ETERNITY:LAW APPRISE

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Securities and Exchange Board of India

Amendment to Securities and Exchange Board of India (International Financial Services Centres) Guidelines, 2015

Securities and Exchange Board of India ("SEBI") vide its Circular dated November 14, 2017 exercised its power conferred under section 11(1) of the Securities Exchange Board of India Act, 1992 and amended the Securities and Exchange Board of India (International Financial Services Centres) Guidelines, 2015 ("SEBI (IFSC) Guidelines, 2015") notified by SEBI on March 27, 2015.

The definition of "issuer" in clause 2(1)(f) of the SEBI (IFSC) Guidelines, 2015 has been amended on the basis of the consultations held with the stakeholders and reads as follows:-

"issuer" shall mean

a. any entity incorporated in India seeking to raise capital in foreign currency other than Indian rupee which has obtained requisite approval under Foreign Exchange Management Act, 1999 (FEMA) or exchange control regulations as may be applicable; or

b. an entity incorporated in a foreign jurisdiction, provided such entity is permitted to issue securities outside the country of its incorporation or establishment or place of business as per the laws and regulations of its country of incorporation, jurisdiction or its constitution,

or

c. any supranational, multilateral or statutory organization/institution/agency provided such organization/ institution/agency is permitted to issue securities as per its constitution.

Investments by Foreign Portfolio Investors in hybrid securities

Securities and Exchange Board of India ("**SEBI**") vide its ***Circular dated November 15, 2017*** exercised its power conferred under section 11(1) of the Securities Exchange Board of India Act, 1992 and specified that the Foreign Portfolio Investors ("**FPI**") net investment data and the FPI Assets Under Custody ("**AUC**") shall be disseminated by the NSDL and CDSL ("**depositories")**. At present the FPI investments are classified as debt or equity depending on the type of the security in which the FPIs transact. The FPIs are permitted to invest in Real Estate Investment Trusts ("**REITs**") and Infrastructure Investment Funds ("**InvITs**") which are classified as hybrid securities, however the FPI investment are not being reflected in the daily FPI net investment data or the monthly or fortnightly FPI AUC data at present.

In this regard the SEBI has created a third category termed as "hybrid security" for the purpose of capturing and disseminating FPI investment data in hybrid securities. The depositories shall put in place the necessary systems for the daily reporting by the custodians of the FPIs and shall also disseminate on their websites the AUC of the FPIs in debt, equity and hybrid securities.

Insolvency and Bankruptcy Code, 2016

Engenious Engineering Private Limited versus Onaex Natura Private Limited

Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") has pronounced its Order dated November 01, 2017 in the matter Engenious Engineering Private Limited ("**Appellant**"/ "**Financial Creditor**") versus Onaex Natura Private Limited ("**Respondent**"/ "**Financial Debtor**").

1. Background

   The Appellant had filed a Petition in National Company Law Tribunal ("**NCLT**") Ahmedabad Bench wherein NCLT had rejected the Petition on the ground that the Appellant was not a Financial Creditor. Thereafter the Appellant approached NCLAT against the order of NCLT.

2. NCLAT's Ruling

   The Hon'ble NCLAT upheld the NCLT ruling. The Hon'ble NCLAT observed that the Appellant had invested some amount with the Respondent's Company and therefore was allotted equity shares. Pursuant to the petition under 397 and 398 of the Companies Act, 1956 the Company Law Board cancelled the allotment of share capital in favour of the Appellant. After such cancellation the amount was lying with the Respondent's Company as a debt amount of Rs. 79,15,480/- (Rupees Seventy-Nine Lacs Fifteen Thousand Four Hundred and Eighty Only).

3. The Hon'ble NCLAT held that there is nothing on record to suggest that the Appellant comes under the purview of Financial Creditor under Section 5(8) read with Section 5(9) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") despite accepting fact that the amount has been shown to be a debt in the records of the Company, does not mean that the Appellant is a 'Financial Creditor'.

Shriram EPC Limited Versus Rio Glass Solar SA

NCLAT has delivered its *Order dated November 02, 2017* in the matter of Shriram EPC limited ("**Appellant**"/ "**Operational Debtor**") versus Rio Glass Solar SA ("**Respondent**"/ "**Corporate Creditor**").

1. Background

The Respondent, in the present appeal, had preferred an application under Section 9 of the IBC seeking to set in motion the 'Corporate Insolvency Resolution Process' against Operational Debtor to the adjudication authority i.e. The National Company Law Tribunal ("**NCLT**"). Vide the impugned order dated August 10, 2017 the NCLT ordered a Moratorium and appointed an 'Interim Resolution Professional'. The present appeal arises out of the said impugned order.

2. NCLAT held as:

a. It was submitted by the Appellant that the application under Section 9 is not maintainable as the demand notice which was to be served under Section 8 of the IBC was supposed to be served by the Operational Creditor and instead was served by the Respondent through their Advocate/Lawyer's Firm, which is not permissible.

b. The plea taken by the Appellant is that the application under Section 9 in Form-5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has not been signed by the Operational Creditor, but by the "Power of Attorney holder".

c. The NCLAT has admitted the appeal and held that the contentions raised by the Appellants as correct. Section 8(1) of the IBC read with Rule 5 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ("**Adjudicating Authority Rules**") states that the 'Operational Creditor' has to deliver the demand notice in Form-3 or invoice attached with the notice in Form-4 to the 'Corporate Debtor'.

d. Section 8(1) of the IBC reads as follows:

> *"8. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed."*

e. Rule 5(1) of the Adjudicating Authority Rules reads as follows:

> *"5. Demand notice by operational creditor— (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely- (a) a demand notice in Form 3; or (b) a copy of an invoice attached with a notice in Form 4."*

f. The next contention raised by the Appellants was that in terms Section 9(3)(c) of the IBC the Respondent, which is a foreign company of Spain, has not submitted a copy of any "Certificate from Financial Institutions maintaining accounts" of the 'Operational Creditor' confirming that there is no payment of an 'Unpaid Operational Debt' by the 'Corporate Debtor'.

g. The Respondents were unable to show any records of default on part of the Appellants.

Hence the Impugned Order was thereby set aside and the Application made by the Respondent was dismissed.

RERA
MahaRERA

Modem Abodes Private Limited Versus Kavya Mira Realty

Maharashtra Real Estate Regulatory Authority ("**MahaRERA**") has pronounced its *Order dated November 17, 2017* in the matter Modem Abodes Pvt. Ltd. ("**Complainant**") versus Kavya Mira Realty ("**Respondent**")

1. Background

The complaint was filled by the Complainant, stating that the Complainant had entered into a registered agreement for sale with the Respondent to purchase an apartment in Respondents project named Kavya Residency. Inspite of paying 95% of the total consideration the Respondent is delaying in handing over the possession of the apartment to the Complainant as the date of possession was on or before December 2013.

Respondent stated that, without water connection and other necessary amenities which are to be provided by the local authorities, they cannot issue Occupancy Certificate. The Respondent will take 4-6 months to obtain Occupancy Certificate after which the Respondent will hand over the possession to the Complainant.

2. MahaRERA held as: -

MahaRERA held that construction work carried out at site is commensurate with the 95% of the amount paid by the Complainant, and the revised dated of possession should be according to the balance development work. Therefore, Respondent is ordered to handover the possession to the Complainant before March 31, 2018 failing which he is liable to pay interest on the entire amount paid from April 01, 2018 to the Complainant at the highest Marginal Cost of Lending Rate of State Bank of India prevailing plus two (2) percent. Further the balance 5% of the consideration amount should not be demanded by the Respondent until they handover the possession of the said apartment.

Sachin Patil Vs. Manish Khandelwal

1. The Hon'ble Maharashtra Real Estate Regulatory Authority ("**Authority**"), in its Order dated November 20, 2017 ruled out the maintainability of the complaint pertaining to refund of advances/payments by the Promoter in case of voluntary cancellation of the buyer under the Real Estate (Regulation and Development) Act, 2016 ("**Act**").

2. The relevant portion of the Order stated that:

> *"So far as the refund of advances / payments are concerned, this Authority does not get jurisdiction to direct the Promoter to refund the same unless and until the case comes under one of the Sections such as Section 7, 11(5), 12, 14, 18 or 19 of the Act..."*

3. The homebuyer had registered a complaint under the Act and wanted his booking amount to be refunded. The Complainant on his freewill had cancelled the booking of a flat which involved no fault on the part of Respondent. Pursuant to such cancellation, the Complainant demanded total refund of the amount paid including the booking amount from the Respondent. In view of this situation, Authority clearly ruled out its jurisdiction to entertain such cases as there was no expressed provision in the Act. The Authority, on the other hand, has jurisdiction to direct the Promoter to refund the advances/payments only if the subject matter of the case comes under one of the Sections such as Section 7, 11(5), 12, 14, 18, 19 of the Act.

Mahadeo Nalawade versus APL Yashomangal Developers

Maharashtra Real Estate Regulatory Authority ("**MahaRERA**") has pronounced its *Order dated November 20, 2017* in the matter Mahadeo Nalawade ("**Complainant**") versus APL Yashomangal Developers ("**Respondent**").

Background:

The complaint was filled by the Complainant under section 18 of Real Estate (Regulation and Development) Act, 2016 ("**Act**") for getting interest / compensation for the delayed period in handing over the possession of the flat purchased by the Complainant in the Alfa Greenfields project of the Respondent (period of delivery was December 31, 2013) and also complained that the Respondent failed to adhere to the sanctioned plan and project specification.

Held that:

MahaRERA dismissed the complaint stating that "the cause of action to claim compensation for the delayed possession did not survive on May 1, 2017 when MahaRERA came into force. Since the fit-out possession is given in March 2015 and the Complainant is residing in the flat from November 2015, section 18 of RERA will have no role to play. In this situation, it was held that the complaint is not maintainable under Section 18 of the Act and hence, has been dismissed".

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Warm Regards,

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