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Article

Special Purpose Acquisition Companies (SPACs): Are we ready to launch the spac-ship?

By **Sudish Sharma and Vidhi Madan**

Introduction and lifecycle of a SPAC

Although the inception of modern Special Purpose Acquisition Companies ('SPACs') happened in the United States in the early 1990s, the recent spike in this phenomenon has undoubtedly taken the markets by a storm. A current favourite for companies intending to go public is by way of SPACs. They are commonly referred to as 'blank cheque entities' or 'shell companies', because they raise capital from an initial public offering ('IPO') to acquire an unspecified operating business.

It must be noted that SPACs have no active line of business activity or commercial operations and are formed for the sole purpose of raising capital through an IPO. Generally, a SPAC is established by experienced sponsors or managers with nominal invested capital of 20%. By leveraging their expertise, they raise the funds from public through IPO. The proceeds of the IPO are then held in a trust or an escrow account until the target is identified for acquisition. Once the target is identified, consent of the shareholders of SPAC is sought and those who do not approve of the proposed acquisition are given an option to exit, by redeeming their shares in the SPAC. The final step is the acquisition of the target, which is commonly referred to as the de-SPAC transaction. Once the acquisition is complete, the SPACs reflect the identity of the target company. Consequently, the unlisted target gets listed automatically. This entire process is usually completed in a span of 18-24 months.

In case the acquisition is not made within two years of the IPO, the SPAC is de-listed and the money is returned to the investors.

Benefits

Given the faster execution of SPACs over a traditional IPO route, it is generally preferred by start-ups. Additionally, since the listing is through merger, they facilitate companies to go public without being subject to the complexities of the market, such as multiple investor negotiations, underwriter negotiations, valuation uncertainty, regulatory compliances and overwhelming documentations and filings.

Further, SPACs sponsors are mostly seasoned industrial professionals and investors. The process is further streamlined due to their existing goodwill in the industry, combined with their experienced management prowess and well-established track records in the relevant sector.

Regulation Framework around SPACs

The primary regulations concerning SPACs in the Indian context are:

- Companies Act, 2013 ('**Companies Act**'): Companies Act was recently amended to allow the direct listing of Indian companies on foreign stock exchanges[1]. Additionally, the Foreign Exchange Management Act, 1999 ('**FEMA**') guidelines do not prohibit

[1] Section 23(3), Companies Act 2013.

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an Indian resident individual from investing overseas, within certain annual limit.[2]

Given that these are new entity forms, there are a few matters which needs to be addressed under the Companies Act for their smooth and effective functioning. The Companies Act provides that a company is required to carry on the business as per the object clause in the constitution documents. As per Section 248(1) of the Companies Act, the registrar of companies ('**RoC**') has the discretion to strike off the name of the company if it fails to commence its business within one year from its incorporation. For SPACs, the typical acquisition timeline is around 18 months or more. Considering that the SPACs do not have objects as well as operating business of their own and adopt the objects and the business of the target operating companies, this will prevent the functioning of a SPAC in India, as it usually takes about 2 years for a SPAC to identify a suitable target.

If a company fails to commence its operations within 1 year of its inception, it has the option of converting itself as a dormant company. However, the barriers which are created because a SPAC is a dormant company are as follows:

a) The securities of such a company cannot be listed with any stock exchange outside or inside India[3];

b) It cannot have any public deposits which are outstanding or should not be in default of the same or any interest thereof[4]; and

c) It can remain as a dormant company for only up to 5 consecutive years, after which the RoC will strike off the name of the company from the register of companies.[5]

- Securities Exchange Board of India ('**SEBI**') Regulations: Under the Securities and Exchange Board of India Act, 1992 ('**SEBI Act**'), an unlisted issuer making a public issue is required to satisfy certain eligibility criteria. The company must have at least INR 3 crores worth of net tangible assets in the preceding 3 years of which not more than 50% should be held in monetary assets. Moreover, the company should have a minimum average pre-tax operating profit of INR 15 Crores in at least 3 of the last 5 years along with a Net worth of at least INR 1 crore in each of the preceding three full years. This necessitates a company to conduct an IPO only after three years of its incorporation and commencement of business.

Draft SEBI SPAC Guidelines

At the 18th Annual Capital Market Conference organized by the Federation of Indian Chambers of Commerce and Industry (FICCI), SEBI chairman Mr. Ajay Tyagi remarked that SEBI is actively examining the possibility of introducing a framework for SPACs in India. The Primary Market Advisory Committee had been vested with task, and detailed listing regulations shall be specified for these companies. The class of sponsors for a SPAC shall only be limited to sophisticated and seasoned group of investors. While these regulations are still in the

[2] https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10192&Mode=0.

[3] Company (Miscellaneous) Rules 2014, *supra* note 23, r. 3.

[4] Company (Miscellaneous) Rules 2014, *supra* note 23, r. 3.

[5] *Id.* at r. 8 (proviso).

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consultation stage, the International Financial Services Centres Authority ('**IFSCA**') came up with a consultation paper on the issuance and listing of securities ('**Consultation Paper**'), containing draft guidelines titled as IFSCA (Issuance and Listing of Securities, Regulations, 2021('**IFSC Listing Regulations**') and invited suggestions for the same.

As per the Consultation Paper, it envisages the listing of SPACs on the international exchange at Gujarat International Finance Tec-City (GIFT City) and states that a SPAC shall be eligible to raise capital through an IPO of specified securities if: (i) the primary objective of the issuer is to effect a merger or amalgamation or the acquisition of shares or assets of a company having business operations; and (ii) the issuer does not have any operating business.

The Consultation Paper goes on to set forth the following amongst other things:

1. **Offer Size:** The issue shall be of a sizenot less than USD 50 million or any other amount as may be specified by IFSCA from time to time, with the sponsors holding at least 20% of the post issue paid up capital. Certain disclosures are specified within the guidelines, with the requirement that the offer shall be made by the issuer within a period of not more than one year from the date of issuance of observations by IFSCA.

2. **Minimum Application:** The minimum application size in an IPO of a SPAC shall be USD 250,000. No single application shall be allotted more than 20% of the post issue capital and the allotment to investors shall be on a proportionate or discretionary basis, as disclosed in the offer document.

3. **Minimum Subscription:** The minimum subscription to be received in the issue shall be at least 75% of the offer size for the offer to be successful. Underwriting is permitted.

4. **Other SPAC specific obligations:** Acquisition of target is to be completed within 3 years but can be extended to one more year. The SPAC issuer shall ensure that at least 90% of the proceeds from the IPO are kept in an interest-bearing escrow account controlled by an independent custodian until consummation of acquisition of the target. The escrow funds shall be invested only in instruments disclosed in the offer document and shall include only short-term investment grade liquid instruments.

The issuer resulting from the completion of the business acquisition by the SPAC shall be required to meet the listing eligibility criteria set out in these regulations within 180 days, in order to continue the listing on the recognised stock exchange(s).

Conclusion

The meteoric popularity of SPACs may be attributed to the above discussed reasons. Since 2015, there have been approximately 700 SPAC IPOs. At the same time, it is not necessary that the SPAC-led transactions are always free from encumbrances and would yield profits. While SPAC experts remark that it is unfair to judge the success of blank cheque companies based on how they thrive post the deal, it may be noted that like any other business venture, SPAC transactions are also susceptible to market risks and pitfalls. Secondly, these companies have no other 'tangible' assets other than the funds raised, investors are likely to lose their assurance in them in the slightest face of turmoil- for the cash may be lost or wasted in a jiffy.

Nonetheless, many Indian companies have ventured on the SPAC route for their listing goals on the NASDAQ. For instance, recently, India's leading and largest renewable energy producer, merged with a NASDAQ-listed corporation. Similarly, an online India-based travel agent

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platform has been listed on NASDAQ through a merger with SPAC firm. In any case, given the grey areas and hurdles posed by the Indian regulatory framework, SPAC-ships in India are not ready for a launch just yet. On the upside, the SPAC structure has well caught the attention of the regulators in the country. Thus, with an enabling framework in place, India shall hold a promising future for the SPACs

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Notifications and Circulars

IFSCA (Capital Market Intermediaries) Regulations, 2021 notified: The International Financial Services Centres Authority (IFSCA) has notified the IFSCA (Capital Market Intermediaries) Regulations, 2021 ('**Intermediaries Regulation'**) *vide* Notification dated 18 October 2021. The Intermediaries Regulations *inter alia* provides for the regulatory framework and requirements in respect of registration, intermediaries' obligations and inspection of various capital market intermediaries such as the brokers, investment advisers, depository participants, credit rating agencies, portfolio managers, etc.

Entities desirous of obtaining a certificate of registration as a capital market intermediary in IFSC shall be required to submit an application form along with the relevant fees to the IFSCA. Such entities shall also be required to comply with the net worth, and fit & proper requirements, as specified.

A registered capital market intermediary shall also be required to appoint a person as its compliance officer for ensuring compliance with the regulatory requirements. Further, such registered intermediary shall have an annual audit conducted in respect of compliance with these regulations by a member of the Institute of Chartered Accountants of India (ICAI) or a member of the Institute of Company Secretaries of India or any person authorised to conduct audit in a foreign jurisdiction.

Resident Indians as foreign portfolio investors – SEBI (Foreign Portfolio Investors) (Second Amendment) Regulations, 2021 notified: The Securities and Exchange Board of India has issued the SEBI (Foreign Portfolio Investors) (Second Amendment) Regulations, 2021 *vide* Notification dated 26 October 2021 to further amend the SEBI (Foreign Portfolio Investors) Regulations, 2019 ('**FPI Regulations'**).

A new proviso has been added under Regulation 4 of the FPI Regulations in relation to the eligibility criteria for foreign portfolio investors. Under the new proviso, resident Indians, other than individuals, may also be constituents of the

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applicant under the FPI Regulations, subject to certain conditions. According to the proviso, the Applicant should be an Alternate Investment Fund (AIF) setup in the International Financial Services Centre (IFSC) and regulated by the International Financial Services Centre Authority (IFSCA) and such resident Indian, other than individuals, is a sponsor or manager of the applicant. The conditions also prescribe the quantum of contribution of such resident Indian.

Food imports – Mandatory registration and inspection of foreign food manufacturing facilities: The Food Safety and Standards Authority of India (FSSAI) has amended the Food Safety and Standards (Import) Regulations, 2017 to provide for registration and inspection of foreign food manufacturing facilities. According to the new provisions, effective from 3 November 2021 and to be complied by the Food Operators with effect from 1 June 2022, the FSSAI will specify the categories of food products intended for export to India for further regulating control and the foreign food manufacturing facilities falling under such categories and desirous to export such article of food to India would have to register with the Food Authority before exporting to India. It may be noted that inspection will not be required in case the categories of food are covered under the mandatory Bureau of Indian Standards (BIS) Certification Mark Scheme, where the BIS scheme of inspection includes the requirements specified under Schedule 4 of the Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011. The new provisions also provide for suspension or cancellation of registration.

SEBI revises Risk Management Framework for mutual funds: SEBI *vide* Circular No. SEBI/HO/IMD/IMD-1 DOF2/P/CIR/2021/630 has revised the Risk Management Framework (‘**RMF**’) for mutual funds. The Circular prescribes certain systems, procedures and practices that must be followed by all mutual funds with regard to risk management in various areas like fund management, operations, customer service, marketing and distribution, disaster recovery and business contingency. The Circular describes the roles and responsibilities of the Board of Asset Management Companies (‘**AMC**’) and Board of Trustees.

AMCs are required to establish an RMF for their mutual fund business as per the standards prescribed by SEBI. The objective is that the RMF must assist the Board of Directors of both the AMC and the Trustees in early identification of risk and increasing accountability in the organization. Every AMC must identify at least one CXO (Chief Experience Officer) level officer who shall hold responsibility for the risk management of specific functions of the AMC. The RMF must have clarity on the roles and responsibilities assigned to the CXO and this needs to be disclosed on their website.

Compliance with the RMF must be reviewed annually by the AMC and reports of such review should be placed before the Board of the AMC and Trustees for their consideration. Trustees may also forward the findings and steps taken to mitigate the risk along with their comments to SEBI in the half-yearly trustee reports.

RBI announces Retail Direct Scheme enhancing access to G-secs for retail investors: On 12 November 2021, the Reserve Bank of India (‘**RBI**’) launched the Retail Direct Scheme which aims to enhance access to government securities (G-sec) for retail investors.

Retail investors can open a Retail Direct Gilt (RDG) Account with the RBI to invest in G-secs. To open an RDG Account, the investor must

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possess a PAN Card, a rupee savings bank account maintained in India, KYC documents, a registered email address and a mobile number. The retail investor can place bids for primary issuance of G-secs as per the non-competitive scheme for participation in primary auction of government securities and procedural guidelines for SGB issuance. Investors can also buy and sell G-secs on the secondary market on NDS-OM (Negotiated Dealing System – Order Matching segments) ('Odd Lot' and 'Request for Quotes' segments). The investors can pay for their investments using a savings bank account, through net banking, or even through the Unified Payments Interface (UPI). The RBI will not be charging any fees for the facilities provided under this Scheme.

SEBI (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2021 notified: SEBI has issued the SEBI (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2021 on 9 November 2021 to further amend the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. The Amendment shall come into effect from 1 April 2022 unless specified otherwise.

The latest Regulations modify the first proviso to the definition of 'related party' stating that any person or entity forming part of the promoter group of the listed entity, or any person holding more than 20 per cent equity shares or more than 10 per cent equity shares, (with effect from 1 April 2023) shall be deemed as a related party.

Further, the definition of 'related party transaction' has been widened to include even transactions between two subsidiaries and which shall be subject to the listed entity's approval. With effect from 1 April 2023, any transaction between the listed entity or any of its subsidiaries on one hand, and any other person or entity on the other hand, the purpose and effect of which is to benefit a related party of the listed entity or its subsidiaries, will also be termed as a related party transaction.

The amendment also brings about a requirement of obtaining approval of the Audit Committee of the listed entity, for transactions undertaken between two or more subsidiaries of the listed entity, if the value of the transaction (either individually or taken together with previous transactions during a financial year) exceeds 10 per cent of the annual consolidated turnover of the listed entity, as per its last audited financial statements.

Portfolio Managers (Fourth Amendment) Regulations, 2021 notified: On 9 November 2021, the Securities and Exchange Board of India has amended the SEBI (Portfolio Managers) Regulations 2020 by notifying the SEBI (Portfolio Managers) (Fourth Amendment) Regulations, 2021. The amendment provides definitions for the terms 'Alternate Investment Fund', 'Co-investment Portfolio Manager', 'investee company', 'Manager' and 'Sponsor'.

Further, Regulation 7 of the earlier Regulations, pertaining to consideration of applications for grant of certificate of registration, has been substituted to say that SEBI shall consider whether the principal officer of the applicant has the relevant NISM (National Institute of Securities Markets) certificate as specified, provided that at least 2 years of the relevant experience is in portfolio management or investment advisory services or in areas related to fund management.

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Ratio Decidendi

Adjudicating authority, in case of admitted debt and in absence of pleadings of Corporate Debtor, cannot assume defenses on behalf of 'Corporate Debtor'

The National Company Appellate Tribunal ('**NCLAT'**), Chennai Bench, while allowing an appeal filed against the dismissal of a petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('**Code'**), has held that if a financial debt has been clearly admitted and no objections have been raised by the corporate debtor, the NCLT cannot assess the financial health of the debtor independently and reject the initiation of Corporate Insolvency Resolution Process (CIRP).

Brief facts:

(i) The dispute arose between the Appellant/ Financial Creditor and the Respondent/ Corporate Debtor from the default committed by the latter in repayment of financial debt against the export facility extended by the Appellant. After issuing multiple notices of demand, the Appellant/Financial Creditor had filed an application under Section 7 of the Code for initiating CIRP against the Corporate Debtor ('**Petition'**). The Corporate Debtor had failed to file a Reply in said proceedings.

(ii) NCLT, Bengaluru Branch preliminarily observed that the Corporate Debtor had admitted to the financial debt by virtue of a Demand Promissory Note issued by it to the Appellant. Further, an 'Irrevocable Undertaking for Recourse against the Corporate Debtor' ('**Undertaking'**) had also been given by the Debtor. However, by relying upon the ratio in *Mobilox Innovations Private Limited* v. *Kirusa Software Private Limited*, (2018) 1 SCC 353, NCLT held that IBC provisions should not be used merely for recovery of debt from an otherwise solvent and compliant company. Accordingly, the Petition was dismissed. The present appeal was preferred to the NCLAT, Chennai Branch against such order ('**Impugned Order'**).

Submissions:

(i) The Appellant submitted that the Impugned Order is invalid and illegal as NCLT had accepted existence of debt due and payable to the Appellant and that NCLT had no jurisdiction to evaluate the financial health of the Corporate debtor for admitting the petition under Section 7 of the Code and initiating CIRP.

(ii) It was further submitted that 'inability to pay debt' is not a mandatory consideration for initiating CIRP and that the NCLT has committed an error in assuming defenses for the Corporate Debtor in the absence of any reply and objections by the Corporate debtor.

Decision:

(i) The NCLAT in its decision observed that the 'Adjudicating Authority' is not a 'Court of Law' and that 'CIRP' is not a litigation. Therefore, if the NCLT is satisfied as to the existence of default, that the application is a complete one and that no disciplinary proceedings are pending against the proposed 'Resolution Professional', it is incumbent upon it to admit the application. Further, if the debt is an admitted debt and there is failure to repay, such debt comes under the meaning of 'financial debt' under Section 5(8) of the Code.

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(ii) NCLAT observed that NCLT exceeded its jurisdiction by taking the defense of the Corporate Debtor, especially in the absence of any 'Reply' by the Corporate Debtor. Accordingly, the Impugned Order was set aside and the Petition was directed to be restored before the NCLT, admitted and proceeded with as per law.

[*Drip Capital Inc.* v. *Concord Creations (India) P.Ltd.*- Judgment dated 8 November 2021 ,MANU/NL/0484/2021, NCLAT, Chennai Branch]

Merely having an explicit clause in contract is not sufficient to make time the essence of the contract

The Supreme Court has observed that mere inclusion of an explicit clause stating that time is essence of the contract will not make it so, and that various provisions of the contract, such as extension clauses, imposition of liquidated damages etc., are to be considered to ensure that the contract is interpreted as per the terms of the entire document as well as the circumstances surrounding the parties. Further, in case where time is not of the essence, liquidated damages cannot be automatically levied and the actual loss suffered by the party needs to be considered, as per Section 55 of the Indian Contract Act, 1872 ('**Contract Act**').

Brief facts:

(i) The Respondent had flouted a global tender for the procurement of steel-based goods, to which the Appellant was a successful bidder. Purchase orders ('**POs**') were issued by the Respondent. It was explicitly mentioned in the POs that time and date of delivery is the essence of the POs. Even if delayed deliveries were accepted by the Respondent, the same were to be subject to imposition of liquidated damages.

(ii) Disputes arose between the Appellant and Respondent on account of the recovery of liquidated damages made by the Respondent, after granting various extensions in delivery time. The Arbitral Tribunal ('**Tribunal**'), constituted to resolve said disputes, held that simply having a clause in the contract making time the essence of it would not be enough to determine it, and that an overall view having regard to all the terms of contract are to be taken into consideration. Further, the presence of an extension clause itself dilutes the obligation of timely performance. It was held that liquidated damages cannot be granted as there was no breach of contract since time was not the essence. The Tribunal directed for payment of unliquidated damages based on actual loss caused to the Respondent.

(iii) The Respondent thereafter filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('**Act**') before the District Court, which dismissed the same, while revising the costs of arbitration. Both parties then appealed against the same before the High Court of Uttarakhand. The High Court disagreed with the view of the Tribunal as well as the District Court. Review petitions filed against said order of the High Court was disposed of accepting partial claims of the Appellant and further, upholding the revised costs of arbitration, which were appealed against before the Supreme Court.

Submissions:

(i) The Appellant re-iterated that time was not the essence of the contract, since the contract provided for extension of time of delivery. Further, if liquidated damages are waived for certain extensions by the

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Respondent, damages cannot be claimed for further extensions.

(ii) The Respondent, relying on the judgment of *ONGC Ltd.* v. *Saw Pipes Ltd.,* (2003) 5 SCC 705, held that liquidated damages imposed in similar circumstances therein have been upheld by the Apex Court. Further, in a contract having provision for liquidated damages, unliquidated damages cannot be given.

Decision:

(i) The Apex Court, while deciding whether time was of the essence in a contract, observed that reliance on the contractual conditions and conduct of parties to conclude that existence of extension clause dilutes time being the essence of the contract, was in accordance with Rules of contractual interpretation. It was observed that '*as the contract was spread over a long tenure, the intention of the parties to provide for extensions surely reinforces the fact that timely performance was necessary. However, the fact that extensions were granted indicates efforts on the parties to uphold the integrity of the contract*', and such actions render the time clause ineffective.

(ii) The Court accepted the Tribunal's interpretation of loss under Section 55 of the Indian Contract Act, 1872 to mean actual tangible loss provable by evidence, instead of pre-estimated loss as a reasonable interpretation. Further, once liquidated damages have been waived for extension in time, the same cannot be imposed for further extensions without prior agreement to the same, and for such reasons the Supreme Court upheld the Tribunal's order. Various judgments such as *Renusagar Power Co. Ltd.* v. *General Electric Co.,* 1994 Supp (1) SCC 644 and *ONGC Ltd.* v. *Western Geco International Limited*, (2014) 9 SCC 263 were relied upon to arrive at the decision.

[*Welspun Specialty Solutions Limited & Ors.* v. *Oil and Natural Gas Corporation Ltd. & Ors.* – Judgment dated 13 November 2021, MANU/SC/1059/2021, Supreme Court of India]

Limitation period for appeal under IBC operate from date of pronouncement of order – Delay caused by waiting for certified copy of order cannot be ground for claiming relief

This appeal was preferred before the Supreme Court under Section 62 of IBC from judgment of NCLAT, Delhi which had dismissed the appeal before them as being barred by limitation.

The Supreme Court interpreted the provision of limitation in IBC and observed that speedy disposal is the essence of IBC hence grounds for delay such as waiting for free copy of certified order are not sustainable in law. Furthermore, the court observed that the limitation period begins from date of pronouncement of order.

Brief facts:

(i) The Corporate Debtor was undergoing liquidation. The Appellant, being the erstwhile Resolution Professional and the Liquidator to the Corporate Debtor had instituted proceedings under Sections 43 and 45 of the Code, to avoid certain preferential and undervalued transactions of the Corporate Debtor against Respondents No. 1-4. No relief was sought against Respondent No. 10, being a subsidiary of Respondent No. 1. However, Respondent No. 10 sought to invoke certain bank guarantees issued by the Corporate Debtor for its failure to provide services. The Appellant filed an application to resist the

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invocation of this performance guarantee until the liquidation proceedings are concluded.

(ii) The NCLT held that performance guarantees were not a part of 'Security Interest', as defined under Section 3(31) of the Code and had refused to grant an injunction against their invocation ('**NCLT Order'**). Thereafter, an appeal was preferred before the NCLAT, which was dismissed stating that it was filed beyond the period of limitation. Aggrieved by the same, the Appellant filed the present appeal before the Supreme Court. The Appellant was present during the pronouncement of the NCLT Order on 31 December 2019. However, as per the Appellant, said Order copy was filed on the website of NCLT only on 20 March 2020. The appeal before NCLAT had been preferred on 8 June 2020.

Submissions:

(i) The Appellant contended that, owing to Covid-19, the NCLT was shut for hearings and furthermore an appeal was filed seeking extension of the limited period due to delay in uploading the copy of the NCLT Order, as well as failure to provide the certified copy of said Order.

(ii) Also, due to the pandemic, the limitation period of 30 days for filing an appeal under Section 61 of the Code will not apply. The appellant further contended that, while Rule 22 of the NCLAT Rules, 2013 mandates filing of a certified copy of the order for an appeal, Rule 14 permits exemption from complying with any of the rules on just ground. A reading of Section 420(3) of Companies Act, 2013 and Rule 50 of NCLT Rules, 2013 which direct a free copy to be issued to every party, also imply that the period of limitation should start from the date of issue of the free certified copy of the impugned order, even in the absence of such words in section 61 of the Code. Section 12(2) of the Limitation Act, 1963, which deals with exclusion of time in legal proceedings, also applies from the date on which the copy of the order is made available and not from the date when such order is passed.

(iii) The Respondent contended that Section 61 of the Code mandates a 30 day period, extendable to a maximum of 15 days, for preferring an appeal, and observing of such limitation is essential to the object of the Code. As held in Pr. Director General of Income Tax v. Spartek Ceramics India Ltd., mere knowledge of the order is sufficient for preferring an appeal. The Respondent also contended that time was of the essence of the Code, as held in Ebix Singapore Private Ltd. v. Committee of Creditors of Educomp Solutions Ltd.

Decision:

(i) The Apex Court observed that the limitation period in IBC is the only one that is applicable to the case, since the Code has an overriding effect and is a whole code, as held in *Dharmshi* v. *Kotak Investment Advisors Ltd.*

(ii) It was stated by the Court that IBC does not state limitation shall commence from 'date on which a free certified copy is issued' and such deliberate omission was made to hasten the bankruptcy proceedings and disputes under the IBC are different from the Companies Act in the sense that parties under the Code should take active steps and pay for the copy of the order from the

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date of it being made available instead of waiting for the free copy of the judgment.

(iii) The Court further went on to hold that attachment of certified copy of the judgment to the annexure is mandatory in the appeal as it highlights that the aggrieved party has done their due diligence. Accordingly, the Apex Court dismissed the appeal.

[*V. Nagarajan* v. *SKS Ispat & Power Ltd. & Ors.* – Judgment dated 22 October 2021, MANU/SC/0956/2021, Supreme Court of India]

News Nuggets

High Court has no standard power of appellate forum under Arbitration Section 37

The Supreme Court of India has held that High Courts or District Courts, in matters of appeal from arbitral awards under Sections 37 and 34 of the Arbitration and Conciliation Act, 1996 ('**Act**') do not have the standard powers of an appellate forum, but, should limit themselves to examining grounds for interference. In the case of *Punjab State Civil Supplies Corporation Ltd. & Ors. v. Ramesh Kumar & Company,* the Sole Arbitrator had rejected the claims of the Respondents and had upheld the action of the Appellants of forfeiting the security deposit. In appeal proceedings under Section 34 of the Act, the District Court at Chandigarh dismissed the appeal finding no substance in it. Thereafter, an appeal was preferred before the High Court of Punjab and Haryana under Section 37, whereunder the High Court reversed the order of the District Court and decreed the claim of the Respondents, along with interest. The Supreme Court observed that, while considering a petition under Section 34, upon satisfaction of such grounds mentioned under said section, the court may take action. However, the court cannot act as an appellate forum. Likewise, in proceedings of appeal under Section 37 of the Act, the High Court can only look at whether the District Judge had acted contrary to Section 34 of the Act and cannot go into the merits of the matter. The Court held that the jurisdiction in a first appeal arising out of a decree in a civil suit is distinct from the jurisdiction of the High Court under Section 37 of the Act arising from the disposal of a petition challenging an arbitral award under Section 34.

Lack of Director's signature on Board Resolution for preferring application to initiate insolvency renders initiation of such proceedings void ab initio

NCLAT, New Delhi Bench has held that lack of signature on the Board Resolution required for preferring an application before the NCLT, for initiating CIRP, renders the proceedings *void ab initio.* Even though liquidation proceedings had already been initiated against the Corporate Debtor, in light of the appeals preferred both against the initiation of CIRP as well as liquidation proceedings, the NCLAT in the case of *State of Telangana & Ors.* v. *Nizam Deccan Sugars Limited & Ors.* halted the liquidation proceedings, since the Board

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Resolution discussing the filing of application under Section 10 of the IBC was void due to the lack of affirmative vote of the nominee director of the concerned Corporate Debtor. Even though an order directing liquidation was passed against the Corporate Debtor, in light of the absence of the signature, it was considered as a failure rendering the entire process illegal and the order initiating CIRP itself was set aside by NCLAT. Consequently, the order initiating liquidation proceedings was also set aside.

Insolvency – Pendency of dispute – Effect of default dismissal of appeal under Arbitration Section 37

In a case where the appeals under Section 37 of the Arbitration and Conciliation Act, 1996 were dismissed in default and were not restored as on the date of demand notice under the Insolvency and Bankruptcy Code, 2016, the Supreme Court of India has rejected the plea that the law requiring pre-existing disputes is of no application. The Court held that the submission that the restoration of appeal was a later development or post facto event, was not compatible with the law. Relying upon its earlier decision in the case of K. Kishan v. M/s. Vijay Nirman Company, the Apex Court was of the view that it was not a clear case of the corporate debtor being in default with no pre-existing dispute. It noted that on the date of issue of notice, the operational creditor was aware of the fact that the appeal under Section 37 of the 1996 Act was not decided on merits and the applications for restoration had been moved within 30 days of such default dismissal. The Supreme Court in Jai Balaji Industries v. D K Mohanty [Judgment dated 1 October 2021] observed that the fact of moving an application for restoration of appeal and bringing it to the notice of the operational creditor was sufficient to bring the matter within the four corners of 'pre-existing dispute', so as to effectively negate any attempt by the operational creditor to seek insolvency resolution.

Centre seeks comments on Draft Mediation Bill, 2021

The Department of Legal Affairs has proposed a draft Mediation Bill 2021 ('Mediation Bill') for promoting, strengthening and expanding the scope and reach of Alternate Dispute Resolution (ADR) in the country. The Mediation Bill shall facilitate timely and consensual resolution of disputes and serve the interest of stakeholders as an effective alternative remedy. The term 'Mediator' has been defined to mean an individual who is appointed to be a mediator, to undertake mediation, and includes a person registered as a mediator with the Mediation Council of India ('Council'). The Mediation Bill proposes enforcement of domestic and international mediation settlement agreements, provide for a body (the Council), for registration of mediators, and proposes for pre-litigation mediation for pre-trial alternative settlement of disputes.

The Mediation Bill also encourages community mediation for disputes which are likely to affect peace, harmony and tranquillity amongst the residents or families of any area or locality. The Mediation Bill also intends to make online mediation as an acceptable and cost effective process. It provides that successful outcome of mediation, in the form of a Mediation Settlement Agreement ('MSA'), shall be made enforceable by law and such MSA can be challenged only on all or any of the following grounds: (a) fraud; (b) corruption; (c) gross impropriety; or (d) impersonation.

Comments and suggestions are invited on the Mediation Bill from all stakeholders and can be shared by mail/email to the relevant authority.

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Singapore Stock Exchange opens first offshore office in India at GIFT City

The Singapore Stock Exchange ('SGX') on 22 October 2021 opened its first offshore office in India in the Gujarat International Finance Tec-City (GIFT City). GIFT City, located in Gandhinagar, Gujarat, is India's first operational International Financial Services Centre (IFSC). GIFT City is a special economic and financial zone which is treated as an offshore territory under Indian foreign exchange regulations.

SGX has set up an Indian entity, SGX India Connect IFSC Pte Ltd, in GIFT City and also announced the launch of GIFT Data Connect. GIFT Data Connect is a joint collaboration between the National Stock Exchange (NSE) and SGX to set up data connect infrastructure to facilitate access by SGX's international members to Nifty trading data. This will further support India's endeavour to integrate the global financial systems and position the IFSC as a gateway for capital flows in and out of the country.

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