MONTHLY CORPORATE LAW UPDATES

OCTOBER, 2023

- INSOLVENCY & BANKRUPTCY LAW
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1. The jurisdiction of the National Company Law Tribunal ("NCLT") is summary in nature and not as extensive as that of a civil court: National Company Law Appellate Tribunal ("NCLAT") [*Sanjay Pandurang Kalate v. Vistra ITCL (India) Ltd.*]. [Link]

The NCLAT has held that unlike civil courts, which have broad jurisdiction to delve deeper and inquire into the matter, the NCLT's jurisdiction is only summary in nature. Additionally, it observed that internal disputes amongst the respondents cannot be a cogent and reasonable ground for denying the financial creditor their right to claim payment towards debts owed, and that it cannot look into the resolution of disputes.

2. An operational creditor is not eligible for the benefits outlined in Section 14 of the Limitation Act if it voluntarily withdraws the suit it initiated: NCLAT [*GRI Towers India Pvt. Ltd. v. Inox Wind Ltd.*]. [Link]

The NCLAT has held that recourse to Section 14 of the Limitation Act cannot be taken if the reason for the failure of a prior proceeding was not a defect of jurisdiction or any other similar case. Here, the operational creditor had withdrawn its own application, which fails to meet the above-mentioned criteria.

Section 14 of the Limitation Act pertains to the computation of the limitation period in a legal proceeding in a forum which does not have proper jurisdiction over the matter.

3. Reduction in the amount of claim in a resolution plan cannot be construed as being violative of Section 30(2)(e) of the code: NCLAT [*Mr. Ankur Narang & Ors. v. Mr. Nilesh Sharma RP & Ors.*]. [Link]

The NCLAT has held that a decrease in any creditor's claim does not automatically render the resolution plan unlawful. Any provision in the resolution plan mandating creditors to accept a reduction cannot be interpreted as a violation of Section 30(2)(e) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), which ensures that resolution plans do not contravene any provision of the law.

The tribunal also noted that once the Committee of Creditors ("**CoC**") has endorsed the Resolution Plan with the necessary majority, following the relevant legal provisions, it is not subject to judicial scrutiny or alteration.

4. Disputes pertaining to claims and counter-claims cannot be settled by the adjudicating authority: NCLAT [*Rakesh Kumar (Suspended Director of Suchi Paper Mills Ltd.) v. Flourish Paper & Chemicals Ltd.*]. [Link]

The NCLAT determined that the adjudicating authority, operating within its summary jurisdiction, is not equipped to adjudicate disputes concerning claims and counter-claims. In this particular instance, the tribunal emphasized that there is no valid basis to establish a pre-existing dispute that could hinder the admission of Corporate Insolvency Resolution Process ("**CIRP**") against the corporate debtor.

5. Moratorium under the IBC does not apply to agreements governed by conventions and protocols related to aircraft, aircraft engines, airframes, and helicopters: Ministry of Corporate Affairs ("MCA"). [Link]

The central government has notified that moratorium under Section 14(1) of the IBC shall not apply to transactions, arrangements or agreements, under the Convention of International Interests in Mobile Equipment ("**Convention**") and the Protocol to the Convention on matters specific to Aircraft Equipment ("**Protocol**").

The Convention and the Protocol were adopted under the International Civil Aviation Organization and the International Institute for the Unification of Private Law. India is a signatory to the Convention and the Protocol.

6. The Insolvency and Bankruptcy Board of India ("IBBI") releases a discussion paper on rationalization of regulatory framework to enhance the effectiveness of Insolvency Professional Entities ("IPEs") in Insolvency Resolution Process ("IRP"). [Link]

A discussion paper on streamlining the regulatory environment to improve IPE efficacy in the IRP has been published by IBBI. The discussion paper addresses a variety of topics, including how to oversee IPEs serving as Insolvency Professionals ("**IPs**"), identify connected parties for IPs, set a minimum fee schedule, and limit the number of assignments an IP may take on.

This document aims to rationalize the regulatory framework in order to satisfy the new needs resulting from the entities' expanding role in carrying out the insolvency resolution process under the IBC, hence implementing measures to improve the efficacy of IPEs.

7. Allottee doesn't cease to be a 'home buyer' under Section 5(8)(f) (Explanation) of the IBC merely because he got a refund order from the Real Estate Regulatory Authority ("RERA"): Supreme Court ("SC") [*Vishal Chelani &Ors. v. Debashis Nanda*]. [Link]

Section 5(8)(f) of the IBC provides that any amount raised under transactions like any forward sale or purchase agreement has the commercial effect of a borrowing. The introduction of the explanation to Section 5(8)(f) by the 2018 amendment included home buyers and allottees of real estate projects in the class of "financial creditors" because financial debt is owed to them.

The SC held that treating a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable. Such action does not alter or disturb the status of the concerned party as a financial creditor. The court further held that the provisions of the IBC cannot be held to be subordinate to the provisions of the RERA Act.

8. Financial creditors cannot be stopped from pursuing CIRP against a corporate debtor by the application of the doctrine of election: SC [*Tottempudi Salalith v. State Bank of India & Ors.*]. [Link]

The Supreme Court ruled that under the IBC, a Financial Creditor may seek the NCLT to initiate CIRP against a Corporate Debtor, and that the "Doctrine of Election" cannot be used to stop them from doing so. The law of evidence, which prohibits the prosecution of the same right in two separate fora based on the same cause of action, is the embodiment of the doctrine of election.

For the purpose of debt recovery, the option to choose a forum under the Recovery of Debts Due to Banks and Financial Institutions ("**DRT**") Act, 1993, as well as under the IBC can only arise when the recovery certificate has been issued. Once a moratorium is issued under the IBC, the application of the DRT and even the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest ("**SARFAESI**") Act, 2002 will cease. In such a scenario, the Financial Creditor can go ahead with recovery proceedings in a new forum rather than being stuck with the mechanism through which the recovery certificate was issued.

9. Mentioning 'Date of default' in Form No.1/Form No.5 is a statutory requirement and thus can't be done away with in the CIRP petition: NCLT [*Asset Reconstruction Company (India) Ltd. v. Manyata Developers (P.) Ltd.*]. [Link]

According to the NCLT, mentioning the "Date of Default" in Form No. 1/Form No. 5, which must be filed with the application, is required by law. It establishes the deadline for submitting an application under IBC Sections 7 or 9. It further concluded that the date of default, which is specified in the CIRP application and the supporting Form No. 1, cannot be changed by the applicant and is an obligatory condition. Should such a request be granted, the notion of limitation will lose its significance.

10. Transactions or arrangements related to aircraft registered under international conventions are now exempted from the ambit of moratorium provisions. [Link]

Section 14(1) of the IBC provides that from the insolvency commencement date, the adjudicating authority can declare a moratorium which prohibits activities like initiating a law suit, continuing a suit against the corporate debtor, prohibiting the corporate debtor from disposing of his interests in the property, etc.

Through this notification, the government has decided that the provision regarding moratorium shall not apply to Transactions, Arrangements or Agreements, under The Convention and the Protocol, relating to Aircraft, Aircraft Engines, Airframes and Helicopters.

11. The time limit for filing an appeal begins on the date the order is pronounced, not when the party who was wronged learns of its contents: NCLAT [*Raiyan Hotels & Resorts Pvt. Ltd. v. Unrivalled Projects*]. [Link]

According to the NCLAT's ruling, the time limit for filing an appeal starts when the order was pronounced rather than when the appellant learned of its contents. The tribunal ruled that knowledge of the order must be actual or constructive, and that when the orders are issued, it is reasonable to assume that the aggrieved party has constructive knowledge of the contents of the order.

It was decided that, although Section 61 of the IBC omits this statement, Section 421(3) of the Companies Act, 2013 required the appeal to be filed as soon as the aggrieved party received a copy of the NCLT's ruling.

1. Guidelines for Business Continuity Plan ("BCP") and Disaster Recovery of Qualified Registrars and Transfer Agents ("QRTAs"). [Link]

SEBI has come up with guidelines to strengthen the governance of QRTAs for handling disruption and improving preparedness by conducting periodic drills. The QRTAs are institutions that provide the infrastructure necessary for the smooth and uninterrupted functioning of the securities.

In order to ensure continuity of operations, and maintain data and transaction integrity, the manpower deployed at the Disaster Recovery Site ("**DRS**") is required to have knowledge and expertise of various technological and procedural systems and processes relating to all operations. Further, QRTAs need to have a sufficient number of trained staff at their DRS.

Additionally, all QRTAs shall constitute an Incident and Response Team / Crisis Management Team ("**CMT**"), which shall be responsible for the actual declaration of disaster, invoking the BCP and shifting of operations from the Primary Data Centre ("**PDC**") to DRS whenever required. Further, QRTAs shall also have a 'Near Site' to ensure zero data loss.

Moreover, the disaster recovery site should preferably be set up in different seismic zones so that both DRS and PDC are not affected by the same disaster. In the case of disruption of critical systems, the QRTA shall have to be within 30 minutes of the incident, declare that incident as 'Disaster' and take measures to restore operations.

The RTAs shall conduct periodic training programmes to boost the preparedness and awareness level among its employees outsourced staff, and vendors, among others as per BCP policy.

2. The Securities and Exchange Board of India ("SEBI") has introduced a centralised mechanism for reporting the demise of an investor through KRAs. [Link]

SEBI has introduced a centralised mechanism for the reporting and verification of the demise of an investor. The listed companies wishing to provide beneficial access to such a centralized mechanism to their investors holding securities in physical form can establish connectivity with Know Your Client ("**KYC**") Registration Agencies ("**KRA**") through their registrars to issue and share transfer agents.

Under the mechanism, after the receipt of intimation about the demise of an investor, the concerned intermediary shall have to obtain the death certificate along with the permanent account number from the notifier or nominee and verify the death certificate through online or offline mode.

After verification of the death certificate, the concerned intermediary shall submit a KYC modification request to the KRA and upload the relevant documents on the same day of verification. Further, the intermediary shall have to block all debit transactions in the account or folios of the deceased investor. Further, after the validation of the death certificate, the KRA shall update the KYC record as "Blocked Permanently" in the system and intimate the same to all linked intermediaries.

Additionally, in order to have uniformity for operationalising the mechanism, the stock exchanges, depositories and industry associations, in consultation with stakeholders, may put in place common standard operating procedures.

3. SEBI redefines Large Corporates ("LCs"); relaxes borrowing norms for LCs through issuance of debt securities: SEBI. [Link]

The framework shall apply to all listed entities that have outstanding long-term borrowings of Rs. 1,000 crore or above with a credit rating of AA/AA+/AAA. The previous stipulated limit was Rs. 100 crores. A large corporate shall raise not less than 25 per cent of its qualified borrowings by way of issuance of debt securities. This requirement can be met over three years.

At the end of three years, if the actual borrowings through debt securities are more than 25 per cent of the qualified borrowings for a particular financial year, the annual listing fees pertaining to debt securities or non-convertible redeemable preference shares and contribution to the core settlement guarantee fund will be reduced.

The new norms shall apply from April 1, 2024 for large corporates following April-March as their financial year, and on January 1, 2024 for those following a January-December financial year.

4. SEBI requires brokers functioning in the Execution Only Platforms ("EOP") segment to maintain Rs. 10 lakhs with exchanges as a Base Minimum Capital ("BMC") deposit: SEBI. [Link]

EOP are digital platforms used to carry out transactions like subscription, redemption and switch transactions in direct plans of mutual fund schemes. An EOP can be registered as a Category 1 or a Category 2 EOP.

A Category 1 EOP can be registered at the Association of Mutual Funds in India ("**AMFI**") and act as an agent of an AMC. Category 2 EOPs need to get registered as a stock broker in terms of SEBI (Stock Brokers) Regulations, 1992 under the EOP segment of Stock Exchanges.

SEBI has notified that the members of stock exchanges functioning only in EOP segment (Category 2 EOP) shall maintain a sum of Rs. 10 Lakhs with the stock exchange as BMC deposit. EOPs in category 1 need not have a BMC.

1. Courts exercising powers under Section 9 of the Arbitration and Conciliation ("A&C") Act are not bound to strictly follow the provisions of the Code of Civil Procedure, 1908 ("CPC"): Calcutta High Court ("HC") [*Prathyusha – AMR JV v. Orissa Expressway Pvt Ltd*]. [Link]

The Calcutta HC clarified that when exercising powers under Section 9 of the A&C Act, it is not mandatory to strictly adhere to the provisions of interim relief outlined under Order XXXVIII Rule 5 of the CPC. Under Section 9, the Court is only required to ascertain a prima facie case, balance of convenience and irreparable loss. Proof of potential dissipation of the subject matter is not required.

Further, the HC makes a clear demarcation between Section 9 and Order XXXVIII Rule 5. While the latter is invoked when there is a threat of obstruction or delay to the execution of the decree, the former is only concerned with protecting the arbitration proceedings until an award is passed by the tribunal.

2. An award for damages cannot be sustained merely on a penalty clause in the agreement: Delhi HC [*Sudershan Kumar Bhayana v. Vinod Seth*]. [Link]

The Delhi HC ruled that an award of damages, even when a penalty clause is present in the agreement, cannot be sustained without evidence of actual loss. A party must assert and substantiate the damages incurred due to the breach. The court went on to set aside the portion of the award that granted claims to the owners without proof of actual loss.

3. Arbitrators must not reject material evidence on procedural grounds. Doing so would lead to patent illegality: Delhi HC [*Zakir Hussain v. Sunshine Agrisystem Pvt Ltd, OMP*]. [Link]

The Delhi HC emphasized that arbitrators should not reject additional material evidence solely on procedural grounds, as it violates principles of natural justice and amounts to patent illegality. The court found that the arbitrator had erred in various aspects, including refusing to admit additional evidence, misapplying contract law, and misinterpreting the timing of contract breaches. As a result, the court set aside the award, allowing the parties to initiate fresh arbitration proceedings.

4. Every claim settled under the resolution plan becomes non-arbitrable once the CoC approves the plan: Delhi HC [*IOCL v. Arcelor Mittal Nippon Steel India Limited*]. [Link]

The Delhi HC has held that when a claim is covered under a resolution plan and is settled thereunder, no arbitration can be initiated with regard to such claims once the resolution plan receives the assent of the CoC.

5. The mandate of a tribunal cannot be terminated on the ground that it has unilaterally revised its fee: Supreme Court ("SC") [*M/S Chennai Metro Rail Limited v. M/S Transtonnelstroy Afcons JV*]. [Link]

The SC has held that the mandate of a tribunal cannot be terminated because of the mere fact that it has unilaterally revised its fee. The reason is that such a ground is not mentioned under Schedule 5 or 7 of the A&C Act, 1996. However, the court also held that fees should only be revised with the consent of the parties.

Section 12 of the A&C Act talks about challenging the mandate of an arbitrator, while Schedules 5 and 7 specify the grounds on which such a challenge can be based.

6. Writ jurisdiction cannot be invoked for challenging an award passed under the Micro, Small and Medium Enterprises Development ("MSMED") Act, 2006, on the mere ground that the arbitrator denied the adjournment sought: Calcutta HC [*Spectrum Infra Ventures v. WBSMEFC*]. [Link]

The Calcutta HC has held that rejection of an adjournment request by the tribunal is not a sufficient ground to challenge the award, passed under the MSMED Act, through a writ. A writ petition challenging an award can only be filed in cases where there is a gross failure of justice. Otherwise, the awards need to be challenged under Section 34 of the A&C, read with Section 19 of the MSMED Act.

7. Translation of an arbitral award into English by an official or sworn translator is also valid under Section 47(2) of the A&C Act: Jammu & Kashmir HC [*CRP Food Import-Export v. Kashmir Kesar Mart*]. [Link]

The Jammu & Kashmir HC has held that an arbitral award translated by an official or sworn translator is also valid under Section 47(2) of the A&C Act. Section 47(2) provides that an award given in a foreign language must be translated into English before filing for its enforcement. It should be certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct according to the law in force in India.

1. Dematerialisation of shares in Private Companies. [Link]

To increase efficiency, transparency and investor participation while simultaneously reducing the risk associated with physical certificates, the MCA has mandated the dematerialisation of shares in private companies. Dematerialisation is a process by which individuals can convert their physical shares and securities to a digital format.

The MCA has amended the Companies (Prospectus and Allotment of Securities) Rules, 2014 by inserting a new Rule 9A that mandates every private company (other than small companies and government companies) to dematerialise all its securities. Further, it requires the issue of securities and permits transactions only in dematerialised form.

2. Direct Listing of the Indian Companies on Foreign Exchange. [Link]

In order to boost the global capital of Indian companies, MCA has issued a notification stating the enforcement of the amendment in Section 23 of the Companies Act, 2013. The amendment provides flexibility to certain classes of domestic public companies to list their shares directly on foreign exchanges.

The amendment also exempts these companies from certain procedural requirements, such as prospectuses, share capital and beneficial ownership requirements, and the requirement to distribute dividends.

1. MCA notifies October 26, 2023 as the effective date for enforcement of Section 45 of Competition (Amendment) Act, 2023. [Link]

The MCA has officially declared October 26, 2023, as the date on which Section 45 of the Competition (Amendment) Act, 2023, comes into effect. Section 45 of the Act pertains to the procedures governing the issuance of regulations and guidelines by the Competition Commission of India ("**CCI**"). This provision mandates the CCI to maintain transparency by publicly disclosing draft regulations and guidelines related to the Act or its rules, either in response to a request or independently.

2. CCI becomes a member of the International Competition Network's ("ICN") steering group [Link]

CCI has joined the steering group of the ICN, comprising 140 competition agencies from 130 countries, as a member for two years. This membership was secured during the ICN Annual Conference 2023 in Barcelona, Spain, marking the first time that CCI has become a member of the ICN's steering group. ICN serves as a platform for competition authorities to maintain regular contacts and address practical competition concerns informally.

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