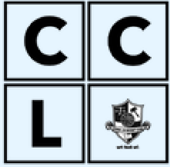

THE CENTRE FOR CORPORATE LAW
NATIONAL LAW UNIVERSITY ODISHA

#IN SIGHTS

DECEMBER, 2024

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

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INSOLVENCY & BANKRUPTCY LAW

The Bombay High Court ("HC") has held that the delisting of shares under a resolution plan governed by the Insolvency Bankruptcy Code, 2016 ("IBC") is not ultra-vires to the Securities Exchange Board of India ("SEBI") Act, 1992 ("the Act") [*Harsh Mehta v. SEBI*]. [Link]

The HC has refused to strike down Regulation 3(2)(b)(i) of the SEBI (Delisting of Equity Shares) Regulations, 2021 ("**the Regulation**") as being ultra-vires of the SEBI Act as it was within the scope of the powers of SEBI to create such a distinction in the interest of investors. The IBC is a statute enacted after the SEBI Act and therefore the HC noted that the IBC took cognizance of preceding legislations. The HC upheld the ability enshrined in Section 238 of the IBC to override other laws.

The HC noted that the lack of such a provision would cause incompatibility between the SEBI Act and the IBC. Therefore, the SEBI's conscious choice to allow the IBC to govern the delisting of shares under a resolution plan was not ultra-vires. The HC also held that the Regulation was constitutionally valid as it has well-defined conditions for its applications and the process under the IBC was elaborate.

The National Company Law Appellate Tribunal ("NCLAT") has held that a dissenting shareholder is also bound by the decision taken by the Committee of Creditors ("CoC") [*Union Bank of India v. Mr. Dinkar T. Venkatasubramanian & Ors.*]. [Link]

The NCLAT has held that the Resolution Plan which is approved in the commercial wisdom of the CoC binds all stakeholders including the dissenting financial creditor. The NCLAT noted that the commercial wisdom of the CoC approving the Resolution Plan is binding on all, which is the law laid down by multiple precedents.

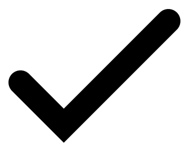
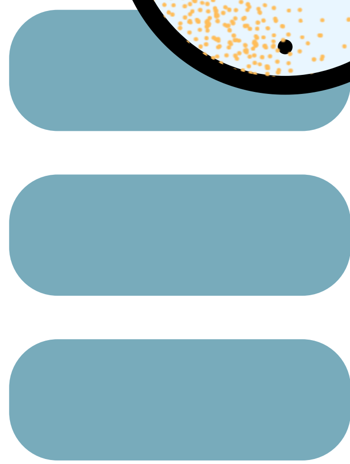
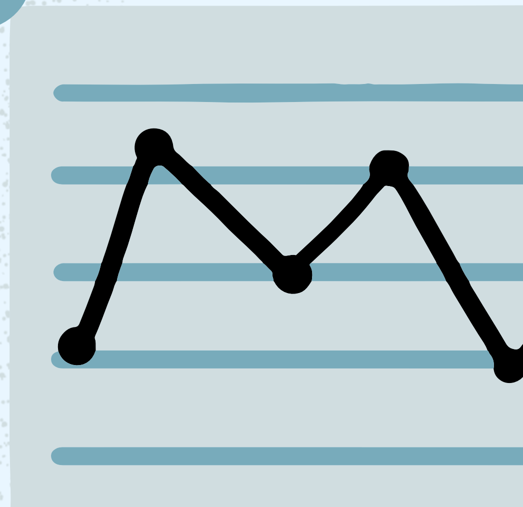
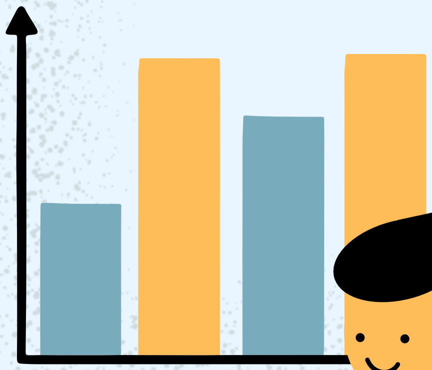
In the present case, the dissenting financial creditor objected to the distribution of the recovered amount. The NCLAT stated that the dissenting financial creditor was fully bound by the Resolution Plan as one of the subjects on which the CoC is to approve a Resolution Plan according to Section 30(4) of the IBC is the manner of distribution proposed.

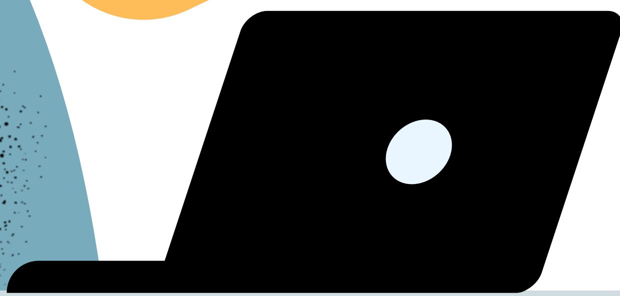
The NCLAT has held that a Compulsory Convertible Debenture ("CCD") is a debt under the IBC as it had time value for money. [*Indian Renewable Energy Development Agency Limited v. Waaree Energies Limited*]. [Link]

The NCLAT has held that the financial instrument being a Debenture Subscription Agreement ("**DSA**"), though being a CCD, is a debt as it has an interest component payable in case of default. This signified the time value of the money and made the financial instrument a debt. The NCLAT noted that the amount had been raised by the issuance of debenture, which was clearly a 'financial debt' within the meaning of Section 5(8) of the IBC.

The NCLAT employed the documents entered between the parties to find out the nature of debt and the nature of the transaction, as to whether there was time value of money or not. The terms of the DSA showed that the debenture was compulsorily convertible into equity shares at the option of the Investor. This differentiated the DSA from an equity instrument and denoted is as debts.

SECURITIES LAW



SEBI has proposed extending algorithm-based trading (“algo trading”) to retail investors. [Link]

In a bid to offer more opportunities to retail investors, SEBI has proposed extending algo trading to retail investors, which is currently dominated by institutional players. SEBI suggests granting retail investors access to approved algorithms under strict regulatory oversight, with brokers required to obtain stock exchange approval for each algorithm and its updates. To ensure transparency and accountability, all algorithm orders would carry unique exchange-issued identifiers. The framework emphasizes safeguards, including limiting access to algorithms provided by SEBI-registered brokers and clearly defining the responsibilities of stakeholders like brokers, investors, and market infrastructure institutions.

SEBI prohibits Foreign Portfolio Investors (“FPIs”) from issuing offshore derivative instruments (“ODIs”) linked to derivatives as the underlying asset. [Link]

In a recent circular, SEBI has prohibited FPIs from issuing ODIs linked to derivatives as the underlying asset. ODIs are financial instruments issued by FPIs to overseas investors, allowing them indirect exposure to Indian securities without directly registering with SEBI. Additionally, FPIs are barred from hedging ODI positions through derivatives on Indian stock exchanges.

ODIs must now be backed exclusively by non-derivative securities and maintained on a one-to-one fully hedged basis with the same securities throughout their duration. FPIs intending to issue ODIs are required to obtain separate registrations under the same permanent account number, with “ODI” added as a suffix.

However, ODIs based on government securities are exempt from this requirement. FPIs must also collect and retain ownership information of shareholders controlling the ODIs they issue. This measure aims to enhance transparency and strengthen compliance with SEBI's regulatory framework.

SEBI introduces Specialised Investment Fund (“SIF”). [Link]

In a bid to provide diversified investment opportunities, SEBI has launched a new asset class, the SIF, to cater to investors with a higher risk tolerance. Positioned between mutual funds (“**MFs**”) and portfolio management services, SIFs are designed to provide high-net-worth individuals and sophisticated investors with tailored investment options.

The minimum investment amount for SIFs is set at Rs. 10 lakhs, with accredited investors exempted from any minimum threshold. These funds can operate using open-ended, close-ended, or interval-based strategies and may include investments in equity, debt, real estate investment trusts, or derivatives such as futures and options. Structured similarly to MFs, SIFs will follow comparable procedures for investment and redemption and will have similar tax implications for both investors and asset managers.

Key highlights from the SEBI Board Meeting. [Link]

The SEBI board has introduced several regulatory reforms aimed at enhancing market integrity, transparency, and investor protection. Stricter regulation for Small and Medium Enterprises’ Initial Public Offering (“**IPO**”) now mandates companies to demonstrate operating profits of at least Rs. 1 crore in two of the last three financial years and restrict promoters from selling more than 50% of their holdings during the IPO. Merchant banker requirements have also been strengthened, with higher net worth criteria to ensure that only well-capitalized entities manage public offerings and market-related activities.

In addition, insider trading regulations have been further tightened to promote transparency and fairness, safeguarding the integrity of financial markets. SEBI has also simplified the process for Non-Resident Indian (“**NRI**”) investments by allowing FPIs in GIFT City to accept unlimited investments from NRIs and Persons of Indian Origin. Exit guidelines for stock exchanges were outlined, requiring a minimum net worth of Rs.100 crore and an annual trading volume of Rs.1,000 crore, with non-compliant exchanges required to exit.

Moreover, SEBI has relaxed pro-rata rights for Alternative Investment Funds (“**AIFs**”), offering greater flexibility, particularly for government-backed entities opting for junior units with higher risks or lower returns. Lastly, the Corporate Debt Market Development Fund has been classified under Category I AIF, providing regulatory clarity and facilitating its smooth operation.

SEBI introduces key amendments to SEBI (Investment Advisers) Regulations, 2013 (“IA Regulations”). [Link]

SEBI recently introduced key changes in IA Regulations. These include the introduction of part-time Investment Advisors (“**IAs**”), who can serve up to seventy-five clients while engaging in other activities and are subject to the same qualifications and obligations as full-time advisers.

The amendment also revises definitions, excludes “investment products” and “reading calls” from the scope of investment advice, and mandates IAs to disclose their use of artificial intelligence in advisory operations.

It further clarifies the role of the Principal Officer (“**PO**”), requiring foreign firms to appoint an India-based PO, and introduces a deposit requirement for IAs to cover penalties or disputes.

The International Financial Services Centres Authority (“IFSCA”) launched the IFSCA (Informal Guidance) Scheme, 2024 to offer clarity on regulatory matters. [Link]

To enhance regulatory clarity and support stakeholders in making informed decisions within the financial services market, the IFSCA has launched the Informal Guidance Scheme. This scheme is available to eligible applicants, including IFSCA-registered entities and those planning to operate in an International Financial Services Centre. Applicants can seek guidance through two types of letters: No-Action Letters, which address proposed business activities, and Interpretive Letters, which offer interpretations of legal provisions or guidelines.

COMPANY LAW

The Supreme Court ("SC") rules that obtaining approval from the company's shareholders is mandatory for listing shares on the stock exchange [*Jyoti Limited v. BSE Limited & Anr.*]. [Link]

The SC has held that debt-to-equity converted shares cannot be listed on the stock market without obtaining prior approval from the company's shareholders. The Court emphasized that in principle approval under Section 62(1)(c) of the Companies Act, 2013, is a mandatory prerequisite for allotting such shares. Previously, it was presumed that if the proposal was not initiated by the company, it would not require the approval of the shareholders.

Additionally, the Court clarified that even if shareholder approval is secured, the shares do not automatically qualify for listing. Listing eligibility must also be approved by the recognized stock exchange in accordance with Regulation 28 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

While rejecting the appeal of the Appellant, the Court upheld the Securities Appellate Tribunal's decision and confirmed that both shareholder and stock exchange approvals are essential for listing.

ARBITRATION LAW
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Arbitral tribunal's jurisdiction to clarify award after becoming functus officio [*North Delhi Municipal Corporation v. M/S. S.A. Builders Ltd.*]. [Link]

In a key ruling, the SC clarified the limited jurisdiction of an arbitral tribunal under section 33 of the Arbitration and Conciliation Act, 1996 ("**A&C Act**") to address errors or provide clarifications in an award, even after becoming functus officio.

The Court emphasized that the tribunal's extended jurisdiction under section 33(1) is subject to strict procedural and temporal conditions. While parties are generally required to file such a request within 30 days of receiving the award, it held that this timeframe may be extended by mutual agreement of the parties.

Further, it clarified that the purpose of the section is to address interpretative or procedural gaps, ensuring the award is clear and executable without reopening the substantive merits of the case. Therefore, the Court emphasized the need for caution in exercising these powers to preserve the finality and binding nature of the award.

Application of Section 14 of Limitation Act, 1963 to arbitral proceedings [*Kirpal Singh v. Gov. of India*]. [Link]

In a recent judgment, the SC held that Section 14 of the Limitation Act, 1963 ("**the Act**"), is applicable when filing objections under Section 34 of the A&C Act. The Court ruled that the time spent in pursuing an alternative remedy in good faith and with due diligence must be excluded while calculating the limitation period under Section 34 of the A&C Act.

The Court emphasized the need to interpret the provisions of the Act liberally, given the limited scope and timeframes for seeking substantive remedies under Sections 34 and 37 of the A&C Act. It held that courts need to ensure that the limitation period is calculated in a manner that preserves and protects the right to seek remedies under these provisions.

Applicability of arbitration in statutory disputes [*Dushyant Janbandhu v. M/s Hyundai AutoEver India Pvt. Ltd.*]. [Link]

The SC recently clarified that disputes governed by mandatory statutory frameworks are non-arbitrable. It emphasised that while Section 11(6) of the A&C Act facilitates arbitration, it does not permit arbitration in all cases.

The court applied the fourfold test from *Vidya Drolia v. Durga Trading Corporation* and underscored that arbitration is barred when statutory frameworks expressly or implicitly mandate central adjudication.

Furthermore, the Court observed that invoking arbitration as a means to bypass statutory mechanisms or to delay resolution, particularly when disputes are already within the jurisdiction of competent authorities, constitutes an abuse of the arbitral process.

COMPETITION LAW

SC favours shifting Amazon and Flipkart petitions on the Competition Commission of India ("CCI") probe to the Karnataka HC [*CCI v. Cloudtail India Private Limited & Anr. Etc.*]. [Link]

The SC has indicated it may transfer all writ petitions filed across various HCs by Amazon and Flipkart-associated sellers against CCI's probe into alleged anti-competitive practices to the Karnataka HC. The Court emphasized consolidating cases in the Karnataka HC for efficiency and directed the CCI to include all necessary parties in its filings.

The dispute stems from a CCI probe initiated in January 2020, alleging Amazon and Flipkart gave preferential treatment to select sellers. Previous challenges to the probe in the Karnataka HC and the Apex Court were dismissed allowing the investigation to proceed. The CCI concluded that both companies had violated the provisions of the Competition Act, 2002, which prompted further legal challenges by associated sellers in multiple HCs.

MISCELLANEOUS

The Department of Telecommunications notifies the Telecommunications (Procedures and Safeguards for Lawful Interception of Messages) Rules, 2024 (“Interception Rules”). [Link]

The Department of Telecommunications issued the Interception Rules on December 6, 2024. These rules are the fourth set of regulations introduced under the recently enacted Telecommunications Act, of 2023. These Interception Rules will supersede Rules 419 and 419A of the Indian Telegraph Rules, 1951. However, the Interception Rules will not override the terms and conditions of existing orders issued under the previous rules regarding the interception of messages, which will remain in effect until the expiration of their periods.

These rules lay down the protocol and the due process for the government to lawfully intercept the message of citizens in the country. The rules introduce crucial definitions of 'authorized agency', 'competent authority', and 'interception order'. They further give the central government the power to issue an order specifying authorized agencies to intercept any messages using an interception order.

The key modifications in the rules are regarding the authority qualified to issue interception orders, the threshold for issuing interception orders, and the form and destruction of interception orders.

Delhi HC: Software provided by a foreign company to its agents in India does not necessarily mean that it has a Permanent Establishment (“PE”) in India. [*Director Of Income Tax Intn'l v. Western Union Financial Services Inc.*]. [Link]

The Delhi HC held that because software is an intangible property, it alone can not constitute PE of a foreign entity in India. Article 5 of the Double Taxation Avoidance Agreement (“**DTAA**”) between India and the United States of America (“**USA**”) defines PE as a fixed place of business through which the business of an enterprise is carried out. PE of foreign entities in India are eligible for taxation purposes. The HC stated that a bare perusal of Article 5 of DTAA makes it clear that an intangible property such as software lacks the physical attributes, that form an integral part of PE, thus it fails to qualify as a parameter for the constitution of PE just by itself.

Profit accrued by buying & selling cargo space to importers/exporters on a principal-to-principal basis is exempt from service tax. [*M/s. Seagull Maritime Agencies Pvt. Ltd. v. Commissioner of Central Goods & Service Tax, Audit-II, New Delhi*]. [Link]

The New Delhi Bench of the Customs, Excise, and Service Tax Appellate Tribunal ("**CESTAT**") ruled that the profit derived from purchasing and selling cargo space in the freight business on a principal-to-principal basis is not liable to service tax, as it qualifies as a trading activity rather than as an intermediary service.

The Bench clarified that when an assessee independently purchases and sells space from shipping lines or airlines to importers/exporters, the activity does not qualify as a service liable to service tax. It further stated that this is particularly true in the cases when the assessee is not acting as an intermediary or agent promoting the business of airlines or shipping lines, but instead operates independently without forward or backward integration into the activities of these entities.

The Ministry of Finance issued a draft bill on the Banning of Unregulated Lending Activities ("BULA"). [Link]

The Ministry of Finance issued a draft bill to curb unregulated lending activities. The bill seeks to prohibit all individuals/entities not authorized by the Reserve Bank of India or other regulators from undertaking public business lending activity, including digital lending.

The bill refers to public lending activity as the financing business carried out by individuals, which involves providing loans to non-relatives at interest rates, either in cash or in kind. However, loans given to relatives are not covered under this definition.

Additionally, in case of violation of its provisions, the bill provides for a punishment of a minimum of two years, which may extend to seven years, and a fine ranging from Rs. 2 lakhs to Rs. 1 crore.

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