NATIONAL LAW UNIVERSITY ODISHA

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MONTHLY CORPORATE LAW UPDATES

AUGUST, 2022

- INSOLVENCY & BANKRUPTCY LAW
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1. Insolvency and Bankruptcy Code ("IBC") will prevail over the Customs Act: Supreme Court ("SC") [*Sundaresh Bhatt v. Central Board of Indirect Taxes and Customs*] [Link]

It is the nature of the IBC to override other statutes. In pursuance of the same, the Apex Court recently held that the pending dues cannot be recovered from an insolvent company/ company under liquidation. This is because the provisions concerning moratorium for such companies specifically bars any recovery against them.

2. Principle of res judicata will apply to IBC proceedings. [*Vikas Dahiya v. Arrow Engineering Ltd.*] [Link]

The principle of Res Judicata states that a matter cannot be reconsidered by a court once it has been already been settled on its merits by another court. Recently, the National Company Law Appellate Tribunal ("NCLAT") has held that the principle will apply to proceedings under the IBC. Strangely, in this case, a judgment of NCLAT (which was upheld by the Supreme Court) was challenged in the NCLAT itself.

3. Slump Sale cannot be treated as 'Sale as a Going Concern': NCLAT [*Jindal Power Ltd. v. Dushyant C. Dave*] [Link]

In this instance, the bidder successfully won a bid in a liquidation. The mode of liquidation was slump sale. However, the bidder intended that the same shall be treated as 'going concern' sale. Doing the same would allow the bidder in getting the benefits of fresh slate and protection from criminal proceedings under Section 32A of the IBC.

4. Resolution plan can be sent back to the CoC for reconsideration on account of discovery of new facts: NCLT [*Asset Reconstruction Company (India) Ltd. v. Nivaya Resources Pvt. Ltd.*] [Link]

The National Company Law Tribunal ("NCLT") has held that a Committee of Creditors ("CoC") approved resolution plan can be sent back to the CoC on discovery of new facts related to the resolution applicant. This stage is the one where the CoC has approved a resolution plan and the same has been filed before the Adjudicating Authority ('AA') for ratification. The Tribunal held that doing the same falls within the 'commercial wisdom' of the CoC.

5. Liability of the guarantor does not get absolved on approval of resolution plan: Delhi HC [*Sanjay Sarin v. The Authorised Officer, Canara Bank and Ors.*] [Link]

The Delhi High Court ("HC") has held that a guarantor is not absolved from its liability once the resolution plan of the Corporate Debtor ("CD") is approved by the NCLT. It concluded that the financial creditor has the right to proceed against the securities of the guarantor for recovery of its dues, independent of the approval of the resolution plan.

1. Enhanced regulatory framework for Debenture Trustees ("DT"): Security and Exchange Board of India ("SEBI"). [Link]

SEBI has issued guidelines to improve due diligence of security creation for DTs and Listed Issuer Companies. The guidelines have revised requirements related to encumbrance, creation of securities, and related due diligence by DTs.

2. Relaxed Regulations for Alternative Investment Funds ("AIF") and Venture Capital Funds ("VCF"): SEBI. [Link]

AIFs and VCFs could invest in the securities of companies incorporated outside of India only if they had an Indian connection. SEBI has done away with the above requirement. Now, AIFs and VCFs can invest in any overseas companies subject to certain conditions as may be issued by Reserve Bank of India ("RBI") and SEBI from time to time.

3. SEBI joins Account Aggregator Framework ("AAF"). [Link]

Last year, RBI introduced AAF to facilitate the collection and easy access of financial information. The framework operates through Account Aggregators who will connect the user to the financial information provider ("FIP"). Now, SEBI has notified that it has joined AAF as a FIP. This will boost access to information within the securities market.

4. New Guidelines for Related Party Transactions by Portfolio Managers ("PM"): SEBI. [Link]

SEBI has issued compliance guidelines in pursuance of the amendments to the SEBI (PM) Regulations, 2020. Under the new guidelines, PMs can invest up to 30% of their client's portfolio in the securities of their own related parties/associates. However, they are required to take prior consent of their clients before making any such investments. This will help improve the prudential standards for PMs.

5. Enhanced Norms for Credit Rating Agencies ("CRA"): SEBI. [Link]

SEBI has enhanced the norms for disclosures and withdrawal of Perpetual Debt Securities ("PDS") for CRAs. CRAs will now have to compare two consecutive sharp rating action for making any disclosure. Further, CRAs can withdraw credit ratings for PDS if they have rated the PDS for a period of five years continuously or received an assent that a rating is already available for the same.

1. Companies (Accounts) Rules amended: Backup of books of accounts mandated. [Link]

With this amendment, the Ministry of Corporate Affairs ("MCA") has mandated companies to back up their books of accounts and other books and papers daily in electronic format. These books, including those at a place outside India, must be accessible at all times and maintained in data servers physically located in India. The name, location, and internet address of the service provider ("SP") or the book keeper in case the SP is not in India, have to be disclosed to the Registrar of Companies ("RoC").

2. Companies (Incorporation) Rules, 2014 amended: Physical verification process of Registered offices by RoC introduced. [Link]

The MCA has notified the process for physical verification of registered office of the company to create enhanced disclosure of operation. This procedure for the verification includes creation of a report by the RoC, requirement of independent witnesses, etc. Upon non-compliance, the company will be notified of RoC's intention to remove it from the register of companies.

3. MCA amends Companies (Registration of charges) Rules, 2014: Signing of charge e-forms for insolvency resolution or liquidation. [Link]

Under this amendment, insolvency resolution professionals or liquidators will have to sign charge e-forms for companies undergoing resolution or liquidation. Charge e-forms (registration of a charge on assets of a company) include Forms CHG-1, CHG-4, CHG-8 and CHG-9. The forms will have to be filed with the RoC.

1. Binding obligation: A necessity to qualify as an arbitration agreement: SC [*Mahanadi Coalfields Ltd. v. IVRCL AMR Joint Venture*]. [Link]

In the present instance, the SC distinguished between an arbitration clause/ agreement and a clause which merely uses the word 'arbitrator' and 'arbitration.' The latter does not connote a binding obligation on the parties to refer the matters to arbitration, and thus, a fresh consent is required to initiate arbitration.

2. Arbitration Tribunal: Not a Civil Court: Bombay HC [*Ashok Palav Coop. Housing Society Ltd. v. Pankaj Bhagubhai Desai & Anr*] [Link]

Section 79 of the Real Estate (Regulation and Development) Act places a bar on civil courts from entertaining any suit under the Act. The Bombay HC ruled that an arbitration tribunal is not a civil court and thus, has the authority to preside over such a case. The reason for this stems from the legislative intent to never treat arbitration tribunal as a civil court. Further, interpreting a phrase of Section 79, the Court stated that a tribunal is not an authority ("any court or authority under the provision").

3. Arbitration agreement: Essential for appointment of the arbitrator: Calcutta HC [*Eastern Coalfields Ltd. v. RREPL-KIPL (JV)*] [Link]

Section 11 of the Arbitration and Conciliation Act ("A&C") provides for the appointment of an arbitrator. The Calcutta HC has ruled that the existence of an arbitration agreement is an essential condition for invoking the Section. The Court cannot substitute the requirement of an agreement with any other grounds such as conduct of the parties.

4. Arbitration clause in annexure to the main agreement is enforceable/binding: Delhi HC [*Piyush Kumar Dutt v. Vishal Mega Mart Private Limited*] [Link]

The Delhi HC has ruled that an arbitration clause within the annexure to a main agreement is valid. The Court observed that if the main agreement makes a reference to the annexure that contains an arbitration clause, then arbitration agreement is binding on the parties.

MISCELLANEOUS

1. RBI cancels the license of Deccan Urban Co-operative Bank Ltd., Vijayapur, Karnataka. [Link]

RBI, exercising its power under Banking Regulation Act, cancelled the license of "Deccan Urban Co-operative Bank Ltd., Vijaypur, Karnataka due to inadequate capital and no earning prospects. The Bank is now prohibited from conducting its business. Upon liquidation, every depositor of this bank will be entitled to receive the deposit insurance claim amount of their deposits up to a monetary ceiling of Rs. 5 lakh from Deposit Insurance and Credit Guarantee Corporation.

2. Jurisdiction of Competition Commission of India ("CCI"): Not excluded merely because actionable information relates to a Patent: Delhi HC [Link]

Delhi HC held that CCI is competent to take up the cases involving competition issues such as anti-competitive conduct, abuse of dominance, act impeding competition, adoption of unfair means, etc. The jurisdiction of CCI is not ousted just because the actionable information is relating to patents until and unless there are competition issues involved in the case as mentioned above.

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