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LEX NOVUS
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EDITORIAL

On behalf of the entire team of SB Partners, here's wishing you a very Happy New Year!

In the last three months we saw numerous changes in the areas of Banking and Finance, Capital Markets and Corporate Laws, Competition Laws and Insolvency and Bankruptcy Laws of India.

The process pertaining to re-classification of *'Public Shareholders'* to *'Promoters'* and *vice-versa*, underwent some major changes. SEBI has now made it mandatory to get the *'re-classification request'* approved by the board of directors as well as shareholders of the company. Further, in terms of the new process, promoters who seek reclassification shall not hold 10% of the total voting rights of the company.

The other notable developments were in the area of Corporate Laws. The Companies (Amendment) Ordinance, 2018 ("**Ordinance**") introduced several new compliances which are to be adhered by the companies and several new penalties on companies and officers in default, which have been discussed in detail herein. It also provided for disqualification of directors in case their directorships exceed the permissible limits under the Companies Act, 2013 and empowers the Registrar of Companies to strike off the name of a company from the Register of Companies, in case it is not carrying on any business.

In addition to the foregoing, this issue of *'Lex Novus'* also focuses on other key regulatory developments in the field of Capital Markets. The issuers are no longer required to give a security deposit of one (1) % of the value of securities to the stock exchange before getting *'debt securities'*, *'non-convertible redeemable preference shares'*, *'securitized debt instruments'* and 'security receipts' listed on such stock exchange.

We hope you find this edition of Lex Novus informative and insightful.

IN THE NEWS

RBI GUIDELINES

- **MINIMUM MATURITY PERIOD OF ECBs REDUCED**

Reserve Bank of India ("**RBI**") has liberalized the External Commercial Borrowing ("**ECB**") Policy by amending the *'Master Direction on External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers'*. The changes are as follows:

a The minimum average maturity period of ECBs in infrastructure sector has been reduced from five (5) years to three (3) years; and

b The average maturity period requirement to claim exemption from mandatory hedging provision applicable to ECBs has been reduced from ten (10) years to five (5) years.

Accordingly,, ECBs in infrastructure sector, with minimum average maturity period of less than 5 years, shall have to meet 100% mandatory hedging requirement.

- **NEW REGULATIONS TO REGULATE SPONSORS OF ASSET RECONSTRUCTION COMPANIES**

RBI issued the *'Fit and Proper Criteria for Sponsors - Asset Reconstruction Companies (Reserve Bank) Directions, 2018'* on October 25, 2018 ("**Directions**") laying down the provisions to regulate sponsors of Asset Reconstruction Companies ("**ARC**"), which are as follows:

a Any person (legal or natural) holding more than or equal to 10% of the paid-up equity capital of an ARC is eligible to be a '*sponsor*' of such ARC;

b Sponsor's integrity, reputation, business and track record, sources and stability of funds, ability to access financial markets, shareholding agreements and compliance with applicable laws and regulations will be taken into account while determining its eligibility;

c All Sponsors have to submit on yearly basis, declarations to ARC in the applicable forms prescribed in the Directions declaring and disclosing various information like their name, address, citizenship, details of bank accounts, sources of funds, income tax returns, details of directors, details of shareholders agreement, insolvency and bankruptcy details, etc.;

d Each ARC is required to examine the information provided by its Sponsor, and if any Sponsor is not fit and proper to hold shares, then the ARC is required to immediately report such fact to RBI; and

e Each ARC shall obtain the prior approval of RBI in case of any change in its shareholding.

- **MINIMUM HOLDING PERIOD FOR SECURITIZATION OF LOANS BY NBFCs REDUCED**

In order to encourage Non-Banking Financial Companies ("**NBFCs**") to securitize/assign their eligible assets, it has been decided by RBI to relax the Minimum Holding Period ("**MHP**") requirement in respect of loans of original maturity above five (5) years. The MHP requirement has been reduced from receipt of repayment of twelve (12) monthly installments to six (6) monthly installments (in case of monthly instalments) and from receipt of repayment of four (4) quarterly installments to two (2) quarterly instalments (in case of quarterly instalments).

However, the abovementioned relaxation shall apply to only those transactions, where the securitising / assigning NBFC retains with itself, atleast 20% of the book value of the securitized loan or 20% of the cash flows from the assigned assets.

It is also to be noted that the above dispensation shall be applicable to only those securitization / assignment transactions which are carried out during a period of six months from the date of issuance of this circular i.e. November 29, 2018.

INSOLVENCY AND BANKRUPTCY LAWS

- **INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS SIMPLIFIED**

The Insolvency and Bankruptcy Board of India ("**IBBI**") has amended the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2018 ("**Regulations**") via notification dated October 05, 2018 ("**Amendment Notification**"). The major changes brought by the Amendment Notification in the Regulations are as follows:

a The definition of *'Dissenting Financial Creditors'* has been removed from the Regulations;

b The resolution professional ("**RP**") is now required to circulate the minutes of the meeting to the authorized representative of the class of creditors too (if any), along with all members of the *'committee of creditors'* within forty-eight hours of the conclusion of the meeting;

c The authorized representative of a particular class of creditors is required to circulate the minutes of the meeting received from the RP to the financial creditors in that particular class. He shall also announce the voting window to vote and decide on the matter discussed in such meeting at least 24 hours before the window opens and shall keep the voting window open for at least 12 hours;

d The amount due to *'operational'* creditors under the resolution plan shall be paid in priority over *'financial'* creditors;

e The prospective resolution applicant is no longer required to give an undertaking that it will provide for additional funds, if required to pay the insolvency resolution process costs, liquidation value due to operational creditors and liquidation value due to dissenting financial creditors; and

f A duty has been conferred on the interim resolution professional or the RP, as the case may be, to preserve a physical as well as an electronic copy of the records relating to corporate insolvency resolution process of the corporate debtor.

- **RESTRICTIONS IMPOSED ON THE SHAREHOLDING OF INSOLVENCY PROFESSIONAL AGENCIES**

IBBI has amended the IBBI (Insolvency Professional Agencies) Regulations, 2016 and have introduced some restrictions on the shareholding of Insolvency Professional Agencies ("**IPAs**"), which are as follows:

a Subject to clause (b) and (c) below, no company is allowed to acquire or hold more than 5% of the paid-up equity share capital in an IPA;

b A stock exchange, a depository, a banking company, an insurance company, a public financial institution and a multilateral financial institution is allowed to acquire or hold, directly or indirectly, up to 15% of the paid-up equity share capital of an IPA; and

c The Central Government, any State Governments and statutory regulators are allowed to acquire or hold, directly or indirectly, up to 100% of the paid-up equity share capital of an IPA.

Apart from the abovementioned restrictions, the company applying for the registration as an IPA is also required to disclose the details of the persons holding more than 5% of its share capital, directly or indirectly.

- **CHANGES IN THE POWERS OF LIQUIDATOR AND PROCEDURE OF VALUATION OF ASSETS**

IBBI (Liquidation Process) Regulations, 2016 has been amended by IBBI via notification dated October 22, 2018 ("**Amendment Notification**"). The changes brought by the Amendment Notification are as follows:

a *'Business'* of the company is included in the definition of the *'Assets'* of the company.

b The liquidator has been given the power to sell the the business of the corporate debtor as a going concern. However, if there is an asset of the corporate debtor which is subject to any security interest, it shall not be sold by the liquidator, unless the security interest therein has been relinquished by the security holder;

c The liquidator has also been asked to consider the average of the estimates of values arrived in the valuations performed under any insolvency resolution process, to do the valuation of assets or business intended to be sold by him; and

d A *'relative'* of the liquidator, a *'related'* party of the corporate debtor, an *'auditor'* of the corporate debtor and a 'partner' or *'director'* of the insolvency professional entity of which the liquidator is a partner or director cannot be appointed as registered valuers.

CAPITAL MARKETS

- **NO SECURITY DEPOSIT TO BE PAID TO THE STOCK EXCHANGES PRIOR TO LISTING OF SECURITIES**

The Securities and Exchange Board of India ("**SEBI**") has released (a) SEBI (Issue and Listing of Debt Securities) (Amendment) Regulations, 2018; (b) SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) (Amendment) Regulations, 2018; and (c) SEBI (Issue and Listing of Securitized Debt Instruments and Security Receipts) (Second Amendment) Regulations, 2018 (collectively the "**Amendment Notifications**").

By virtue of these Amendment Notifications, the issuer is no longer required to give a security deposit of one (1) % of the value of securities to the stock exchange before getting *'debt securities', 'non-convertible redeemable preference shares', 'securitized debt instruments'* and *'security receipts'* (as applicable) listed on such stock exchange.

- **SEBI EASES DELISTING NORMS, INTRODUCES CONCEPT OF COUNTER OFFER BY ACQUIRERS / PROMOTERS**

SEBI, via its amendment dated November 14, 2018 ("**Amendment Regulations**") amended the SEBI (Delisting of Equity

Shares) Regulations, 2009 ("**Regulations**"). The major changes brought by the Amendment Regulations are as follows:

a A definition of *'acquirer'* has been added in the Regulations and it has been added that any reference made to the *'promoter'* under the Regulations shall apply mutatis mutandis to an *'acquirer'* making a delisting offer;

b The definition of *'public shareholders'* has been amended in order to exclude promoter group and acquirers from its ambit;

c Subsequent to the Amendment Regulations, the company, delisting its shares, needs to satisfy the stock exchange that it has complied with all the condition of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015;

d The date for determining the names of shareholders to whom the letter of offer shall be sent, shall not be later than one (1) working day from the date of the public announcement of delisting. As per the earlier provisions, such date could have been extended to thirty (30) working days from the date of the public announcement;

e The Amendment Regulations have introduced the concept of *'counter offer'* wherein, if the acquirer / promoter is not satisfied with the price of the securities in relation to which the exit option is provided, discovered under the reverse book building process, then such acquirer / promoter may make a counter offer to the public shareholders within two (2) working days and which shall not be less than the book value of the company as certified by the merchant banker; and

f A clarification has now been included in the Amendment Regulations that the reference date for computing the *'floor price'* would be the date on which the recognised stock exchange(s) were required to be notified of the board meeting in which the delisting proposal would be considered.

- **PROCESS OF RE-CLASSIFICATION OF PUBLIC SHAREHOLDERS TO PROMOTERS OR VICE-VERSA CHANGED**

SEBI enacted the SEBI (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2018 ("**Amendment Regulations**") in order to amend the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**Regulations**").

There have been several changes in the Regulations, majorly in the provisions relating to re-classification of *'public shareholders'* as *'promoters'* or vice-versa, which are as follows:

a Earlier, the request for reclassification was allowed to be filed either by the concerned listed entity or the concerned shareholder(s). Now, it is mandatorily to be filed by the listed entity, subsequent of which, the concerned shareholder can file its request;

b The request by the concerned shareholder shall be approved by the board of directors as well as other shareholders of the company. There shall be a gap of three (3) months between board and shareholders' meeting and a request of the *'promoter'* seeking re-classification shall be approved in the general meeting by an ordinary resolution only;

c The promoters seeking reclassification shall not (i) hold more than 10% of the total voting rights in the entity; (ii) exercise control over the affairs of the entity; (iii) have any special rights with respect to the entity; (iv) be represented on the board of directors of the entity; (v) act as a key managerial person in the entity; and (vi) be a wilful defaulter of fugitive economic offender; and

d The listed entity whose promoter seeks re-classification as public shareholders shall be compliant with the requirement for minimum public shareholding, shall ensure that trading in its shares is not suspended by the stock exchanges and shall not have any outstanding dues to SEBI, the stock exchanges or the depositories.

Some other major changes brought by the Amendment Regulations are:

a The definition of '*fugitive economic offender*' has been added in the Regulations.

b Provisions have been incorporated to enable listed entities to apply to SEBI to seek relaxation under the Regulations, against payment of non-refundable fee of Rs. 1,00,000/-.

c Listed Companies are required to disclose in its Annual Reports status of complaints filed under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; and

d In case of transmission of securities which are held in single name without a nominee, an affidavit from all legal heirs of the holder of those securities, to the effect of identification and claim of legal ownership to the securities is required to be filed. However, if such legal heir/claimant is named in the *'succession certificate'* or *'will'* or *'letter of administration'*, an affidavit from such legal heir/ claimant would suffice.

- **GUIDELINES FOR AIFs TO OPERATE IN INTERNATIONAL FINANCIAL SERVICES CENTRES ISSUED;**

SEBI issued a circular dated November 26, 2018 ("**Circular**") to lay down operational guidelines for Alternative Investment Funds ("**AIFs**") in International Financial Services Centres ("**IFSCs**"). The Circular provides for following provisions:

a *Registration of such AIFs:* Any fund established or incorporated in IFSC, in the form of a trust, a company, a limited liability partnership or a body corporate, has to apply for registration to SEBI under the provisions of SEBI (Alternative Investment Funds) Regulations, 2012 ("**AIF Regulations**"), along with a non-refundable application fee;

b *Compliance requirements, conditions and restrictions:* Any person can invest in AIFs operating in IFSCs subject to the provisions listed in SEBI (International Financial Services Centre) Guidelines, 2015 ("**IFSC Guidelines**"). Further, any AIF operating in IFSC is permitted to make investment in terms of provisions listed in IFSC Guidelines;

It is to be noted that each scheme of AIF operating in an IFSC shall have corpus of at least 3 million USD and it shall not accept an investment of less than 150,000 USD from any investor. Also, employees or directors of the AIF or employees or directors of the manager of such AIF, shall not invest less than 40,000 USD. Furthermore, the manager or sponsor of an AIF shall have a continuing interest in the AIF of atleast 2.5% of the corpus or 750,000 USD, whichever is lower, in the form of investment in the AIF;

The sponsor or manager of an AIF (Category I and II) shall appoint a custodian registered with SEBI for safekeeping of securities if the corpus of the AIF is more than 70 million USD whereas It will be mandatory for Category III AIF to appoint a custodian;

An angel fund operating in an IFSC shall have a corpus of at least 750,000 USD and shall not accept up to a period of 5 years, an investment of less than 40,000 USD from an angel investor. Furthermore, the manager or sponsor of such angel fund shall have a continuing interest in the angel fund of atleast 2.5% of the corpus or 80,000 USD, whichever is lesser; and

c *Miscellaneous:* All provisions of the AIF Regulations and the guidelines and circulars issued thereunder, shall apply to AIFs setting up/ operating in IFSC, their investors, sponsors, managers and other intermediaries as applicable. However, the applicability of this Circular is subject to such conditions that may be prescribed by SEBI, RBI and other appropriate authority from time to time.

- **UPI PAYMENT MECHANISM APPROVED FOR PUBLIC ISSUE OF EQUITY SHARES AND CONVERTIBLES**

SEBI via circular dated November 01, 2018 ("**Circular**"), introduced the use of Unified Payments Interface ("**UPI**") as a payment mechanism with in public issues by individual investors through intermediaries to streamline the process of public issue of equity shares and convertibles. The proposed process would increase efficiency, eliminate the need for manual intervention at various stages, and will reduce the time duration from issue closure to listing by upto three (3) working days.

However, considering the time required for making necessary changes to the systems and to ensure complete and smooth transition to UPI payment mechanism, the proposed mechanism and consequent reduction in timelines has been proposed to be introduced in phases, described as under:

(a) *Phase I:* From January 01, 2019, the UPI mechanism for individual investors through intermediaries will be made effective along with the existing process and existing timeline. The same will continue, for a period of three (3) months or floating of five (5) main board public issues, whichever is later;

(b) *Phase II:* Thereafter, for applications by individual investors through intermediaries, the existing process of physical movement of forms from intermediaries to Self-Certified Syndicate Banks ("**SCSBs**") for blocking of funds will be discontinued and only the UPI mechanism with existing timeline will continue, for a period of three (3) months or floating of five (5) main board public issues, whichever is later; and

(c) *Phase III:* Subsequently, final reduced timeline will be made effective using the UPI mechanism.

Some of the other relevant provisions of the Circular are as follows:

Channels for making application:

For the purpose of public issues, UPI would allow to block the funds at the time of application. With the introduction of UPI as a payment mechanism, multiple channels for making application in public issue by various categories of investors i.e. Retail Individual Investor; Qualified Institutional Buyer; Non-Institutional Investor, has been given for Phase I, Phase II and Phase III.

Timelines:

The revised indicative timelines for various activities in Phase I & II are specified in the annexures to the Circular. The timelines for Phase III will be notified subsequently.

Process of becoming a Sponsor Bank:

Banks desirous of becoming Sponsor Bank and to be eligible to be appointed as a Sponsor Bank by the Issuer shall complete the certain formalities, as detailed in the Circular.

Validation by Depositories:

The details of investor viz. PAN ID, DP ID / Client ID, entered in the Stock Exchange platform at the time of bidding, shall be validated by the Stock Exchange/s with the Depositories on real time basis.

Number of applications per bank account:

In order to ensure parity across the various channels for submitted applications, it has been decided by SEBI that an investor making application using any of the channel, shall use only his / her own bank account or only his / her own bank account linked UPI ID to make an application in public issues.

Obligations of the Issuer:

The issuer shall appoint one of the SCSBs as Sponsor Bank to act as a conduit between the Stock Exchanges and NPCI in order to push the mandate collect requests and / or payment instructions of the retail investors into the UPI.

CORPORATE LAWS

- **NEW COMPLIANCES AND PENALTIES INTRODUCED FOR COMPANIES UNDER COMPANIES ACT, 2013**

The President of India promulgated the Companies (Amendment) Ordinance, 2018 on November 02, 2018 ("**Ordinance**") in order to amend the Companies Act, 2013 ("**Act**"). The changes brought by the Ordinance are as follows:

a No company will be allowed to commence its business until (i) a declaration is filed by its director within six (6) months from the date of incorporation, declaring that every subscriber of MOA has paid the value of shares, agreed to be

taken by him; and (ii) until a verification of registered office of the company is filed with the Registrar within 30 days of the incorporation of the company.

Failure to comply with this requirement will render the company liable to a penalty of Rs. 50,000/- and every officer in default will be liable of Rs. 1,000/- per day till the default continues but not exceeding Rs. 1,00,000/-;.

b If the Registrar has reasonable cause to believe that the company is not carrying on any business, he can initiate the action to remove the name of the company from the Register of the Companies;

c Any alteration of the Articles of Association of the company which results into conversion of *'public'* company to a *'private'* company shall become valid only if approved by Central Government;

d Companies and every officer in default of such companies, offering shares at discount price, not in compliance with the Act, shall be liable to a penalty of an amount equal to the amount raised through such issue of shares or Rs. 5,00,000/-, whichever is less;

e Where any company fails to give notice to registrar of alteration in its share capital, such company and every officer who is in default shall be liable to a penalty of Rs. 1,000/- per day during which such default continues, or Rs. 5,00,000/- whichever is less;

f The time limit for registering *'charges'* has been decreased from three hundred (300) days to sixty (60) days from the date of creation of charge;

g Any person or the company, aggrieved by the order of the tribunal on the issue of correctness of information provided by the beneficial owner of shares to the company or failure of the beneficial owner of shares to provide relevant information to the company, shall make an application against such order within one (1) year of passing of such order of the tribunal;

h A person failing to provide the information of his beneficial ownership of shares to a company shall also be liable for imprisonment for one (1) year;

i Officers in default of the company shall also be made liable to pay a penalty of Rs. 50,000/- and a continuing penalty of Rs. 100/- per day for which the failure continues, upto a maximum of Rs. 5,00,000/-, in case of failure of the company to file its annual return; and

j A new penalty has been added for instances where a company or an officer in default of a company already been subjected to penalty under this Act, again commits such default within a period of three (3) years from the date of order imposing such penalty, it or he shall be liable for the for an amount equal to twice the amount of penalty provided for such default under the relevant provisions of this Act.

Several other penalties have also been added or amended by the Ordinance in the Act.

• CCI ALLOWS PARTIES IN COMBINATION TO WITHDRAW AND RE-FILE THE NOTICE OF COMBINATION

The Competition Commission of India ("**Commission**") via its notification dated October 09, 2018 amended the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. Some of the major changes are as follows:

a The time taken by the parties to submit the requisite details or additional information of the *'combination'* to the Commission and the time taken by the Commission to complete the proceedings regarding invalidation of combination notice shall be excluded from the period of 210 days which are counted from giving of notice of combination to the Commission, on completion of which, the combination comes into effect;

b The parties are now allowed to withdraw and refile the notice of combination. In case of such withdrawal and refiling, the fee already paid in respect of such notice shall be adjusted against the fee payable in respect of new notice

provided the new notice is given within three (3) months from the date of withdrawal; and.

c Earlier, it was the discretion of the Commission to ask for additional details or modification in previously provided details of the combination if it feels that such a combination will cause an appreciable adverse effect on competition in the market. Now, such a modification or additional details can be filed by the parties by their own discretion. No permission is required to be taken from the Commission.

IN THE COURTS

- **COURTS HAVE NO DISCRETION TO IMPOSE LESSER PENALTY WHILE ADMITTING INSUFFICIENTLY STAMPED DOCUMENTS**

In the case of case of Gangappa and Another ("**Appellants**") v. Fakkairappa ("**Respondent**"), the Supreme Court, while interpreting a provision in the Karnataka Stamp Act, 1957 ("**Act**"), observed that, while admitting insufficiently stamped documents, trial courts have no discretion to decide the quantum of penalty to be levied on such documents.

FACTS OF THE CASE

The Appellants entered into *'agreement to sell'* with Respondent which was not stamped adequately as per Karnataka Stamp Act, 1957. Thereafter, on denial by the Respondent to abide by the terms of agreement to sell, the Appellants filed suits, praying for specific performance of contract. The Principal Civil Judge impounded the *'agreement to sell'*, under the powers given to it by Section 33 of the Act, and directed the Appellants to pay the deficient portion of the stamp duty along with the penalty, which was decided by the Principle Civil Judge to be twice the deficient portion of the stamp duty. However, as per Section 34 of the Act, an amount equivalent to 10 times the value of the deficient portion of stamp duty, was required to be paid as penalty.

Aggrieved by the above judgment of the Principal Civil Judge, Respondent filed a writ petition in the High Court. The High Court directed the courts below to levy the penalty at 10 times of the deficient portion of the stamp duty. Aggrieved by the judgment of the High Court, this appeal was filed by the Appellants before the Apex Court.

ISSUE

Whether the trial court can exercise its discretion in imposing penalty on the deficient amount of stamp duty, at the rate less then what is prescribed under the provisions of the Act?

JUDGEMENT

The Supreme Court said that under Section 33 of the Act, the power is given to every person who has authority by law or by the consent of the parties to receive the evidence, or to any public officer, that if a deficiently stamped document is produced in front of them, they can impound such documents. A further power is conferred on such person or public officer under Section 34 of the Act, to order the payment of deficient amount of stamp duty along with a penalty of 10 times the deficient amount of stamp duty payable on such instrument.

The Supreme Court, while deciding upon this matter, held that the trial courts will fall under the ambit of Section 33 and 34 of the Act and cannot use their discretion to decide the quantum of penalty which is to be paid on deficiently stamped instruments. They have to impose a penalty of 10 times the deficient amount of stamp duty and cannot levy a penalty less then this. Though, the person paying the stamp duty has a right to approach the Deputy Collector to get a refund of the penalty under Section 38 of the Act.

However, in this particular case, keeping in mind the ends of justice and in the interest of time, the Supreme Court closed the matter by confirming the payment of deficit duty with the double penalty as imposed by the trial court which shall obviate the proceeding of approaching the Deputy Commissioner for reduction of penalty. The Court said that, *'the High Court has correctly interpreted the provisions of Section 33 but instead of prolonging the matter permitting the Appellant*

to deposit 10 times of penalty and thereafter to take recourse under Section 38, we, in the facts of the present case, close the proceedings regarding penalty on the agreements to sell by approving the direction of the trial court for payment of entire deficit duty and double the penalty'.