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Is Nominee Director liable to retire by rotation?

Introduction.

Companies Act 2013 ('the Act') provides for management of companies by the board of directors on behalf of shareholders. The Act also provides for appointment and retirement/resignation of directors. Generally speaking, all the directors are appointed by shareholders or even if appointed by board, then approved by the shareholders at general meetings. The only exception to this rule is, appointment of nominee director.

As per explanation to sub-section (7) of section 149 of the Act, Nominee director is a director who is appointed by the board on the recommendation of a financial institution, government or any other person to represent his interestⁱ. Further as per sub-section (3) to section 161 board of directors have the power to appoint nominee directorⁱⁱ. Therefore, the Act does not mandate requirement of obtaining shareholder approval for appointment of nominee director. Hence there arises a question that whether nominee directors are liable to retire by rotation like all other directors as provided under sub-section (6) of section 152 of the Act. In this article we shall try to find out an answer to this question.

Retirement by rotation – the Actⁱⁱⁱ

Sub-section (6) of Section 152 of the Act says that unless articles of association provide for retirement of all directors, minimum 2/3rd of the total directors excluding independent directors shall be liable to retire by rotation every year. An express exclusion from this section is provided only to the independent directors and to no one else. Therefore, literally speaking, all directors including nominee directors and excluding independent directors shall be considered for calculating number of directors liable to retire by rotation.

Retirement by rotation - Articles of association.

As stated above appointment of nominee director is subject to provisions of Articles of Association ['AOA']. The AOA should have a provision relating to appointment and retirement of nominee director and whether or not he shall be liable to retire by rotation shall depend in this provision. If the AOA states that nominee director appointed under sub-section (3) of section 161 of the Act shall not be liable to retire by rotation, then the nominee director cannot be counted while calculating total number of directors for calculating 2/3rd directors as it will be in violation of provisions of AOA. But if AOA is silent, then he will have to be consider in this calculation as the Act does not provide any express exemption to nominee director.

Liable to retire by rotation - managing director/whole time director vis a vis nominee director.

Reliance on provisions of AOA in this regard gives rise to one more question. At times, AOA of the companies provide exemption to managing director or whole-time director from being liable to retire by rotation. In such a case, if nominee director is not provided with such exemption as per AOA but MD/WTD is entitled to exemption, then nominee director shall be liable to retire by rotation whereas, MD/WTD shall not be liable. But what if the articles provide this exemption to both, nominee director as well as MD/WTD and the remaining directors are less than 2/3rd in number? In such a situation, if all directors excluding nominee director and MD/WTD are only made liable to retire by

rotation then compliance with AOA will result in non-compliance of the Act which is not acceptable.

In such a case, the company will have to make MD/WTD liable to retire by rotation as he is appointed by shareholders and the nominee director is appointed on the recommendation of an outsider pursuant to an agreement.

Conclusion.

From all the above discussion, we can say that the Act does not provide any express exemption to nominee director from being liable to retire by rotation, but such exemption can be available to him by virtue of provisions in AOA of the company. If AOA contains such provision giving exemption to nominee director, then he is safe. Otherwise, if AOA is silent then he is also liable to retire by rotation like all other directors.

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<https://www.taxmann.com/research/company-and-sebi/top-story/10501000000024486/is-nominee-director-liable-to-retire-by-rotation-experts-opinion>

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ⁱ Explanation. —For the purposes of this section, “nominee director” means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

ⁱⁱ Subject to the articles of a company the board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by central government or the state government by virtue of its shareholding in a government company.

ⁱⁱⁱ (6) (a) Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall--

(I) be persons whose period of office is liable to determination by retirement of directors by rotation; and
(ii) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(b) The remaining directors in the case of any such company shall, in default of, and subject to any regulations in the articles of the company, also be appointed by the company in general meeting.

(c) At the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed in accordance with clauses (a) and (b) and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

(d) The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.
(e) At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

Explanation. -- For the purposes of this sub-section, "total number of directors" shall not include independent directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company.



Understanding Shorter Notice Consent in calling Annual General Meeting

Introduction

Companies Act, 2013, ['the Act'] provides for convening of Annual General Meeting (AGM) of companies. The Act provides for compliances and timelines for activities to be undertaken before AGM, during, AGM and after the AGM. One key aspect of pre-AGM compliance is issuing the notice of AGM. The Act provides that AGM shall be convened by giving 21 clear days' notice to all the members of the company. Further the Act also provides that an AGM can be called by sending a notice for a period shorter than 21 days to the members of the company. Further the Act provides for the procedure for taking a shorter notice consent for calling AGM. Further the Act also provides for shorter notice consent for certain other purposes in the Act.

In this article we shall focus on the compliance requirements for obtaining consent for a shorter notice period of members of company for convening AGM and shorter notice consent for sending of financial statements etc in terms of provisions of section 136 of the Act.

Shorter notice consent for AGM in case of public companies

The notice period for convening an Annual General Meeting (AGM) or any other General Meeting is specified under Section 101 of the Companies Act, 2013 which is as follows:

(1) A general meeting of a company may be called by giving not less than clear twenty-one [twenty-one days] notice either in writing or through electronic mode in such manner as may be prescribed:

Provided that a general meeting may be called after giving shorter notice than that specified in this sub-section if consent, in writing or by electronic mode, is accorded thereto—

(i) in the case of an annual general meeting, by not less than ninety-five per cent. of the members entitled to vote thereat; and

(ii) in the case of any other general meeting, by members of the company—

(a) holding, if the company has a share capital, majority in number of members entitled to vote and who represent not less than ninety-five per cent. of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or

(b) having, if the company has no share capital, not less than ninety-five per cent. of the total voting power exercisable at that meeting:

Provided further that where any member of a company is entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, those members shall be taken into account for these purposes of this sub section in respect of the former resolution or resolutions and not in respect of the latter.]

As per section 101 of the Act consent of not less than ninety-five per cent. of the members entitled to vote thereat is required to call an AGM by giving notice of less than 21 clear days.

So, for example (a) If a company has twenty members, 95% of the membership equates to nineteen members. Therefore, for a valid shorter notice period, consent must be obtained from these nineteen members.

b) If a company has nineteen members, 95% of this number is approximately 18.05 members. In this case, consent for a shorter notice period must be obtained from all nineteen members, as the regulations require consent from at least 95% of the members entitled to vote. So, for calling AGM at a shorter notice in case of public companies consent of atleast 95% of the members of the company is required.

Shorter notice consent for AGM in case of private companies

Section 101 is also applicable to private companies. But as per the Ministry of Corporate Affairs ('MCA') notification dated 05th June 2015ⁱ, Section 101 is applicable to private companies unless the articles of association of the private company specify otherwise.

So, if the articles of association of private company stipulate a notice period shorter than 21 days for calling an AGM, it takes precedence over Section 101 of the Act.

However, in the absence of specific provisions in the articles of association of private company, section 101 of the Act mandates a 21-day notice period for closely held private companies. In this case a shorter notice consent of members would be required for convening AGM. Moreover, if the articles of association of a private company require a notice period of three days for calling AGM then this would be in compliance with Section 101 of the Act and no additional Shorter Notice consent is needed from members specified in Section 101.

Shorter notice consent – sending of copy of financial statements.

Section 136 of the Act also provides for shorter consent for the purpose of sending a copy of financial statements and other documents required to be placed in general meeting. Section 136 of the Act reads as follows:

(1) *“a copy of the financial statements, including consolidated financial statements, if any, auditor’s report and every other document required by law to be annexed or attached to the financial statements, which are to be laid before a company in its general meeting, shall be sent to every member of the company, to every trustee for the debenture-holder of any debentures issued by the company, and to all persons other than such member or trustee, being the person so entitled, not less than twenty-one days before the date of the meeting:*

Provided that if the copies of the documents are sent less than twenty-one days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent if it is so agreed by members-

(a) holding, if the company has a share capital, majority in number entitled to vote and who represent not less than ninety-five per cent. Of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or”

(b) having, if the company has no share capital, not less than ninety five percent. of the total voting power exercisable at the meeting:

Section 136 of the Act states that if a company wants to send a copy of financial statements along with other documents to be placed at AGM at a shorter notice then consent of members would be required to be taken as per section 136. To explain the above provisions with the help of an example if a company has three members, a majority will consist of two members. These members must collectively represent not less than ninety-five per cent of such part of the paid-up share capital of the company as gives a right to vote at the meeting. If such consent is taken, then only company can send the documents referred to in section 136 of the Act at a shorter notice.

Anamolies

As seen above section 101 and section 136 both provide for sending notices to members for calling AGM and dispatch of financial statements along with other documents 21 days prior to the meeting. Further section 101 and section 136 both provide that a company may call a general meeting or send a copy of financial statements along with other documents as specified on a shorter notice if consent in this regard is taken from members of the company.

But it needs to be highlighted here that section 101 and 136 provide for a different criterion for taking shorter notice consent from members.

Section 101 of the Act provides for shorter notice consent of the majority of members as against this section 136 of the Act provides for consent of majority of shareholders holding 95% of voting rights.

So even if a company has taken an approval for calling AGM by taking a shorter notice consent of members as per section 101 that consent cannot be equated with shorter notice consent taken required to be taken under section 136 for dispatch of financial statements along with other documents required to be placed at AGM. Thus, even if compliant with Section 101, separate shorter Notice consent under Section 136 is mandatory.

Further it needs to be highlighted that compliance with section 136 with regard to shorter notice consent is not exempted for private companies. As we have seen above in case of private companies if the articles of association provide for a shorter period of notice for calling AGM then it is possible to call meeting by sending notice at a shorter period specified in articles but this shorter time period would not be applicable to shorter notice consent required under section 136 of the Act.

Hence even if articles of association of private companies provide for calling AGM at shorter notice consent separate shorter notice consent would be required to be taken for sending financial statements along with other documents under section 136.

Conclusion

All companies must carefully consider notice periods shorter than 21 days for convening AGM and compliance with section 136. The criteria specified under Section 101 for

Shorter Notice consent differs from that under Section 136. Failure to obtain Shorter Notice consents renders resolutions passed at such meetings invalid.

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ⁱ https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf



Are Listed companies making disclosures updating material development?

Introduction:

Regulation 30 of the Securities Exchange Board of India (Listing Obligation and Disclosure Requirement), Regulations, 2015 ('SEBI LODR') read with Schedule III of SEBI LODR provides for disclosure of events or information by listed entities to stock exchanges. This regulation casts responsibility on the listed entities to make disclosures of any event or information which, in the opinion of the board of directors of the listed company are material. Regulation 30 (7) of SEBI LODR provides as follows: "*The listed entity shall, with respect to disclosures referred to in this regulation, make disclosures updating material developments on a regular basis, till such time the event is resolved/ closed, with relevant explanations.* Hence as per SEBI LODR, continuous updates on disclosures already made to stock exchanges are required to be made so that market participants are updated in this regard.

In this article we are going to ascertain and understand as to what can be considered as 'material developments' for the purpose of giving updates on already disclosed information to stock exchange.

Analysis

The term 'material development' is not defined in SEBI LODR. As per Merriam Webster dictionary- the word 'material' would mean - '*having real importance or great consequences.* So, it means any development on the already disclosed event or information which has a greater consequence or is a significant development on the already disclosed event or information, will be considered as 'material development.' To understand this further let us see few enforcement orders of SEBI in this regard.

In the case of Asian (Hotels) North Limitedⁱ ('company'), SEBI had alleged company for violation of regulations 30(7) of SEBI LODR. In this order, the company on November 13, 2020, disclosed to the stock exchange, restructuring plan approved by its Board of Directors. Further in this matter one of the lenders i.e. Yes Bank had issued a Loan Recall Notice dated February 17, 2022, against the company, and declared the company's account as NPA with effect from December 20, 2020. The company assailed this action of Yes Bank before Hon'ble Delhi High Court. This loan recall notice as well as related litigation were not disclosed by the company to the stock exchange at all. In this regard Asian (Hotels) North argued that "*the default of the Company and declaration of NPA as alleged by Lenders, had been principally stayed by the Hon'ble Delhi High Court and is sub-judice before the Hon'ble Delhi High Court. Aforesaid issues were yet to be decided by the Hon'ble Delhi High Court, even at the interim stage, thus, there was no occasion to make any disclosure regarding declaration of the Company's accounts as NPA.*"

In response to this SEBI stated that, "*Loan recall Notice, declaration of loan as NPA by the lenders and filing of suit by company before Hon'ble High Court of Delhi etc. are **intricately linked** with the implementation of the Restructuring Plan which had been disclosed earlier by the Company. Therefore, as per the requirement of Regulation 30(7), Noticee was required to make the disclosures regarding the same and make such disclosure regarding developments on a regular basis until the event is resolved. As per Regulation 30(7), even the said litigation, though sub judice, was required to be disclosed until decided by the court or final resolution was there.*" In this case SEBI stated that as it was already disclosed that

company would be undergoing a restructuring then it meant that the debts would be settled by all lenders. But when Yes Bank decided not to be a part of restructuring plan and seek the repayment of debts this event would mean that there would be a change to restructuring plan. Hence this was required to be disclosed.

Further in one more adjudication order of AGI Greenpac Limitedⁱⁱ ('Noticee') it was seen that, Noticee had made a disclosure to the exchanges dated October 31, 2022, which mentioned that the Resolution Professional had issued a letter of intent to the noticee confirming that the committee of creditors of HNG Industries Ltd ('HNGIL') had approved resolution plan submitted by the Noticee and declared Noticee as the successful resolution applicant in the Corporate Insolvency Resolution Process of HNGIL. Further Noticee mentioned that as per regulations of Competition Commission of India (CCI) they had to file certain forms with CCI with regard to such proposed transaction with HNGIL. Further Noticee repeatedly made disclosure to NSE, that it had had filed certain forms with Competition Commission of India (CCI) as per the Regulations of CCI. However CCI in its order dated March 15, 2023 had stated as follows: *'The Commission in its meeting held on February 9, 2023, considered the information on record, details provided in the Notice and the responses filed by the Acquirer, and formed a prima facie opinion that the Proposed Transaction is likely to cause an appreciable adverse effect on competition(AAEC) in relevant market(s) in India. Accordingly, in terms of Section 29(1) of the Act, a show-cause notice dated 10 February 2023 (SCN) was issued to the Acquirer, wherein the Acquirer was directed to respond in writing, within 30 days of the receipt of the SCN, as to why investigation in respect of the Proposed Transaction should not be conducted.'* Noticee had not disclosed to stock exchange about this SCN issued by CCI. Noticee had failed to disclose the material developments with respect to SCN issued by CCI. Here SEBI mentioned that *"CCI had issued the SCN after forming an opinion about the proposed transaction which was likely to cause an adverse effect. Thus, the Noticee should had disclosed the issuance of the SCN as it could had led to material impact."*

Noticee contended that receipt of SCN from CCI, was only a prima facie opinion given by CCI against proposed transaction and the issuance of the said SCN did not even culminate into an investigation by the CCI against it. Also Noticee mentioned that as soon as CCI approved the proposed transaction same was promptly informed to SE on March 16, 2023 of the receipt.

SEBI stated that 'CCI issued the SCN after forming an opinion that the proposed transaction was likely to cause an adverse effect. Thus, the Noticee should had disclosed the issuance of the SCN as it could had led to material impact. Further, the Noticee should had disclosed the same as a material development.'

Particularly important to note in this adjudication order that SEBI was of the view that once the disclosure of the CCI order to exchange had been deemed material, any challenge, litigation with respect to the order which **had the effect of changing the outcome of the CCI order, thus would be material.**

So, after understanding the views taken by SEBI, we can say that any event /information which has capacity to change the outcome of what was already disclosed to stock exchange can be considered as material development. Further one of the understandings is also that the original event/ information should be intricately linked to the material developments around it in order to be disclosed to stock exchange.

In the adjudication order of Future Enterprise Limited ('FEL')ⁱⁱⁱ it was seen that FEL was a Future Group Company. Arbitration Proceedings was initiated by Amazon on October 05, 2020 before Singapore International Arbitration Centre ('SIAC') wherein the promoters of the FEL, were respondents. The said Arbitration proceedings were inter alia with respect to the composite Scheme of Arrangement between Future Group and Mukesh Dhirubhai Ambani (MDA) Group. Thereafter Amazon obtained an interim order from 'SIAC' on October 25, 2020, preventing the transaction's progression.

Now FEL had earlier provided a disclosure on August 29, 2020, about the composite scheme between Future group and MDA Group under the provisions of regulation 30 of LODR Regulations to exchanges. However, FEL delayed disclosing information about arbitration initiation by Amazon against such composite scheme to exchanges until November 1, 2020, resulting in alleged violations of SEBI LODR Regulations.

The FEL had defended itself by stating that commencement of the Arbitration Proceedings was not considered a material event by the FEL and thus not disclosed. FEL further contented that as it was neither a party to any agreement nor to arbitration proceedings initiated by Amazon because, Future Retail Limited, a group company of the FEL had filed its objections to the Arbitration Proceedings on October 06, 2020 before SIAC.

SEBI stated that 'the 'Scheme' which was inter-alia the subject matter of the arbitration proceedings was already disclosed by the FEL to exchange as a material event and therefore the arbitration proceedings and its outcome having an effect of stay on scheme between Future Group and MDA Group, should had been disclosed by the FEL.

The key learnings from this matter highlight the importance of timely and transparent disclosure of material events by listed companies, the necessity of a clear process for assessing the materiality of information, and strict adherence to regulatory requirements like SEBI LODR.

In one of the Settlement orders of PC Jewellers limited ^{iv}, it was seen that PC Jeweller Limited ('PCJ') violated regulation 30(1), 30(4)(i) and 30(7) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 by failing to regularly update the stock exchanges about material developments regarding its proposed buy-back offer. Specifically, PCJ had not disclosed the State Bank of India's ('SBI') objections to the buy-back offer in a timely manner, even though these objections constituted material information.

On May 10, 2018, the Board of Directors of PCJ had approved the proposal of "buy-back" of its fully paid-up equity shares from its shareholders through the tender offer route. On July 07, 2018, PCJ wrote to SBI for providing 'no objection certificate' ('NoC') for its proposed "buy-back" offer and on same day SBI issued its objection to PCJ. Letter issued by SBI dated July 07, 2018, wherein SBI had refused permission to PCJ to go ahead with its "buy-back" offer and stated that –*"we advise that the present priority of the lenders is towards reduction of overall Bank exposure while maintaining adequate liquidity in the company to support its operations. Accordingly we are not in favour of the proposed buyback plan which envisage outflow of Rs. 424.00 crs of cash/funds in the form of buyback. We therefore advise that Bank had decided to not to permit to go ahead with its proposed buyback plan.*

On July 12, 2018, PCJ again wrote to SBI for granting NoC for its proposed “buy-back” offer to which SBI showed its inability to accede to the request of PCJ for granting NoC to its proposed “buy-back” offer.

On July 13, 2018, PCJ had made a corporate announcement that its “buy-back” offer was withdrawn due to non-receipt of NoC from its bank SBI.

Exchanges came to know about this event of objections raised by SBI for buyback offer vide its letter dtd July 7, 2018 when they sought clarification from SBI. PCJ had not disclosed the information about the objection of SBI to BSE as well NSE.

PCJ had admitted before BSE that *‘it had not appraised its board of the necessary approvals that would be required for successful initiation of “buy-back” offer. This action of PCJ was not in keeping with the principles of full disclosures and transparency, even to its board, especially in view of the fact that its management was aware that the consent of the bank was required as a pre-condition as mentioned in the loan covenants.* SEBI stated that PCJ should have notified BSE about refusal of NoC by SBI on July 07, 2018, instead of waiting till end of the period of postal ballot, as it constituted material information in regard to the ongoing voting for approving its “buy-back” proposal.

When NSE mentioned to PCJ that they should have informed the exchange about the developments of buy back offer & SBI’s Objection to the same, PCJ contended before NSE that the objection raised by SBI was not material.

SEBI observed that PCJ had not disclosed the objection raised by SBI vide letters dated July 07, 2018 and July 12, 2018 for its proposed “buy-back” offer and on July 13, 2018, it had disclosed to BSE and NSE that in view of the non-receipt of the requisite NoC from SBI, its board of directors had decided to withdraw the “buy-back” offer. SEBI had found that non-disclosure of SBI’s objections by PCJ was a material information and required to be disclosed to the stock exchanges as prescribed under the regulation 30(1), 30(4)(i) and 30(7) of the LODR Regulations.

On perusal of above referred orders, what can be considered as ‘material development’ of already disclosed event or information would differ on case to case. Hence it is necessary to keep track of updates or developments happening in relation already disclosed events or information. Once they are identified it needs to be ascertained on following parameters whether they are material developments or not?

1. **Intricately Linked Events:** Developments having consequences that are going to affect the previously disclosed material events should be updated as material developments.
2. **Potential Impact on Previously Disclosed Information:** Any event or information that has the potential to change the outcome of what was already disclosed to the stock exchange should be considered material. This includes updates that might affect the company’s financial health, strategic initiatives, or regulatory compliance.

Conclusion:

The cases discussed highlight the common pitfalls where companies misinterpret or fail to recognize the need for continuous disclosure, particularly when events are still under adjudication or subject to regulatory scrutiny. Listed Companies need to understand that

the materiality of an event is not limited to its initial disclosure but extends to any subsequent developments that could influence the event's outcome. Listed entities must put in place systems for identifying material developments and diligently update the stock exchanges about ongoing developments until the issues are resolved or closed.

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ⁱ https://www.sebi.gov.in/enforcement/orders/apr-2024/adjudication-order-in-the-matter-of-asian-hotels-north-limited_83032.html

ⁱⁱ https://www.sebi.gov.in/enforcement/orders/apr-2024/adjudication-order-in-the-matter-of-agi-greenpac-limited_83117.html

ⁱⁱⁱ https://www.sebi.gov.in/enforcement/orders/mar-2022/adjudication-order-in-respect-of-future-enterprises-limited-in-the-matter-of-future-enterprises-limited_56883.html

^{iv} https://www.sebi.gov.in/enforcement/orders/nov-2019/settlement-order-in-respect-of-pc-jeweller-limited-in-the-matter-of-pc-jeweller-limited_44871.html



Section 14 of IBC in no manner impact invocation of Bank Guarantee during pendency of the Moratorium

In the matter of Mitsubishi Heavy Industries Limited (Appellant) vs Punj Lloyd Limited (Respondent) and others at National Company law Appellate Tribunal (NCLAT) 9 August 2024

Facts of the Case:

- In 2015, a contract was entered between Indian Oil LNG Private Limited (IOLPL) and Mitsubishi Heavy Industries Limited (the appellant) on 15 September 2015. The appellant subcontracted parts of the work to Punj Lloyd Ltd. (Respondent No. 1/Corporate Debtor/CD)
- As per the contract's general conditions, the Corporate Debtor (CD) was required to provide an unconditional and irrevocable Bank Guarantee as security for proper and timely performance of the obligations. A Performance Bank Guarantee worth approximately Rs. 47.7 Crores was issued by State Bank of India in favor of the appellant.
- The agreed mechanical completion date under the contract with CD was 23 March 2018, but the appellant issued a Mechanical Completion Certificate with a completion date of 31 January 2019.
- On 8 March 2019, the Corporate Insolvency Resolution Process (CIRP) was initiated against CD before the National Company Law Tribunal (NCLT).
- On 30 October 2019, the appellant invoked the Performance Bank Guarantee due to fundamental breaches of the contract, including delays in achieving mechanical completion and failure to inspect and repair leakage in the LNG Tank during the defect liability period.
- On 13 November 2019, the Resolution Professional (RP) of CD filed an application before the NCLT, seeking directions under Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) to restrain the appellant from encashing the Performance Bank Guarantee.
- *NCLT referred to the NCLAT judgment in C&C Construction Ltd. v. Power Grid Corporation of India Limited (26 July 2021), where it was held that the moratorium period under Section 14 of the IBC does not cover performance bank guarantees.*
- On 27 May 2022, NCLT directed the liquidation of the CD as a going concern.
- Despite this, the RP's application to restrain the appellant from encashing the Performance Bank Guarantee was allowed by an order dated 30 October 2023, against which this appeal has been filed.

Arguments of the Appellant

- The Performance Bank Guarantee (PBG) issued by State Bank of India in favor of the appellant was irrevocable and unconditional.
- The CD had agreed to complete the work by the mechanical completion date, but there was a 10-month delay. During the defect liability period, the appellant sent emails to CD to inspect leakage in the LNG tank, but these requests were refused, resulting in a breach of contract by CD.

- As a result, the appellant was forced to invoke the PBG on 30 October 2019.
- The RP filed an application on 13 November 2019, seeking to restrain the appellant from encashing the PBG. However, the application was not maintainable because:
 - NCLT lacked jurisdiction to determine the legality of the PBG invocation or adjudicate contractual disputes between the appellant and CD.
 - The PBG is an independent contract, and courts should not interfere with its invocation except in exceptional circumstances, which did not exist in this case.
- Since the bank guarantee was unconditional and irrevocable, the appellant was not required to prove losses at the time of invocation. The appellant had valid claims due to:
 - Delay in mechanical completion.
 - Failure to cure defects during the defect liability period
- The Defect Liability Period was 30 months from the mechanical completion date or 24 months from the issuance of the completion certificate. During this period, the CD was required to conduct searches, tests, or trials to determine the cause of any defect.
- The NCLT's order restraining the appellant from encashing the PBG was without jurisdiction.
- The PBG has been explicitly excluded from the moratorium under Section 14 of the IBC, following an amendment by Act 26/2018 effective 6 June 2018.
- As such, the moratorium under Section 14 of the IBC did not apply to the PBG, and the appellant was fully entitled to invoke the PBG even after the insolvency proceedings against CD which began on 8 March 2019.
- In similar cases within the same CIRP, NCLT rejected applications filed by the RP seeking to restrain the invocation of guarantees by IOCL and GAIL, but in this case, the NCLT allowed the RP's application, resulting in an inconsistent ruling.
- The NCLT was aware that the issue was pending before the NCLAT in the case of C&C Construction Ltd., which was decided on 26 July 2021, confirming that the moratorium period under Section 14 does not cover performance bank guarantees, meaning the RP's application should have been rejected

Arguments of the Respondent

- NCLT had ample jurisdiction to adjudicate the application filed by the RP regarding the bank guarantee.
- NCLT previously considered similar applications filed by the RP in cases involving IOCL, GAIL, and Triveni-Mersens and passed orders on the issues related to bank guarantees, indicating that the appellant cannot now claim that NCLT lacks jurisdiction .
- The orders passed by NCLT in the IOCL, GAIL, and PLL cases were not overturned by the NCLAT, and the Triveni-Mersens order applied directly to this case. In the Triveni-Mersens case, NCLT held that once a Mechanical Completion Certificate is issued, the bank guarantee should be discharged.
- Even if the bank guarantee was termed unconditional and irrevocable, this did not mean the appellant could invoke it arbitrarily or outside the scope of contractual provisions. Any claim during the Defect Liability Period should have been

quantified and communicated to the Corporate Debtor (CD) with sufficient evidence, which the appellant failed to do.

- As per Clause 7.1.2, once a Mechanical Completion Certificate is issued, the contractor is no longer responsible for that part of the work, unless there is damage caused by the CD's ongoing activities.
- In this case, the Mechanical Completion Certificate was issued on 3 September 2018, so the CD could not be held responsible for the alleged leakage. The invocation of the bank guarantee could lead to asset stripping of the CD.
- The argument that the bank guarantee is not an asset of the CD should be rejected, as State Bank of India extended the bank guarantee based on the CD's collateral. If the bank guarantee was wrongfully invoked, the State Bank of India would claim the same from the CD as a creditor, causing the CD to suffer the ultimate loss.
- NCLT has jurisdiction to examine all aspects related to bank guarantee invocation, including factual aspects. Given the special equities in favor of the CD, the bank guarantee should not have been invoked, as doing so would cause irretrievable injury to the CD.

HELD:

- NCLAT referred the following cases:
 - *State Bank of India Vs. V. Ramakrishnan & Anr.*
 - *Himadri Chemical Industries Ltd. Vs. Coal Tar Refining Co.*
 - *Standard Chartered Bank Vs. Heavy Engineering Corporation Limited & Anr.*
- *It was noted that the issue regarding the invocation of performance bank guarantees during the moratorium period is well established in law. Also noted that the definition clarifies that "Security Interest" does not include PBG. Effective from June 6, 2018, Section 14(3) explicitly excludes security in a contract of guarantee from the provisions of Section 14(1) of the IBC. It is well settled that Section 14 does not affect the right of a beneficiary to invoke a bank guarantee during the moratorium. The disputes between the beneficiary and the party who requested the bank guarantee are immaterial and do not affect invocation. Invocation of a bank guarantee may only be restrained on the grounds of irretrievable injury and special equity.*
- NCLT did not allow the application filed by the Resolution Professional (RP) based on exceptions highlighted by the Supreme Court in Standard Chartered Bank. Instead, NCLT stated that the appellant failed to prove any fault on the part of the CD or quantify its claim
- NCLT allowed the application on the grounds that the appellant did not prove a default of contract by the CD.
- According to the Supreme Court in *Standard Chartered Bank*, disputes raised by the contractor regarding the invocation of an unconditional and irrevocable bank guarantee are not to be considered.
- The NCLT erred by allowing the application to restrain the appellant and other banks from invoking the bank guarantee, rendering its order unsustainable. The appeal was allowed, overturning the NCLT's decision.

This article is written by **Esha Tandon – Deputy Manager** -eshatandon@mmjc.in and **Arti Ahuja Partner** – artiahuja@mmjc.in



MEDIA COMMENTS FOR THE MONTH OF SEPTEMBER & OCTOBER 2024

Sr. No.	Topic for Media Comment	Link
1.	SEBI probes into insider trading, front running matters jump in FY24	https://www.moneycontrol.com/news/business/markets/sebi-probes-into-insider-trading-front-running-matters-jump-in-fy24-12811952.html
2.	UPI now mandatory for bids up to ₹5 lakh in public debt issues	<p>https://www.cnbctv18.com/personal-finance/sebi-new-rules-november-1-ipo-public-issues-debt-securities-apply-upi-mandatory-5-lakh-19482036.htm</p> <p>Mandating UPI for bids up to ₹5 lakh will ease the process, potentially drawing more retail investors into the debt segment."</p> <p>Joshi added that this comes at a time when UPI transactions have surged to ₹1,669 lakh crore, according to data from the Ministry of Finance.</p>
3.	Notification amending Prohibition of Insider Trading	<p>https://x.com/YatinMota/status/1838073662982828258?mx=2</p> <p>In the new avtar trading plan provisions inter alia specify revised timelines for trading plan along with option to deal in securities either on the basis of price or quantity. Trading plan provisions are designed to suit thousands of designated persons from around 6000 listed entities. Implementation of this would bring ease in compliance.</p>
4.	'MF Lite' framework for passive funds	<p>https://theprint.in/economy/sebi-decides-to-introduce-new-asset-class-mf-lite-framework-for-passive-funds-2/2291578/</p> <p>SEBI's Bold Moves: New High-Risk Asset Class, 'MF Lite' Framework, And Slashed Rights Issue Timeline — 5 Key Announcements Times Now (timesnownews.com)</p>

		<p>https://www.news18.com/business/markets/sebi-board-meeting-outcome-madhavi-puri-buch-mutual-fund-lite-9069956.html</p> <p>SEBI's Bold Moves: New High-Risk Asset Class, 'MF Lite' Framework, And Slashed Rights Issue Timeline — 5 Key Announcements (msn.com)</p> <p>Sebi's initiative in reducing timelines (i.e. rights issue to be completed in 23 days approx from the existing time required of 317 days) for rights issue is a welcome step. With reduced timelines, corporates can have faster access to funds through rights issues</p>
5.	New Investment Product	<p>https://www.livemint.com/industry/sebi-board-meeting-g-padmanabhan-committee-recommendations-rbi-mfs-investors-rias-regulations-11727699210526.html</p> <p>A lot of awareness would be required amongst these persons also to ensure that amended provisions are effectively implemented</p>
6.	Faster rights issue	<p>SEBI board meeting highlights: Faster rights issue, new asset class, T+0 settlement, but mum on F&O - BusinessToday</p> <p>SEBI's initiative in reducing timelines (i.e. rights issue to be completed in 23 days approx from existing time required of 317 days) for rights issue is a welcome step. With reduced timelines corporates can have faster access to funds through rights issue. Revised rights issue timelines would make it a preferred option for fund raising as it gives an opportunity to all existing shareholders to be a part of growth story of company,</p> <p>sebi on rights issue: Sebi board meet: Rights issue to be completed within 23 working days - The Economic Times (indiatimes.com)</p>
7.	SEBI circular on audio visual clip for all DHRPs to be effective from Oct 1 2024	<p>https://investmentguruindia.com/newsdetail/comment-on-sebi-circular-on-audio-visual-clip-for-all-dhrps-to-be-effective-from-tomorrow-oct-1-by-makarand-m-joshi-founder-mmjc-and-associates338210</p>

		SEBI' decision to submit audio visual clip mandatorily for all DRHPs from tomorrow is a benchmark initiative. In an age of diminishing reading habits and increased use of smart gadgets this initiative would further help share crucial information about companies bringing public issues in an authentic manner.
8.	DRHPs to carry audio visuals to explain features	<p>http://epaper.deccanchronicle.com/articledetailpage.aspx?id=18339122</p> <p>The initiative would further help share crucial information about companies bringing public issues in an authentic manner.</p>
9.	Amendment in Companies (Prospectus and Allotment of Securities) Rules, 2014,	<p>Explained: What's the new norm that increases transparency for 60% of India Inc, and why concerns were raised with MCA (moneycontrol.com)</p> <p>The need for greater transparency was felt because 60 percent of the corporate ecosystem was functioning with the paper form of securities (share certificates). Securities in paper form are subject to manipulations in transfer, transmission, KYC or know your customer process and so on, leading to legal disputes. This leads to wastage of a lot of resources. Securities in demat form are subject to a periodic KYC process which makes it easy to identify and trace the actual shareholder. A standardised transfer and transmission process makes the same quick, and brings transparency. Demat shares can also be pledged through the demat system easily. This will bring ease of doing business, which would further help improve India's ranking at the Financial Action Task Force also. (The FATF is an international grouping formed to combat money laundering.)</p>
10.	SEBI easing compliance norms for RAs, IAs	<p>Sebi easing compliance norms for RAs, IAs welcomed; some worry about bad actors flooding the scene (moneycontrol.com)</p> <p>Sebi's initiative in reducing timelines (i.e. rights issue to be completed in 23 days approx from the existing time required of 317 days) for rights issue is a welcome step. With reduced timelines, corporates can have faster access to funds through rights issues</p>

**NEWS UPDATES/AMENDMENTS FOR THE MONTH OF
SEPTEMBER & OCTOBER 2024**

Sr. No.	News Updates/Amendments	Link & Brief Summary
	NEWS	
1	Indian audit regulators spar on proposed change for companies	<p>https://legal.economictimes.indiatimes.com/news/regulators/indian-audit-regulators-spar-on-proposed-change-for-companies/113608263?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etlegal_news_2024-09-24&dt=2024-09-24&em=aGFzdGl2b3JhQG1tamMuaW4=</p> <p>India's accounting regulators are clashing over a proposal to make parent company auditors responsible for consolidated financial statements.</p>
2	Banks to push for change in IBC rules amid fears of promoters gaming system	<p>https://cfo.economictimes.indiatimes.com/news/banks-to-push-for-change-in-ibc-rules-amid-fears-of-promoters-gaming-the-system/113684413?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etcfo_news_2024-09-26&dt=2024-09-26&em=aGFzdGl2b3JhQG1tamMuaW4=</p> <p>Banks are urging changes to insolvency regulations to prevent promoters from manipulating their companies' size to qualify as MSMEs and retain control during bankruptcy proceedings.</p>
3	IBBI Tweaks norms to speed up insolvency resolution in housing	<p>https://legal.economictimes.indiatimes.com/news/regulators/ibbi-tweaks-norms-to-speed-up-insolvency-resolution-in-housing/113724978?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etlegal_news_2024-09-28&dt=2024-09-28&em=aGFzdGl2b3JhQG1tamMuaW4=</p> <p>The insolvency watchdog has tweaked regulations to allow the hiring of an interim representative for a group of creditors like homebuyers until the bankruptcy court approves the final appointment to expedite the rescue of stressed real estate.</p>

4	SEBI mulls standardize format for disclosure of change in risk-ometers of MF schemes	<p>https://legal.economictimes.indiatimes.com/news/regulators/sebi-mulls-standardise-format-for-disclosure-of-change-in-risk-ometers-of-mf-schemes/113748519?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etlegal_news_2024-09-28&dt=2024-09-28&em=aGFzdGl2b3JhQG1tamMuaW4=</p> <p>To further enhance the pictorial representation of risk, SEBI has proposed that the risk o meter of mutual fund scheme be depicted using a colour scheme.</p>
5	NFRA at six: top auditors urge stronger engagement and tech use amid rising debarments	<p>https://cfo.economictimes.indiatimes.com/news/tax-legal-accounting/nfra-at-six-top-auditors-urge-stronger-governance-and-tech-use-amid-rising-debarments/113833171?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etcfo_news_2024-10-01&dt=2024-10-01&em=aGFzdGl2b3JhQG1tamMuaW4=</p> <p>As the NFRA marks six years of enhancing audit quality in India, top auditors call for stronger governance engagement, technological adoption and a remedial approach.</p>
6	SEBI tightens F&O framework to curb speculative trading	<p>https://legal.economictimes.indiatimes.com/news/regulators/sebi-tightens-fo-framework-to-curb-speculative-trading/113860493?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etlegal_news_2024-10-02&dt=2024-10-02&em=aGFzdGl2b3JhQG1tamMuaW4=</p> <p>To curb speculative trading, markets regulator has put in place a stricter framework for equity index derivatives by increasing the minimum contract size and mandating upfront collection of option premiums.</p>
7	SEBI introduces new stress testing methodologies for equity derivatives segment	<p>https://legal.economictimes.indiatimes.com/news/regulators/sebi-introduces-new-stress-testing-methodologies-for-equity-derivatives-segment/113860457?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etlegal_news_2024-10-02&dt=2024-10-02&em=aGFzdGl2b3JhQG1tamMuaW4=</p>

		<p>02&dt=2024-10-02&em=aGFzdGl2b3JhQG1tamMuaW4=</p> <p>Market regulator has introduced new stress testing methodologies for the equity derivatives segment to better account for changing market dynamics and assess risks.</p>
8	Company registration decline 21% in Sept, LLPs rise 8%	<p>https://cfo.economictimes.indiatimes.com/news/strategy-operations/company-registrations-decline-21-in-sept-llps-rise-8/113891328?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etcfo_news_2024-10-03&dt=2024-10-03&em=aGFzdGl2b3JhQG1tamMuaW4=</p> <p>New company incorporations in India fell by almost 21% in September compared to last year, marking the third consecutive month of decline.</p>
9	Banks shouldn't use group entities to circumvent rules, proposes RBI	<p>https://legal.economictimes.indiatimes.com/news/regulators/banks-shouldnt-use-group-entities-to-circumvent-rules-proposes-rbi/113946389?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etlegal_news_2024-10-05&dt=2024-10-05&em=aGFzdGl2b3JhQG1tamMuaW4=</p> <p>The RBI has proposed that banks should be barred from using group entities to circumvent regulations applicable to them.</p>
10	Stockbrokers may participate in the G-Secs market, proposes SEBI	<p>https://legal.economictimes.indiatimes.com/news/regulators/stock-brokers-may-participate-in-the-g-secs-market-proposes-sebi/113946329?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etlegal_news_2024-10-05&dt=2024-10-05&em=aGFzdGl2b3JhQG1tamMuaW4=</p> <p>The regulatory framework issued by the relevant authority will specify how stock brokers operating on NDS-OM handle policy ,eligibility, risk management, investor grievance ,inspection , enforcement, and claims</p>
11	NFRA warns auditors on negligence in audit of group financial statements, says	<p>https://cfo.economictimes.indiatimes.com/news/tax-legal-accounting/nfra-warns-auditors-on-negligence-in-audit-of-group-financial-</p>

	must comply with SA 600 and Companies Act	statements-says-must-comply-with-sa-600-and-companies-act/113933614?action=profile_completion&utm_source=Mailer&utm_medium=newsletter&utm_campaign=etcfo_news_2024-10-05&dt=2024-10-05&em=aGFzdGl2b3JhQG1tamMuaW4= The NFRA has issued significant warning about gross negligence and audit failure in the audits of Group Financial from several well know companies.
	Amendments/Circulars/ Consultation Papers	
1	NSE Circular	https://nsearchives.nseindia.com/web/sites/default/files/inline-files/Circular_for_custodian_for_notfied_partie_s_NSECML_202426.pdf NSE Circular on Intimation of credit of Dividend into attached bank accounts of notified parties under Special Court (TORTS) Act 1992 Exchange is in receipt of additional letter from the Office of the Custodian, Department of Financial Services dated June 12, 2024, advising listed entities regarding identification of notified parties and intimation to the office of custodian whenever online dividend payment is credited into bank account of notified parties by the listed entities.
2	Master Circular	https://www.sebi.gov.in/legal/circulars/sep-2024/master-circular-on-surveillance-of-securities-market_86929.html Master Circular on surveillance of securities market This master circular includes information contained in all the circulars pertaining to surveillance of securities market at one place.
3	SEBI Circular	https://www.sebi.gov.in/legal/circulars/sep-2024/usage-of-upi-by-individual-investors-for-making-an-application-in-public-issue-of-securities-through-intermediaries_86972.html Usage of UPI by individual investors for making an application in public issue of securities through intermediaries

		<p>Detailed newsletter on above circular in now available on mentioned link: https://www.mmjc.in/usage-of-upi-by-individual-investors-for-making-an-application-in-public-issue-of-securities-through-intermediaries/</p>
4	NSE Circular	<p>https://nsearchives.nseindia.com/web/sites/default/files/inline-files/25-09-2024.pdf NSE Circular on enforcement action on Merchant Bankers for Market Maker's non-participation in SME segment.</p> <p>The NSE circular mandates Merchant Bankers to ensure Market Makers' participation in the SME segment for at least three years, with graded penalties for non-compliance, ranging from advisory notices to a six-month debarment. These actions aim to maintain liquidity and investor confidence in SME securities while holding Merchant Bankers accountable for regulatory breaches.</p> <p>Detailed newsletter on above circular in now available on mentioned link: https://www.mmjc.in/enforcement-action-on-merchant-bankers-for-market-makers-non-participation-in-sme-segment/</p>
5	SEBI Circular	<p>https://www.sebi.gov.in/legal/circulars/sep-2024/reduction-in-the-timeline-for-listing-of-debt-securities-and-non-convertible-redeemable-preference-shares-to-t-3-working-days-from-existing-t-6-working-days-as-an-option-to-issuers-for-a-period-of-_87014.html</p> <p>SEBI circular on reduction in the timeline for listing of debt securities and Non-convertible Redeemable Preference Shares to T+3 working days from existing T + 6 working days (as an option to issuers for a period of one year and on a permanent basis thereafter such that all listings occur on a T+3 basis).</p> <p>SEBI has decided to reduce the timeline for listing public issues of debt securities and NCRPS to T+3 working days.</p>

		Detailed newsletter on above circular is now available on mentioned link: https://www.mmjc.in/sebi-circular-on-reduction-in-timeline-for-listing-of-debt-securities-and-non-convertible-redeemable-preference-shares-ncrps/
6	Consultation paper	https://www.sebi.gov.in/reports-and-statistics/reports/sep-2024/consultation-paper-on-the-proposal-to-exempt-certain-transactions-from-trading-window-restrictions_87021.html Consultation paper on the proposal to exempt certain transactions from trading window restrictions. It is proposed that certain transactions such as subscription to Non-Convertible Debentures and similar other instruments, which meet the guiding principles, maybe exempted from trading window restrictions . The comments/ suggestions may be submitted latest by October 17, 2024.
7	SEBI Amendment	https://www.sebi.gov.in/legal/regulations/oct-2024/securities-and-exchange-board-of-india-infrastructure-investment-trusts-third-amendment-regulations-2024_87230.html Securities and Exchange Board of India (Infrastructure Investment Trusts) (Third Amendment) Regulations, 2024
8	SEBI Amendment	https://www.sebi.gov.in/legal/regulations/oct-2024/securities-and-exchange-board-of-india-real-estate-investment-trusts-third-amendment-regulations-2024_87228.html Securities and Exchange Board of India (Real Estate Investment Trusts) (Third Amendment) Regulations, 2024
9	SEBI Circular	https://www.sebi.gov.in/legal/circulars/oct-2024/relaxation-from-compliance-with-certain-provisions-of-the-sebi-listing-obligations-and-disclosure-requirements-regulations-2015_87323.html . SEBI, vide circular dated October 7, 2023, had relaxed the applicability of regulation 36(1)(b) of the SEBI LODR Regulations for Annual General Meetings and regulation

		<p>44(4) of the LODR Regulations for general meetings(in electronic mode)held till September 30, 2024.</p> <p>This relaxation is extended till Sept 30,2025.</p> <p>Detailed newsletter on above circular is now available on mentioned link: https://www.mmjc.in/sebis-extended-relaxation-on-compliance-with-lodr-regulations/</p>
10	NSE/BSE Circular	<p>https://nsearchives.nseindia.com/web/sites/default/files/inline-files/Circular%20for%20SSE%20disclosure%20timeline%20extension.pdf</p> <p>https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20241008-9</p> <p>BSE/NSE Circular on extension of timeline to submit Annual Disclosures and Annual Impact Report to Social Stock Exchange (“SSE”)</p> <p>Time period for submission of annual disclosures by Social Enterprises on SSE under Regulation 91C(1) of SEBI (LODR) Regulations, 2015 and Annual Impact Report under Regulation 91E(1) of SEBI (LODR) Regulations, 2015, for FY 2023-2024 has been extended from October 31, 2024 to January 31, 2025.</p> <p>This circular is issued in line with SEBI circular dtd Oct 7,2024</p>

