MONTHLY CORPORATE LAW UPDATES

NOVEMBER, 2022

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1. An appeal challenging a Corporate Insolvency Resolution Process ("CIRP") order becomes unnecessary after liquidation order has been filed: National Company Law Appellate Tribunal ("NCLAT") [*Mr. Rakshit Dhirajlal Doshi v. IDBI Bank Limited*]. [Link]

NCLAT has ruled that a challenge to an initiation of a CIRP order becomes unnecessary when the Committee of Creditors ("**CoC**") have already filed a liquidation order of the Corporate Debtor ("**CD**"). The tribunal observed that the CoC have applied their commercial wisdom while deciding to liquidate the CD. Therefore, an appeal challenging a CIRP order becomes aimless when the CoC have already come to a consensus to liquidate.

2. No mandate to calculate and fix the exact amount of debt in default of repayment, for initiating CIRP under Section 7 of Insolvency and Bankruptcy Code ("IBC"): NCLAT. [*Suzlon Synthetics Ltd. v. Ṣtressed Asset Stabilization Fund*]. [Link]

In the present case, the NCLAT has ruled that there is no requirement to calculate and fix amount of debt default for adjudication of a CIRP order under Section 7 of the IBC. Further, the tribunal opined that the value of default shall be determined to the extent of whether it crosses the threshold amount of rupees 1 lakh. Therefore, the exact amount of debt in default is immaterial if the amount is more than the threshold value.

3. CoC member who was inducted post first meeting, needs to ratify the decision of the first meeting which otherwise, will be set aside: NCLAT [*Edelweiss Asset Reconstruction Company Ltd. v. Mohit Goyal*]. [Link]

In the present case, a financial creditor was allowed membership of the CoC after a decision was taken in an already held meeting. In light of this, the NCLAT has held that the past deliberations and decisions of CoC are not set aside after the creditor becomes a member post the first CoC meeting. The only caveat is such decision needs to be ratified by the creditor to be valid.

4. No impact on liquidator's fee if they have acted with due diligence: NCLAT [*Small Industries Development Bank of India (SIDBI) Vs. Shri Vijender Sharma*]. [Link]

The NCLAT held that the liquidator is not liable for the delay in liquidation process as they have acted with due diligence. Further, the secured creditor lapsed in complying with Regulations 2(ea), 2A, 21A and 37 of Liquidation Process Regulations and Section 52/53 of IBC when realizing its security interest. The said provisions pertain to liquidation cost and fees, and realisation of security interest. The delay was caused by the secured creditor. Therefore, such delay will not be considered while calculating the liquidator's fee.

5. Interim moratorium under Section 96 of the IBC will only extend to a specific guarantor: Delhi High Court ("HC") [*Axis Trusteeship Services Limited v. Brij Bhushan Singhal & Anr*]. [Link]

An interim moratorium under Section 96 starts from the date of filing the application to initiate CIRP. The HC held that such an interim moratorium under Section 96 can only be applicable to that particular guarantor of a debt. It would not be applicable to the co-guarantors and other individuals associated with the same debt. Additionally, it was held that the legal incapacity of one guarantor cannot exhaust the remedies available to another.

6. Pre-existing contractual issues not to be resolved under the CIRP: NCLAT [*a'XYKno Capital Services Pvt. Ltd. v Rattan India Power Ltd*]. [Link]

In the given case, the operational creditor sought to initiate CIRP against the corporate debtor for not fulfilling his contractual obligations. The operational debtor was particularly not satisfied with the deficient service provided by a'XYKno Capital Services. The NCLAT held that insolvency proceedings are not the same as recovery proceedings as the former can only be used to recover "undisputed" debts. For cases where there are still questions of fact or pre – existing disputes they have to be resolved through a Civil Court and not through CIRP.

1. Guidelines on standardization of rating scales for Credit Rating Agencies ("CRA"): Securities & Exchange Board of India ("SEBI"). [Link]

SEBI has prescribed guidelines for the standardization of rating scales used by CRAs. SEBI had devised certain standardized rating symbols and definitions for CRAs in the year 2011. Every CRA shall now be required to use the rating symbols and definitions for ratings. Furthermore, CRAs shall specify standard descriptors when a security is placed under the categories of rating outlook/ rating watch

2. Regulatory framework for Online Bond Platforms ("OBP"): SEBI. [Link]

SEBI has introduced a regulatory framework to protect and facilitate the participation of investors in the bond market. Every entity that desires to operate as an OBP shall have to register as a stock broker in the debt segment of a recognized stock exchange. SEBI has devised a set of requirements for any application by an entity for registration as an OBP. The requirements include compliance with minimum disclosure, investor redressal and risk profiling mechanism.

3. Further Reductions in the Cap on International Securities Number ("ISIN"): SEBI. [Link]

ISIN Code is a 12 digit alphanumeric code that is used to uniquely identify a security/bond/ commercial paper. SEBI had reduced the cap on ISINs previously in the year 2017 & 2018. It observed that the capping helped to boost & deepen liquidity within the corporate bond market. Thus, SEBI has now decided to further reduce the cap on ISINs. A maximum number of 14 ISINs shall be allowed for an issuer of listed debt securities. This is a reduction from the earlier cap of 17 securities

4. New guidelines for Alternative Investment Funds ("AIF"): SEBI. [Link]

SEBI has prescribed guidelines for AIFs for declaration of first close, calculation of tenure and change of sponsor/manager. It has specified that the first close shall have to be declared within 12 months from its communication to take the Private Placement Memorandum of the scheme on record. The tenure of close ended schemes will now be calculated from the date of the declaration of the first close. Moreover, it can be modified at any time before the declaration. SEBI has also specified the fees that shall be levied in case of change of sponsor/ manager.

5. AIFs cannot accept fresh investments in schemes with a 'priority distribution model': SEBI. [Link]

It has come to the attention of SEBI that certain schemes of AIFs have adopted a 'priority distribution model' which accords priority to a certain class of investors. This leaves the other investors at a disadvantage. They have to bear a disproportionate sharing of losses. However, the SEBI (Alternative Investment Funds) Regulations, 2012 only prohibits disproportionate sharing of losses between sponsors and investors. There is no clear restriction on such differentiation between the different classes of investors. Therefore, SEBI has asked AIFs to refrain from accepting fresh investments in such schemes until a final decision has been taken in this regard.

6. Issuers of Municipal Debt Securities can now issue Green Debt Securities ("GDS"): SEBI. [Link]

SEBI has notified that the issuers of municipal debt securities can now issue GDS. These are the debt instruments used to finance projects for the benefit of the environment. SEBI (Issue and Listing of Municipal Debt Securities) Regulations, 2015 ("**ILMDS**") provides the framework for issuance of municipal debt securities. However, the regulations do not define GDS. The term GDS is defined under the SEBI (Issue and Listing of Non- Convertible Securities) Regulations, 2021 ("**NCS**"). Therefore, the issuers of municipal debt securities under ILMDS can issue GDS if it falls within the definition as provided under the NCS Regulations.

7. Alternate thresholds for the appointment & removal of Independent Directors: SEBI. [Link]

The appointment/removal of the director is made through a special resolution. The special resolution can be passed only when 75% of the board votes in favour of the same. SEBI has now introduced alternate thresholds for the appointment and removal of independent directors from the boards of companies. These include the thresholds for ordinary resolution and majority of minority shareholders. The alternate thresholds shall be available in cases where the special resolution fails to fulfill the required threshold of 75%.

8. Consultation Papers: SEBI

SEBI has floated a set of consultation papers to review and revamp the securities law regime within the country. The papers with a significant impact on the stakeholders are listed below:

A. *Review of disclosure requirements for material events or information under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR**")* [**Link**]

The Regulation 30 of LODR Regulations prescribes the material events/ information that need to be disclosed by listed companies to the stock exchanges. SEBI has issued the consultation paper to review and amend the disclosure requirements for material events/ information under the said regulation. Additionally, the consultation paper proposes that the top 250 listed companies should actively verify any material information that is reported about the company within the mainstream media.

B. *Review of SEBI (Buyback of Securities) Regulations, 2018 ("**BS**")* [**Link**]

SEBI had been receiving suggestions from market participants to review substantive provisions of the SEBI BS Regulations. Therefore, SEBI has issued the consultation paper to propose key changes within the existing regulations. These proposals include changes with respect to open market buybacks, tender offers and the time taken for the completion of a buyback.

C. *Framework for protection of interest of public equity shareholders in case of listed companies undergoing CIRP under the IBC.* [**Link**]

SEBI has issued a consultation paper to protect the interest of public equity shareholders in case of the CIRP of a listed company. According to

Sthe consultation paper, CIRP primarily protects the interests of the creditors. This often leaves the public equity shareholders at a disadvantage. Therefore, the proposal aims provide an opportunity to the shareholders to participate in the resolution process on the same pricing terms as the resolution applicant (up to 25%).

1. Companies (Registered Valuers and Valuation) Rules, 2017 amended: Disclosure norms announced: Ministry of Corporate Affairs ("MCA"). [Link]

The MCA has introduced disclosure norms for registered valuers as well as registered valuers organisations. Registered valuers shall intimate any change in their personal details or changes in the partnership agreement, to the authority. Also, registered valuers organisations shall notify any change in their governing board or its committees to the authority. The valuers and the valuers organisations are required to pay change fees, for reflecting such change in details in the official records of the authority. Furthermore, a company or a partnership firm will not be eligible to become a registered valuer unless they are a member of a registered valuers organisation.

2. Section 206 of the Companies Act ("CA") does not preclude registrar from initiating parallel proceedings upon discovery of additional material warranting inquiry: Calcutta HC [*Shree Radhe Tea Plantation Private Limited & Anr. v. Registrar of Companies, West Bengal & Ors*]. [Link]

Section 206(4) of the CA empowers the Registrar of Companies to institute an inquiry against a company if it is satisfied that the company's business is fraudulent or unlawful, or non- compliant with the Act. Sections 206- 210 of the CA contain such provisions relating to inspection, inquiry and investigation of companies. The Calcutta HC has held that there is no prohibition on the Registrar, under these Sections, to initiate a parallel inquiry if it discovers some additional material or evidence warranting a fresh initiation.

1. Medium & Small Enterprises Development Act ("MSMED") will prevail over Arbitration & Conciliation Act ("A&C"): Supreme Court ("SC") [*Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd (Unit 2) & Anr*]. [Link]

SC held that the provisions of MSMED Act shall have an overriding effect over the powers of A&C Act. Parties shall continue to have access to a Facilitation Council as provided under the MSMED act even in the presence of an arbitration agreement between them. The court reasoned that the MSMED Act is a specific legislation that regulates medium and small enterprises. Thus, it shall prevail over the A&C Act which is general in nature. Therefore, it shall override any arbitration clause within an agreement.

2. 'Group of Companies' doctrine cannot be invoked in case of a partnership: Delhi HC [*Faizan through Guardian Mrs, Ranu Khan v. The State of Madhya Pradesh & Others*]. [Link]

The Delhi HC held that the 'Group of Companies' doctrine is applicable in agreements entered into by one of the companies within the group. This doctrine treats companies under the same group as a single economic entity for the purpose of arbitration. Thus, a non-signatory company may be bound by an agreement of one of its sister companies. However, the Court held that the doctrine cannot be invoked by a partnership to bind a non-signatory third party company. It reasoned that a partnership is fundamentally different from a company. The court thus, narrowed the scope of the doctrine to only include companies within its ambit.

3. A financial institution cannot invoke arbitration under Section 11 of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act ("SARFAESI") in a lender-borrower dispute: Delhi HC [*Bell Finvest India Limited v. A U Small Finance Bank Limited*]. [Link]

The Section 11 of the SARFAESI provides that any dispute with respect to the securitization/ reconstruction/ non-payment of amount among the parties shall be settled according to the A & C Act, 1996. These disputes may arise between financial institutions, qualified buyers, asset reconstruction companies or banks. The Delhi HC has held that a financial institution cannot invoke arbitration under the said section in a simple lender-borrower agreement. A financial institution has the power to invoke arbitration under the clause only when the dispute is among the parties explicitly mentioned in the act.

4. An arbitrator cannot apply trade against the intention of the parties within the contract: Calcutta HC [*M/S Universal Seaport Private Limited v. The Chairman, Board of Trustees for the Port of Kolkata*]. [Link]

The Section 28 (3) of A&C Act provides that an arbitrator can apply the trade usages applicable to the transaction. A trade usage may be defined as a specialized term/ practice that is commonly used within an area of business. However, the Calcutta HC has held that an arbitrator can apply trade usages to determine a dispute only when the contract is silent on the said aspect.

In the instant case, the trade usage was the Schedule of Rates ("**SOR**") issued by the Tariff Authority of Major Ports. The parties had clearly stated their intention to apply SOR only in exceptional circumstances. Therefore, the arbitrator cannot invoke the usage to act against the express intention of the parties within the contract

5. Grounds for ineligibility under the Seventh Schedule of the A&C Act apply to all proceedings commenced before or after the 2015 amendment of the act: Delhi High Court ("HC") [*Ram Kripal Singh Construction Pvt. Ltd. v. NTPC*]. [Link]

The Delhi HC held that Section 12(5), which was inserted by the 2015 amendment to the A&C Act, will apply to all the appointments of arbitrators. Section 12(5) talks about ineligibility of persons related to the disputed parties or the subject matter as mentioned under Seventh Schedule from being arbitrators. The court has held that even if an arbitration proceeding had commenced before the 2015 amendment had been passed, appointment of an arbitrator after the passing of the amendment would be subject to Section 12(5) and the Seventh Schedule.

6. Arbitration survives even if arbitration under MSMED Act declared non-maintainable: Madras HC [*Deetech Projects Pvt. Ltd. v. Batliboi Environmental Engineering Ltd*]. [Link]

The Madras HC upheld that once a dispute is arbitrated by the Facilitation Council ("FC") under the MSMED Act, arbitration under A&C Act would be barred. However, if the FC refuses to exercise its jurisdiction for whatever reason and declares arbitration under the MSMED Act to be non-maintainable, the arbitration agreement will survive. The parties, in such a case, may choose to go for arbitration according to the terms of their agreement.

7. Rights under an agreement are superseded by a subsequent one? Arbitrator to decide: Delhi HC [*PVR Limited v. Imperia Wishfield Private Limited*]. [Link]

The Delhi HC held that an arbitration clause relates to the resolution of any dispute arising out of a contract and not the performance of the contract. Thus, according to the doctrine of severability which deems the arbitration clause to be independent, the clause will survive even if the contract comes to an end. Further, the issue as to whether the rights of the parties under the contract survives or not is itself arbitrable and the arbitrator can rule on its own jurisdiction in such a case.

8. Challenge under the SARFAESI Act would not bar arbitration proceedings: Delhi HC [*Hero Fincorp Limited versus Techno Trexim (I) Pvt Ltd & Ors*]. [Link]

The Delhi HC held that arbitration won't be barred if a party has already taken an action under the SARFAESI Act by filing a petition at the Debt Recovery Tribunal against any action of the secured creditors. The arbitration proceedings and the proceedings under the SARFAESI Act can continue simultaneously.

MISCELLANEOUS

1. Expenses towards advertisement, brokerage and commission incurred by a Real Estate Developer should be treated as 'Revenue Expenditure': Delhi HC [*Commissioner of Income Tax v Somnath Buildtech Pvt Ltd*]. [Link]

The Delhi HC has laid down those certain expenses incurred by a real estate developer comes under revenue expenditure towards advertisement, brokerage and commission are in the nature of general administration cost and selling cost. This is with respect to the classification done by the Guidance Note with regards to the cost incurred in the production issued by the Institute of Chartered Accountants of India.

2. If insurance company is not liable, there should not be no direction to 'Pay or Recover': SC [*Balu Krishna Chavan v The Reliance General Insurance Company Ltd & Ors*]. [Link]

The apex court held that the insurance company is not liable to reimburse the insurance company in this case was not liable to reimburse the compensation. The court laid down a general rule that insurance companies are liable. There shall not be any direction to 'pay and recover' when the company is not liable for the compensation claim. However, this principle should change with different facts and circumstances of the case, if required, to meet the ends of justice.

3. Liability under Section 201 of Income Tax Act is a vicarious liability: Income Tax Appellate Tax ("ITAT"). [Link]

Recently, the ITAT interpreted the nature of liability under Section 201 of Income Tax Act. The section deals with liability to deduct any sum in accordance with the provisions of the Act. It held that liability, under this provision is vicarious in nature that ends with the discharge of principal liability of the recipient of income. As a result, the deduction of TDS ceases to exist when the primary liability of the recipient of income is already discharged. Therefore, it cannot be invoked against the assessee. Further, ITAT added that provisions under Section 201 are only recovery provisions, thus only compensatory and not penal in nature.

4. Taxpayers to file previous tax periods GSTR-1 before filing current period GSTR-1: Centre Board of Indirect Taxes and Custom("CBIC"). [Link]

The CBIC has announced that the taxpayers need to file previous tax periods on

GSTR-1. It is a statement of outward supplies that are filed on a quarterly basis. Subsequently, the GSTR-1 for the current period is filed, followed by the filing of GSTR-3B for the tax period. GSTR-3B is a self-declared summary GST return filed every month.

5. Facility charges against electricity expenses do not attract service tax: Customs, Excise, and Service Tax Appellate Tribunal ["CESTAT"]. [Link]

In this case, the CESTAT held that service tax is not payable on the amount received as facility charges. This is because electricity is a 'good' and not a 'service'. Thus, it is outside the scope of service tax. However, this is with regards to the specific facts and circumstances of a particular case. The issue is wholly interpretational, and hence, an extended period is not invokable.

6. Industrial township comes under the ambit of 'Local Area' when entry tax is levied by states: SC. [*M/s OCL India Ltd v State of Orissa & Ors*]. [Link]

Recently, SC held that industrial townships are 'local areas' for the purposes of entry tax. Even though the same are excluded from the purview of municipalities. The nature of the services provided in industrial areas shall be decided by the State or Governor. This inclusion is with respect to the power vested by the Municipal Law. The inclusion of industrial ownerships is required because the state can levy taxes on the entry of goods into a local area for consumption, use or sale inside it.

7. When Debts Recovery Tribunals ("DRT")/Debts Recovery Appellate Tribunals ("DRAT") is empowered to decide a matter there is a bar on civil court jurisdiction under Section 34 of SARFAESI: SC *[Leelamma Mathew v M/s Indian Overseas Bank & Ors*]. [Link]

Recently SC, while deciding a case related to a bank that had secured a property, opined that the bar under Section 34 of SARFAESI is applicable only when there is a jurisdiction of DRT/DRAT over that matter. Section 34 bars the civil court to have jurisdiction any matter which a DRT or the Appellate Tribunal is empowered. This was with respect to the situation where the plaintiff claimed the damages/compensation, where DRT had jurisdiction. However, a civil court had pronounced their opinion with regards to the same. Therefore, the suit was barred by Section 34 of the SARFAESI.

8. Any change in the jurisdiction of DRT without amendment of Recovery of Debts and Bankruptcy ("RDB") Act 1993 is unsustainable: Bombay HC. [*Ishwarlal Shankarlal Lalwani v. Union of India*]. [Link]

Recently, the court while hearing a challenge with regards to a notification of the government, denied inculcating any changes without amendment of RDB Act, 1993. The notification was with regards to the jurisdiction of DRT in matters above Rs 100 crores. The court noted that the impugned notification would divest the jurisdiction of DRT established by RDB Act without amending the current provision.

9. Competition Commission of India ("CCI") slams Google with two penalties within a week for various anti - competitive practices in the digital market. [Link 1] [Link 2]

Firstly, CCI has imposed a penalty of whooping 1337.6 crores on Google for abusing its dominant position in the operating system market. Smartphone manufacturing companies had to pre-install Google applications in order to use Android operating software. This was considered as an abuse of dominance in Operating System market, to self-prefer its own applications. Secondly, CCI also imposed 936 crores on google for forcing app developers to use google play's billing system for purchases.

10. Sale of scrap not arising out of a manufacturing activity, also taxable: ITAT [*Umeshkumar Harilal Shah v. ITO (TDS)-3, Ahmedabad*]. [Link]

Section 206C of the Income Tax Act, 1961 talks about percentage of tax to be charged on various goods one of which is scrap. Scrap is defined as waste which is further not usable. The ITAT held that the source of scrap was irrelevant for the purpose of taxation. It could be scrap generated from a manufacturing activity or scrap bought and sold in both the cases tax would be charged, basically that the seller need not be the generator of scrap.

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