Swift India
CORPORATE SERVICES LLP

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CHANGE IN NAME FROM SWIFTINDIAINC CORPORATE SERVICES LLP AS ON 07.02.2017

Swift e-Bulletin
Edition 32/20-21
Week – February 22nd to February 26th

Quote for the week:

"Freedom is not worth having if it does not include the freedom to make mistakes."

- Mahatma Gandhi

Introduction

We welcome you to our weekly newsletter!

The 'Swift e-Bulletin' - weekly newsletter, covers all regulatory updates and critical judgements passed during the week. We hope that you liked our previous editions and found it to be of great value in its content. We want this newsletter to be valuable for you so, please share your feedback and suggestions to help us improve.

In the wake of COVID-19, the various regulatory authorities have been granting many relaxations, exemptions and amendments to the various legislations by regulatory authorities to ease out the operations during this time of crisis.

Further, various regulatory authorities have been proactive in bringing significant regulatory changes in recent challenging times. This week's newsletter covers various Circulars/notifications issued by certain regulatory authorities such as, the Ministry of Corporate Affairs ("**MCA**"), the Securities and Exchange Board of India ("**SEBI**") and the International Financial Services Centres Authority ("**IFSCA**") and critical judgements and orders passed by the National Company Law Tribunal (**"NCLT"**), SEBI, Supreme Court and High Court.

We have prepared a comprehensive summary for quick reference of the aforesaid updates and Judgements / orders issued during the week of February 22, 2021 to February 26, 2021.

Thank you,
Swift Team

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REGULATORY UPDATES

MCA UPDATES

1. **MCA amends Companies (Specification of definitions details) Rules, 2014 vide Notification dated February 19, 2021**

- These rules shall be called **Companies (Specification of definitions details) Second Amendment Rules, 2021** and shall come into effect on **April 01, 2021.**

- In furtherance of ease of doing business initiative the Ministry of Corporate Affairs ("**MCA**") vide this Gazette Notification has prescribed the class of Companies which ***shall not be considered as Listed Company*** henceforth in the context of Companies Act, 2013 ("**CA 2013**"). They are:

  - Public companies which have not listed their equity shares on a recognized stock exchange but have listed their:
    - *Non-Convertible Debt Securities ("**NCD**") issued on Private Placement basis in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008;* ***or***
    - *Non-Convertible Redeemable Preference Shares ("**NCRPS**") issued on Private Placement basis in terms of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013;* ***or***
    - *Both the categories of as mentioned above.*
  - *Private Companies which have listed their NCD on Private Placement basis on a recognized stock exchange in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008;*
  - *Public Companies which have not listed their equity shares on a recognized stock exchange but whose equity shares are listed on a stock exchange in a jurisdiction as specified in sub-section (3) of Section 23 of the Act which defines stock exchanges in permissible foreign jurisdictions or such other jurisdictions, as may be prescribed.".*

To read the Notification in detail, please click here.

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SEBI UPDATES

1. **SEBI imposes Pre-expiry Margin on commodities under the Alternate Risk Management Framework vide Circular dated February 23, 2021**

- SEBI had vide its Circulars dated October 01, 2015 and July 26, 2019 had prescribed norms related to Pre-Expiry margins. In light of an unprecedented event of negative final settlement price in the crude oil futures markets in the recent past SEBI had prescribed an Alternate Risk Management Framework ("**ARMF**") that would be applicable in case of near zero and/or negative prices for any underlying commodities/futures vide Circular dated September 21, 2020. Pursuant to clause 3.2 of the aforesaid Circular, Clearing Corporations had to identify commodities susceptible to the possibility of near zero and negative prices.

- The matter of negative crude oil price event was deliberated upon in the Risk Management Review Committee ("**RMRC**") of SEBI. In this regard, one of the suggestions of RMRC was that Indian Exchanges should consider introducing some mechanism to encourage significant reduction of Open Interest as the contract approaches the expiry date.

- In line with the recommendations of the RMRC, SEBI has decided in consultation with Clearing Corporations ("**CC**") that pre-expiry margins shall be imposed on cash settled contracts wherein the underlying commodity is deemed susceptible to possibility of near zero and/or negative prices as identified by exchange/CC under ARMF circular. In case of these contracts, pre-expiry margins shall be levied during the last five trading days prior to expiry date, wherein they shall increase **by 5% every day.**

- This Circular shall become effective from the first trading day of the month of **April 01, 2021.**

  To read the Circular in detail, please click here.

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IFSCA UPDATES

1. **IFSCA enacts mechanism for recognition of a Custodian of Assets/Securities vide Circular dated February 24, 2021**

- With a view to facilitate a vibrant ecosystem for custodial services in GIFT-IFSC, IFSCA has decided to enact a mechanism for recognition of a custodian of assets/securities.

- Any entity registered and regulated in India as a custodian with the Securities and Exchange Board of India shall be permitted to provide custodial services in **GIFT-IFSC**, by establishing a branch at GIFT-IFSC subject to prior approval by the Authority and shall comply with the following conditions:

  - *The entity shall adequately ring fence the operational, technological and financial aspects of the branch in GIFT-IFSC from its domestic operations, and*
  - *The entity shall ensure financial segregation by allocating funds to the tune of USD 700,000 towards its IFSC branch. The entity shall submit a declaration to the Authority in this regard*

- Any entity regulated as a custodian in a foreign jurisdiction, shall be permitted to provide custodial services by establishing a branch at GIFT-IFSC subject to prior approval by the Authority and shall comply with the following conditions:

  - *The entity is from a Financial Action Task Force ("**FATF**") compliant jurisdiction.*
  - *The entity is registered as a custodian and regulated by a securities market regulator in its home jurisdiction.*
  - *The entity shall adequately ring fence the operational, technological and financial aspects of the branch in GIFT-IFSC from its overseas operations*
  - *The entity shall ensure financial segregation by allocating funds to the tune of USD 700,000 towards its IFSC branch. The entity shall submit a declaration to the Authority in this regard*
  - *The entity should have a minimum net worth of USD 7 million*

- Any entity regulated as a capital market intermediary in a foreign jurisdiction, shall be permitted to provide custodial services by establishing a branch at GIFT-IFSC. subject to prior approval by the Authority and shall comply with the following conditions:

- *The entity is from a Financial Action Task Force compliant jurisdiction*
- *The entity is registered as a capital market intermediary and regulated by a securities market regulator in its home jurisdiction*
- *The entity shall adequately ring fence the operational, technological and financial aspects of the branch in GIFT-IFSC from its overseas operations*
- *The entity shall ensure financial segregation by allocating funds to the tune of USD 3 million towards its IFSC branch. The entity shall submit a declaration to the Authority in this regard*
- *The entity should have a minimum net worth of USD 35 million.*

- Any entity not falling under any of the above categories shall be permitted to provide custodial services by establishing a subsidiary at GIFT-IFSC subject to prior approval by the Authority and shall comply with the following conditions:

  - *The entity is from a Financial Action Task Force compliant jurisdiction*
  - *The subsidiary should have a net worth to the tune of USD 70 million. The entity shall submit a declaration to the Authority in this regard.*

- Additional requirements to be taken care of by the entities are:

  - *The entity shall obtain a certificate of recognition from the Authority prior to commencement of operations of its branch or subsidiary, whichever is applicable. All the other fees applicable to a custodian in IFSC shall be applicable to such a branch or subsidiary of the entity*
  - *An entity desirous of obtaining a certificate of recognition as a custodian shall submit an application form provided at* ***Annexure I*** *to this circular, along with supporting documents. The application shall be accompanied with a fee of USD 1000 and a recognition fee of USD 10,000. In the event the Authority refuses to grant recognition to the applicant, the recognition fee shall be refunded to the applicant. The certificate of recognition granted by the Authority shall be valid for a period of three years from the date of grant of recognition or its renewal.*
  - *The branch office shall have adequate mechanisms for the purposes of reviewing, monitoring, and evaluating the controls, systems, procedures and safeguards and shall appoint a compliance officer who shall be responsible for monitoring the compliance of the Act, rules and regulations, notifications, guidelines, instructions, etc., issued by the Authority or the Central Government.*

To read the Circular in detail, please click here.

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JUDGEMENTS/ ORDERS

NCLT

1. **National Company Law Tribunal allows the Restoration of M/s. ACMOS India Private Limited**

National Company Law Tribunal, New Delhi Bench **("Tribunal")** accepts the appeal filed by the shareholders of the M/s. ACMOS India Private Limited **("Appellant Company")** under section 252 of the Companies Act, 2013 **("the Act")** and allows the restoration of the Appellant Company.

The Appellant Company had been struck off from the Register of Companies by Registrar of Companies **("RoC"),** NCT of Delhi and Haryana due to non-filing of financial statements and annual returns from financial years 2016-17 onwards, in accordance with section 248 of the Act and had not filed application under section 455 of the Act for obtaining status of Dormant Company.

The learned counsel of Appellant Company submitted that the failure to file the annual returns by the company was due to inadvertence and lack of professional advice on the same, however all the assets of the Appellant Company were intact during the relevant period and the Appellant Company had never been defunct.

In order to support his plea, the learned counsel placed the audited accounts for the years 2016-17 onwards, copy of Income Tax Returns from financial year 2015-16 onwards, and copy of Bank statements of the relevant period before Tribunal. Further, RoC expressed its no objection to the restoration of the Appellant company.

Based on facts presented, the Tribunal was satisfied that during the relevant period, the Appellant Company was carrying its business activities and was a going concern. Hence, Tribunal passed the restoration order subject to payment of costs of INR 50,000/- to the Prime Minister's Relief and filing of all statutory returns by the Appellant Company.

To read the order in detail, please click here.

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SEBI

1. **Order in the matter of Vayaa Builder and Developers Private Limited and Two Directors**

The Securities and Exchange Board of India **("SEBI")** had received complaints against Vayaa Builder and Developers Private Limited **("Noticee")** and it was alleged that the company had mobilized fund from investors through different land/plot allotment scheme under the garb of a real estate business and thereafter company had closed its office and failed to repay the investors their invested amount.

In this regard, SEBI appointed Adjudicating officer (AO) to conduct adjudication proceedings against the noticee and based on the information available AO issued Show Cause Notice **(SCN)**. It was alleged that Noticee was mobilizing funds which was in the nature of running an unregistered Collective Investment Scheme **("CIS")** and which is fraudulent practice under SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ("**PFUTP Regulations, 2003**").

During the examination Noticee provided various documents and stated that they had neither launched any scheme nor raised money from public. After examining the documents provided by the Noticee and documents available with MCA, AO observed that the activity carried on by Noticee prima facie satisfied the four requirements of CIS as defined under section 11AA of the SEBI Act. AO further noted as per the provisions of Regulation 4 (2) (t) of PFUTP Regulations 2003, the raising of funds by the Noticee under its'Scheme' without seeking registration from SEBI or filing any offer document as required under the CIS Regulations amounts to illegal mobilization of funds and therefore the Noticees have violated the PFUTP Regulations, 2003.

After taking into consideration all the facts and circumstances of the case SEBI imposed penalty under Section 15HA of the SEBI Act, 1992 for violation of the provisions of Section 12(1)(B) of the SEBI Act, 1992 read with Regulation 3 of CIS Regulations and Regulation 4(2)(t) of PFUTP Regulations INR 15,00,000/- (INR Fifteen Lacs Only) on Noticee and two Directors.

To read the order in detail please, click here.

HIGH COURT

1. **Central Electricity Regulatory Commission (CERC) was directed by the Delhi High Court to consider and dispose of the application filed by Clean Solar Power Bhadla Private Limited**

Clean Solar Power Bhadla Private Limited	**Petitioner**
Solar Energy Corporation of India Limited & ORS.	**Respondents**

Date of Judgement: February 22, 2021

Petition filed by Clean Solar Power Bhadla Private Limited, seeking a direction be issued to Solar Energy Corporation of India Limited to give full legal effect to the Change in Law Provision of the Statutory Power Purchase Agreements which allegedly triggered on account of the Change in Law Event i.e. imposition of Safe Guard Duty by way of notification. The petitioner had been constrained to approach the Delhi High Court in view of the fact that the Central Electricity Regulatory Commission (**"CERC"**) is not functional in the absence of a Member (Legal) and further submits that an application in the petition is still pending before the CERC, which is not taken up for consideration.

Such being the case, it was brought to the notice of the Delhi High Court that the Member (Legal) for CERC has affirmed and it was informed that the CERC is likely to commence functioning shortly.

Considering the facts of the case, the Delhi High Court disposed of the said petition by directing the CERC to take up for consideration and dispose of the application filed by Clean Solar Power Bhadla Private Limited expeditiously.

To read the Judgement in detail, please click here.

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2. **Court dismissed the appeal filed by Hindustan Zinc Limited considering it in the category of extreme cases where the provision of CPC should be applied.**

Hindustan Zinc Limited	**Appellant**
Durha Construction Private Limited	**Respondent**

Date of Judgement: February 24, 2021

Appellant - Hindustan Zinc Limited had challenged the application filed by the Durha Construction Private Limited under Code of Civil Procedure (CPC) that the defence of the appellant has been struck off, for failure to comply with the order passed under CPC. Considering this, a suit for recovery was filed by the Durha Construction Private Limited, contending that it had received a work order from M/s. Bharat Heavy Electricals Limited for erection and commissioning of 80 Mega Watt Capacity Power Plant.

The first and subsequent application filed by the respondent got dismissed by the Joint Registrar and another application filed thereafter was rejected. However, in a Chamber appeal the said application was allowed and was specifically directed the appellant – Hindustan Zinc Limited to discover, in accordance with law and as provided in the specified form, the documents being the work protocols entered into by the appellant/defendant with M/s. BHEL pertaining to such work protocols which had a direct bearing on the work which was sub contracted by the appellant to the respondent.

The Court observed that the work protocols were executed at relevant time and the documents were in the possession of the appellants and hence it was obligatory to have discovered them and if not available, would have explained through an affidavit, as to why the documents were no longer in its power and possession. The Court further stated that since appellant has not given any explanation, it was clear that appellant is refusing to discover the said documents.

Considering the facts of the case, the Court was of the view that it is an extreme case where the provision of CPC should be applied. The Court further dismissed the appeal on the grounds that it found no infirmity in the challenged order or found any merit in the appeal, as the conduct of the appellant as noticed in the case clearly bring it within the category of extreme cases, where there is contumacy on the part of the defendant or a willful attempt to disregard the order of the court as laid down by the Supreme Court in Babbar Sewing Machine Company vs. Trilok Nath Mahajan (Supra).

To read the Judgement in detail, please click here.

SUPREME COURT

1. **Madras High Court Arbitration Centre issued Order directing that, the Application filed by the Contractor under the MSMED Act, will stand closed by the Facilitation Council, Pune.**

GR Green Life Energy Private Limited	**Petitioner**
Leitwind Shriram Manufacturing Private Limited	**Respondent**

Date of Judgement: February 22, 2021

GR Green Life Energy Private Limited, who being a Contractor to provide services under the Development Agreement to set up a Wind Farm Project in Sangli District in Maharashtra, had filed a Civil Appeal challenging the Order passed on an Application filed under Section 11 of the Arbitration and Conciliation Act, 1996 by the Madras High Court in Original Petition of 2019.

Disputes arose between the parties to the Wind Farm Project had entered into a Development Agreement, with respect to claims raised by GR Green Life Energy Private Limited, which led to issuance of legal notice seeking payment of outstanding dues. However, the Leitwind Shriram Manufacturing Private Limited, being the respondent, rejected the allegations and contended that the Contractor had failed to provide services as agreed under the Development Agreement, and further contended that the said Contractor was also liable to refund amount with interest and to pay the liquidated damages.

The arbitration clause of the Development Agreement was invoked by the respondent and nominated its arbitrator and also filed a petition before the Madras High Court, praying to Court to appoint an arbitrator. However, subsequently, the Contractor got itself registered under Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act") and filed an application for resolution of disputes before the Facilitation Council, Pune.

Considering the facts of the case, a Sole arbitrator was appointed to adjudicate on all the claims and counter claims made by the parties to the Development Agreement and the proceedings were conducted by the Madras High Court Arbitration Centre in accordance with its Rules. Order was issued in this respect by the Madras High Court Arbitration Centre by directing that, the Application filed by the Contractor under the MSMED Act, will stand closed by the Facilitation Council, Pune, even though Section 24 of the MSMED Act gives overriding effect to the MSMED Act, it would not be applicable in this case, since there is no provision under this Act to deal with counter-claims filed against the supplier-contractor. The Appeal stands disposed of in the afore-mentioned terms.

To read the Judgement in detail, please click here.

2. **Supreme Court modified the Order of the High Court to the extent all disputes arising out of the Contract Agreement shall be conducted in accordance with the Alternative Dispute Resolution Act of Bhutan, 2013 with the seat of arbitration at Thimphu.**

Punatsangchhu – 1 Hydroelectric Project Authority, Bhutan	**Appellant**
Larsen & Toubro Limited	**Respondent**

Date of Judgement: February 22, 2021

A Contract Agreement was executed between the Appellant and the Respondent – Contractor for the construction of Diversion Tunnel, Intake and Desilting Arrangement including Hydro-mechanical Works of the Punatsangchhu-I Hydro-electric Project located in Wangdue Phodrang District in Bhutan. However, disputes arose between the parties with respect to certain claims. In this respect, the Kingdom of Bhutan enacted the Alternative Dispute Resolution Act, 2013 (“the Bhutan Act”) to provide for settlement of disputes through arbitration.

The Supreme Court disposed of the Civil Appeal basis the view of the consensus arrived between the parties, the Order of the High Court stands modified to the extent all disputes arising out of the Agreement shall be conducted in accordance with the Alternative Dispute Resolution Act of Bhutan, 2013 with the seat of arbitration at Thimphu. However, it was further ordered that, the Tribunal will be at liberty to conduct some of the hearings, in consultation with the parties, at such venues as may be convenient.

To read the Judgement in detail, please click here.

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