



MONTHLY CORPORATE LAW UPDATES

SEPTEMBER, 2023

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

1. Belated claim can't be entertained after Committee of Creditor's ("COC") approval of Resolution Plan even if claimant wasn't aware that Corporate Debtor ("CD") was undergoing Corporate Insolvency Resolution Process ("CIRP"): Supreme Court ("SC") [*RPS Infrastructure Ltd. v. Mukul Kumar*]. [\[Link\]](#)

The SC held that since the appellant was a commercial entity litigating against the CD, the entity ought to have been vigilant enough to find out whether the CD was undergoing CIRP. The mere fact that the Adjudicating Authority has yet to approve the plan does not imply that the plan can go back and forth, thereby making the CIRP an endless process. The plea of not being aware of newspaper pronouncements is not one which should be available to a commercial party.

Section 15 of the Insolvency and Bankruptcy Code, 2016 ("IBC") and Regulation 6 of the Insolvency and Bankruptcy Board of India ("IBBI") Regulations mandate a public announcement of the CIRP through newspapers. This would constitute deemed knowledge on the part of the appellant.

2. Related party is not per se disqualified from bidding in e-auction of assets of CD in liquidation: SC [*Eva Agro Feeds (P.) Ltd. v. Punjab National Bank*]. [\[Link\]](#)

Section 29A of the IBC provides a list of persons who are ineligible to submit a resolution plan. A related party is disqualified from submitting a resolution plan under Section 29A and consequently from bidding in e-auction of assets of CD in liquidation only if he is in charge of the company or an influential member of the company when the bid was made.

The SC observed that in this case, the disqualification that was sought to be attached to the appellant was without any substance as the related party had ceased to be in the helm of affairs of the CD more than a decade ago. He was not in charge of the CD or an influential member of the CD when the bid was made, and thus would not be automatically disqualified from bidding.

3. Promoter's control over subsidiary CD leads to ineligibility under Section 29A(c) of the IBC for submission of Resolution Plan: National Company Law Tribunal (“NCLT”) [*Indian Bank v. Athena Demwe Power Ltd*]. [\[Link\]](#)

The NCLT held that where the applicant is a promoter exercising its control over CD through its subsidiary company, no error is committed by RP or CoC in declaring the applicant ineligible for submitting a resolution plan under Section 29A(c) of the IBC.

The tribunal observed that on the lifting of the corporate veil, it had no doubt that the applicant was indeed exercising control through directors of its related/connected companies and was in control of the CD.

4. IBBI mandates operational and financial Creditors to submit chronology of debt and default along with evidence. [\[Link\]](#)

The IBBI has notified an amendment to the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The amendment requires that the financial or operational creditor, while filing an application under Sections 7 or 9 of the IBC, submit along with the evidence, the chronology of the debt and default, including the date when the debt became due, the default date and date of part payments and the limitation applicable.

Section 7 of the IBC pertains to the initiation of CIRP by a financial creditor. Section 9 of the IBC provides for application for initiation of CIRP by an operational creditor.

5. Amendment to the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies (“IPAs”)) Regulations, 2016. [\[Link\]](#)

The IBBI has notified an amendment to the IBBI (Model Bye-Laws and Governing Board of IPAs) Regulations, 2016. Previously, Clause 10 of para VI only provided for the enrolment of an individual as a professional member of the IPAs. Now, after the amendment to Clause 10(1), even an insolvency professional entity can apply for membership.

The acceptance of the application must now be communicated to the applicant within 60 days. Also, in addition to the existing conditions, the agency may refuse to accept the surrender of membership by any professional member if a member doesn't comply with payment of fees, disciplinary orders, filings and disclosures, etc.

6. Liquidator cannot cancel a valid auction on mere expectation of fetching a higher price: SC [*Eva Agro Feeds Private Limited v. Punjab National Bank & Anr.*]. [\[Link\]](#)

The SC ruled that while the highest bidder in an auction under the IBC has no indefeasible right to demand the acceptance of his bid, any rejection order of such a bid should be substantiated by the liquidator. In such a case, the liquidator does not have unfettered discretion to cancel the auction, unless it is found that fraud or collusion had vitiated it. The court held that mere expectation of the liquidator that a higher price may be obtained is not a sufficient reason to cancel an otherwise valid auction.

7. NCLT cannot adjudicate avoidance application pursued by a third party to whom debt was assigned: NCLT [*Ritu Tandon v. M/s Rain Automotive India Private Limited*]. [\[Link\]](#)

The NCLT held that avoidance applications pursued by assignees are not issues arising out of CIRP or Liquidation of the CD in terms of Section 60(5) of the IBC. This is because the beneficiary of such proceedings or claims would be the third party or assignee, and recovery, if any, would be realised by the assignee. Section 60(5) provides the tribunal the jurisdiction to entertain any application or proceeding, by or against the CD.

The tribunal held that in terms of Section 60(5) of the IBC, the NCLT has no jurisdiction to adjudicate an avoidance/PUFE (preferential, undervalued, fraudulent and extortionate) application pursued by a third party/assignee to whom debt was assigned.

8. Advances paid by property buyers to real estate developers are ‘borrowing’ and ‘financial debt’: National Company Law Appellate Tribunal (“NCLAT”) [*Venkat Rao Marpina v. Vemuri Ravi Kumar*]. [\[Link\]](#)

The NCLAT has held that advances given by property buyers to real estate developers would be considered as ‘borrowing’ under Section 5(8)(f) of the IBC. The property buyers and allottees will therefore qualify as financial creditors under the code, and can consequently pursue an appeal under Section 7 of the IBC.

Section 5(8)(f) of the IBC defines ‘financial debt’ and provides that it includes any amount raised under any transaction, including sale or purchase agreement, that creates the commercial effect of a borrowing.

9. Resolution Professional (“RP”) is not obligated to share all information with shareholders of CD: NCLAT [M/s Dauphin Cables Pvt. Ltd. v. Mr. Praveen Bansal]. [\[Link\]](#)

The NCLAT held that the IBC provisions do not require that all information collected by the RP has to be shared with the shareholders of the CD, irrespective of their request. If the resolution plan has been approved, no further issue raised by the shareholders validates further consideration.

1. The Securities and Exchange Board of India (“SEBI”) revised the existing complaint redressal (SCORES) platform and linked it to the Online Dispute Resolution platform. [\[Link\]](#)

In SEBI Complaint Redressal System (“**SCORES**”) is a centralized web-based complaint redressal facilitation platform launched in 2011 to provide a facilitative platform for the benefit of the aggrieved investors whose grievances against the (a) listed company, (b) registered intermediary or (c) market infrastructure institution (Entities) remain unresolved. In order to strengthen the existing redressal mechanism, SEBI has come up with a solution to reduce the timelines and introduce auto-routing and auto-escalation of complaints.

Accordingly, all the Entities have to review the complaints of the investor and submit the Action Taken Report (“**ATR**”) within 21 days of receipt of such complaints. The complainant may request a review of the resolution provided by the entity within 15 days from the date of the ATR. Additionally, the concerned Designated Bodies shall take cognizance of the complaint for the first review of the resolution through SCORES. Moreover, the complainant may also seek a second review of the complaint within 15 days from the date of the submission of the ATR.

The Designated Bodies are responsible for monitoring and handling grievances of investors against respective entities, taking non-enforcement actions including issuing advisories and caution letters for non-redressal of investor grievances, and referring them to SEBI for enforcement actions.

Further, in case the listed company fails to redress the grievances and/or pay a fine levied within 15 days from the date of such notice, the concerned Designated Stock Exchange (“**DSE**”) shall issue notices to the promoter(s) to ensure submission of ATRs on the pending complaints and payment of fines by the listed company within 10 days from the date of such notice.

In cases where the listed entity again fails to submit ATRs or pay a fine levied within the period stipulated in this notice, the DSE shall intimate the depositories to freeze the entire shareholding of the promoter(s) in such listed company as well as all other securities held in the demat account of the promoter(s).

2. SEBI opens a new bank account for crediting funds to ‘Investor Protection and Education Fund’ (“IPEF”) via online mode only. [\[Link\]](#)

SEBI had earlier prescribed that the amounts shall be credited to the IPEF through online mode or by way of a demand draft (DD) in favour of the Board. SEBI has now opened a new bank account to facilitate market participants to make payment to the IPEF. For this, a link has been provided on the SEBI website which enables the remitter to make payment to this bank account via several online methods.

3. Framework for unitholders of Real Estate Investment Trusts (“REITs”) and Infrastructure Investment Trusts (“InvITs”) allowing them to exercise their board nomination rights: SEBI. [\[Link\]](#)

The Investment Manager of the InvIT shall, within ten days from the end of each calendar month, review whether the eligible unitholder(s) who have exercised the board nomination right continue to have/hold the required number of units of InvIT and make a report of the same. The Investment Manager of the InvIT shall submit such a report to the Trustee of the InvIT.

Regulation 4(2)(h) of SEBI (Infrastructure Investment Trusts) Regulations, 2014 provides that unitholder(s) holding at least 10% of the total outstanding units of the InvIT, either individually or collectively, shall be entitled to nominate one director on the board of directors of the Investment Manager.

1. An order of an emergency arbitrator can be taken up for consideration under Section 9 of the Arbitration & Conciliation (“A&C”) Act, 1996: Calcutta High Court (“HC”) [*Uphealth Holdings Inc v. Glocal Healthcare Systems Pvt Ltd*]. [\[Link\]](#)

The Calcutta HC has held that an order of an emergency arbitrator can be considered a supplemental factor to be taken up under Section 9 of the A&C Act. It is not of relevance that there is no provision similar to Section 17 of the A&C Act in Part II of the A&C Act.

Section 9 of the A&C Act confers on the court the power to provide interim measures, while Section 17 confers similar powers on the arbitral tribunal. Part II of the A&C Act deals with the enforcement of foreign awards, while Part I is about domestic awards.

2. Sending a copy of an award through email will be considered a conclusive delivery under Section 31(5) of the A&C Act: Delhi HC [*Ministry of Youth Affairs and Sports v. Ernst and Young Pvt Ltd*]. [\[Link\]](#)

The Delhi HC has held that for the purpose of Section 31(5) of the A&C Act, sending a signed copy of an arbitral award through email would suffice and be considered a valid delivery. Section 31 of the A&C Act talks about the form and contents of an arbitral award. Sub-section 5 of Section 31 mandates that after the passing of an arbitral award by a tribunal, a signed copy of such award shall be delivered to all the parties.

3. Courts can give time-bound orders to the collector of stamps to decide on unstamped arbitration agreements: Delhi HC [*Splendor Landbase Ltd. v. Aparna Ashram Society*]. [\[Link\]](#)

The Bombay HC has held that that the arbitrator cannot compel the parties to participate in the arbitral proceedings after the expiration of the arbitrator’s mandate and then justify it as a waiver of right to object under Section 4 of the A&C Act.

The court went on to hold that even if made voluntarily, the time limit provided under Section 29A of the A&C Act for passing an arbitral award is non-derogable and cannot be dispensed with by a waiver.

4. The security offered by the award debtor for the purpose of the stay of the award must be clean and unblemished: Calcutta HC [*Sarat Chatterjee and Co. (VSP) Private Limited v. Sri Munisubrata Agri International Limited (Formerly known as LMJ International Ltd.) and Anr.*]. [\[Link\]](#)

The Calcutta HC has held that the security given by the award debtor under Section 36(3) of the A&C Act for stay of execution of the award must be clean and unblemished and give confidence to the court that the security will be sufficient to perform the obligations arising out of the award.

Section 36 of the A&C Act provides the rules for the enforcement of an award, and its sub-section 3 mandates that while entertaining the application for stay of the execution of an award for payment of money, the courts must consider the provisions of the CPC regarding stay of a money decree.

5. The mandate of an arbitral tribunal can be extended only during the continuation of the mandate and not after its expiration: Calcutta HC [*Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Limited*]. [\[Link\]](#)

The Calcutta HC has held that Section 29A of the A&C Act envisages extension to the mandate of an arbitral tribunal only when the extension application is filed during the subsistence of the mandate. Once the mandate of a tribunal expires, an extension cannot be granted under Section 29A of the A&C Act.

The HC reasoned that Section 29A of the A&C uses the word "extension", which means to enlarge or prolong something beyond its original limit, rather than words like "renewal" or "revival", which mean to bring back to life something that has already become defunct.

6. Once the fee of an arbitrator has been unconditionally accepted by the parties, it cannot be disputed later: Madras HC [*EDAC Engineering v. Industrial Fans (India) Pvt Ltd*]. [\[Link\]](#)

The Madras HC has held that once the arbitrators fixed their fees and that was accepted by the parties without any conditions, it could not be later called into question by the parties by invoking Section 39(2) of the A&C Act.

Section 39 of the A&C Act deals with lien on arbitral award and deposits as to costs. Its sub-section 2 provides that when an arbitral tribunal refuses to pass an award without first receiving its demanded fee, the court may direct the parties to deposit an amount equivalent to the fee to the court. After passing the award, a reasonable sum out of the deposited amount shall be given to the arbitrators, and any balance amount will be refunded to the parties.

7. A moratorium under the IBC is not a ground to withhold the payment of arbitrators that became due prior to the moratorium: Madras HC [*EDAC Engineering v. Industrial Fans (India) Pvt Ltd*]. [\[Link\]](#)

The Madras HC has held that a moratorium under Section 14 of the IBC does not bar the payment of fees to the arbitrators that accrued before the moratorium. Further, the HC also held that the fees of arbitrators and liquidators must be given equal regard, but the former must be given priority in the settlement of dues.

8. Claims cannot be referred to arbitration when the requirement to mandatorily notify such claims is not followed: Delhi HC [*M/s Bcc-Monalisha (JV) v. Container Corporation of India Ltd*]. [\[Link\]](#)

The Delhi HC has ruled that claims cannot be referred to arbitration if the mandatory requirement to notify such claims to the General Manager is not followed. The Court can conduct a preliminary inquiry to determine the arbitrability of disputes based on the agreement and may decline arbitration when claims are clearly non-arbitrable.

Furthermore, if the contract stipulates arbitration only when the aggregate value of claims remains below 20% of the contract value, the Court will not refer parties to arbitration if claims exceed this threshold. The decision underscores the importance of strict compliance with contract terms in arbitration.

9. The India International Arbitration Centre (“IIAC”) releases Conduct of Arbitration Regulations, 2023. [\[Link\]](#)

The IIAC has unveiled its "Conduct of Arbitration Regulations, 2023." These regulations provide comprehensive guidance on arbitration processes, including initiation, arbitrator selection, and dispute resolution mechanisms.

Key highlights include allowing arbitration requests via the IAC website, email, or physical submission, a 14-day response period for respondents, acknowledgement of digital transactions, and provisions for efficient dispute resolution. The regulations also cover arbitrator independence, fast-track procedures, emergency arbitrators, language preferences, and confidentiality. The IAC aims to promote fairness, promptness, and cost-effectiveness in arbitration proceedings. Fees are outlined in a separate schedule.

10. Liquidated damages provided in the agreement cannot be awarded to a party in absence of any proof of actual loss: Delhi HC [*Vivek Khanna v. OYO Apartments Investment LLP*]. [[Link](#)]

Delhi HC clarified the requirement for proof when claiming liquidated damages in contracts. The court emphasized that the predetermined sum agreed upon as liquidated damages does not exempt the claiming party from proving actual losses resulting from a contract breach. The court distinguished liquidated damages from penalties, stating that they represent pre-estimated potential losses from a contract breach and are only payable when actual losses are incurred.

Further, the Court held that it is the quantification of loss that would not require any substantiation if the loss is suffered by a party and a pre-estimated sum is agreed by the parties as liquidated damages for such loss.

1. The Ministry of Corporate Affairs (“MCA”) can order a company to change its name after 12 months if it is deceptively similar to another previously registered company: *Telangana HC [M/s GMR Spintex Private Limited, rep. by its Director v. The Regional Director, Ministry of Corporate Affairs]*. [\[Link\]](#)

The Telangana HC held that the Regional Director, MCA is authorized to direct a company for a change of name, even after an expiry of 12 months, if it has reason to believe that the company incorporated at a later date is trying to pass off as a company incorporated on a prior date.

The Registrar is not required to thoroughly investigate the originality of the name at the time of registration. However, if a complaint is raised at a subsequent stage within the time stipulated under Section 22 of the Companies Act (“CA”), 1956, the Central Government has the authority to direct a change of name.

1. Material disclosed to the Income Tax Settlement Commission needn't be something which wasn't discovered by the assessing officer: SC [*Kotak Mahindra Bank Limited v. Commissioner Of Income Tax Bangalore and Anr*]. [\[Link\]](#)

In a significant ruling regarding Section 245H of the Income Tax ("IT") Act, 1961, the SC clarified that the material disclosed by the taxpayer to the Settlement Commission need not be entirely separate from what was discovered by the Assessing Officer. Section 245H pertains to the powers of the Settlement Commission to grant immunity from prosecution and penalties to taxpayers.

The court emphasized the importance of cooperation and "full and true disclosure of income" by taxpayers. The court also cautioned against frequent interference with Settlement Commission orders and highlighted the narrow scope for judicial review in such matters. The ruling reinforces the objective of reducing disputes and expediting settlements in tax matters.

2. The Central Board of Direct Taxes ("CBDT") amends Rule 11UA in respect of Angel Tax, incorporating new valuation methods. [\[Link\]](#)

The CBDT has issued a final notification, amending Rule 11UA of the Income-tax Rules. This amendment follows a period of soliciting feedback from stakeholders and the public on the draft Rule 11UA, which introduced five new valuation methods. These changes aim to provide more clarity and accuracy in income tax valuation processes.

3. Reserve Bank of India ("RBI") releases draft master directions on the treatment of wilful defaulters . [\[Link\]](#)

The directives issued by RBI aim to create a just and fair procedure for identifying wilful defaulters, in accordance with the principles of natural justice. It also aims to make it easier to caution lenders against providing financial aid to wilful defaulters by facilitating the exchange of credit information about them.

The documents contain important clauses pertaining to its applicability to different financial organisations including banks, non-banking financial companies ("NBFCs"), asset reconstruction companies ("ARCs") and credit information companies ("CICs"). The regulations also define wilful default while providing methods to locate and evaluate such wilful defaulters.

Although the documents primarily focus on wilful defaulters, they also contain measures pertaining to large defaulters that are in accordance with RBI's prudential standards.


4. CBDT classifies NBFCs into Top, Upper, And Middle layers. [\[Link\]](#)

The CBDT has categorized NBFCs into top, upper, and middle layers. These layers will determine the eligibility of NBFCs for certain deductions under the IT Act, which will be applicable only upon actual payment. NBFCs are registered under the CA, 1956, and engage in various financial activities such as lending, leasing, insurance, deposits, chit funds, and stock acquisitions.



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