THE CENTRE FOR CORPORATE LAW
NATIONAL LAW UNIVERSITY ODISHA

#IN SIGHTS

NOVEMBER, 2024

- INSOLVENCY & BANKRUPTCY LAW
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INSOLVENCY & BANKRUPTCY LAW

The Insolvency Bankruptcy Board of India ("IBBI") has introduced a centralized electronic listing and auction platform for the sale of assets under the liquidation process. [Link]

The IBBI (Liquidation Process) Regulations, 2016 provides for liquidators to sell the assets of a corporate debtor ("**CD**") through an auction via an electronic auction platform. IBBI has introduced a centralised platform for listing and auction to tackle the issue of information asymmetry for potential buyers of assets under liquidation.
For this purpose, a specific module within the eBKray platform has been developed to host information pertaining to assets under auction. IBBI has attempted to streamline information and enhance transparency through this module to maximise returns in the liquidation process.

The Bombay High Court ("HC") has held that an asset deposited in the court as security before the initiation of the Corporate Insolvency Resolution Process ("CIRP") remains an asset [*Siti Networks v. Rajiv Suri*]. [Link]

To clarify the interplay between the rights of a judgment creditor and its effect on insolvency law, the Bombay HC has held that assets deposited in court by a corporate debtor before initiation of CIRP do not cease to be assets although the CD may not have possession. It further held that the substantive rights of the judgment creditor in such a suit where security was given is governed by the provisions of the Insolvency Bankruptcy Code, 2016 (**"IBC"**).

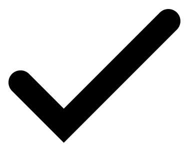
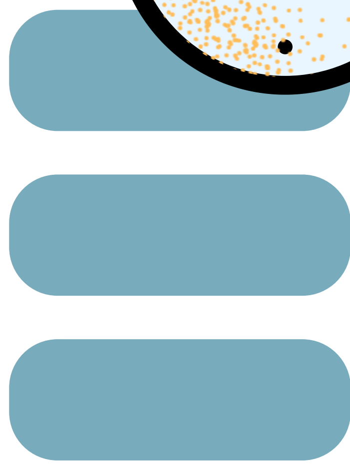
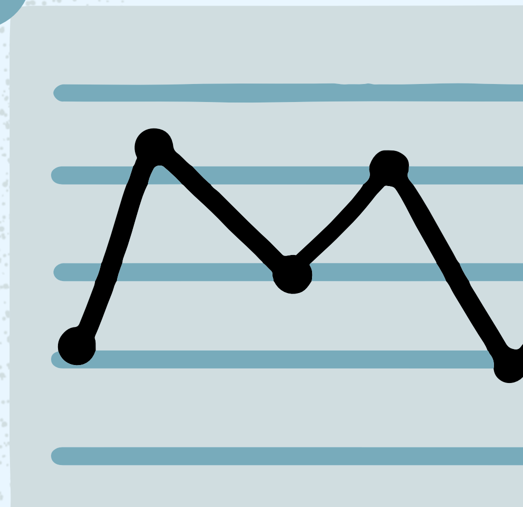
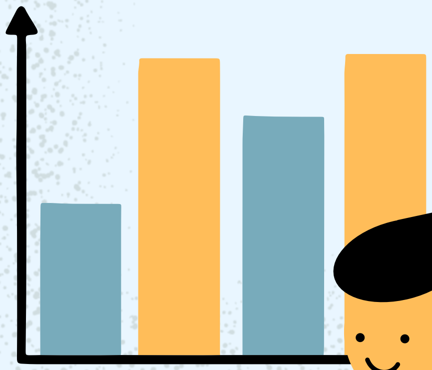
The HC observed that the substantive right to security interests over the assets of the corporate debtor in order to secure amounts due under a judgment or decree would give way to the IBC. It stated that the promulgation of IBC changed the application of insolvency law to such situations. The rights of such a judgment creditor would be subject to the waterfall mechanism provided by the IBC.

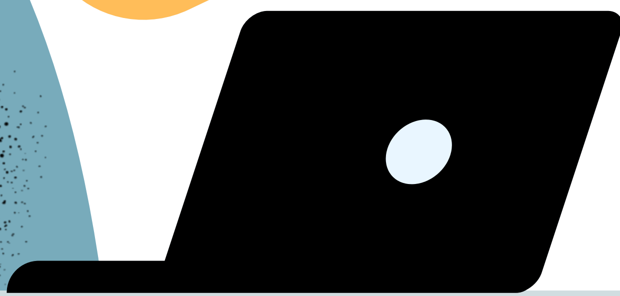
The National Company Law Appellate Tribunal ("NCLAT") has held that the National Company Law Tribunal ("NCLT") and the NCLAT can enquire into allegations of fraud [*Apnaghar Builders v. Intense Fitness and Spa Pvt. Ltd.*]. [Link]

The NCLAT has held that the NCLT and the NCLAT have jurisdiction to enquire into the fraud at the time of initiation of the CIRP. The NCLAT took note of Section 65(1) of the IBC which gives the NCLT the authority to levy a penalty on parties for malicious or fraudulent initiation of CIRP.

The NCLAT held that Section 66 and Section 69 of the IBC give the authority to the NCLT to enquire into the fraudulent conduct in both fraudulent initiation and fraudulent transactions in the CIRP process. As a corollary, NCLAT would also have jurisdiction over these matters. The NCLAT further held that fraudulent initiation of CIRP cannot be deployed to bypass an alternate remedy of appeal provided by Section 61 of IBC.

SECURITIES LAW



The Securities and Exchange Board of India ("SEBI") proposes stricter regulations for small and medium enterprises ("SMEs") initial public offerings ("IPOs") to mitigate risks for investors. [Link]

SEBI has proposed sweeping changes to SME IPO norms to enhance investor protection and compliance. Key proposals include introducing a minimum IPO size of Rs.10 crore and replacing the earlier framework with no minimum requirement. Additionally, the application size is proposed to increase from Rs.1 lakh to Rs.2 lakh, with a potential further hike to Rs.4 lakh. Furthermore, the promoter's offer-for-sale is proposed to be limited to 20% of the issue size.

For IPOs exceeding Rs.20 crore, SEBI has recommended the mandatory use of monitoring agencies to oversee fund utilization, while smaller IPOs would require certification by statutory auditors. Companies would be required to have a minimum operating profit of Rs.3 crore in at least two of the last three years and issue shares with a face value of Rs.10.

Additionally, related-party transaction norms would apply to SME-listed entities, except those with a paid-up capital of less than Rs.10 crore and a net worth of less than Rs. 25 crores.

Moreover, using IPO proceeds to repay loans related to promoters may be prohibited, and periodic certifications would ensure that funds raised for working capital are appropriately utilized. Offer documents must be made public for at least twenty-one days to ensure transparency.

SEBI has approved mutual funds ("MF") to invest in overseas MFs/Unit Trusts ("UT") that have exposure to Indian securities. [Link]

To simplify foreign investments for Indian MFs and help them diversify their portfolios, SEBI has released new guidelines. These guidelines allow Indian MFs to invest in overseas MFs/UTs that allocate up to 25% of their assets to Indian securities.
Indian MF schemes must ensure that their overseas funds do not surpass the 25% threshold. If the exposure exceeds this limit, a six-month period will be provided to rebalance the assets, during which no new investments in those overseas funds will be permitted.

Furthermore, all contributions from investors in the overseas MF/UT will be pooled into a single investment vehicle, ensuring proportional rights to returns or gains. The overseas MF/UT will not maintain separate portfolios, and all investors will share the fund's profits in proportion to their contributions.

SEBI suggests diversification of ownership of Clearing Corporations ("CC"). [Link]

SEBI has proposed changes to diversify the ownership of CCs, which are currently fully owned by stock exchanges. SEBI rules stop CCs from listing directly, but since stock exchanges can list, CCs may still face market pressures indirectly. To address this, SEBI has proposed two options.

The first option allows exchange shareholders to own 49% of the CC directly, with the parent exchange holding 51%. Over time, the exchange would be required to reduce its stake to 15%.

The second option proposes that exchange shareholders directly hold the entire equity of the CC, requiring changes to existing regulations, as stock exchanges must currently own at least 51% of the CC.

SEBI mandates pro-rata rights for Alternative Investment Fund ("AIF") investors in investments and proceeds. [Link]

SEBI has updated AIF rules, requiring investors' rights to be proportional to their commitments in the scheme. Investors' rights must be equal unless specified otherwise in certain provisions. Differential rights can be granted to select investors, provided they do not harm the interests of others. Large Value Funds are exempt from ensuring equal rights, provided that each investor agrees to waive this condition.

SEBI has proposed changes to the "skin in the game" rule for MF employees. [Link]

To ease the burden on non-investment employees, SEBI has proposed changes to the "skin in the game" rule for MF employees, aiming to ease compliance, especially for lower-earning staff. Currently, designated employees such as the chief executive officer, chief information officer, and fund managers must invest 20% of their annual salary and perks in the MFs they manage, with the amount locked for three years. SEBI suggests reducing this percentage based on salary brackets.

Accordingly, employees earning below Rs.25 lakh would not have a mandatory investment, while those with a cost to the company between Rs 25-50 lakh would invest 10%, those between Rs 50 lakh-1 crore would invest 14%, and those above Rs 1 crore would invest 18%.

Additionally, SEBI plans to exclude non-cash components such as employee stock ownership plans from the mandatory investment calculation.

SEBI is considering broadening the definition of unpublished price-sensitive information ("UPSI"). [Link]

To enhance transparency in market disclosures, SEBI is considering expanding the scope of UPSI under SEBI (Prohibition of Insider Trading) Regulations, 2015 to include a wider range of corporate events. The proposed changes aim to encompass activities such as planned fundraising, restructuring efforts, one-time bank settlements, and developments in corporate insolvency, like tribunal-approved resolution plans.

Additionally, SEBI suggests that the launch or conclusion of forensic audits related to financial misconduct be considered UPSI. Other proposed additions include actions by regulatory or judicial bodies, such as penalties or sanctions against a company or its key personnel.

SEBI proposes changes in the regulatory framework of Angel Funds (“AF”) in AIF. [Link]

In a bid to allow more investor participation SEBI has proposed major changes to the regulatory framework for AF under AIF. These changes include raising the maximum investment limit of Rs.10 crore to Rs.25 crore, while the minimum could drop from Rs.25 lakh to Rs.10 lakh.

Furthermore, only “accredited investors” would be allowed, and the lock-in period could be reduced from twelve months to six months for third-party sales. SEBI recommends requiring each fund to have at least three investors, excluding the manager or sponsor.

Additionally, employees, directors, and advisors of the fund or its manager may be permitted to invest with a minimum contribution of Rs.5 lakh, aligning their interests with external investors. A fund might also be allowed to allocate up to 25% of its capital to unlisted companies or other funds, fostering wider capital flow.

COMPANY LAW

The Reserve Bank of India (“RBI”) and SEBI introduce a framework for the reclassification of foreign portfolio investment (“FPI”) to foreign direct investment (“FDI”). [Link]

The RBI introduced a new framework to allow investors to convert their FPI to FDI as per Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019. This framework enables investors to reclassify their shareholding as FDI if their investment in a company exceeds 10%, which is the upper limit for FPI. This reclassification must be completed within five trading days of breaching the limit. Previously, the investors had to sell off their shares in case of a breach of the shareholding limit. With this change, the investors can reclassify the excess shareholding as FDI provided it meets all the regulatory criteria.

Additionally, this reclassification is not permitted in sectors where FDI is prohibited. To reclassify, the FPI needs approval from the government and consent from the investee company. If the FPI fails to divest or reclassify within the prescribed period, the entire investment will automatically be treated as FDI.

Similarly, SEBI has introduced amendments detailing the procedures for the reclassification of such holdings.

ARBITRATION LAW

Determination of the seat of arbitration in cross-border commercial disputes [*M/S Arif Azim Co. Ltd. v. M/S Micromax Informatics FZE*]. [Link]

In a recent clarification by the Supreme Court (**"SC"**) multiple aspects of the test to determine the seat of arbitration were dealt with. First, it upheld the exclusive jurisdiction principle, stating that only courts specified as 'seat' in an arbitration agreement have the authority to regulate and oversee proceedings. Second, it held that the BALCO principle applies only to arbitrations seated in India or those governed by Indian laws.

The application of the Shashoua principle was affirmed and made clear that even if the place of arbitration is labelled as the 'venue' it shall be generally considered the 'seat' of arbitration. Ultimately, courts must respect party autonomy, and the curial law and adhere to the doctrines of party autonomy, lex arbitri, and competence-competence, with conditional application of the doctrine of forum non conveniens doctrine.

These observations underscore the importance of having a single supervisory court linked to the seat. The notion that multiple jurisdictions could oversee the proceedings was rejected, thereby dismissing the application of the 'close connection test'.

Unilateral arbitrator appointment clauses in public-private contracts held invalid [*Central Organisation for Railway Electrification v. M/S ECI SPIC SMO MCML (JV) A Joint Venture Company*]. [Link]

In another landmark decision, the SC ruled that clauses that allow Public Sector Undertakings (**"PSUs"**) to unilaterally appoint arbitrators in disputes with private contractors are invalid. The Court held that despite the Arbitration and Conciliation Act, 1996 (**"A&C Act"**) allowing PSUs to maintain a panel of potential arbitrators, it does not empower the PSUs to mandate other parties to choose an arbitrator solely from that panel. Such clauses in agreements violate Article 14 of the Constitution, compromise the principles of equal treatment, and raise doubts about the independence of the arbitrators. The SC emphasized several key points in relation to this.

First, the principle of equal treatment applies to all stages of the proceedings. Second, unilateral appointment clauses restrict fair participation, thereby resulting in the absence of genuine participation in the selection process. This decision will apply prospectively to appointment applications, specifically in the case of three-member tribunals.

SC: Section 11 petitions must strike a balance between judicial intervention and party interest [*Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.*]. [Link]

In its recent judgement, the SC has reaffirmed the well-settled principles associated with Section 11 petitions under the A&C Act. It reiterated that, at the Section 11(6) stage, referral courts are only required to ascertain the existence of an arbitration agreement and determine whether the petitions are filed within the prescribed three-year limitation period.

According to it, this approach upholds the intention of the parties, at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. It also clarified that examining whether the claims are ex-facie time-barred, or discharged through “accord and satisfaction” is the prerogative of the arbitral tribunal.

However, limited judicial intervention at this stage may result in some claimants misusing the process by coercing parties into frivolous and lengthy arbitration proceedings. Acknowledging this, it suggested that for parties who have been dragged into unwarranted proceedings, the tribunal may direct that the costs of the arbitration shall be borne by the party found to have abused the process. This ultimately aims to protect the other party from unnecessary harassment and ensuring fairness in arbitration.

Unconditional withdrawal of arbitrator appointment application shall bar subsequent application on the same cause of action [*M/s HPCL Bio-Fuels Ltd. v. M/S Shahaji Bhanudas Bhad*]. [Link]

In a key ruling, the SC made it clear that a second application for the appointment of an arbitrator under Section 11(6) of the A&C Act is not maintainable if the first application was unconditionally withdrawn without the express permission to file afresh.

It further emphasised that such withdrawals imply that the party intends to abandon the arbitration process initiated under Section 21 of the A&C Act.

The court applied the principles of Order 23 Rule 1 of the Civil Procedure Code, 1908, and stated that these principles must be applied to ensure efficiency and prevent repetitive litigation in such applications. Although such principles are typically reserved for suits, the court justified its approach by emphasising the objectives of the A&C Act, namely, expeditious dispute resolution and avoiding prolonged litigation.

However, the court has distinguished this from applications which involve a fresh cause of action that arises after the initial invocation of the arbitration clause. In such cases, it stated that a subsequent appointment application remains permissible, thereby ensuring a balance between procedural finality and flexibility of arbitration proceedings.

COMPETITION LAW

The Competition Commission of India ("CCI") published draft amendments to the CCI (Manner of Recovery of Monetary Penalty) Regulations, 2011 ("CCI Regulations") inviting public comments. [Link]

To streamline the penalty recovery process and enhance regulatory compliance, the CCI has proposed amendments to its CCI Regulations. The CCI has requested stakeholders to submit their feedback on the proposed draft amendments by December 6, 2024. The regulations propose a central role for the recovery officer, who will oversee compliance, issue recovery certificates, and execute recovery actions in cases of default. The amendments also strengthen cross-agency cooperation.

Under the proposed rules, unpaid penalties may be referred to income tax authorities, where the defaulter will be classified as an "assessee in default" under the Income Tax Act, 1961. Any transfer or disposal of assets by a defaulter after a penalty is imposed becomes void unless made for adequate consideration and without knowledge of pending proceedings or with prior permission from the CCI. It issues a demand notice for penalties and grants thirty days for payment which is extendable upon request, with interest charged on delays. If unpaid, recovery actions are initiated, including asset attachments or referrals to tax authorities.

MISCELLANEOUS

Stamp duty demand of Rs. 218 Crore against Ambuja Cement quashed by Delhi HC [*Ambuja Cement Ltd. vs. Collector of Stamps, Delhi*]. [Link]

The key issue before the court was to decide whether the merger between two or more subsidiaries having the same parent company would be exempted from paying the stamp duty under the Notification no. 13 dated 25.12.1937 issued by the Central government (**"1937 Notification"**). The court interpreted the word conveyance under Section 2(10) of the Indian Stamp Act, 1899, stating that amalgamation whether involving movable or immovable property would be covered under the definition.

The 1937 notification exempts transfers between parent and subsidiary companies from stamp duty. This exemption applies to transfers between two subsidiary companies, provided that not less than 90% of the share capital of each subsidiary is in the beneficial ownership of a common parent company. The HC ruled that the 1937 Notification was applicable to the present case because both the transferee Company and Ambuja Cement India Pvt Ltd were wholly owned subsidiaries of the same parent company, thereby satisfying the conditions for the exemption.

The government notifies the Telecommunications (Critical Telecommunication Infrastructure) Rules, 2024. [Link]

The government introduced the Telecommunications (Critical Telecommunication Infrastructure) Rules, 2024 on November 22, 2024. The rules mandate telecom entities designated as Critical Telecommunication Infrastructure (**"CTI"**) to grant government-authorized personnel access to inspect software, hardware, and data. These rules are part of the Telecommunications Act, 2023, enabling the government to designate telecom networks as CTI if their disruption could severely impact national security, public health, the economy, or safety.

The rules require the telecom entities to appoint a chief telecom security officer, to overlook cybersecurity measures and report incidents within six hours. Further, remote repairs or maintenance from outside India requires government approval, and upgrades to software or hardware must be reviewed within fourteen days.

Draft of Telecommunications (Regulatory Sandbox) Rules, 2024 issued by the Department of Telecommunication. [Link]

The Department of Telecommunication issued the draft of the Telecommunications (Regulatory Sandbox) Rules, 2024, on November 27, 2024. The draft prescribes how regulatory sandboxes are to be set up. These regulatory sandboxes are meant to test new telecom services, products, and processes on a limited set of test users for a specified time period.

Under the proposed rules, the union government can set up a regulatory sandbox under two circumstances. First, if the union government, based on its own evaluation, concludes that there is a necessity for one. Second, upon receiving a proposal from an applicant, either of its own volition or in response to a request for proposals by the government.

As per the draft rules, a sandbox can be valid for at most 24 months. The government can increase its validity up to 12 months at a time only upon a request for extension either from an approved applicant or upon a recommendation from the governance committee.

Telecommunications (Temporary Suspension of Services) Rules, 2024 notified by the Ministry of Communications. [Link]

The Ministry of Communication notified the Telecommunications (Temporary Suspension of Services) Rules, 2024 to enhance procedural safeguards and transparency in the process of suspending telecommunication services. It provides that directions to suspend any telecommunication service can only be issued by a suspension order, subject to its confirmation by the competent authority, within 24 hours.

It further states that all suspension orders need to be published stating the reasons for such orders. Subsequently, the suspension order should be forwarded to a review committee (**“RC”**) within 24 hours of the issuance. The RC will meet within 5 days of the issuance of any suspension order and record its findings.

CCL

Kerala HC rules that income from the sale of immovable properties is to be treated as 'capital gains', not 'business income'. [*M/s Knowell Realtors India Pvt. Ltd. v. Assistant Commissioner of Income Tax*]. [Link]

The Kerala HC has stated that income from the sale of immovable properties is to be treated as 'capital gains', not 'business income' for taxation purposes. The HC observed that the requirement of ensuring consistency in tax assessments cannot be overlooked, especially while categorizing the nature of the activity carried on by an assessee to earn its income for taxation purposes.

SC rules that mobile towers & pre-fabricated buildings ("PFB") qualify as 'capital goods' for central value-added tax ("CENVAT") credit [*Bharti Airtel Ltd. v. Commissioner of Central Excise*]. [Link]

The issue before the court was whether mobile service providers (**"MSP"**) could get the benefit of CENVAT credit under the CENVAT Credit Rules, 2004 (**"CENVAT Rules"**). This pertains to the availability of CENVAT credit on PFBs owned by MSPs and passive infrastructure support service providers.

The SC held that PFBs supporting base transceiver systems qualify as "capital goods" under CENVAT Rules. It further clarified that mobile towers and PFBs, being movable goods used in telecommunication services, also qualify as "inputs" eligible for credit benefits.

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