MONTHLY CORPORATE LAW UPDATES

DECEMBER, 2022

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1. An assignee can continue with pending Corporate Insolvency Resolution Proceedings ("CIRP") under the Insolvency and Bankruptcy Code ("IBC"): National Company Law Appellate Tribunal ("NCLAT") [*Siti Networks Ltd. v Assets Care and Reconstruction Enterprises Ltd. & Anr*]. [Link]

Section 5(7) of the IBC defines a financial creditor and includes an assignee within the definition. NCLAT has held that IBC does not prohibit an assignee from continuing any pending CIRP proceedings if it has been assigned to do so by the assigner. An assignee becomes a financial creditor by the virtue of the assignment. Thus, it acquires the right to continue the proceeding initiated by the original creditor.

2. Resolution Professional ("RP") cannot pursue an avoidance application after the approval of resolution plan by the Adjudicating Authority ("AA"): National Company Law Tribunal ("NCLT") [*State Bank of India v. Ushdev International Limited*]. [Link]

The Bench observed that once a resolution plan is approved by AA, an application for avoidance of preferential transaction cannot be carried on by the RP on behalf of the Corporate Debtor ("**CD**"). This is due to the fact that once the plan is approved, the CD is managed by a new management. The role of the RP becomes limited because he has already performed his duties.

3. Insolvency Professionals ("IP") to act as Interim Resolution Professionals ("IRP"), Liquidators, RP and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2022: Insolvency and Bankruptcy Board of India ("IBBI"). [Link]

Recently, IBBI has notified guidelines prescribing preparation of a common panel of IPs for appointment as IRP, Liquidator, RP and Bankruptcy Trustees. The appointed name should be communicated to the AA. According to the guidelines, this panel will be renewed every six months. It also notifies the criteria for an IP to be eligible for the IPs panel. Additionally, NCLT is given the power to appoint the same for Liquidation Process, Insolvency Resolution or Bankruptcy Process relating to a CDs and personal guarantors to CDs, as the case may be.

4. Section 31 of IBC doesn't vest power to AA to modify resolution plan: NCLAT [*Mathuraprasad C Pandey & Ors. v. Partiv Parikh & Anr*]. [Link]

The According to Section 31 of IBC, when a resolution plan is presented before the AA for approval, it is clear mandate of legislation to either approve or to reject the same. In this Section, the word "shall" have been incorporated with proviso that the AA must be satisfied that the resolution plan has provisions for its effective implementation. This does not imply that AA can modify the resolution plan to such effect, like in the present case. The NCLAT held that AA only accept or reject the resolution plan and not modify it.

5. Section 96 (1)(b) of IBC does not stay any future liability or obligation: NCLAT [*Ashok Mahindru & Anr. v Vivek Parti*]. [Link]

The NCLAT observed that the word 'debt' in Section 96(1)(b) of IBC is read along with the definition of 'debt' in Section 3(11) of the same. The former states the status of any legal action or proceeding pending in respect of any debt during the interim-moratorium period. The interim moratorium shall be for such proceedings which relates to a liability or obligation due. The Section 96(1)(b) cannot be read to mean that any future liability or obligation is contemplated to be stayed.

6. A trust can become a resolution applicant: NCLAT [*M/s. Aswathi Agencies v Bijoy Prabhakaran Pulipra & Ors*]. [Link]

According to Section 5(25) of IBC, resolution applicant means a 'person' who submits a resolution plan . Further, Section 3(23)(d) of IBC, which defines the term 'person' for the above purpose, includes trust within its scope. Therefore, NCLAT has held that there is no bar on a trust to become a resolution applicant for the purpose of a CIRP. A trust can successfully become an applicant and submit its resolution plan before the resolution professional.

7. Date of default does not strictly mean the date of declaration of Non-Performing Asset ("NPA"): NCLAT [*Edelweiss Asset Reconstruction Company Ltd. Vs. Perfect Engine Components Pvt. Ltd*]. [Link]

The Section 3(12) of IBC defines 'default' as non-payment of debt by the CD. The definition provides the date of default as the date on which the debt becomes 'due and payable'. The NCLAT has held that the date of default does not have to strictly be interpreted as the date of NPA. If there has been a written acknowledgement of the default by the defaulting party, a fresh period of limitation will be calculated from the date of the signing of the said acknowledgement.

1. Equity Exchange Traded Funds (“EETF”) now eligible for Margin Trading Facility (“MTF”): Securities and Exchange Board of India ("SEBI"). [Link]

EETF is an investment fund which is traded on stock exchanges. EETF has emerged as an investment product with various advantages such as transparency, diversification and low costs in recent years. Margin Trading is a type of trading where borrowed funds are used to trade a financial asset SEBI has notified that EETF will now be eligible as a security and collateral under MTFs.

2.New Guidelines for Foreign Investment in Alternative Investment Funds (“AIF”): SEBI. [Link]

SEBI has issued guidelines for the foreign investors who wish to invest in AIFs. The manager of an AIF is required to ensure that the foreign investor is the resident of a country which is signatory to the International Organization of Securities Commission’s Multilateral Memorandum of Understanding (“**MoU** ") or a signatory to the bilateral MoU with SEBI.

However, an AIF may accept commitment of a government related investor who does not meet the above-mentioned criteria if it is approved by the Government of India. Additionally, the investor should not be a person mentioned under the United Nation Security Council’s Sanctions List and a resident of a state identified by the Financial Action Task Force for money laundering activities.

3. Policy framework for winding down of a Clearing Corporation (“CC”): SEBI. [Link]

SEBI has devised a framework for the orderly winding down of critical operations and services of a CC. Every CC is now required to formulate a Standard Operating Procedure (“**SOP**”) that outlines the manner in which its operations will be carried out. The SOP will help to ensure that the operations and services of any CC does not cause a disruption to the financial system. Furthermore, SEBI has identified potential scenarios which may prevent a CC from providing its services and thus, lead to the winding down of its operations.

4. Takeaways from the SEBI Board Meeting. [Link]

SEBI took certain key decisions in its board meeting on 20th December, 2022. Some of these decisions which shall have a significant impact on the stakeholders in the securities market are mentioned below:

A. *Stronger governance mechanism for Market Infrastructure Institutions ("**MII**")*

The functions of MIIs shall now be categorized into three verticals namely-
(1) critical operations;

(2) regulatory compliance and risk management and (3) any other functions including business development. MIIs are also required to allocate more resources towards the first two functions.

Furthermore, SEBI has decided to streamline the process for appointment of Public Interest Directors ("**PID**"). MIIs shall appoint PIDs with a strong background and expertise in the areas of technology, law and capital markets. Additionally, MIIs shall now set up an Investment Committee which will be responsible for evaluating investments and the Corporate Social Responsibility activities of the institution. The following decisions have been taken to ensure greater transparency and accountability in the functioning of MIIs.

B. *Amendment to SEBI (Buy-back of Securities) Regulations, 2018 ("**BS**')*

The Board has decided to amend the BS regulations after taking into account the suggestions received from various stakeholders with regards to buy-back of shares. Buy-back through stock exchange route shall be phased out in a gradual manner. It will be substituted by buy back through the route of tender offer. These amendments are expected to streamline the buy-back process and promote ease of doing business.

C. *Regulatory Framework for Execution Only Platforms ("EOP") for Mutual Fund Schemes ("**MF**")*

Many entities including Investment Advisors ("**IA**") and stock brokers offer digital execution services in direct plans of MF schemes. Currently, there is no regulatory framework to facilitate the provision of such services. Therefore, the Board has decided to introduce a framework to govern EOPs for direct plans of MF schemes. Under the framework, EOPs may be granted registration in either of the two categories- (1) EOP as an agent of Asset Management Companies or (2) EOP as an agent of Investor.

D. *Amendment to SEBI (Issue and Listing of Non- Convertible Securities) Regulations, 2021*

The Board undertook a review of the regulatory framework for Green Debt Security ("**GDS**") in the wake of the increasing interest in sustainable finance in India and across the world. It has been decided to enlarge the scope of the definition of GDS to include new modes of sustainable finance in relation to pollution prevention and eco-efficient products. Furthermore, the Board has introduced the concepts of Blue (related to water management and marine sector), yellow bonds (related to solar energy) and transition bonds as sub-categories of GDS.

E. *Enhanced risk management framework for stock brokers designated as Qualified Stock Brokers ("**QSB**")*

Certain stock brokers handle a large number and volume of client funds. The possible failure of these brokers has the potential to cause widespread impact on investors and the Indian securities market at large. Therefore, the Board has now decided to amend the SEBI (Stock Brokers) Regulations, 1992 to designate such stock brokers as QSBs. QSBs will be subject to enhanced monitoring by SEBI and MIIs.

1. A moratorium under the Companies Act, 2013 (“CA”) is not arbitrable : Delhi High Court ("HC") [*DLF Ltd. v. IL&FS Engineering and Construction Company*]. [Link]

The Section 14 of IBC provides the AA with the power to grant a moratorium to prohibit the institution or continuation of a proceeding against a CD. The Delhi HC has held that a moratorium granted under the Section 241 and 242 of the CA is similar to an order of moratorium passed under the Section 14 of IBC. Therefore, the moratorium under CA cannot be arbitrated.

1. Disclosure by the arbitrator is not discretionary but a mandatory requirement, non-disclosure vitiates the award: Delhi HC [*Ram Kumar v. Shriram Transport Finance Co. Ltd*]. [Link]

The HC held that disclosure by the arbitrator under Section 12 of the Arbitration & Conciliation ("**A&C**") Act is mandatory and not a discretionary requirement. Section 12, read along with the VIth Schedule, lists down the grounds for disqualification of the arbitrator. Failure by the arbitrator to disclose such a fact that is crucial to justify his impartiality will vitiate the proceedings and the subsequent award.

2. Issue as to which party would bear the Good and Service Tax ("GST") expenses under the agreement is arbitrable: Delhi HC [*Spectrum Power Generation Limited v. GAIL (India) Limited*]. [Link]

The HC held that a contractual dispute which is purely on the question of which party shall carry the burden of paying GST is arbitrable. This is because the dispute is not related to the taxing power of the government or any action taken or an order made in exercise thereof. Therefore, such a contractual dispute is arbitrable

3. Fresh notice under Section 21 of the A&C Act not required to be issued for appointment of substitute arbitrator: Jharkhand HC [*M/s. Central Coalfields Limited v. Eastern India Powertech Ltd*]. [Link]

Ordinarily, while referring a dispute to arbitration, the invoking party must send a notice to the other party under Section 21 of the A&C Act, upon which both parties appoint their respective arbitrators. If either party fails to do so, after 30 days, they can file a Section 11 application to the court for the appointment of the remaining arbitrator.

The HC, in this case, held that once a party files a Section 11 application to the Court for the appointment of an arbitrator, the party loses its jurisdiction to appoint an arbitrator as per the arbitration agreement. Therefore, if the mandate of an arbitrator appointed under Section 11 of A&C Act terminates, a substitute arbitrator can be appointed directly upon the filing of another Section 11 application. It is not required for the party to issue a notice to the opposite party under Section 21of the A&C Act again.

4. Challenge relating to the bias of an arbitrator cannot be raised under Section 14 of the A&C Act: Delhi HC [*Union of India v. Reliance Industries Ltd*]. [Link]

The HC held that Section 14 of the A&C Act confers the power on the Court to terminate the mandate of the arbitrator. And to further appoint a substitute arbitrator only in circumstances that fall within the VIIth Schedule of the A&C Act. The VIIth Schedule deals with mere legal ineligibility of the arbitrator.

However, ground of bias or lack of independence and impartiality falls within the Vth Schedule (read with Section 12(3) of A&C Act) wherein only the tribunal can decide on the challenge. Therefore, such a challenge cannot be entertained under Section 14 of the A&C Act.

5. Section 11 A&C Act order can be recalled if it suffers from patent and manifest error: Delhi HC [*Always Remember Properties Pvt. Ltd. v. Reliance Home Finance Ltd. & Anr*]. [Link]

Section 11 of the A&C Act empowers the court to appoint an arbitrator on its own if either party fails to appoint its own arbitrator or if the two arbitrators appointed by the parties fail to appoint the presiding arbitrator. The HC has ruled that it may choose to recall its earlier order under the Section if it believes that it suffers "from a patent and manifest error apparent on the face of the record." It continues to be a court of record while exercising its powers under Section 11.

6. Venue restriction provision contained in Section 42 of A&C Act, not applicable to proceedings seeking enforcement of award: Delhi HC [*Ramacivil India Constructions Pvt. Ltd. v. Union of India*]. [Link]

The Section 42 of the A&C Act dictates that once any application under Part I of the same (which deals with domestic awards) is made in a particular court. Such court alone shall have exclusive jurisdiction over the arbitration proceeding and any subsequent applications arising out of it.

The HC in this case ruled that this provision does not apply on applications to court seeking enforcement of the arbitral award. No court has exclusive jurisdiction to hear enforcement matters.

7. Court empowered to grant money claim under Section 9 of A&C Act on the basis of admitted claim: Bombay HC [*J. P. Parekh & Son & Anr. v. Naseem Qureshi & Ors*]. [Link]

The HC held that it is empowered to pass an order under Section 9 of A&C Act granting the applicant's money claim, on the basis of an admitted claim or acknowledged liability. It noted that the court is not strictly bound by the provisions of the CPC while considering a relief under Section 9 of the Act. Its power under Section 9 to grant interim measures of protection, is wider than the power under the provisions of the CPC.

8. A CIRP application would not make a dispute non-arbitrable: Delhi HC [*Brilltech Engineers Pvt. Ltd. v. Shapoorji Pallonji and Co. Pvt Ltd*]. [Link]

The Delhi HC has held that a dispute would not become non-arbitrable merely because the operational creditor had filed a CIRP application before an application for the appointment of an arbitrator. A CIRP application can be filed only for admitted debts and such debts cannot be referred to arbitration. However, the court ruled that a mere application against the debt does not imply that it has been admitted. Therefore, the dispute can be referred to arbitration.

1. Competition Commission of India ("CCI") to handle issues related to anti-profiteering under GST. [Link]

The Section 171 of Central Goods and Services Tax Act, 2017 ("**CGST**") states that a supplier who avails any input tax credit/reduction in tax rate must ensure that there is commensurate reduction in the price of the goods/services supplied to the customer. This is known as anti-profiteering. All the issues related to anti-profiteering were taken care of by the National Anti-Profiteering Authority ("**NAA**"). Now, the Central Board of Indirect Taxes and Customs ("**CBIC**") has empowered CCI to take decisions on anti - profiteering cases.

2. Suggestions in Competition (Amendment) Bill, 2022: Parliamentary Standing Committee on Finance. [Link]

The Parliamentary Committee has recommended various changes in the Competition (Amendment) Bill, 2022. These recommendations focus on expanding scope of settlement to cartels under the proposed bill. Other suggestions include changing transaction value threshold to prevent certain mergers and acquisitions from falling under the ambit of CCI. Further, they have advised to not reduce timeline of case due to staff shortage and have atleast one judicial member in CCI.

MISCELLANEOUS

1. A new framework for overseas businesses of Indian Banks / All India Financial Institutions ("AIFI"): Reserve Bank of India ("RBI"). [Link]

Previously, foreign subsidiaries/ foreign branches of Indian Banks/AIFIs could not undertake financial activities in foreign markets which are not permitted by RBI in the Indian market. If one had to undertake such an activity, prior approval from the RBI was necessary. The new framework repeals the above restriction. It allows them to undertake such activities, subject to few conditions stipulated by RBI. The framework would also specify its applicability to International Financial Services Centres ("**IFSC**") in India.

2. Variable Capital Companies ("VCC") structure to be soon launched in India. [Link]

An expert committee headed by M. S. Sahoo has come up with a legal framework for allowing Variable Capital Company Structure in IFSCs. VCC is a body corporate, with a variable capital base i.e., with every issue and redemption of shares, the capital base changes. This is expected to foster fund management space in India.

3. Land received in exchange for a 'business' loan foregone would be treated as a business asset: Income Tax Appellate Tribunal ("ITAT") [*M/s. TVS Finance & Services Ltd. v. ACIT*]. [Link]

The ITAT held that the origin of an asset would determine the nature of the asset. Hence, the asset acquired by foregoing a business loan, would continue to be a business asset. It further held that the asset would continue to be of the nature as was originally irrespective of the entry in the books of accounts.

4. Key changes recommended by 48th Meeting of the GST Council. [Link]

A. GST is not applicable on the income earned by renting a residential dwelling to a registered person who uses the dwelling for personal purposes.

B. Incentives paid to banks by the Central Government to promote RuPay and BHIM UPI transactions would not be taxed.

C. The Council has taken steps regarding decriminalize certain sections under GST. First, it has increased the minimum threshold of tax amount for launching prosecution under GST from Rs. one crore to Rs. two crores, except for the offense of issuance of invoices without supply of goods or services or both. Secondly, it has decriminalized - obstruction or preventing any officer in discharge of his duties; deliberate tempering of material evidence and failure to supply the information.

D. No claim bonus ("**NCB**") is a reward given by an insurance company to an insured for not raising any claim requests during a policy year. The GST Council in its 48th meeting has said that NCB offered by the insurance companies to the insured is an admissible deduction for valuation of insurance services.

5. Concessional rate of sales taxes not applicable on oxygen as it is not a raw material for manufacture of Steel: Supreme Court ("SC") [*State of Jharkhand and Ors v. Linde India Limited and Anr*]. [Link]

Concessional rate of sales tax is a reduced rate of taxes for a certain particular group. This rate is applicable on the raw material in the production of steel. However, the main function of oxygen in manufacturing steel is to reduce the carbon content. Thus, the SC held that oxygen can be considered only a refining agent and not a raw material, so the concessional rate of sales tax is not applicable on the same.

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