MONTHLY CORPORATE LAW UPDATES

AUGUST, 2023

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1. Admission of revised date of default by National Company Law Tribunal ("NCLT") to take Corporate Insolvency Resolution Process ("CIRP") application out of the purview of Section 10A was a patent error: National Company Law Appellate Tribunal ("NCLAT") [*Malavika Hedge v. Indusind Bank Ltd*]. [Link]

The NCLAT has held that the NCLT had committed a patent error in accepting the revised date of default submitted by the financial creditor which indicates the date of default as 28.2.2020 instead of 30.4.2020. The revised date took it out from purview of Section 10A of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Section 10A says that no application shall ever be filed for CIRP of a corporate debtor for any default occurring after 25th March, 2020, for a period of six months, which was extended to 9 months by a notification.

2. Transfer of assets within group companies will not constitute fraudulent trading under Section 66(1) of IBC: NCLAT [*Renuka Devi Rangaswamy v. Madhusudan Khemka*]. [Link]

The NCLAT has held that the transaction of transfer of assets, within group companies, will ordinarily not come within umbrage of fraudulent trading under section 66(1) of IBC. In order to establish that such a transaction would constitute fraudulent trading, the applicant must establish fraud or dishonest intent on the respondent's side.

3. A stock broker company is recognized as a 'financial service provider' under the IBC. CIRP cannot be initiated against it: NCLT [*M/s Bezel Stockbrokers Private Limited v. Security Exchange Board of India & Anr.*]. [Link]

The NCLT has held that under Section 3(15) of the IBC, 'securities' fall under 'financial product', and since a stock broker company deals in securities, it is providing a 'financial service'. This makes the company a 'financial service provider' in terms of Section 3(17) of the IBC.

CIRP proceedings can only be initiated against a 'corporate person', and since 'corporate person', as defined under Section 3(7) of the IBC, expressly excludes any 'financial service provider', CIRP cannot be initiated against a stock broker company.

4. Payment of performance linked incentive fee by the Committee of Creditors ("CoC") is discretionary and NCLT or NCLAT cannot intervene: NCLAT [*Ravindra Kumar Goyal v. Committee of Creditors of Yashasvi Yarns Limited & Anr*]. [Link]

Rule 34B(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") provides to the CoC the power to pay performance linked incentive fees to the Resolution Professional ("**RP**").

NCLAT has held that the inclusion of terms like 'may' and 'in its discretion', in rule 34B(4) of the CIRP regulations emphasizes that the decision regarding the payment of this fee is at the discretion of the CoC. The CoC's refusal to pay this fee is not in contravention of the powers vested under regulation 34B and the NCLT or NCLAT does not have jurisdiction to interfere with the decision.

5. NCLAT can 'recall' its judgment but not 'review' them: Supreme Court ("SC") [*Union Bank of India v. Financial Creditors of M/s Amtek Auto Limited & Ors*]. [Link]

The SC has held that the NCLAT has the power to recall judgements by invoking inherent powers under Rule 11 of the NCLAT Rules, 2016. However, this power does not extend to re-hearing a case and the power of review is not vested in NCLAT. The power of recall can be exercised only upon the occurrence of a procedural error in the delivery of the earlier order. During review, on the other hand, a court would see if there was an error on merits.

6. A secured creditor can initiate recovery proceedings against a guarantor even if a moratorium is placed on the defaulter: Bombay High Court ("HC") [*Latif Yusuf Manikkoth v. Board of Directors of the Bank of Baroda and Ors*]. [Link]

The Bombay HC dismissed a writ petition seeking to prevent a bank from recovering a loan on the ground that the NCLT had issued a moratorium on the borrower under Section 14 of the IBC. The court held that since the 'secured asset' was owned by the guarantor bank, the secured creditor could proceed against the property under The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest ("**SARFAESI**") Act, 2002.

In initiating SARFAESI proceedings against the guarantor, the bank does not violate the moratorium imposed on proceedings against the borrower.

6. Application filed under Section 9 of the IBC is not maintainable against a claim for compensation penalty under a contract: NCLAT [*Chandrashekhar Exports Pvt. Ltd. v. Babanraoji Shinde Sugar & Allied Industries Ltd*]. [Link]

The NCLAT has upheld the dismissal of an application filed under Section 9 of the IBC based on a claim for compensation penalty under a contract. Section 9 of the IBC pertains to application for the initiation of CIRP by an operational creditor.

For an application to be admissible, an operational debt must be crystallized and undisputed, such that it does not require adjudication by the tribunal. The crystallization of the compensation penalty has to be determined by a competent court and not the AA.

7. Approval of a resolution plan does not waive the statutory obligations of the corporate debtor: NCLT [*Corporation Bank v. General Composite Pvt. Ltd*]. [Link]

The obligations and liabilities of the corporate debtor shall be dealt with by the appropriate authorities, and the approval of a resolution plan does not waive these liabilities. Any waiver sought shall be awarded subject to the approval of the concerned authorities.

8. Differential payments can be made to assenting and dissenting unsecured financial creditors: NCLAT [*Peter Beck and Partner Vermoegensverwaltung GMBH v. Sharon Bio-medicine Limited & Ors*]. [Link]

The NCLAT has held that differential payments can be made to assenting and dissenting unsecured financial creditors. The assenting financial creditors are entitled to payment as proposed in the resolution plan and the dissenting financial creditors would be entitled to minimum entitlement as stipulated under Section 30(2)(b) of the IBC. The section provides that payment to creditors shall not be less than the amount to be paid in the event of liquidation of a corporate debtor.

9. Central Excise Authority is not a secured creditor under IBC: NCLAT [*The Assistant Commissioner of Central Tax v. Mr Sreenivasa Rao Ravinuthala & Anr*]. [Link]

The NCLAT has held that according to a circular issued by the Department of Revenue in 2017, dues under the Central Excise Act, 1944 would have first charge only after the dues under the provisions of the IBC are recovered. 'Secured interest' as defined in the IBC expressly excludes charges created by operation of law. Accordingly, the tribunal held that the Central Excise Authority is not a secured creditor under the IBC.

1. Reduced time limit for making overseas investments by alternative investment funds ("AIFs") and venture capital funds ("VCFs") from 6 months to 4 months: Securities and Exchange Board of India ("SEBI"). [Link]

In terms of earlier circulars released by SEBI, VCFs and AIFs had a time limit of six months from the date of prior approval from SEBI for making the allocated investments in offshore venture capital undertakings. In case the applicant AIF/VCF did not utilize the limits allocated within six months, SEBI could allocate such unutilized limit to other applicant AIFs/VCFs.

SEBI, taking into account recommendations of the Alternative Investments Policy Advisory Committee, has decided to reduce the aforesaid time limit for making overseas investments by AIFs/VCFs from six months to four months, so that the allocated limit is utilised efficiently.

2. SEBI mandates prior approval for change in control of the intermediary in matter of schemes of arrangement. [Link]

Earlier, SEBI, via a circular, had specified the procedure for seeking prior approval for change in control of certain intermediaries including Merchant Bankers and Bankers to an Issue. Now, SEBI has mandated prior approval from the Board for any change in control of market intermediaries in the matter of Schemes of Arrangement.

The application for approval of the proposed change in the control of the intermediary must be filed with SEBI prior to filing the application with the NCLT. The validity of such in-principal approval must be three months from the date of issuance, within which the relevant application must be made to the NCLT. Within 15 days from the date of the order of NCLT, the intermediary must submit an online application to the SEBI for final approval, along with the required documents.

3. SEBI reduces exit option timeline from 30 to 15 days granted to unitholders in case of change in control of Asset Management Companies ("AMCs"). [Link]

SEBI has recently come up with a circular under which, unitholders in an AMC have been given an option to exit on the prevailing Net Asset Value ("**NAV**") without any exit load within a time period not less than 15 calendar days from the date of communication in case of a change in control of the AMC.

However, in case of change in control resulting in consolidation or merger of schemes, the unitholders have been given an option to exit on the prevailing NAV without any exit load within a time period not less than 30 calendar days from the date of communication.

4. SEBI enhances disclosure norms strengthening the 'General obligations and responsibilities' of Foreign Portfolio Investors ("FPIs"). [Link]

SEBI has notified an amendment to the SEBI (Foreign Portfolio Investors) Regulations, 2019. New sub-regulations 6 and 7 have been introduced in Regulation 22 which pertains to general obligations & responsibilities of FPIs. Now, an FPI that fulfils the criteria specified by SEBI is required to provide information or documents in relation to persons with any ownership, economic interest or control in the FPI.

Further, Regulation 4 which pertains to the eligibility criteria for FPIs has been amended. Under the previous norms, the applicant or its underlying investors contributing 25% or more to the corpus of the applicant, or investors identified based on control, could not be persons mentioned in the Sanctions List notified by the United Nations.

Now, instead of the limit of 25%, compliance must be ensured with the threshold prescribed under Rule 9 of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 which provides for client diligence. SEBI's policy aims to promote transparency, accountability and prevent the evasion of taxes.

5. SEBI reduced the timeline for the listing of shares in Public Issue from existing T+6 days to T+3 days). [Link]

SEBI has come up with a circular, reducing the time taken for listing specified securities after the closure of public issues to 3 working days (T+3 days) as against the present requirement of 6 working days (T+6) days. Here, "T" denotes the issue closing date.

Accordingly, the T+3 timeline for listing shall be appropriately disclosed in the offer documents of public issues. The timelines for submission of application, allotment of securities, unblocking of application monies, and listing shall prominently be made a part of pre-issue, issue opening, and issue closing advertisements issued by the Issuer for public issues in terms of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018.

The provisions of this circular will be applicable on a voluntary basis for public issues opening on or after September 1, 2023, and on a mandatory basis for public issues opening on or after December 1, 2023.

6. Simplification of the Know Your Client ("KYC") process and rationalization of a risk management framework for (Know Your Client) Registration Agency ("KRA"): SEBI. [Link]

SEBI has released a circular to streamline the KYC process and the risk management framework for KRA's to ease the onboarding of clients for dealing in the securities market. The KYC process means obtaining the proof of identity and proof of address of the client.

In the interest of investors and for ease of transacting in securities markets, the clients are now allowed to open an account with intermediaries and transact in the securities market as soon as the KYC process is completed.

The KRA's are responsible for the verification of the Permanent Account Number ("**PAN**") including PAN-Aadhaar linkage, name, address, mobile number, and email id of all the clients within 2 days of receipt of KYC records.

For the purpose of simplification of the whole process, the KRAs will now develop systems/mechanisms in coordination with each other and shall follow uniform internal guidelines/standards detailing aspects of identification of attributes and procedures for verification/ validation, in consultation with SEBI.

7. SEBI mandates additional disclosures by FPIs that fulfil certain objective criteria. [Link]

SEBI has come up with a circular mandating additional disclosure by FPIs to mitigate the concerns posed by certain FPIs who have been observed to hold a concentrated portion of their equity portfolio in a single investee company/ corporate group. SEBI mandates FPIs to disclose granular details of all entities holding any ownership, economic interest, or exercising control in the FPI, on a full look-through basis, up to the level of all natural persons, without any threshold.

EFPIs holding more than 50% of their Indian Equity Assets Under Management ("AUM") in a single Indian corporate group shall disclose the specified information within 10 trading days from the date on which this threshold is exceeded. Such FPIs shall not make fresh purchases of the equity shares of any company belonging to such Indian corporate group, during the next 30 calendar days from the date on which the FPIs exceeded the threshold.

FPIs, including their investor group, holding more than INR 25,000 crore of equity AUM in the Indian markets shall disclose the specified information within 90 calendar days from the date on which this threshold is exceeded. Accounts of all FPIs, individually or belonging to such investor group, shall be blocked for further equity purchases until the holding is brought below INR 25,000 crore of equity AUM in the Indian markets.

1. An award holder may be allowed to withdraw the security deposit furnished by the judgement debtor if the Section 34 application is pending: Calcutta HC [*The State of West Bengal & Ors v. M/s BBM Enterprise*]. [Link]

The Calcutta HC has held that an award holder can withdraw the security deposit that had been furnished by the judgement debtor for a stay on the arbitral award. If the courts permit, an award holder can withdraw such an amount by furnishing a bank guarantee of an equal amount. This can be done when the court has passed an order for a stay on the execution of the award and an application challenging the award is pending under Section 34 of the Arbitration & Conciliation ("**A&C**") Act, 1996.

2. An express or written consent is not required by the parties for extending the arbitral period: Himachal Pradesh HC [*Balak Ram v. NHAI*]. [Link]

The Himachal Pradesh HC has held that it is not necessary for the parties to have express or written consent for the purpose of extending the arbitral period under Section 29A(3) of the A&C Act. Such consent can also be implied from the acts and conduct of the parties.

3. Time limit provided under Section 29A of the A&C Act is mandatory: Bombay HC [*Mahaveer Realities & Ors v. Shirish J Shah*]. [Link]

The Bombay HC has held that that the arbitrator cannot compel the parties to participate in the arbitral proceedings after the expiration of the arbitrator's mandate and then justify it as a waiver of right to object under Section 4 of the A&C Act.

The court went on to hold that even if made voluntarily, the time limit provided under Section 29A of the A&C Act for passing an arbitral award is non-derogable and cannot be dispensed with by a waiver.

4. When family members have signed an arbitration agreement to which the head of the family is a party, they shall be bound by the agreement: Delhi HC [*Mrs Vinnu Goel v. Mr Santosh Goes and Ors*]. [Link]

The Delhi HC held that when the respective heads of two families are parties to an arbitration agreement, the family members of the respective heads will also be bound by the agreement if they are signatories to it.

The court also clarified that when parties attach their signatures to a Memorandum of Understanding ("**MOU**"), they shall be bound by the arbitration agreement mentioned in it. The parties cannot evade the agreement merely on the ground that they have not expressly been made parties to it.

5. The Judgement debtor being out of funds is not a sufficient ground to stay the award: Delhi HC [*B L Kashyap and Sons Ltd v. Emaar India Ltd*]. [Link]

The Delhi HC held that the judgement debtor's monetary deficiency cannot be a ground to stay the enforcement of an arbitral award under Order XXI Rule 26(1) of the Code of Civil Procedure, 1908. Such a stay would be against the interests of the award holder. Further, the judgement debtor cannot furnish a bank guarantee before the court instead of cash equivalent to the award amount. Cash is required by the award holder to run its business effectively and cover its losses.

6. Once the arbitrator has decided upon its jurisdiction, it can only be disputed by challenging the award: Allahabad HC [*Purvanchal Vidyut Vitaran Nigam Ltd. (Puvvnl) v. M/S Prabha Mvomni (Jv)*]. [Link]

The Allahabad HC has held that when the jurisdiction of an arbitrator is challenged under Section 16 of the A&C Act and the same is rejected by the arbitral tribunal, the aggrieved party cannot file an application under Section 11 of the A&C Act to bypass the tribunal's decision. The only way to move ahead with such a contention is to challenge the award when it is passed.

Section 11 of the A&C Act empowers the court to appoint an arbitrator in case the parties fail to agree upon the appointment of an arbitrator or the appointment procedure itself.

7. A clear intention of the parties is necessary to incorporate an arbitration clause by reference: Calcutta HC [*Kobelco Construction Equipment India Private Limited v. Lara Mining & Anr*]. [Link]

The Calcutta HC has held that in order to incorporate an arbitration clause through reference from the 'master' agreement to the 'settlement' agreement under Section 7(5) of the A&C Act, a clear and unambiguous intention of the parties in that regard is a must. A general intention would not suffice.

8. Courts can partially set aside an arbitral award; doctrine of severability is enshrined in Section 34 of the A&C Act: Delhi HC [*NHAI v. Trichy Thanjavur Expressway Ltd*]. [Link]

The Delhi HC has held that the Courts exercising powers under Section 34 of the A&C Act has the power to partially set aside an arbitration award to strike off the offending portion of the award while retaining the remaining award. Further, it held that the doctrine of severability as applicable to arbitral awards is explicitly recognised under Section 34 of the Act.

It further stated that the power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that may have been returned by the arbitral tribunal.

1. Power to appoint Director General ("DG") (investigation) transferred from the Ministry of Corporate Affairs ("MCA") to the Competition Commission of India ("CCI"). [Link]

The CCI has implemented a key provision of the Competition (Amendment) Act 2023, which vests the power of appointing the DG (investigation) in the CCI. Previously, this power rested with the central government through the Search-cum-Selection Committee, headed by the Secretary of the MCA.

By a separate notification, the MCA has also amended the CCI (Director General) Recruitment Rules, 2009. As a result, the Search-cum-Selection Committee is now under the direction of the Chairperson of CCI. This committee comprises two members, with the MCA nominating one and the central government nominating the other. The latter would be an eminent expert in the field.

2. CCI introduces Draft Regulations for Commitment and Settlement Proceedings. [Link]

The CCI has unveiled draft regulations pertaining to commitment and settlement proceedings. The framework aims to reduce litigation and expedite complaint resolution with greater flexibility. Compensation may also be awarded in settlement cases, adding to the potential liability for entities opting for the settlement mechanism.

The Competition (Amendment) Act, 2023 had earlier introduced the settlement and commitment mechanism for enterprises facing inquiries related to abuse of dominance or anti-competitive agreement. Under the mechanism, an enterprise can choose to submit an application for settlement to the CCI after receiving the Director General's report but before the CCI passes an order.

MISCELLANEOUS

1. The Digital Personal Data Protection Bill gets President's approval. [Link]

The President of India has given assent to the Digital Personal Data Protection Bill, 2022 after unanimous approval from both houses of parliament. The Act is applicable to personal data collected both online and offline, whether it's within India or overseas.

The Act mandates that personal data be processed only with the consent of the individual, and only the necessary information be retained for the specified consented purpose. However, exemptions have been provided for certain legitimate uses and for specific data fiduciaries like startups. Further, processing that negatively impacts children's well-being, like tracking, behavioural monitoring, or targeted advertising, is strictly prohibited.

Under the Act, a Data Protection Board ("**DPB**") will be established which will be responsible for addressing complaints, investigating breaches, and imposing penalties based on severity. In cases of data breaches, the DPB will initiate inquiries and impose penalties on violators.

2. Parliament passes the Mediation Bill, 2023. [Link]

The parliament has recently passed the Mediation Bill, 2023 which now awaits President's assent. The objective of the Bill is to enable individuals to voluntarily attempt to resolve civil or commercial disputes through mediation before resorting to any court or tribunal. It also incorporates a provision for conducting mediation through online mode in order to make the process cost-effective.

Furthermore, the Bill mandates the central government to establish the Mediation Council of India. The Council will undertake various functions such as registration of mediators, and accreditation of mediation institutes responsible for training, educating and certifying mediators.

3. RBI issues guidelines for penal charges in loan accounts. [Link]

The Reserve Bank of India (RBI) has issued comprehensive instructions to all banking entities, including commercial banks, co-operative banks, non-banking financial companies ("**NBFCs**"), housing finance companies, and various All India Financial Institutions, pertaining to the imposition of penal charges in loan accounts.

The instructions would not be applicable to specific financial products like Credit Cards, External Commercial Borrowings, Trade Credits, and Structured Obligations, which are covered under separate product-specific guidelines. The primary objective behind the levying of penal interest/charges is to instill a sense of credit discipline among borrowers.

The key provisions of the guidelines include that if a penalty is charged for non-compliance of material terms and conditions of the loan contract by the borrower, it shall be treated as a 'penal charge'. It shall not be levied in the form of 'penal interest' that is added to the rate of interest charged on the advances. Further, the quantum of penal charges shall be reasonable and commensurate with the non-compliance.

4. Board for Industrial and Financial Reconstruction ("BIFR") can't sanction any modification to a scheme requiring the Income Tax Department ("ITD") to give further tax concessions without its consent: Delhi HC [*PR Director General of Income Tax v. M/S The Indian Plywood Mfg Co Pvt Ltd & Anr*] [Link]

According to Section 19 of the Sick Industrial Companies (Special Provisions) Act, 1985 ("**SICA**"), no such scheme that entails any sacrifice, concession, or financial assistance from the Central Government, State Government, Banks, Public Financial Institutions, State Level Institutions or any other authority can be sanctioned without the consent of the concerned government, bank, institution or authority.

The Delhi HC has held that where consent is declined by the concerned authorities under Section 19(4) of the SICA, it is not permissible for the BIFR to sanction the scheme. Therefore, no scheme modification can be sanctioned, which requires the ITD to give further concessions, without the department consenting to grant such an extension.

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