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Recent developments in India's corporate & commercial laws

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Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2024

MCA's new rules to facilitate reverse flipping for startups

On September 9, 2024, the Ministry of Corporate Affairs (**MCA**) introduced the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2024, which came into effect on September 17, 2024. These amendments aim to simplify the process of 'reverse flipping', a practice where startups that were initially incorporated abroad are relocating back to India due to relaxed regulations, better IPO opportunities, and increasing government incentives.

Previously, the merger of a foreign company with its Indian counterpart required approvals from the Reserve Bank of India (**RBI**) and the National Company Law Tribunal (**NCLT**) under Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. This often resulted in delays due to the lengthy NCLT approval process, slowing down the return of startups to India.

The amendment introduces Rule 25A(5), which allows foreign holding companies to merge with their Indian subsidiaries using the fast-track merger route under Section 233 of the Companies Act, 2013, bypassing the need for NCLT approval. Companies still need RBI approval, compliance with 'fast-track merger guidelines' under Section 233 of the Companies Act, and additional declarations if the foreign company is from a country sharing a land border with India. However, no RBI approval is required if the merger complies with the Foreign Exchange Management (Cross Border Merger) Regulations, 2018.

This change significantly reduces both the time and cost associated with the merger process, allowing startups to relocate their operations back to India more efficiently. The amendment is likely to encourage more companies, especially in the fintech sector, to return and capitalize on India's growing IPO market and regulatory support. Although the streamlined process is expected to benefit startups, ensuring that entities meet the specific conditions for RBI approval and other regulatory compliances remains crucial, particularly for companies based in sensitive regions like border-sharing nations. High-profile companies like PhonePe and Groww have already reversed flipped, and this regulatory easing is expected to accelerate the trend, boosting India's position as a global startup hub.

Amendments to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019

Simplifying share swap transactions in India

On August 16, 2024, the Government of India introduced amendments to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, aimed at simplifying cross-border share swap transactions. These changes facilitate the issuance or transfer of Indian equity instruments in exchange for foreign equity instruments, supporting the global expansion of Indian companies through mergers and acquisitions.

Under the previous regulations, Indian companies could only issue equity instruments to foreign investors in exchange for their equity instruments. This limitation created significant regulatory hurdles and restricted the scope for secondary share swaps, making it challenging for companies to engage in cross-border transactions. Additionally, the lack of tax neutrality further diminished the attractiveness of such share swap arrangements.

The recent amendments introduce Rule 9A, which permits Indian companies to issue equity instruments in exchange for foreign equity capital. This rule also allows for secondary share swaps between foreign investors and Indian companies, thereby increasing flexibility in the structuring of share swap transactions. However, these transactions will still need to comply with established valuation guidelines, ensuring that the pricing is fair and transparent.

These regulatory changes are expected to enhance the efficiency of share swap transactions, align Indian regulations more closely with global practices and create more avenues for mergers and acquisitions, particularly in the rapidly evolving fintech sector. However, despite the positive advancements brought about by these changes, certain challenges remain. Companies must ensure compliance with the new regulations, which may require careful navigation of tax implications for share swaps not conducted through mergers. Furthermore, ambiguities surrounding the treatment of secondary swaps could lead to uncertainty in their execution. This being said, the recent amendments represent a significant step toward facilitating share swaps in India, offering companies greater flexibility in structuring cross-border transactions. While the benefits of these changes seem to outweigh the challenges, businesses must remain vigilant and adaptable in response to the evolving regulatory landscape to fully leverage the opportunities presented by these new rules.

Amendments to Competition Act, 2002

Streamlining CCI's combination approval process

Effective from September 10, 2024, the Ministry of Corporate Affairs (**MCA**) notified changes to merger control regulations under the Competition Act, 2002, based on the Competition (Amendment) Act, 2023. These changes impact the criteria and processes for filing mergers and acquisitions, streamlining the approval process, and introducing new thresholds.

Prior to this amendment, combinations requiring Competition Commission of India (**CCI**) approval had to meet certain asset or turnover-based thresholds. The process was often time-consuming, with combination reviews taking up to 210 days, and certain acquisitions still requiring multiple CCI clearances.

Key aspects:

- **Deal value threshold:** Transactions with a deal value exceeding INR 2000 crore (approx. USD 240 million) and where the target has significant operations in India now require mandatory filings. This threshold is applicable even if the traditional asset or turnover thresholds are not met.
- **Streamlined timelines:** The CCI's approval period is now reduced from 210 to 150 days, with the initial review period shortened from 30 to 15 days. Certain transactions will be automatically approved upon filing, provided they meet the 'Green Channel' criteria.
- **De minimis exemption:** Combinations where the target's assets are less than INR 450 crore (USD 54 million) or turnover below INR 1250 crore (USD 150 million) in India are exempt from filing.
- **Exemptions and criteria:** Stock market acquisitions, certain minority acquisitions (less than 25% shareholding), and transactions with no change in control do not require CCI approval. Additionally, the 'Green Channel' route for automatic clearance has been codified, reducing the regulatory burden for transactions without competition risks.

These updates are designed to speed up approvals, reduce compliance burden, and ensure that high-value deals, especially in digital markets, do not bypass regulatory scrutiny. This reflects the Government's focus on capturing mergers involving data-sharing and privacy concerns. However, despite the reduced timelines, companies must ensure they comply with the new deal value thresholds and expanded criteria for business overlap evaluations, which now include affiliates and group entities. Transactions will now require careful evaluation to determine if they meet the new thresholds and benefit from the available exemptions.

SEBI's consultation paper on appointment of Public Interest Directors

Fostering shareholder participation in Market Infrastructure Institutions

In a move intended to foster shareholder participation in the appointment process of Public Interest Directors (**PIDs**), the Securities and Exchange Board of India (**SEBI**) released a consultation paper (**Paper**) inviting inputs regarding changes to the process of appointing such PIDs to Market Infrastructure Institutions (**MIIs**). The paper invites comments from the public on various issues such as remuneration, cooling-off period and revisiting the rigorous requirement of documentation for appointment and reappointment of PIDs.

MIIs are public utility infrastructure institutions, such as stock exchanges, clearing corporations and depositories. They provide critical market infrastructure for trading, settlement and record keeping and are responsible for ensuring fair and equal access to all market participants. While MIIs are incorporated like any other company under the Companies Act, 2013, they hold a higher status due to their nature and functions, which also translates to higher levels of accountability. PIDs play a pivotal role on the governing boards of MIIs, representing the interests of the broader public and ensuring that MIIs operate with the highest standards of transparency, integrity, and investor protection. Decisions taken by PIDs impact the governance and performance of the MIIs and consequently influence shareholders' interests and markets at large.

Notably, SEBI had constituted a Working Group (**WG**) to deliberate on the existing process of appointment of PIDs. The WG considered two alternatives:

- Having the shareholders' votes be the sole determinant for the PID appointment.
- Having both SEBI and shareholder approval as a requirement for the PID appointment.

The WG noted that conflicting choices regarding appointments proposed by the shareholders (who have vested interests in their companies, but do not owe a statutory duty to protect the interest of the markets at large) and by SEBI (the market regulator tasked with protection of investor interest) could undermine the regulator's decisions and expertise. The WG recommended that Non-Independent Directors (**NIDs**) should be allowed to serve as members of all statutory committees, including the Nomination and Remuneration Committee (**NRC**). This recommendation was implemented by SEBI pursuant to its circular dated June 25, 2024. Since the NRC is responsible for shortlisting and recommending names to the governing board of the MII, including NIDs on the NRC, the existing procedure would ensure adequate representation of shareholders in relation to the appointment process of PIDs. Consequently, the WG concluded that there was no need to change the process for appointing PIDs to the governing board of an MII and the present process of SEBI approval may continue.

Notwithstanding the WG's recommendations, SEBI considered it worthwhile to explore if the appointment process can benefit from greater involvement and participation of shareholders. Therefore, the Paper was issued.

Key aspects:

- **Current appointment process and reforms:** In terms of Schedule II, Part H (III)(1) of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018, PIDs are currently appointed by SEBI on recommendation of the NRC of the MIIs, with subsequent approval from the board of the respective MII. At present, the approval of shareholders of MIIs is not necessary for the appointment process. The Paper proposes two alternatives for the inclusion of shareholders in the appointment process, as follows:
  - Retain the existing process: SEBI solely approves the appointment of PIDs, with no direct involvement from shareholders.
  - Involve both SEBI and the shareholders: SEBI would first be issuing a No Objection Certificate (**NOC**) before shareholders give their approval. Final approval would then be required from SEBI.

  With respect to the second alternative, the Paper proposes that names shall be suggested by MIIs for a PID, for which NOC would be required from SEBI. Upon issuance of the NOC, MIIs shall seek shareholders' approval regarding the appointment of the PID, which will then be finally approved by SEBI. This proposal may lead to delays and increase compliance burden, on account of the several layers of approvals required (and potential conflicts). To address this possibility of delays, the Paper proposes a two-round exercise where if a name is not approved by the shareholders

within two rounds of selection, then SEBI will *suo motu* go ahead with appointment of the proposed PIDs.

- **Establishment of a High-Level Appointment Committee:** The Paper suggests another method to protect investor interest by establishing a High-Level Appointment Committee (**HLAC**) which would independently make decisions regarding names forwarded by MIIs. After such verification, SEBI will approve the names for appointment as PIDs.
- **Easing documentation:** The Paper proposes easing of documentation required for potential PID candidates. Currently, the selection process involves a comprehensive review of multiple candidates, who must submit detailed paperwork and go through multiple levels of scrutiny before SEBI takes a decision. It is a time-consuming and bureaucratic process that may discourage highly qualified professionals from seeking PID roles. The Paper proposes to ease the documentation process to address this issue by making the process more efficient while still ensuring thorough vetting.
- **Introduction of a fixed stipend:** The Paper also recommends a fixed stipend of INR 30 lakh per annum for PIDs which will be in addition to the sitting fees they currently receive. SEBI's reasoning behind this proposal lies in the increasing demands placed on PIDs, whose role is integral to maintaining the safety, efficiency, and governance standards of MIIs. By offering a fixed stipend, SEBI aims to attract and retain high-calibre individuals who may otherwise find the role financially unappealing, especially when compared to similar roles in other sectors such as banking, where fixed remuneration for independent directors is already a norm.
- **Reduction of cooling-off period:** In addition to these reforms, SEBI is also considering reducing the cooling-off period for PIDs between appointments to different MIIs. Currently, a 1-year cooling-off period is required before a PID can join another MII, with a longer 3-year cooling-off period before joining a subsidiary of their former MIIs. The Paper indicates that there is a shortage of skilled PIDs, and this blanket restriction limits the pool of available talent. By reducing the cooling-off period, SEBI hopes to allow experienced professionals to contribute to other MIIs without unnecessary delays while still avoiding potential conflicts of interest, particularly when moving between competing MIIs.

SEBI's proposals in this Paper, which were open for public comments, stem from the increasing complexity of governance structures within MIIs and the need to address concerns raised by both shareholders and market participants. Shareholder interests are central to this complexity since the decisions of PIDs impact the MII's financial performance. Yet, given the vital role of MII's in ensuring market integrity, they are expected to maintain governance standards that align with public interest, balancing their commercial objectives with investor protection. The PIDs, by design, serve as independent custodians of this balance, which necessitates an appointment process that is both rigorous and transparent. SEBI's Paper is a step towards finding this delicate balance.

Revised T+2 timeline for bonus issue trading

SEBI takes steps to promote greater market efficiency

On September 16, 2024, the Securities and Exchange Board of India (**SEBI**) issued Circular No 122 (**Circular**) to expedite and streamline the process of issuance and subsequent trading of bonus equity shares. In terms of Regulation 295(1) of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (**ICDR Regulations**), bonus issues must be implemented within 15 days of board approval. The implementation date refers to the date when the trading of bonus issue commences. Notably, this Circular comes into play pursuant to SEBI's observation in its consultation paper dated August 5, 2024, which noted that, while the ICDR Regulations prescribe overall timelines for implementation of bonus issues, there is a lack of specific provisions regarding the timelines for crediting and trading of bonus shares from the date of issue.

Previously, after a bonus issue was announced, the existing shares remained available for trading under the company's original International Securities Identification Number (**ISIN**), while the new bonus shares were credited to a temporary ISIN and were made available for trading approximately 2-7 working days from the record date. This practice resulted in a lack of uniformity regarding the timelines for a bonus issue and exposed the market for such shares to various risks, such as price swings and market volatility. The Circular expedites the bonus share trading process ensuring prompt crediting and implementation of bonus issue, thereby reducing the risk of market volatility.

Key aspects:

- The Circular requires companies to apply for an in-principle approval to the relevant stock exchange(s) within 5 working days of the board's approval of the bonus issue.
- Once the record date of the issue is set, the allotment must be recorded by the next working day. The company then informs the stock exchange(s) regarding the allotment and upon receiving acknowledgement/ notification from the stock exchange(s) noting the record date and the number of bonus shares to be issued, the company is required to furnish the necessary documents by the next working day to ensure the quick crediting of shares to shareholders' accounts.
- This process guarantees that bonus shares are available for trading 2 days post the record date, eliminating uncertainty regarding the timelines for these shares. This move will reduce delays and uncertainties that previously plagued the market due to unclear timelines.
- Notably, non-compliance with the Circular may attract penalties under SEBI's circular dated August 19, 2019, which imposes a fine of INR 20,000 per day of non-compliance with regulations pertaining to bonus issue of shares, till the date of compliance. The possibility of heavy monetary penalties ensures that the stock exchange(s) will strive to remain compliant with the Circular.

By expediting the process and reducing the time gap, SEBI aims to create a smoother and more predictable market environment, benefiting all stakeholders. As a consequence of this change, investors will now have faster access to their bonus shares, allowing them to trade these shares sooner. However, the faster crediting of bonus shares may lead to short-term volatility in the markets owing to a sudden influx of shares in a short period of time. Short-term investors may rush to sell their shares which could result in a temporary drop in price, or conversely, a surge in buying could cause prices to spike. Moreover, a spike in the availability of bonus shares in the market may lead to liquidity challenges, as the market may struggle to absorb the large volume of newly listed shares in a short span. If there are not enough buyers to accommodate the influx of shares, it could lead to a temporary liquidity crunch, impacting short-term market stability.

SEBI's Circular represents a significant improvement in the efficiency and predictability of the Indian secondary market. By reducing the time gap between the announcement of a bonus issue and the trading of bonus shares, simplifying the process, and aligning with global standards, these changes foster a more stable and attractive market environment. While potential challenges like short-term volatility and liquidity may arise, the benefits of a faster, more streamlined process are likely to outweigh these risks in the long run, enhancing investor confidence and promoting greater market efficiency.

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2024

IBBI fast-tracks the insolvency resolution process of real estate companies

In a move to fast-track the insolvency resolution process of real estate companies, the Insolvency and Bankruptcy Board of India (**IBBI**) has notified the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2024 on September 24, 2024.

These Regulations introduce an Interim Representative (**IR**), who will be act as a representative on behalf a class of creditors until the appointment of an Authorised Representative (**AR**).

The AR is an insolvency professional selected on the choice of the highest number of (individual) financial creditors in a class to act as their collective representative during CIRP. Section 21(6A)(b) of the Insolvency and Bankruptcy Code, 2016 (**Code**) provides that the AR shall be appointed by the NCLT prior to the first meeting of the Committee of Creditors (**CoC**), a step that causes significant delay in conducting the Corporate Insolvency Resolution Process (**CIRP**).

This amendment to the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2024 (**Regulations**) provides that the insolvency professional selected by the financial creditors will act as their IR, addressing the delay in appointment of the AR while simultaneously ensuring effective representation of individual creditors of a class by presenting their collective mandates during CoC meetings. This facilitates smoother operations within the insolvency resolution framework, addressing complexities that arise from diverse creditor interests.

The amendment confers the IR with the rights and responsibilities of an AR as outlined in Section 25A of the Code:

- To participate in CoC meetings, vote as per prior instructions of the creditors and file such instructions with the CoC
- To circulate the agenda and minutes of the CoC meetings to the creditors
- To not act against the interests of the creditors

UP RERA issues advisory directing developers to sign agreement for sale before demanding more than 10% of the unit cost from homebuyers

UP RERA reinforces homebuyer rights in terms of Section 13 of RERA, 2016

The Uttar Pradesh Real Estate Regulatory Authority (**UP RERA**) recently issued an advisory directing execution of a registered agreement for sale between the parties before the promoter(s) can demand more than 10% of the unit cost or before the allottee(s) can pay any amount beyond 10% of the cost of the unit. This advisory is intended to enhance trust, transparency and accountability in real estate transactions by securing homebuyer rights in terms of Section 13 of Real Estate (Regulation and Development) Act, 2016 (**RERA**).

Key aspects:

- The advisory reinforces the mandate of law under Section 13 of RERA, which outlines the requirement for developers and homebuyers to enter into a written agreement for sale of the unit before demand or payment of more than 10% of the unit cost.
- Section 13 of RERA had been incorporated to bring transparency and accountability to the real estate sector in India, crystallizing the legal rights homebuyer while protecting them from unreasonable demands for payment.
- The advisory recommends that the agreement between the real estate developer and homebuyer should cover several facets of the project's development such as details of construction of the buildings and flats, requirements for both internal and external development, payment plans, transfer of possession, etc.
- The agreement should also address the issue of interest rates in default provisions. It is necessary to ascertain the interest rate that will apply to the promoter and allottee in case of a default. The government sets these rates, which are equal to the MCLR plus 1% of the State Bank of India.
- To avoid conflicts and guarantee a just and responsible environment for promoters and homebuyers alike, the authority has mandated the registration of such agreements.

Tenant corporations in Maharashtra cannot regain protection after reduction in share capital

Reducing scope of protection for tenant corporations

The protection from unfair evictions and unreasonable rent enhancement under the Maharashtra Rent Control Act, 1999 (**Act**) extends to private and public companies and individuals alike. Section 3(1)(b) of the Act exempts application of the Act to premises let to companies having a share capital of more than INR 1 crore. Enhancing the scope of this exemption provision, the Bombay High Court, in the matter of ***Depe Global Shipping Agencies v. Mather and Platt (India) Ltd*** (Civil Revision Application No. 719 of 2023) recently clarified that a tenant corporation that forfeits its rent control protections by increasing its paid-up share capital will not be able to resume such protections by subsequently voluntarily reducing its share capital.

Rent control legislations were enacted in India to prevent unscrupulous enhancement of rents and unreasonable eviction of tenants. A landlord, otherwise entitled to regain possession on merely serving a termination notice, is confined to the grounds set out in Section 16 of the Act, provisions of which significantly reduce the scope of eviction, under a tenancy to which the Act applies. Additionally, on the ground of non-payment of rent, a landlord can file an eviction suit only after the expiry of 90 days.

In the instant case, the Respondent-tenant corporation, having share capital of more than INR 1 crore as on the date of the implementation of the Act (March 31, 2000), had subsequently reduced its share capital by way of a Scheme of Arrangement and Demerger sanctioned by an order of the Bombay High Court. Thereafter, the Petitioner-landlord issued a termination notice, which was resisted by the Respondent on the ground of regular payment of rent harbouring protection under the Act.

In its judgment, the Bombay High Court highlighted the objective of the exemption under Section 3(1)(b) of the Act that if an entity can afford to pay market rent it should be excluded from the ambit of rent protection. Observing that the demerger (resulting in the reduction of share capital) was merely a rejig of the Respondent's business, the Court 'lifted the corporate veil' and noted that the Respondent had not become incapable of paying market rent. As such, the Court held that mere voluntary reduction of share capital below INR 1 crore would not result in regaining the lost protection under the Act.

This order has significant implications for corporate real estate management. It enhances landlords' authority by confirming that companies losing protections under the Act cannot regain them through subsequent capital reduction. Landlords can now manage properties with greater confidence as eviction of the tenant would no longer be subject to the limited and exhaustive grounds enumerated in the Act. This decision will also gravely impact the structuring of rental contracts possibly creating a significant leverage in favour of landlords, compelling companies to carefully evaluate their capital structure decisions, given the significant long-term implications for their leasing arrangements and financial security.

While it remains to be seen, the application of the doctrine of 'piercing the corporate veil' may potentially be extended to exempt even a group company entity (that individually never exceeded the INR 1 crore threshold) from availing the benefit of protections under the Act.

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