Between the lines...

November, 2016

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Highlights

I. SEBI penalizes Piramal Enterprises Limited for breaching insider trading norms during Abbott deal

The Securities and Exchange Board of India (**"SEBI"**) by Adjudication Order passed in the matter of Piramal Enterprises Limited (**"Piramal"**) dated October 3, 2016 imposed fine for non-compliance with insider trading norms.

The transaction under scrutiny was the sale of domestic healthcare business of Piramal to Abbott Laboratories Limited (**"Abbott"**) in May, 2010 and public announcement made with respect to the same. SEBI had conducted investigation into the alleged irregularities in the scrip of Piramal looking at possible violation of the provisions of the old insider trading norms, namely, the SEBI (Prohibition of Insider Trading) Regulations, 1992 (**"the PIT Regulations"**), the Listing Agreement and the Securities Contracts (Regulation) Act, 1956.

Price Sensitive Information is defined in the PIT Regulations as below:

"price sensitive information" *means any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of company.*

Explanation.—The following shall be deemed to be price sensitive information:—

(i) periodical financial results of the company;

(ii) intended declaration of dividends (both interim and final);

(iii) issue of securities or buy-back of securities;

(iv) any major expansion plans or execution of new projects;

(v) amalgamation, mergers or takeovers;

(vi) disposal of the whole or substantial part of the undertaking;

(vii) and significant changes in policies, plans or operations of the company.

In the present matter, price sensitive information was sale by Piramal of its domestic healthcare formulation business to Abbott, till such information became public.

The allegations regarding violation of several provisions of the PIT Regulations were:

I. Piramal, Mr. Ajay Piramal, Ms. Swati A Piramal, Ms. Nandini Piramal and Mr. N Santhanam had failed to handle the Unpublished Price Sensitive Information ("UPSI") as Mr. Anand Piramal (son of Mr. Ajay Piramal) was aware about the transaction at every stage, being neither employee nor Director of Piramal.

ii. Closure of trading window was not announced by Piramal, Mr. Ajay Piramal, Ms. Swati A Piramal, Ms. Nandini Piramal and Mr. N Santhanam.

iii. Mr. Harinder Sikka, Director of Piramal traded in the scrip of Piramal during the UPSI period without obtaining pre-clearance.

Allegation was also levied regarding violation of the Listing Agreement and the Securities Contracts (Regulation) Act, 1956.

In response to the allegations levied against them, it was submitted on behalf of the parties in defense that, inter alia, Mr. Anand Piramal had not traded in the scrip of Piramal and he was not involved in the decision making process at Piramal. Further that, he was part of promoter group and therefore was reasonably expected to know about the transaction. With respect to closure window, it was contended, inter alia, that it was not announced because the transaction was not final at that stage. Coming to trading by Mr. Harinder Sikka, defense taken was that he was not privy to UPSI.

With regard to issue of handling of UPSI, Adjudicating Officer, SEBI ("the **AO**") very briefly discussed the diligence standards with regards handling of UPSI, noting that UPSI should be shared strictly on a need to know basis. It was observed that as Mr. Anand Piramal was neither Director nor employee of Piramal, sharing of information about the transaction with him could have been avoided. The AO held that Piramal, Mr. Ajay Piramal, Ms. Swati A Piramal, Ms. Nandini Piramal and Mr. N Santhanam failed to handle UPSI on a 'need-to-know' basis and therefore violated the Model Code of Conduct for Prevention of Insider Trading read with Regulation 12(3) of the PIT Regulations (Regulation 12 of the PIT Regulations deals with code of internal procedures and conduct for listed companies and other entities).

Regarding issue of closure of trading window, firstly, it is to be noted that the Model Code of Conduct for Prevention of Insider Trading for Listed Companies as contained in Part A of Schedule I of the PIT Regulations provides, inter alia:

"3.2 Trading window 3.2.1 The company shall specify a trading period, to be called "trading window", for trading in the company's securities. The trading window shall be closed during the time the information referred to in para 3.2.3 is unpublished.

XXXX

3.2.3 The trading window shall be, inter alia, closed at the time:—

XXXX

(f) Disposal of whole or substantially whole of the undertaking.

XXXX

3.2.3A The time for commencement of closing of trading window shall be decided by the company."

As captured above and as noted by the AO, it was for the company to decide about the commencement of closure of trading window which had to be opened only 24 (twenty-four) hours after the information was made public. The AO further took note of the fact that because the trading window was not closed at all, Mr. Harinder Sikka who was one of the designated employees of Piramal could manage to trade in the scrip. Order of the Securities Appellate Tribunal in the matter of G Jayaraman v SEBI was cited, in which, it was observed that, "If Compliance Officer fails to close the trading window inspite of being in possession of price sensitive information, then he would be violating PIT Regulations. In such a case, whether any employee/director by taking undue advantage has traded in securities of that company or not, Compliance Officer would be liable for violating PIT Regulations." The AO held that Piramal, Mr. Ajay Piramal, Ms. Swati A Piramal, Ms. Nandini Piramal and Mr. N Santhanam violated clauses 3.2.1 and 3.2.3(f) of Model of Conduct for Prevention of Insider Trading read with Regulation 12(3) of the PIT Regulations.

Dealing with the issue of trading by Mr. Harinder Sikka, clauses 3.3.1 and 4.2 of the Model Code of Conduct for Prevention of Insider Trading for Listed Companies as contained in Part A of Schedule I of the PIT Regulations must be referred to as below:

"3.3.1 All directors/officers/designated employees of the company and their dependents as defined by the company who intend to deal in the securities of the company (above a minimum threshold limit to be decided by the company) should pre-clear the transaction as per the pre-dealing procedure as described hereunder.

4.2 All directors/ officers/ designated employees who buy or sell any number of shares of the company shall not enter into an opposite transaction i.e. sell or buy any number of shares during the next six months following the prior transaction. All directors/ officers/ designated employees shall also not take positions in derivative transactions in the shares of the company at any time."

With regard to this issue, the AO held, *"There are no allegations that he received UPSI from any insider and traded on that basis. As already observed, it is the failure of the company to close the trading window that has enabled his transactions to go through without any pre-clearance and Noticee No. 6 cannot be faulted for the impugned transactions when the trading window was not closed necessitating pre clearances of trades. In view of the above, it is not established that Noticee No. 6 violated Clauses 3.3-1 and 4.2 of Model Code of Conduct read with Regulation 12(3) of PIT Regulations."*

Violations under the Listing Agreement were not established.

Penalty totaling to INR 6,00,000/- (INR Six Lakhs only) was imposed on Piramal, Mr. Ajay Piramal, Ms. Swati A Piramal, Ms. Nandini Piramal and Mr. N Santhanam.

VA View

After this order was passed, Piramal Enterprises Limited addressed a letter to the Bombay Stock Exchange Limited and the National Stock Exchange of India Limited dated October 4, 2016 and clarified that this order was in respect of certain technical non-compliances with the Model Code of Conduct prescribed under the PIT Regulations. Further, it was stated in company's letter that there was no finding of any insider trading done or gains made by the noticees in this case.

The stand taken by the company seems to be correct. This order against the Piramal Enterprises Limited and other noticees is on technical violation of insider trading norms. There is no case of monetary gains made by the company and other noticees by flouting such norms. Having said that, the company ought to have scrupulously adhered to the compliance norms under the PIT Regulations.

It also remains to be seen as to what action or future course the company will take concerning this order, whether it will go for an appeal against this order or will choose to pay the fine imposed by SEBI.

II. SEBI Informal Guidance: Shareholder approval not required for reclassification of promoter group

The Securities and Exchange Board of India (**"SEBI"**), vide its interpretative letter of opinion (dated October 17, 2016) under the SEBI (Informal Guidance) Scheme, 2003 (**"the IG Scheme"**) in the matter of M/s. Alembic Pharmaceuticals Limited (**"Alembic"**) clarified that shareholder approval is not required for reclassification of shareholding from promoter group to public category.

Alembic had sought guidance from SEBI under the IG Scheme vide its letter dated September 21, 2016. Alembic had submitted that 5 (five) persons out of 25 (twenty-five) persons who were part of the promoter group were desirous of reclassification of their shareholding from promoter group to public category. One of the reasons put forth by the company was that these 5 (five) persons were not directly or indirectly connected with any activity of Alembic as they were senior citizens leading their lives and occupations independently. Other reasons given for reclassification were that such persons never held any position of key managerial personnel in Alembic and they did not have any special rights through formal or informal arrangements with Alembic or any person in the promoter group, etc. After the reclassification, the promoter group shareholding was to be at 72.68%.

The issue on which interpretative letter was sought from SEBI by Alembic was that whether Alembic could approach the Stock Exchanges directly for permission under Regulation 31A (2) and (3) of the SEBI (Listing Regulations and Disclosure Requirements) Regulations, 2015, with shareholder approval being dispensed with. Regulation 31A of the SEBI (Listing Regulations and Disclosure Requirements) Regulations, 2015 provides for disclosure of class of shareholders and conditions for reclassification. Sub-regulation (2) and (3) are as below:

"(2) The stock exchange, specified in sub-regulation (1), shall allow modification or reclassification of the status of the shareholders, only upon receipt of a request from the concerned listed entity or the concerned shareholders along with all relevant evidence and on being satisfied with the compliance of conditions mentioned in this regulation.

(3) In case of entities listed on more than one stock exchange, the concerned stock exchanges shall jointly decide on the application of the entity/ shareholders, as specified in sub-regulation(2)."

SEBI's view in its interpretative letter on the issue is that, *"the company may not be required to obtain approval of the shareholders for the proposed reclassification. However, such reclassification may be allowed by the stock exchanges under Regulation 31A (2) and (3) of the Listing Regulations subject to compliance of Regulation 31A."*

VA View

The procedure for reclassification required that the promoters proposing to reclassify themselves as public shareholders apply to the company, which then informs the stock exchanges. Once the proposal is accepted by the board of the company, the approval from shareholders is required to be obtained by way of ordinary resolution. Subsequently, the company has to submit the outcome of shareholders' approval to the stock exchange in the prescribed format so as to formalize the process of reclassification of promoters to public shareholder.

With this informal guidance, SEBI has made it clear that shareholder nod is not required for reclassification of shareholding from promoter group to public category. However, applicable provisions under the SEBI (Listing Regulations and Disclosure Requirements) Regulations, 2015 have to be adhered to in this regard.

This clarification by SEBI assumes particular significance considering the recent trend observed as emerging in the country whereby several promoters in various companies want to re-classify their shareholding from promoter group to public category. Promoters not involved in the day-to-day operations of companies would like to re-classify themselves as public shareholders. The purpose behind such reclassification is clear, to avoid the constant legal scrutiny and be exempt from possible litigation on charges like insider trading and other legal responsibilities involving the company. This trend will now intensify with the SEBI informal guidance that shareholders' nod is no longer required for re-classification of promoter group members to public category.

III. Delhi High Court decision: A big boost for international arbitrations

The case of Raffles Design International India Private Limited &Anr. vs. Educomp Professional Education Limited &Ors, before the Delhi High Court, was decided on October 7, 2016.

Raffles Education Corporation Limited (**"RECL"**) and Educomp Solutions Limited (**"ECL"**) entered into a Master Joint Venture Agreement (**"MJVA"**) in 2008, which led to the establishment of Educomp Raffles Higher Education Limited (**"ERHEL"**) for providing courses in management and designing. RECL and ECL are parent companies of the petitioner company and the respondent company respectively. RECL and ECL had 50:50 stake in ERHEL and RECL had subsequently increased its stake in ERHEL to 58.18%.

A Share Purchase Agreement (**"the SPA"**) was entered into in 2015 between the petitioners and the respondents. Shares of respondents in ERHEL were to be acquired by the petitioners on fulfillment of certain conditions incorporated in the SPA.

Disputes erupted between the parties. It was provided in the SPA that disputes were to be governed and construed as per the laws of Singapore. Arbitration was to be conducted at Singapore under the Arbitration Rules of the Singapore International Arbitration Centre (**"the SIAC Rules"**).

The petitioners invoked the arbitration clause and made a request for appointment of an Emergency Arbitrator. Meanwhile, the SPA was terminated by the respondents, contending that there was breach of the SPA by the petitioners. Singapore International Arbitration Centre (**"SIAC"**) appointed Mr. Michael Lee as the Emergency Arbitrator. Interim Emergency Award came to be passed by the Emergency Arbitrator, granting certain Interim relief to the petitioners. The petitioners initiated the process to enforce the Emergency Award against respondent no. 2 in Singapore and certain enforcement order was obtained. The respondents filed an application praying for setting aside of the Emergency Award. However, on January 14, 2016 a consent order was passed by the sole arbitrator. As per the consent order the operative first two paragraphs of the Emergency Award was reiterated

Petitioners alleged that the respondents, even after passage of the Emergency Award, continued to act in contravention of the rights of the petitioners under the SPA. The petitioners were thus compelled to file this petition before the Court under Section 9 of the Arbitration and Conciliation Act, 1996 ("the Act"). The maintainability of this petition was challenged by the respondent.

The questions that arose for consideration before the Court regarding maintainability were:

(i) Whether the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 ("the Amendment Act") were applicable to the proceedings?

(ii) If the answer to the aforesaid question was in the affirmative then whether Section 9 of the Act is applicable by virtue of the proviso introduced in Section 2(2) of the Act by Section 2 (II) of the Amendment Act?

Section 26 of the Amendment Act reads as under:

"26. Act not to apply to pending arbitral proceedings. –

Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

The Court was of the view that the Amendment Act would not apply to arbitral proceedings commenced under Part-I of the Act before October 23, 2015. However, regarding the second limb of Section 26, it was observed that it would cover all proceedings which are connected with the arbitral proceedings whether commenced under Part-I or otherwise including proceedings under Sections 8, 9, 14, 34 and 37 of the Act.

The Court further observed, *"The Parliament had specified the date on which the Amendment Act came into force and unless enacted otherwise, it would be applicable to all proceedings instituted after the specified date. There is no reason to hold that the Amendment Act would not apply to the applications filed in Courts. For the reasons stated herein before the Amendment Act would also apply to pending proceedings before courts."*

With regards enforceability of the Emergency Award, it was noted, *"In the circumstances, the Emergency Award passed by the Arbitral Tribunal cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit. However, in my view, a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted."*

VA View

This judgment makes an important point that in respect of foreign seated arbitrations, there is no implied bar in respect of all arbitration related court proceedings including under section 9 instituted after the Amendment Act came into force, even if the related arbitration was commenced before the Amendment Act.

This judgment also points out a lacuna in as much as in a foreign seated arbitration, an emergency award is unenforceable in India. Therefore, in such cases, an application under section 9 is the only remedy available to the parties seeking interim measures of protection in India.

We have, in our recent editions, captured a series of judgments which are set to give a big boost to the alternate dispute resolution landscape in India. The arbitration friendly approach of the Indian judiciary will go a long way in bolstering the confidence in arbitration as an effective and speedy dispute resolution mechanism.

IV. SEBI offers more clarity on voluntary delisting

Securities and Exchange Board of India (**"SEBI"**) issued interpretative letter (dated November 3, 2016) under the SEBI (Informal Guidance) Scheme, 2003 (**"the IG Scheme"**) in the matter of Fiber Plus Industries Limited (**"Fiber Plus"**). It relates to voluntary delisting.

For more than fifteen years, the equity shares of Fiber Plus were listed on the Delhi Stock Exchange. The Delhi Stock Exchange Limited was derecognized vide SEBI order dated November 19, 2014. After the Delhi Stock Exchange got derecognized, the equity shares of Fiber Plus were listed on the Metropolitan Stock Exchange of India Limited from February 13, 2015. The equity shares of Fiber Plus were not listed on any other stock exchange. Promoters wanted to delist Fiber Plus by providing public shareholders with exit opportunity as per the provisions of the SEBI (Delisting of Equity Shares) Regulations, 2009 (**"the Delisting Regulations"**).

Regulation 4 of the Delisting Regulations provides for certain circumstances and conditions in which delisting is not permissible. Regulation 4 (1) (c) of the Delisting Regulations is important for the purposes of this informal guidance, as below.

"4. (1) No company shall apply for and no recognised stock exchange shall permit delisting of equity shares of a company, -

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(c) unless a period of three years has elapsed since the listing of that class of equity shares on any recognised stock exchange; or XXXX"

The issue on which interpretative letter was sought from SEBI by Fiber Plus was that whether Fiber Plus was eligible for voluntary delisting under Regulation 4 (1) (c) of the Delisting Regulations.

SEBI took the view that, *"the condition at Regulation 4 (1) (c) above implies that the equity shares proposed to be delisted should have had the 'listed' status on 'any recognised stock exchange' for a period of 3 years prior to the application for delisting. XXXX, the equity shares of Fiber Plus Industries Limited appear to qualify within the said provision for the purpose of voluntary delisting."*

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