MONTHLY CORPORATE LAW UPDATES

JUNE, 2022

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1. CoC's commercial wisdom paramount: Withdrawal of CIRP allowed [*Vallal RCK v. M/S Siva Industries and Holdings Limited & Ors.*] [Link]

In this case, the Adjudicating Authority ("**AA**") did not allow the Resolution Professional's ("**RP**") application to withdraw the Corporate Insolvency Resolution Process ("**CIRP**"). Thereafter, the question before the Supreme Court ("**SC**") was whether the AA was right in its disallowance. The SC observed that when the majority (i.e., ninety percent or more) of the creditors find it in the interest of all stakeholders to withdraw CIRP, then the AA cannot sit in an appeal over it.

The requisite vote share was achieved by the Committee of Creditors ("**CoC**") to permit the withdrawal of the CIRP. Accordingly, it was held that the AA should not have rejected the petition and questioned the commercial wisdom of the CoC.

2. CIRP cannot be initiated for *mala fide* reasons. [*Gateway Offshore Private Ltd. and Anr. v. Runwal Realtors Private Ltd.*] [Link]

In this case, the financial creditors made an attempt to initiate CIRP. However, they failed to substantiate any evidence of a loan agreement, contract, promissory note, etc. They placed reliance on written contracts entered with the corporate debtor which however did not indicate the purpose of the transaction as per the AA and therefore were termed as "insufficient evidence". Finally, the AA held that an application to initiate CIRP filed with *mala fide* reasons without any documentation indicating the existence of financial debt may be rejected.

3. Creditors have a right of receipt and verification of their claims even if their authorized representatives do not. [*Aashray Social Welfare Society & Ors. v. Saha Infratech Pvt. Ltd. & Ors.*] [Link]

The present case dealt with interpreting the scope of power of authorized representatives of a class of creditors under the IBC and the CIRP Regulations, 2016. The issue was whether the creditors could approach the AA regarding their claims when their authorized representative's claim was rejected by the Insolvency Resolution Professional.

The NCLAT held that although the authorized representative has no role in receipt and verification of the claims of the creditor, it cannot be said that the creditors of a class themselves do not have this right. Therefore, the Tribunal opined that the creditors could approach the AA for the same.

4. Amendment in Record of Debt and Default: Insolvency and Bankruptcy Board of India ("IBBI") [Link]

This amendment has introduced some additional requirements to be adhered to while filing an application for initiation of CIRP. The operational creditor who has a Goods and Services Tax ("**GST**") registration number is mandated to submit copies of the GST forms ("**GSTR-1**" and "**GSTR-3B**") and e-bills along with the application.

Additionally, the financial creditor and the operational creditor have to submit their Permanent Account Number ("**PAN**") and email-id details to the RP. Moreover, the personnel associated with the CD have to provide information on the assets and liabilities of the CD, its stock statements, valuation reports, etc., to the RP.

5. Amendment: Information of default to be filed with Information Utilities ("IU") [Link]

The amendment mandates the creditor to file information of default with the IU before filing an application for CIRP. The IU will in-turn process this for issuing record of default. The status of the verification of default will be displayed in three colours—red, yellow and green. Further, the status of authentication will be provided by IU to the creditors of the debtor and the parties/sureties of the debt. Further, the amendment provides a format of the Record of Default to be given by the IU.

6. IBBI proposes allowing entities to become Insolvency Professionals ("IP") [Link]

The discussion paper proposes that entities be allowed to register as an IP under the IBC. This is because ensuring that a CD remains a going concern throughout the CIRP is an onerous task and an individual IP is not qualified enough to make sure of this. Moreover, a plethora of resources and manpower will assist entities in ensuring the going concern status of the CD is intact. This is in line with the core objectives of the IBC as well.

In this regard, the IBBI proposed two recommendations. *First*, to allow existing Insolvency Professional Entities ("**IPE**") to become IPs, and *second*, after existing IPEs register as an IP, they should be allowed to provide support services to IPs.

7. Recommendations in respect of CIRP and liquidation processes: 5th Report, the Insolvency Law Committee ("ILC") [Link]

In ILC's 5th Report, recommendations were made with the aim of fixing gaps in the present mechanism to ensure alignment with the objectives of the IBC. Recommendations were proposed such as mandating the financial creditors to submit IU records along with their CIRP application, etc. This would strengthen the IU framework and reduce delays in admission of CIRP applications.

Apart from this, recommendations relating to the continuation of proceedings for avoidable transactions and improper trading after the CIRP, curbing the practice of submitting unsolicited resolution plans, etc were also made.

8. Ways to Improve Value of Items and Reduce Delays in the Insolvency Process: IBBI Discussion Paper [Link]

The discussion paper recommends a slew of changes to the IBC and the IBBI Regulations in order to reduce delays and improve resolution value. The changes proposed are as follows:

CHANGE PROPOSED	HOW IT WILL BE IMPLEMENTED
Change in timelines of CIRP	• Parallelly conducting activities like claim filing/collation, formation of CoC, inviting Expression of Interest ("EoI"), etc. • Reducing the time for filing avoidance applications from T+135 to T+130 days. • Change in the timeline of submission of Information Memorandum ("IM") was also recommended.
Marketing of assets by RP	When the EoI is being finalized, the RP should prepare a strategy to market the assets of the CD when the total claims exceed 100 crores. This includes details of the type of advertising strategy to be used, the platforms to be used, etc.
Different Resolution Plans for part assets of CD	After the time for submitting resolution plans is over and no plan is submitted, the CoC and the RP should be allowed to entertain different resolution plans to resolve part assets of the CD.
Guiding principles for early liquidation	If the CD has been defunct for 3-5 years, or the goods/service/technology has become obsolete, etc., the CoC can consider these factors and recommend liquidation of the CD to the AA early on.

1. Investor grievance redressal mechanism: New Framework, SEBI [Link]

SEBI has formulated a new framework to strengthen the investor grievance redressal mechanism. As per this new framework, any dispute of civil nature between a client and a member arising out of a stock exchange transaction should first be referred to the Investor Grievance Redressal Committee ("**IGRC**") and/or the SEAM before resorting to any other legal remedies.

If the complainant/member is not satisfied with the IGRC's recommendations, they may settle their complaints within 3 months of the recommendation made by the arbitration mechanism of the stock exchange. This 3-month timeline would apply only to those cases where the IGRC recommendation is being challenged; all other cases shall be governed by the Limitation Act.

2. Choice given to Mutual Fund Unit Holders with regards to the nomination: SEBI [Link]

The SEBI has decided to provide a choice to the investors who wish to nominate themselves to subscribe to the Mutual Fund Units on or after August 1, 2022. They shall have the option of providing their nomination in the format prescribed by SEBI as per the fourth schedule of SEBI (Mutual Funds) Regulations, 1996 or they can opt out of nomination through a signed Declaration form. Additionally, the investors can either submit the form physically, or online.

3. Standard Operating Procedures ("SOP") for Dispute Resolution modified, Stock Exchange Arbitration Mechanism to be used: SEBI [Link]

SEBI has modified the SOP followed by listed companies/ Registrar and Transfer Agents ("**RTAs**") offering services on behalf of listed companies. In case of disputes related to investor services between the shareholders of the listed company and the RTAs, the RTAs shall be subjected to the Stock Exchange Arbitration Mechanism ("**SEAM**") with the listed company as a party to this process. The SOP also mandates arbitration to be initiated only after exhausting all actions for resolution of complaints.

1. Removal of Company's name from Register of Companies: Procedural steps added; Ministry of Corporate Affairs ("MCA") [Link]

The Registrar of Companies ("**RoC**") now has the power to examine application for removal of a company's name from the register of companies. In case of an incomplete or inadequate form, it can direct for resubmission. If the company fails to resubmit the form within 15 days, the RoC can term the application as invalid. If the inconsistencies remain post such resubmission, the RoC shall direct the company to submit the modified form again. All applications made before this amendment are exempted from this process.

The requisite vote share was achieved by the Committee of Creditors ("**CoC**") to permit withdrawal of the CIRP. Accordingly, it was held that the AA should not have rejected the petition and questioned the commercial wisdom of the CoC.

2. Amendments to Appointment of Directors: MCA

2.1 Appointment of director belonging to a country bordering India. [Link]

A person belonging to a country bordering India, seeking an appointment as a director, will have to attain the approval of the Central Government and security clearance from the MCA. The person shall also furnish such clearance along with the required consent form to the RoC.

2.2 Inclusion in the databank of independent directors. [Link]

If a person has been removed from the databank of independent directors under Rule 6(4), they can apply for the restoration of their name. Upon such application, they would be required to pass a self-assessment test within one year. Until this materializes, their name would be shown in a separate restored category. On failure, they will have to re-apply.

3. Penal action on non-compliance of National Financial Reporting Authority ("NFRA") Rules, MCA. [Link]

NFRA Rules were amended to replace the general penalty provision. In case of any violation of the Rules, a penalty of Rs. 5000 will be levied with an addition of Rs. 500 per day of recurring violation. This has been done with an attempt to rationalise the penalty provisions.

1. Mere pendency of a civil suit: Not an absolute bar to a petition for arbitrator's appointment. [*Priya Rishi Bhuta & Anr. v. Vardhaman Engineers and Builders & Ors.*] [Link]

The Bombay High Court ("**HC**") held that mere pendency of a civil suit is not an absolute bar to a petition for appointment of arbitrator. The only caveat is that this is applicable as long as the plaintiff can withdraw its suit before the defendant files its statement on the issue. The civil court may also consider the plaintiff's application for suit withdrawal in case of a pre-existing arbitration agreement and refer the matter to arbitration.

2. Proceedings under Section 9 cannot be used to enforce conditions of a contract. [*Kanhai Foods Ltd. v. A and HP Bakes*] [Link]

The Gujarat HC ruled that the proceedings under Section 9 of the Arbitration and Conciliation ("**A&C**") Act are only regarding interim measures. In these proceedings, the party cannot indirectly seek a final relief. Thus, the conditions of a contract can only be enforced when the rights of the parties are finally adjudged or crystalized by the arbitrator.

3. Arbitration on reference without an arbitration agreement for matters involving MSMEs. [*M/s SGM Packaging Industries v. M/s Goyal Plywood LLP*] [Link]

The Punjab and Haryana HC observed that a matter referred to Micro and Small Enterprises Facilitation Council can be arbitrated even in the absence of an arbitration agreement. As the Micro, Small and Medium Enterprises Development Act is a special Act, it will prevail over the general A&C Act. Therefore, an arbitration agreement between the parties for the dispute resolution would have to be ignored if a party is an MSME.

MISCELLANEOUS

1. Prevention of Misleading Advertisements and their Endorsements; Central Consumer Protection Authority ("CCPA") [Link]

The CCPA has issued a set of guidelines with the aim of curbing false/misleading advertisements which will apply to all advertisements regardless of form, format, or medium of advertisement. These guidelines also list out various parameters of a valid, non-misleading advertisement such as truthfulness, honest representation, etc. Further, it prohibits surrogate advertising and sets out some conditions for a bait advertisement such as maintaining sufficient supply of the goods to cater to future demands, not enticing the consumers, etc.

2. Firms penalised for bid rigging: Cartelization in Railway Tenders; Competition Commission of India ("CCI") [*In re: Cartelisation in the supply of protective tubes to Indian Railways*] [Link]

A group of seven companies/firms were involved in cartelization and bid-rigging relating to the supply of protective tubes to the Indian Railways. The CCI found these companies guilty of engaging in conduct that was causing an appreciable adverse effect on competition as per the Competition Act, 2002. Further, the CCI noted that the cartels were unable to show a positive effect of their cartel activity– as it had no actual benefit to the consumers or any improvement in the market conditions. Instead, their actions included engaging in practises such as coordinating and manipulating the bidding process, mutually determining prices, etc.

3. CCI's penalty on Amazon: 'Fair and Sensible,' NCLAT [Link]

Amazon had notified the CCI of a 'Combination' regarding their investment into the Future Group's shareholding. They made representations to the CCI that they would not acquire any direct or indirect shareholding rights as a result of this transaction. Subsequently, the Future Group filed an application to the CCI. They alleged that Amazon had initiated litigation and arbitration regarding Future Group's asset transfer by misrepresenting their true intention behind the investment.

The CCI held Amazon guilty of misrepresenting and concealing material facts and imposed a penalty of Rs 200 crore on them. Amazon appealed this decision before the NCLAT where the NCLAT observed that Amazon misrepresented with an intent to gain unfair advantage and to deceive others by suppressing material facts which amount to fraud. Therefore, it upheld the CCI's order, terming it as fair and sensible.

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