MONTHLY CORPORATE LAW UPDATES

NOVEMBER, 2023

- INSOLVENCY & BANKRUPTCY LAW
- SECURITIES LAW
- COMPANY LAW
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1. Moratorium placed under Sections 96 and 101 of the Insolvency and Bankruptcy Code, 2016 ("IBC") cannot limit the ability to take action under Sections 7, 9, or 10 of the IBC: National Company Law Tribunal ("NCLT") [*Furnace Fabrica (India) Limited v. State Bank of India*]. [Link]

The NCLT has held that the moratorium under Sections 96 and 101 of the IBC cannot take away the right to action under Sections 7, 9, or 10 of the IBC, as such a moratorium is placed against a body corporate or company and not an individual. Under IBC, the Section 14 moratorium is derived from the corporate debtor's primary debt, and the Section 96 or 101 moratorium is derived from the secondary debt, or guarantee default.

2. The criteria for determining the date of default and the limitation period in relation to debt are different: NCLT [*M/s. DB Power Limited v. M/s Kreate Energy (I) Private Limited*]. [Link]

The NCLT Bench observed that the parameters on which the limitation period and the date of default for a debt are calculated are different. They are two distinct questions of law and fact and therefore cannot be evaluated on similar grounds.

3. Section 95 to 100 of the IBC are not unconstitutional: Supreme Court ("SC") [*Dilip B Jiwrajka v. Union of India & Ors*]. [Link]

Sections 95 to 100 of the IBC, which deal with Personal Guarantors' Insolvency Resolution, and were added by the 2019 amendments, were affirmed by the SC as constitutional. These provisions deny personal guarantors a right to a hearing prior to the admission of an insolvency petition filed by creditors against them. Further, a moratorium is also imposed as soon as the filing happens. The court further held that a resolution professional is not intended to perform an adjudicatory function under Section 97 of the IBC.

4. An approved resolution plan cannot be disputed by application of the doctrine of promissory estoppel: National Company Law Appellate Tribunal ("NCLAT") [*Fervent Synergies Limited v. Manish Jaju*]. [Link]

The NCLAT has held that an approved resolution plan under the IBC cannot be subject to the doctrine of promissory estoppel if it complies with the requirements of Section 30, Subsection (2) of the IBC and the Corporate Insolvency Resolution Process ("**CIRP**") Regulations, 2016.

Section 30 of the IBC deals with the submission of a resolution plan, while the CIRP Regulations, 2016, provide for the essential contents of a resolution plan.

5.Even if some allottees' claims have expired or fall below the Rs. 1 crore threshold, CIRP under Section 7 may still be initiated: NCLAT [*Mist Avenue Pvt. Ltd. v. Nitin Batra & Ors.*]. [Link]

The NCLAT has ruled that it is not mandatory that the amount of debt owed to each real estate allottee should be more than 1 crore or that the limitation requirement should be fulfilled separately for each allottee in the event that a Section 7 application for the initiation of CIRP is filed jointly by the allottees. Even if only a part of the financial creditors (allottees) meet the required minimum default threshold of Rs. 1 crore, the CIRP under Section 7 of the IBC may still get underway.

Section 7 requires proof that the default of Rs. 1 crore owed by the corporate debtor is not barred by limitation. If the corporate debtor's default of Rs. 1 crore is within limitation, it is immaterial that the claim of some other allottees, who were joint applicants, is barred by limitation.

6. While exercising its power under Section 31 of the IBC, the tribunal cannot go beyond probing whether Section 30(4) of the IBC has been complied with: NCLAT [*Sita Chaudhary v. Haryana Telecom Limited*]. [Link]

The NCLAT held that the enquiry under Section 31 of the IBC, which pertains to the approval of a resolution plan by the adjudicating authority, is limited to examining adherence to Section 30(4) of the IBC. Section 30(4) provides that a minimum of 75% voting share of the financial creditors is required to approve a resolution plan.

The bench also noted that if there is no timely challenge to the CIRP and the Committee of Creditors ("**CoC**") constitution, an appellant cannot ask for rejection of a duly approved resolution plan if the requirements under Section 30(4) have been satisfied.

7. There should be no arbitrary intervention with the commercial wisdom of the CoC: SC [*Ramkrishna Forgings Limited v. Ravindra Loonkar & Anr*]. [Link]

The NCLT suspended the approval of a resolution plan while directing an official liquidator to re-evaluate the corporate debtor's assets. The SC has set aside this NCLT direction as the valuation of assets was already done by the Resolution Professional as per the provisions of the IBC.

The court further held that the appointment of an official liquidator by the tribunal is unwarranted when no party has raised an objection with the Resolution Professional or CoC. The resolution plan was formulated and approved in accordance with the provisions of the code, and therefore, there was no need to cursorily interfere with the commercial wisdom of the CoC.

8. The protection granted under Sections 32A(2) and 33(5) of the IBC takes precedence over the authority of the Enforcement Directorate ("ED") to seize properties under Section 5(1) of the Prevention of Money Laundering Act ("PMLA"): Gujarat High Court ("HC") [*AM Mining India Private Limited v. Union of India*]. [Link]

The Gujarat HC held that Sections 32A(2) and 33(5) of the IBC take precedence over the ED's power to attach properties under Section 5(1) of the PMLA, as such attachment would intervene with the sale process that is essential to ensuring successful liquidation. Section 32A deals with liability for prior offences, while Section 33 deals with the initiation of liquidation.

This also reaffirms the position enshrined in Section 238 of the code, which provides that the provisions of the IBC would override anything inconsistent with any other law. While the PMLA also has a similar provision in Section 71, the same gets overridden by the provisions of the IBC, which was enacted after the PMLA.

9. The Insolvency and Bankruptcy Board of India ("IBBI") suggests changes to the CIRP Regulations [Link]

The IBBI has proposed amendments to the IBBI CIRP Regulations. The proposed amendments include; mandating monthly meetings for the CoC; the Insolvency Professional requiring the approval of the CoC for insolvency resolution costs; discussion of valuation methodology and report with the CoC before finalisation of the valuation report; clarifying the minimum entitlement to dissenting financial creditors and many others aimed at streamlining the insolvency process.

10. The IBBI suggests real estate related changes to the CIRP Regulations and the IBBI (Liquidation Process) Regulations, 2016. [Link]

The proposed changes include; mandatory registration and extension of projects under Real Estate Regulatory Authority ("**RERA**") for projects wherein registration is about to expire; operating a separate bank account for each real estate project to ensure transparency in the insolvency process; execution of registration deeds with the approval of the CoC to facilitate smooth transfer of possession; mandating the CoC to examine separate resolution plans for each project; excluding the property in possession of homebuyers from the liquidation estate; among other proposed changes.

1. Securities and Exchange Board of India ("SEBI') releases a consultation paper that allows for greater flexibility in insider trading of business shares. [Link]

The SEBI intends to loosen rules to allow key management personnel ("**KMP**"), who frequently have access to unpublished price-sensitive information ("**UPSI**"), greater latitude when trading business shares. Such employees are prohibited from trading shares by SEBI's insider trading restrictions since they have access to UPSI, which is not available to the general public.

SEBI has recently established a working group to review the legislation, and the group has produced some proposals that will allow KMPs to have more flexibility when it comes to their trading strategies.

2. SEBI to amend rules to facilitate Small and Medium Real Estate Investment Trusts ("SM REITs"). [Link]

SEBI has decided to establish a regulatory framework for organisations that support fractional real estate investments, requiring them to conduct business as SM REITs. Revisions to the Real Estate Investment Trusts ("**REITs**") Regulations, 2014, have been adopted by the SEBI board. The purpose of these revisions is to provide a legal framework that will facilitate the establishment of SM REITs, which will have asset values of at least Rs. 50 crores, as opposed to the minimum asset value of Rs. 500 crores for ordinary REITs.

3. Modified regulations require Alternative Investment Funds ("AIFs") to dematerialize units: SEBI. [Link]

SEBI stated that any new investments made by an AIF after September 2024 shall be held in dematerialized form in order to improve investor protection and make compliance easier. SEBI said that the mandate for the appointment of custodians should be extended to all AIFs. Currently, the requirement applies only to schemes of Category III AIFs and schemes of Category I and II AIFs with a corpus of more than Rs 500 crore. Investments held by AIF liquidation schemes, schemes having a one-year duration, and schemes of an AIF with an extended term would be free from the new requirement.

4. Simplified norms for processing investor service requests by Share Transfer Agents ("RTA") and norms for furnishing Permanent Account Number ("PAN"), Know Your Client ("KYC") details, and Nomination: SEBI. [Link]

SEBI simplified the norms for processing investor services by omitting the provision of freezing of folios without the furnishing of PAN, KYC details, and Nominations for all holders of physical securities.

Earlier, it was mandatory for all holders of physical securities in listed companies to furnish the details of PAN, KYC, and nomination. The failure to produce any such documents would lead to the freezing of the folios by the Registrars to an Issue and RTA. To mitigate these unintended challenges, this decision has been taken based on representations received from the Registrars' Association of India and feedback from investors.

The freezing of folios under the Benami Transactions (Prohibitions) Act, 1988, and/or Prevention of Money Laundering Act, 2002, has also been done away with by the above provisions.

5. Simplification and streamlining of Offer Documents of Mutual Fund Schemes: SEBI. [Link]

SEBI revamped the format of the Scheme Information Document ("**SID**") to increase its readability for investors.

The top 10 holdings of the issuer and fund allocation towards various sectors shall now be disclosed by way of a functional web link where the said data will be hosted. Moreover, the Statement of Additional Information ("**SAI**") for mutual fund schemes must contain specific disclosures regarding the collective investment in the scheme by the board of directors and key personnel of the Asset Management Company ("**AMC**").

The discretion to establish a segregated portfolio lies with the AMC and is to be exercised if the SID incorporates enabling provisions for such portfolios, accompanied by detailed disclosures in the SAI.

Furthermore, it enhances transparency and provides investors with crucial risk-related information at the forefront of the documentation. The AMCs are obligated to prominently disclose the risk-o-meter of the benchmark on the front page of the initial offering application form, SID, key information memorandum and common application form, in conjunction with comprehensive information about the respective scheme.

6. SEBI introduces a procedural framework for dealing with unclaimed amounts lying with entities having listed non-convertible securities and the manner of claiming such amounts by to investors. [Link]

In order to uniform the process of claiming unclaimed funds by investors, SEBI has introduced a procedural framework. This framework applies to entities holding listed non-convertible securities, including interest, dividend, or redemption amounts that remain unclaimed thirty days after the due date. It also extends to REITs and Infrastructure Investment Trusts ("**INVITs**") with unclaimed or unpaid amounts from declared distributions.

Under this framework, listed entities must fulfil their obligation by transferring unclaimed amounts to an escrow account in any scheduled bank within the prescribed period. For REITs and INVITs, if payments to unitholders go unpaid or unclaimed for up to fifteen days from the declaration date, the manager must transfer these amounts to an escrow account within seven working days after the end of these fifteen days.

Further, entities falling under these guidelines are also required to appoint a "Nodal Officer" to act as the point of contact for investors seeking to claim their unclaimed amounts, as well as for communication with SEBI, stock exchanges, and depositories.

7. SEBI reduces the minimum issue size for the Social Stock Exchange ("SSE") to Rs 50 lakhs. [Link]

SEBI has reduced the minimum issue size of public issuance of Zero Coupon Zero Principal Instruments by Not-for-Profit Organisations ("**NPO**") on SSE from Rs.1 crore to Rs. 50 lakhs. This decision has been taken to provide impetus to fundraising by NPOs. The minimum application size has also been reduced to Rs. 10,000 from Rs. 2 lakhs to widen the participation of subscribers.

Additionally, to provide a positive approach towards the social sector, SEBI has changed the nomenclature of "Social Auditor" to "Social Impact Assessor". Further, NPOs are now permitted to disclose their past social impact report in the fundraising document.

SEBI has also introduced a regulatory framework for Index Providers. This decision has been taken to foster transparency and accountability in the governance and administration of financial benchmarks in the securities market.

These regulations will only be applicable to 'Significant Indices' that shall be notified by SEBI based on objective criteria. Accordingly, these regulations will provide a framework for the registration of these 'Significant Indices'.

1. The mandate of an arbitral tribunal can be extended even if the application is filed after the expiration of the time limit for the award: Delhi HC [*ATC Telecom Infrastructure Pvt Ltd v. BSNL*]. [Link]

The Delhi HC has held that an extension to the mandate of a tribunal can also be granted in cases where the application, in that regard, is not filed within the time limit provided for passing the award. Section 29A of the Arbitration and Conciliation Act, 1996 ("**A&C Act**") provides for a time limit for passing an arbitral award, and its sub-section 5 provides for an extension to the mandate of the tribunal in case an award is not made within the time limit.

2. A dispute arising out of any additional work done without any formal agreement would still be governed by the arbitration clause of the main agreement: Jammu & Kashmir and Ladakh HC [*A K Engineers and Contractors Pvt Ltd v. Union Territory of J&K*]. [Link]

The Jammu & Kashmir and Ladakh HC has held that when any additional work connected to the main work is taken up without any formal agreement, then any dispute in relation to the additional work will be governed by the arbitration clause of the main agreement.

3. An objection raised in the grant of leave application against a suit on the ground of the existence of an arbitration agreement is valid: Delhi HC [*Madhu Sudan Sharma v. Omaxe Ltd*]. [Link]

The Delhi HC has held that contending the non-maintainability of a suit in the grant of leave application on the ground of the existence of an arbitration agreement also satisfies the requirement of Section 8 of the A&C Act. Section 8 empowers a judicial body to refer the parties to arbitration in case there is an arbitration agreement between them, while Order XXXVII Rule 3(5) of the Code of Civil Procedure ("**CPC**"), 1908, provides for the grant of leave to defend a particular suit.

4. Furnishing a bank guarantee is not a necessity if the respondent is not trying to prejudice the enforcement of the award: Delhi HC [*Skypower Solar India Pvt Ltd v. Sterling and Wilson International FZE*]. [Link]

The Delhi HC has held that the respondent would not be ordered to furnish a bank guarantee by a court via Section 9 of the A&C Act if there is no apprehension of the respondent alienating or disposing of its assets so as to impair the enforcement of the arbitral award. Further, the court equated the direction to furnish a bank guarantee under Section 9 with the order of attachment given under Order XXXVIII Rule 5 of the CPC.

5. A general jurisdiction clause in a previous agreement is always superseded by an exclusive jurisdiction clause: Calcutta HC [*R.P. Infosystems Pvt Ltd v. Redington (India) Limited*]. [Link]

The Calcutta HC has held that if there is an exclusive jurisdiction clause in an arbitration agreement, then it will have preponderance over a general jurisdiction clause contained in a previous agreement between the parties.

6. A party cannot contest an arbitral award for exceeding the reference scope if it failed to object when the alleged breach initially occurred: Delhi HC [*Aman Hospitality Pvt Ltd v. Orient Lites*]. [Link]

The Delhi HC ruled that a party cannot contest an arbitral award for exceeding the scope of reference if it did not raise objections during the alleged breach by the tribunal. The court held that a party cannot challenge an arbitral award on the ground that the tribunal went beyond the scope of reference when it admittedly did not raise any objection when the alleged breach was first committed by the tribunal.

7. No separate application under Section 8 of the A&C act is required when the objection is duly raised in the written submissions: Delhi HC [*Madhu Sudan Sharma v. Omaxe Ltd*]. [Link]

The Delhi HC clarified that objecting to a court's jurisdiction in the written statement due to an arbitration clause is sufficient compliance with Section 8 of the A&C Act. The court held that the mere absence of a separate application requesting arbitration does not negate compliance when the presence of an arbitration clause is expressly raised in the written submission. Additionally, the court dismissed the notion of waiver, stating that contesting a suit does not relinquish the right to arbitration if the objection is raised.

Section 8 of the A&C Act is peremptory in nature. It provides that a judicial authority shall, based on the arbitration agreement between the parties, direct the parties to go for arbitration.

8. Writ petition not maintainable when there exists an arbitration clause to look into dispute: Calcutta HC [*ILEAD Foundation v. State of West Bengal*]. [Link]

The Calcutta HC ruled that a writ petition is not maintainable when an arbitration clause exists and the dispute involves contested facts requiring detailed assessment. The court held that while an alternative remedy doesn't always bar a writ petition, detailed factual assessment falls within the domain of arbitration.

9. Court exercising powers under Section 34 of the A&C Act cannot allow claims rejected by the Arbitral Tribunal: Delhi HC [*Bharti Airtel v. Jamshed Khan*]. [Link]

The Delhi HC held that its powers under Section 34 of the A&C Act do not extend to allowing claims rejected by the arbitral tribunal. It stated that the court cannot rewrite an arbitral award but can only set it aside or uphold it. While partial setting aside is possible for severable issues, the court cannot modify the award by allowing rejected claims. The judgment underscores the intent of Section 34 and the court's role in maintaining the arbitration proceedings.

10. Denial of arbitration clause in reply to arbitration notice can't disentitle a party to invoke Section 8 of the A&C Act in a suit: Delhi HC [*ANR International Pvt Ltd v. Mahavir Singhal*]. [Link]

The Delhi HC stated that when a valid arbitration agreement exists and the respondent applies for arbitration before submitting a written statement, the court is obligated to refer the dispute to arbitration. The court rejected the argument that initial denial of the arbitration agreement prevents subsequent reference, emphasizing that the doctrine of approbation and reprobation doesn't apply when the plaintiff acknowledges the agreement.

The doctrine of approbation and reprobation is a legal concept that precludes a party from acknowledging a transaction, benefit, or act, and subsequently disowning or repudiating it when such disavowal becomes detrimental. In simple words, an individual may not simultaneously endorse and disapprove of the same action or transaction at disparate times, particularly if the alteration in stance proves inequitable or prejudicial to the counterparty.

11. The arbitration clause contained in the tax invoice is binding when the terms and conditions of the invoice were accepted and acted upon: Calcutta HC [*R.P. Infosystems Pvt Ltd v. Redington (India) Limited*]. [Link]

The Calcutta HC ruled that an arbitration clause in a tax invoice is binding when accepted and acted upon. The court held that an exclusive jurisdiction clause in the invoice prevails over a general territorial jurisdiction. The decision underscores the significance of parties' actions in accepting invoices and the exclusivity of jurisdiction clauses in determining the validity and jurisdiction of arbitration agreements.

1. Ministry of Corporate Affairs ("MCA") notifies rules for Significant Beneficial Owners ("SBOs") & their Declaration to reporting Limited Liability Partnerships ("LLPs"). [Link]

The MCA notified the Limited Liability Partnership (Significant Beneficial Owners) Rules, 2023, mandating every LLP to declare individuals identified as SBOs for the company under Section 90 of the Companies Act, 2013.

Here, "significant influence" refers to the authority to engage, either directly or indirectly, in the decision-making processes related to the financial and operational policies of the reporting LLP. However, this term does not encompass control or joint control over these policies.

The individual who is identified as SBO has to make a declaration within 90 days from the date of commencement of these rules. Accordingly, upon receiving the declaration from the SBO, the reporting LLP is obligated to submit a return in the prescribed format to the registrar of companies. This filing must be completed within 30 days from the date of receiving the aforementioned declaration.

Additionally, LLPs are mandated to uphold a register of SBOs. This register shall be open for examination during regular business hours.

These rules do not apply to LLPs held by the Central Government, State Government, or Local Authorities. Similarly, the reporting LLP, any body corporate, or entity under the control of the Central or State Governments is exempt from these provisions.

Furthermore, these regulations do not extend to investment vehicles subject to the oversight of the SEBI or those regulated by the Reserve Bank of India, the Insurance Regulatory and Development Authority of India, or the Pension Fund Regulatory and Development Authority.

1. Reserve Bank of India ("RBI") releases Regulation of Payment Aggregator - Cross Border ("PA - CB"). [Link]

The RBI has brought under its regulation all entities that facilitate cross-border payments for import and export of goods and services via online modes. All ePay companies would now need to adhere to the compliance requirements and will be brought under the RBI's direct supervision.

Non-banking entities that undertake PA - CB services will mandatorily require authorization from the RBI. Some of the compliance requirements include a net-worth requirement of Rs. 15 cr; maintenance of Import Collection Account and Export Collection Account; mandating customer due diligence by way of KYC, especially in transitions involving larger sums of money; requiring non-bank PA - CBs to register with the Financial Intelligence Unit prior to seeking authorization from the RBI; imposing a transaction limit of Rs. 25 lacs per unit of goods or services for import and export transactions, among other requirements.

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