MONTHLY CORPORATE LAW UPDATES

MAY, 2023

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

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1. Issue of Notice to the creditors at pre-admission stage under Section 10 of Insolvency and Bankruptcy Code ("IBC") is not mandatory: National Company Law Appellate Tribunal ("NCLAT") [*SMBC Aviation Capital Limited v. Interim Resolution Professional of Go Airlines (India) Limited*]. [Link]

Recently, a division bench of the NCLAT held that Section 10 of the IBC does not contain any requirement which requires a notice be served upon the creditors. It observed that Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 mandates the Corporate Applicant to send a photocopy of the application to the Insolvency and Bankruptcy Board of India only. There is no such obligation towards the creditors by the Corporate Applicant.

2. While calculation of days for limitation period for appeal to NCLAT, date of order pronouncement & time taken to provide certified copy should be excluded: Supreme Court ("SC") [*Sanket Kumar Agarwal & Anr v. APG Logistics Private Limited*].[Link]

Section 61(2) of IBC provides the limitation period for appealing the order of NCLAT. The Hon'ble SC, set aside the order of NCLAT which did not exclude the date of pronouncement of order while computing limitation. Additionally, reliance was placed on Section 12(2) of the Limitation Act 1963, which specifies the exclusion of time that is required for obtaining a copy of the order while computing the period of limitation.

3. A resolution applicant cannot be rendered ineligible to submit a resolution plan under the IBC, by assuming their disqualification under Section 164(2)(b) of the Companies Act, 2013 ("CA"): SC [*M.K. Rajagopalan v. Dr. Periasamy Palani Gounder & Anr*].[Link]

Recently, a division bench of SC observed that even if there is a possibility of a resolution applicant being disqualified under Section 164(2)(b) of CA, such applicant cannot be assumed to be rendered ineligible to submit a resolution plan under the IBC. Accordingly, it was observed that the principle of 'Commercial Wisdom' of Committee of Creditors ("**CoC**") cannot brush aside the shortcomings of the CoC. This is with respect to cases where decision making was done in contravention to a law which is in force for the time being.

4. Resolution Plan cannot be accessed by third parties: NCLAT [*Rupinder Singh Gill v. Three C Universal Developers Pvt. Limited*].[Link]

NCLAT ruled that a resolution plan which is pending for an approval or rejection before an Adjudicating Authority can only be accessible to claimant, creditor or a participant in the Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor (**"CD"**). Any third party who does not have a stake in the CIRP cannot access the plan.

5. Section 66 of IBC does not allow for a remedy against third parties: SC [*Glukrich Capital Pvt Limited v. The State of West Bengal*].[Link]

Section 66 of IBC provides for the penalty on the CD in cases where it is found to have indulged in fraudulent trading. The SC ruled that the right for recovery of dues payable to the CD is not available against third parties under the said section. The resolution professional can initiate civil remedies for recovery of such dues independent of the right under this section.

1. Risk disclosure framework for individual traders in equity derivative segment: Securities and Exchange Board of India ("SEBI").[Link]

SEBI has introduced a risk disclosure framework for individual traders with respect to trading in the equity Futures & Options ("**F&O**") segment. The new framework will come into effect from July 1 2023.

According to this framework, all stock brokers will have to display the risk disclosures with respect to trading in equity F&O segment on their websites. Furthermore, all Qualified Stock Brokers shall maintain the Profit and Loss data of their clients on a continuous basis as per the format given by SEBI.

2. Guidelines on investor protection fund ("IPF") and investor services fund ("ISF"): SEBI.[Link]

SEBI has introduced revised guidelines on IPF and ISF to strengthen the existing investor protection mechanisms. Stock exchanges and depositories are now required to establish IPFs administered through separate trusts. The investor protection trust will consist of five trustees including directors, investor association representative, and compliance officer. The stock exchanges have also been asked to ensure that funds are well segregated and immune from liabilities of exchange and depository.

3. Modifications in rules for mutual fund investments in the name of minor: SEBI.[Link]

SEBI has modified the rules for investment in mutual funds made in the name of a minor through a guardian. All Asset Management Companies are required to make the necessary changes to facilitate such mutual fund transactions with effect from June 15, 2023.

As per the new rules, payment for investment in mutual funds by any mode will be accepted from the bank account of the minor, parent or legal guardian of the minor, or a joint account of the minor with the parent.

1. Companies (Removal of Names of Companies from the Register of Companies) Second Amendment Rules, 2023 notified: Ministry of Corporate Affairs ("MCA").[Link]

Rule 4(1) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 provides for removal of name of the Company by making an application to the Registrar. This rule contains certain ineligibilities/safeguards for filing such application in the proviso to this rule. For instance, Companies having overdue financial statement, and annual returns are ineligible.

Earlier, such provisos were specific and included the form numbers concerning each ineligibility/safeguard. This has been amended. Post amendment, only the related provisions of the CA are used to reflect such ineligibility/safeguard.

2. MCA amends e-Companies (Compromises, Arrangements and Amalgamations) Rules, 2016: New rules for approval of mergers notified. [Link]

Amendments have been made in Rule 25 of the Compromises, Arrangements and Amalgamations) Rules, 2016 which concerns Mergers and Amalgamation of Certain Companies. The amendments made include some procedural change in the confirmation order for the scheme by the Central Government, deemed confirmation by the Central Government, enabling central government to not consider objections or suggestions of Registrar of Companies or Official Liquidator regarding the scheme.

1. Invalidity of a board resolution is a procedural and curable defect, and thus cannot lead to rejection of claims or termination of arbitral proceedings: Bombay High Court ("HC") [*Palmview Investments Overseas Limited v. Ravi Arya*].[Link]

The Bombay HC has held that a defect in a board resolution authorizing a person to initiate arbitration is merely a procedural and a curable defect. It cannot be a ground for the rejection of the claims or termination of the arbitral proceedings.

The court also held that an order of the arbitral tribunal on the invalidity of the board resolution would be an interim award under Section 31(6) of the Arbitration and Conciliation ("**A&C**") Act and thus could be challenged directly under Section 34 of the Act.

2. Issues that fall within the exclusive jurisdiction of Estate Officer under The Public Premises Act, are non-arbitrable: Delhi HC [*S.S. Con-Build Pvt Ltd v. Delhi Development Authority*].[Link]

The Delhi HC has held that disputes relating to the arrears of rent payable or determination of a lease in respect of public premises are to be mandatorily decided by the Estate Officer under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. Thus, the same are non-arbitrable.

3. After setting aside arbitral award, court cannot proceed to grant further relief by modifying the award: SC [*Indian Oil Corporation v. Sathyanarayana Service Station*].[Link]

The SC has held that in arbitration cases, a court cannot, after setting aside the award, proceed to grant further relief by modifying the award. Upon the award being set aside, the parties must be free to pursue, or not pursue, other remedies even where they may interfere with the award.

1. Competition Commission of India ("CCI") cannot review decisions of statutory regulators, only has the ability to regulate markets: Delhi HC [*Institute of Chartered Accountants of India v. CCI*].[Link]

The Delhi HC clarified that the power of CCI is limited to regulate markets and not to review decisions made by statutory bodies. The power, even remotely, does not extend to "addressing any grievance" regarding an arbitrary statutory action. Thus, CCI also cannot compel an organization or an enterprise to outsource its activities.

MISCELLANEOUS

1. Central Board of Direct Taxes notifies new e-Appeals Scheme (2023). [Link]

The new scheme shall be applicable to all e-appeals/class of appeals under Section 246 of the Income Tax Act, 1961 ("**IT Act**") for the cases excluded under Section 246(6). The new changes include bringing in the scope for video conference hearings and allocating appeals to the Joint Commissioner of Income Tax.

2. Assessee in 'work contract' is liable to pay service tax on service element and sales tax in good transferred: SC [*CC and CE and ST, Noida v M/s Interarch Building Products Pvt. Limited*].[Link]

The SC has ruled that the value of the service portion in a works contract must be determined according to Rule 2A of the Service Tax (Determination of Value) Rules, 2006, or the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

The court overturned a decision by the Customs, Excise and Service Tax Appellate Tribunal. The latter had allowed the assessee to remit service tax on the entire contract value and claim Central Value Added Tax Credit ("**CENVAT**") Credit on the entire amount. The SC held that the assessee had to pay service tax on the service element and could claim CENVAT Credit only on that amount.

3. Carrier of Goods not an 'owner' under IT Act; Bitumen not a 'valuable article' under Section 69A of the IT act: SC [*M/s. D.N. Singh v Commissioner of Income Tax, Central, Patna & Anr*].[Link]

In this case, the High Court order was appealed which deemed the assessee as the owner of the bitumen based on its value. However, the SC held that the ownership did not pass to the assessee, who was a mere carrier, and therefore, Section 69A of the IT Act did not apply. Further, the court emphasized that bitumen, due to its low price and commonality, cannot be considered a 'valuable article' under the Act.

4. ₹2000 banknote withdrawal from circulation, however will continue as legal tender: Reserve Bank of India ("RBI").[Link]

RBI has announced the withdrawal of the ₹2000 denomination banknotes from circulation as part of its "Clean Note Policy." Banks are instructed to discontinue issuing ₹2000 banknotes and reconfigure ATMs accordingly. The public is allowed to deposit or exchange these notes until September 30, 2023, with certain limits and compliance requirements.

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