NATIONAL LAW UNIVERSITY ODISHA

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Centre for Corporate Law

MONTHLY CORPORATE LAW UPDATES (MAY, 2021)

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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

1 End of the Personal Guarantors saga under IBC [Lalit Kumar Jain Vs. Union of India & Ors.]

The Supreme Court has finally put an end to the long drawn saga of Personal Guarantors under the IBC. This case challenges the constitutionality of the notification whereby the Central Government had brought to force the provisions under IBC related to personal guarantors.

The main contention in challenging the notification was that the Central Government exercised excessive delegation in bringing the provisions to effect only for personal guarantors.
The Apex Court concluded that the Central Government was well within its powers to bring the provisions to force and NCLT shall be the forum for adjudication in order to consolidate creditors and avoid multiplicity of claims. Despite of the fact that the Apex Court recognised a couple of lacunae in the concerned notification specifically with respect to the guarantors right to subrogation, it was ratified in toto and was held as valid and legal.

This judgement will be the start of a new era for the implementation of IBC. It will be interesting to see when and how the rest of the provisions are brought into force by the Central Government.

[Order can be accessed here]

2 Continuing the IBC vs State Legislation debate [Directorate of Economic Offences Vs. Binay Kumar Singhania & Ors]

The interplay between IBC and other legislations is quickly becoming the most sought-after topic in the legal fraternity. Though it is well settled that the moratorium under Section 14 of IBC expressly stops the institution or continuation of pending proceedings against the Corporate Debtor, some laws creep in to create an exception.

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On the same lines, an interesting decision was recently pronounced by the NCLAT, New Delhi.

The issues in the instant case concerned the interplay between the IBC and the West Bengal Protection of Interest of Depositories in Financial Establishment Act, 2013 ("WBPIDFE Act"). The latter Act was enacted to provide for the protection of interest of depositors in financial establishments in West Bengal. The WBPIDFE Act attaches the assets of the Corporate Debtor so as to not make them available at the Resolution Professional's disposal which creates a contradiction.

In dealing with the overriding effect of the IBC, the tribunal ruled that the two statutes are of two different fields with two different aims. While IBC aims at resolution of the corporate persons under insolvency, WBPIDFE Act aims to protect the interest of depositors and provides for penal actions. Therefore, it was ultimately ruled that the property of the corporate person under insolvency can be attached under the provisions of the WBPIDFE Act.

This judgment is under the scanner for several reasons. One of the reason is that, this comes in contrast with the decision passed by the NCLAT itself in the case of The Directorate of Enforcement vs. Sh. Manoj Kumar Agrawal and Ors where IBC was found to have an overriding effect on the Prevention of Money laundering Act, 2002 which operates on similar lines as the WBPIDFE Act.

[Order can be accessed here]

3 Karnataka High Court takes a departure from the NCLAT's ruling with respect to similar state legislations

[M/s. Dreams Infra India Pvt. Ltd. Vs. The Competent Authority Dreamz Infra India Pvt. Ltd.]

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Similar to the WBPIDFE Act, the Karnataka Protection of Interest of Depositors in Financial Establishment Act, 2004 ("KPIDFE Act") is also a state legislation which recently came head to head with IBC. While the NCLAT in Directorate of Economic Offences Vs. Binay Kumar Singhania & Ors. was of the view that the IBC will not override the WBPIDFE, the High Court of Karnataka seems to be more in alignment with the judicial pronouncements rendered by the Hon'ble Apex Court in Alchemist Asset Reconstruction Company Limited while ruling that the IBC will override the KPIDFE Act. In the instant case, since CIRP was already initiated by some homebuyers and a Resolution Professional had been appointed, in light of the same the Hon'ble High Court was of the opinion that proceedings under Section 7(1) of the KPIDFE Act cannot sustain.

It will be interesting to see how far this dilemma between the IBC and state laws continues.

[Order can be accessed here]

4 Disputed claims continue to wander under the aegis of IBC [Sirpur Paper Mills Limited Vs. I.K. Merchants Pvt. Ltd.]

The clean slate doctrine under IBC, laid down in the landmark case of Essar continues to haunt disputed claim holders. According to the clean slate theory, after the approval of the resolution plan, the Corporate Debtor undertakes a new avatar and disputed claims are like "hydra head popping up" severely disrupting the working of the successful resolution applicant. The facts of the case are such that on the date when the insolvency commenced, the award granted by the Arbitral Tribunal in favor of the respondent was challenged by the Corporate Debtor. under Section 34 of the Arbitration and Conciliation Act, 1996 and hence was not a crystallized claim to be filed before the Resolution Professional. The issue in the present proceedings was regarding the maintainability of the application for setting aside of the Award post the approval of the Resolution Plan. The High Court of Calcutta while deciding on the issue did not even bother to get into the merits of the case considering that

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the approval of the resolution plan would either ways render the entire proceedings infructuous and once again upheld the clean slate doctrine.

[Order can be accessed here]

5 NCLT uses inherent powers to do justice to Senior Citizen [Deepak Narrottam Sampat vs. Jitender Kumar Jain]

The NCLT, Mumbai has rendered a very surprising judgement while using its inherent powers under Rule 11 of the NCLT Rules, 2016. The petitioner was a 72 year old septuagenarian who had invested all his terminal benefits with the Corporate Debtor. CIRP was initiated against the Corporate Debtor, however the petitioner failed to file a claim before the Resolution Professional in due time and hence the same was rejected. Further the instant petition was also filed by the petitioner under Section 60(5)(c) of the IBC seeking direction to the Liquidator to accept his claim after considerable delay. Despite of the fact that the filed claim was grossly barred by limitation, the NCLT chose to not apply a strait jacket formula while deciding on it and considered the miseries of the applicant while allowing his claim.

[Order can be accessed here]

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ORDERS

1 Cairn India penalized for Buyback fraud

The recent Buybacks in the Indian Financial markets have been subject to controversy, especially after the Vedanta saga. One of the more recent instances related to buybacks came to light in the matter of Cairn India.

The issue in this case was regarding the unintentional buyback announced by the directors of Cairn India. The question which SEBI sought to answer was whether the act of making such announcements amounts to fraud.

The facts of the case were that Cairn India and its directors made a public announcement of buyback of their listed shares. SEBI's investigation revealed that Cairn India did not place adequate buy orders despite the availability of adequate sell orders at NSE. Thus, failing to achieve even the minimum buyback size assured.

[Order can be accessed here]

2 SEBI fines Biocon Limited for violating market norms

SEBI through its Prevention of Insider Trading Regulations (PIT), mandates the adoption of a Code of Conduct. This Code while governing trading by a company's employees, keeps a check on Insider Trading. Market norms require that the violation of a Code of Conduct be informed to SEBI 'promptly'. However, recently SEBI penalised Biocon Limited for its failure to promptly inform SEBI regarding violation of its Code of Conduct.

SEBI discovered that Narendra Chirmule, a designated person engaged in trading of the company's securities when the trading window was closed. In doing so, he violated the PIT Regulations. Chirmule informed the company of his transaction during the trading window

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closure. However, Biocon informed SEBI only after 28 days of becoming aware of this violation. Holding the Company in violation of its Code of Conduct and the PIT Regulations, SEBI levelled a fine of Rs. 9 lakhs.

[Order can be accessed here]

1 REPORTS & STATISTICS

Consultation Paper on Review of the regulatory framework of promoter, promoter group and group companies as per Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (May 11)

The financial market's regulator SEBI is on a massive spree of implementing the recommendations of the primary markets advisory committee ("PMAC"). As the markets are getting matured, the need to update the regulatory regime has also increased. In light of the same, SEBI through its recent Consultation Paper has taken up the review of the regulatory framework of promoter, promoter group. It focuses on four aspects:

- Reduction in lock-in-period

Lock-in period is the time period during which investors are barred to sell their investments. Further, this lock-in period seeks to protect the interests of small investors who invest in the idea of promoter itself. Presently, the lock-in period post an IPO is three years. In this regard, SEBI has proposed that if the object of the issue involves offer for sale, then the minimum promoters' contribution of 20 per cent should be locked-in for one year from the date of allotment in the IPO. This proposal may bring flexibility to promoters with respect to their post IPO holdings, in turn incentivising them to undertake IPOs.

- Rationalization of the definition of promoter group & streamlining the disclosure of the group companies

Disclosure requirements of Promoters have been a long-standing challenge. Any company seeking to undertake an IPO is required to make disclosures regarding 'promoter group' and

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'group of companies' in its offer document. Noting the present burdensome provisions of promoter group disclosing interrelationships within the group, SEBI has proposed to rationalize the disclosure burden, while bringing it in line with post listing disclosure requirements. This proposal while helping the issuer company reducing disclosure burden, will also aid in smooth investment decision by Investors due to lesser, yet effective disclosures.

- **Redefinition of 'Promoters' to 'Person in Control'**

It is a common observation that high net worth individuals, institutional investors etc, are investing heavily in the public companies, and thereby, gaining substantial control over their affairs. Even though they exercise such massive control, they do not fall under the sweep and expression of the term promoters. Therefore, SEBI is willing to promote an alternative term i.e., 'person in control'. It refers to those persons who have a substantial shareholding in the company. This may help in better scrutiny over the affairs of the company, enable fair market price discovery, and ultimately protect investors' interest.

[Report can be accessed here]

REGULATIONS

1 SEBI (Issue of Capital And Disclosure Requirement (5th May)

In recent years, India has made its mark by being amongst the top countries with the start-up ecosystem. However, the need of the hour is to increase capital availability for these start-ups. So, in 2019 the SEBI introduced a mechanism called Innovators Growth Platform (IGP) intending to provide easy access for the start-ups to list their shares. However, IGP failed to get traction owing to issues related to the minimum holding period for pre-issue shareholding, norms for allowing discretionary allotment to eligible investors, etc. Therefore, the SEBI decided a slew of relaxations in the norms to encourage startups to go public and list on the IGP.

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(Regulation can be accessed here)

2 SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021 (5th May)

One of the many obstacles encountered by the SEBI when making executive decisions is balancing the multitude of interests of the various stakeholders in the business. The Companies Act, 2013 introduced the concept of independent directors (IDs) for the same purpose. In March 2021, the need was soon realized by SEBI for the inclusion of IDs and released a consultation paper on 'Review of Regulatory Provisions Related to Independent Directors'. In a bid to align the provisions of LODR Regulations, with that of the provisions of the Companies Act, 2013, the SEBI recently introduced the second amendment to the LODR regulations.

The SEBI focused primarily on the establishment of the risk management committee (RMC). It approved changes related to the applicability, constitution, and role of the RMC of listed entities. It stated that RMC shall have a minimum of three members with at least one ID to lend technical business acumen and independent judgment on the SEBI's deliberations on a multitude of issues ranging from strategy & risk management to performance evaluation of the SEBI itself. Further, it also notified the mandatory disclosure of specific contents on the website of a listed entity along with the revelation of the schedule of analyst or institutional investor meet on their website.

The SEBI also incorporated few minor adjustments to ensure gender equality. Amidst the global debate over gender equality, making it mandatory for listed entities to have at least one female director on their board of directors appears to be quite novel and impressive. These amendments and the extension of certain provisions to listed entities have been made to encourage ease of doing business. It is predicted to have a significant impact on the corporate governance of these entities.

[Regulation can be accessed here]

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3 Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2021(5th May)

Another reform concerning the IGP was the change in the takeover regulations. Currently, many Indian companies are eyeing public listing overseas. Experts say that the startups are using Special Purpose Acquisition Company (SPAC) and shell companies as a way of public liquidity. If that becomes the norm, it is an opportunity lost for Indian capital markets and the regulator needs to provide opportunities for Indian investors.

To stanch a potential exodus of local companies to foreign capital markets, the SEBI is continuously aiming at encouraging successful Indian startups to list in the domestic markets. The SEBI eased up the process of substantial acquisition of shares and takeovers by approving certain amendments. It lowered the open offer requirement for startups from 25% to 49%, except in cases where the target company's management control changes. SEBI has also decided to relax the restrictions for companies who want to move from the Innovators Growth Platform to the mainboard. Startups who want to be listed can now do so by allocating 50% of their capital to qualified institutional investors. With these amendments, the IGP may turn out to be an effective tool for startups to raise public money.

[Regulation can be accessed here]

MINISTRY OF CORPORATE AFFAIRS

1 Relaxation w.r.t gap between Board Meetings

Section 173 of the Companies Act, 2013 prescribes that companies hold periodic Board Meeting within a period of 120 days. In lieu of the difficulties rising due to the COVID-19 pandemic and requests received from stakeholders, the MCA vide its General Circular said that the requirement under this section stands extended by sixty days. This however is a temporary measure in light of the pandemic accompanied by lockdowns and is applicable to the first two quarters of the financial year 2021-22. The delayed board meetings can cause delay in the announcement of financial results.

[Notification can be accessed here]

2 Relaxation of time for filing charge forms under Companies Act, 2013

Every loan transaction seeking to create a charge on the company mandatorily requires registration. For registration of such charge, a form is filed on payment of fees in a manner prescribed by the registrar. However, owing to the adverse effects of the pandemic and accompanying lockdown, the Central Government has decided to relax the time for filing charge forms. This too is a temporary measure to ease the process of registration in these trying times.

[Notification can be accessed here]

Centre for Corporate Law - National Law University Odisha

The Centre for Corporate Law, as it is called, is an initiative to promote interdisciplinary research in corporate law, and related fields like competition law and policy making, conflict management, banking and insurance laws.

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