



MONTHLY CORPORATE LAW UPDATES

APRIL, 2023

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

1. Secured Creditors who do not fall under the categories of Financial Creditors or Operational Creditors will also have rights under Sections 52 and 53 of the IBC: Supreme Court [*M/s. Vistra ITCL (India) Ltd. & Ors. v. Mr. Dinkar Venkatasubramanian & Anr.*] [[Link](#)]

Section 52 read with 53 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) lays down the rights, priority level and obligations of a secured creditor who has relinquished its security interest to the liquidation estate.

This case involved a peculiar situation where the Corporate Debtor (“**CD**”) had pledged some equity shares in favour of Vistra ITCL (India) Limited. Here, the SC recognized Vistra as a secured creditor but could not classify it either as a financial or operational creditor. The Supreme Court (“**SC**”) ruled that Section 30(2) read with Section 31 recognises and protects the interests of such creditors and thus, granted Vistra ITCL (India) Ltd. all the rights and obligations similar to a secured creditor under Sections 52 and 53 of the Code.

2. For a Section 7 application, the period of limitation for both Principal Borrower and Corporate Guarantor will depend on the Deed of Guarantee: National Company Law Appellate Tribunal (“**NCLAT**”) [*Archana Deepak Wani v. Indian Bank*] [[Link](#)]

Section 7 of the IBC provides for the application of initiation of the Corporate Insolvency Resolution Process (“**CIRP**”) by the financial creditor. Upon any default, the debt becomes due for both the Principal Borrower and Guarantor as per Section 3(11).

Relying upon the SC's judgement in *Syndicate Bank v. Channaveerappa Beleri*, the NCLAT held that a guarantor's liability depends on the terms of his contract. Thus, the loan agreement with the Principal Borrower and the Deed of Guarantee with the Guarantor will be treated as separate transactions, and the Guarantor's liability (and period of limitation) must be assessed based on the terms of the Deed of Guarantee.

3. The date of NPA cannot be taken to be the date of default and it cannot be changed by the Bank for the purpose of filing CIRP application under IBC: NCLAT [*Ramdas Dutta v. IDBI Bank Ltd.*] [[Link](#)]

The NCLAT has reaffirmed that the date of default cannot be changed by the bank and date of declaring a non-performing asset (“**NPA**”) cannot be considered as the date of default for limitation purposes.

On issues related to the Limitation Act, 1963, it further held that one-time settlement offers made after the limitation period's expiration cannot be considered to extend the limitation period under Section 18 and the payment acknowledgments must be in written form for computing a fresh limitation period under Section 19.

4. A Resolution Plan can't be questioned on the ground of allocation of "meagre amount" to creditors unless that value is less than the liquidation value: NCLAT [*Pani Logistics v. Vikas G. Jain & Ors.*] [[Link](#)]

The NCLAT has upheld an NCLT's order and held that operational creditors ("OC") cannot claim a higher amount under the resolution plan when financial creditors ("FC") have not been paid in full. The NCLAT opined that mere allocation of "meagre amount" to the creditors does not warrant questioning the plan. The allocation can only be challenged if the allocated value to the OCs falls below the liquidation value.

5. Section 30(4) of IBC directory in nature, does not compel CoC to distribute payments based on value of security: National Company Law Tribunal ("NCLT") [*Stressed Assets Stabilisation Fund, Mumbai v. M/s. Galada Power and Telecommunications Ltd.*] [[Link](#)]

Section 30(4) of the IBC gives the Committee of Creditors ("CoC") to approve a resolution plan by a vote of not less than 66% of voting share of the financial creditors, after considering its feasibility, viability and other various factors.

The NCLT has ruled that Section 30(4) does not require the CoC to distribute payments to creditors based on the value of their security interests. In this case, a financial creditor was seeking distribution based on voting share rather than the kind of charge held on the debtor's assets. The NCLT emphasised that the decision on payment priority rests with the CoC's commercial wisdom.

6. Resolution Professional is within his power to amend or modify the terms of pre-CIRP contracts: NCLT [*Schreiber Dynamix Dairies Pvt. Ltd. v. Sumat Kumar Gupta, RP of International Mega Food Park Ltd.*] [[Link](#)]

The NCLT has upheld the Resolution Professional's ("RP") authority to modify pre-CIRP contracts. In the case, the RP passed on increased electricity tariffs to the resolution applicant ("RA"), preventing significant financial losses to the CD. The NCLT found the action of the RP's justified in light of RP's duty to secure the CD's financial viability under the provisions of the IBC.

1. Modification in filing of Offer Documents by Mutual Funds: SEBI [\[Link\]](#)

The Securities and Exchange Board of India (“SEBI”) has issued a circular modifying the requirement of filing offer documents by mutual funds prior to the launch of the scheme. All final Scheme Information Document (SID) and Key Information Memorandum (KIM) shall be filed digitally two working days prior to the scheme launch. Moreover, all new fund offers are to remain open for subscription for a minimum of three working days. This comes into effect on May 01, 2023.

2. Bank Guarantees created out of clients’ funds: SEBI [\[Link\]](#)

Through its circular, SEBI has implemented certain measures on the bank guarantees created out of pledging clients’ funds with Banks by stockbrokers or clearing members. Accordingly, from May 01, 2023, no new bank guarantees are to be created out of clients’ funds by stockbrokers or clearing members and any such existing bank guarantees are to be wound down by September 30, 2023. SEBI has also clarified that such norms are not applicable on proprietary funds of stockbrokers, and their funds deposited with clearing members in the capacity of a client.

3. Dispute Resolution Mechanism for Limited Purpose Clearing Corporation: SEBI [\[Link\]](#)

Limited Purpose Clearing Corporation (“LPCC”) are set up for clearing and settling repo transactions. Through its circular, SEBI has put in a dispute resolution mechanism for deciding disputes between the clearing members, clearing members or its clients and the LPCC, clearing members and their clients, LPCC, and its vendors/service providers.

Regarding resolving disputes between clearing members inter-se, it shall be settled by conciliation and/or by an arbitration panel. The decision of the panel is to be final and binding on the parties.

4. Legal Entity Identifier for Issuers Listed or Proposing to List Non-Convertible Securities, Securitised Debt Instruments and Security Receipts: SEBI [\[Link\]](#)

Legal Entity Identifier (“LEI”) is a unique 20-character code for legal entities that participate in financial transactions. Currently, the Reserve Bank of India (“RBI”) has mandated non-individual borrowers of aggregate exposure above Rs. 25 crores to obtain an LEI code.

Now, SEBI in its circular, has mandated issuers having outstanding listed non-convertible securities (as on August 31, 2023), securitised debt instruments and security receipts to obtain and report LEI code in Centralized Database of corporate bonds.

5. Additional Requirements for Transition Bond Issuers: SEBI [\[Link\]](#)

Transition bonds is one of the sub-categories of green debt securities as revised by SEBI in 2021. These bonds are funds that are raised to facilitate the transition to more sustainable form of operations. Certain additional requirements have been prescribed By SEBI for these bonds to ensure transparency and avoid misallocation of these funds.

Thereby, issuers of transition bonds shall make disclosures in the offer document for public issues or private placement of such transition bonds. Disclosure in the centralized databased is also to be made for corporate bonds. Moreover, the plan of transition along with the progress of implementation must be disclosed in the annual report. Any revision in the transition plan must be reported to stock exchanges as well.

1. Ministry of Corporate Affairs's ("MCA") notifies amendment to the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016. [\[Link\]](#)

In line with Central Government's vision of establishing Centre for Processing Accelerated Corporate Exit ("**C-PACE**"), the application for removal of name of the company will now be made to the Registrar of C-PACE with an increased fee of Rs. 10,000. The Registrar of C-PACE will be considered as the Registrar of Companies ("**ROC**") for the purposes of processing and disposal of applications. Additionally, the company no longer has to submit a copy of a special resolution to the ROC, for the submission of the application.

2. The tribunal can entertain a delayed appeal under Section 421 of Companies Act, 2013 ("CA") if there is sufficient reason for delay: National Company Law Appellate Tribunal ("NCLAT") [*Gursharan Singh Sawhney v. Harkiran Kaur Sawhney & Ors.*] [\[Link\]](#)

The NCLAT has held that a party can petition the tribunal even after the prescribed 45-day appeal period if they are able to satisfy the tribunal. The party should provide reasonable grounds for delay, for availing an extension post 45 days after the order of the Adjudicating Authority. The court observed that no plausible explanation was given by the party to explain day-to-day delay and concluded that it will not entertain its petition.

3. Director's Resignation Effective for Prosecution, Irrespective of Company's Failure to Intimate RoC: Calcutta High Court ("HC") [*Pranab Kumar Roy v. Securities and Exchange Board of India*] [\[Link\]](#)

The Calcutta HC in a recent decision has held that a director's resignation communicated to the Registrar of Companies ("**RoC**") is valid for prosecution, even if the company fails to inform the RoC. Section 168 of the Companies Act imposes the duty on the company to inform the RoC about the resignation, but the resigning director may also inform the RoC directly. In a specific case, where a director resigned in 2013 and notified the RoC accordingly, he cannot be prosecuted for a matter related to 2017. Despite his name being listed as a director in RoC records, the resignation was effective, as the director had no involvement in the company's operations and had already resigned.

4. Workers' Dues not a Priority in the Liquidation process, Section 327(7) of the Companies Act is constitutionally valid: Supreme Court [*Moser Baer Karamchari Union v. Union of India*] [\[Link\]](#)

The SC has upheld the constitutional validity of Section 327(7) of the Companies Act, 2013, which provides that workers' dues will not be given priority in the event of a company's liquidation under the Insolvency and Bankruptcy Code, 2016. The Court dismissed petitions challenging the constitutionality of this provision, stating that it was added to align with the new IBC regime. It noted that the IBC's Section 53 overrides other laws and determines asset distribution after liquidation. The court emphasized the need for sacrifices in the revival and rehabilitation of companies and rejected claims of arbitrariness.

5. Ministry of Corporate Affairs (“MCA”) notifies amendment to the Companies (Indian Accounting Standards) Rules, 2023. [\[Link\]](#)

The MCA has introduced amendments to the Companies (Indian Accounting Standards) Rules, 2023. The amendments include the addition of new paragraphs, 39AH and B14, related to deferred tax on assets and liabilities arising from single transactions, as well as leases and decommissioning liabilities. The changes aim to improve transparency, provide more detailed accounting policy information, and align with International Financial Reporting Standards. The amendments will enhance the quality of financial reporting and facilitate informed decision-making by stakeholders.

6. Section 140(5) of the Companies Act is constitutionally valid: Supreme Court [*Union of India v. Deloitte Haskins and Sells LLP*] [\[Link\]](#)

The SC has upheld the constitutional validity of Section 140(5) of the Companies Act, 2013, stating that it is not discriminatory or arbitrary. It ruled that proceedings under this section can continue even after the resignation of the auditor. The court emphasized the importance of auditors in protecting public interest and rejected claims that the provision is excessive or violates Article 14 and Article 19(1)(g) of the Constitution. It affirmed that auditors involved in fraudulent activities can face disqualification and that the provision serves the purpose of regulating fraud.

1. Arbitration Clause in an unregistered and unstamped contract non-enforceable: Supreme Court [*M/s. N.N. Global Mercantile Pvt. Ltd. v. M/s. Indo Unique Flame Ltd. And Ors.*] [\[Link\]](#)

A five-judge bench settled the issue of whether an arbitration clause of an unregistered and unstamped contract is valid. The majority opined that an arbitration agreement attracts stamp duty. Therefore, an insufficiency in doing so must render such instrument as non-existent in law until the instrument is validated under the Stamp Duty Act.

2. “Intertwined” and “Direct Benefits” Estoppel Theory Invoked to Refer Non-Signatory to Arbitration: Delhi High Court [*Gaurav Dhanuka And Anr v. Surya Maintenance Agency and Ors.*] [\[Link\]](#)

In a dispute between a flat-owner and a maintenance agency, the Court held that a non-signatory to an agreement can refer to the arbitration clause by the application of both the “direct benefits” and “intertwined” estoppel theory.

In this case, the Court opined that the respondent (non-signatory and developer of a building) impleaded on the ground that the maintenance agency’s authority was derived from the developer under the agreement executed between them. Therefore, the developer was deriving direct benefit from the agency. It, therefore, cannot contend that it is not a party to the relevant maintenance agreement which contains the arbitration clause.

3. Test for Passing An Attachment Order before Passing Arbitral Award Laid Down: Delhi High Court [*M/s. Promax Power Ltd v. M/s. Tahal Consulting Engineers India Pvt Ltd*] [\[Link\]](#)

Passing an attachment order before passing an arbitral award may not be specifically set out in the provisions of the Arbitration and Conciliation Act (“**A&C Act**”). However, the Court ruled that such an order can be passed on the basis of a test. The power to pass an attachment order cannot be invoked only because the claimant has a valid claim. The claimant, additionally, has to provide to the Tribunal that the defendant is indulgent in activities to remove the assets which intends to defeat the arbitral award that may be passed. This two-fold test must be checked before an attachment order is passed.

4. Applying Reasonable Third Person Test While Considering Arbitrators' Requirement for Disclosure: Bombay High Court [*HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited and Ors.*] [\[Link\]](#)

The bench opined that applying the 'reasonable third person' test while determining whether there was any requirement on the part of the arbitrator for disclosure eliminates or negates any likelihood of bias. This was decided in light of the Guidelines issued by the International Bar Association which have been adopted in the A&C Act. In case certain situations do not prescribe disclosure, the Court would apply the test of reasonable third person in place of a subjective test to determine whether the fact is to be disclosed.

5. Appointment of Arbitrator can be challenged at any stage by a Party: Madras High Court [*P. Cheran v. M/s. Gemini Industries & Imaging Limited*] [\[Link\]](#)

The Court held that a party can challenge the appointment of the arbitrator at any stage of the proceedings. Moreover, even if the award debtor had failed to challenge after having knowledge of the appointment, it would not take away the right to challenge such appointment. The bench also opined that when the appointment of an arbitrator is improper under the law, the proceedings of arbitration stand vitiated from the point of appointment. Thereby, any decision reached by such an arbitrator is invalid.

1. Strengthening Merger Control and Enhancing Enforcement: The Competition (Amendment) Bill, 2022 receives Presidential Assent [\[Link\]](#)

The Competition Act, 2002 has been amended after a four-year-long deliberation process. The Amendment Act, 2023 introduces significant changes in merger control, behavioral regulations, penalties, leniency programs, and powers of the Director General ("DG"). It also includes other amendments such as a limitation period for filing violations and the subsuming of the DG within the Competition Commission of India ("CCI"). The aim is to enhance enforcement, increase compliance, and address new challenges in the competition landscape.

2. Competition Commission of India ("CCI") Approves Demerger and Acquisition in Haldiram Snacks for FMCG Business [\[Link\]](#)

The CCI has granted approval for the demerger of the fast-moving consumer goods ("FMCG") business of Haldiram Snacks and Haldiram Foods, enabling the formation of a new entity called Haldiram Snacks. The demerged entity will be responsible for the collective FMCG business of both companies and their subsidiaries.

Additionally, the CCI also approved the acquisition of 56% and 44% shareholdings in Haldiram Snacks Food by the existing shareholders of Haldiram Snacks and Haldiram Foods. The demerger will be carried out through an NCLT-approved scheme of arrangement, facilitating the consolidation of the FMCG businesses under a single entity.

3. Google Challenges Delhi High Court's ("HC") Direction to CCI on User-Choice Billing Policy [*Alliance of Digital India Foundation v. Competition Commission of India & Ors.*] [\[Link\]](#)

The Delhi HC issued notice on an appeal filed by Alphabet Inc, Google's parent company, challenging a single judge's order directing the CCI to consider applications against Google's new in-app user choice billing policy. The appeal seeks to review the order and suspend the policy until the CCI adjudicates on the matter.

In response, Google has moved the Delhi HC to challenge the single judge's direction to the CCI regarding the applications filed by the Alliance of Digital India Foundation (ADIF) against Google's new user-choice billing policy.

1. Same Activity Can be Taxed as ‘Goods’ and ‘Services’: Supreme Court [*Commissioner of Customs, Central Excise & Service Tax v. M/s. Suzlon Energy*] [[Link](#)]

The Supreme Court ruled that the same activity can be taxed as ‘goods’ and ‘services’ only when the contract is indistinguishable and there is a levy of service charge on the service supplied. This comes in light of the case wherein the import of “engineering design and drawings” falls under “design services,” service charge being taxable under the Finance Act and the same was under the category of “goods” under the Customs Act.

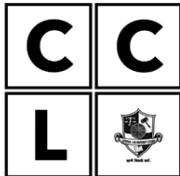
2. Assessing Officer Order Causing Prejudice to Revenue Revisable: Supreme Court [*The Commissioner of Income Tax v. M/s. Paville Projects Pvt Ltd.*] [[Link](#)]

In this case, the order of the Assessing Officer (“**AO**”) allowing deduction as claimed by the assessee was set aside by the Commissioner of Income Tax (“**CIT**”). This was done based on revision of orders which are prejudicial to revenue. The bench held the AO’s order as erroneous and decided that the CIT can revise such orders which are in prejudice to the interest of revenue i.e., which cause a loss of revenue in the form of tax.



MONTHLY CORPORATE LAW UPDATES

APRIL, 2023

<i>Contributors</i>	<i>Contact Us</i>
<p>Srilagna Dash Ananya Dash B. R. Garima Rao Ch. Paramjit Misra Devansh Sehgal Prerak Sheode Siddharth Sengupta Shivani Pattnaik Shubham Singh</p>	 <hr data-bbox="732 1745 1305 1749"/> 