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Centre for Corporate Law

MONTHLY CORPORATE LAW UPDATES (NOVEMBER, 2021)

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TABLE OF ABBREVIATIONS

ABBREVIATIONS	FULL-FORM
A&C Act	Arbitration and Conciliation Act, 1996
AMC	Asset Management Companies
CD	Corporate Debtor
CIRP	Corporate Insolvency Resolution Process
DC	District Court
ETF	Exchange Traded Funds
HC	High Court
IBC	Insolvency and Bankruptcy Code 2016
IEPF	Investor Education and Protection Fund
LODR	Listing Obligations and Disclosure Requirements

TABLE OF ABBREVIATIONS

ABBREVIATIONS	FULL-FORM
MCA	Ministry of Corporate Affairs
NCDRC	National Consumer Disputes Redressal Commission
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
RP	Resolution Professional
RTP	Related Party Transactions
SC	Supreme Court

INSOLVENCY AND RESTRUCTURING LAW

JUDGEMENTS

1 Deviating from the time period under Section 12 of the IBC would defeat the object and purpose of the IBC [Committee of Creditors of Amtek Auto vs Dinkar T. Venkatsubramanian]

Time and again the legislature and the judiciary have emphasized on the importance of the strict timeline provided under the IBC. This strict timeline has been the distinguishing factor for the IBC since its inception.

The Apex Court yet again reiterated that the entire resolution process has to be completed within the period stipulated under Section 12 and that the approved resolution plan has to be implemented at the earliest.

(Order available here.)

2 CD is absolved of all criminal offences committed prior to CIRP despite pending appeals under Section 31 of the IBC [Dewan Housing Finance Corporation Limited vs Union of India]

Section 32A of the IBC absolves the criminal liability of the CD for an offense committed prior to the commencement of CIRP. However, this protection can only be granted if the CD fulfills 3 conditions: firstly, the resolution plan for the CD has been approved by the adjudicating authority as per Section 31 of the IBC; secondly, the approved plan resulted in a change in management of the CD; and thirdly, this change in management is not in favour of related parties of CD.

The present case is in continuation of the Dewan Housing and Finance Limited (DHFL) saga where the petitioner, DHFL was seeking protection in the cases pending before the Sessions Court. The Bombay HC found that the petitioner fulfilled the abovementioned conditions and hence was eligible to be afforded protection under Section 32A. Another question the Bombay HC considered was whether the successful resolution applicant

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was allowed to invoke Section 32A of the IBC when appeals were pending before the NCLAT. The Bombay HC stated that just filing an appeal would not affect the rights of the successful resolution applicant as the matter had not yet reached finality before the appellate tribunal and hence, the application was not premature.

(Order available here.)

3 NCLAT Delhi clarifies that Tribunals and Adjudicating Authorities under the IBC have power to entertain contempt proceedings [Shailendra Singh vs Nisha Malpani]

The main issue in this case was whether the powers conferred to the NCLT under Section 425 of the Companies Act, 2013 to punish for 'Contempt' under the Contempt of Courts Act, 1971 are transferable to proceedings under the IBC.

The NCLAT Delhi bench evaluated the relevant provisions of the IBC and the Companies Act, 2013 and concluded that just because the IBC does not specifically mention about the contempt provisions, it cannot be said that the 'adjudicating authority' has no powers of contempt. A contrary interpretation would render the IBC in 'black letters without a teeth to bite'. A purposeful and meaningful construction of the IBC must be given to achieve its objectives.

(Order available here.)

4 CIRP has to be initiated if there is an existence of default and the Adjudicating Authority cannot look into the reasons for default [Drip Capital Inc vs Concord Creations (India) P. Ltd.]

To initiate the CIRP, there are a few conditions that must be satisfied. There must be the existence of a debt, the application must be a complete one and no disciplinary proceedings must be pending against the proposed RP. The question before NCLAT Chennai was whether the adjudicating authority is to look into the reasons for the CD's default and grant more time for repayment.

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The NCLAT Chennai bench clarified that no other 'yardstick' would be required for the adjudicating authority to admit an application if the above conditions are fulfilled. The NCLAT Chennai stated that the adjudicating authority must merely look at the relevant documents to ascertain if there is an existence of a 'debt' and if a 'default' has occurred. It does not matter if the debt is disputed, as long as it is due to the creditor.

(Order available here.)

5 SC reaffirms that the Adjudicating Authorities cannot exercise residuary jurisdiction when there is a contractual dispute between parties [TATA Consultancy Services Ltd vs Vishal Ghisulal Jain]

While the adjudicating authority has the residuary jurisdiction to adjudicate any question of law or fact arising out of or in relation to the insolvency resolution of the CD, the instant case raises a question with respect to the extent of this residuary jurisdiction. The issue that arose in this appeal was whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon contractual dispute between the parties.

The Apex Court stated the NCLT does not have any jurisdiction to entertain a contractual dispute which has arisen dehors the insolvency of the CD. The courts cannot invoke this jurisdiction for matters relating to termination of contract or other such disputes which are in no way related to insolvency or CIRP of the CD.

(Order available here.)

SECURITIES LAW

REGULATIONS

1 Securities and Exchange Board of India (LODR) (Sixth Amendment) Regulations, 2021

Indian corporate entities are heavily promoter driven. Promoters enter into transactions with different parties, including related parties, on behalf of the entity. In RPT, persons in control of the entity and their related parties engage in a transfer of resources, services or obligations. These related parties broadly consist of directors, key managerial persons, promoters and their relatives.

However, RPTs are prone to abuse by persons in control. Scams such as Satyam have reflected the misuse of RPTs for personal gains. Therefore, in order to curb self-serving transactions, RPTs require strict regulation.

In this regard, SEBI through the amendment of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (LODR) Regulations seeks to strengthen the monitoring and enforcing norms pertaining to RPTs. The key amendments are as follows:

- **Redefinition of related party and related party transaction**

Via the amendment, SEBI has redefined the terms 'related party' and 'RPT'. Earlier, related party referred to any person or entity belonging to the promoter/promoter group and holding 20% or more shareholding. The amendment mandates that meeting either of the two conditions shall be sufficient to be a related party. The rationale behind such amendment was to alleviate the influence of certain promoters/promoter groups on the decision making of the entity, holding below 20% shareholding.

Further, SEBI modified the definition of RPTs in the present Circular. Previously, RPT referred to any transaction between a listed entity and a related party regardless of whether a price was charged. However, entities shied away from classifying transactions under RPTs in order to avoid disclosure requirements.

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To curb the same, SEBI has widened the definition of RPTs to include any transaction undertaken, directly or indirectly, with the intention of benefitting related parties.

- **Related party transactions: Thresholds for classification as material**

Materiality lays down a threshold for the classification of a transaction as a material RPT. Material RPTs require the prior approval of the shareholder. Earlier, RPTs that exceeded 10% of the annual consolidated turnover as per the last audited financial statements, were considered material. However, the amended thresholds are set at over Rs. 1000 Crore or 10% of the consolidated annual turnover of the entity, whichever is lower. The objective of the amendment is to expand the scope of shareholders' approval.

- **Approval of audit committee and shareholders**

Audit committee, constituted majorly by independent directors, oversees the financial reporting of an entity. Presently, all RPTs require the approval of the listed entity's audit committee. Given that the new definitions capture a wider ambit of transactions, the amendment narrows the audit committee's approval in certain cases.

The approval of the audit committee is not required for transactions where the listed subsidiary is a party and the listed entity is not. An exemption has also been extended to transactions between two wholly-owned subsidiaries of the listed holding company, whose accounts are consolidated with such holding company.

However, the role of the audit committee has been expanded as well. It is now the duty of the audit committee to disclose material transactions to shareholders. Further SEBI has introduced the assent of shareholders in RPTs. Material RPTs and subsequent material modifications, based on the thresholds as defined earlier, require prior approval of the shareholders.

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All in all, this amendment by strengthening the regulatory framework pertaining to RPTs, could potentially strengthen the audit committee and shareholders in making an informed decision.

(Regulation available here.)

MASTER CIRCULAR

1 Scheme of arrangement by listed entities

A scheme of arrangement is a process used by a company in financial difficulty to reach a binding agreement with its creditors. The arrangement eases returning all, or part, of an entity's debts over an agreed timeline. An entity must go through a three-tiered process in order to get a draft scheme approved. Primarily, the entity has to submit documents to stock exchanges, post which, approval on the draft scheme is to be sought by SEBI. Lastly, the scheme is filed before the National Company Law Tribunal (NCLT). The NCLT reviews and implements the same.

The objective behind this multi-tiered process is to safeguard the interests of the creditors. Therefore, tight reviews are required at every stage of the approval process.

In this regard, the SEBI issued a Master Circular tightening the review process for an application on the scheme of approval. It prescribes additional disclosures by listed entities and obligations by the stock exchange(s).

- **Disclosures by listed entities**

The valuation of a listed entity reflects the market value of its net capital. The amendment mandates listed entities to submit a valuation report. Further, this valuation report must be accompanied by an undertaking from the listed entity.

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The undertaking must state that no material event, impacting the valuation of the entity, has occurred during the intervening period of filing the documents with the stock exchange(s) and the period under consideration for valuation.

Further, listed entities must provide a declaration on any past defaults of listed debt obligations of the entities forming part of the scheme. This disclosure will give investors a clearer picture of the potential risk factors in their investments resulting from potential debt defaults of the company.

Throwing a new dimension to the tightening of disclosures, SEBI has introduced an attraction of punitive action in the event of any misstatement or false information on behalf of the listed entities.

- **Obligations by stock exchange(s)**

Submission of documents by the listed entities to the stock exchange is the primary step in getting any arrangement approved. As witnessed above, the Circular imposes several novel disclosures to be made by the listed entity. This directly impacts the obligation of the stock exchange in approving any arrangement.

The addition of novel disclosures tightens the review process on the stock exchange's end. The present amendment would ensure that exchanges refer the draft schemes to SEBI only upon being fully convinced that the listed entity is in compliance with SEBI's Regulations and Circulars.

(Circular available here.)

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CIRCULARS

1 Norms for Silver Exchange Traded Funds and Gold Exchange Traded Funds

An Exchange Traded Fund (ETF) is a combination of mutual funds and stocks. On one hand, ETFs are a result of Asset Management Companies (AMC) investing public money on securities and on the other hand, ETFs are traded directly on a stock exchange. Earlier, SEBI had enabled investment in gold ETFs. In furtherance to this, the new amendment provides a regulatory framework pertaining to silver ETFs.

The rationale behind such introduction is to enable convenience of the investors in terms of transparent exposure to the commodity. The Circular lays down certain operating norms for the regulation of silver ETFs. These include norms on disclosure, liquidity and standard of silver to be complied with.

The scheme information document must include disclosures pertaining to market risk due to volatility of silver prices, tax provisions, etc. On the liquidity front, AMCs must facilitate the liquidity of units of silver in the secondary market. The amendment mandates that such facilitation must be done through the appointment of Authorised Participants or Market Makers. Further, SEBI has made the London Bullion Market Association, an investment house, a benchmark for the fixation of silver price. The physical silver should conform to 30kg bars with a purity of 99%.

The norms on the silver ETFs could potentially achieve returns that are consistent with the performance of physical silver in local prices.

(Circular available here.)

SECURITIES LAW

PUBLIC NOTICE

1 Investor Charter for Investors in Securities Market

Investment is a gamble. A gamble that risks the monetary interests of the investor. In infusing capital, investors play a vital role in the growth of the securities market. As a capital markets' regulator, SEBI is entrusted with the duty to protect investors' interests.

In this regard, SEBI has recently introduced an investor charter. The charter apprises investors of the risks associated with investments, rights and responsibilities of the investors, etc.

With a right comes a requirement for remedy. To deal with the redressal of grievances of investors, SEBI has launched a centralized web-based complaints redressal system called 'SCORES'. Through this platform, investors can lodge complaints with SEBI against listed companies and SEBI registered intermediaries.

The do's and don'ts for the investors, apprising them of the risks associated with investment would go a long way in protecting investors' interests and in turn promoting the holistic development of the securities market.

(Public Notice available here.)

COMPANY LAW

NOTIFICATIONS

1 MCA releases Investor Education and Protection Fund Authority (Accounting, Audit, Transfer, and Refund) Second Amendment Rules, 2021

Companies Act mandates companies to transfer all dues that are unpaid or unclaimed for seven years. Shareholders can seek a refund of the same from Investor Education and Protection Fund Authority (IEPF). IEPF is a fund created under the Companies Act 2013.

The purpose of IEPF is the promotion of investors' awareness and protection of the interests of investors. Various amounts such as matured debentures, the amount in the unpaid dividend account of companies, unclaimed or unpaid shares due to shareholders of the company, etc. are credited to IEPF. For the various amounts transferred to the fund, shareholders can seek a refund from IEPF.

In order to ease the mechanism of refund, various documentation and other requirements have been relaxed under the amended rules by the MCA. The rationale behind such an amendment is to achieve ease of doing business.

(Notification available here.)

ARBITRATION LAW

JUDGEMENTS

1 Unilateral appointment of an arbitrator cannot be challenged under section 34 of the A&C Act: Delhi HC [Kanodia Infratech Limited vs Dalmia Cement (Bharat) Limited]

The Arbitration and Conciliation Act, 1996 (A&C Act) enables parties to appoint an arbitrator subject to the agreement between the parties. When parties fail to appoint an arbitrator, the court is vested with the power to appoint an arbitrator. Any party aggrieved by the award passed by the arbitrator can file to set aside an arbitral award under Section 34.

In the present matter, an award was passed by the arbitrator who was appointed unilaterally by one party. The other party aggrieved by the same, pleaded before the Delhi High Court (HC) to set aside the award on the ground of unilateral appointment. The question faced by the Delhi HC was whether the unilateral appointment of an arbitrator can be challenged in an application under Section 34.

In this regard, the Delhi HC (HC) observed that the scope of interference in an application to set aside an arbitral award is limited. An award can only be interfered with, when it goes beyond the four walls of the contract between the parties, ultimately exceeding its jurisdiction. Further, the Delhi HC observed that the party filing an application under Section 34, itself participated in the proceedings without objecting to the same.

Hence, the Delhi HC held that in an application to set aside an arbitral award under Section 34 of the Arbitration Act, the unilateral appointment of an arbitrator cannot be challenged.

(Judgment available here.)

ARBITRATION LAW

2 An arbitration clause in an agreement does not bar the jurisdiction of Consumer forum: NCDRC [Ansal API Megapolis Buyer's Assn. vs Ansal Hi-Tech Townships Ltd]

Where there is an agreement, there is room for disputes. Deficiency of services by one party could be a ground for a dispute. While agreements generally contain arbitration clauses, the Consumer Protection Act, 2019 allows for complaints on the ground of deficiency of services as well. This sprouts confusion regarding the clash of jurisdiction between the two.

In a recent matter before the National Consumer Disputes Redressal Commission (NCDRC), one of the parties claimed deficiency of services by its counterpart. Here, the agreement between the parties included an arbitration clause. However, the performing party approached the Consumer Forum for the resolution of the dispute.

The question of law faced by the NCDRC was whether the existence of an arbitration clause bars the jurisdiction of the consumer forum. In this regard, the NCDRC observed that protection afforded under the Consumer Protection Act, 2019 is consistent with the remedies provided under already existing acts, including arbitration under the A&C Act. Hence, an arbitration clause does not bar the jurisdiction of the NCDRC.

(Judgment available here.)

ARBITRATION LAW

3 Parties are not barred from raising new grounds in an appeal to set aside an arbitral award under Section 37 of the A&C act: SC [State of Chhattisgarh & Anr. vs M/s Sal Udyog Private Limited]

Section 34 provides for setting aside of an arbitral award. An appeal against an arbitral award can be filed under Section 37 of the Act. An award can be set aside if it is patently illegal. An arbitral award can be patently illegal if it consists of a prima facie error of law and goes against the statutory provisions. There is no explicit bar on raising new grounds in an appeal under Section 37, which were not raised under Section 34.

In the present case, an arbitral award was passed in a dispute between the parties. Aggrieved by the award, the state, being one of the parties approached the DC under Section 34 of the A&C act to set aside the arbitral award. An appeal was then filed before the HC with an additional ground which was not present in the original application. However, the HC dismissed the appeal due to the inclusion of a fresh ground. This further went before the Supreme Court (SC).

The question before the SC was, whether a party is barred from raising additional grounds in an appeal to set aside an arbitral award, that was absent in the original application.

The SC allowed the appeal on the ground that a Court is empowered to set aside an award if it finds the same to be vitiated by patent illegality prima facie. Therefore, it was held that a party is not estopped from raising a new ground in an appeal to set aside an arbitral award that was not raised in the original application.

(Judgment available here.)

ARBITRATION LAW

4 Section 14 and 15 of the A&C Act cannot be invoked when the arbitrator has become functus officio: Allahabad HC [P.N. Garg, Engineers & Contractors vs Sultania Infantry Lines Bhopal]

Section 14 of the A&C Act provides that mandate of an arbitrator terminates if he becomes unable to perform his duties or withdraws from his office. Section 15 outlines that the mandate of an arbitrator stands terminated when they withdraw from their office or if mutually agreed by the parties. An arbitrator becomes functus officio when they are no longer in mandate or official authority. After the termination of the mandate of an arbitrator, a substitute arbitrator has to be appointed.

In the present matter, after a dispute arose between the contracting parties, a sole arbitrator delivered the arbitral award. Aggrieved by the said award, an application to set aside the arbitral award was filed before the DC. The DC passed the matter back to the arbitrator to reconsider the issues raised by the party.

However, the arbitrator had retired and adjourned himself from the arbitration proceedings. Therefore, he was no longer eligible to reconsider the matter due to his retirement. This confusion brought the matter before the Allahabad HC.

The question before the HC was whether Sections 14 and 15 of the A&C Act could be invoked when the arbitrator had become functus officio.

In this regard, the HC asserted that the provisions of Sections 14 and 15 of the A&C Act apply only where arbitration proceedings are pending. In the aforementioned case, the mandate of the arbitrator was terminated after the completion of the arbitration proceedings. Therefore, the Allahabad HC held that since the arbitrator became functus officio the application of Section 14 and 15 was unmaintainable.

(Judgment available here.)

ARBITRATION LAW

5 An arbitral award can be modified under Section 33 of A&C Act only in case of arithmetic or clerical errors: SC [Gyan Prakash Arya vs M/s Titan Industries Limited].

Section 33 of the A&C Act speaks of for correction, interpretation of the arbitral award on account of clerical or arithmetical mistakes or errors arising from accidental slip or omission.

In the present matter, a dispute arose between the contracting parties relating to the recovery of gold in possession of Gyan Prakash Arya. Titan Industries Limited invoked the arbitration clause. Subsequently, the arbitrator passed an award directing Gyan Prakash Arya to return the gold at a rate of 18%, calculating the value of gold at Rs 740 per gram.

However, Titan filed an application under Section 33 requesting for a modification. The modification requested was substituting Rs. 740 per gram to Rs 20,747 per 10 grams. The same was modified in the original award. Aggrieved by the same, the opposing party approached the SC.

The question faced by the SC was whether such modification was beyond the ambit of jurisdiction of the arbitrator under Section 33. In this regard, the SC observed that an arbitral award can be only modified in the case of arithmetical or clerical errors and these errors can only be corrected.

In the present matter, there was no arithmetical or clerical error in the original award passed by the arbitrator. Therefore, the SC held that the modified award passed by the arbitrator was beyond the scope of Section 33 of the A&C Act.

(Judgment available here.)

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