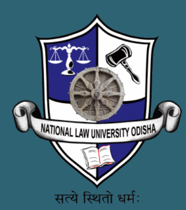

MONTHLY CORPORATE LAW UPDATES

JULY, 2023

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

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1. Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 amended: Updated qualifications for Insolvency Professionals ("IP"). [Link]

The Insolvency and Bankruptcy Board of India ("**IBBI**") has notified new qualifications required to become an IP through the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2023. The amendment mandates that a Post Graduate Insolvency Programme will be the stipulated qualification for an IP instead of the previous requirement of Graduate Insolvency Programme.

2. IBBI notifies Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2023: Exemptions for payment of regulatory fees announced. [Link]

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has been amended to provide exemption for payment of regulatory fees. The fees are payable to the IBBI where the realisable value of the Corporate Debtor ("**CD**") is more than the liquidation value. This exemption will only be applicable in cases where the approved resolution plan in respect of insolvency resolution of a real estate project is from an association or group of allottees in such real estate project.

3. Rejection of an application under Section 7 of Insolvency and Bankruptcy Code, 2016 ("IBC") will require reasons to be disclosed, and not for admission of the application: National Company Law Appellate Tribunal ("NCLAT") [*Mukesh Kumar v. Ambrane India Pvt Ltd and Other*]. [Link]

The NCLAT has held that rejecting an application under Section 7 of the IBC, which deals with the initiation of corporate insolvency resolution process by financial creditor, will call for adequate reasons to be given.

The tribunal opined that admission of a Section 7 application, after fulfilling certain conditions, is akin to a rule and the rejection of the same is an exception. Therefore, the tribunal does not have to provide reasoning while admitting such applications.

4. IBC prevails over Electricity Act, 2003 ("EA"): Supreme Court [*Paschimanchal Vidyut Vitran Nigam Ltd. v. Raman Ispat Private Limited & Ors*]. [Link]

The Supreme Court has ruled that the IBC will override the EA. Even though the CD owed electricity charge dues to the government, secured debt will take primacy over the government dues during the liquidation process as per Section 53 of IBC which lays down the 'waterfall mechanism' for liquidation.

After considering that the IBC is a special statute and the EA a general one, the court held that IBC will have an overriding effect over the EA as per Section 278 of the IBC. Therefore, electricity dues would be recoverable only through the liquidation process and the government cannot opt out of the process if it wants to recover the dues.

5. 30 days' notice period for e-auction should be provided: NCLAT [*Naren Seth v. Sunrise Industries & Ors*]. [Link]

The NCLAT has opined that even though the current liquidation regulations do not provide for the same, a month's notice is beneficial to attain maximised value of the CD. No time was given to conduct due diligence of the property of CD and the tribunal found the liquidator to have acted in haste. After consideration of the arguments, the tribunal held that 30 days' time ought to have been given by the liquidator to the bidders.

6. The National Company Law Tribunal ("NCLT") does not have the discretion to decide a Section 7 application under the IBC, once the due debt amount is admitted by the CD: NCLAT [*Mohan Nathuram Sakpal v. State Bank of India*]. [Link]

The NCLAT has ruled that the NCLT has to admit a Section 7 application under the IBC once the existence of default and debt has been proven. The tribunal highlighted the fact that the CD had previously admitted the due debt amount in a compromise proposal to the financial creditor. Once the CD has admitted the due debt amount, the tribunal has no choice but to allow the application.

1. The Securities and Exchange Board of India ("SEBI") comes up with Alternative Dispute Resolution Mechanism (Amendment) Regulations, 2023, which amends several SEBI Regulations. [Link]

SEBI has issued a notification introducing amendments to the Alternative Dispute Resolution Mechanism Regulations. As a consequence, respective amendments have been carried out in several SEBI Regulations adding regulations that mandate an alternative dispute resolution mechanism consisting of mediation and/or conciliation and/or arbitration.

The regulations that have been amended include the Merchant Bankers Regulations, 1992; Debenture Trustees Regulations, 1993; Mutual Funds Regulations, 1996; Credit Rating Agencies Regulations; Alternative Investment Funds Regulations, 2012; Investment Advisers Regulations, 2013; Research Analysts Regulations, 2014; Infrastructure Investment Trusts Regulations, 2014; Real Estate Investment Trusts Regulations, 2014; Listing Obligations and Disclosure Requirements Regulations, 2015; and the Foreign Portfolio Investors Regulations, 2019; Portfolio Managers Regulations, 2020 among others.

2. Appointment of director nominated by the debenture trustee on boards of issuers: SEBI. [Link]

SEBI has come up with a circular that requires certain categories of issuers to appoint a director to their board who will be nominated by the debenture trustee(s). These categories include issuers that are not governed by the Companies Act ("**CA**"), 2013. The circular was brought in as there were none for other types of issuers.

This requirement is applicable only in three scenarios. First, two consecutive defaults in payment of interest to the debenture holders; second, default in creation of security for debentures; and third, default in redemption of debentures, as mentioned in Regulation 15(1)(e) of SEBI (Debenture Trustees) Regulations.

3. Regulatory framework for sponsors of a mutual fund: SEBI. [Link]

SEBI has introduced an alternative set of eligibility criteria in order to encourage and facilitate new types of entities to act as sponsors of mutual funds.

A. <u>Deployment of liquid net worth by Asset Management Company (“**AMC**”)</u>

An AMC shall deploy the minimum net worth required in assets, as may be specified by SEBI. However, bespoke structures/structured obligations, credit enhancements or embedded options or any other structure/feature which increase the liquidity risk of the instrument have been prohibited from being made a part of the net worth requirement.

B. <u>Acquisition of an AMC</u>

In the case of a change in the ownership of an existing AMC due to acquisition of shares, the funds used for acquiring those shares can come from borrowings provided by a sponsor. However, the sponsor must have enough additional assets to pledge as collateral for borrowings, apart from the shares of the proposed AMC.
Also, the minimum incremental capital contribution required in the AMC shall not be funded through borrowings and shall be funded only out of the net worth of the acquirer.

C. <u>Pooled Investment Vehicle as sponsor of mutual funds</u>

Regulation 7(a) of the Mutual Funds Regulations, 1996 allows a private equity fund, a pooled investment vehicle or a pooled investment fund to sponsor mutual funds. SEBI has clarified that among the pooled investment vehicles, only the Private Equity funds (“**PEs**") can sponsor a mutual fund. Such PEs shall comply with Regulation 7 (a) of the Mutual Funds Regulations.

D. <u>Reduction of stake and disassociation of sponsor</u>

An AMC has been permitted to become a “self-sponsored AMC”, subject to fulfilling the conditions mentioned in the Regulatory Framework.

Any sponsor proposing to disassociate should have been a sponsor of the concerned mutual fund for at least 5 years before the proposed date of disassociation. Further, any sponsor proposing to disassociate may undertake to reduce shareholding below 10% within a period of 5 years from the proposed date of disassociation in case of listed AMCs and within a period of 3 years in case of unlisted AMCs.

Post disassociation of any sponsor from an AMC, all shareholders of such AMC shall be classified as "financial investors" and there shall not be any sponsor of such AMC.

E. Re-association of the sponsor(s)

If the AMC does not meet the specific criteria to qualify as a self-sponsored AMC according to the Regulatory Framework, a one-year grace period will be given. During this time, the AMC must take necessary actions to meet the self-sponsored AMC criteria.
If, even after the grace period, the AMC still fails to fulfil the conditions for self-sponsored AMCs, the disassociated sponsor or a new entity will be designated as the sponsor of the relevant mutual fund.
In such instances, the investors holding units in the existing schemes of the mutual fund will be offered an exit option without incurring any exit load charges.

4. Disclosure requirements under Regulations 30 and 30A inserted by the recent amendment to the Listing Obligations and Disclosure Requirements ("LODR") Regulations: SEBI. [Link]

SEBI has released a circular consisting of four annexures with respect to disclosure requirements under Regulations 30 and 30A of the LODR Regulations. Annexure I of the circular specifies the details that need to be provided while disclosing material events. Annexure II provides the timeline for disclosing the material events. Annexure III provides guidance on when an event/information can be said to have occurred. And annexure IV provides guidance on the criteria for determination of materiality of events/information.

5. New category of mutual fund schemes for Environmental, Social and Governance ("ESG") investing: SEBI. [Link]

SEBI has decided to authorize mutual funds to introduce multiple ESG schemes with diverse strategies.

For this purpose, SEBI has introduced a separate sub-category for ESG investments under the thematic category of Equity schemes. At least 80% of the total Assets Under Management ("**AUM**") of ESG schemes must be allocated to equity and equity-related instruments corresponding to the specific strategy of the scheme.

ESG schemes will be required to allocate a minimum of 65% of their AUM to companies that report on comprehensive Business Responsibility & Sustainability Reporting (BRSR), instead of the general requirement of 100%. Additionally, the AMCs must annually obtain an independent and credible assurance regarding the compliance of their ESG scheme's portfolio with the scheme's strategy and objectives.

6. Framework for Corporate Debt Market Development Fund ("CDMDF"): SEBI. [Link]

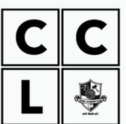
Following the introduction of CDMDF by SEBI, it has now come up with a regulatory framework for the same. Under the framework, CDMDF shall comply with the Guarantee Scheme for Corporate Debt. Further, the fund shall deal only in low duration government securities, treasury bills, tri-party repo on government securities, and guaranteed corporate bond repo with maturity not exceeding 7 days. CDMDF shall also follow the loss waterfall accounting, as elaborated in annexure B of the framework.

7. Online Dispute Resolution ("ODR") in the Indian securities market: SEBI. [Link]

SEBI intends to establish an ODR Portal for resolving disputes in the Indian securities market through online conciliation and arbitration.

If an investor/client faces a grievance with a Market Participant, they can initiate dispute resolution through the ODR Portal once all other available options are exhausted and the investor/client remains dissatisfied. Similarly, the Market Participant can also opt for the ODR Portal after giving the investor/client at least 15 calendar days' notice for resolving the dispute amicably.

The ODR Institution that receives the reference of the complaint/dispute shall appoint a sole independent and neutral conciliator from its panel of conciliators. In case the matter is not resolved through the conciliation process within the stipulated time frame, an investor/client may pursue online arbitration.



8. Mandating Legal Entity Identifier (“LEI”) for all non-individual Foreign Portfolio Investors (“FPIs”): SEBI. [Link]

Presently, FPIs have the option to voluntarily provide their LEI details in the Common Application Form used for registration, KYC, and account opening. However, SEBI has decided to now make it compulsory for all non-individual FPIs to furnish their LEI details.

1. NCLAT announces checklist for filing appeals under CA, 2013 . [Link]

In furtherance of its digitisation initiative, NCLAT has provided checklists for e-filing appeals under CA. The checklist consists of the procedure for filing an appeal online under CA with the e-filing portal of NCLAT. The same checklist would also be applicable for filing appeals under the IBC. Additionally, NCLAT has also released the checklist for filing appeals under Competition Act, 2002.

1. Non-Consideration of clause in agreement does not constitute opposition to fundamental policy of Indian law: Delhi High Court ("HC") [*National Highways Authority of India v. GVK Jaipur Expressway Private Limited*]. [Link]

The Delhi HC has held that the omission of a clause from the executed agreement between the parties does not constitute an error by the arbitral tribunal that opposes the fundamental policy of Indian law.

The court clarified that a plausible view by the arbitrator prevents the arbitral award from being patently illegal, making such omission insufficient for the purpose of setting aside the award.

2. Once a party surrenders its right to choose an arbitrator under Section 11(6) of the Arbitration and Conciliation ("A&C") Act, 1996 to the court, it cannot be revived later: Calcutta HC [*Srei Equipment Finance Limited v. Seirra Infraventure Private Limited*]. [Link]

The Calcutta HC recently held that if a party gives up its right to choose an arbitrator under Section 11 of the A&C Act, it cannot change its decision later to replace the arbitrator with a new one when the current arbitrator is unable to continue their duties.

3. The request for a review of a Section 11 petition order cannot be pursued based on a subsequent decision of the Supreme Court: Delhi HC [*Ambience Developers and Infrastructure Pvt Ltd v. Zesty Foods*]. [Link]

The Delhi HC states that seeking a review of the court's order permitting the petition under Section 11 of the A&C Act is not permissible based on a subsequent decision of the Supreme Court, N.N. Global in this instance.

The court itself contemplates that in certain situations the arbitrator may determine the sufficiency of stamping, and if necessary, after referring to Section 33 of the Indian Stamp Act, 1899. Section 33 addresses the examination and impounding of inadequately stamped instruments.

4. The arbitrator's appearance as counsel for an 'affiliate company' of the claimant renders the award liable to be set aside: Calcutta HC [*Gopaldas Bagri v. C&E Ltd*]. [Link]

The Calcutta HC held that an arbitration award may be set aside for the arbitrator's failure to disclose their representation of an 'affiliate company' of the claimant in court during the arbitration. It violates Section 12 of the A&C Act which deals with the grounds for challenging the mandate of an arbitrator.

5. Courts can extend arbitrator's mandate without parties' consent under Section 29A(4) of A&C Act: Kerela HC [*Hiran Valiiyakkil Lal & Ors v. Vineeth M.V & Ors*]. [Link]

The Kerala HC recently held that the mandate of an arbitrator can be extended by the court under Section 29A (4) of the A&C Act even if the parties have not extended the period by consent. This mandate can be extended only if the court finds sufficient cause to do so.

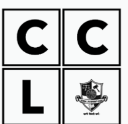
6. Objections under Section 36 of the A&C Act are limited to issues of patent or inherent lack of jurisdiction: Jharkhand HC [*M/S ESL Steel Limited v. Ispat Carriers Pvt Ltd*]. [Link]

The Jharkhand HC ruled that Section 36 of the A&C Act, which deals with the enforcement of an arbitral award in a domestic arbitration, allows objections only on issues of patent or inherent lack of jurisdiction of the arbitral tribunal. This, however, can only be done if such objection appears on the face of the record during the execution proceedings under Section 36.

The court also stated that during enforcement of an award under Section 36, objections under Section 47 of the Civil Procedure Code are permissible only if they relate to jurisdiction of an arbitral tribunal, non-est award, or nullity.

1. Statutory Functions of Insurance Regulatory and Development Authority of India ("IRDAI") are not within our jurisdiction: Competition Commission of India ("CCI") [*Shrikant Ishwar Mendke v. Insurance Regulatory and Development Authority of India*]. [Link]

The CCI observed that the Indian Institute of Insurance Surveyors and Loss Assessors is established under IRDAI's promotion and hence its regulatory functions fall outside its jurisdiction. The CCI held that alleged anticompetitive actions by the opposite parties are not within the scope of Competition Act, 2002. Consequently, the request for relief was denied under Section 33 where the commission has the power to issue interim orders.



1. MoUs between Reserve Bank of India (“RBI”) and the Central Bank of UAE ("CBUAE"). [Link]

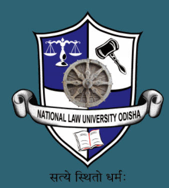
RBI and CBUAE signed two MoUs to promote the use of local currencies (INR and AED) for cross-border transactions and cooperate on interlinking their payment and messaging systems, aiming to facilitate seamless cross-border transactions and foster greater economic cooperation between India and UAE.

2. Interest on 'Outstanding Interest Receivable' in transfer pricing transaction is allowed: Mumbai Income Tax Appellate Tribunal (“ITAT”) [*Parle Biscuits Pvt Ltd v. Assessment Unit*]. [Link]

The Mumbai ITAT upheld the levy of interest on 'outstanding interest receivable' against Parle Biscuits in a transfer pricing transaction. The ITAT ruled that the interest element on the loan given to the Associated Enterprises (“AEs”) becomes part of the loan transaction, and the AEs need to be compensated for the delay in paying interest. The appellant's contention that interest on interest receivable is not a separate international transaction was rejected.

3. Claims of secured creditors prevail over government dues under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (“SARFAESI”): Bombay HC [*Ronak Industries v. Assistant Commissioner*]. [Link]

The Bombay HC has ruled that under Section 26-E of the SARFAESI, the priority for payment of dues belongs to the secured creditor, including dues of the central government, state government, or local authority. The court held that government dues cannot claim priority over the dues of a secured creditor like the Bank of Baroda if they have not registered their claim or attachment order with Central Registry of Securitisation Asset Reconstruction and Security Interest.



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