



MONTHLY CORPORATE LAW UPDATES

SEPTEMBER, 2022

- **INSOLVENCY & BANKRUPTCY LAW**
- **SECURITIES LAW**
- **COMPANY LAW**
- **ARBITRATION LAW**
- **MISCELLANEOUS**

1. If statutory dues are ‘secured’ as per the levying act, they have to be provided for in the Resolution Plan: Supreme Court ("SC"). [*State Tax Officer v. Rainbow Papers Ltd*] [\[Link\]](#)

The SC ruled that a resolution plan will be rejected if statutory dues of the corporate debtor ("CD") are not considered. This has been stated specifically in a situation where the statutory dues were equated with a ‘secured debt’ as per the act levying such statutory dues. The state is considered as a ‘secured creditor’ as per the Insolvency and Bankruptcy Code ("IBC"). Thus, the court concluded that the dues payable to legal authorities or state governments cannot be ignored by the Committee of Creditors ("CoC"), otherwise the resolution plan will be rejected.

2. Insolvency and Bankruptcy Board of India ("IBBI") amends Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

A. Insolvency Professional ("IP") Regulations amended to bar Insolvency Professionals ("IP") from sharing fees or accepting fees: IBBI. [Link](#).

Through this amendment, the IBBI has prohibited sharing or accepting of any fee or charges by IPs, from other IPs or support service providers, appointed on a single project.

B. Third amendment to IP Regulations notified: IBBI raises fees. [Link](#).

IBBI has amended the IP regulations to bring changes concerning fee payable to IPs. It also provides for performance linked incentive to be paid to IPs.

C. Fourth amendment notified: IBBI widens scope of IP regulations through inclusion of IP entities. [Link](#).

IBBI has amended the provision defining IP to include IP entities. This will enable companies to register as IPs. Eligible IP entities will have to apply for IP registration by filing Form AA with the IBBI, along with payment of an application fee

3. The Adjudicating Authority (“AA”) has no choice but to allow initiation of liquidation proceedings under Section 33(2) of the IBC: National Company Law Appellate Tribunal (“NCLAT”). [Rakesh Gupta v. Mr Nitin Narang, Liquidator of M/s Gupta Marriage Halls Pvt. Ltd] [\[Link\]](#)

The NCLAT has held that the AA has no discretion but to allow initiation of Liquidation Proceedings when all the conditions prescribed in the act are complied with. The tribunal relied on the word 'shall' in Section 33(2) to justify the mandate of the AA to allow liquidation. Additionally, the tribunal opined that the directors of the CD are no longer suspended once the CIRP comes to an end.

4. The Resolution Professional (“RP”) does not have the opportunity to be heard before being replaced, under Section 27 of the IBC: NCLAT. [Sumat Kumar Gupta, M/S Vallabh Textiles Company Ltd. v. Committee of Creditors of M/S Vallabh Textiles Company Ltd. Through Punjab National Bank]. [\[Link\]](#)

The NCLAT has held that the RP is not entitled to the right to be heard, before approval of their replacement by the Adjudicating Authority (“AA”). By definition, principles of natural justice do not apply to Section 27. Therefore, the tribunal concluded that the specified majority vote by the CoC is only required to complete replacement of the RP.

5. Information Utilities (“IU”) Regulations amended to hike registration and annual fees: IBBI. [\[Link\]](#)

Through this amendment, the IU registration fees for fresh and renewed application, has been doubled to 10 lakhs Indian Rupees (“INR”). Certificate charges for IU registration have also been hiked to 1 crore INR. Additionally, annual fees for IUs will now be based on the preceding year’s annual turnover of the entity, wherein 10% of revenue is to be paid to IBBI before 30th April.

6. IBBI notifies amendments to Insolvency Resolution Process for Corporate Persons Regulations.

A. Fee regulations for Interim Resolution Professional (“IRP”) and Resolution Professional (“RP”) introduced. [Link](#).

IBBI has introduced numerous regulations on the fees paid to Interim RPs or RPs relating to the determination, payment and its approval. Minimum fixed fees for IRPs and RP based on the total monetary value of claims, have been introduced. Additionally, two types of performance linked incentive fees have been introduced, in order to speed up CIRP as well as to maximum value.

B. Fourth amendment to the Insolvency Resolution Process for Corporate Persons Regulations notified. [Link](#).

Under this amendment, duties of the IRP have been specified, such as creating a correspondence email for stakeholders as well as communicating public announcement of their appointment to the creditors of the CD. Similarly, various duties for the RP such as preparing a marketing strategy for assets exceeding 100 crore INR after successful resolution, have also been mandated.

For liquidation of the CD, the amendment also requires the CoC to consider factors such as absence of CD’s assets, non-operational status of the CD from the preceding three years. Additionally, amendments to the regulations pertaining to the information memorandum have also been notified.

C. Fifth amendment notified: Regulatory Fees Introduced. [Link](#).

IBBI has included two regulatory fees under the definition of CIRP costs. The first type of regulatory fee is payable to IBBI if the realisable value of CD is more than its liquidation value. The fee is 0.25% of the realisable value. This regulatory fee is charged as long as the resolution plan is approved before 1st October 2022. Additionally, the other type of regulatory fee (1% of the Insolvency Resolution process costs) is charged on hiring any IP or services for assistance in the CIRP.

7. Liquidation Process Regulations amended: Constitution of consultation committee and Duties of liquidator: IBBI. [\[Link\]](#)

Under this amendment, IBBI has provided for provisions which among other things relate to the Stakeholders' Consultation Committee ("SCC"). Pursuant to the amended regulations, the Committee of Creditors shall function as the SCC until a permanent SCC is constituted. Also, replacement of the liquidator will now be decided by the SCC through a majority vote and the application of Liquidator's replacement will be filed with the AA. Another landmark thing is the inclusion of event based timeline for the auction process. The purpose of the changes was to streamline liquidation process and realise better value.

8. IBBI amends Voluntary Liquidation Process ("VLP") regulation: Preservation of VLP records. [\[Link\]](#)

IBBI has mandated liquidators to preserve copies of any required record for the VLP. Copies of records are required to give a complete account of VLP such as AA filings. They are to be preserved in a digital as well as physical format for minimum of 8 and 3 years respectively. Details of preservation of such records are to be disclosed to the AA. On replacement of the liquidator during VLP, the outgoing liquidator will hand over the records in its possession to the new liquidator.

1. Securities and Exchange Board of India (“SEBI”) issues guidelines on algorithmic trading. [\[Link\]](#)

Algorithmic trading does not offer guaranteed returns on investment. However, it has come to the notice of SEBI that some unregulated platforms offer such services with “claims” of high returns. SEBI had earlier cautioned investors against dealing with such platforms. Now, SEBI has barred stock brokers who provide algo trading through such a platform from referring to any past/future returns.

2. SEBI releases master circular on surveillance of securities market. [\[Link\]](#)

SEBI issues various circulars for effective surveillance of the securities market. It has now issued a master circular to ensure comprehensive availability of all these circulars at one place. It includes circulars till the date of August 31, 2022. The circular includes guidelines to be followed by all recognized stock exchanges, depositories, listed companies, market intermediaries and fiduciaries. All market intermediaries registered with SEBI have been instructed to follow an internal code of conduct to avoid the transmission of unauthenticated news by its employees.

3. New Guidelines on Firewall Practices for Credit Rating Agencies (“CRA”): SEBI [\[Link\]](#)

SEBI has issued a circular to strengthen the firewall between SEBI-registered CRAs and their Non-Rating Entities (“NRE”). Under the guidelines, CRAs shall have to formulate a policy on separation (firewall) with their NRAs and document the same in their governing document. Further, a CRA shall have to disclose details of any common Director/Chief Executive Officer/ Managing director between the CRA and its NRE. The circular shall come into effect from January 1 2023.

4. SEBI Circular on Debenture Trustees (“DT”) has retrospective application: SC [*SEBI v. Rajgopal Nagpal & Ors*] [\[Link\]](#)

SEBI had in October 2020, issued a circular on Standardization of procedure to be followed by Debenture Trustee(s) in case of ‘Default’ by Issuers of listed debt securities. In this regard, the SC has ruled that the circular has retrospective application.

5. Detailed Regulatory Framework for Social Stock Exchanges (“SSE”):SEBI. [\[Link\]](#)

SEBI has issued a detailed regulatory framework that needs to be complied by Not-For Profit Organizations (“NPO”) who wish to register/ raise funds through SSEs. The framework specifies the minimum legal requirements that a SSE needs to comply with for registration with a SSE. NPOs are also required to make annual disclosures if they have raised funds/ are registered with SSEs. Additionally, they will have to provide a duly audited Annual Impact Report to the SSE within 90 days from the end of the financial year.

6. SEBI’s green signal to Bombay Stock Exchange (“BSE”) for launching Electronic Gold Receipts (“EGR”) [\[Link\]](#)

BSE has received final approval from SEBI for introducing EGR on its platform. It had earlier in February 2022, received in-principle approval for the said proposal. EGR is India’s first spot physical gold exchange trading product. They will be notified as securities with trading, clearing and settlement features similar to other securities that are currently available in the country.

1. Section 203 of the Companies Act, 2013 (“CA”) applies to appointment of a Chief Financial Officer (“CFO”) by a private company: NCLAT. [*The Hamlin Trust and Ors v. LSFIO Rose Investments S.a.r.l. and Ors*] [\[Link\]](#)

The NCLAT held that Section 203 of the CA is applicable to appointment of CFOs in the private companies. A CFO is key managerial personnel (“**KMP**”) in a company. Therefore, Section 203 of the act which provides the conduct of a KMP, applies to voluntary appointment of a CFO. Unless there is specific mention of eligibility for a CFO in the articles of association of the company, Section 203 extends to private companies as well.

2. Ministry of Corporate Affairs (“MCA”) amends provision for definition of small companies under CA. [\[Link\]](#)

A small company was previously a company paid-up capital and turnover of which did not exceed 2 crores and 20 crores respectively. To boost ease of doing business, MCA has notified an amendment to the definition of small company, that raises the threshold limit of paid-up capital and turnover to 4 crores and 40 crores respectively. Now more companies can avail benefits given to small companies such as exemption from preparing cash flow statement, etc.

3. MCA mandates creation of a Corporate Social Responsibility (“CSR”) committee for companies with unspent CSR funds. [\[Link\]](#)

MCA amended the CSR Rules to lay down that companies having unspent CSR funds will be required to institute a CSR committee. Now, the company website will have to provide the constitution of CSR committee, CSR policy, CSR projects, etc. Further, the Board of the company must ensure that CSR activities are being undertaken by the company or other entities as specified in the notification. Apart from the above, the format for annual CSR report has also been amended.

1. Courts not strictly bound by the Civil Procedural Code (“CPC”) while granting interim relief under Section 9 of the Arbitration and Conciliation (“A&C”) Act: SC. [*Essor House Private Limited v. Arcellor Mittal Nippon Steel India Limited*] [\[Link\]](#)

The Section 9 of the A&C Act provides that a party may apply to the court for interim measures in an arbitral proceeding. SC has ruled that the court is not strictly bound by the provisions of the CPC while granting an interim relief under Section 9 of the act. The court recognized that the power under Section 9 should not be ordinarily exercised by ignoring the provisions within CPC. However, if a strong case can be made out in favor of granting the relief, the court should not withhold the relief merely for procedural technicality within the CPC.

2. The intention of the parties is of primary importance while determining the validity of an arbitration clause. [*Babanrao Rajaram Pund v. M/S Samarth Builders & Developers & Anr*] [\[Link\]](#)

The SC ruled that an arbitration clause cannot be invalidated on the mere deficiency of certain words/characteristics like “final and binding” nature of the arbitration. If the intention of the parties to refer the matter to arbitration is clear, the party autonomy to this effect deserves to be protected.

3. Tax concession disputes are not arbitrable in nature: SC [*M/s Shree Enterprise Coal Sales Pvt. Ltd. v. Union of India & Anr*] [\[Link\]](#)

The SC ruled that tax concession disputes are not arbitrable in nature. The Court reasoned that contractual disputes are amenable to be resolved by arbitration. However, a tax concession dispute falls outside the scope of a contractual dispute. Therefore, it cannot be referred to arbitration.

4. An interim award with trappings of finality are essential to challenge it under Section 34 of the A&C Act: Delhi High Court (“HC”) [*Punita Bhardwaj v. Rashmi Juneja*] [\[Link\]](#)

The Section 34 of the A&C Act grants authority to the court to set aside an arbitral award/order. An interim order can be challenged under the provision only when it has the characteristic of finality. In the instant case, a proposed amendment to the claims as provided in the Section 23 (3) of the act was rejected because it was made at a

later stage. The Delhi HC observed that an arbitral tribunal has the power to reject the application if it is made at a later stage. The order is not interim in nature and therefore, cannot be challenged under the Section 34 of the act.

5. Court cannot examine issues that require detailed interpretation of a contract under Section 11 of the A&C Act: Delhi HC. [*OYO Hotels and Homes Pvt. Ltd. v. Agarwal Packers and Movers Ltd*] [[Link](#)]

Section 11 of the A&C act provides for the appointment of an arbitrator. In the present case, the Delhi HC refused to examine whether the arbitration clause in a subsequent agreement would govern past transactions of similar nature under Section 11 of the act. The question required detailed consideration of the contract and surrounding circumstances. However, the court has a limited scope of judicial scrutiny under Section 11 of the act and cannot examine issues that require an interpretation of the contract. All such issues shall be referred to the arbitrator.

1. Investigation order by Competition Commission of India (“CCI”) does not affect rights of the individuals: Gujarat HC. [*M/s Shree Shivam Corporation Through Its Sole Proprietor Mr Prahlad Durlabhjibhai Joshi v. Competition Commission of India (“CCI”)*] [\[Link\]](#)

The Gujarat HC opined that the investigation order passed by CCI, under Section 26 of the Competition Act is only a prima facie inquiry and does not affect the rights of any person. Further, it directed the private companies, who were facing this inquiry, that these orders can only be reviewed in two cases. Firstly, when such order is contrary to the provisions of the act and secondly, if the order has included irrelevant material or not included relevant material.

2. Goods and Service Tax (“GST”) Council issued guidelines for filing or revising TRAN-1/TRAN-2 in a common portal for two months. [\[Link\]](#)

TRAN-1/TRAN-2 forms help businesses transition smoothly and carry forward their input tax credit. The GST Council has released the guidelines for filing or revising these TRAN-1/TRAN-2 forms in accordance with SC’s direction in Union of India v. Filco Trade Centre Pvt Ltd. The portal from the same is functional from 1st September to 31st October, 2022. These kinds of applications can’t be rejected when they are filed as a writ petition before the High Court or where the taxpayer has been decided by Information Technology Grievance Redressal Committee.

3. The role of Designated Authority (“DA”) under Section 14 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (“SARFAESI”) Act, 2002 is purely a ministerial role: Bombay HC. [*Phoenix ARC Pvt Ltd v. The State of Maharashtra*] [\[Link\]](#)

In this case, the Bombay HC highlighted the “dos” and “don’ts” in the role of DA under the Section 14 of SARFAESI act. It observed that the jurisdiction of DA is only limited to assist secured creditors in recovering possession of their secured assets. The role of DA is purely ministerial and he cannot go beyond his jurisdiction to order regarding possession and mortgage as was done by the DA in the present case.

4. GST Council issued guidelines for launching of prosecution of criminal proceedings under the Central Goods and Service (“CGST”) Act. [\[Link\]](#)

In pursuance of the Section 132 of the CGST Act, GST Council has set up guidelines for launching of prosecution of criminal proceedings. According to the guidelines, a criminal proceeding shall be initiated after availability of adequate evidence. Further, it should not be initiated in cases of technical nature. The guidelines also specify the monetary limit to be launched where the person is found guilty of offences and its exception. It additionally talks about procedure of sanction of prosecution, authority to sanction prosecution and procedure for withdrawal of prosecution.

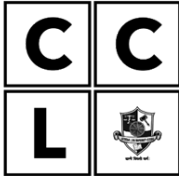
5. The Reserve Bank of India (“RBI”) has issued guidelines on Digital Lending. [\[Link\]](#)

Recently, RBI issued the guidelines on Digital Lending with some major changes in it keeping the deadline till 30th November, 2022. Firstly, all loan and repayments will be carried forward and executed between the borrower and the regulated entity (“RE”) without passing through any third party. Secondly, RE will pay the fees, charges etc. directly to Lending Service Provider (“LSP”). Additionally, these guidelines have categorised the LSP to different heads in terms with the regulation mechanism.



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