Centre *for* Corporate Law

MONTHLY CORPORATE LAW UPDATES (DECEMBER,2021)

-INSOLVENCY AND RESTRUCTURING LAW

-SECURITIES LAW

-COMPANY LAW

-ARBITRATION LAW

-MISCELLANEOUS

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TABLE OF ABBREVIATIONS

ABBREVIATIONS	FULL-FORM
A&C Act	Arbitration and Conciliation Act, 1996
AGM	Annual General Meeting
Algo Trading	Algorithmic Trading
AMC	Asset Management Company
API	Application Programming Interface
BRDS	Bills Re Discounting Scheme
CA	Competition Act, 2002
CCI	Competition Commission of India
FCPL	Future Coupons Private Limited
HC	High Court
MCA	Ministry of Corporate Affairs

TABLE OF ABBREVIATIONS

ABBREVIATIONS	FULL-FORM
MF	Mutual Funds
MSME	Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act)
MSME FC	Micro and Small Enterprises Facilitation Council
NCLAT	National Company Law Appellate Tribunal
OAVM	Other Audio-Visual Means
PMLA	Prevention of Money Laundering Act 2005
RBI	Reserve Bank of India
RP	Resolution Professional
SC	Supreme Court
Tribunal	Arbitral Tribunal
UBL	United Breweries Limited
VC	Video Conference

INSOLVENCY AND RESTRUCTURING LAW

JUDGEMENTS

1 NCLT cannot compel any party to settle a dispute- SC [E S Krishnamurthy and Others vs. M/s Bharath Hi Tech Builders Pvt. Ltd.]

Settlements under the IBC have to be encouraged since the ultimate purpose of the IBC is to facilitate the continuance and rehabilitation of a corporate debtor, as opposed to pushing it into liquidation. But can the Adjudicating Authority and Appellate Authority act as courts of equity and direct parties to settle?

The Hon'ble Apex Court answered this question in the negative while reiterating that the AA is empowered only to verify whether a default has occurred or not and decide the petition accordingly. The SC stated that in the instant case, the Adjudicating Authority and Appellate Authority have acted beyond their jurisdiction and have directed the respondent to settle the remaining claims within three months, leaving it open to the original petitioners, to move fresh proceedings. Such a course of action is not contemplated by the IBC.

(Order available here.)

2 If the CD is an MSME, the promoters need not compete with other Resolution Applicants to regain control of the CD [C. Raja John vs. R. Raghavendran and Others]

In order to recognize the importance of MSMEs, the IBC was amended to include Section 240A which explicitly disallows the applicability of certain limitations prescribed under Section 29A, when the CD is an MSME. The purpose of this amendment was to encourage the promotors of an MSME to submit viable and feasible resolution plans.

The NCLAT stated that the CoC can consider the feasibility, viability, and other such requirements of a resolution plan. If an MSME being a resolution applicant fulfils these criteria, the CoC need not follow all the procedures of CIRP under the IBC.

INSOLVENCY AND RESTRUCTURING LAW

Keeping the intention of the legislature in mind, the NCLAT stated that in exceptional circumstances, if the CD is an MSME, it is not necessary for the promotors to compete with other resolution applicants to regain control of the CD.

(Order available here.)

3 Approval of sale of liquidated assets of CD by the AA is the starting point for Section 32A to come into force [Nitin Jain Liquidator PSL Limited vs. Enforcement Directorate through: Raju Prasad Mahawar, Asst. Director, PMLA]

Section 32A of the IBC provides for the cessation of liability for any offence committed prior to the commencement of the CIRP, once a resolution plan is approved by the AA or there is a sale of the liquidation assets of the CD. This case dealt with the conflict between PMLA and IBC vis-à-vis Section 32A of IBC.

The Delhi HC noted that the two statutes essentially operate over distinct subjects and subserve separate legislative aims and policies. However, in case of conflict between the two, the HC opined that it will be for the Courts to discern the legislative scheme and enable the respective authorities to discharge their obligations to the extent that the same does not encroach upon the jurisdiction of the competing statute. In doing so, the courts are expected to strike a correct balance between the statutes.

In the present case, the conflict between the two statutes needed to be answered solely on the anvil of Section 32A. The HC ruled that once the Adjudicating Authority approves the sale of the liquidation assets of the CD, it marks the starting point for the protection of Section 32A to apply. Hence, the power to provisionally attach or move against the properties of the corporate debtor under PMLA would stand foreclosed as soon as the relevant order for sale of assets is passed by the AA.

(Order available here.)

INSOLVENCY AND RESTRUCTURING LAW

4 Banks that have sanctioned housing loans to the buyers of flats/projects floated by the CD cannot be considered as a Financial Creditor [Axis Bank Limited vs. Value Infracon India Private Limited]

Ever since the inception of the IBC, the definition of a financial debt has been a much-deliberated topic. The present case dealt with the issue of whether a bank can be considered a 'Financial Creditor' on account of it having granted credit facilities to some of the allottees who have purchased Flats/units in the Project floated by the CD.

The NCLAT Delhi referred to its previous jurisprudence and ruled that the home buyer is the one that should be considered a Financial Creditor, regardless of whether he/she has self-financed or has taken a loan from a bank. The court also stated that it is definitely not the scope and objective of the Code to include Banks/Financial Institutions which have advanced loans to Home Buyers to be considered as 'Financial Creditors', specifically considering that the liability to repay the Home Loan is on the individual Home Buyers.

(Order available here.)

SECURITIES LAW

REGULATIONS

1 Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2021

An issue governing the Indian capital markets is the delisting of shares. On one hand, listing is highly regulated and on the other, delisting of shares has been a hassle. Delisted shares refer to the shares of a listed company that have been removed from the stock exchange permanently. Delisting of shares can be either voluntary or involuntary. A listed company's shares get involuntarily delisted from stock exchanges for various reasons including insufficient market capitalization, filing bankruptcy, and failure to comply with exchange regulatory requirements.

Most of the mergers and acquisitions of a company opt for voluntary delisting. Company opting for voluntary delisting plan has two options, one is to offload company's shares in reverse book building mechanism and another option is to hold shares till one finds a buyer. Through reverse book building mechanism, promoters or acquirers are required to make public announcement of the buyback by sending a letter of offer and a bidding form to eligible shareholders. In this case, as an eligible shareholder, one may opt out by tendering ones' shares. The final price is determined by the price at which the greatest number of shares that are offered. Delisting is considered successful when the number of shares tendered by shareholders reaches the specified limit.

In the existing framework, if the acquirer's open offer is disrupted, adherence with existing guidelines may increase the incoming acquirer's shareholding to more than 75%, or even 90%. Further, in order to ensure compliance with the Securities Contract (Regulation) Rules, the acquirer may be pushed to first carry their shareholding down to 75%. This is due to SEBI's delisting norms which would not allow the acquirer to even attempt delisting unless the shareholding is first reduced to 75%. Such directionally contradictory transactions in a sequence complicate takeover of listed companies.

Under the new framework, if the open offer results in the delisting threshold of 90%

SECURITIES LAW

shareholding being met, all shareholders who tender their shares will be paid the indicative price. If the response to the offer is insufficient to meet the delisting threshold of 90% shareholding, all shareholders who tender their shares will be paid the open offer price. If a company does not get delisted after an open offer under this framework and the acquirer crosses 75% shareholding due to the open offer, the acquirer will be given a 12-month period from the date of the open offer's completion to try again to delist the company using the reverse book building mechanism.

Unlike the earlier framework, the new framework attempts to make delisting successful if 50% of the remaining public shareholding is acquired and the delisting threshold is met. If the acquirer is unable to delist during this extended 12-month period, the acquirer must comply with the minimum public shareholding norm within 12 months of the end of such period. If the acquirer states during the open offer that they intend to remain listed, and the total stake at the end of the tendering period exceeds 75%, the acquirer may choose to scale down purchases made under both, i.e., the underlying share-purchase agreement and the shares tendered under the open offer.

The relaxation of SEBI's delisting rules for company acquirers aims to simplify the mergers and acquisitions process. By eliminating the complexities and contradictions in the previous process, the new framework emphasized investor's interest in the M&A process. In contrast to the previous framework, which posed many directional contradictions and complexities in the takeover of listed companies, the new revised framework aims to make M&A transactions for listed companies a rather more rational and convenient process, harmonising the interests of all investors involved in the process.

(Regulation available here.)

SECURITIES LAW

CIRCULAR

1 Circular on Mutual Funds

When an investor puts money into mutual fund schemes through an aggregator platform such as Groww, Paytm Money, etc, the money goes into a pool account before reaching the respective Asset Management Company ("AMC"). For instance, if an investor invests Rs 25,000 in one AMC, another Rs 25,000 in another, the money first goes to a single pool account, and from there it will go to the respective AMCs. It has been an industry practice for about 10 years now.

Such practice is associated with certain risks. Since the money directly reaches the account of the aggregator, there could be a scope for misuse, or delay of the transaction or events may occur which could affect the investors. Earlier, SEBI had discontinued the use of pool accounts post the Karvy aftermath. However, considering the transactional convenience offered by pooling, for both investors and aggregators, SEBI has eased the rules surrounding their usage. This is allowed subject to certain conditions.

According to the existing rules, trustees and AMCs must ensure segregation of assets and liabilities, bank accounts, etc of each MF scheme from others. As the responsibility to ensure segregation is on the trustees and AMCs, they should have internal policies to ensure that adequate internal controls are in place for such segregation. The circular also mandates a half yearly audit of the whole mechanism by the auditor appointed by the trustees.

SECURITIES LAW

Further, the circular directs that segregated securities or funds held in pool accounts at MF level must be reflected in the books of respective schemes at the end of the day. This is aimed at enforcing regulatory and disclosure measures. With the circular aimed at avoiding any conflict of interest amongst investors, the securities or funds of one scheme are directed not to be used for another scheme at any point in time.

The circular is aimed at furthering SEBI's objective of protecting the interests of investors in securities and regulating the Indian securities market.

(Circular available here.)

CONSULTATION PAPER

1 Consultation Paper on Algorithmic Trading by Retail Investors

Investment is an art. An art, where the investor analyses companies and invests in an idea. While the process of buying or selling one instrument is fairly easy, replicating it across various stocks can be an impossible task to do manually. This is where the application of algorithmic trading comes into picture. Through Algorithmic trading ("Algo Trading"), computers assist the buying and selling of stocks. It automatically monitors the live stock prices and initiates an order when the given criteria such as volume, price, etc., are met.

Currently, Stock Exchanges approve Algo Trading submitted by brokers. However, now many brokers in India have started providing Application Programming Interface (API) access to their clients. These APIs are an interface offered by a broker that provides users with relevant and accurate stock market data, often in real time. This is why APIs are seeing increasingly widespread use within the financial sector.

SECURITIES LAW

However, a problem arises when retail investors use Algo Trading with APIs. The Stock Exchanges nor the brokers can identify if a trade coming from the API link is an algo or a non-algo trade. While such a system is in disagreement with the fundamental idea behind investing itself, it poses monetary risks as well.

This kind of unregulated algo trading poses a risk to the market as they can be misused for market manipulation. Further, retail investors are lured by guaranteeing them higher returns. In that regard, SEBI issued a consultation paper to regulate such algo trading to make it safe for retail investors.

- **Proposed Framework**

Under the existing provisions, algo trading shall be provided by the stock broker after obtaining permission of the stock exchange. Taking this a step ahead, now stock brokers need to take approval on all algos from the Exchange as per the Consultation Paper. Each Algo strategy has to also be certified by authorized auditors.

Moreover, SEBI has proposed that all orders coming from an API must be treated as algo orders and controlled by the stockbroker. Also, APIs carrying out algo trading should have a unique algo ID, which will be provided by the Exchange after an approval.

- **Enhancing stockbroker accountability**

Another problem that arose from unregulated algo providers/vendors before was that there was no investor grievance redressal mechanism in place. In order to address this, now the Stock broker is responsible for all algos emanating from its APIs and redressal of any investor disputes. The SEBI also suggests that Brokers need to use suitable and adequate technology to ensure appropriate checks and controls on unauthorised tweaking of algos.

SECURITIES LAW

The proposed framework is certainly a step in the right direction to ensure protection of interests of retail investors. It will bolster the investor confidence while also keeping a check on price manipulation and misuse of algo trading with APIs. However, it increases the burden on Brokers substantially. It is to see whether the proposed framework will regulate the Algo Trading with API or reduce its usage altogether, taking the market advancement of India two steps back.

(Consultation paper available here.)

COMPANY LAW

CIRCULAR

1 Extension of holding of Annual General Meeting (AGM) through Video Conference (VC) or Other Audio-Visual Means (OAVM) up to 30th June 2022

The CA 2013, mandates companies to hold an Annual General Meeting ("AGM") every year. Further, companies are required to hold an AGM within six months from the date of completion of the financial year.

In this regard, the MCA has permitted companies to conduct their AGM through Video Conferencing ("VC") or Other Audio-Visual Means ("OAVM"). Companies whose AGMs are due in the year 2021 can now hold them by 30th June 2022 through VC or OAVM. This Circular however, by no means, grants an extension on the time frame to hold the AGM as prescribed under the CA, 2013. This is a temporary relief granted to companies to smoothly carry out their responsibilities in the wake of the pandemic.

(Circular available here.)

ARBITRATION LAW

JUDGEMENTS

1 Initiation of arbitration proceedings mandatory after the failure of conciliation between the parties under the MSME act: SC [Jharkhand Urja Vikas Nigam Ltd vs The State of Rajasthan and Ors]

There is an underlying difference between arbitration and conciliation. In conciliation, the conciliator assists the parties to arrive at an amicable settlement. Whereas, in arbitration, the arbitration tribunal or an arbitrator decides the matter between the parties. Under the MSME Act, with regard to disputes pertaining to any amounts due between the parties, reference can be made to the Micro and Small Enterprises Facilitation Council ("MSME FC") which carries out conciliation proceedings. The MSME Act mandates that where conciliation is unsuccessful between the parties, the council is mandated to initiate or refer the dispute for arbitration proceedings.

In the present matter, parties entered into a contract for the supply of conductors. The supplier party approached Rajasthan MSME FC, claiming for recovery of the principal amount along with the interest amount. After the absence of the buyer in the conciliation proceedings, the council passed an order directing the buyer to pay the claimed amount to the supplier. The order was challenged before the Supreme Court. The question before the court was that whether arbitration proceedings must be initiated after the failure and termination of conciliation under the MSME Act.

Regarding this, the SC observed that the Rajasthan MSME FC is mandated to conduct conciliation as per the MSME Act. Upon the failure of conciliation, the MSME FC is obliged to initiate arbitration proceedings or refer it to any other institution. Hence, the impugned order passed by the Rajasthan MSME FC was held in violation of the same. Thus, the SC held that arbitration and conciliation proceedings cannot be clubbed under the MSME Act and arbitration attempt is mandatory after the failure of conciliation.

(Judgement available here.)

ARBITRATION LAW

2 An arbitration tribunal or court is open to award costs unless an agreement regarding the same is made after the dispute arose: Delhi HC [Union of India vs Om Vajrakaya Construction Company]

Under the provisions of the A&C Act, 'costs' refers to the reasonable expenses incurred in connection with the arbitral proceedings and arbitral award. A court or an arbitral tribunal is empowered to determine such costs including the amount of the costs, whether the costs are payable by one party to another and when the costs are payable. The only exception is an agreement between the parties which says that one party will pay the entire or a portion of the arbitration costs, provided such an agreement is made after the dispute has arisen.

In the present matter, a dispute arose between the parties concerning the payment of the bills, after which the matter was referred to the Arbitral tribunal. The contract between the parties stipulated that each party would bear its own costs in an event where the matter is referred to arbitration. However, the tribunal awarded arbitration costs to one of the contracting parties including arbitral fees and counsel fees. The question before the Delhi HC arose that whether a prior agreement between the parties regarding the payment of the costs prevents a court or a tribunal to award the same.

While deciding the question, the Delhi HC remarked that the power of the arbitral tribunal to award cost is limited by the terms of the contract between the parties. However, there is no such bar on the discretion of the tribunal to award costs. The Delhi HC held that the discretion of a tribunal or a court to award costs is not subjected to the agreement between the parties. The only exception is an agreement between the parties regarding the payment of costs made after the dispute has arisen. Thus, the Delhi HC maintained that in the present matter, the tribunal was not wrong while granting costs to the party as there existed no agreement regarding the costs, made after the dispute.

ARBITRATION LAW

Therefore, the Delhi HC held that unless the parties engage in an agreement after the issue has arisen, any agreement between the parties prohibiting the granting of costs would be impermissible.

(Judgement available here.)

Centre for Corporate Law

MISCELLANEOUS

CCI ORDER

1

CCI penalizes Amazon for concealing material information [Amazon.com NV Investment Holdings LLC v. Future Coupons Private Limited.]

Amazon's investment into Future Coupons Pvt. Ltd. (FCPL) has been in the limelight amidst the legal battle between the two on the sale of the Future Group's retail business to Reliance. Competition Commission of India ("CCI") in November 2019 had cleared deal after through assessment of the overlapping businesses of Amazon, FCPL and their group entities. In March 2021 however, FCPL filed a petition alleging that in the arbitration proceedings instituted by Amazon, they contradicted their stand on their investments as opposed to their submissions to CCI. FCPL claimed that this led to false misrepresentation and suppression of material facts.

As per the provisions of the Competition Act, 2002 ("CA, 2002"), a person/enterprise can be held liable by CCI for the omission in providing certain material information. Further, it also empowers the CCI to impose penalty on the entity for failure to notify the combination. This may extend to one percent of the total turnover or the assets, whichever is higher in that case.

Presently, based on this, CCI has put a stay on the order given out in 2019, which allowed for Amazon to acquire 49% stake in FCPL. The fair-trade regulator's pivotal contention was that Amazon had received the approval on the order by suppressing certain relevant facts, which is a violation of CA, 2002.

CCI has now imposed Amazon with separate penalties of Rs. 200 crore and Rs. 2 crores under multiple sections of the CA, 2002 for concealing material information about its approximately $200-million investment in the Future Group. CCI believes that it was an attempt to suppress the actual scope and purpose of the combination. Amazon has further been directed to file a fresh notice with the details of the transactions within 60 days.

(Order available here.)

MISCELLANEOUS

NCLAT ORDER

1 NCLAT stays CCI order in UBL's beer collusion case [United Breweries Ltd. vs Competition Commission of India & Ors.]

When several corporations collude to fix the price of commodity, it is known as cartelization. The corporations collude in order to raise prices above competitive levels through coordinated action. In an instance of beer cartelization, CCI had penalized United Breweries Limited ("UBL"), Carlsberg India, All India Brewers' Association and 11 individuals. In furtherance to this, CCI imposed penalties aggregating to over Rs. 873 crores.

The investigation of this matter commenced in 2009. The Director General submitted a report to the CCI on the beer collusion based on said investigation. However, the CA, 2002 mandates further investigation post submission of a report.

Filing an appeal before the NCLAT, UBL alleged that CCI imposed penalties solely based on the report without further investigation. Additionally, that CCI did not take into account the absence of any agreement which could have created an appreciable adverse effect on competition in the beer market.

Post hearing, NCLAT through an interim order, stayed the order given by CCI. NCLAT stayed the order to prevent the aberration of and to uphold the ends of justice.

(Order available here.)

CONTRIBUTORS

ANJALI SONI

ISHITA KHANDELWAL

NIKHIL JAVALI

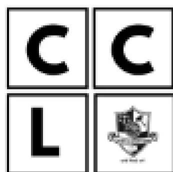
SANSITA SWAIN

SHACHI GAMBHIR

SOUJANYA RAMASWAMY

SOUMYA PRADHAN

SOURAV JENA



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