, the lenders could require a guarantor to perform its obligations.

Background

1. M/s Iskon Infra Engineering Private Limited ("**Company**") initiated voluntary liquidation under Section 59 of the IBC. The proceeding was at its final stage. The Company, through the liquidator filed a company petition under Section 59(7) of the IBC[15] seeking dissolution of the Company before the NCLT, New Delhi Bench – VI;
2. during the hearing of the Company Petition, the NCLT, New Delhi issued notice to the Registrar of Companies ("**ROC**"). The report of the ROC revealed that the Company had extended corporate guarantees to one, M/s Abhinav Steels and Power Limited ("**Principal Borrower**") of more than INR 1,257 crore (Indian Rupees one thousand two hundred fifty-seven crore) (approx.). The Principal Borrower had availed term loan facilities from a consortium of banks namely, Punjab National Bank ("**PNB**"), Oriental Bank of Commerce ("**OBC**") and Central Bank of India ("**CBI**");
3. the ROC further revealed that this guarantee had been extended from 2010 onwards and that as on date, there are 23 (twenty-three) charges against the Company and there is no satisfaction of charge by the Company or the liquidator;
4. the NCLT, New Delhi also issued notices to PNB, OBC and CBI. CBI also filed its objection placing on record the details of the working capital term loan by the Principal Borrower which was secured by the Company's corporate guarantee. In view of these objections, the NCLT, New Delhi dismissed the Company's petition; and
5. the Company challenged the NCLT, New Delhi order before the NCLAT on the grounds that the Company's corporate guarantee has not been invoked by any of the financial creditors and no claim had been filed before the liquidator. The liquidator argued that the liability against a corporate guarantor only arises once a guarantee is invoked.

Issue

Whether the Company can be dissolved (under voluntary liquidation) when it has extended corporate guarantees which are neither invoked, nor have any claims filed in that respect?

Findings and Rational

NCLAT dismissed the Company appeal and upheld the order of the NCLT, New Delhi. The NCLAT held that:

1. the fact that the guarantee has not been invoked does not absolve the corporate guarantor from debt. The NCLAT referred to the clauses of the guarantee deed between the Principal Borrower and the corporate guarantor to conclude that the corporate guarantor has extended a corporate guarantee and undertaken to pay the debts to the lenders. Under such clause, the corporate guarantor had agreed that the "*Lenders shall be at liberty to require the performance by the Guarantor of its obligations hereunder to the same extent in all respects as if the Guarantor had at all times been solely liable to perform the said obligations*";
2. the liability of a corporate guarantor is coextensive with the borrowers, and the lenders are at liberty to require the guarantor to perform its obligations; and
3. the NCLAT rejected the submission that there is no debt since the guarantee has not been invoked or claims have not been filed. The NCLAT held that guarantee continues to bind the Corporate Guarantor to discharge its liability. If the guarantee has not been invoked within a particular date, it cannot be a ground for Company to be liquidated under Section 59 of the IBC.

[15] *"Section 59 (7) - Where the affairs of the corporate person have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person."*

Conclusion

This is a significant decision on the continuing liability of corporate guarantors even in situations where neither the guarantee has been invoked, nor the creditors have filed their claims before the liquidator.

Regulation 3(2) of the IBBI (Voluntary Liquidation) Regulations, 2017[16] requires a corporate person to declare (on affidavit) that the corporate person is not being liquidated to defraud any person. This judgement effectively expands the applicability of the existing safeguards by preventing indirect evasion of liability and serves as a deterrent for errant corporate guarantors resorting to voluntary liquidation to evade its liabilities.

Bombay High Court affirms jurisdiction of NCLT to direct Enforcement Directorate to release the attached properties after approval of resolution plan

In the case of ***Shiv Charan and Ors. Vs. Adjudicating Authority and Anr.***[17], the Division Bench of the Hon'ble High Court of Bombay ("**Bombay HC**") *inter alia* upheld the powers of the NCLT, Mumbai to direct the Enforcement Directorate ("**ED**") to release attached properties of a corporate debtor, after the approval of a resolution plan by the NCLT, Mumbai, in light of Section 32A of the IBC.[18]

Brief Facts

Various first information reports were filed against DSK Southern Projects Private Limited ("**Corporate Debtor**") and its erstwhile promoters in October 2017 alleging cheating and criminal breach of trust which were "scheduled offense" under the Prevention of Money Laundering Act, 2002 ("**PMLA**"). Accordingly, in March 2018, the ED filed an Enforcement Case Information Report ("**ECIR**"). Pursuant to the ECIR, the ED attached certain assets of the Corporate Debtor by way of a provisional attachment. The provisional attachment was continued by the Adjudicating Authority under the PMLA *vide* its confirmatory order dated August 5, 2019. Subsequently, CIRP was initiated against the Corporate Debtor at the instance of a financial creditor. The NCLT, Mumbai *vide* its order dated February 17, 2023 ("**Approval Order**"), approved a resolution plan by Mr. Shiv Charan, Ms. Pushpalata Bai and Ms. Bharti Agarwal (collectively referred to as the "**Resolution Applicants**"), and directed ED to release the attached properties of the Corporate Debtor. By way of a subsequent order dated April 28, 2023 ("**April 2023 Order**"), NCLT, Mumbai yet again directed ED to release the attached properties. However, the provisional attachment continued even after the commencement of CIRP of the Corporate Debtor, and further continued after approval of the resolution plan.

The Resolution Applicants filed a writ petition *inter alia* seeking directions to release the attached properties in light of the Approval Order. A counter-writ was filed by ED challenging the validity of the April 2023 Order passed by the NCLT, Mumbai.

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[16] "*Regulation 3 (2) - Where a corporate person, other than a company, intends to liquidate itself voluntarily, a majority of the-*
(a) designated partners, if the corporate person is a LLP, or
(b) persons responsible for exercising its corporate powers, if the corporate person is not a company or a LLP shall make a declaration, verified by an affidavit stating that—
i) they have made a full inquiry into the affairs of the corporate person and they have formed an opinion that either the corporate person has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and
ii) the corporate person is not being liquidated to defraud any person."

[17] Writ Petition (L) No.9943 of 2023 along with Writ Petition (L) No.29111 of 2023. Judgement dated March 1, 2024.

[18] Section 32A of the IBC provides immunity to a corporate debtor and its assets from any prosecution, action, attachment, seizure, retention or confiscation, upon approval of a resolution plan by the NCLT, Mumbai, if such resolution plan results in the change in the management or control of the corporate debtor.

Issue

Whether the NCLT, Mumbai has the jurisdiction to direct the ED to release the attached property by invoking Section 32A of the IBC?

Analysis and Findings

The Bombay HC made the following observations:

1. **Analysis of Section 32A of the IBC**

   At the outset, the Bombay HC analysed Section 32A basis which the April 2023 Order was passed by the NCLT, Mumbai. It observed that Section 32A is a *non-obstante* provision and becomes applicable once a resolution plan is approved by the adjudicating authority. It further observed that Section 32A provides immunity to a corporate debtor for an offense committed prior to the commencement of the CIRP upon fulfilment of the following conditions:

   a) a resolution plan should be approved by the adjudicating authority;

   b) the promoters or those in the management or control of the corporate debtor prior to the commencement of CIRP, or any related parties of such persons, should be totally delinked from the management or control of the corporate debtor under the approved resolution plan;

   c) the Investigating Authority should not (based on material) have reason to believe that the new management had abetted or conspired for the commission of the offense in question; and

   d) in case of liquidation, the asset of the corporate debtor should be sold to a person who is not connected to the corporate debtor.

   However, the immunity under Section 32A is available only to the corporate debtor and its properties. The erstwhile management of the corporate will continue to remain liable to prosecution, and the corporate debtor will continue to cooperate with the enforcement agencies in the prosecution against its erstwhile management. The Bombay HC also took note of the case of *Manish Kumar vs Union of India*[19] wherein it was argued by the Union of India that the purpose of introducing Section 32A was to ensure that the new management starts on a clean slate basis.

   The Bombay HC noted that the conditions specified under Section 32A were complied with and accordingly held that the Corporate Debtor and its assets will be immune from any proceedings commenced prior to the commencement of the CIRP.

2. **Jurisdiction of the NCLT to direct ED to release the attached properties by invoking Section 32A of the IBC**

   In the instant case, it was argued by the ED that the jurisdiction of the NCLT under Section 60(5) is limited to interpreting the IBC and ought not to traverse beyond the IBC and enter upon the domain covered by the PMLA.

   To address the argument raised by the ED, the Bombay HC proceeded to analyse Sections 31 and 60(5) of the IBC. It observed that Section 31 pertains to approval of the resolution plan by the adjudicating authority and as per the *proviso* to the section, prior to approving the resolution plan, the adjudicating authority should be satisfied that the resolution plan has effective provisions for its implementation. The Bombay HC noted that it was in exercise of its obligation under Section 31 to ensure effective implementation of the resolution plan, that the NCLT directed the ED to raise the attachment of the attached properties.

   It further observed that Section 60(5) is also a *non-obstante* provision just like Section 32A and confers jurisdiction on the NCLT to entertain or dispose of any question of law or fact arising in relation to the CIRP of a corporate debtor which includes the right to decide grant of immunity under Section 32A.

   Accordingly, the Bombay HC rejected the argument raised by the ED and held as follows:

   "*the NCLT is well within its jurisdiction and power to rule that prior attachment of the property of a corporate debtor that is the subject matter of an approved resolution plan, must be released, if the*

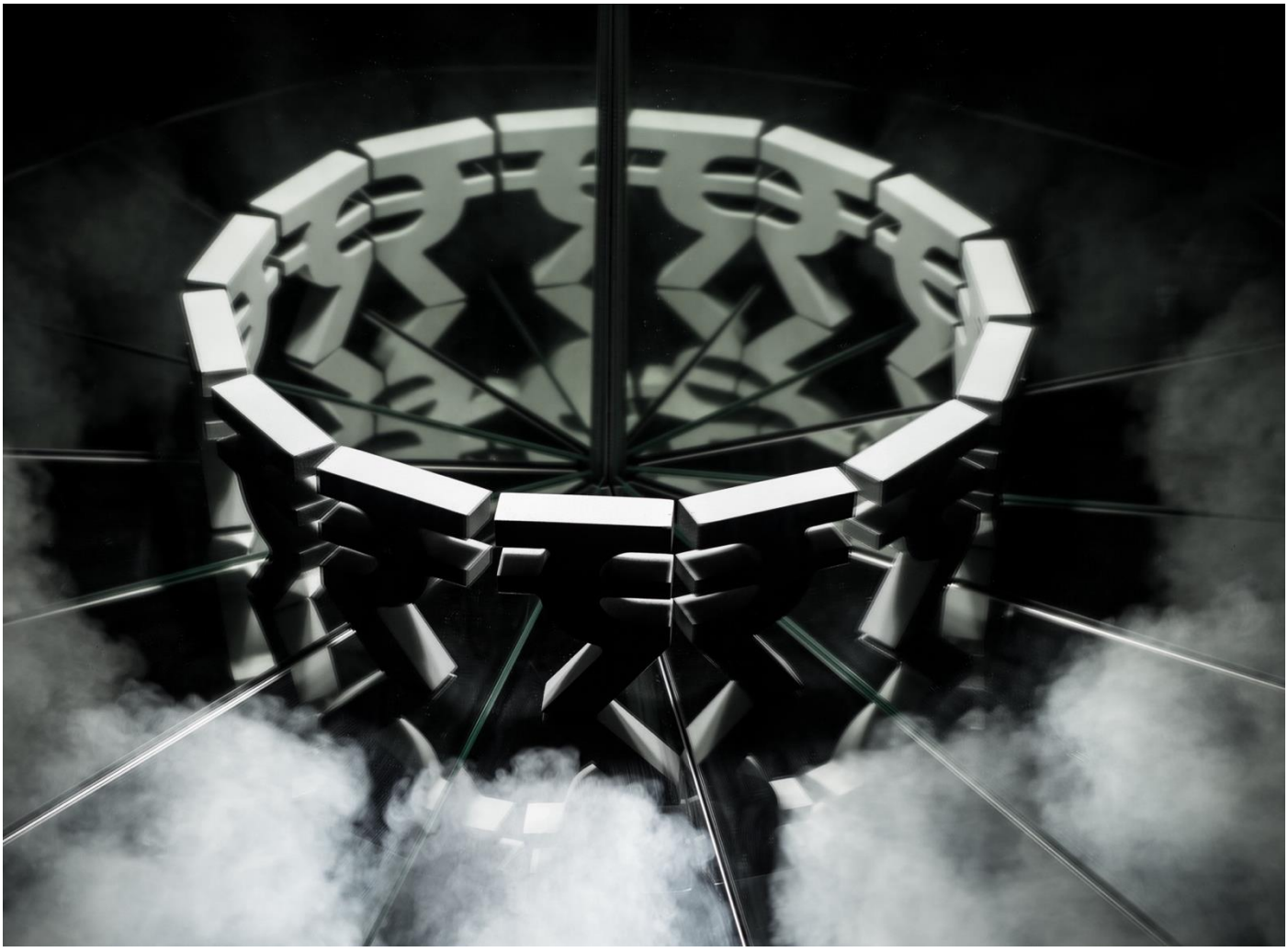
[19] (2021) 5 SCC 1

jurisdictional facts for purposes of Section 32A exist."

Conclusion

By way of this judgment, the Bombay HC has comprehensively laid down the scheme under Section 32A of the IBC and has clarified that attachments made under the PMLA must be raised once the conditions under Section 32A of the IBC are met. This is in consonance with the legislative intent and objective of the IBC, by way of which a successful resolution applicant must be allowed to take over the affairs of a corporate debtor with a *clean slate* so as to avoid ghosts from the past emerging to confiscate the assets of the corporate debtor. Further, the Bombay HC clearly laid down the powers of NCLTs to decide upon such questions of facts and law, which is derived from Section 60(5) of the IBC.

Pertinently, the Bombay HC has refrained from dealing with the important question of whether upon imposition of moratorium under Section 14 of the IBC, attachments under the PMLA must be raised. Successful resolution applicants across the country are facing the ire of central and state agencies refusing to comply with the provisions of the IBC for reasons best known to them, thus leading to a situation where agencies pursue actions seemingly without due regard to the law of the land. It is imperative that the powers of agencies *vis-à-vis* the IBC be clarified so as to avoid situations where the objective of legislations are defeated due to the cavalier attitude of the state machinery.



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Our full spectrum of services includes advising clients on corporate debt transactions (including term and working capital debt), acquisition finance, structured finance, project finance, asset finance, real estate finance, trade finance, securitisation, debt capital markets and restructuring and insolvency assignments.

Our practice has been consistently ranked in the top-tier for several years, and several of our partners are regarded highly, by international publications such as Chambers and Partners, IFLR, Asia Law, Legal 500, Asia Legal Business, IBLJ and Leaders League.

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This Compendium has been prepared by:

Anish Mashruwala
Partner

Soumitra Majumdar
Partner

Varghese Thomas
Partner

Probir Roy Chowdhury
Partner

Dheeraj Nair
Partner

Yajas Setlur
Partner

Fatema Kachwalla
Partner

Abhishek Ray
Partner

Arrchana A Panchall
Partner

Pratish Kumar
Partner

Vinod Kumar
Partner

Aditi Sehgal
Partner

Abhay Agarwal
Principal Associate

Zahan Kalyaniwalla
Senior Associate

Ahsan Allana
Senior Associate

Vishrutyi Sahni
Senior Associate

Sonali Singh
Senior Associate

Saibarath
Senior Associate

Bhaskar Dhandharia
Associate

Muskaan Gupta
Associate

Virgil Braganza
Associate

Kabir Saund
Associate

Moushami Nayak
Associate

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Innovative Technologies Law Firm of the Year 2023

Banking & Financial Services Law Firm of the Year 2022</td>
<td>7 Ranked Practices,
16 Ranked Lawyers

Elite – Band 1 - Corporate/ M&A Practice
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3 Band 1 Practices
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4 Band 1 Lawyers,1 Eminent Practitioner</td>
<td>Ranked #1
The Vahura Best Law Firms to Work
Report, 2022

Top 10 Best Law Firms for Women in 2022

7 Practices and
3 Ranked Lawyers</td>
</tr>
</table>

For more details, please contact km@jsalaw.com

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