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DRAFTING RIGHT OF FIRST REFUSAL CLAUSES: LEGALITY, ISSUES & CONCERNS

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INTRODUCTION

A right of first refusal ("ROFR") is a contractual entitlement of a party to enter into a business transaction with the counterparty (to a contract) which such counterparty is desirous of executing with a third party. When tested on the principles of contract law in India, such contracts are held to be valid so long as the ROFR is exercised during the original or mutually extended term of the original contract between the parties which contains the ROFR clause. Any term of the contract which contains a negative covenant restricting freedom of trade, such as allowing exercise of the right under a ROFR Clause, beyond the terms of the contract would be in violation of Section 27 of the Indian Contract Act, 1872. [1]

Joint venture ("JV") agreements, otherwise, also referred to as shareholders agreements, contain terms primarily pertaining to management and governance rights, share transfer restrictions and exit rights.

A ROFR clause in such JV agreements entails that the exiting partner/shareholder must allow the remaining partners/shareholders to match the offer price received by the exiting partner from a third party to buy the offered shares of the exiting partner. The rationale behind the ROFR clause in JV agreements is to control and restrict who may become a shareholder in such JVs. In this piece, we shall take cue from certain cases which have dealt with ROFR clauses and discuss the legality of such clauses, their ingredients and guidelines for drafting of ROFR Clauses.

VALIDITY OF ROFR CLAUSES

A few judgments of the High Court of Bombay ("BHC") have discussed the legality of ROFR clauses on the anvil of company law. In 2010, a Single Judge of the BHC in Western Maharashtra Development Corporation v. Bajaj Auto [2] ("Bajaj Auto SJ") held that any restrictions on the transfer of shares in the form of a ROFR clause would be a

ABOUT THE FIRM

AKS Partners (formerly known as A.K. Singh & Co) is a law firm based in New Delhi (India) that provides a comprehensive range of legal services and solutions to domestic and international clients. The Firm offers a unique blend of the local knowledge to apply the regulatory, economic, political and cultural context to legal issues and develop case strategies. We regularly handle technically challenging and complex multi-jurisdictional matters. Our team is spearheaded by one of the highly recognised lawyers with extensive experience in international dispute resolution and strong government and diplomatic backgrounds. This experience gives us the deepest understanding of the key decision points that are critical in navigating complex & complicated matters and managing government regulations.

violation of the principle of free transferability enshrined under Section 111A of the Companies Act, 1956 ("CA 1956"). Subsequently, a Division Bench of the BHC in Messer Holdings Limited v. Shyam Madanmohan Ruia [3] ("Ruia DB BHC") held that the conclusion of Bajaj Auto SJ is incorrect to the extent that it states that any agreement of pre-emption entered into freely between the shareholders imposes a restriction on the free transferability of shares. Although the judgment in Ruia DB BHC was appealed, the Supreme Court did not deal with this issue in the appeal.

On the basis of the judgment in Ruia DB BHC, an appeal was preferred by Bajaj Auto from Bajaj Auto SJ. In the interregnum, the Companies Act, 2013 ("CA 2013") was enacted which replaced the CA 1956. In 2015, the Division Bench of the BHC in Bajaj Auto Limited v. Western Maharashtra Development Corporation [4] ("Bajaj Auto DB") overruled the decision in Bajaj Auto SJ and held that even in public companies, a private agreement between two parties regarding the manner of transfer of shares, including a ROFR, does not violate the principle of free transferability of shares as mandated under Section 111A of the CA 1956.

The BHC also relied on Section 58 of the CA 2013 and stated that the language in the new provision makes it explicit that even public companies can have private shareholding agreements having rights of pre-emption. The BHC also relied on the report of the standing committee on the Companies Bill, 2011 which stated that Section 58 "simply seeks to codify the pronouncements made by various Courts holding that contracts relating to transferability of shares of a company entered into by one or more shareholders of a company (which may include promoter or promoter group as a shareholder) shall be enforceable under law." [5]

It is pertinent to mention that the BHC also referred to the notification of the Securities and Exchange Board of India ("SEBI") dated 3 October 2013 ("2013 Notification") issued under the Securities Contract (Regulations) Act, 1956 to support the conclusion derived above. The 2013 Notification was in supersession of the notification dated 1 March 2000 which provided for sale of shares other than spot delivery contracts.[6] Under the 2013 Notification, SEBI outlined the manner in which a contract for sale of shares can be entered into which inter alia included under sub clause (c) "contracts for pre-emption including right of first refusal, or tag-along or drag-along rights contained in shareholders agreements or articles of association of companies or other body corporate". [7]

It is noteworthy that CA 1956's lack of clarity on the validity of ROFR clauses had little effect on the widespread presence of such clauses in agreements dating before CA 2013 or the Companies Bill, 2011 for that matter.

Based on the provisions of the CA 2013, the decisions cited above and the understanding of the report of the standing committee on the Companies Bill, 2011 (later CA 2013), it can be safely stated that as per Section 58 of the CA 2013, pre-emption clauses or ROFR clauses are valid in the context of private companies if they find place in the article of association (though there is no lack of contrary opinions on such mandatory incorporation to ensure enforceability) or shareholders agreement and also valid for public companies when they find place in a private agreement which would be enforceable as a contract. [8]

DRAFTING A ROFR CLAUSE – ISSUES AND CONCERNS

While drafting a ROFR clause may seem to be quite a simple affair, the plethora of cases surrounding these clauses seem to point the other way. While avoiding litigations in all circumstances is never possible, a carefully drafted, precise ROFR clause may go a long way in reducing the probability of a long-drawn dispute arising from such a clause. The following part discusses essential elements of a ROFR clause that drafters may keep in mind while drafting a ROFR clause:

Incorporation into articles of association vis-à-vis enforceability

An oft disputed concern that arises with respect to shareholders agreement is the incorporation of the terms of such agreements into the articles of association. Under the erstwhile CA 1956, the judgment in the case of V.B. Rangaraj v. V.B. Gopalakrishnan and Ors. [9] ("V.B. Rangaraj") had held that share transfer rights, unless expressly included in the articles of association, shall not be enforceable. The view in the V.B. Rangaraj decision has however been negated by the Supreme Court in Vodafone International Holdings BV v. Union of India, [10] ("Vodafone") wherein the Supreme Court observed that as long as the terms in the shareholders agreement were not violative of the articles of association, such terms could be held to be enforceable.

Under the CA 2013, the position seems to have changed with the inclusion of a proviso to Section 58 (2) of CA 2013, stating that "any contract or arrangement between two or more persons in respect to transfer of securities shall be enforceable as a contract." However, this position was only made applicable to public companies.

Recent judgments, however, continue to follow the trend set by the V.B. Rangaraj dicta, since this judgment has not been specifically overruled in the Vodafone case [11]. To avoid any confusion, parties may find it advisable to incorporate relevant share transfer rights provisions found in the shareholders agreements in the articles of association as well.

Lack of clarity

Any lack of clarity in a ROFR clause may result in disputes which could hamper the rights of the parties to an agreement. In AstraZeneca UK ltd. v. Albemarle International Corporation [12] ("AstraZeneca Case"), the Queen's Bench Division Commercial Court was called upon to discuss whether the clause, which was allegedly breached by AstraZeneca by not allowing Albemarle to match the offer made by another entity, was a ROFR clause or not. The clause is extracted hereunder:

"In the event that at any time BUYER (AstraZeneca) reformulates or otherwise changes its Diprivan brand to substitute propofol for the PRODUCT, BUYER will so notify SELLER (Albemarle) and will give SELLER the first opportunity and right of first refusal to supply propofol to BUYER under mutually acceptable terms and conditions."

The court itself noted that there was lack of jurisprudence under English contract law as to what does such right entail. The court finally concluded that under a ROFR Clause, "if a third party has offered terms which the grantor is accepting, the essence of granting the right of first refusal must be the affording to the grantee of the opportunity to match any such offer made by a third party".

The court analysed the arguments made and the evidence led to conclude that the clause was indeed a ROFR clause and that AstraZeneca was in breach of the ROFR clause when it wrongfully declared that Albemarle has not matched the offer made by the third party. The entire dispute could have been avoided by the inclusion of a more detailed clause.

One of the most basic types of ROFR clauses simply state that if any shareholder ("Selling Shareholder") proposes to sell all or any portion of his/her securities of the company to any person ("Third Party"), then the Selling Shareholder shall, by written notice, first offer to sell the securities to the investor/promotor ("Right Holder").

While on the face of it, the clause seems completely unambiguous, however certain issues do have the possibility of cropping up. The ROFR clause must necessarily be thorough enough to address the following concerns.

What is the trigger point?

The clause (set out in para 14 above) does not elucidate upon the event that triggers the Right Holder to exercise its right. It is advisable to specify the exact circumstance that would trigger the obligation of the Selling Shareholder to provide a written notice to the Right Holder. For instance, it may be specified that receiving an offer in the form of a term sheet (binding or conditional) from a Third Party would act as a trigger for the ROFR clause necessitating the provision of a notice to the Right Holder.

In a case where the court ordered the sale of shares to satisfy a judgement creditor, the Virginia Supreme Court has held that the Right Holder may exercise his/her right by matching the highest bidder's offer at the judicial sale [13]. In this case, even a court mandated sale may act as a trigger for the ROFR clause and the Right Holder may exercise its right.

Multiple parties

Where there are multiple Right Holders, parties must also consider including the mechanism of how the right is to be exercised by all the Right Holders together. Lack of clarity on this division of right can raise a dispute as was seen in the case of United Company Rusal PLC v. Crispian Investments Limited, [14] wherein it was held that the ROFR clause provided both Right Holders an equal right to the shares of the Selling Shareholder and that either both Right Holders must buy the shares together or none at all.

Accordingly, it is advisable that in case of multiple Right Holders, the ROFR clause should mention whether the Right Holders will get the right in proportion to their shareholding or one after the other or in any other agreed manner. In the dispute regarding the exercise of the ROFR clause between the shareholders of Mumbai International Airport Limited ("MIAL"), the ROFR clause in the shareholders agreement granted a parallel right to all shareholders to purchase the shares being sold in proportion to their respective shareholdings. A similar specification in other ROFR clauses shall assist parties in ascertaining the extent of the right available to each Right Holder where the ROFR clause is triggered.

Essentials of a notice

The parties may discuss and include in the ROFR clause what might be the essentials of the notice. What are to be the points of information that must

necessarily be included in the notice? Is it to be a simple letter notifying the intention to sell shares or should it be more specific in nature delineating the terms and conditions on which the Selling Shareholder is willing to sell to a Third Party?

In the case of Koch Industries, Inc. v. Sun Co. Inc., [15] it was held that the 'owner need only give the holder a copy of the third party's written offer'. In the case of Specialty Shops Ltd. v. Yorkshire & Metropolitan Estates Ltd [16]., Park J. observed that, "...the landowner is not obliged positively to offer to sell the land to the pre-emption holder, but rather he is obliged to notify the pre-emption holder of the situation, leaving it for the pre-emption holder to make his own offer to purchase the land if he chooses."

While there seems to exist no particular mandate under Indian law on specifying certain minimum information in such notices, however, from a combined reading of the above judgments, it appears that while no particular form of notice is prescribed by law, parties would find it prudent to specify the terms of the offer made by a Third Party, the acceptance and payment mechanism (in case the Right Holder elects to exercise its right), and all terms and conditions of the proposed sale.

A notice under a ROFR clause may be considered equivalent to an offer to sell and keeping with the legal requisites of an offer, such notice must specify: (a) the exact number and type of shares to be sold; (b) the amount for which the shares are being sold; (c) the timeline within which such offer is to be accepted; and (d) the mechanism that is to ensue once the Right Holder elects to exercise his/her right.

Time limit for compliance

Another usual key omission in ROFR clauses is the absence of a precise timeline to complete the sale after issuance of notice by the Selling Shareholder. Such timeline must be reasonable for the Right Holder to fulfil all compliances, such as, obtaining consent of board of directors and shareholders, arranging the necessary funding, sectoral compliances, approvals from statutory authorities, etc. This is aptly demonstrated by the dispute regarding the exercise of the ROFR clause between the shareholders of MIAL.

Bid Services Division Mauritius ("BSDM"), having 13.5 % stake in MIAL, received an offer from a third party (Adani Group) for its stake in MIAL at INR 77 per share totalling to INR 1248 Crores. [17] GVK Airport Holdings Ltd. ("GVK") invoked the ROFR clause which existed in Clause 3.7 of the Shareholders Agreement of MIAL, which mandated that the transaction be completed within 30 days of the offer being made to the ROFR holders[18]. Disputes arose between GVK and BSDM when BSDM alleged that GVK has failed to close the sale under the ROFR clause of the shareholder agreement within 30 (thirty) days of the offer being sent to GVK and ACSA Global Ltd. in the form of the notice as per the ROFR Clause [19]. Hence, to avoid any dispute regarding the time limit for completing the formalities, the time provided in the ROFR Clause should be adequate for performing the conditions under the ROFR Clause.

Other than the time limit for compliance, the ROFR clause also needs to point out the process that is to ensue once the clause is triggered. A typical question might arise as to the compliances to be undertaken once a notice has been provided by the Selling Shareholder. Either the ROFR

clause itself or the notice must necessarily provide the next steps that the Right Holder must take in order to conclude the sale.

What happens when the Right Holder chooses to buy the shares?

The ROFR clause may consider mandating that the Right Holder, in order to establish its bona fide may deposit the money/consideration in an escrow account or any other form of deposit system, giving necessary control to a neutral escrow agent as to when to release the money. This step would give the parties the necessary comfort to complete the formalities of finalising the agreement to sell the shares. In the MIAL dispute, such a clause for deposit of amount did not exist. However, the arbitral tribunal ordered GVK to deposit the amount in an escrow account to grant GVK interim protection in the form of restraining BSDM from selling the shares to Adani Group. [20]

What happens when ROFR is not triggered?

A well drafted ROFR clause must also provide the steps to be undertaken where none of the Right Holders choose to exercise their right within the specified period. In such a scenario, a different albeit longer timeline would have to be specified for the completion of the sale. For instance, where the shares are sold to a Third Party upon the failure of the Right Holders to exercise their right, such Third Party may wish to undertake a due diligence of the Company. Additionally, adequate documentation must be provided by the Selling Shareholder to exhibit that the sale has taken place on the same terms and price as offered to the Right Holder.

Parties should also draft ROFR clauses in such a manner so as to restrict any implied waiver of such clauses. Any waiver of ROFR by the Right Holder should always be express. However, there may also arise situations where the Right Holder wishes to modify certain terms of the offer. Such modifications are usually looked down upon by the courts. In Miller v. LeSea Broadcasting Inc.[21], it was observed that the Right Holder must abide by all conditions that the Selling Shareholder reasonably and in good faith deems material.

Dispute resolution

Since disputes resulting from ROFR clauses have the potential of becoming lengthy and expensive, parties elect to insert an arbitration clause under the shareholder agreement to be undertaken under the aegis of an institution, preferably which provides the facility of an emergency arbitration.

Emergency arbitration provides for immediate action to stop a transaction which would vitiate the rights of the parties on the opposite sides of a ROFR clause. The High Court of Delhi [22] and the BHC [23] have already recognized interim reliefs / awards under emergency arbitrations made in foreign jurisdictions. Arbitration centres like the Delhi International Arbitration Centre [24] and the Mumbai Centre for International Arbitration [25] have also provided for emergency arbitration provisions.

CONCLUDING REMARKS

While it may not be possible to avoid all disputes that may arise from boilerplate ROFR clauses, drafting a clear, precise and descriptive clause specifying all terms, conditions and requirements may go a long way in reducing the extent, length and costs incurred in defending a ROFR claim. It may be noted that each clause shall necessarily differ on account of the broader contract in which the ROFR clause appears, the facts and circumstances surrounding the contract and the bargaining and commercial interests of the parties involved.

ROFR clauses constitute one of the most sought-after standard rights particularly emphasised upon by investors and JV partners. Such clauses are almost always sought in addition to a standard lock-in period so as to ensure that parties continue to remain invested for a certain fixed duration before exiting. However, ROFR clauses are gradually losing steam and clout to Right of First Offer ("ROFO") clauses. This is because ROFR clauses put the Selling Shareholders at a disadvantageous position by making the sale process cumbersome and lengthy. While most contracts do possess a ROFR clause, a gradual shift towards the inclusion of ROFO clauses instead can be seen.

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DOMESTIC NEWS AND UPDATES

DOMESTIC ARBITRATION

DELAY IN FILING APPLICATION UNDER SECTION 37 OF THE ARBITRATION AND CONCILIATION ACT, 1996 ("ARBITRATION ACT") CAN BE CONDONED:

The Supreme Court of India ("Supreme Court") in Government of Maharashtra v. Borse Brothers Engineers and Contractors Pvt Ltd. has overruled the decision in the case of M/s NV International v. State of Assam, wherein it was held that a delay of more than 120 days in filing of appeals under Section 37 of the Arbitration Act, cannot be condoned. The Supreme Court, in this case, held that a delay beyond 90, 60 or 30 days for filing appeals under Section 37 of the Arbitration Act, depending on the forum, can be condoned. The Supreme Court noted that the power to condone delay under Section 5 of the Limitation Act, 1963 ("Limitation Act") applies to Section 37 of the Arbitration Act, by virtue of Section 43 of the Arbitration Act and Section 29(2) of the Limitation Act.

ARBITRATION REFERENCE NOT MAINTAINABLE IF FILED AFTER ADMISSION OF INSOLVENCY RESOLUTION PETITION UNDER SECTION 7 OF THE INSOLVENCY AND BANKRUPTCY CODE ("IBC"):

The Supreme Court in Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund has held that in any proceeding which is pending before the adjudicating authority under Section 7 of IBC, in case such petition is admitted upon the adjudicating authority recording the satisfaction with regard to the default, any application under Section 8 of the Arbitration Act made thereafter shall not be maintainable. The Supreme Court observed that even if an application under Section 8 of the Arbitration Act is filed, the adjudicating authority has a duty to advert to contentions put forth on the application filed under Section 7 of the IBC, examine the material placed before it by the financial creditor, and record a satisfaction as to whether there is default or not.

RECENT THOUGHT LEADERSHIP

- Environmental Obligations In Investor-State Arbitrations: The Investor Perspective
- Voiding Of Supplementary Contracts Made Under Economic Duress
- Guesstimate – Honest Guesswork In Quantification Of Damages By The Arbitral Tribunal

ISSUE OF NOVATION OF CONTRACT CANNOT BE CONSIDERED IN AN APPLICATION UNDER SECTION 11 OF THE ARBITRATION ACT:

The Supreme Court in Sanjiv Prakash v. Seema Kukreja and Others has held that the question of novation of contract containing an arbitration clause cannot be considered by the court in an application filed under Section 11 of the Arbitration Act. The Supreme Court relied on its recent decision in Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1 to hold that the court cannot, at the stage of an application under Section 11 of the Arbitration Act, enter into a mini trial or elaborate review of the facts and law which would usurp the jurisdiction of the arbitral tribunal.

WHEN PARTIES CHANGE VENUE OF ARBITRATION BY MUTUAL AGREEMENT, CHANGED VENUE BECOMES SEAT OF ARBITRATION:

The Supreme Court in M/s Inox Renewables Ltd v. Jayesh Electricals Ltd has held that when parties change the venue/place of arbitration by mutual agreement, the new venue/place will become the seat of the arbitration. The court relied on the decision of BGS SGS Soma JV v. NHPC Ltd, wherein it was held that the venue of arbitration will be the juridical seat of arbitration in the absence of contrary intention of the parties. The court observed that the parties may mutually arrive at a seat of arbitration and may change the seat of arbitration by mutual agreement.

DELHI HIGH COURT ("DHC") UPHOLDS EMERGENCY AWARD PASSED AGAINST FUTURE-RELIANCE DEAL:

The DHC in Amazon.com NV Investment Holdings LLC v. Future Coupons Pvt Ltd and Others has upheld the emergency award passed by the emergency arbitrator against the Future-Reliance deal. The DHC observed that an emergency arbitrator is an arbitrator for all intents and purposes, and that an order of the emergency arbitrator is an order under Section 17(1) of the Arbitration Act, enforceable as an order of this court under Section 17(2) of the Arbitration Act, and appealable under Section 37 of the Arbitration Act. The DHC observed that the current legal framework for recognizing emergency arbitration under the Arbitration Act is sufficient and no amendment in the law is necessary in this regard.

AMOUNT AWARDED WITHOUT REASONING IN ARBITRAL AWARD LIABLE TO BE SET ASIDE:

The DHC in Delhi Development Authority v. M/S Eros Resorts and Hotels Ltd has held that when a sum is awarded in an arbitral award, but no reasoning is given for the same, and no material exists to substantiate the amount, the award is liable to be set aside to the extent of the amount awarded without justification. The DHC observed that such an award falls foul of Section 31(3) of the Arbitration Act which requires an award to be reasoned unless, the parties agree otherwise.

OBJECTION UNDER SECTION 16 OF ARBITRATION ACT HAS TO BE RAISED AT INCEPTION:

The DHC in Surender Kumar Singhal and Others v. Arun Kumar Bhalotia and Others has held that a jurisdictional objection under Section 16 of the Arbitration Act by its very nature would be one which has to be raised at inception, at the earliest stage. The DHC also observed that under the scheme of the Arbitration Act,

such an objection has to be raised with a "sense of alacrity" which must be decided by the arbitral tribunal with a "sense of urgency".

NO BAR IN CODE OF CIVIL PROCEDURE, 1908 ("CPC") / ARBITRATION ACT FOR ACCEPTING IMMOVABLE PROPERTY AS SECURITY FOR STAY OF DECREE:

The High Court of Calcutta ("CHC") in Nitu Shaw v. Bharat Hitech (Cements) Pvt. Ltd. has held that there is no bar under the CPC or under the Arbitration Act, in accepting immovable property as security for stay of decree. The CHC held that the intention behind seeking security is simply to furnish an effective cushion for the decree-holder in case the challenge to the decree fails, and that cash security is not sine qua non under the statutes. The CHC noted that Section 36(3) of the Arbitration Act, which contemplates procedure for stay of an award, does not mention the word "security" and only indicates that the court may impose suitable terms for stay of the award. The CHC thus observed that the language of Section 36(3) of the Arbitration Act imparts discretion to the court for deciding the conditions which may be imposed.

COURT CAN APPOINT NEW ARBITRATOR WITH PARTIES' CONSENT AFTER AWARD IS SET ASIDE:

The CHC in Jagdish Kishinchand Valecha v. Srei Equipment Finance Limited and Anr. has held that after setting aside of an arbitral award under Section 34 of the Arbitration Act, courts are empowered to appoint a fresh arbitrator with the consent of all the parties involved.

COMPANY LAW & IBC

SECTION 14 OF THE LIMITATION ACT APPLIES TO APPLICATION UNDER SECTION 7 OF THE IBC:

The Supreme Court in Sesh Nath Singh v. Baidyabati Sheoraphuli Co-operative Bank Ltd has held that in an application under Section 7 of the IBC, the applicant can claim the benefit of Section 14 of the Limitation Act in respect of proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"). The Supreme Court held that Section 14 of the Limitation Act applies to an application under Section 7 of the IBC and that there is no rule that the exclusion of time under Section 14 of the Limitation Act is available, only after the proceedings before the wrong forum terminate.

ADJUDICATING AUTHORITY CANNOT SUBSTITUTE ANY COMMERCIAL TERM OF RESOLUTION PLAN APPROVED BY COMMITTEE OF CREDITORS:

The Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association & Ors. vs. NBCC (India) Ltd. & Ors., while disposing a batch of cases relating to the resolution plan, concerning the corporate debtor, Jaypee Infratech Limited, held that the adjudicating authority cannot substitute any commercial term of the resolution plan approved by committee of creditors ("CoC") and if, within its limited jurisdiction, the adjudicating authority finds any shortcoming in the resolution plan vis-à-vis the specified parameters, it should only send the resolution plan back to the CoC, for re-submission.

BALANCE SHEETS CAN AMOUNT TO ACKNOWLEDGMENT OF DEBTS UNDER SECTION 18 OF LIMITATION ACT, 1963:

The Supreme Court in Asset Reconstruction Company India Limited v. Bishal Jaiswal has held

that balance sheets can amount to acknowledgment of debts under Section 18 of the Limitation Act. The court, therefore, has set aside the five-member Bench judgment of National Company Law Appellate Tribunal ("NCLAT") in V Padmakumar v. Stressed Assets Stabilization Fund, which had by a 4:1 majority ruled that balance sheet could not be considered as an acknowledgment of debt under Section 18 of the Limitation Act, 1963. The court observed that several Supreme Court judgments have indicated that an entry made in the books of accounts, including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act.

INSOLVENCY PROCESS MAINTAINABLE AGAINST CORPORATE GUARANTOR EVEN IF PRINCIPAL BORROWER IS NOT A CORPORATE PERSON:

The Supreme Court in Laxmi Pat Surana v. Union Bank of India has held that the principal borrower need not be a corporate person for insolvency process to be initiated against a company which stood as its guarantor.

COURT WILL NOT WIND UP A COMPANY IF DEBT IS BONAFIDE DISPUTED:

The Supreme Court in Shital Fibres Ltd. v. Indian Acrylics Limited has held that if the debt is bonafide disputed and the defence is a substantial one, the court will not wind up the company under Sections 433(e) and (f) of the Companies Act, 1956. The Supreme Court also reiterated that where the debt is undisputed, the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt.

NEED TO INTRODUCE LEGAL FRAMEWORK TO GIVE NATIONAL COMPANY LAW APPELLATE TRIBUNAL SUPERVISORY JURISDICTION OVER NATIONAL COMPANY LAW TRIBUNALS ("NCLT"):

The NCLAT in Surinder Kaur v. International Recreation and Amusement Ltd has observed that there is a need to vest in it the power of superintendence and control over the NCLTs. The NCLAT observed that due to lack of supervisory jurisdiction, many aggrieved persons are compelled to adopt the route of filing the appeal, though there is no order on merit.

SECTIONS 18 AND 19 OF LIMITATION ACT APPLICABLE TO PROCEEDINGS UNDER THE IBC:

The NCLAT in Phoenix ARC Pvt. Ltd v. Nagaur Water Supply Company Pvt. Ltd. has held that Sections 18 and 19 of the Limitation Act are applicable to proceedings under the IBC. The NCLAT observed that Section 238 A of the IBC states that the provisions of the Limitation Act shall apply to the proceedings or appeals before the adjudicating authority and the NCLAT, as the case may be. It was also noted that Article 137 of the Limitation Act applies to the applications filed under Sections 7 and 9 of the IBC. The NCLAT held that the IBC has not excluded the application of Sections 4 to 24 of the Limitation Act while determining the period of limitation, and that Section 29(2) of the Limitation Act is also applicable to proceedings under the IBC.

GOVERNMENT OF INDIA ("GOVERNMENT) PROMULGATES INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE 2021 ("ORDINANCE") TO ALLOW PRE-PACKAGED INSOLVENCY PROCESS FOR MSMES:

The Government has promulgated an Ordinance to allow pre-packaged insolvency resolution process for corporate debtors classified as micro, small or medium enterprises under the MSME Act, 2006. The Ordinance amends the IBC to allow the Government to notify such pre-packaged process for defaults up to ₹ 1 Crore.

SECURITIES AND EXCHANGE BOARD OF INDIA ("SEBI") MAKES STARTUP LISTING EASIER:

SEBI has approved several changes to the listing rules on the Innovators Growth Platform, including reducing from two years to one the time early-stage investors need to hold 25% of pre-issue capital, and allowing IPO-bound startups to allocate up to 60% of the issue size to any eligible investor with a lock-in of 30 days on such shares. SEBI approved the proposals with respect to framework of Innovators Growth platform under SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018, with an objective to make the platform more accessible to companies in view of the evolving start-up ecosystem.

AMENDMENT TO REMUNERATION REGIME UNDER THE COMPANIES ACT, 2013:

The Government has amended Schedule V of the Companies Act, 2013, and now the remuneration for directors is also provided for under Schedule V of the Companies Act, 2013. The limit for yearly remuneration payable to managerial persons has also been revised.

NON-REPATRIABLE INVESTMENT BY NON-RESIDENT INDIANS ("NRI") NOT TO BE CONSIDERED AS FOREIGN DIRECT INVESTMENT ("FDI"):

The Department for Promotion of Industry and Internal Trade clarified that downstream investment by a company owned and controlled by NRIs on a non-repatriation basis will not be considered as FDI. Investment on repatriation basis means the sale or maturity proceeds of an investment, net of taxes, are eligible to be transferred out of India. In case of non-repatriation investments, this cannot be transferred out of the country.

SPENDING CSR FUNDS FOR COVID FACILITIES TO BE CONSIDERED A CSR ACTIVITY:

MCA has clarified that spending of CSR funds for setting up makeshift hospitals and temporary Covid care facilities will also be considered a CSR activity under item nos. (i) and (xii) of Schedule VII of the Companies Act, 2013.

AMAZON ANNOUNCES $250MN VENTURE FUND FOR INDIAN STARTUPS:

Amazon announced a $250 million venture fund to invest in Indian startups and entrepreneurs focusing on digitization of small and medium-sized businesses (SMBs) in the key overseas market.

RESERVE BANK OF INDIA ("RBI") CONSTITUTES A COMMITTEE ON FUNCTIONING OF ASSET RECONSTRUCTION COMPANIES ("ARCS") AND REVIEW OF REGULATORY GUIDELINES APPLICABLE TO THEM:

The committee will undertake a comprehensive review of the working of ARCs in the financial sector ecosystem & recommend suitable measures for enabling such entities to meet the growing requirements of the financial sector.

OTHERS

PETITION STYLED AS ONE UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA ("CONSTITUTION") WOULD NOT BAR HIGH COURT TO EXERCISE JURISDICTION WHICH IT POSSESSES:

The Supreme Court in Kiran Devi v. Bihar State Sunni Wakf Board and Others has held that a petition styled as one under Article 226 of the Constitution would not bar the High Court from exercising its jurisdiction which it otherwise possesses under a statute and/or under Article 227 of the Constitution. The Supreme Court observed that the jurisdiction of the High Court to examine the correctness, legality and propriety of determination of any dispute by a tribunal is reserved with the High Court.

SEVERAL DIRECTIONS ISSUED BY CONSTITUTION BENCH FOR EXPEDITIOUS DISPOSAL OF COMPLAINTS UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, 1881 ("NI ACT"):

The Supreme Court in In Re Expeditious Trial Of Cases Under Section 138 of N.I. Act has issued several directions to expedite the trial of cheque dishonour cases under Section 138 of the NI Act.

ACCUSED IN PROCEEDINGS UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, 1881 CAN SEEK CONVERSION OF SUMMARY TRIAL TO SUMMONS TRIAL ONLY AFTER DISCLOSING DEFENCE:

The DHC in Sumit Bhasin v. State of NCT of Delhi and Another has held that in a trial for the offence of cheque dishonour under Section 138 of the NI Act, the accused can seek the conversion of summary trial to summons trial only after disclosing his/her plea of defence. As per Section 143 of the NI Act, the offence has to be tried summarily. However, as per Section 145(2) of the NI Act, the accused or the prosecution can seek that the case be tried as a summons case. The DHC observed that the offences under Section 138 of the NI Act are technical in nature and defences, which an accused can take are inbuilt.

DEMAND NOTICE NEED NOT DISCLOSE NATURE OF TRANSACTION LEADING TO ISSUANCE OF CHEQUE:

The High Court of Kerala ("KHC") in K Basheer v. CK Usman Koya and Others has held that a demand notice under Section 138 of the NI Act need not disclose the nature of transaction leading to the issuance of cheque. The KHC observed that the NI Act did not mandate a format for a demand notice. The KHC thus held that it could not legislate by prescribing a particular form and could not require that the nature of the transaction, leading to the issuance of cheque, be disclosed in the notice, when the statute does not provide for the same.

PARTNER CANNOT CLAIM EXPERIENCE OF ERSTWHILE FIRM IN INDEPENDENT CAPACITY:

The High Court of Punjab & Haryana ("PHC") in M/s A.G. Construction Co. v. Food Corporation of India and Others has held that a person who was earlier a partner of an erstwhile partnership firm could not claim the benefit of experience certificates issued in the name of such firm for satisfying the eligibility criteria of a tender he applies for in his independent capacity.

COPYRIGHT REGISTRATION IS NOT COMPULSORY TO SUE FOR INFRINGEMENT:

The High Court of Bombay ("BHC") in Sanjay Soya Pvt. Ltd. v. Narayani Trading Company has held that copyright registration is not mandatory to claim reliefs under the Copyright Act, 1957, holding that an earlier decision of a co-ordinate bench in the case of Dhiraj Dharamdas Dewani v. Sonal Info Systems Pvt. Ltd. and Others was per incuriam.

INTERNATIONAL LEGAL UPDATES

NEW BRAZILIAN BID AND CONTRACTS ACT FOSTERS THE USE OF ARBITRATION:

Brazilian Law 14.133 was published on April 1st, 2021, introducing a new regime for private parties to bid and enter into contracts with Brazilian state-controlled entities. Among other issues, the new Brazilian Public Contracts Act allows the adoption of arbitration, mediation and dispute boards. The new Public Contracts Act acknowledges that state-controlled entities can submit disputes to arbitration, provided that such disputes deal with disposable pecuniary rights.

SUPREME COURT OF CANADA FINDS UBER ARBITRATION CLAUSE IS UNCONSCIONABLE:

In Uber Technologies Inc. v. Heller, 2020 SCC 16 the Supreme Court of Canada upheld the Ontario Court of Appeal's decision that Uber's arbitration agreement is invalid and unenforceable, leaving disputes under the clause to be litigated in the courts. The Court re-affirmed the competence-competence principle and the deference generally afforded to arbitrators by the courts, while creating an exception to the general rule of arbitral referral.

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AWARDS & RECOGNITIONS

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