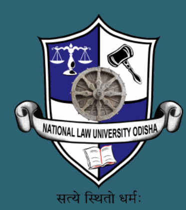

MONTHLY CORPORATE LAW UPDATES

DECEMBER, 2023

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

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1. Real Estate Regulatory Authority ("RERA") is empowered to appeal against the initiation of the Corporate Insolvency Resolution Process ("CIRP") and qualifies as an "aggrieved person": National Company Law Appellate Tribunal ("NCLAT") [*Real Estate Regulatory Authority v. D.B. Corp Ltd & Anr*]. [Link]

Section 61 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") provides for appeals to be filed by 'any aggrieved persons' before the NCLAT. The tribunal affirmed RERA's status as an aggrieved person under Section 61 of the IBC, enabling it to initiate an appeal. This empowers RERA to contest the CIRP initiation order in real estate insolvency cases.

2. Debt resulting from foreign arbitral awards cannot be categorized as financial debt, but can be designated as 'other debts': National Company Law Tribunal ("NCLT") [*Rishima SA Investments LLC (Mauritius) v. Avishek Gupta*]. [Link]

Debts created due to arbitral awards do not fulfill the ingredients of Section 5(8) of the IBC, which provides for 'financial debts', and resultantly, the creditor cannot be categorized as a financial creditor. However, as the debt results from a decree, it will be classified as 'other debts' and upon finalization of the arbitral award, the claim ought to be completely admitted and provided for in the resolution plan.

3. The promoter can submit a resolution plan even if the Micro, Small & Medium Enterprises ("MSME") registration is obtained after the initiation of the CIRP: Supreme Court ("SC") [*Hari Babu Thota*]. [Link]

Section 29A of the IBC provides for the categories of persons who cannot submit a resolution plan. It includes promoters of corporate debtors. However, Section 240A of the IBC exempts MSME corporate debtors from the restrictions of Section 29A. Consequently, the promoter of an MSME would be eligible to submit a resolution plan.
The SC has held that obtaining MSME registration post the initiation of CIRP does not impede promoters of MSMEs from submitting resolution plans. This decision aims to foster broader participation in the resolution process.

4. The limitation period for challenging an order of the NCLT starts from the date of the order: SC [*Sanjay Pandurang Kalate v.Vistra ITCL (India) Limited*]. [Link]

The SC ruled that the limitation period for filing an appeal to NCLAT against NCLT's order commences from the date of the pronouncement of NCLT's order.

Section 61 of the IBC provides for a limitation period of 30 days for challenging an order of the NCLT before the NCLAT. After the expiry of the limitation period, a further extension of 15 days can be provided, subject to the discretion of NCLAT.

5. Insolvency and Bankruptcy Board of India ("IBBI") publishes guidelines for Insolvency Professionals ("IP") to serve as Bankruptcy Trustees, Liquidators, Resolution Professionals ("RP"), and Interim Resolution Professionals. [Link]

The process for setting up a panel of IP to serve as interim resolution professionals, liquidators, RP, and bankruptcy trustees is outlined in these rules. These guidelines will be effective from 1st January 2024 to 30th June 2024. To prevent administrative delays in the IP appointment process, it was thought necessary to compile the panel of IPs ahead of time and share it with the adjudicating authority ("**AA**"). These guidelines further lay down the eligibility criteria, scoring criteria and conditions.

6. When a petition is dismissed as withdrawn and the date of default and amount are different, the previous demand notice issued under Section 8 of the IBC cannot be considered a legitimate demand notice for filing a new petition under Section 9: NCLT [Willis Lease Finance Corporation v. SpiceJet Ltd.]. [Link]

The NCLT concluded that a prior demand notice issued under Section 8 of the IBC cannot be regarded as a valid demand notice for filing a new petition under Section 9 when the petition was dismissed as withdrawn and the date of default and amount are different.

Section 8(1) of the IBC provides that an operational creditor is required to deliver a demand notice for unpaid operational debt and the same is sine qua non for filing and maintaining a petition under Section 9 of the IBC.

Section 8 requires the entire amount to be in the demand notice. Section 9 of the IBC mandates filing a petition only after the issuance of a demand notice under Section 8 of the IBC and without a demand notice no petition can be preferred and maintained.

7. The information and declaration required by the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) ("IRP PGCD") Rules, 2019 must also be provided by IPs who are proposed for appointment as RPs: IBBI. [Link]

Through a recent circular, the IBBI has mandated that the IP who seeks to be appointed as RP in the insolvency resolution process of personal guarantors to corporate debtors shall provide the details and declaration in Part IV of Form C of the IRP PGCD Rules to the creditor for the consideration of the AA.

8. A joint investment in a property on a profit-sharing model cannot be said to be a financial debt: NCLAT [*M/S Realpro Realty Solutions v. Sanskar Projects and Housing*]. [Link]

The NCLAT determined that an investment made by the appellant under a profit-and-loss sharing arrangement could not be considered a debt. The appellant and respondent had entered into a specific business arrangement to carry out the development of the subject property, wherein they had committed to pooling their resources proportionately in a predetermined ratio of 25:75 and sharing the associated costs, profits, and losses.

1. Alternative Investment Funds ("AIF") regulations allow Category III AIFs to invest unutilized funds and divestment proceeds in specific liquid assets: Securities and Exchange Board of India ("SEBI"). [Link]

SEBI released a circular as an informal guideline clarifying the status of permanent mutual fund investments by a Category III AIF. Except for liquid funds used as short-term investments, mutual funds are currently prohibited for Category III AIFs.

Under Regulation 2(1)(o) of AIF Regulations, "investee company" means any company, special purpose vehicle or limited liability partnership or body corporate or real estate investment trust or infrastructure investment trust in which an AIF invests.

However, the circular clarified that the un-invested portion of the investable funds and divestment proceeds pending distribution to investors of AIFs (including Cat III AIFs) may be invested in liquid mutual funds or bank deposits or other liquid assets of higher quality.

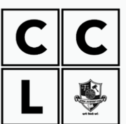
2. SEBI suggests reducing the face value of Non-Convertible Debentures ("NCDs") from Rs. 1 lakh to Rs. 10,000: SEBI. [Link]

SEBI has proposed to permit corporates to issue NCDs and non-convertible redeemable preference shares with a face value of Rs. 10,000. This is against the current system wherein the face value of NCDs is Rs. 1,00,000. The change has been proposed in order to increase the participation of retail investors in the corporate bond market.

A consultation paper has been floated for public comments on how the proposal to reduce face value of NCDs from 1 lakh to 10,000 will impact various stakeholders.

3. SEBI revises framework requiring Stock Brokers/Clearing Members to upstream clients' funds to Clearing Corporations ("CCs"): SEBI. [Link]

SEBI has released a revised framework in order to ensure that the principle of upstreaming of client's funds is complied with and operational difficulties are suitably addressed. Stock Brokers/Clearing Members shall upstream all the clients' clear credit balances to CCs on End of Day basis. Such upstreaming shall be done only in the form of either cash, lien on Fixed Deposit Receipts ("**FDRs**") created out of clients' funds, or pledge of units of Mutual Fund Overnight Schemes ("**MFOS**") created out of clients' funds.



4. If a broker defaults, a banker may enforce pledged shares for an overdraft (“OD”); SEBI may not declare a pledge to be illegal: Securities Appellate Tribunal (“SAT”). [Link]

SAT held that a banker can invoke a pledge where a broker pledges the shares of clients for an OD and defaults in repaying the OD. It further held that SEBI cannot declare the pledge invalid or illegal.

5. In addition to T+1, SEBI suggests T+0 and Instantaneous Settlement of Trades for the Indian securities markets: SEBI. [Link]

Consultation Papers on the introduction of optional T+0 and optional Instant Settlement of Trades, in addition to T+1 Settlement Cycle in Indian securities markets have been released by SEBI.

SEBI has proposed to introduce the shorter settlement cycles in two phases. In phase 1, SEBI is planning to bring in the T+0 settlement cycle. Here, for share trades done till 1.30 PM, settlement of funds and securities will be completed on the same day by 4.30 PM. In phase 2, the regulator will introduce an optional immediate trade-by-trade settlement for transactions which will be carried out till 3.30 pm.

An instant settlement mechanism will eliminate the risk of settlement shortages by requiring both funds and securities to be available prior to placing the order, enabling instant receipt of funds and securities as opposed to the current pay-out on T+1 day.

6. Revised framework for computation of Net Distributable Cash Flow (“NDCF”) by Real Estate Investment Trusts (“REITs”) and Infrastructure Investment Trusts (“INVITs”). [Link]

SEBI has decided to standardize the framework for the calculation of NDCF to promote Ease of Doing Business. NDCF is the key mechanism in INVITs/REITs that assures investors a stable income with capital protection through reliable dividends/returns.

Accordingly, the revised framework for the computation of NDCF shall be as per the computation formula provided in the circulars.

Additionally, both the trust and its Special Purpose Vehicles ("**SPVs**") must guarantee the fulfillment of a minimum 90% distribution of NDCF on a cumulative periodic basis throughout a given financial year. Furthermore, it is essential to note that any restricted cash should not be factored into the computation of NDCF by the SPV, REITs, or INVITs.

7. Simplification of requirements for grant of accreditation to investors. [Link]

In order to provide flexibility and facilitate ease of accreditation of investors, SEBI has simplified the requirements for granting accreditation to investors. An accredited investor is a financial entity or an individual allowed by the SEBI to trade in securities that are not registered with the financial authorities.

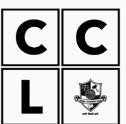
The accreditation agencies, also functioning as Know Your Customer ("**KYC**") Registration Agencies ("**KRAs**") within the prescribed framework, now have the authority to access KYC documents from their records and those of other KRAs for accreditation purposes.

Additionally, SEBI has extended the validity period of accreditation certificates. For applicants meeting the eligibility criteria for the preceding financial year, the accreditation certificate is now valid for two years.

In cases where the applicant is a newly incorporated entity without financial information for the preceding financial year but satisfies the applicable net-worth criteria at the time of application, the accreditation certificate issued will also be valid for two years.

8. SEBI mandates a Software as a Service ("SaaS") Model for risk management for CCs [Link]

In order to ensure business continuity amid software disruptions, SEBI has mandated CCs to establish their critical Risk Management Systems ("**RMS**") using a SaaS model.



The RMS is a critical system of CC that plays an important role in ensuring the smooth and uninterrupted functioning of the securities market by carrying out online real-time risk management of trades. The SaaS is a software distribution model in which a cloud provider hosts applications and makes them available to end users over the internet.

Each CC is required to develop its RMS-SaaS utilizing the RMS software of a peer institution to enable a seamless transition in the event of an RMS shutdown. This proactive measure will enhance the resilience of CCs, mitigate potential operational risks, and contribute to a more robust market infrastructure.

1. Once a party has consented to the formation of an arbitral tribunal, they cannot subsequently demand adherence to pre-arbitral procedures: Delhi High Court ("HC") [*N.K. Sharma v. The General Manager Northern Railways*]. [Link]

The Delhi HC clarified that once a party agrees to establish an arbitral tribunal, it cannot subsequently oppose the appointment of an arbitrator based on alleged non-fulfillment of pre-arbitral steps. The petitioner sought the appointment of an independent sole arbitrator after disagreements arose during the arbitration process. The Court dismissed the objection, emphasizing the agreement's binding nature to constitute the arbitral tribunal. The petition was allowed, and subsequently, an arbitrator was appointed.

2. Arbitration agreement can bind non-signatories: SC upholds 'Group of Companies' doctrine [*Cox and Kings Ltd v. SAP India Pvt Ltd*]. [Link]

A Constitution Bench of the SC affirmed that the 'group of companies' doctrine is integral to Indian arbitration jurisprudence. The decision clarified that an arbitration agreement can bind non-signatories, emphasizing the importance of the doctrine in interpreting complex transactions involving multiple parties and agreements. The Court held that non-signatories can be bound if there is a defined legal relationship and an intention to be bound through conduct.

3. An ex-parte arbitral award becomes invalid if the notice served is improper or flawed: Allahabad HC [*Bharat Pumps and Compressors Limited v. Chopra Fabricators & Manufacturers Pvt Ltd*]. [Link]

The Allahabad HC has ruled that an arbitration award passed ex-parte is invalidated by improper notice of arbitration. Additionally, the court emphasized the lack of proper notice to the appellant, citing Section 14(2) of the Arbitration and Conciliation Act, 1996 ("**A&C Act**"), and criticized the expedited proceedings and non-disclosure of the award during the case's pendency. The flawed proceedings raised concerns about fairness, leading to the court's decision.

4. A statement made before the arbitrator withdrawing an objection to unilateral appointment is insufficient; an "express agreement" is necessary under Section 12(5) of the A&C Act: Delhi HC [*Smaaash Leisure ltd v. Ambience Commercial Developers Pvt Ltd*]. [Link]

The Delhi HC ruled that a party's counsel withdrawing objections to a unilaterally appointed arbitrator does not meet the 'express agreement' requirement under Section 12(5) of the A&C Act. Section 12(5) of the Act outlines that individuals falling within the categories specified in the Seventh Schedule, in relation to the parties, counsel, or the subject matter of the dispute, are ineligible to be appointed as arbitrators. This prohibition stands, regardless of any express agreement.

However, parties have the option to waive this restriction through a subsequent written agreement after a dispute has arisen. It further held that when the petitioner objects to the appointment of the proposed arbitrators, the proper course for the respondents is to seek a court appointment under Section 11(5) and (6) of the A&C Act. Moreover, the court emphasized that an arbitrator's ineligibility renders proceedings void, and awards by such arbitrators hold no legal value.

5. The cancellation of a deed is considered an action in personam, not in rem, and is deemed arbitrable: SC [*Sushma Shivkumar Daga v. Madhurkumar Ramkrishnaji Bajaj*]. [Link]

The SC allowed arbitration in a property dispute and further rejected the stand that a suit for cancelling a deed was non-arbitrable as it pertained to an action in rem. The court held that deed cancellation constitutes an action in personam and is arbitrable based on the expansive language of arbitration. Moreover, the Court emphasized the judiciary's limited role in arbitration matters post the 2015 amendment which brought significant changes in sections 8 and 11 of the Act.

6. Courts should not unnecessarily interfere with tribunal's interim orders while deciding on a Section 37 petition: Calcutta HC [*Concrete Developers LLP v. Gaurav Churiwal and Ors*]. [Link]

The Calcutta HC has held that when a tribunal grants interim relief to a party by exercising its power under Section 17 of the A&C Act, the courts should not cursorily interfere with such an order. When an interim order is challenged under Section 37 of the A&C Act, the courts ought to intervene only if the order is perversely unjust.

7. An uncalculated claim cannot be sought while executing an arbitral award: Delhi HC [*H.P. Cotton Textile Mills Ltd v. The Oriental Insurance Company Ltd*]. [Link]

The Delhi HC has held that at the stage of execution of the award, it is not open for a decree holder to seek a claim that remained uncalculated by the tribunal because of the failure of the parties to provide proofs in that regard.

8. Improper service of notice leads to nullification of an ex-parte arbitral award under the Arbitration Act, 1940 ("Arbitration Act"): Allahabad HC [*M/S Bharat Pumps and Compressors Limited v. M/S Chopra Fabricators and Manufacturers Private Ltd*]. [Link]

The Allahabad HC has held that proper service of notice to the parties post signing of the arbitral award by the arbitrators is an essentiality as provided under Section 14(2) of the Arbitration Act. In the absence of such a notice, the ex-parte arbitral award cannot be executed.of the arbitral award by the arbitrators is an essentiality as provided under Section 14(2) of the Arbitration Act. In the absence of such a notice, the ex-parte arbitral award cannot be executed.

9. Withdrawal of objection to the unilateral appointment of an arbitrator doesn't amount to an 'express agreement in writing' as prescribed in Section 12(5) of the A&C Act: Delhi HC [*Smaaash Leisure Ltd v. Ambience Commercial Developers Pvt Ltd*]. [Link]

The Delhi HC has held that when a party raises objection to the unilateral appointment of an arbitrator but later withdraws it, that doesn't fulfil the 'express agreement in writing' requirement of Section 12(5) of the A&C Act.

Section 12 provides the grounds on which the eligibility of an arbitrator can be challenged. Its sub-section 5 provides that a person is ineligible to be appointed as an arbitrator if their relationship with any of the parties lies under any of the categories provided under Schedule VII of the Act. However, the proviso to this sub-section provides that the applicability of this subsection can be waived if there is an express agreement in writing between the parties in that regard.

10. A settlement agreement cannot be challenged on the ground of fraud or coercion: Delhi HC [Usha Bansal v. Genesis Finance Co. Ltd]. [Link]

The Delhi HC has held that when a settlement agreement is entered into between the parties following a voluntary mediation proceeding, the same cannot be challenged under Section 34 of the A&C Act alleging fraud or coercion.

1. Reserve Bank of India (“RBI”) regulates investments in AIFs to curb the practice of evergreening. [Link]

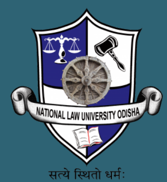
Loans provided to borrowers by Non-Banking Financial Companies (“**NBFCs**”) are regulated by the RBI and have to be returned within a maximum 90-day grace period. If there is a delay beyond such grace period, the NBFC has to classify the loan as a non-performing asset (“**NPA**”). An increase in NPA figures would deter investors and also negatively impact the NBFCs’ credit rating.

To prevent such a situation, many NBFCs often employed the practice of ‘evergreening loans’ to hide bad loans and non-performing assets.

The process employed by the NBFCs, as the lender, usually involved investing in an AIF, and simultaneously, the borrower issuing bonds for their defaulting enterprise. The AIF, in turn, invested and purchased the borrower’s bonds, saving the defaulting venture. The borrower in turn utlised the money invested by the AIF to repay the loan to the NBFC within the stipulated 90-day grace period, preventing it from being declared as a NPA. The borrower then had, at its disposal, additional time to repay the loan to the AIF.

This practice is detrimental as it presents a misleading picture of the asset quality and profitability and poses risks to credit discipline and misguides both investors and regulators.

For these reasons, the RBI has now regulated investments in AIFs. The regulations provide that NBFCs may still invest in AIFs, but only if the AIF does not have downstream investments, either directly or indirectly, in a debtor company of the NBFC. If such a transactional chain already exists, the NBFC will have to exit the venture within 30 days. Failure to achieve this mandates the NBFC to incur an additional expense, equivalent to its investment in the AIF, and create a new provision accounting for 100% of the invested amount in its books.



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