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Centre for Corporate Law

MONTHLY CORPORATE LAW UPDATES (MARCH, 2022)

-INSOLVENCY AND RESTRUCTURING LAW

-SECURITIES LAW

-COMPANY LAW

-ARBITRATION LAW

-MISCELLANEOUS

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TABLE OF ABBREVIATIONS

ABBREVIATIONS	FULL-FORM
AA	Adjudicating Authority
A&C Act	The Arbitration and Conciliation Act, 1996
AO	Assessment Officer
CIS	Collective Investment Scheme
CIMC	Collective Investment Management Company
CCI	Competition Commission of India
CD	Corporate Debtor
CIRP	Corporate Insolvency Resolution Process
CoC	Committee of Creditors
COI	Certificate of Incorporation
Companies Act	Companies Act, 2013

TABLE OF ABBREVIATIONS

ABBREVIATIONS	FULL-FORM
Competition Act	Competition Act, 2002
CPC	Code of Civil Procedure 1908
DIAC	Delhi International Arbitration Centre
DPIN	Designated Partner Identification Number
FMCG	Fast Moving Consumer Goods
FPO	Follow-on Public Offering
HC	High court
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code 2016
IRP	Interim Resolution Professional
ITAT	Income Tax Appellate Tribunal
LLP	Limited Liability Partnership

TABLE OF ABBREVIATIONS

ABBREVIATIONS	FULL-FORM
LLP Act	Limited Liability Partnership Act, 2008
LODR	Listing Obligations and Disclosure Requirements
MCA	Ministry of Corporate Affairs
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
PAN	Permanent Account Number
PCIT	Principal Commissioner of Income Tax
RP	Resolution Professional
SC	Supreme Court
SEBI	Securities and Exchange Board
TAN	Tax Deduction Account Number
Tribunal	Arbitral Tribunal

INSOLVENCY AND RESTRUCTURING LAW

JUDGEMENTS

1 AA has the authority to issue non-bailable warrants against the suspended Directors/Management in case of non-cooperation during CIRP [Vikram Puri (Suspended Director) & Anr. v. Universal Buildwell Private Limited & Anr.]

The IRP has the authority under the IBC to make an application to the AA for necessary directions if the promoters or directors of the CD fail to assist or cooperate during the CIRP with the IRP. In this case, the AA issued non-bailable warrants to the suspended directors of the CD because they did not produce certain documents requested by the IRP. The question before the NCLAT was whether the AA had the jurisdiction to issue such non-bailable warrants or not.

The NCLAT stated that the National Company Law Appellate Tribunal Rules 2016 clearly allows the NCLAT to apply provisions of the CPC in cases pertaining to summons and enforcing the attendance of any person. It stated that the CPC empowers courts to issue warrants which may be either bailable or non-bailable, against any person who fails to cooperate by evading repeated summons. In this case, the NCLAT justified the AA's actions by pointing out that the suspended directors had been given several opportunities to cooperate and they did not. Therefore, the AA was well within its jurisdiction to issue non-bailable warrants against the suspended directors for failing to cooperate even after repeated opportunities.

(Order available here.)

2 SC stays NCLAT order that had clarified that it is not a prerequisite that CIRP should be ongoing before initiating insolvency proceedings against the personal guarantor [Mahendra Kumar Jajodia v. State Bank of India Stressed Asset Management Branch]

Sections 60(1) and (2) of the IBC state that the AA for CIRP of the CD and the personal guarantor shall be the NCLT. Furthermore, when a CIRP suit of the CD is pending before

the AA, the application for initiating an insolvency suit against the personal guarantor shall also be the NCLT. The question that arose with the interpretation of these sections was whether the initiation of a CIRP suit against the CD is a prerequisite before filing a case against the personal guarantor. The NCLAT in its order had clarified the air regarding this by stating that a CIRP suit against the CD is not a prerequisite to file a case against the personal guarantors of the CD. This order of the NCLAT was what was challenged before the SC.

The SC stayed the NCLAT's order that had cleared the air regarding filing a suit against the personal guarantor. It referred to its previous jurisprudence and opined that in the event of an ongoing CIRP or liquidation process, the AA for filing a case against the personal guarantor shall be the NCLT itself. It is yet to be seen as to what the apex court will decide regarding this highly conflicted question.

(Order available here.)

3 'Sale as a going concern' of a company includes sale of assets as well as liabilities of the CD [M.S. Vishwanathan v. Pixtronic Global Technologies Pvt. Ltd.]

The IBBI (Liquidation Process) Regulations 2016 defines two types of going concern sales. The sale of the 'Corporate Debtor as a going concern' and the sale of the 'business of the Corporate Debtor as a going concern'. The present case dealt with a scenario where the Liquidator published advertisements in newspapers for the sale of the CD as a going concern on the one hand, as well as the sale of the other assets of the CD on the other hand. The Liquidator of the CD approached the NCLT for the approval of sale of the corporate debtor as a going concern under the relevant provisions of the IBBI (Liquidation Process) Regulations 2016.

The sale of the company as a 'going concern' to the buyer will include the assets as well as

the liabilities that are an integral part of the business of the CD. However, it differentiated between the sale of the CD as a going concern and the sale of the business of the CD as a going concern by referring to the specific provisions of the IBBI (Liquidation Process) Regulations 2016.

The sale of the CD as a going concern refers to the transfer of all the assets, liabilities, privileges, benefits, rights, etc. to the buyer. Here, the CD's existing shares will not be transferred and the CD itself will not be dissolved. On the other hand, the sale of the business of the CD as a going concern refers to the transfer of all the assets including intangible assets as a going concern to the buyer, but the difference is that the CD will be dissolved. The existing shares of the CD will be extinguished in this case. In conclusion, the NCLT approved the sale of the CD as a going concern.

(Order available here.)

4 Acknowledgment of liability is sufficient for a Section 9 IBC petition to fall within the period of limitation [SVG Fashions Pvt Ltd v. Ritu Murli Manohar Goyal and Anr.]

The date from which the period of limitation is calculated according to Section 18 of the Limitations Act 1963, is the date on which the acknowledgment of liability in writing is signed by the party. The present case before the SC was an appeal against an order passed by the NCLAT. The question before the apex court was whether an acknowledgment in writing was sufficient to invoke the period of limitation according to the relevant provisions of the Limitations Act 1963.

The Supreme Court reiterated the jurisprudence regarding the applicability of Section 18 of the Limitations Act 1963. It discussed that once time has begun, the extension of time for the purposes of filing a legal suit should be according to the Limitations Act. The apex

INSOLVENCY AND RESTRUCTURING LAW

court took note of the fact that the NCLAT did not properly evaluate the limitation date and that the present suit does stand as it is not barred by limitation. This was in line with the settled jurisprudence in this regard.

(Order available here.)

SECURITIES LAW

NOTIFICATION

1 SEBI directs Ruchi Soya to allow FPO investors to withdraw bids

Ruchi Soya is one of the leading fast moving consumer goods (FMCG) brands in the edible oil sector as well as largest manufacturer of soya goods. However, Ruchi Soya had to approach the bankruptcy court in 2017 after it failed to repay the debts. Baba Ramdev led Patanjali acquired Ruchi Soya and promised to settle part the dues. Subsequently, Patanjali came to own about 98% of the company. Considering the major influence Patanjali had in the company, SEBI instructed Patanjali to reduce its shareholding over 3 years.

In this regard, the company planned to reduce their shareholding to 81% by doing Follow-on Public Offering (FPO). Additionally, it priced the shares below the market level and flooded a message to attract investor interest. The message implied to the share prices and read as "Great news for all beloved members of Patanjali parivar. A good investment opportunity in Patanjali Group." Moreover, Baba Ramdev had urged his audience to invest in Ruchi Soya stock in one of his yoga sessions.

Henceforth, SEBI has taken cognizance of the matter as the message was an unsolicited promotional message. Furthermore, it has asked for clarification from Patanjali. Even though Patanjali claimed innocence, SEBI has mandated the company to open a window to allow applicants to withdraw their bids if they wish to. Beside this, it has asked the banking managers of the FPO to publish a notice cautioning the investors regarding circulation of such messages by the company.

Even though the steps taken by SEBI are rare, it shows its effort to regulate manipulation and protect investor interest in the market.

(Notification can be accessed here.)

SECURITIES LAW

ORDER

2 SEBI revises CIS norms along with changes to LODR regulations in its Board Meeting.

Collective Investment Scheme is an arrangement by a company under which the contributions or payments made by investors are pooled together with the objective of receiving income, profits, produce or property and is managed on behalf of the investors. In this regard, SEBI (Collective Investment Scheme) Regulations, 1999 regulates this practice. However, there were regulatory arbitrages in the regulation. In order to strengthen the regulatory framework in line with Mutual Funds regulations and remove such arbitrages, SEBI amended the CIS norms for the first time since 1999.

- **Changes in CIS norms**

SEBI enhanced the net worth criteria as well as mandated having track record in relevant field for being eligible as a Collective Investment Management Company (CIMC). Additionally, CIMC and its group shareholders are limited to a 10% shareholding or participation on the board of another CIMC to avoid conflicts of interest. According to SEBI, CIMC and its designated personnel should be required to invest in the CIS in order to align their interests with the CIS's likewise in the case of mutual funds.

At the CIS level, SEBI also requires a minimum number of investors and subscription amount. It has streamlined the fees and expenses that will be charged to the scheme, as well as the timeframe for the plan's offer period and refund of funds to investors.

- **Changes in LODR Regulations**

The board increased the existing simplified document threshold limit for securities maintained in physical mode from 2 lakh to 5 lakh per listed issuer. Additionally, for

SECURITIES LAW

securities kept in dematerialized form, it has been increased from 5 lakh to 15 lakh for each beneficiary account. Moreover, a legal heirship certificate or an equivalent certificate issued by a competent government entity will be an acceptable document for the transmission of securities.

Apart from the amendments, the board approved the SEBI budget for the financial year 2022-23.

(Order can be accessed here.)

COMPANY LAW

NOTIFICATION

1 MCA notifies LLP (second amendment) rules, 2022.

Limited Liability Partnership (LLP) is a form of business entity, which provides benefits of a partnership firm and private limited company in one frame. LLPs are governed by the Limited Liability Partnership Act (LLP act). The recent amendment to the LLP rules has been released. This is the second Amendment to the LLP rules which presents a few major changes.

- **Number of Designated partners at the time of incorporation of LLP**

Designated partners of any corporate entity are legally accountable for regulatory and legal compliances. As per the provisions of the LLP act, an LLP was earlier supposed to mandatorily appoint two designated partners. Every designated partner of an LLP is mandated to obtain a Designated Partner Identification Number (DPIN) from the Central Government. The recent amendment has increased the number of designated partners from two to five, who can apply for allotment of DPIN at the time of incorporation.

- **PAN and TAN allotment**

All the partners of LLPs were earlier required to provide Permanent Account Number (PAN) and Tax Deduction Account Number (TAN) separately at the time of registration of LLP. The recent amendment provides that LLPs can now obtain PAN and TAN along with the Certificate of incorporation (COI) at the time of incorporation of the LLP. The amendment has been made with the prospect of positioning the incorporation process of LLP to that of the companies.

COMPANY LAW

- **Statement of Account and Solvency**

LLPs are required to file a statement of Account and Solvency, which was earlier supposed to be duly signed only by the designated partners. However, with the recent amendment in a case where the corporate insolvency resolution process has been initiated against the LLP under the Insolvency and Bankruptcy Code (IBC) or the LLP Act, the said statement has to be signed on behalf of LLP by an interim resolution professional or resolution professional, or liquidator or LLP administrator.

Other amendments include the web-based process of LLP incorporation. LLP incorporation process has been made web-based similar to that of the Companies.
Furthermore, it is also provided that, the Latitude and longitude of the address of the Registered Office of the LLP have to be now mentioned in the form FiLLip, filed for registration of LLPs.

(Notification available here.)

ARBITRATION LAW

1 The mere use of the word 'Arbitration' in the heading of an Agreement does not entail the existence of an arbitration agreement - Del HC (Foomill Pvt. Ltd. v. Affle (India) Ltd.)

An arbitration agreement, as defined by the Arbitration and Conciliation Act, 1996 (A&C act), is an agreement through which the parties agree to submit to arbitration for all or certain disputes which have arisen between them in respect of a defined legal relationship. An arbitration agreement can be in the form of an arbitration clause in a contract or in the form of a separate agreement.

After a dispute arose between the contracting parties in the present matter, one of the parties invoked the arbitration agreement. The dispute resolution clause in the agreement was named "Jurisdiction, Arbitration & Dispute Resolution". The clause stated that any dispute or claim regarding the agreement shall be governed and interpreted according to the laws of India. The opposite party stated that there was no arbitration agreement between the parties, thus, denied to resolve the issue through arbitration. The question before the Delhi High Court (HC) was whether the use of the word 'Arbitration' in the heading of an Agreement would entail the existence of an arbitration agreement.

While deciding the issue in the matter, the court was of the view that the said clause regarding dispute resolution merely uses the word 'arbitration' and does not amount to an arbitration clause. The court observed that the intention of the parties to enter into an arbitration agreement has to be gathered from the terms of the agreement. Moreover, though the heading of the said clause mentions the word 'Arbitration' but does not provide that the parties agreed to refer their disputes for resolution through arbitration. Thus, it cannot be said that the terms of the agreement clearly indicate an intention on the part of the parties to refer their disputes to arbitration as a dispute redressal mechanism. Further, the court maintained that the presence of words such as 'arbitration' or 'arbitrator' in a

ARBITRATION LAW

clause does not make the agreement an arbitration agreement. Pertinently, in the present case, the main body of the clause does not even contemplate that the parties may agree to arbitration in the future. Therefore, the court held that the words used in the said clause of the agreement in the present case do not disclose any obligation on the part of the contracting parties to resort to arbitration as a dispute mechanism.

(Judgement available here.)

2 Arbitral Fee under Fourth Schedule of the A&C Act has to be determined on the aggregate value of Claim and Counter-Claim: Delhi HC (Jivanlal Joitaram Patel v. National highways authority of India)

The 4th schedule of the A&C act provides the amount of model fee applicable on the sum in the dispute. The court and the arbitral tribunal are vested with the power of deciding the expenses and costs relating to the arbitration proceedings. Unless it is otherwise agreed by the parties, the arbitration costs are fixed by the arbitral tribunal. The arbitral fee has to be fixed in terms of the 4th Schedule of the Act. In a case where a counter-claim has been submitted along with the claim, to the arbitral tribunal, it may fix a separate amount of deposit for the claim and counter-claim.

In the present case, the contracting parties approached the arbitral tribunal regarding claim and counter claim. After calculating the amount of claim and counter claim, the tribunal fixed the arbitral fee. The tribunal opined that adjudication of claims and counter claims mostly require additional or separate evidence and arguments. Thus, the fixed arbitral fee has to be assessed separately for claim and counter claim. In regards to the same, the parties approached the court seeking clarification in the matter of fixation of arbitral fees. The question before the court was whether the value of claim and counter claim have to be taken separately while fixing the arbitral fee.

ARBITRATION LAW

The HC while interpreting the expression "sum in dispute" used in the 4th Schedule of the Act said that the expression takes in its ambit the amount of both – claim and counter claim. The court maintained that as per the provisions of the A&C Act, in a case where a counter-claim has been submitted to the tribunal, it may fix a separate amount of deposit for the claim and counter-claim. This provision of the act can only apply when the tribunal is not to fix its fee in terms of the 4th schedule of the Act. Furthermore, the court said Delhi International Arbitration Centre (DIAC) rules also provide that the arbitral fee has to be determined on the basis of the aggregate amount of claim and counter claim. Thus, it was held that the term "sum in dispute" provided in the 4th schedule has to be interpreted so as to include the aggregate value of the claim as well as counter claim.

(Judgement available here.)

MISCELLANEOUS

CCI ORDER

1 CCI rules Google's Play Store payments policy as 'unfair' and 'discriminatory'

Dominant position' refers to a position of strength in a market in India wherein the company can operate independently despite competitors.
Companies are not allowed to abuse their dominant position in the market by imposing unfair or discriminatory conditions for purchasing a goods or service as per the Competition Act 2002. The present case dealt with whether Google Play Store's new payments policy was unfair or discriminatory and therefore in breach of the competition law guidelines.

CCI ruled that Google's Play Store policies were 'unfair' and 'discriminatory'; the policy of Google breached the relevant provisions of the Competition Act 2002. While this is not the final decision of the CCI and Google has appealed the order, their position remains that they would continue to engage with the CCI in a transparent manner.

(Order available here.)

2 CCI notifies revised format of Form II for filing of notice for proposed combinations

The CCI has notified a revised format of Form II which is filed for giving notice to the CCI for entering into a combination. They have done so by amending the CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations 2022. This revised format shall come into force from May 1st 2022.

The revised format has 7 parts wherein, the form needs to contain the assets and the turnover of the parties to the combination. This new format provides much required clarity and structure which was lacking in the previous framework.

(Order available here.)

MISCELLANEOUS

3 Assessment order without reasons does not render the order erroneous and provides no leeway to initiate revision proceedings under the provisions of the Income-tax act – ITAT (Reliance Payment Solutions Limited v. Principal Commissioner of Income Tax-8 Mumbai)

Any person who pays tax or any money under the provisions of the Income-tax Act is termed an income tax assessee. An income tax return filed by the assessee can be called for examination which is known as scrutiny assessment. The objective of the assessment is to affirm the correctness of the income declared, losses and deductions claimed etc. A taxpayer can claim tax depreciation on a tax return, to compensate for the losses incurred in relation to the value of the tangible assets, under the provisions of the Income- tax Act.

The assessee in the present matter was engaged in a certain business. The income tax return filed by the assessee was picked up for scrutiny assessment. One of the alleged grounds for scrutiny assessment was that the assessee claimed depreciation at a higher rate. The assessee contended that the claimed rate was as per the rate prescribed under the provisions of the Income-tax Act. The assessment officer (AO) passed the order accepting the submissions of the assessee but no observation was made in terms of the issue regarding the claimed depreciation. As a result, the Principal Commissioner of Income Tax (PCIT) initiated the revision proceedings against the assessee. The PCIT ruled that AO had not noted any explanation for allowing the assessee's claim of depreciation. As a result, the records presented by the assessee arose in question. Aggrieved by the order of PCIT, the assessee approached the Income Tax Appellate Tribunal (ITAT). The question before the ITAT was whether the PCIT was right in initiating the revision order when the submissions during the assessment process were accepted by the AO.

Regarding the same, the ITAT observed that merely because the AO did not state specific reasons for accepting the submission of the assessee, the same cannot be a reason enough to initiate revision proceedings. If in any case, the AO did not mention a few reasons relating to the submission of the assessee, the same does not render the assessment order

MISCELLANEOUS

erroneous and prejudicial. Therefore, the ITAT held that the non-mentioning of reasons provided by the AO does not makes the order detrimental and provides no leeway to initiate revision proceedings under the provisions of the Income-tax act.

(Order available here.)

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