

Newsletter

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ADVOCATES

Edition 3

March 2019

It gives us immense pleasure to circulate the third edition of DMD Advocates' Newsletter.

In this edition, we have covered recent and relevant judgements/orders of the Supreme Court of India, the National Company Law Appellate Tribunal (NCLAT) and National Company Law Tribunals (NCLTs) and some relevant legal updates.

We hope you enjoy reading this edition and find it useful in your area of work.

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Feedback and suggestions from our readers would be appreciated. Please feel free to send your comments, feedback and suggestions to dmdadvocates@dumeds.com

Case Law Updates

Maintainability of the execution case to be considered along with the issue of enforceability of the subject foreign award(s): Supreme Court

A two judge bench of the Supreme Court comprising Justice Ajay Rastogi and Justice A.M. Khanwilkar, upholding a judgement and orders passed by the High Court of Calcutta, has held that maintainability of execution case is intrinsically linked with the question of enforceability of respective foreign award(s) and cannot be considered in isolation and de hors the issue of enforceability of the subject foreign award(s).

The Court observed that “the scheme of Section 48 of the Arbitration and Conciliation Act, 1996 does not envisage piecemeal consideration of the issue of maintainability of the execution case concerning the foreign awards, in the first place; and then the issue of enforceability thereof. Whereas, keeping in mind the legislative intent of speedy disposal of arbitration proceedings and limited inter-

ference by the courts, the Court is expected to consider both these aspects simultaneously at the threshold. Taking any other view would result in encouraging successive and multiple round of proceedings for the execution of foreign awards. We cannot countenance such a situation keeping in mind the avowed object of the Arbitration and Conciliation Act, 1996 in particular, while dealing with the enforcement of foreign awards. For, the scope of interference has been consciously constricted by the legislature in relation to the execution of foreign awards. Therefore, the subject application filed by the petitioner deserves to be rejected, being barred by constructive res judicata, as has been justly observed by the High Court in the impugned judgement.”

Click [here](#) to view the judgement dated 20 February 2019.

Inadvertent mistake in the plaint should be allowed to be corrected: Supreme Court

A two-judge bench of the Supreme Court, comprising Justice D. Y. Chandrachud and Justice Hemant Gupta, has set aside an order of the High Court of Delhi and allowed an application to amend the plaint filed by the Plaintiff.

Relying on the Supreme Court judgement in the case of *Uday Shankar Triyar v. Ram Kalewar Prasad Singh and Another* ((2006) 1

SCC 75), the Court observed that “procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure should never be made a tool to deny justice or perpetuate injustice by any oppressive or punitive use.”

Click [here](#) to view the judgement dated 1 March 2019.

Section 9 application under Insolvency and Bankruptcy Code, 2016 (IBC) is not maintainable if parties settle the matter prior to constitution of Committee of Creditors: National Company Law Appellate Tribunal (NCLAT)

An NCLAT bench, comprising Justice S J Mukhopadhyaya (Chairperson) and Justice Bansi Lal Bhat (Member (Judicial)), has set aside an order of the National Company Law

Tribunal (NCLT), Kolkata Bench and held that an application under Section 9 of the IBC is not maintainable if parties have settled the matter before constitution of the Committee of

Creditors (CoC). Accordingly, the bench ordered closing of the Corporate Insolvency Resolution Process (CIRP) initiated against the Corporate Debtor.

Click [here](#) to view NCLAT's order dated 8 February 2019.

Provisions of IBC will prevail over Prevention of Money Laundering Act, 2002 (PMLA): NCLT, Mumbai

An NCLT Mumbai bench, comprising Justice Bhaskara Pantula Mohan, Member and Mr. V. Nallasenapathy, Member (T), has set aside an order of attachment under the PMLA and held that provisions of IBC will prevail over PMLA.

The bench observed that “[T]he purpose and object of IBC is for resolution of the Corporate Debtor by maximizing the value that can be received by the Creditors and stake holders. The IBC provides for timelines within which the resolution has to be arrived at. The PMLA's object is also to recover the property from wrong doers and compensate the affected parties by confiscation and sale of the assets of the wrong doer apart from imposing punishment. Here the beneficiaries are the creditors of the Corporate Debtor. The criminal proceedings before PMLA will take a longer time and by the time there will be an erosion in the value of assets. However, considering the overriding provisions of Section 238 of IBC which is the later legislation, when compared to the earlier legislation of PMLA, the provisions of IBC will prevail and hence considering the economic interest of the beneficiaries, the IBC will provide solution at the earliest to the Corporate Debtor as well as to the Creditors.”

The bench also observed that attachment under PMLA is a legal proceeding which falls under the ambit of Section 14(1)(a) of IBC, where moratorium on any kind of proceedings is imposed by the Adjudicating Authority. Accordingly, the bench ruled that the attachment order under PMLA is a nullity and hence it will not have any binding force as the

attachment order passed by the PMLA court is hit by the provisions of Section 14 of the IBC and the overriding effect of IBC under Section 238.

The bench also considered Section 63 of the IBC which provides that, no Civil Court or Authority shall have jurisdiction to entertain any suit or proceeding in respect of any matter on which NCLT or NCLAT has jurisdiction under IBC. Relying on the ruling of the Appellate Tribunal for PMLA, in the case of *Bank of India v. The Deputy Directorate Enforcement, Mumbai* (FPA-PMLA-2173/MUM/2018), the bench held that the proceedings before Adjudicating Authority under PMLA in respect of attached properties are civil proceedings and that the Adjudicating Authority under PMLA does not have jurisdiction to attach the properties of the Corporate Debtor undergoing CIRP.

The court further stated that “considering the economic factors associated with the case and the object of both legislations, it is advisable to take a route where assets can be utilized in a speedy manner rather than waiting and lose the value of assets over a period of time.”

Accordingly, the attachment order under the PMLA was set aside in view of Sections 14(1)(a), 63 and 238 of IBC and the Resolution Professional was directed to proceed to take charge of the properties and deal with them under IBC as if there was no attachment order.

Click [here](#) to view NCLT's order dated 12 February 2019.

All statutory dues including 'Income Tax', 'Value Added Tax' etc. come within the meaning of 'Operational Debt': NCLAT

An NCLAT bench, comprising Justice S J Mukhopadhaya (Chairperson) and Justice Bansi Lal Bhat (Member (Judicial)), has set aside a batch of appeals and held that all statutory dues come within the meaning of 'Operational Debt' as per Section 5(21) of the IBC and 'Income Tax Department of the Central Government', the 'Sales Tax Department (s) of the State Government' and 'local authority', who are entitled for dues arising out of existing laws are 'Operational Creditor(s)' within the meaning of Section 5(20) of the IBC.

The bench elaborated that 'Operational Debt' in normal course means a debt arising during the operation of the Company ('Corporate Debtor'). The 'goods' and 'services' including

employment are required to keep the Company operational as a going concern. If the Company is operational and remains a going concern, only in such case, the statutory liability, such as payment of Income Tax, Value Added Tax etc., will arise. As the 'Income Tax', 'Value Added Tax' and other statutory dues arising out of the existing law, arises when the Company is operational, such statutory dues have direct nexus with operation of the Company. The bench for the above reason held that all statutory dues including 'Income Tax', 'Value Added Tax' etc. come within the meaning of 'Operational Debt'.

Click [here](#) to view NCLAT's judgement dated 20 March 2019.

Legal Updates

The Aadhaar and Other Laws (Amendment) Ordinance, 2019

The President promulgated an Ordinance on 2 March 2019 (which was approved by the Cabinet on 28 February 2019), to make amendments to the Aadhaar Act 2016, Prevention of Money Laundering Act 2005 & Indian Telegraph Act 1885.

Impact

Subsequent to this amendment, no individual is compelled to provide proof of possession of Aadhaar number or undergo authentication for the purpose of establishing his identity unless it is required by a law formulated by Parliament.

Salient Features

The salient features of the amendments are as follows:

- Provides for voluntary use of Aadhaar number in physical or electronic form for authentication or offline verification with the con-

sent of Aadhaar number holder.

- Provides for use of an alternative virtual identity to conceal the actual Aadhaar number of an individual.
- Gives an option to children who are Aadhaar number holders to cancel their Aadhaar number on attaining the age of eighteen years.
- Permits entities to perform authentication only when they are compliant with the standards of privacy and security specified by Unique Identification Authority of India (UIDAI); and the authentication is permitted under any law made by Parliament or is prescribed to be in the interest of India by the Central Government.
- Allows the use of Aadhaar number for authentication, on voluntary basis, as acceptable Know Your Customer (KYC) document under the Telegraph Act, 1885 and the Prevention of Money-laundering Act, 2002.

- Deletion of Section 57 of the Aadhaar Act relating to use of Aadhaar by private entities.
- Prevents denial of services for refusing to, or being unable to, undergo authentication using Aadhaar.
- Provides for civil penalties, its adjudication

and appeal thereof with respect to violations of Aadhaar Act and its provisions by various entities in the Aadhaar ecosystem.

We have analysed the impact of the Ordinance in detail in our article titled 'Aadhaar Ordinance', which can be accessed [here](#).

RBI introduces 'Voluntary Retention Route' (VRR) for investment in debt by Foreign Portfolio Investors and operational guidelines for hedging of exchange rate risk for such investment

The Reserve Bank of India (RBI), in consultation with the Government of India and Securities and Exchange Board of India (SEBI), on 1 March 2019 introduced a separate channel, called the 'Voluntary Retention Route' (VRR) for investment in debt by Foreign Portfolio Investors (FPIs). The VRR enables FPIs to undertake long-term investments in Indian debt markets. Under this route, FPIs have been given greater operational flexibility in terms of instrument choices besides exemptions from certain regulatory requirements.

Some of the important features of VRR scheme are set out below:

(a) Eligible Investors: Any FPI registered with SEBI is eligible to participate through this Route.

(b) Eligible instruments:

- (i) Under VRR-Govt (which is the VRR for FPI investment in Government Securities), the FPIs will be eligible to invest in any Government Securities i.e., Central Government dated Securities (G-Secs), Treasury Bills (T-bills) and State Development Loans (SDLs);
- (ii) Under VRR-Corp (which is the VRR for FPI investment in Corporate Debt Instruments), the FPIs may invest in any instrument listed under Schedule 5 of Foreign Exchange Man-

agement (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, other than dated government securities/treasury bills and units of domestic mutual funds; and

(iii) instruments pertaining to repo transactions and reverse repo transactions.

(c) Other applicable provisions:

(i) investment limit under VRR is in addition to the general investment limit set out in the medium-term framework issued by the RBI for investment by FPIs in government securities. Such limit is presently capped at INR 40,000 crore per annum for VRR-Govt and INR 35,000 crore per annum for VRR-Corp;

(ii) allocation of investment amount to FPIs under VRR is to be made on tap or through auctions;

(iii) in case there is a demand for more than 100% of the amount offered, no FPI (including its related FPIs) is to be allotted an investment limit greater than 50% of the amount offered for each allotment by tap or auction;

(iv) the minimum retention period of the investment under VRR is to be three years, or as decided by the RBI for each allotment by tap or auction; and

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(v) amounts of investment is to be reckoned in terms of face value of securities.

(d) In order to hedge the exposure to exchange rate risk on account of investments made under the VRR, authorised dealers may offer derivative contracts using forwards, options, cost reduction structures and swaps with rupee as one of the currencies, to eligible users under VRR or to its central treasury (of the group and being a group entity). Authorised dealers are required to ensure that:

- (i) the FPI has an exposure to exchange rate risk on account of investments made under VRR;
- (ii) the notional value and tenor of the contract does not exceed the value and tenor of the exposure;
- (iii) the same exposure has not been hedged with any other authorised dealer or on the exchange;
- (iv) in cases where the value of the exposure falls below the notional value of the derivative, the derivative is

suitably adjusted unless such divergence has occurred on account of change in market value of the exposure, in which case the FPI may, at its discretion, continue with the derivative contract till its original maturity; and

(v) all payables incidental to the hedge are met by the FPI out of repatriable funds and/or inward remittance through normal banking channels.

(e) Authorised dealers are also required to allow FPIs to freely cancel and rebook the derivative contracts.

Click [here](#) to view the RBI Press Release, dated 1 March 2019, related to VRR for FPIs investment in debt.

Click [here](#) to view the RBI Circular, dated 1 March 2019, related to VRR for FPIs investment in debt.

Events

DMD Advocates' Senior Partner, Rashi Dhir at the UKIBC delegation meeting with Minister of Commerce and Industry and DIPP Secretary at the CII - Partnership Summit 2019 in Mumbai



Our Senior Partner, Rashi Dhir was part of the UK India Business Council (UKIBC) delegation that met with Minister of Commerce and Industry, Mr. Suresh Prabhu and DIPP Secretary, Mr. Ramesh Abhishek at the CII - Partnership Summit on 13 January 2019 in Mumbai. The delegation comprised of CEOs/India heads of some prominent UK and Indian companies.

DMD Advocates' Partner, Sumit Sinha at the UKIBC delegation meeting with Chief Minister of Gujarat during the Vibrant Gujarat Summit 2019 in Gandhinagar

Our Partner, Sumit Sinha represented DMD Advocates at the Vibrant Gujarat Summit 2019 and was part of the delegation that met with the Chief Minister of Gujarat, Mr. Vijay Rupani. The delegation comprised of CEOs/India heads of some prominent UK and Indian companies.



Senior Partner, Rashi Dhir spoke as part of a panel discussion at the 8th Annual One Globe Forum 2019



Our Senior Partner, Rashi Dhir was amongst the panellists who spoke during the panel discussion on 'Private Equity in India' at the 8th Annual One Globe Forum, 2019 held in Delhi on 1 & 2 February 2019.

The panel discussion was moderated by Ms. Arshiya Singh of Henderson Global Investors and included Kamal Bhatia, CEO & Co-head of OC Private Capital, Ashish Guha, Former Chief Executive Officer of Heidelberg Cement and Sandeep Chadha, Co-Founder & Head of Advisory at Oakstone Partners, London.

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Partner, Sumit Sinha spoke as part of a panel discussion on M&A at the Apex 2019 PE-VC Summit & Awards in Mumbai

Our Partner, Sumit Sinha spoke as part of a panel discussion on M&A at the Apex 2019 PE-VC Summit & Awards organized by Venture Intelligence in Mumbai. The panel comprised of LC Singh, Founder & Executive Vice-Chairman of Nihilent, Gowri Shankar Subramanian, Founder & CEO of Aspire Systems, Pravin Advani, Co-Founder & Managing Partner of SA Global Advisors, Yeshasvini Ramaswamy, CPO at Mnagenome and Rajeev Agrawal, Partner at Ambit Pragma.



Deal Disclosure

DMD Advocates advised ad agency Periscope Inc

Quad/Graphics Inc (Quad/Graphics) acquired Minneapolis ad agency Periscope Inc (Periscope) and its subsidiaries in Hong Kong and India. DMD Advocates advised Periscope on the sale of their India operations to Quad/Graphics. The team comprised of Sumit Sinha, Partner, Raja Kishore, Principal Associate and Kaushal Prabhat, Associate.

For more details on the deal, click on the links below:

<https://www.vantageasia.com/deals-in-brief-7/>

<https://barandbench.com/dmd-khaitan-quad-graphics-periscope/>

Rewards & Recognition

INDIA BUSINESS
LAW JOURNAL
— 2019 —
AWARD WINNING
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DMD Advocates has been recognized as one of the best law firms in Litigation by *India Business Law Journal* as part of the Indian Law Firm Awards 2019. Click [here](#) for more details.

Two of our deals featured in the *India Business Law Journal's* "Deals of the Year 2018". Click [here](#) for more details.

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