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About Us

Established in 1993, Dhir & Dhir Associates is a full service law firm with a pan India presence in prime cities of New Delhi, Mumbai, Hyderabad, Bengaluru and with network of alliance across India and abroad, which gives the benefit to the clients of a single window service provider, to deal with all kinds of matters within the country and cross-border transactions under one umbrella. The firm also has an international presence with a representative office in Japan. With over 100 professionals including lawyers, insolvency professionals, chartered accountants, company secretaries, cost accountants, MBAs and engineers, the firm is adept in handling complex legal, commercial and financial matters.

The firm and its partners have been recognized as the leaders in "Restructuring and Insolvency" and "Dispute Resolution", and have also been highly ranked for "Banking and Finance", "Projects, Infrastructure& Energy", "Technology, Media and Telecommunication", "Project Finance", "Corporate /M&A", "Financial Service Regulatory" and "Private Equity" in leading legal publications including Chamber and Partners, Legal 500, IBLJ, IFLR1000 and AsiaLaw Profiles.

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Committee of Creditors are the Decision Makers - Court Perspective

By Mr. Sachin Gupta, Partner, Mr. Amir Ali Bavani, Senior Associate

Insolvency and Bankruptcy Code (IBC / Code) is a time-bound process for restructuring and revival of a Debtor Company, which involves the Committee of Creditors (CoC), Interim Resolution Professional (IRP) / Resolution Professional (RP) and the Adjudicating Authority (AA). IBC is a welcoming legislation, which has brought in a positive perspective of improving credit culture in India by creating a 'creditor driven regime' and the role played by judiciary in achieving the same is noteworthy.

IBC is a mechanism for resolution or liquidation of a Corporate Debtor and once the Adjudicating Authority admits an application under Section 7, 9 or 10; CoC gets to decide the fate of the Corporate Debtor Company. Revival or liquidation of a Corporate Debtor Company, as decided by CoC is subject to judicial approval and many a times there have been instances wherein CoC's authority was challenged with respect to rejection of a Resolution Plan. Whenever Judiciary has been asked to intervene in the decision making process by the affected parties, Tribunals and Courts have been kind enough to interpret the language of the Code as envisaged by legislature.

As stated by the NCLT, Ahmedabad Bench in Vijay Gupta v. Steel Konnect (India) Pvt. Ltd. & Ors. ***"The Code nowhere expressly authorises the Adjudicating Authority to sit over the Judgment on the Resolution of CoC in rejecting the Resolution Plan. The Code, through Section 31 gives the authority to the Adjudicating Authority to approve the plan when approved by CoC and can reject if it does not conform to the requirements referred under Section 30 (2) but not to sit over Judgment on the Resolution Plan approved by the CoC in rejecting the Resolution Plan."*** In this context, the case of Innoventive Industries Ltd. Vs ICICI Bank & Another was referred, in which the Hon'ble Supreme Court alluded to the report of Reforms Committee wherein it was concluded that ***"the most significant change being, that when a company defaults on its debt, control of the company should shift to creditors rather than the management who was retaining control after the default."*** Therefore, the intention of the legislature while introducing IBC is to empower the CoC to take a business decision upon the resolution plan for acceptance or rejection, as the case may be and it is only when the CoC accepts the Resolution Plan; the same is placed before Adjudicating Authority. In other words, the Adjudicating Authority has no authority or jurisdiction to intervene when CoC rejects the Resolution Plan.

The Bombay High Court in Jethalal C. Thakkar Vs. R.N. Kapur decided in 1955 under the erstwhile BSCCA 1925, explained that according to the definition of ready delivery contract, no time must be specified for its performance as it needs to be performed immediately or within a reasonable time. Thus, if under the contract of purchase or sale of shares, there is no present obligation and the obligation arises because of some condition being complied with or some contingency occurring then the same is valid and enforceable. Hence, contracts can be considered within the definition and scope of ready delivery contract, because as soon as the obligation ripened, the contract was to be performed immediately or within a reasonable time. Thus, with regard to the private options contracts, it can always be argued that once the option is exercised, the contract is typically performed immediately, that is, on spot delivery basis and should be enforceable.

Even, under SCRA similar reasoning was given by The Bombay High Court in MCX Stock Exchange Limited Vs. Securities & Exchange Board of India in 2012. In the given case, an impugned order was passed by whole time member of SEBI where buy back agreement was being considered as forward contracts and thus contrary to the provisions under SCRA. However, the Bombay High Court explained that a buyback agreement confers an option on the promisee and no contract for the purchase and sale of shares is made until the option is exercised. The promisor cannot compel exercising of the option and if the promisee did not to exercise the option in future, there would be no contract for the sale and purchase of shares. Once a contract is arrived at upon the option being exercised, the contract would be fulfilled by spot delivery and would, therefore, not be unlawful. This judgement clearly distinguishes a 'forward contract', which are prohibited under the SCRA, and options for sale/ purchase of securities and explains that the nature of an 'option' is that of a privilege and the conclusion of contract to purchase and sell securities comes during exercising the option.

However, the Supreme Court on SEBI's appeal through Special Leave Petition held that SEBI shall not be bound by any observations or comments made by the High Court in the impugned judgment for making amendments in the Regulation.

From The View Point Of Companies Act, 2013 ('CA 2013') And Its Erstwhile Companies Act, 1956 ('CA 1956')

As far as the new CA, 2013 and its erstwhile CA, 1956 is concerned; enforceability of options and pre-emption rights attracts various provisions like nature of shares, inconsistency of any provisions contained in any private agreement and articles of the company or provisions of CA, rectification of register of members, transferability of shares, restriction on transfer of shares by private companies, etc. The importance of interpretations of the abovementioned provisions can be seen through the judgements given in the following case laws.

In one of the landmark judgement VB Rangaraj v. VB Gopalakrishnan, where Supreme Court held that if shareholders agreement imposes any additional restrictions on transferability of shares that are contrary to the articles of association (AOA) of the company then articles of association will prevail. A big question was raised over the enforceability of private agreements between two or more shareholders and/or the company and will it be considered valid if the clauses pertaining such pre-emptive rights and or put and call options of private agreements are embodied in articles of the company.

In Mafatlal Industries Ltd. Vs. Gujarat Gas Co. Ltd. also, it was contended that free transferability of shares refers to absence of restrictions which may be imposed by third parties, but it cannot exclude the right of a shareholder to impose restrictions on himself in the matter of transfer of shares to another person. However, High Court of Gujarat relied on the judgement of the Apex Court given in VB Rangaraj v. VB Gopalakrishnan which held that agreement for pre-emption is not binding.

Thus, from aforementioned judgements, it can be stated that the restrictions on transferability of shares imposed by the shareholder on himself through private shareholders agreement stands nullified which is justified merely because they are not contained in articles of association of the company. If that is the case, then there is a big question on the enforceability of agreements such as security creation agreements with regard to the pledge of share wherein restrictions on its transferability is the essence of the agreement. And, if the shares pledged are of listed companies then is it possible to amend the articles of association of such company that consist of innumerable shareholders.

However, the decision held in M.S. Madhusoodhanan and Anr. Vs. Kerala Kaumudi Pvt. Ltd. and Ors., by the Apex Court is entirely distinguishable on facts which was held in Rangaraj and Mafatlal Industries Ltd. In the Karar (agreement) there is no such restriction on the transferability of shares as the agreement is between particular shareholders relating to the transfer of specified shares. It was also contended that the consensual agreement between two or more shareholders, is in relation to their own specified shares and in restriction of their own right to free transferability of shares held by them, which impose no restriction on the transferability of shares as specified under section 111A of the CA, 1956.

In Western Maharashtra Development Corpn. Ltd. Vs. Bajaj Auto Limited, the High Court of Bombay set aside the arbitral award in 2010 explaining that the Arbitrator fell into a patent illegality by proceeding on the basis that the presence of a clause conferring a right of pre-emption in the AOA was sufficient to dispose of the challenge regarding its legality. The Bombay High Court explained that, in case of private companies the Articles of Association would restrict the right of shareholders to transfer shares and prohibit invitation to the public to subscribe for shares or debentures of the Company. The position in law of a public company is materially different. By the provisions of the CA, 1956, restrictions on the transferability of shares which are contemplated by the definition of a "private company" under Section 3(1)(iii) are expressly made impermissible in the case of a public company by the provisions of Section 111A. Thus, a restriction to that effect cannot be read into the provision of Section 111A as it is not mentioned in the statutory provision and the word "transferable" is of utmost importance that should be given a wide connotation. Reference of Madhusoodhanan case was also given, where Supreme Court noted that the Karar was an agreement between "particular shareholders relating to the transfer of the specified shares" and does not impose any restriction on transferability of shares of the company.

Section 22A of the Securities Contracts (Regulation) Act, 1956 was removed by the Depositories Act, 1996 and simultaneously 111A of the CA, 1956 was introduced which is currently replaced with Section 59 of CA, 2013. Section 59 declares the shares of a company to be freely transferable. However, both the provisions regulates the power of the board of directors to refuse registration of shares and never intended to invalidate contractual restrictions or to affect the right of shareholders to deal with their shares or to enter into any consensual agreement. The legislature intends to ensure that any refusal from the board of directors of the company for registration of transferee as shareholder is backed with a valid reason and not at the discretion of the board. The company or any other shareholder need not be a part of that agreement and for that same reason it need not be embedded in AOA of the company. However, as far as a private company is concerned, it is permitted to insert restrictions on transfer of shares in its articles with respect to provisions of Section 2(68) and Section 58(1) of CA, 2013. Thus, any restriction on transfer of shares or provision pertaining to call and put option as agreed under the consensual arrangement shall be valid. It shall be binding on such a private company and duly incorporated in the AOA, enforceable against the shareholders of a private company.

Vodafone International Holdings Vs Union of India and Anr.

In this case, Supreme Court perceived that all the provisions included in investment agreements regarding pre-emptions or call/ put options etc. may administer and regulate the rights between the parties. These rights should be purely contractual and should be owned by the parties. It was also stated that if mentioned in the Article of Association, then the shares can be freely transferred in any manner.

Nishkalp Investments and Trading Co. ltd vs Hinduja TMT Ltd.

In this case, Bombay High Court observed that a contingent contract is within the scope of SCRA and is also lawfully applicable under it. The problem with respect to this case was related to buy back agreement. In this case, there was repurchase of certain number of shares and these shares were unlisted on the stock exchanges by a certain agreed date.
Bombay high court concluded the contingent contract as invalid because the setup of buy back of shares as mentioned above, were not covered under the provisions of SCRA.

NTT Docomo Inc. v. Tata Sons Limited

The Delhi High Court examined the locus standi of the RBI to object to the enforcement of an award delivered in an arbitration between two private parties. Tata Sons and Docomo had entered into a shareholders' agreement in 2009 by way of which Docomo acquired a shareholding of 26% in TTSL, a joint venture between Tata Sons and Docomo. In terms of the shareholders' agreement, in the event TTSL failed to satisfy certain prescribed performance indicators, Tata Sons would be obligated to find a buyer for or acquire Docomo's shares in TTSL at the higher of (a) fair value of the shares; or (b) 50% of the original investment amount.

Upon a failure on the part of Tata Sons to abide by the put obligation, Docomo invoked arbitration proceedings seated in London, and raised a claim for damages on account of breach of the representations made by Tata Sons under the shareholders' agreement. The arbitral tribunal found in favour of Docomo and ordered Tata Sons to pay Docomo an amount of USD 1,172,137,717. Docomo subsequently sought enforcement of the award before the Delhi High Court. While the enforcement was initially resisted by Tata Sons, the parties subsequently reached a settlement under which Tata Sons agreed to withdraw its objections to the enforcement.

At this stage, the RBI filed an intervention plea before the High Court, and argued that regardless of the settlement arrived at between the parties, the impugned award was unenforceable by virtue of being illegal and contrary to the public policy of India on the basis of non-compliance with FEMA regulations.

Conclusion

After going through the conceptual understanding and interpretations of the court in the abovementioned judgements, it can be concluded that the enforceability of options contracts in case of private limited companies can be held valid merely because of the non-applicability of SCRA. However, in case of public limited companies due to the applicability of SCRA and multiplicity of judgements, it has added to the existing confusion and unless all the hurdles relating to enforceability of options is straightened out, these options may not be able to serve the purpose of the "exit options" as intended by the parties. Thus, considering the uncertainty, due thought and consideration need to be given while drafting the exit rights of any contract.

Glimpse of the Firm's Retreat

Exclusive coverage in the Lex Witness Magazine

Dhir & Dhir Associates – Celebrating 25 Years of Legacy

Dhir & Dhir Associates – a leading full-service law firm, recently traversed to the majestic city of Jaisalmer with its team to earmark completion of 25 years of unprecedented legal services across various industry sectors. Lex Witness had exclusive access to this and here's a glimpse of their celebration.

The firm planned a 4 days retreat to Jaisalmer in Rajasthan. The itinerary offered a combination of celebration along with team-building activities and sightseeing. Focused on individual strengths and team spirit, the activities were planned in such a manner that right from the back-end support to the senior Partners, achieved rewarding results. Each activity was carefully customized to hone their inherent skills and foster cohesiveness amongst all members.

The sightseeing tour involved visits to Jaisalmer Fort, Patwon ki Haveli, The Jain temple, Kuldhara Village and of course The Sam Sand Dunes. An impromptu stand-up satirical comedy on the 'legal fallacies' by one of the attorneys which grabbed everyone's attention, followed by performance by each team. Besides the silver jubilee celebration, there were many foot-tapping dance moments, right from the poolside dinners to stand alone parties organized through the entire stay at the resort and sand dunes. The retreat ended with the famous 'Queen Harish' show, the living legend of Thar-Sam, over cocktails and dinner in the desert.

Awards and Accolades

Mr. Alok Dhir is recognized as an exceptional lawyer and featured in **'The A-List: India's top 100 lawyers 2019'** by India Business Law Journal and the Indian Corporate Counsel Association

Leading Individuals for Restructuring & Insolvency – Mr. Alok Dhir

Band 2 in Dispute Resolution, Capital Markets, Banking & Finance

Band 3 in Corporate and M&A, Technology, Media & Telecommunications (TMT), Projects & Energy, Real Estate & Construction

Band 4 in Labour & Employment

Leading individuals: Mr. Alok Dhir-Restructuring & Insolvency

Ranked in **Band 3 in Dispute Resolution**

Ranked in **Band 4 in Projects, Infrastructure & Energy**

Highly Recommended in Restructuring & Insolvency

Recommended in Dispute Resolution, Banking & Finance and Capital Markets 2019 by Asia Law Profiles

Leading Lawyers – Mr. Alok Dhir for Dispute Resolution –Insolvency

Tier II - Capital Markets, Project Development - Oil & Gas, Transport and Power

Tier III - Project Finance, Private Equity, Project Development- Infrastructure and Telecommunications

Tier IV - Banking and M&A

Making Headlines

THE ECONOMIC TIMES

NCLT seeks views on Sterling Biotech promoters' offer
15 march 2019- Dhir & Dhir Associates shares his views on NCLT's recent move in the Sterling Biotech matter. The tribunal has given two weeks time to the government and various investigation agencies to file their response. The Economic Times

Promoters offered to pay Rs 54,389 crore: NCLT dismisses Ruias' proposal to settle Essar debt
Jan 30, 2019 - Commenting on the development, Alok Dhir of Dhir & Dhir Associates, a law firm, said: "It is a significant step forward for ArcelorMittal and a setback for Essar at this stage... Essar Steel is likely to challenge this at the NCLAT." The Economic Times

Non-steel repayments may soften bankers on Essar bid
Jan 08, 2019 - "This could have a wider impact. In the case of Essar Steel, the asset belongs to the promoters of the company. Their offer to repay the entire debt of Essar Steel deserves to be considered. The laws of the land are very clear in this regard," said Alok Dhir, managing partner, Dhir & Dhir Associates. The Economic Times

Electronic Coverages

March 28, 2019 BTVI- Discuss as to why a private airline like Jet Airways should be bailed out, and why the matter should not be referred NCLT. BTVI

March 28, 2019 BTVI-The Essar Steel case alone took over 600 days, while only Rs 95000 cr out of the bad debt of Rs 2, 77,000 cr recovered so far. BTVI

March 21,2019 BTVI-NCLAT Allows Essar Steel Sale Implementation To ArcelorMittal. BTVI

January 29, 2019 BTVI - NCLT: Race to The Resolution Line BTVI

January 29, 2019 CNBC TV 18 - NCLT Rejects Essar Steel Promoters' Plea to Repay Debt
CNBC TV 18

CNBC TV18

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Select Speakerships

Ms. Varsha Banerjee, Partner speaking at The Lex Witness' Grand Masters at Bengaluru on 22nd Feb 2019 on various litigation and arbitration trends in India

Mr. KPS Kohli, Partner speaking at The Lex Witness 7th Annual Grand Masters- Tech Tantrums at Bengaluru on 22nd Feb 2019

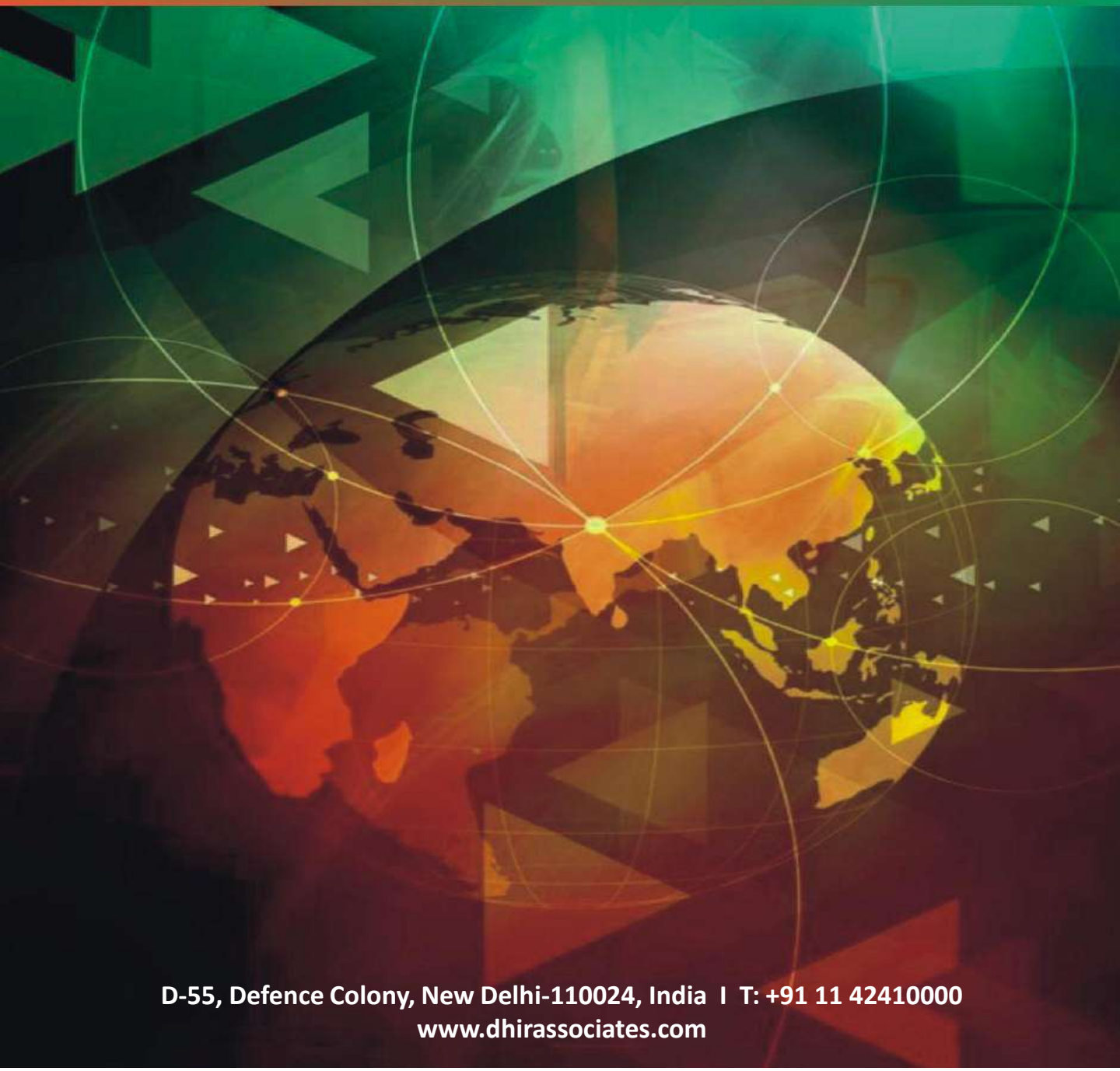
Ms. Namrta Sudan, Associate Partner, speaking at The Lex Witness 7th Annual Grand Masters- Prevention of Sexual Harassment Act at Mumbai on 14th Feb, 2019

Ms. Namrta Sudan, Associate Partner, speaking at The Lex Witness 7th Annual Grand Masters -Prevention of Sexual Harassment Act at Delhi on 7th Feb, 2019

Mr. KPS Kohli, Partner speaking at The Grand Masters 2019 conference organized by Lex Witness on 7th Feb, 2019, Delhi

Mr. KPS Kohli, Partner addressing ITechLaw 2019 International Asia Conference on 31st Jan, 2019 at JW Marriott, Bengaluru

Mr. Alok Dhir & Mrs. Maneesha Dhir, Managing Partner(s) addressing the Conference on 'Combating Insolvency & Bankruptcy Intelligently' by IWIRC India on 24th Jan, 2019 at Le Meridien, Delhi



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DISCLAIMER

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