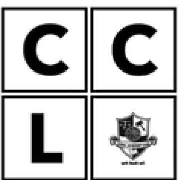

MONTHLY CORPORATE LAW UPDATES

FEBRUARY, 2023

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

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1. An application for recovery of interest on the debt is not maintainable when the principal amount has been paid: National Company Law Appellate Tribunal ("NCLAT") [*Rohit Motawat v. Madhu Sharma*]. [Link]

Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") provides for the application of initiation of the Corporate Insolvency Resolution Process ("**CIRP**") by the operational creditor. NCLAT has held that an application for the recovery of interest on the debt when the principal amount has been paid in full is not maintainable under the Section 9 of the IBC. The bench opined that the spirit of the IBC is the resolution of a debt and not mere recovery of any other miscellaneous amounts.

2.The breach of consent terms of an agreement will not affect the nature of the financial debt: NCLAT [*Priyal Kantilal Patel v. IREP Credit Capital Pvt. Ltd. & Anr.*]. [Link]

Section 7 of the IBC provides for the application of initiation of the CIRP by the financial creditor. In the instant case, the creditor filed an application under Section 7 of the IBC to initiate insolvency proceedings. However, the creditor withdrew the petition once it entered into an agreement specifying the terms of consent with the corporate debtor ("**CD**"). The agreement provided that the creditor could revive and restore the application in case of a breach of the terms.

The CD defaulted the consent terms and the creditor initiated a fresh petition against the default. NCLAT upheld the application for a fresh petition. It opined that the nature of financial debt would not change on account of breach of the consent terms. The mere fact that the creditor has opted for a fresh application instead of reviving the earlier proceedings cannot be a ground to dismiss the subsequent application.

3.Income Tax Authority is a secured creditor: NCLAT [*Principal Commissioner of Income Tax & Anr. v. M/s Assam Company India Ltd.*]. [Link]

A secured creditor is a person who has a legal claim to specific assets/ property of the borrower in the event the borrower defaults on their loan or debt obligations. Analyzing the Income Tax Act, 1961 and relying on the precedents, NCLAT has held that the Income Tax Authority shall be treated as a secured creditor under IBC.

4. Creditors have an equally important role as that of the Insolvency Resolution Professional ("IRP"): NCLAT [*Shri Guru Containers v. Jitendra Palande*]. [Link]

NCLAT has opined that creditors have an equally important role in the CIRP given the present creditor driven IBC regime. They cannot entirely blame the IRP for any delay/ discrepancy in the process when they failed to provide the requisite information and assistance to the IRP in discharge of his/ her functions.

Therefore, NCLAT held that the creditors have the duty to actively participate in the resolution process. They cannot be passive and rely on the IRP to exercise all the functions for the resolution of the debt.

5. The bar under Section 69 (2) of the Indian Partnership Act, 1932 ("IPA") is not applicable on an application under the Section 9 of the IBC: NCLAT [*Rourkela Steel Syndicate v. Metistech Fabricators Pvt. Ltd.*]. [Link]

Section 69(2) of the IPA bars a suit instituted by an unregistered partnership. However, the NCLAT has held that an application under the Section 9 of the IBC to initiate the CIRP cannot be considered as a suit for the purpose of the IPA. Therefore, it held that the bar of the Section 69 (2) which strictly applies to suits shall not be applicable on an application under the Section 9 of IBC.

6. Unrealized cheque does not constitute the acknowledgment of a liability: NCLAT [*M/s. Primee Silicones (Chennai) Pvt. Ltd. v. M/s. UCAL Fuel Systems Ltd.*]. [Link]

NCLAT has held that a cheque which has not been encashed cannot amount to an 'acknowledgement of liability' in accordance with the terms of the Section 18 of the Limitation Act, 1963. Therefore, it will not extend limitation period for the purpose of IBC.

1. Dos and Don'ts to avoid greenwashing : Securities Exchange Board of India ("SEBI"). [Link]

Greenwashing refers to the practice of misleading investors into believing that a company's products, services or operations are environmentally sustainable. SEBI has released a list of dos and don'ts for the issuers of Green Debt Securities ("**GDS**") to safeguard the investors against greenwashing.

Under the guidelines, issuers are required to continuously monitor whether the path chosen by them to achieve a more sustainable mode of operations is contributing towards the said goal. The issuers are also required to refrain from utilizing the funds raised through green bonds for purposes that do not fall within the definition of green debt securities under the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 ("**NCS Regulation**"). In instances where the funds have been utilized for some other purpose, the company shall make a disclosure of the same to the investors and opt for an early redemption of such securities,

Furthermore, the issuers have been advised to not use misleading labels, hide trade-offs or cherry pick data from research to highlight green practices while obscuring other practices that are unfavorable in this regard.

2. Revised disclosure requirements for the issue and listing of GDS : SEBI. [Link]

SEBI has revised the disclosure requirements for the issue and listing of GDS to enhance the transparency within the issue of GDS and provide clarity to investors. The circular includes provisions such as disclosure of the use of proceeds, the methodology used to determine the green nature of the securities, the process for selection of external reviewers, and the format of the annual report. The circular shall be effective from April 1, 2023.

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. Issue Summary Document (“ISD”) for Public Offer : SEBI. [Link]

SEBI has introduced the requirement of an ISD to provide relevant data in respect of public issues, further issues, buybacks and other offers to the relevant stakeholders in a structured manner. The ISD will contain a summary of the key information related to the offering, such as the objectives of the issue, pricing details, risk factors, and financial statements.

Additionally, the circular also outlines guidelines for the dissemination of issue advertisements by companies. The companies are required to ensure that the advertisements are accurate and do not mislead the potential investors.

4. New obligations and responsibilities for Qualified-Stock Brokers (“QSB”) : SEBI. [Link]

SEBI has outlined additional obligations and responsibilities for QSBs to improve the overall efficiency, transparency, and accountability within the securities market. The new regulatory framework requires QSBs to implement measures to prevent insider trading, fraudulent and manipulative activities, and promote investor protection. It also lays down requirements for risk management, internal controls, and systems and procedures that QSBs need to put in place.

5. Consultation papers: SEBI.

*Regulatory Framework for Environmental Social and Governance (“**ESG**”) Rating Providers (“**ERP**”)* [Link]

SEBI has proposed a regulatory and supervisory framework for regulating ERPs. The proposals come in the backdrop of the increasing interest of investors in ESG related issues. According to the framework, providers may opt to register with SEBI under the norms compiled by Credit Rating Agencies. The framework has been formulated with reference to the enforcement of a voluntary code of conduct for ESG providers in other jurisdictions across the world.

Role and obligations of mutual fund trustees. [Link]

SEBI has issued the consultation paper to review the roles and obligations of mutual fund trustees-Asset Management Companies (“**AMC**”). The suggestions have been formulated to enhance the accountability and safeguard the interests of unitholders across all products and services.

*Proposal for introduction of the concept of General Information Document (“GID”) and Key Information Document (“**KID**”).* [Link]

SEBI has released the Consultation Paper to propose the introduction of GID, KID as well as mandatory listing of debt securities of listed issuers under the NCS Regulations. The GID would provide general information about the issuer and the debt securities and will be valid for a period of one year from the date of issue. The KID, on the other hand, would provide specific information about the securities being offered.

The paper also suggests other reforms to the NCS Regulations to improve transparency and efficiency of the securities market. This includes the mandatory disclosure of the various expenses incurred in the issuance of debt securities and non-convertible redeemable preference shares

1. Internal dispute is a reasonable ground to not strike off company's name, on not filing statutory records: NCLAT [*Sirsa Jute Mills Pvt. Ltd. v. The Registrar of Companies*]. [Link]

The NCLAT has held that the name of a company should not be stricken off the register of companies for not filing statutory records, if there is a default due to internal dispute within the company. In this case, there was an internal dispute between shareholders and management which led to failure of filing the records.

Further, action of the income tax department against the company contributed to the default. On consideration of the arguments, the NCLAT ordered restoration of the company's name on the register, conditional on payment of late filing fees.

1. Talks of settlement between parties after arbitrator enters upon reference, would not stop limitation for passing award: Delhi High Court ("HC") [*M/s Raj Chawla and Co. Stock & Share Brokers v. M/s Nine Media & Information Services Ltd. & Anr.*]. [Link]

Section 29A of the Arbitration and Conciliation Act, 1996 ("**A&C Act**") prescribes a time limit by which an arbitral award must be passed after completion of pleadings by both parties. In regards to this, the Delhi HC has held that talks of settlement between the parties after the arbitrator enters upon reference would not stop the limitation period prescribed under Section 29A for passing an arbitral award.

2. 'Seat' of arbitration would be at the same place as Facilitation Council under Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act") conducted arbitral proceedings: Delhi HC [*Ahluwalia Contracts (India) Ltd. v. Ozone Research & Applications (I) Pvt. Ltd.*]. [Link]

TThe Delhi HC has held that in the absence of an arbitration clause through which the parties have agreed to a particular 'seat,' the 'seat' of arbitration would be the place where the Facilitation Council under the MSMED Act has conducted the arbitral proceedings.

However, if such a clause specifying the 'seat' is present in an arbitration agreement between the parties, the 'seat' would be as agreed to in said agreement, with only a shift in the 'venue' of arbitration to the location of the Facilitation Council.

3. Delay in approaching appointing authority for constitution of tribunal, won't render claims time barred: Delhi HC [*Kidde India Ltd. v. National Thermal Power Corporation Ltd.*]. [Link]

The Delhi HC has held that the question whether the claims are barred by limitation has to be determined with reference to the date on which the arbitral proceedings are deemed to commence. Such deemed commencement, according to Section 37(3) of the A&C Act, occurs when one party serves a notice requiring the appointment of an arbitrator, on the other party.

Once this notice invoking arbitration is served on the respondent, the period of limitation for making the claims stops running, it added. Thus, any delay by the party in taking further steps for constitution of an arbitral tribunal, will not render the party's substantive claims as barred by limitation.

4. Clarification sought by arbitrator on other matters, won't make them subject of arbitral proceedings: Delhi HC [*University of Delhi v. M/s Kalra Electricals*]. [Link]

The Delhi HC has ruled that information and clarification sought by the arbitral tribunal on matters and dispute arising under other contracts, which do not form a part of the arbitral reference, will not alone make them the subject of such arbitral proceedings.

5. New arbitrator fee limit by SC will not affect fee already fixed by arbitration tribunal: Delhi HC [*NHAI v. IJM Gayatri JV*]. [Link]

The Supreme Court had earlier, in ONGC v. Afcons, held that the maximum fees that an arbitrator can charge on a claim is Rs. 30 Lakhs.

The Delhi HC has held here that if the arbitrator's fee had already been fixed by the tribunal before the pronouncement of the judgement of ONGC v. Afcons, the previous fee limit of Rs. 49,87,500 as set by the judgment of the Delhi HC in Rail Vikas Nigam Ltd. v. Simplex Infrastructure Ltd. would apply.

6. Arbitrator has no jurisdiction to set aside sale notice issued by secured creditor under Section 13(4) of SARFAESI Act: Delhi HC [*M/s. Indiabulls Housing Finance Ltd & Anr. v. Shipra Estate Ltd.*]. [Link]

The Delhi HC has ruled that the Arbitrator has no jurisdiction to set aside the sale notice issued by the secured creditor under Section 13(4) of the SARFAESI Act, 2002, seeking to enforce its "security interest".

The court held that the matter of a notice issued under Section 13(4) of the SARFAESI Act is not arbitrable, and thus, the Arbitrator does not have the option to exercise any discretion under Section 17 of the A&C Act.

7. Merely because the borrower is an MSME, it would not be governed by the arbitral mechanism provided under MSMED Act: Gujarat HC [*Indian Bank (erstwhile Allahabad Bank) v. Morris Samuel Christian*]. [Link]

The Gujarat HC has ruled that merely because the borrower is an MSME, it would not be governed by the provisions of the MSMED Act, including the arbitral mechanism envisaged under the said Act.

The court observed that as per the mechanism provided under the MSMED Act, all kind of disputes concerning MSME are not arbitrated as per MSMED Act. Only the dispute between the supplier and the buyer of goods or services may be adjudicated through arbitration in accordance with the A&C Act. Therefore, the same does not contemplate adjudication of disputes arising from a loan transaction, which is the subject matter of a special act such as the SARFAESI Act.

8. Arbitration under Section 42 of Special Economic Zones Act, 2005 would override a contractual arbitration clause: Telangana HC [*Ranganath Properties Pvt. Ltd. v. Phoenix Tech Zone Pvt. Ltd.*]. [Link]

The Telangana HC has held that arbitration under Section 42 of the Special Economic Zones Act, 2005, being a special legislation, would override a contractual arbitration clause entered into between the parties, and hence the A&C Act.

1. Dues of Secured Creditor cannot play second fiddle to Sales Tax/Value Added Tax ("VAT") dues: Gujarat HC [*Odhavjibhai Mohanbhai Gadhiya v. State of Gujarat*]. [Link]

The court held that VAT and sales tax dues have no precedence over the bank's dues for recovery of which the bank exercises powers under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI"). It stated that the bank, in this case, was a secured creditor. The debt due to the bank was a secured debt. Hence the dues owed to the bank should be paid in 'priority' as per Section 26E of SARFAESI over the dues of Sales Tax/VAT.

2. Budget 2023 Highlights: key direct and indirect tax amendments by Finance Bill, 2023. [Link]

The recent Budget of 2023 has brought sweeping changes to the tax regime. It seeks to extend the date of incorporation for startups to March 31, 2024, for deductions under Section 80-IAC of the Income Tax Act 1961 ("IT Act"). Further, Amendment for Section 55 of the IT act is proposed to make the cost of acquisition and improvement 'nil.' Additionally, an amendment to Section 194B of the IT Act would effectively provide for Tax Deducted at source ("TDS") for online gaming where the aggregate payment amount to a user during the financial year exceeds INR 10,000.

3. Section 14A disallowance not warranted if no exempt income is earned: Income Tax Appellate Tribunal ("ITAT") [*DCIT v. Indian Farmers Fertiliser Cooperative Ltd.*]. [Link]

ITAT held that the disallowance under Section 14A of the IT Act is not warranted if no exempt income is earned. Section 14A of the IT Act states that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act. It accordingly held that not all 'investments' give exempt income.

4. Expenses incurred in the daily course of business cannot be classified as a capital expense: ITAT [*ACIT v. Drishti Soft Solutions Pvt. Ltd.*]. [Link]

The tribunal held that the professional fees - including monthly retainership fees for professional services, cannot be treated as capital expenses as the same is incurred during the regular course of business.

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