Newsletter

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Editor's note

Dear Readers,

I am delighted to share the SNG newsletter for the month of February, 2023.

You will notice that there are substantial and regular updates on ESG which has the eyes and ears of the top regulators in India as well as the corporate India. It's heartening to see that there is significant awareness on the subject and more and more corporate groups and individuals who have meaningful say on such issue are participating. The recent discussion paper issues by SEBI on the subject opens door for a meaningful dialogue.

RBI has come up with various circulars and directives and so has SEBI which are all relevant. The recent judgements pronounced by various Courts and Forums on IBC are important for the practitioners in this area and are duly covered.

The Gujarat High Court recent judgment in the matter of Kotak Mahindra Bank has reiterated that SARAFESI Act is meant for the enforcement of security interests created in favour of the secured creditors. Any other section or rule cannot defeat Section 26 of the SARFAESI Act.

I am sure you would find this edition useful.

I wish a very happy and fun filled HOLI to all the readers.

Best wishes,

Rajesh Narain Gupta

Managing Partner,
SNG & Partners

A. COMPETITION LAW :

1. Change of the name of 'New Delhi International Arbitration Centre' to 'India International Arbitration Centre'.

The Central Government has passed a notification to substitute the words 'established the 'New Delhi International Arbitration Centre' with 'established the India International Arbitration Centre'.

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B. ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG):

1. Gujarat HC expounds: A financial institution has priority over state/ central government to recover its dues.

The Gujarat High Court opined that the Securitization and reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARAFESI Act") is meant for the enforcement of security interests created in favour of the secured creditors. Any other section or rule cannot defeat Section 26 of the SARFAESI Act.

In the present case, Bank became a secured creditor and has a valid first charge over the mortgaged property. Therefore, it would have priority under Section 26E of the SARFAESI Act to recover the dues.

It was propounded that the dues of the bank/financial institution must be paid first before prioritizing the dues payable to the State/Central Government.

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C. ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG):

1. Dos and don'ts relating to green debt securities to avoid occurrences of greenwashing.

Certain significant alterations have been made to the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 ("NCS Regulations") after the framework of 'green debt security' was reviewed.

Concerns regarding 'greenwashing' were received from stakeholders and hence, certain directions have been issued to an issuer of green debt securities. These are:

a. Continuously monitoring to check whether the path undertaken towards a more sustainable form of operations is resulting in a reduction of the adverse environmental impact.
b. Funds raised through green bonds are not to be utilized for purposes that are not covered under the definition of 'green debt security' under the NCS Regulations.
c. Maintain the highest standards associated with the issue of a green debt security
d. Quantification of the negative externalities associated with the utilisation of the funds raised through the issue of green debt security.
e. No untrue claims that give a false impression of certification by a third-party entity are to be made.

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2. SEBI (Issue and Listing of Non-Convertible Securities) (Amendment) Regulations, 2023

Amendments have been made to the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021. The following is the amendment with respect to green debt security:

a. Substitution of Regulation 2①(q)

"Green debt security" means debt security issued for raising funds subject to the conditions as may be specified by the Board from time to time, to be utilised for the project(s) and/or asset(s) falling under any of the following categories":

(i) Renewable and sustainable energy
(ii) Clean transportation
(iii) Climate change adaptation
(iv) Energy efficiency
(v) Sustainable waste management

(vi) Sustainable land use

(vii) Biodiversity conversion

(viii) Pollution prevention and control

(ix) Circular economy-adapted products, product technologies, and processes

(x) Blue bonds

(xi) Yellow bonds

(xii) Transition bonds

(xiii) Any other category as may be specified from the Board

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3. Consultation Paper on Regulatory Framework for ESG Rating Providers ("ERPs") in Securities Market

SEBI has sought public comments on the proposed regulatory framework for ERPs. It has been proposed that ERPs may register with SEBI under the SEBI (Credit Rating Agencies) Regulations, 1999 and CRA Regulations to be amended to include a chapter for ERPs.

- ESG Rating: It has been defined as the e broad spectrum of rating products that are marketed as providing an opinion regarding an entity that is listed or proposed to be listed on a stock exchange recognized by the Board, or security, that is listed or proposed to be listed on a stock exchange recognized by the Board, about its ESG profile or characteristics or exposure to ESG, governance risk, social risk, climatic or environmental risks or impact on society, climate, and the environment, that are issued using a defined ranking system of rating categories, whether or not these are explicitly labelled as "ESG ratings".
- Category of ESG Rating Provider: SEBI has proposed to introduce 2 categories of ERPs (Category 1 ESG Rating Provider and Category II ESG Rating Provider).
- Code of Conduct for ESG Rating Providers: 6th schedule of Annexure I provides for a very descriptive code of conduct.

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4. Consultation Paper on ESG Disclosures, Ratings, and Investing

Public Comments on the regulatory framework of ESG Disclosures by listed entities, ESG Ratings in the securities markets, and ESG investing by Mutual Funds are sought to ensure a balance between transparency, simplification, and ease of doing business.

a. **ESG Disclosures:** For the Financial year 2023-24. SEBI has proposed to make reasonable assurance in BRSR core mandatory for the top 250 companies and for the top 500 companies for the Financial year 2024-25 and the top 100 companies for the Financial year 2025-26.
b. **ESG Ratings:** 15 ESG parameters have been suggested, having an Indian context that would help ESG Rating providers in adopting a broad common approach.
c. **ESG Investing:** SEBI has recommended enhanced stewardship reporting ESG Scheme. Further, to reduce greenwashing at the scheme level, it is proposed that the ESG scheme invest a minimum of 65% of its asset under management in companies that are reporting on comprehensive BRSR and are also providing assurance on BRSR core disclosures.

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D. INSOLVENCY AND BANKRUPTCY CODE (IBC):

1. NCLAT, New Delhi enunciates: Cause of default irrelevant for the purpose of Section 7 Application

The NCLAT, New Delhi expounded that once the debt becomes due and Corporate Debtor does not pay it, that's a warning signal for the Corporate Debtor. Further, when there is sufficient evidence to prove that the debt was not repaid and a default has been committed by the Corporate Debtor, the NCLT is not required to go into the cause of the default for the purpose of an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "IBC").

Moreover, the suit preferred by the Corporate Debtor in the High Court cannot be a ground to not consider the Section 7 application as the suit filed is a separate issue, which has to be adjudicated upon by the High Court. The decision of the Court can at best determine the default for the purpose of the suit and the same cannot be reasoned for not entertaining the Section 7 application.

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2. NCLAT, New Delhi expounds: Assets of a subsidiary company to be excluded from CIRP proceedings of the holding company

The NCLAT, New Delhi opined that the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") separately recognizes the assets of the Corporate Debtor and the assets of the subsidiary of the Corporate Debtor. Section 18① Explanation unequivocally provides that assets of the Corporate Debtor cannot include assets of the subsidiary company. It was expounded that assets of the subsidiary company cannot be dealt with in the CIRP of a holding company as both companies have separate legal statuses.

It was also propounded that the assets of the landholding companies (subsidiaries of the Corporate Debtor) cannot be treated as assets of the Corporate Debtor. Lastly, it was ruled that the resolution plan cannot deal with lease land and have a provision for the transfer of leasehold right without prior permission of the lessor.

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3. NCLAT, New Delhi enunciates: Section 69② of the Partnership Act is inapplicable on Section 9 applications

The NCLAT, New Delhi Bench opined that Article 137 of the Limitation Act of 1963 talks about the limitation period for applications, and the same is applied to the limitation period in the case of Sections 7, 9, and 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC").

The Bench opined that an application under Section 9 IBC cannot be said to be a suit and the same is strengthened by the fact that Section 5 of the Limitation Act is inapplicable to suits and it does apply to Sections 7 and 9 of the IBC. Based on this, it was ruled that NCLT committed an error in dismissing the Section 9 application on the ground that it was barred by Section 69② of the Partnership Act, 1932.

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4. NCLAT, New Delhi enunciates: Secured creditor can only claim the amount as claimed in Form D

The NCLAT, New Delhi opined that Form D unequivocally stipulates that the claim includes interest "as at the liquidation commencement date". The liquidation commencement date is when the NCLT passes the order for liquidation. Therefore, it was ruled by the Bench that an additional amount cannot be claimed when Form D fixes the claim on a particular date.

It was further expounded that no claimant can be allowed to increase his claim as the same contravenes the scheme of the liquidation process.

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5. NCLAT, New Delhi enunciates: Different lenders cannot file multiple applications under Section 95 against the same Personal Guarantor

The NCLAT, New Delhi expounded that under Chapter III of the Insolvency and Bankruptcy Code of India, 2016 (hereinafter referred to as "IBC"), the multiplicity of applications against the same Personal Guarantor is not contemplated. Different lenders cannot file manifold applications against the same Personal Guarantor.

The issue framed for adjudication was whether another lender of the same transaction can proceed against the Personal Guarantor when an application is already filed by one lender against the Personal Guarantor under Section 95 of the IBC.

The Tribunal observed that as per Section 96①(a) the interim moratorium commences on the date of the application in relation to all the debts. Further, Section 96①(b) uses the phrase 'creditors of the debtor' which refers to other creditors of the debtor apart from the one who has filed the application based on which interim moratorium commenced.

In the present case, it was ruled that the application by the Respondent was filed after the commencement of the interim moratorium and therefore, the NCLT could not have proceeded ahead with the application.

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6. NCLAT, New Delhi enunciates: If the resolution plan is not as per Section 30②(e), it can be sent back to CoC for review

The NCLAT, New Delhi expounded that if the plan is not as per the parameters set out in Section 30②(e) of the Insolvency and Bankruptcy Code of India, 2016 (hereinafter referred to as "IBC") then the plan can be sent back to Committee of Creditors (CoC) for review.

In the present case, it was observed that the Resolution Applicant himself consented for the matter to be sent back to CoC and therefore, now the stand cannot be changed. The reconsideration was only sought for the clause dealing with the release of the personal guarantee of the Promoters. It was ruled that it was not a case where the withdrawal of the plan was sought. Therefore, the plan could have been sent back to CoC for review.

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7. NCLAT, New Delhi enunciates: Liquidator has no jurisdiction to modify the claim after admitting it

The NCLAT, New Delhi expounded that there is no quarrel with the scheme given under Sections 38 to 42 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") related to the claims, however, once the claim is admitted, the Liquidator cannot reject or modify the claim. The Liquidator has to approach the NCLT for purpose of modification

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8. Bombay HC expounds: No moratorium on the right of decree holder to seek release of monies deposited by the Corporate Debtor before the commencement of CIRP

The Bombay High Court opined that over every issue concerning the Corporate Debtor, the NCLT would not have jurisdiction. The NCLT can adjudicate when the issue arises solely out of insolvency. In the present case, the issue is regarding the termination of the employee, it had nothing to do with the insolvency of the Corporate Debtor and hence, the NCLT would not have jurisdiction. Further, since monies were deposited much before the corporate insolvency resolution process (hereinafter referred to as "CIRP"), the issue was not solely arising out of insolvency. Hence, it was ruled that the Court has the jurisdiction to decide the 1st appeal and the interim application.

Concerning the moratorium of Section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC"), the High Court propounded that the moratorium extends only to the assets belonging to the Corporate Debtor and monies deposited by the Appellant in the Trial Court did not qualify as assets of the Corporate Debtor.

It was expounded that when the assets do not belong to the Corporate Debtor, the creditor cannot be precluded from enforcing its rights against the assets. Section 14 only applies in relation to the assets and properties of the Corporate Debtor. Further, the Bench opined that in the present case, the appeal has been preferred by the Corporate Debtor and hence, the moratorium could never apply to the 1st appeal preferred by the Corporate Debtor. Moreover, the moratorium did not have bearing on the Respondent's rights to withdraw the monies deposited in the Court.

The Bombay High Court unequivocally stated that the rights of a decree-holder to withdraw monies deposited in the Court before the commencement of CIRP are not hit by the Section 14 moratorium.

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9. NCLAT, New Delhi expounds: Section 9 application solely for the recovery of interest is not maintainable, expounds NCLAT

The NCLAT, New Delhi expounded that when the principal amount had already been paid by the Appellant and the issue was only regarding the recovery of interest, a Section 9 Application under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") could not have been maintainable as the Code envisages 'resolution of debt' and not 'recovery.

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10. NCLAT, New Delhi expounds: Timelines in Regulation 35A are only directory

The NCLAT, New Delhi ruled that the timeline in Regulations 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as "2016 Regulations") was not mandatory and that the requirement to approach NCLT on or before the 135th day of the insolvency commencement day ("ICD") is only directory in nature. Further, the fact that there was a delay in the determination of opinion cannot by itself be a ground for the non-maintainability of the petition.

In the present case, there was a gap of nearly 8 months.

Further, the formation of opinion has to be completed on or before the 75th day of the ICD, and the determination of the opinion on or before the 115th day of the ICD. In the present case, these timelines were not adhered to by the Resolution Professional ("RP").

It was noted that the RP was not provided with any documents from the suspended management. Moreover, the work in preparing the report was hindered due to the Covid-19 pandemic. Hence, it was held that the delay in submitting applications under Sections 43 and 66 was with sufficient cause and not due to laxity or leniency.

Further, the purpose of Section 43 was enunciated which is to determine and nullify the preferential transactions undertaken by the parties at the relevant time to withdraw money from a distressed corporate debtor when it is on the verge of the commencement of the corporate insolvency resolution process ("CIRP").

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11. ITAT, New Delhi rules: IBC overrides every act including Income Tax Act

The Income Tax Appellate Tribunal, Delhi Bench opined that the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") overrides every other Act including the Income Tax Act, 1961 (hereinafter referred to as the "Act").

It was observed that a financial creditor filed an application under Section 7 of the IBC against the Assessee Company and such an application has been allowed by the NCLT. Further, a moratorium has been imposed. Hence, it was held that no proceedings could be initiated against the Corporate Debtor (Assessee Company).

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12. Gujarat HC rules: Authority cannot be given a free pass to pass attachment orders qua properties sold to bidders in the liquidation process

The Gujarat High Court propounded that if the Authorities were allowed to pass orders of attachment for those properties which are acquired by bidders in a liquidation process, then the same would be contrary to the interest of value maximization of the Corporate Debtor's assets as it significantly reduces the chances of finding a Resolution Applicant or a bidder in liquidation.

The Bench noted that it is only that property that is obtained directly or indirectly as a result of criminal activity can be classified as proceeds of crime. In the present case, there was no explanation regarding the properties that were sold to the Petitioners being proceeds of crimes especially since these assets were neither overseas nor belonged to the group companies.

It was further enunciated that the "reason to believe" cannot arise from mere suspicion or doubt or rumour or gossip. There must be some tangible and cogent material to suggest the same. Hence, the properties were directed to be released from the attachment.

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E. MINISTRY OF CORPORATE AFFAIRS (MCA):

1. Extension of time for filing of 45 company e-Forms and PAS – 03 in MCA 21 Version 3.0 without additional fee-reg.

An additional time of 15 days for filing of the 45 company e-Forms and PAS – 03 has been allowed, without any additional fees, as the filing in Version 3 has been modified.

Further, concerning Form PAS – 03, it can be filed without any additional fees for a period of 15 days, whose due dates for filing fall between 20.01.2023 and 06.02.2023.

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2. Filing of Forms GNL-2, MGT-14, PAS-3, SH-8, SH-9 and SH-11 due to migration from V2 Version to V3 Version in MCA 21 Portal from 22.02.2023 to 31.03.2023

MCA has decided that the companies intending to file:

- Form GNL – 2
- MGT – 14
- PAS – 3
- SH – 8
- SH – 9
- SH – 11

from 22.02.2023 to 31.03.2023 on the MCA 21 Portal may file these forms in physical mode along with a copy thereof in the electronic media with the Registrar without payment of fee and take acknowledgment of the same.

No additional fees will be levied.

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3. Extension of time for filing 45 company e – Forms, PAS-03, and SPICE + Part A in MCA 21 Version 3.0 without additional fee-reg.

MCA has decided to allow further additional time till 31.03.2023 for filing of the 45 forms launched with effect from 23.10.2023 which are due for filing between 07.02.2023 and 28.02.2023, without any additional fees.

Further, even Form PAS – 03 whose due dates for filing fall between 20.01.2023 and 28.02.2023 can be filed without any additional fees till 31.03.2023.

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F. RESERVE BANK OF INDIA (RBI):

1. Change in Bank Rate

The Bank Rate has been revised upwards by 25 basis points from 6.50% to 6.75% with immediate effect. Accordingly, all penal interest rates on shortfall in reserve requirements also stand revised.

The circular is made applicable to all banks.

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2. Liquidity Adjustment Facility – Change in rates

The policy repo rate under the Liquidity Adjustment Facility has been increased by 25 basis points from 6.50% to 6.75% with immediate effect. Accordingly, the standing deposit facility rate and marginal standing facility rate stand adjusted to 6.25% and 6.75% respectively.

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3. Governance, measurement, and management of Interest Rate Risk in Banking Book

Interest Rate Risk in Banking Book (IRRBB) refers to the current or prospective risk to banks' capital and earnings arising from adverse moments in interest rates that affect their banking book positions.

The guidelines require the Banks to measure, monitor and disclose their exposure to IRRBB as excessive IRRBB is a risk. The final guidelines along with the revised framework on IRRBB have been enclosed as Annexure.

The circular is applicable to all commercial banks other than the regional rural banks, small finance banks, payment banks, and local areas banks.

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G. REAL ESTATE (REGULATION AND DEVELOPMENT) AUTHORITY (RERA):

1. MahaRERA enunciates: Date of possession once mentioned in the draft agreement of sale cannot be changed

The Maharashtra Real Estate Regulatory Authority observed that while the Respondents had mentioned the proposed date of completion of the project as 31.12.2021 and later revised it to 29.12.20222 on the MahaRERA website, the draft agreement reflected the date of possession as 31.12.2019, opined that now, the date of the possession cannot be changed, irrespective of whether it was rightly or wrongly put in the draft agreement for sale.

The Respondent, therefore, was directed to refund the entire amount paid along with the interest at the rate of SBI's Highest Marginal Cost Lending Rate plus 2% as prescribed under the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "RERA"). It was also held that the Respondent was entitled to claim the benefit of the "moratorium period" concerning the payment of interest, which was to be paid within a period of 6 months from the date of this order.

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2. MahaRERA expounds: No locus standi to file a complaint under RERA if Complainant fails to establish himself as either a homebuyer or an Allottee

The Maharashtra Real Estate Regulatory Authority ("MahaRERA") observed that there was no allotment letter or any agreement for sale executed between the parties. Further, there was no binding contract between the parties to establish a relationship between an Allottee and a Promoter. It expounded that the Complainant was neither a home buyer nor an Allottee of the said project, and hence, had no locus standi to file an application under RERA. It was held that the said complaint was not maintainable.

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3. MahaRERA enunciates: Allottee is entitled to interest even after the date of possession is revised

The Maharashtra Real Estate Appellate Tribunal expounded that in case of delayed possession, the Promoter is obliged under Section 18 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "RERA") to pay interest if the Allottee does not withdraw from the project. The Tribunal enunciated that there is no such bar that Section 18 cannot apply after the date of possession is revised by the Promoter or even after receipt of the occupation certificate by the Promoter.

Further, it was ruled that the reliefs given to an Allottee under Section 18 cannot be said to be abandoned by the Allottee merely because the Allottee failed to object to the revised date of possession. The Allottee is neither required nor expected to record the acceptance for the revised date of possession without prejudice to his right to claim interest because this relief has been expressly and statutorily provided under the Act. It was expounded that the Allottee can claim interest unless expressly waived.

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4. MahaRERA orders: Issue of FSI violations by the Promoter outside the purview of MahaRERA

The Maharashtra Real Estate Regulatory Authority opined that the present complaint was filed after the handing over of possession raising issues such as defect liabilities/common amenities. The Authority ruled that the issue of FSI violation does not fall within its purview and therefore, the concerned planning authority may deal with it. Regarding the parking area, the Authority did not find merit in the contention raised by the Complainants, and it appeared that the parking space is open and not closed. For the leakage issues, the Respondent was directed to cure/rectify such defects.

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5. MahaRERA rejected interest and compensation to Allottee while enunciating that Section 18 does not value oral assurances, documentary evidence is a must

The Maharashtra Real Estate Regulatory Authority ("Maha RERA") opined that under Section 18 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "RERA", oral assurance has no value, as the Section mandates the agreement for sale or any other document. Therefore, no interest or compensation was granted to the Complainant under Section 18.

It was observed that the allotment letter brought on record by the Complainant did not show any date of possession. There was no cogent evidence to prove that the Respondent committed any date of possession in writing. Therefore, due to the absence of any written documentary evidence to prove the date of possession, the Authority did not find substance in the Complainant's contentions.

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6. De-registration of real estate projects or part of a real estate project

In cases where the Promoters are unable to commence and complete the construction of a registered project, upon receiving an application from Promoters, the MahaRERA may allow for de-registration of such real estate project.

- The prerequisites for such de-registration of real estate projects have been specified.

a. The project should have 0 allottees

b. In the case of bookings, the de-registration will be considered subject to the rights of the allottees being settled.

- Application to be submitted to the Secretary of MahaRERA until an online procedure is established.

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7. MahaRERA rules: No review if an appeal has already been filed against the order of the Maha RERA

The Maharashtra Real Estate Regulatory Authority ("Maha RERA") expounded that as per Regulation 36 of MahaRERA (General) Regulation, 2017 and Section 39 of RERA, no review application can be filed against the order if an appeal has been filed against the same order.

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8. MahaRERA enunciates: Without any cogent evidence, a registered project cannot be cancelled

The Maharashtra Real Estate Regulatory Authority opined that as per Section 7 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "RERA"), a project may be cancelled if the Promoter default or violates any terms and conditions of the approval or if he is involved in unfair practices or irregularities. However, in the present case, no such evidence was brought on record to prove any of this. Therefore, the prayer-seeking cancellation was not accepted.

Moreover, For the revelation of pending litigations, the Authority opined that it is the mandatory obligation of the Promoter to disclose all pending litigations on the MahaRERA website.

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H. SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI):

1. Changes to the Framework to enable verification of upfront collection of margins from clients in cash and derivatives segment

A circular was issued on July 20, 2022, which enabled the verification of the upfront collection of margins from clients in cash and derivatives segments. Additional snapshots for the commodity derivatives segment were introduced vide another circular issued on December 16, 2021.

Subsequently, a circular issued on May 10, 2022, modified the framework and provided that the margin requirements for the intra-day snapshots in derivatives and commodity derivatives segments shall be calculated based on the fixed Beginning of Day (BOD) margin parameters.

It has now been decided that End of Day (EOD) margin collection requirements from clients in derivatives and commodity derivatives segments shall also be calculated based on the fixed BOD margin parameters.

Further, it has been clarified that this change is only for verification of the upfront collection of margins from clients.

The circular will come into effect after 3 months from the date of issuance.

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2. Transaction in Corporate Bonds through Request for Quote (RFQ) Platform by Alternative Investment Funds (AIFs)

To increase the liquidity on the RFQ Platform and to enhance the transparency and disclosure regarding the trading in the secondary market in Corporate Bonds, the following has been prescribed by SEBI:

a. AIFs shall undertake a minimum of 10% of their total secondary market trades in Corporate Bonds by value in a month by placing quotes on the RFQ Platform.
b. It has been clarified that where AIF is on both sides of the trade, the trade shall be executed through the RFQ Platform in 'one-to-one' mode.
c. However, if any transaction is entered by an AIF in Corporate Bonds in 'one-to-many' mode and it gets executed with another AIF, it shall continue in that mode only.

The circular will come into effect from April 01, 2023.

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3. Amendments to Operational Circular for Credit Rating Agencies

A circular issued on January 06, 2023 'Operational Circular for Credit Rating Agencies' has been amended. Following are some of the amendments:

a. Para 5.6.1 – Expected Loss-based Rating Scale
   The rating scale has been modified.
b. Para 8.2.2 – Rating Process
   The rating process will now include a review along with an appeal for policy for request by the issuer against the rating being assigned to its securities.
c. Para 12.6 – Withdrawing any credit rating of securities and assigning a credit rating to such security
   This para has been deleted.
d. Para 12.2- Press Release for withdrawal of rating of a rated security
   It now includes cases, where there are no obligations under the security rated by the CRA or the company whose security is rated, is wound up or merged, or amalgamated with another company.
e. Para 12.3.3
   This para has been included and it states that a CRA may also withdraw a rating subject to it having received an undertaking from the other CRA(s) that a new rating has been assigned to such security.
f. Para 12.4.4
   This para has been included and it states that a CRA may also withdraw a rating earlier than stipulated, provided that the CRA has received an undertaking from the other CRA(s) that a rating is available on such security.
g. Para 16.2
   It has been modified and now provides that the MD/CEO of CRA shall not be a member of rating committees of the CRA.
h. Para 17- Request by Issuers for review/appeal of ratings provided by CRAs
   It has been modified to include a request by the issuer for review/appeal of ratings provided to its securities.
i. Para 24A
   It has been added and provides guidelines on the listed securities/instruments/products falling under the purview of other financial sector regulators or authorities.

j. Para 27.3.2- Initial rating for timelines of review and press releases

It has been modified and now includes acceptance of the rating or request for review/appeal of the rating by the issuer.

k. Para 27.5.2- Format for disclosure of all non-accepted ratings

It has been modified.

Read More

4. Manner of achieving minimum public shareholding

SEBI has permitted different methods that may be used by listed entities to achieve compliance with the minimum public shareholding requirements as per Rule 19②(b) and 19A of the Securities Contracts (Regulation) Rules, 1957 read with Regulation 38 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

In this regard, a few of the existing methods have been reviewed and rationalized and 2 additional methods have been added.

Read More

5. Updated Operational Circular for Credit Rating Agencies

An Operational circular has been prepared in order to enable the industry and other users to access all the applicable circulars/directions in one place, relating to Credit Rating Agencies.

The circular is a compilation of all the existing circulars as on February 03, 2023, with the necessary changes.

Read More

6. SEBI (Issue and Listing of Non-Convertible Securities) (Amendment) Regulations, 2023

Amendments have been made to the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021. The following are the key amendments:

a. Regulations 15⑥- Sending a notice to the issuer regarding recall/redemption of Non-convertible debentures
   It has been modified and now includes the manner in which the notice has to be sent.
b. Insertion of new Regulation 18(6A)
   It provides that a trust deed should have a provision mandating the issuer to appoint the person nominated by the debenture trustees as per Regulation 15①(e) of SEBI (Debentures Trustees) Regulations, 1993.
c. Insertion of Regulation 23⑥
   It provides additional obligations of the issuer in case the issuer is a company.
d. Insertion of Regulation 33A- Period of Subscription
e. Insertion of Regulation 50⑤- Collection of a regulatory fee
f. Substitution of Schedule VI Clause I
   It now clarifies the details of a non-refundable fee in respect of every draft document filed in terms of the regulations.

Read More

7. Grant of extension of time to entities operating/desirous of operating as Online Bond Platform Providers (OBPPs) for making an application to obtain a certificate of registration as a stock broker

SEBI has decided to grant an additional 3 weeks commencing from February 09, 2023, for making an application to obtain a certificate of registration as a stock broker under the Securities and Exchange Board of India (Stock Brokers) Regulations, 1992. The application for registration by OBPPs as stock brokers shall accordingly be made by March 01. 2023.

Read More

8. Securities and Exchange Board of India (Buy-Back of Securities) (Amendment) Regulations, 2023

Certain amendments have been made to the Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 2018. The key amendments are:

a. Regulation 2

The definitions of 'frequently traded shares and 'secretarial audit' have been added. The definition of 'odd lots' has been removed.

b. Regulation 4

The maximum limit of buy-back will now be calculated based on the standalone or consolidated financial statements, whichever sets a lower amount.

c. Regulation 5

The mention of 'odd lot' has been removed and instead of this, the term that the maximum limit of buy-back will be calculated based on the standalone or consolidated financial statements, whichever sets a lower amount has been inserted.

Another condition for authorization of buy-back has been added- prior consent of lenders in case of a breach of any covenant with such a lender.

The case of buy back through tender offer has been inserted.

d. Regulation 8

The filing now has to be completed in 2 working days from the record date. 'Draft letter of offer' has been changed to 'letter of offer'. Further, the clause related to fees has been deleted. It has been clarified that no draft letter of offer is required to be filed.

e. Regulation 9

The deposit amount has been altered to a minimum of 2% of the total amount earmarked for buy-back.

f. Regulation 15

It has been altered and now states that a minimum of 75% of the amount earmarked for buy- back is utilized for buying back shares. Further, a clause regarding utilisation within the initial half of the specified duration is added.

g. Regulation 16

The public announcement would not be done in an electronic mode.

h. Regulations 22A to E have been inserted

i. Regulation 22A- Disclosures, filing requirements, and timelines for public announcement
j. Regulation 22B- Offer procedure
k. Regulation 22C- Payment to holders of shares or other specified securities
l. Regulation 22D- Retail and promoter participation
m. Regulation 22E- Methodology of acceptance of bids

Read More

9. Entities allowed to use e-KYC Aadhaar Authentication services of UIDAI in the Securities Market as sub-KUA:

155 reporting entities vide Notification dated July 13, 2022, and 39 reporting entities vide Notification dated January 30, 2022, were notified by the Department of Revenue-Ministry of Finance to use Aadhaar authentication of UIDAI under Section 11A of the Prevention of Money-laundering Act, 2002.

The above-mentioned entities are required to enter into an agreement with a KUA and get registered with UIDAI as sub-KUAs. The KUAs will facilitate the onboarding of these entities as sub-KUAs to provide the services of Aadhar authentication concerning KYC.

Read More

10. Clarification w.r.t. issuance and listing of perpetual debt instruments, perpetual non-cumulative preference shares, and similar instruments under Chapter V of the SEBI (Issue and Listing of Non-convertible Securities) Regulations, 2021

The applicability of the provision relating to Perpetual Debt Instrument in Chapter V of the SEBI (Issue and Listing of Non-convertible Securities) Regulations, 2021 is clarified by SEBI.

Only such securities having the below-mentioned characteristics shall be required to comply with the provisions for the issuance and listing of Perpetual Debt Instruments:

a. The issuer is permitted by RBI to issue such instruments,
b. The instruments form part of non-equity regulatory capital,
c. The instruments are perpetual debt instruments, perpetual non-cumulative preference shares, or instruments of similar nature and

d. The instruments contain a discretion with the issuer/RBI for events including but not restricted to all or any of the below events:
   (i) Conversion into equity
   (ii) Write off interest/principal
   (iii) Skipping/delaying payment of interest/principal
   (iv) Making an early recall
   (v) Changing any terms of issue of the instrument

The circular shall come into force with immediate effect.

Read More

11. Securities and Exchange Board of India (Payment of fees and Mode of Payment) (Amendment) Regulations, 2023

- Securities and Exchange Board of India (Stock Brokers) Regulations, 1992 – amended
  Schedule III, clause III substituted.
- Securities and Exchange Board of India (Custodian) Regulations, 1996- amended
  2nd Schedule, Part B, Clause I substituted.
- Securities and Exchange Board of India (Mutual Fund) Regulations, 1996 – amended
  2nd Schedule, Clause II substituted.
- Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 – amended
  2nd Schedule, Clause 3 substituted.
- Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011- amended
  Regulation 10 ⑦ substituted.
  Regulation 11 ④ substituted.

Similarly, minor amendments have been made to many other regulations.

The amendments shall come into force on April 1st, 2023.

Read More

12. Clarification in respect of the compliance by the first-time issuers of debt securities under SEBI (Issue and Listing of Non-convertible Securities) Regulations, 2021 with Regulation 23⑥

The Stock Exchanges are advised to take an undertaking from the first-time issuers who are in the process of preparing for their first listed privately placed Non-Convertible Debentures (NCD) or public issue of NCDs. The undertaking should be that the first-time issuers will ensure amendment of the Articles of Association within a period of 6 months from the date of the listing of the debt securities.

The undertaking has to be obtained at the time of in-principal approval.

The circular shall come into force with immediate effect.

Read More

13. Consultation Paper on the review of the role and obligations of Mutual Fund Trustees

SEBI has invited public comments on the review of the role and obligations of trustees of Mutual Funds as provided currently in SEBI (Mutual Funds) Regulations and clarity on the role and accountability of the Board of Asset Management Companies (AMC) to safeguard the unitholder's interest, across all product services.

Some of the key issues framed for public consultation are:

a. Core responsibilities of Trustees
b. Responsibilities of Trustees for which Trustees can rely on third-party assurances
c. Enhancing the accountability of the board of AMC
d. Duties of operational nature that can be delegated to AMC
e. Structure of Trustees

Read More

14. Consultation paper on the proposal for introduction of the concept of General Information Document and Key Information Document, mandatory listing of debt securities of listed issuers, and other reforms under the NCS Regulations

Certain provisions of the SEBI (Issue and Listing of Non-convertible Securities) Regulations, 2021 are being reviewed and certain provisions are being added with the aim of providing ease of doing business to the issuers and safeguarding the interests of the investors.

The concepts of General Information Document and Key Information Document are being introduced and a review of disclosures in placement memorandums concerning private

placement of non-convertible securities and commercial paper is proposed to be listed.

The benefits of the proposed changes are also discussed in the paper.

Read More

15. Securities and Exchange Board of India (Infrastructure Investment Trusts) (Amendment) Regulations, 2023

The Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014 have been amended. Some of the key amendments are:

a. Regulation 2①(g)- definition of 'change of control' expanded

   Now, it includes separate explanations in cases of body corporate in case the shares are listed and when the shares are unlisted.

b. Regulation 2①(saa)- added

   It defines the independent director.

c. Regulation 2①(zxa)- added

   It defines senior management.

d. Regulations 10⑥- altered

   The period of appointment of Investment Manager has been changed to 'till the date of conclusion of 6th annual meeting from the meeting wherein he was appointed.'

e. Regulation 10(6A)- added

   It provides for people that cannot be appointed or reappointed by the Investment Manager.

f. Regulation 13②(e)- added

   It states that an auditor must take a limited review of audits of all the entities or companies.

g. Regulation 20⑥- explanation added.

h. Chapter VIB- inserted

   It talks about 'Obligations of the Investment Managers'.

i. Schedule VII- added

   It provides for 'Governance bonds'.

   The amendments will come into force on the date specified in the Official Gazette, provided Regulations 3① and 3⑥ will come into force from April 1, 2023.

Read More

16. Introduction of Issue Summary document (ISD) and dissemination of issue advertisements

- An ISD has been designed to introduce the ISD for the following in XBRL format:
  a. Public issue of specified securities
  b. Further issues, rights issues, issue of American Depository Receipts, Global Depository Receipts, and Foreign Currency Convertible Bonds
  c. Open offer
  d. Voluntary delisting of equity shares
- The ISD has to be filed in 2 stages.
  a. 1st stage – ISD will be filed containing pre-issue/ offer fields.
  b. 2nd stage- ISD will be filed containing ost-issue/ offer fields after allotment/offer is completed.
- The format has been given for ISD in Annexure A.
- The implementation is being done in 3 phases:
  a. 1st phase- ISD for public issues of specified securities for offer documents filed on or before March 01, 2023.
  b. 2nd phase- ISD for further issues, implemented from April 03, 2023.
  c. 3rd phase- ISD for open offer, buy-back, and voluntary delisting, implemented from May 02, 2023.

Read More

17. Master Circular for Substantial Acquisition of Shares and Takeovers

A master circular for the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 has been issued by SEBI to ensure that the stakeholders have access to the provisions of all the applicable circulars in one place.

Annexure V of this master circular sets out some directions regarding certain circulars that are to be rescinded to the extent that they relate to SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Read More

18. Advisory for SEBI Regulated Entities (Res) regarding Cybersecurity best practices

Few practices have been recommended for the SEBI Res because of the increasing cybersecurity threat to the securities market. The advisory has to be read with the pre-existing SEBI circulars and updates.

Some practices are:

- Defining the roles and responsibilities of a Chief Information Security Officer
- Monitoring cyberspace to identify phishing websites and reporting the same
- Updating all operating systems and applications with the latest patches.
- Ensure effective data protection, backup, and recovery measures.
- Strong password policy including period reviews of accounts of ex-employees Passwords to not be reused.

Read More

19. Consultation Paper on Holding of Sponsor in REITs and InvITs

Public comments on the proposal to review norms regarding Sponsor of Real Estate investment trusts (REITs) and Infrastructure Investment Trusts (InvITs) for aligning the interest between the Sponsors and unit holders are invited.

A Sponsor is responsible for setting up the REIT/InvIT and the formation transaction. A key role is also played in the registration of the REIT/InvIT as the registration is granted based on the eligibility conditions fulfilled by the Sponsor.

To align the interest between the Sponsor and unitholder, a new manner in which the Sponsor shall be required to hold a certain % of total unit capital has been proposed. Further, the units held by the Sponsor cannot be encumbered.

The comments must be sent latest by March 08, 2023.

Read More

20. Consultation Paper on Streamlining Disclosures by Listed Entities and Strengthening Compliance with SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

Public comments are sought on the proposal to amend the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

It has been proposed to insert Regulation 33③(j) regarding the timeline for the submission of 1st financial results by the newly listed entity. Another recommendation is to delete Regulation 25⑥ and insert another sub-regulation under Regulation 17① related to filling up vacancies of directors by listed entities.

The comments can be sent till March 06, 2023.

Read More

21. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2018

SEBI brought SEBI (Issue of Capital and Disclosure Requirements) (Amendment) Regulation, 2023 on January 11, 2023, to amend the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2018.

In Regulation 2, the 'senior management' definition has been added and these words have been inserted with key managerial personnel in every clause talking of the representatives of the company.

Read More

22. Consultation Paper on strengthening corporate governance at listed entities by empowering shareholders- Amendments to the SEBI (LODR) Regulations, 2015

Public comments are invited to strengthen the corporate governance at listed entities by empowering shareholders to address issues such as agreements binding listed entities, special rights of shareholders, board permanency at listed entities, etc.

After the suggestions, the required amendments would be made to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2018.

Comments can be sent till March 07, 2023.

Read More

I. REAL ESTATE DEVELOPERS CALL FOR SINGLE WINDOW APPROVAL MECHANISM UNDER RERA TO STREAMLINE PROJECT CLEARANCE PROCESS

By : Tanuja Singh and Divya Bharti

The Real Estate (Regulation and Development) Act, 2016 (RERA) was enacted with the objective of promoting transparency, accountability, and efficiency in the real estate sector. One of the key provisions of RERA is the requirement for developers to obtain various approvals and clearances before launching a project. However, the lack of a single window approval mechanism under RERA has been a persistent challenge for developers, causing delays in project clearance and increasing project costs. While it is true that in recent years, the Real Estate Regulating Authority has brought in transparency and structural reforms in the real estate sector to make developers accountable, but the major stakeholders remained insulated. Consequently, facilitating early completion of projects remained unaddressed and developers faced a lot of challenges.

The absence of a single window approval mechanism means that developers have to obtain approvals and clearances from multiple government departments and agencies, which can be time-consuming and costly. This results in delays in project completion and increases the cost of the project, which is ultimately borne by the homebuyers. Currently, developers have to obtain multiple approvals and clearances from different government departments and agencies, including local authorities, the environment department, and the fire department, among others. The process of obtaining these approvals is often time-consuming and cumbersome, as developers have to submit multiple applications and comply with various requirements and regulations.

The lack of a single window approval mechanism under RERA has also led to increased project costs, as developers have to engage with multiple consultants and experts to obtain the required approvals and clearances. Additionally, delays in project clearance can also result in cost escalations due to inflation, increase in interest rates, and other factors.

To address this issue, the real estate industry has been calling for the implementation of a single window approval mechanism under RERA. This mechanism would enable developers to submit a single application for all the required approvals and clearances, which would be processed and issued through a single window. A single window approval mechanism would have several benefits. Firstly, it would make the project clearance process faster and more efficient. This would result in faster project completion and lower project costs, which would ultimately benefit the homebuyers. Secondly, it would reduce the number of approvals and clearances required, which would reduce the complexity of the project clearance process

Several states have already taken steps towards implementing a single window approval mechanism under RERA. For instance, the Maharashtra Government has launched the 'Maha RERA Single Window Clearance System' to provide a unified platform for developers to apply for various approvals and clearances. Similarly, the Gujarat Government has

introduced the 'Gujarat Online Building Approval System' (GOBAS) to enable developers to obtain building permissions and other clearances through a single window.

However, implementing a single window approval mechanism under RERA would require significant coordination between different government departments and agencies. It would also require the development of a robust IT infrastructure to support the process. Moreover, there may be challenges in ensuring that the process is transparent and accountable, and that it does not lead to corruption or favouritism.

One of the key challenges in implementing a single window approval mechanism under RERA is the lack of coordination between different government departments and agencies. Currently, there is no centralized mechanism for coordinating approvals and clearances between different departments and agencies. As a result, developers have to approach each department or agency separately, which can be time-consuming and inefficient. To address this challenge, the government could set up a centralized agency to coordinate approvals and clearances between different departments and agencies. This agency could act as a single window for all project clearances, and would be responsible for coordinating approvals and clearances from different departments and agencies. The agency could also develop a web-based portal that developers could use to submit applications for clearances and track the status of their applications.

Ensuring transparency and accountability is another key challenge in implementing a single window approval mechanism under RERA. There is a risk that the process could lead to corruption or favouritisms, as developers may try to influence the agency responsible for coordinating project clearances. To address this challenge, the government could set up a code of conduct for the agency responsible for coordinating clearances, and the establishment of an independent oversight body to monitor the process and ensure compliance with the code of conduct. The government could also require developers to disclose all relevant information about their projects, including details of any payments made to the agency responsible for coordinating clearances.

In conclusion, the lack of a single window approval mechanism under RERA has been a persistent challenge for the real estate industry, leading to delays in project clearance and increased project costs. The implementation of a single window approval mechanism under RERA can streamline the project clearance process, reduce delays, and lower project costs. However, it is important to ensure that the mechanism is implemented effectively, with adequate coordination and transparency to avoid delays and conflicts.

Tanuja Singh, Associate and Divya Bharti, Associate

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