NATIONAL LAW UNIVERSITY ODISHA

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MONTHLY CORPORATE LAW UPDATES

APRIL, 2024

- INSOLVENCY & BANKRUPTCY LAW
- SECURITIES LAW
- COMPANY LAW
- ARBITRATION LAW
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1. The limitation for filing an appeal starts from the date of the order if it is passed in the presence of the respective legal counsels for the parties: National Company Law Appellate Tribunal ("NCLAT") [*Supreme Construction Developers Pvt Ltd v Puranik Builders Ltd*]. [Link]

The NCLAT has ruled that when both parties' counsels are present during the pronouncement of the order, the time limit for filing an appeal with the NCLAT against that order begins from the date of the order and not from the date when it was uploaded on the National Company Law Tribunal's ("**NCLT**") website.

2. The Tribunal does not have the power to consider the case de novo under recall jurisdiction: NCLAT [*Adv (CA) V Venkata Sivakumar v Hari S Hari Karthik & Ors*]. [Link]

The NCLAT has held that the Tribunal can't hear a case de novo while dealing with an application to recall an order. Further, the Tribunal would not exercise the power to recall a judgment when the party had the option of re-opening proceedings, vacating the Judgment, or filing an appeal but chose not to do so.

3. Erstwhile liquidator has no power to request a recall of an order in his own capacity: NCLAT [*Adv (CA) V Venkata Sivakumar v Hari S Hari Karthik & Ors*]. [Link]

The NCLAT has held that a liquidator who has been replaced with another cannot independently seek recall of an order. If the former liquidator is aggrieved by an order passed by NCLAT, they must pursue remedy through appeal under Section 62 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

4. A resolution applicant cannot withdraw or alter a resolution plan that the Committee of Creditors ("CoC") has approved: Supreme Court ("SC") [*Deccan Value Investors LP & Anr v Dinkar Venkatasubramanian & Anr*]. [Link]

The SC has held that it's not permissible for a resolution applicant to alter or retract the resolution plan once it has received approval from the CoC as the IBC also does not provide any such provision. Even identification of ambiguities and absence of specific details in the resolution plan will not be acceptable after the CoC approves it unless there is a serious case where data and facts are manipulated or hidden.

5. The key to distinguishing between a financial debt and an operational debt lies in ascertaining the real nature of the transaction: SC [*Global Credit Capital Ltd v Sach Marketing Pvt Ltd*]. [Link]

The SC has held that the real nature of the underlying transaction is the crucial factor which determines the nature of the debt. The test to determine whether a debt is a financial debt within the meaning of sub-section 8 of Section 5 of the IBC is the existence of a debt along with interest, if any, which is disbursed against consideration for the time value of money.

Further, where one party owes a debt to another and when the creditor is claiming under a written agreement/arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some connection or co-relation with the 'service' subject matter of the transaction.

6. Amendments to Section 435 of the Companies Act, 2013, ("Companies Act") do not have any effect on Section 236 of the IBC: SC [*Insolvency and Bankruptcy Board of India v Satyanarayan Bankatlal Malu & Ors*]. [Link]

Initially, Section 435 of the Companies Act provided that only the Special Court, presided over by Sessions Judges or Additional Sessions Judges, had the power to issue summons in relation to the offences committed under the Companies Act. When the IBC was enacted, Section 435 of the Companies Act was incorporated into Section 236 of the IBC.

Later, Section 435 was amended to provide that for offences punishable with up to two years of imprisonment, the Judicial Magistrate will have the power to issue summons and for any offences punishable with more than two years, the Sessions Judges or Additional Sessions Judges will have the power to issue summons.

The SC has held that the original incorporation of certain sections of the Companies Act in the IBC upon the latter's enactment was a case of 'legislation by incorporation' and not a case of 'legislation by reference.' Legislation by incorporation means that even though a former law has been incorporated into the latter, any amendment to the former will not automatically effectuate similar amendments in the latter. But in the case of legislation by reference, any amendment to the former will automatically lead to the incorporation of such amendments into the latter as well.

Therefore, as per the SC, even though Section 435 of the Companies Act has introduced a distinction in the manner of issuance of summons between offences punishable with up to two years of imprisonment and more than two years of imprisonment, no such distinction can be read into Section 236 of the IBC. Thus, for all the offences committed under the IBC, the Sessions Judge or an Additional Sessions Judge presiding over the Special Court still has the power to issue summons.

7. A free copy of an order provided by the NCLT Registry cannot be said to be a certified copy of the order for the purpose of filing an appeal: NCLAT [*Munagala Roja Harsha Vardhini v Vardhansmart Private Limited*]. [Link]

Rule 50(2) of the NCLT Rules, 2016, provides that upon the pronouncement of an order by the NCLT, a free copy of the order shall be provided by the Registry to the parties to the case. On the other hand, Rule 22(2) of the NCLAT Rules, 2016 provides that every application for appeal before the NCLAT shall be filed along with a certified copy of the impugned order. A party can obtain a certified copy of an order by paying a fee.

The NCLT has held that the obligation of a party to pay a fee for obtaining a certified copy of an order cannot be dispensed with. Therefore, a free copy of an order cannot be said to be a certified copy of the order for the purpose of filing an appeal.

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1. The Securities and Exchange Board of India ("SEBI") provides flexibility for Alternative Investment Funds ("AIFs") and their investors to deal with unliquidated investments of their schemes. [Link]

SEBI has notified certain amendments to the SEBI (Alternative Investment Funds) Regulations, 2012, which are meant to provide flexibility to AIFs and their investors to deal with unliquidated investments of their schemes. Now, an AIF, during its liquidation period, can distribute investments of a scheme that are unsold due to lack of liquidity, in-specie to the investors (distribution of investments directly to investors without converting them into cash), or enter into a dissolution period after obtaining the approval of at least 75% of the investors by value of their investment in the AIF scheme.

Previously, a separate liquidation scheme was initiated in order to deal with these unsold investments. To avail this flexibility, the AIF/manager will be required to arrange bids for a minimum of 25% of the value of unliquidated investments of the scheme to provide an exit option to the dissenting investors.

2. SEBI permits Category I and II AIFs to create an encumbrance on their holding of equity in investee companies. [Link]

In order to provide flexibility and ease of doing business to Category I and II AIFs, SEBI allows them to create encumbrances on their holdings of equity in investee companies. Accordingly, the encumbrance can be created on the equity of the investee company, which is in the business of development, operation, or management of projects in the infrastructure sub-sectors listed in the Harmonized Master List of Infrastructure issued by the Central Government. The encumbrance cannot be created on the investments in foreign investee companies.

Furthermore, the encumbrance on equity is permitted solely for borrowing by the investee company, whose duration shall not be greater than the residual tenure of the scheme. Moreover, the funds raised through this borrowing can only be used for the specific purpose for which they were borrowed.

3. Key insights from SEBI latest board meeting. [Link]

In its 205th board meeting, SEBI approved a framework for Unit-Based Employee Benefit ("**UBEB**") schemes for employees of investment managers of Infrastructure Investment Trusts ("**InvITs**") and Real Estate Investment Trusts ("**REITs**"). This involves amending the SEBI (InvITs) Regulations, 2014, and the SEBI (REITs) Regulations, 2014. Under this framework, investment managers may receive units of InvITs/REITs as management fees, allocated directly to an employee benefit trust for exclusive use in the UBEB scheme.

Further, to address challenges faced by Venture Capital Funds ("**VCFs**") under the former SEBI (Venture Capital Regulations), 1996, the Board approved a proposal allowing these VCFs to migrate to the SEBI (AIF) Regulations 2012. This creates a new sub-category called 'Migrated VCFs' under Category I AIFs. Registration as Migrated VCFs incurs no fees, and they are exempt from additional investment conditions. The migration option is open for 12 months from the notification of relevant amendments to SEBI (AIF) Regulations 2012.

Additionally, SEBI has amended the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021, updating provisions on financial result disclosure, record dates, due diligence certification, and reducing face value for debt securities and non-convertible redeemable preference shares. Furthermore, the Board approved a proposal to reduce compliance costs for listed entities by allowing those with only listed non-convertible securities to opt for newspaper intimations (featuring a QR code and website link) rather than full financial results disclosure.

Additionally, amendments to the SEBI (Mutual Funds) Regulations, 1996, now permit equity passive schemes to invest in sponsor group companies up to the weightage of constituents in the underlying index, with an overall cap of 35% investment. To address recent front-running instances, SEBI has amended this regulation, requiring asset management companies to establish structured mechanisms for identifying and deterring potential market abuse, including front-running and fraudulent transactions.

Lastly, to streamline compliance for market infrastructure institutions under the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018, SEBI approved various proposals, including aligning shareholding pattern disclosure formats with those applicable to listed companies, thus eliminating redundant provisions.

4. SEBI standardizes the reporting format of Private Placement Memorandum ("PPM") audit report. [Link]

In order to have uniform compliance standards and for ease of compliance reporting, SEBI standardizes the reporting format of PPM audit reports. According to the SEBI (AIF) Regulations 2012, AIFs are required to submit their annual PPM audit reports to the trustee, board of directors, or designated partners of the AIF, as well as to the board of directors or designated partners of the manager and SEBI, within 6 months after the end of the financial year. The standardized reporting format for the PPM audit report has been prepared in consultation with the pilot Standard Setting Forum for AIFs.

1. Notes of account are part of a company's balance sheet under Section 134(7) of the Companies Act, 2013: SC [*State of Bihar v Ziqitza Health Care Ltd*]. [Link]

The SC has held that the tendering authority was right in disqualifying the bidder on the ground that no notes of account were appended to the balance sheet. Notes of accounts are important explanatory statements that aid in the proper comprehension of a balance sheet. Such notes are part of the balance sheet itself, as per Section 134(7) of the Companies Act, 2013.

1. An arbitrator's mandate would not be terminated when delays were not caused by it: Bombay High Court ("HC) [*Glencore India Pvt Ltd v Amma Lines Limited*]. [Link]

The Bombay HC ruled that an arbitrator's mandate persists despite agreed timelines if delays stem from the party seeking termination itself. A party cannot seek the termination of the tribunal's mandate on account of its own delay.

2. Section 9 of the Arbitration and Conciliation Act, 1996 ("A&C Act") confers greater powers to the courts than Order 38 Rule 5 of the Civil Procedure Code, 1908 ("CPC"): Calcutta HC [*Uphealth Holdings Inc v Glocal Healthcare Systems Pvt Ltd*]. [Link]

The Calcutta HC ruled that Section 9 of the A&C Act grants broader powers than Order XXXVIII Rule 5 of the CPC to the courts. Thus, a party's right to approach the court for relief under Section 9 of the A&C Act cannot be restricted by the rigours of the CPC.

3. If an arbitral award remains unchallenged under Section 34, it cannot subsequently be challenged during execution proceedings: *Madras HC [Sahayaraj v M/s Shriram Transport Finance Company Ltd*]. [Link]

The Madras HC has held that when a challenge has not been made under Section 34 of the A&C Act, an executing court cannot go behind an arbitral award and decide on its challenge. Thus, party who has failed to challenge the award under Section 34 of the A&C Act cannot subsequently do so at the stage of execution.

4. No fresh notice is necessary to resume arbitration following the setting aside of the initial award: *Bombay HC [Kirloskar Pneumatic Company v Kataria Sales Corporation*]. [Link]

The Bombay HC ruled that once the initial award is set aside under Section 34 of the A&C Act, there is no need for a fresh notice under Section 21 of the A&C Act to recommence arbitration. This is because the arbitration has already commenced, and the other party also knows about the existence of the dispute.

1. Interest cannot be levied for a delay in paying the penalty if a demand notice is not issued by the Competition Commission of India ("CCI"): Delhi HC [*Geep Industries (India) (P) Ltd v Competition Commission of India*]. [Link]

Regulation 3(1) of the CCI (Manner of Recovery of Monetary Penalty) Regulations, 2011 provides that where a penalty has been imposed on an enterprise by the CCI, a demand notice as set out in Form-I appended to the regulations has to be served on the enterprise through the Recovery Officer after the expiry of the period specified in the order of penalty expires.

Further, Regulation 5 provides that in case there is a delay in payment of the penalty, the enterprise concerned shall be liable to pay simple interest at one and a half percent. The Delhi HC has recently held that a demand notice must be issued before the levying of penalties. A penalty cannot be imposed if a demand notice has not been issued in accordance with Regulation 3.

1. The Reserve Bank of India ("RBI") notifies amendments to the Foreign Exchange Management Act, 1999 ("FEMA") payment norms. [Link]

The RBI has notified amendments to FEMA regulations in order to streamline the process for Indian companies seeking to list on international stock exchanges. One of them is the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) (Amendment) Regulations, 2024. It provides that the proceeds from the purchase or subscription of equity shares of an Indian company listed internationally should be either remitted back to a bank account in India or deposited into the foreign currency account of the Indian company. Moreover, the net sale proceeds of these equity shares, after taxes, can be remitted overseas or credited to the permissible holder's bank account.

2. The RBI notifies amendments to the FEMA foreign currency account norms. [Link]

In order to streamline the process for Indian companies seeking to list on international stock exchanges, the RBI has also notified the Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) (Amendment) Regulations, 2024. It elaborates on the regulations concerning foreign currency accounts held by residents in India, particularly concerning funds raised through mechanisms like External Commercial Borrowings, American Depository Receipts, and Global Depository Receipts, as well as through direct listings of equity shares of companies incorporated in India on international exchanges. These funds, if not yet utilized or repatriated, are to be maintained in foreign currency accounts with banks outside India.

3. The RBI expands hedging options for Gold Price Risk in the International Financial Services Centre ("IFSC"). [Link]

The RBI has enhanced the hedging facilities available to resident entities, enabling them to mitigate gold price risks more effectively. The circular issued by the RBI permits these entities to use Over-the-Counter ("**OTC**") derivatives in the IFSC for hedging purposes, in addition to the existing options on recognized exchanges.

Gold price volatility can significantly impact industries that rely heavily on gold, such as jewellery manufacturing and trading sectors. Hedging against price fluctuations is crucial for these businesses to manage their financial risks more predictably. The ability to hedge in the OTC segment provides additional flexibility and could potentially lead to better risk management strategies tailored to the specific needs of businesses.

4. The RBI issues draft guidelines on 'Digital Lending – Transparency in Aggregation of Loan Products from Multiple Lenders'. [Link]

The RBI has released a draft circular titled 'Digital Lending – Transparency in Aggregation of Loan Products from Multiple Lenders' with the aim of creating a regulatory framework for lending service providers ("**LSPs**") that offer loan aggregation services. According to the draft, LSPs must offer borrowers a digital display showcasing all available loan options. Additionally, the information presented by LSPs must be unbiased and refrain from endorsing any specific lending entity to avoid deceptive practices or patterns.

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