



# MONTHLY CORPORATE LAW UPDATES (MAY, 2022)

- INSOLVENCY AND RESTRUCTURING LAW
- SECURITIES LAW
- COMPANY LAW
- ARBITRATION LAW
- MISCELLANEOUS

## TABLE OF ABBREVIATIONS

ABBREVIATIONS	FULL-FORM
AA	Adjudicating Authority
A&C Act	Arbitration and Conciliation Act, 1996
CA	Companies Act, 2013
CD	Corporate Debtor
CIMC	Collective Investment Management Company
CIRP	Corporate Insolvency Resolution Process
CLC	Company Law Committee
CoC	Committee of Creditors
IBC	Insolvency and Bankruptcy Code, 2016
IPO	Initial Public Offering
KMP	Key Managerial Personnel

## TABLE OF ABBREVIATIONS

ABBREVIATIONS	FULL-FORM
NBFC	Non-Banking Financial Company
NFRA	National Financial Reporting Authority
NPCI	National Payments Corporation of India
NRC	Nomination and Remuneration Committee
PAN	Permanent Account Number
RBI	Reserve Bank of India
SEBI	Security and Exchange Board of India
UPI	Unified Payments Interface

# INSOLVENCY AND RESTRUCTURING LAW

## 1 SC declares that NOIDA is an Operational Creditor [New Okhla Industrial Development Authority v. Anand Sonbhadra]

---

Here, NOIDA leased a piece of land to a developer for building residential flats. The question that arose here was if NOIDA, the lessor, was a Financial Creditor under the IBC. The SC considered the relevant provisions of the IBC relating to financial debt.

Firstly, an analysis of the relevant rules of the Indian Accounting Standards (IAS) was ventured into, and it was accordingly concluded that the lease was not a ‘financial lease’. Secondly, it explained that for amounts raised by transactions to constitute the ‘commercial effect of borrowing’ under the IBC, which denotes an intent to turn a profit by the same. Hence, the Court concluded that the lease was not a financial debt as it was neither a financial lease as per IAS, nor did it have the commercial effect of borrowing. Therefore, the SC held that NOIDA was an Operational and not a Financial Creditor.

(Judgment available [here](#).)

## 2 Proceedings under the SARFAESI Act cannot proceed once moratorium is declared. [Indian Overseas Bank v. RCM Infrastructure Ltd]

---

In the present case, the financial creditor had extended credit facilities to the CD which were defaulted upon. Resultantly, the CD was declared an NPA by the lending bank and proceedings under the SARFAESI Act were initiated. The creditor held e-auctions for the sale of the CD’s assets to raise funds which was partially completed by the time CIRP was initiated which was then encumbered by the resultant moratorium. The question here arose that whether proceedings under the SARFAESI Act could continue despite the moratorium. The Court relied on relevant provisions of the IBC and concluded that actions to foreclose, recover or enforce security interests would cease once the moratorium period began. Further, it held that any sale of securities under the SARFAESI Act would be completed only when the entire payment was made and the certificate of sale of the property would be issued.

# INSOLVENCY AND RESTRUCTURING LAW

Thus, it was held that due to the moratorium, the ongoing sale would freeze ipso facto.

(Judgment available [here](#).)

## 3 Mere pendency of an insolvency petition is not a bar for appointment of Arbitrator (Millenium Education Foundation v. Educomp Infrastructure and School Management Limited)

---

The question before the Court was whether the pendency of an insolvency petition would bar the HC from appointing an arbitrator under the A&C Act.

The Delhi HC concluded that mere pendency of an insolvency petition would not bar the HC's power from appointing an arbitrator under the A&C Act. It explained that the effect of the IBC would apply only after the CIRP had been initiated and the moratorium had been declared. Therefore, mere pendency of an insolvency petition would not take away the HC's right to appoint an arbitrator.

(Judgment available [here](#).)

## 4 Non-payment of TDS amount is not a ground to initiate CIRP [Amitabh Roy v. Master Development Management (India) Pvt. Ltd.]

---

Here, the CIRP proceedings were dismissed by the AA due to the parties informing the AA in a joint statement that they would resolve their dispute by way of mutual settlement. However, the AA retained the liberty to revive CIRP if the settlement talks failed. Even after settlement was reached however, the operational creditor sought to revive the CIRP on the ground that the TDS amount was unpaid. The AA revived the CIRP by holding that the TDS amount was a default under the IBC. This decision was appealed before the NCLAT.

# INSOLVENCY AND RESTRUCTURING LAW

The NCLAT overturned the AA's decision and opined that the Income Tax Act had separate provisions to deal with non-payment of TDS amount and it could not be dealt with as a default under the IBC. Therefore, it held that non-payment of TDS amount could not be grounds for initiating CIRP.

(Judgment available [here](#).)

## 5 SC clarifies that proceedings against the personal guarantor of the CD can happen independently [Mahendra Kumar Jajodia etc. v. State Bank of India]

---

In January 2022, the NCLAT Delhi had clarified that there was no prerequisite that an insolvency petition should be pending before the AA before proceeding against the personal guarantor of the CD. It reasoned that the intent behind the provision in the IBC for simultaneous claims against the CD and the personal guarantor was so that insolvency claims would be heard before the same AA. This order was stayed by the apex Court in March 2022.

Now, the apex Court has upheld the NCLAT's view that it is not a prerequisite that an insolvency petition must be pending before the AA before filing a claim against the personal guarantor. They can be proceeded against independently as well.

(Judgment available [here](#).)

## 6 NCLAT recommends amendment to mandate the RP to inform the CoC of any dues that he/she may be aware of that may accrue on the CD [Employees Provident Fund Organization v. Mr. Subodh Kumar Agarwal]

---

Proceedings under the Employees Provident Fund and Miscellaneous Provisions Act 1952 were ongoing to determine whether the CD owed statutory dues to the employees.

# INSOLVENCY AND RESTRUCTURING LAW

Meanwhile, the resolution plan was approved by the AA. This plan was challenged before NCLAT on the grounds that it did not include these statutory dues that may be due on the CD.

The NCLAT did not set aside the resolution plan. However, it referred to the relevant provisions of the IBBI Regulations and pointed out that there exists a lacuna in the law. Currently, the RP is not under any obligation to inform the CoC of any statutory liabilities that may be due on the CD. It is up to the discretion of the RP. The NCLAT recommended an amendment in the Regulations providing for an obligation on the RP to inform the CoC of such dues that may be due. It reiterated that this is in line with the object of the insolvency resolution process which is to take account of all liabilities of the CD and resolve it.

(Judgment available [here](#).)

# SECURITIES LAW

## NOTIFICATIONS

### **1** SEBI (Securities and Exchange Board of India) withdraws permanent recognition granted to ICEX (Indian Commodity Exchange)

---

Demonstrating its commitment to enforce compliance and maintain decorum of regulated exchanges, SEBI recently took cognizance of non-compliance by ICEX (an online commodity derivative exchange providing nationwide trading services which was granted permanent recognition in 2009) with its circulars, inspection observations, net-worth and infrastructural requirements and revoked the exchange's permanent recognition along with ordering it to pay all its dues to the market authority and stop using the term 'stock exchange' in its name.

(Order available [here](#).)

### **2** SEBI revises the prescribed audit framework for MIIs (Market Infrastructure Institutions)

---

Back in January 2020, SEBI mandated all stock exchanges, clearing organisations, and depositories (MIIs) to have an annual system audit by a reputable independent auditor. Now, SEBI has changed its System Audit Framework to keep up with fast technology advances in the securities business. The new guidelines require MIIs to undertake system and network audits according to the regulator's framework and Terms of Reference. SEBI has urged these institutions to identify and report any serious audit non-compliance instances. The report must then be presented to the MII's governing board, and it must be sent to SEBI within a month of the audit's completion.

(Circular available [here](#).)



## SECURITIES LAW

### 3

#### SEBI reviews and revises regulatory framework for Passive Funds.

---

Passive funds, which are investment vehicles that track a market index or segment to determine what to invest in like tracker funds such as ETFs (Exchange Traded Funds), have been popular with regular investors worldwide in recent years. In light of this move, SEBI formed a working group of passive funds stakeholders to assess and recommend modifications to the current regulatory structure.

Now, SEBI has updated market-making and ETF-promotion regulations based on their suggestions. As per the new framework, every AMC (Asset Management Company) must employ two market makers to ensure continuous liquidity on the stock exchange platform. Fund houses would only enable direct investor transactions above INR 25 Cr. These modifications attempt to increase passive fund liquidity.

(Circular available [here](#).)

### 4

#### SEBI modifies SOP (Standard Operating Procedure) in case of defaults by Trading and Clearing Member

---

In July 2020, SEBI had specified the SOP that MIIs should undertake in cases where they are of the view that a trading/clearing member is likely to default in repayment of securities or funds to its clients. The market regulator, after consultation with the MIIs, has decided to modify the SOP in order to provide equitable distribution of funds amongst investors. Under the new framework, the MIIs are required to settle the claims of the maximum number of clients by the way of interim measures within 30 trading days from crystallization of balances.

(Circular available [here](#).)

# COMPANY LAW

## NOTIFICATION

### **1** MCA amends Companies (Prospectus and Allotment of Securities) Rules, 2014

In 2020, Press Note 3 was introduced by the Government to curb opportunistic takeovers of stressed and strategic assets in light of COVID-19 pandemic. The Press Note notified that a non-resident entity can invest in India, subject to the FDI policy except in those sectors/activities which are prohibited. Moreover, the same Press Note notified that an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such neighboring countries, can only invest under the Government route.

In this regard, the MCA has amended the Companies (Prospectus and Allotment of Securities) Rules, 2014 in order to ensure stricter disclosure norms for companies seeking investment from companies incorporated in neighboring countries. Pursuant to the amendment, prior government approval under the Foreign Exchange Management (Non-debt Instrument) Rules, 2019 is required to offer or invite any securities to a company incorporated in, or a national of, a country which shares its border with India. Additionally, if any such approval is required and the same has been obtained, it must be enclosed within the application letter. This step was taken in the line of the FDI regime and must ensure that the FDI approvals are indeed in place.

(Notification can be accessed [here](#).)

### **2** MCA amends Companies (Share Capital and Debenture) Rules, 2014

In order to increase the obligation on companies to ensure stricter compliance of disclosure norms under the FDI policy, the MCA has amended the Companies (Share Capital and Debenture) Rules, 2014. As per the amendment, the companies have to declare whether they require government approval under the Foreign Exchange Management (Non-Debt Instrument Rules), 2019 prior to transfer of shares or not.

## COMPANY LAW

And if the government approval has been obtained, the declaration needs to be inserted before the Enclosures.

This step would ensure stricter compliance with the provisions of the Foreign Exchange Management (Non-Debt Instrument Rules), 2019 and will also ensure that all stakeholders are aware of the FDI regime in India, and reduce instances of non-compliance.

(Notification can be accessed [here](#).)

# ARBITRATION LAW

1

SC (Supreme Court) holds that the power of an arbitral tribunal to award interest is discretionary and subject to the agreement between the parties (*Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation*)

---

In the present case, the appellant and respondent entered into a concession agreement. A dispute arose between the parties and this was referred to arbitration. After the arbitrator granted the award to the appellant party, it filed for execution of the award and sought future interest on the entire amount of the sum awarded by the arbitrator. This was rejected by the executing Court and therefore, aggrieved the appellant approached SC.

The question before the Court was whether the arbitrator's power to award interest is discretionary and subject to the agreement between the parties as under Section 31(7) (a) of the A&C act. The judges in the case opined that the power vested in an arbitrator to award interest is discretionary and it can allow interest on any part of the claim.

But the Court also held that party-autonomy is the cornerstone of the act and therefore, the discretion available with the arbitrator is limited and subject to the agreement between the parties, the discretionary power would cease to have effect once the parties have exercised their autonomy under the said section of the act.

(Judgment available [here](#).)

2

No direction can be passed in relation to the sale of property to a third party under Section 9 of the A&C act (*Aditya Birla Finance Ltd v. Mcleod Russel India Ltd. and Ors*).

---

In the present case, the petitioner invested in compulsorily convertible shares of one of the respondents in the case with a put option that was exercisable after 12 months. A dispute arose between the parties in respect to the put option and the matter was referred to arbitration. The arbitral tribunal passed an interim award in favor of the petitioner and the respondents were jointly and severally directed to make payment to the

## ARBITRATION LAW

petitioner in case of non-performance of obligation. Therefore, the petitioner filed the application for interim relief under Section 9 of the A&C act.

The question before the Court was whether a direction can be passed under Section 9 of the act to sell the subject property to an outsider who was not party to the arbitration proceedings. The Court opined that the objective of the said section is to provide interim protection for the preservation of the subject matter of the arbitration. The direction would result in the subject property going out of the girdle of arbitration and this will defeat the purpose of the section. Therefore, the Court rejected the contentions of the petitioner and held that no direction can be passed to sell property to a third party under the Section 9 of the A&C act.

(Judgment available [here](#).)

3

**Remedies under A&C and SARFAESI (Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002) can be resorted to simultaneously (Om Prakash Kumawa v. Hero Housing Finance Ltd., S.B. Civil Writ Petition No.)**

---

In the present case, the petitioner filed a writ petition challenging the order by a chief magistrate under the Section 14 of the SARFAESI act on the ground that the loan agreement between the parties contains an arbitration clause and that the respondent having filed an application under Section 9 of the A&C act could not avail a remedy under SARFAESI Act.

# ARBITRATION LAW

The question before the Court was whether the presence and invocation of the arbitration clause can act as a bar to institute proceedings under SARFAESI act. The Court held that the mere presence and application under Section 9 of the A&C act will not in itself make any proceedings under SARFAESI non-maintainable. The Court further held that proceedings under A&C and SARFAESI act can go hand in hand and a party can resort to both simultaneously.

(Judgment available [here](#).)

# MISCELLANEOUS

## RBI ORDER

### **1** RBI extends time period for lending by Commercial banks to NBFCs and SFBs to NBFC-MFIs on an ongoing basis

---

To promote banks-NBFC cooperation in key areas, RBI recently authorised commercial banks and SFBs to lend to NBFCs and NBFC-MFIs for on-lending to certain priority sectors on an ongoing basis which was previously permitted up to March 31, 2022. RBI also notified that commercial banks and SFBs may lend up to 5% and 10% respectively of their total priority sector lending limit.

(Notification can be accessed [here](#).)

## JUDGEMENT

### **2** GST Council's decision not binding on Union and State Governments [Union of India v. Mohit Pvt Ltd]

---

Recently, the SC while discussing GST Council's role in implementing GST laws, analysed relevant GST laws and held that GST council's recommendations were not mandatory on the Union or State governments as GST council's role was to promote cooperative federalism and state-federal concord.

(Judgment available [here](#).)

# CONTRIBUTORS

ANANYA DASH

CHOUDHURY PARAMJIT MISRA

DEVANSH SEHGAL

NIKHIL JAVALI

PRERAK SHEODE

SANSITA SWAIN

SHIVANI PATTNAIK

SOURAV JENA



**Centre for Corporate Law - National Law  
University Odisha**

The Centre for Corporate Law, as it is called, is an initiative to promote interdisciplinary research in corporate law, and...

 CCL