



MONTHLY CORPORATE LAW UPDATES

MARCH, 2023

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

1. Resolution professional (“RP”) is entitled to take control of Corporate Debtor's ("CD") rights in assets licensed to third parties: Supreme Court (“SC”) [*Victory Iron Works Limited v Jitendra Lohia & Anr*]. [[Link](#)]

Section 25 of the Insolvency and Bankruptcy Code, 2016 (“IBC”) defines the duty of a RP to protect and preserve the assets of the CD. The assets include the continuing business operations of a CD. The SC ruled that the RP is entitled to take control of the rights of a CD in assets which are licensed to third parties under Section 25 of the IBC.

Section 18 of the IBC excludes assets owned by a third-party, but in the possession of the CD held under contractual arrangement, from the definition of the term “assets”. However, the court ruled that the said section begins with the caveat “for the purposes of this section”. Therefore, the exclusion as under Section 18 of the IBC is inapplicable on Section 25 of the IBC and the RP can take control of the assets licensed to third parties.

2. In a situation when the financial creditors are not paid in full amount under a resolution plan, the operational creditors cannot claim higher amount: National Company Law Tribunal (“NCLT”) [*Noble Resource International Pvt. Limited v Sona Alloys Pvt. Limited*]. [[Link](#)]

The NCLT opined that upon reading Section 30 along with Section 53 of IBC, it is evident that financial creditors are placed at a higher priority than operational creditors. Therefore, in a situation where in a resolution plan the former is not paid fully, the latter cannot claim an amount that is higher than earlier, under the same circumstances.

3. Sale of CD as a going concern can be conducted even after the first auction of its assets: NCLT [*Mr. Surinder Manchanda v Nolsar International Limited*]. [[Link](#)]

The NCLT has held that there is no bar on sale of CD as a going concern in the subsequent auctions even if the liquidator may sell only the assets of the CD exclusively at the first auction of the CD. The tribunal concluded, through a conjoint reading of Regulation 32A(4) and Regulation 32(e) of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 that refer to sale of assets of CD as a going concern, that the liquidator is free to conduct subsequent auction of the CD as a going concern and permission of the tribunal is not required for the same.

4. Excess payment made by the operational creditor to the CD, cannot be treated as operational debt if the claim is derived from a quasi-contract: NCLT [M/s. Sandvik Mining & Construction Tools AB v M/s TA Hydraulics Pvt. Limited]. [\[Link\]](#)

The NCLT has ruled that overpayment to the CD as an operational creditor cannot be established as operational debt. Operational debt must be in respect of provision of goods or services. The tribunal took note of the fact that the claim of the debt came from a quasi-contract and was not in relation to a purchase order or commercial invoices.

It was concluded that such a claim will not be termed as operational debt, as the claim cannot be subject to an investigation by the NCLT, under the IBC, on sufficiency of proof. Further, the amount claimed under such quasi-contracts will be 'recovery' and not 'resolution of CD' for the purposes of IBC.

1. Cyber security and resilience framework for portfolio managers: Securities and Exchange Board of India (“SEBI”). [\[Link\]](#)

SEBI has formulated a cyber resilience framework for portfolio managers to protect the relevant data from potential data breaches. As per the framework, portfolio managers are now required to formulate a cyber security policy in accordance with the principles prescribed by the National Critical Information Infrastructure Protection Centre (“NCIIPC”). Further, they are required to establish an appropriate security monitoring system to facilitate continuous monitoring of security events and timely detection of unauthorized events. The circular shall be effective from October 1, 2023.

2. Amendments to the Securities Lending Scheme, 1997: SEBI. [\[Link\]](#)

SEBI has amended the Point 7 under Annexure-B (Schedule of Fees) of Securities Lending Scheme, 1997 to discontinue the option of payment through Demand Draft and ensure that the payment of any fees /penalties/recoveries are made only through digital mode of payment. This is in accordance with the decision taken by the SEBI board in its meeting on December 20, 2022.

3. E-wallets investments in mutual funds: SEBI. [\[Link\]](#)

SEBI has issued a circular to permit the use of e-wallets to invest in mutual funds. However, the usage of e-wallets as a mode of payment is subject to certain conditions. E-wallets can be used for payments within the umbrella limit of INR 50,000 and it should be ensured that they are compliant with the Know Your Customer norms as prescribed by the Reserve Bank of India.

4. Norms for Scheme of Arrangement by unlisted Stock Exchanges, Clearing Corporations and Depositories: SEBI. [\[Link\]](#)

SEBI has introduced a detailed framework for the scheme of arrangement by unlisted Market Infrastructure Institutions (“MII”) to bring uniformity in the norms related to scheme of arrangement for unlisted MIIs in line with provisions currently applicable to listed MIIs. The decision was made based on recommendations from the Secondary Market Advisory Committee and comments received from unlisted MIIs.

Under the framework, unlisted MII must file the draft scheme of arrangement with SEBI to obtain an observation or no-objection letter before filing with any court or tribunal. They are also required to pay a fee to SEBI at 0.1% of the paid-up share capital of the unlisted, transferee, or resulting company, subject to a cap of INR 5,00,000.

The provisions may not apply to schemes which solely provide for a merger of a wholly subsidiary or its division with the parent company. However, such draft schemes should be filed with SEBI for the purpose of disclosure and the same should also be disseminated on the unlisted MII's website.

1. Central Government of India establishes Centre for Processing Accelerated Corporate Exit (“C-PACE”) : Ministry of Corporate Affairs (“MCA”). [\[Link\]](#)

In line with the proposal for C-PACE announced in the 2022-23 Budget, the MCA has notified the establishment of C-PACE to quicken the winding-up of companies. The object of this centre would be to facilitate and speed up the voluntary winding-up of these companies from the currently required 2 years to less than 6 months.

1. Arbitration clause can be invoked by assignee of rights under contract: Bombay High Court ("HC") [*M/s. Siemens Factoring Pvt. Limited v Future Enterprises Pvt. Limited*]. [\[Link\]](#)

The Bombay HC has ruled that an arbitration agreement is assignable, just as any other contract. Where the obligations and rights under an agreement, containing an arbitration clause, are assigned in favour of an assignee, the remedy of arbitration would also stand assigned in its favour.

2. Power to award interest as per Section 31 of Arbitration & Conciliation Act ("A&C Act") applies only in absence of an agreement: Delhi HC [*Bawana Infra Development Pvt Ltd. v Delhi State Industrial & Infrastructure Development Corporation Ltd. (DSIIDC)*]. [\[Link\]](#)

The Delhi HC has ruled that Section 31(7)(a) of the A&C Act, which deals with the arbitrator's discretion while awarding interest in respect of the pre-reference period, applies only where there is no agreement between the parties with respect to the rate of interest to be awarded.

3. Antrix Devas Deal: Delhi HC upholds single judge's decision of setting aside arbitral award [*Devas Employees Mauritius Pvt. Ltd. v Antrix Corporation Ltd. & Ors*]. [\[Link\]](#)

The Delhi HC dismissed an appeal against single judge's order setting aside an arbitral award by which Antrix Corporation Limited was required to pay US\$ 562.2 million to Devas Multimedia Private Limited over wrongful repudiation of a contract. The bench held that it is "well established" that Devas was incorporated with fraudulent intentions so that it could enter into the agreement with Antrix, the commercial and marketing arm of ISRO.

4. Section 9 of the A&C Act does not envisage the restoration of terminated contract: Delhi HC [*Yash Deep Builders v Sushil Kumar Singh*]. [\[Link\]](#)

The Delhi HC has held that the scope of Section 9 of the A&C Act does not envisage relief in the nature that would restore a contract which already stands terminated. Further, a court, while exercising powers under Section 9 of the A&C Act, cannot direct specific performance of a determinable contract. The HC held that it cannot specifically enforce a contract which is determinable in nature as the same is statutorily prohibited under Section 14(d) of the Specific Reliefs Act.

5. Arbitrator under the National Highways Act has to give an award within one year, failure can result in termination of the mandate: Himachal Pradesh HC [*Ganga Ram v. Special Land Acquisition Officer*]. [\[Link\]](#)

The Himachal Pradesh HC has held that the arbitration proceedings under the National Highways Act, 1956 are governed by the A&C Act. In terms of Section 29(A) of the A&C Act, the arbitrator is mandated to deliver an award within 1 year from the date of entering reference. Non-compliance with this provision will result in the termination of the mandate of the arbitrator. Thus, the arbitrator so appointed by the Central Government under Section 3G(a) of the National Highways Act is bound to follow the provisions of the same.

1. The Competition Commission of India's ("CCI") penalty on Google upheld with key modifications: NCLAT [*Google LLC v. Competition Commission of India*]. [\[Link\]](#)

The NCLAT has upheld the ₹1,337.76 crore fine imposed by CCI on Google for abuse of its dominant position in the Android market. However, the Tribunal set aside key directions issued by CCI in its order. The most significant ones being:

- Google will now not need to allow hosting of third-party app stores inside the Play Store.
- Google will now not need to allow hosting of third-party app stores inside the Play Store.
- Google can also continue imposing curbs on so-called "sideloading", a practice of downloading apps without using an app store.

1. Arbitration Settlement amount related to Indian project office of the assessee to be taxed in India: ITAT [*TGE Gas Engineering GmbH v. DCIT*]. [\[Link\]](#)

The assessee is a German company which engaged in economic activity through a project office in India. It had not paid tax on receipt of arbitration settlement amount related to the project office. The Income Tax Appellate Tribunal has upheld the ruling of the Dispute Resolution Panel, that as the settlement amount is related to the project office in India the amount in question is liable to be taxed as 'income from other sources' under Article 7 of the India-Germany Double Taxation Avoidance Agreements.

2. 'Documentary Evidence' not pre-condition to avail remedy under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest ("SARFAESI") Act, 2002 against secured creditor's action under Section 13(4): Madhya Pradesh HC [*M/S Agrawal Coals And Logistics (Partnership) v. DRT & Ors*]. [\[Link\]](#)

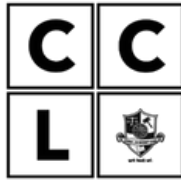
The Madhya Pradesh HC has held that 'documentary evidence' is not a pre-condition to avail remedy under Section 17 of the SARFAESI Act against secured creditor's alleged action under Section 13(4) of SARFAESI.

Section 17 provides remedy of appeal before Debt Recovery Tribunal to any person, including the borrower, aggrieved by measures taken by the secured creditor under Section 13(4) of the Act for recovery of his secured debt.



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