MONTHLY CORPORATE LAW UPDATES

JANUARY, 2023

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1. Key changes to the Insolvency & Bankruptcy Code, 2016 ("IBC"): Ministry of Corporate Affairs ("MCA"). [Link]

The MCA has proposed key changes to strengthen the IBC regime within the country. The proposed changes are inter alia relating to the admission of Corporate Insolvency Resolution Process ("**CIRP**"), amendments to the liquidation process, and the role of service providers under the IBC. Further, MCA has proposed to widen the role of information utilities at the stage of admitting a CIRP application. The proposed change will help to reduce the time taken to determine the occurrence of a default in the payment of a debt.

2. Adjudicating Authority ("AA") empowered to direct a tenant to vacate the premises of the Corporate Debtor ("CD"): National Company Law Appellate Tribunal ("NCLAT") [*M/s. Jhanvi Rajpal Automotive Pvt. Ltd. v. R.P. of Rajpal Abhikaran Pvt. Ltd. & Anr*]. [Link]

Section 18 of the IBC provides that the Interim Resolution Professional ("**IRP**") may take control of any asset owned by the CD. The said control is permitted irrespective of whether or not the CD has the possession of the said property. NCLAT observed that the IRP may approach the AA to effectuate the said duty. Therefore, the AA is empowered to direct a tenant to vacate the premises owned by a CD.

3. Section 10 (A) of the IBC applicable only when the default arises in the prohibition period: NCLAT [*Vishal Agarwal Erstwhile Director of Gagan I-Land Township Pvt. Ltd. v. ICICI Prudential Real Estate AIF-I & Anr*]. [Link]

Section 10 (A) of the IBC provides that no CIRP can be initiated against a default in debt arising on or after 25th March 2020 to 25th March 2022. The Central Government had introduced the said Section to safeguard the interests of distressed corporate debtors against insolvency proceedings during the COVID-19 pandemic.

In the present case, NCLAT specifically held that the benefit under the said Section can be claimed only when the default arises in the prohibition period. Any debt which arose before the outbreak of the pandemic cannot avail the benefit under the Section.

4. Delay in filing CIRP application condonable on sufficient cause: SC [*Sabarmati Gas Limited v. Shah Alloys Limited*]. [Link]

The bench noted that the Limitation Act, 1963 is applicable to applications filed under Sections 7 and 9 of the IBC. Additionally, the position is that the period of limitation is three years from the date the right to apply accrues, but the delay is condonable on sufficient grounds. Hence, delay in filing CIRP application condonable to the extent prescribed in Limitation Act if the applying party has 'sufficient cause'. The court also clarified that 'sufficient cause' is the cause for which a party could not be blamed.

5. The decision to liquidate the CD can be taken by the Committee of Creditors ("CoC") before the date of expiration of Invitation of Expressions: NCLAT [*Hero Fincorp Limited v. M/s Hema Automotive Private Limited*]. [Link]

The NCLAT observed that the Section 33(2) of IBC clarifies that CoC can decide to liquidate the Corporate Debtor any time after its constitution under Section 21(1). The decision has to be before the confirmation of the Resolution Plan and at any time before the preparation of Information Memorandum. However, the AA's obligation to direct for liquidation shall rise only when the decision of the CoC is in accordance with IBC.

6. Companies (Registration Offices and Fees) Rules, 2014 amended: Signing by IRP, Resolution Professional ("RP") And liquidators on e-forms mandated. [Link]

For the purpose of authentication, e-forms required for authentication of documents during CIRP are to be signed by the RPs wherever applicable. Additionally, e-forms required for liquidation are to be signed by liquidators wherever necessary. The e-forms are to be filed with the Registrar of Companies ("**ROC**") along with the payment of requisite registration fees.

1. Participation of Alternative Investment Funds ("AIF") in Credit Default Swaps ("CDS"): Security and Exchange Board of India ("SEBI"). [Link]

SEBI has amended the SEBI (Alternative Investment Funds) Regulations, 2012 ("**AIF Regulations**") to enable AIFs to participate in CDS. A CDS is a financial agreement where the seller agrees to compensate the buyer in the event of a default on the debt. AIFs can participate in the agreement as protection buyers or sellers. SEBI has specified a set of conditions for the three categories of AIFs. Category I and II AIFs can buy CDS on a debt security only for the purpose of hedging. However, Category III AIFs can buy CDS for purposes other than hedging.

2. Introduction of future contracts on Corporate Bond Indices ("CBIN"): SEBI. [Link]

SEBI had constituted a working group of representatives from National Stock Exchange ("**NSE**"), Bombay Stock Exchange ("**BSE**") and Metropolitan Stock Exchange of India ("**MSEI**") to make recommendations on CBIN. SEBI has decided to allow stock exchanges and clearing corporations to introduce future contracts on CBINs based on their recommendations.

Any stock exchange which wishes to introduce future contracts should submit a detailed proposal to SEBI for approval. The proposal should provide details relating to the underlying CBIN, index methodology, contract specifications and risk management system etc. The move will help to enhance liquidity within the bond market and provide investors with the opportunity to hedge their positions.

3. Stock exchanges set to launch multiple contracts on a single commodity in Commodity Derivatives Market ("CDM"): SEBI. [Link]

SEBI has decided to permit stock exchanges to launch multiple contracts on a single commodity in the CDM. The current framework allows multiple contracts only on specific commodities: gold, silver and precious metals. Consequently, the participation of investors remains limited in other areas, especially in metal contracts. Thus, SEBI's decision is expected to encourage broader participation of investors in CDMs.

4. New Framework for Offer on Sale ("OFS") of shares through the stock exchange mechanism: SEBI. [Link]

SEBI has modified the existing OFS framework based on the feedback received from various market participants. The facility of OFS shall be available on BSE, NSE and MSEI.Furthermore, non-promoter shareholders can now offer shares through the OFS mechanism. The promoters/ promoter group of entities may participate in OFS in compliance with the regulations as specified by SEBI. As per the new framework, a minimum of 25% of the shares to be offered should be reserved for mutual funds and insurance companies.

5. Key amendments to the SEBI (Listing Obligations and Disclosure Requirements) (Amendments) Regulations, 2023 ("LODR"): SEBI. [Link]

SEBI has introduced certain key amendments to the LODR Regulations, 2015.The definition of senior management shall include functional heads of listed entities within its ambit. Therefore, all compliances mentioned in the regulations for the senior management shall now be applicable to the functional heads as well. Further, SEBI has made changes in the timeline for the approval of the shareholders for the appointment/ re-appointment of directors/ managers within the entity.

6. 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 foreseeable impact on the stakeholders are mentioned below:

A. *Review of regulatory framework for sponsors of a mutual fund.* [Link]

Regulation 7 of the SEBI (Mutual Fund) Regulations, 1996 ("**MF Regulations**") prescribes the eligibility criteria for the sponsors of a mutual fund. However, SEBI felt the need to reexamine the said criteria to enable new players in the market. Thus, it constituted a working group to devise an alternative set of requirements for sponsorship in a mutual fund.

The consultation paper proposes key changes including an increase in the participation of Private Equity Funds as sponsors. Further, the paper proposes that Asset Management Companies ("**AMC**") should be allowed to disassociate themselves from their sponsors if they satisfy the conditions as specified by SEBI.

B. *Standardized approach to valuation of investment portfolio of AIFs.* [Link]

The SEBI (Alternative Investment Funds) Regulations, 2012 ("**AIF Regulations**") prescribe disclosure with respect to valuation of investment portfolios. However, the regulations are silent on the procedure/ methodology to be adopted in this regard. This leaves AIF managers with the flexibility to adopt any method for valuation of a portfolio. The lack of a standardized procedure can result in incomplete disclosures to investors and lack of uniformity within the AIF industry. Therefore, SEBI has issued the paper to propose a standardized approach for valuation of investment portfolios of AIFs.

1. National Company Law Tribunal ("NCLT") cannot exercise jurisdiction in parallel with SEBI, for contravention of SEBI regulations: SC [*IFB Agro Industries Limited v. Sicgil India Limited*]. [Link]

The court has held that the rectificatory jurisdiction of NCLT is summary in nature under Companies Act, 2013 ("**CA**") and does not deal with violations of SEBI regulations. The court noted that the prayer was in relation to disputed acquisition of shares, and concluded that NCLT was not the appropriate forum to approach.

2. Amendment to Companies (Authorized to register) Rules, 2014: filing and disclosure provisions introduced. [Link]

In order to ease company formation and conversion processes, MCA has notified provisions pertaining to disclosure compliances for registration of company's name with the ROC. The provisions will apply to all types of conversions of entities into a company, except for a One Person Company converting to a public or a private company. The entity will have to file a No Objection Certificate from a secured creditor and the charge-holder with the ROC, after obtaining proof of availability of the company's name. Conversion compliance provisions relating to the requirement of written consent of members, financial estimates and disclosure of proposed members and directors have been removed.

3. Approval of a scheme is subject to rectification of objections raised by public authorities: NCLAT [*Crown Beers India Pvt. Ltd. v. The Regional Director, South Eastern Region, Ministry of Corporate Affairs, Hyderabad*]. [Link]

The NCLAT has held that a scheme under Section 230 of CA will not be admitted by the tribunal if there are any objections raised by public authorities. The tribunal observed that the appellant company did not provide its updated financial statements even after concerns were raised by the Regional Director ("**RD**"). After hearing all arguments, the tribunal concluded that the petition for approval of the scheme will be rejected as it fails to satisfy the authorities even after liberty was granted to refile a rectified petition.

1. Specific performance of agreement to lease in future can be sought before arbitrator; bar of Section 41 of Presidency Small Cause Courts Act, 1882 ("PSCC") will not apply: Bombay High Court [*Edufocus International Education LLP v. Yashovardhan Birla & Ors*]. [Link]

Normally, disputes arising out of lease agreements are not arbitrable as the Small Cause Courts have exclusive jurisdiction over such matters under Section 41 of the PSCC Act. However, the high court has held that in cases where the parties have sought to create a lease in future pursuant to an agreement to lease is not barred by Section 41 of the PSCC Act.

2. Starting point of limitation under Section 34(3) of the Arbitration and Conciliation Act, 1996 ("A&C Act") in cases of suo moto correction of award is the date of correction: SC [*USS Alliance v. State of Uttar Pradesh*]. [Link]

The SC has held that the starting point for the limitation under Section 34 of the A&C Act, in case of suo-moto correction of the award, would be the date on which the correction was made and the date of receipt of the corrected award by the party and not the date of the passing of the original award.

3. 12 months' time limit under Section 29A of the A&C Act not applicable to International Commercial Arbitration: SC [*TATA Sons Pvt Ltd. v. Siva Industries and Holdings Ltd*]. [Link]

The SC has held that post the 2019 amendment, Section 29A of the A&C Act which prescribes a time limit of 12 months for the completion of the arbitration from the date of completion of pleadings applies mandatorily only to domestic arbitrations. This time limit is only directory for International Commercial Arbitrations.

4. Award debtor failed to take recourse to Section 26 of the A&C Act; cannot challenge award claiming expert was not examined: Bombay HC [*Zenobia Poonawala v. Rustom Ginwalla & Ors*]. [Link]

The court has ruled that if an award debtor has failed to take recourse to the provisions of Section 26 of the A&C Act, it cannot seek to set aside the award on the ground that the expert, whose report was relied upon by the arbitrator, was not examined by the opposite party.

Section 26(2) provides that a party may request the expert to participate in an oral hearing where the parties would have the opportunity to put questions to him and the opportunity to present their own expert witnesses, to testify on the points at issue.

5. Issue whether main claim is time barred, is an issue on merits; must be decided in arbitral proceedings: Bombay HC [*TLG India Pvt. Ltd. v. Rebel Foods Pvt. Ltd*]. [Link]

The court ruled that while the limitation period for filing a petition seeking appointment of an arbitrator or reference to arbitration, is to be examined by the court, the limitation aspect of the substantive claims is to be looked into by the arbitral tribunal and not by the court. The court added that the only exception to this is a situation where the claim being referred to arbitration is hopelessly barred by limitation, which is apparent from the admitted facts and documents.

6. Order of Emergency Arbitrator ("EA") in a foreign seated arbitration can be considered as a factor while dealing with application under Section 9 of the A&C Act: Calcutta HC [*Uphealth Holdings Inc v. Glocal Healthcare Systems Pvt. Ltd. & Ors*]. [Link]

The A&C Act does not provide for enforcement of orders passed by an EA in cases of a foreign seated arbitration. However, in this case the HC has held that both parties had participated in the proceeding before the EA and had agreed to be bound by its order. Thus, the court concluded that the order of the EA can be taken factor which can be taken into account at the stage of considering an application under Section 9 of the A&C Act.

1. NCLAT order to persist, no relief for Google on Rs 1,337 crore penalty: SC [*Google LLC and Anr. v. CCI and Ors*]. [Link]

Earlier, the NCLAT had refused to stay the Competition Commission of India's ("**CCI**") decision to impose a 1,337-crore penalty for abuse of its dominant position in the Android mobile device ecosystem. The SC declined to interfere with this order after prima facie consideration. The hon'ble court noted that it is desisting from giving any opinion on merits as the same can hinder the proceedings of NCLAT.

MISCELLANEOUS

1. Readily available food/ beverages sold over the counter do not constitute "restaurant services" under Goods and Service Tax ("GST"): Authority of Advance Ruling ("AAR"). [Applicant: *Ridhi Enterprises*]. [Link]

Restaurant services are the services provided by restaurants/eating joints in relation to the supply of food and beverages ("**F&B**") or any other articles for human consumption. It can be for consumption on or away from the premises.

The AAR differentiated between the sale of F&B prepared in the restaurant, and the sale of readily available F&B. It held that the former would be classified under the category of "restaurant services" with a leviable tax rate under GST. And the latter would not constitute "restaurant services". Instead, it would be classified under the "supply of goods" category under GST, which has a separate tax bracket.

2. GST exemption is not available for coaching/training institutions: AAR. [Applicant: *Tutor Comp Info Tech Private Limited*]. [Link]

Education Institutions can claim tax exemptions under GST. The AAR held that coaching/training institutions must not be classified as 'Educational Institutions.' The training provided by the applicant neither leads to the grant of any qualification recognized by any law nor is part of an approved vocational education course. Hence, no GST exemption is available for coaching/training Institutions that do not provide a degree recognized by law.

3. SARFAESI Act to prevail over The Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED"): SC [*Kotak Mahindra Bank limited v. Girnar Corrugators Pvt. Ltd. & Ors*]. [Link]

On one hand, Section 26E of SARFAESI states that "the debts due to any secured creditor shall be paid in 'priority' over all other debts." On the other, in MSMED, there is no specific provision that prioritizes payments under the MSMED over the dues of the secured creditor. This contradiction was resolved by the SC by considering the objects and purpose of SARFAESI and by referring to the non-obstante clause in the former. It concluded that the same would override.

4. Reserve Bank of India ("RBI") released a discussion paper on introducing Expected Credit Loss Framework for Provisioning by Banks. [Link]

A loss loan provision is an expense set aside by banks for loan defaults. There are two approaches towards calculating loss - the 'incurred loss approach' and the 'expected loss approach.' In the former, the loss is incurred only when the loss occurs, while the latter is incurred based on a forward-looking estimate. The new 'expected loss approach' may cure delay in recognizing loan losses. However, it may result in creation of excess provisions.

5. Recently, International Financial Services Centres Authority ("IFSCA") notified five regulations concerning insurance. They are as follows:

A. *International Financial Services Centres Authority (Insurance Products and Pricing) Regulations, 2022.* [Link]

This regulation provides a framework for designing and pricing of insurance products by International Financial Service Centre Insurance Offices ("IIOs"). Additionally, to ensure control to protect the interests of policyholders while designing and pricing of insurance products.

B. *International Financial Services Centres Authority (Investment by International Financial Service Centre Insurance Office) Regulations, 2022.* [Link]

The objective of this regulation is to put in place the regulatory framework and processes related to investment of assets by an IIO.

C. *International Financial Services Centres Authority (Maintenance of Insurance Records and Submission of Requisite Information for Investigation and Inspection) Regulations, 2022.* [Link]

The objective of these regulations is to specify minimum information that is required to be maintained by an IIO and IIO Offices. This is with accordance of Section 33 of the Insurance Act, 1938 for the purposes of investigation and inspection.

D. *International Financial Services Centres Authority (Appointed Actuary) Regulations, 2022.* [Link]

These regulations aim to lay down the regulatory framework for the persons who are engaged by the IIOs to perform the roles and discharge the functions as 'Appointed Actuary'.

E. *International Financial Services Centres Authority (Manner of Payment and Receipt of Premium) Regulations, 2022.* [Link]

The objective of these regulations is to put in place the manner of payment of premium for insurance policy, assumption of risk, receipt or refund of premium and other terms and conditions. This is in accordance with Section 64 VB of the Insurance Act, 1938.

6. Rationalization of reporting in Single Master Form ("SMF") on Foreign Investment Reporting and Management System ("FIRMS") portal. [Link]

RBI issued a notification which consisted of two changes with regards to the reporting of foreign investment in SMF on FIRMS portal. Firstly, the forms submitted on the portal will be auto-acknowledged. The Authorized Dealer ("**AD**") banks shall verify the same within five working days based on the uploaded documents, as specified. Secondly, in cases of delayed reporting, the AD banks shall advise the late submission fee to the applicants, which will be computed by the system or advise for compounding of contravention.

7. Tax Deducted at Source ("TDS") not applicable to salary/commission paid to partners: ITAT (*ACIT v. M/S. Dhar Construction Company*). [Link]

The tribunal observed that the definition of salary, under Section 15 of the Income Tax Act 1961 includes salary, bonus, commission, or remuneration received by a partner. It was further held that there is no requirement under the provisions of the Income Tax Act, 1961 for TDS by the partnership firm on salary, bonus, commission, remuneration, etc.

8. Discussion Paper on Securitization of Stressed Assets Framework ("SSAF"): RBI. [Link]

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI**") provides for the securitization of Non-Performing Assets ("**NPA**") which have to be undertaken by Asset Reconstruction Companies ("**ARC**"). However, there is no mechanism for the securitization of NPAs through Special Purpose Entities ("**SPE**"). The relevant stakeholders and market participants felt the need for an alternative mechanism for the sale of bad loans. Therefore, RBI has released a discussion paper detailing the proposed framework for SSAF.

The discussion papers broadly cover nine relevant areas within the proposed framework. These include asset universe and eligibility, minimum risk retention, regulatory framework for SPE and resolution manager, access to finance for resolution manager, capital treatment, due diligence, credit enhancement, and valuation.

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