MONTHLY CORPORATE LAW UPDATES

MARCH, 2024

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1. An advance paid by a speculative buyer is not a debt under the Insolvency and Bankruptcy Code, 2016 ("IBC"): National Company Law Appellate Tribunal ("NCLAT") Delhi [*Naman Infradevelopers Pvt Ltd v Metcalfe Properties Pvt Ltd*]. [Link]

The NCLAT Delhi has held that an advance payment made by a speculative buyer in a real estate deal does not qualify as a debt under the IBC. Section 5(8) of the IBC defines financial debt as a debt along with interest, if any, that is disbursed against consideration for the time value of money.

2. When the Request for Resolution Plan ("RFRP") and the resolution plan are silent regarding the profits accrued during the corporate insolvency resolution process ("CIRP"), they shall be allocated to the financial creditors: National Company Law Tribunal ("NCLT") Mumbai [*Kalyan Janata Sahakari Bank Ltd & Anr v Arun Kapoor*]. [Link]

The NCLT Mumbai has held that profits accrued by the corporate debtor during the CIRP shall be allocated to the financial creditors if the RFRP and the resolution plan are silent about it. NCLT placed reliance upon the commercial wisdom of the committee of creditors ("**CoC**") and the intent of the resolution plan to secure the interest of the financial creditors.

3. A Memorandum of Understanding ("MoU") and an extract of ledger are insufficient to establish a financial debt: NCLAT [*D S Kulkarni & Associates v Manoj Kumar Aggarwal*]. [Link]

The NCLAT has held that a MoU and an extract of ledger are not sufficient to establish a financial debt under the IBC. The claim of the appellant that the MoU establishes a financial debt under Section 5(8)(f) of the IBC was rejected by the NCLAT. As per Section 5(8)(f), a financial debt includes any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.

4. A resolution professional becomes an aggrieved party the moment its decision is overturned by the NCLT: NCLAT Delhi [*Devendra Singh v Homebuyers of Sidhartha Buildhome Pvt Ltd*]. [Link]

The NCLAT Delhi has held that when the decision of a resolution professional is repealed by the NCLT, it becomes an aggrieved party and can appeal to the NCLAT. However, this is allowed when the resolution professional is acting neutral and not taking any sides.

1. The Securities and Exchange Board of India ("SEBI") launches a beta version of the T+0 rolling settlement cycle on an optional basis in equity cash markets. [Link]

In order to boost efficiency and transparency in the securities market, SEBI introduces T+0 rolling settlement on an optional basis in addition to the existing T+1 settlement cycle. The beta version will be introduced for a limited set of 25 scrips and with a limited number of brokers. The proposed T+0 settlement ensures that funds and securities for trade are settled on the same day they are executed. This change aims to enhance liquidity for domestic retail investors, as traders will now receive trade proceeds instantly, eliminating the one-day lag experienced with the current T+1 settlement system.

Accordingly, all surveillance measures applicable to the T+1 settlement cycle will also apply to scrips included in the T+0 settlement cycle. However, T+0 prices will not factor into index calculations or settlement price computations, and there will be no distinct closing price for securities traded within the T+0 segment.

2. SEBI relaxes mandate for additional disclosures by Foreign Portfolio Investors ("FPIs"). [Link]

SEBI has eased the rules regarding additional disclosures by FPI having over 50% of its Indian equity assets under management ("**AUM**") in a corporate group. Initially, these additional disclosures were mandated by SEBI to protect investor interests in securities and foster the development of the securities market.

In order to avail the latest relaxation, the apex company in such groups should have no identifiable promoter. Further, FPI holdings in the corporate group, excluding the apex company, must not exceed 50% of their Indian equity AUM. Additionally, the combined holdings of all FPIs in the apex company should remain below 3% of its total equity share capital.

1. It is the responsibility of the arbitrator to determine whether a party's claims are time-barred: Telangana High Court ("HC") [*M/S Sms Limited v Uranium Corporation of India Limited*]. [Link]

The Telangana HC held that the determination of whether a party's claims are time-barred should be done by the Arbitral Tribunal. The bench, taking into account the provisions laid out in Section 16 of the Arbitration and Conciliation Act, 1996 ("**A&C Act**"), has concluded that the matter of limitation is subject to adjudication by the Arbitral Tribunal. Sub-section (1) of Section 16 explicitly empowers the Arbitral Tribunal to rule on its jurisdiction, encompassing any objections related to the existence or validity of the arbitration agreement.

2. Section 12(5) and the 7th Schedule of the A&C Act apply to institutional arbitrations as well: Bombay HC [*Era International v Aditya Birla Global Trading India Pvt. Ltd*]. [Link]

The Bombay HC held that Section 12(5) and the 7th Schedule of the A&C Act apply to institutional arbitrations as well. Further, the courts retain the authority to terminate an arbitrator's mandate based on grounds under Section 14(1)(a) of the A&C Act. Dismissal of challenges to the appointment of an arbitrator by arbitral institutions doesn't nullifies the court's jurisdiction, especially with regard to the 7th Schedule.

Section 12(5) provides that any person whose relationship with the parties, counsel, or subject matter of the dispute falls under any of the categories specified in the 7th Schedule shall be ineligible to be appointed as an arbitrator. Section 14(1)(a) provides that the mandate of an arbitrator shall terminate the moment he becomes de jure or de facto unable to perform his functions or fails to act without undue delay.

3. Membership of an arbitral institution is not a necessary requirement for invoking arbitration: Delhi HC [*Rani Construction v Union of India*]. [Link]

The Delhi HC has held that when the arbitration agreement mentions that any dispute will be settled through institutional arbitration, it doesn't entail that the parties must take membership of that arbitral institution. An arbitral institution cannot force the parties to take its membership as a condition for appointing the arbitrators.

1. The Ministry of Corporate Affairs ("MCA") revises thresholds under the Competition Act, 2022, for mergers or amalgamations. [Link]

The MCA has revised the asset and turnover thresholds outlined in Section 5 of the Competition Act, 2002. Entities are now exempt from notification requirements where the value of assets acquired, controlled, merged, or amalgamated does not exceed Rs. 450 crores or turnover does not surpass Rs. 1250 crore in the immediately preceding financial year. The new exemptions will be in place until 6 March, 2026.

2. The MCA enhances the threshold for value of assets and turnover for combinations. [Link]

The MCA enhances the threshold for value of assets and turnover for the purpose of Section 5 of the Competition Act, 2002, i.e., combinations. The threshold is increased by one hundred and fifty percent, based on the wholesale price index.

3. The Ministry of Corporate Affairs releases the report of the Committee on Digital Competition Law. [Link]

The Committee on Digital Competition Law released its report, proposing the enactment of a Digital Competition Act for the ex-ante regulation of digital markets. Among significant suggestions are the regulation of large digital enterprises having significant market influence and their categorization as Systemically Significant Digital Enterprises for ex-ante regulation ("**SSDE**"). For SSDEs, non-compliance with the requirements may lead to a fine equivalent to up to 10% of global turnover.

4. The CCI orders an investigation into Google's practices regarding its Play Store policies. [Link]

The CCI has ordered an investigation into Google's Play Store billing policy, citing concerns over the imposition of an 'unfair service fee' on app developers. The order directs the Director General of CCI to conduct the probe and submit a report within 60 days. This move follows Indian startups raising issues about Google's alleged non-compliance with its earlier decision to allow third-party billing services for in-app purchases. Google is still imposing a service fee on developers, even for transactions made through third-party billing services.

5. The CCI notifies the CCI (Settlement) Regulations, 2024. [Link]

The Competition (Amendment) Act, 2023, introduced Sections 48A and 48C in the Competition Act, 2002, to establish a settlement mechanism. In 2023, the CCI released the Draft Settlement Regulations 2023 for public comment. After receiving constructive comments from 41 stakeholders, CCI has now notified the CCI (Settlement) Regulations, 2024. The regulations deal with filing and disposing of settlement applications.

A settlement application is one that is filed by a settlement applicant before the CCI for the settlement of proceedings initiated owing to an alleged violation of Section 3 or 4 of the Competition Act, 2002. Under the Competition Act, 2002, Sections 3 or 4 deal with anti-competitive agreements and abuse of dominant position, respectively.

6. The CCI notifies the CCI (Commitment) Regulations, 2024. [Link]

The Competition (Amendment) Act, 2023, introduced Sections 48B and 48C in the Competition Act, 2002, to establish a commitment mechanism. In 2023, the CCI released the Draft Commitment Regulations 2023 for public comment. After receiving constructive comments from 39 stakeholders, CCI has now notified the CCI (Commitment) Regulations, 2024. The regulations deal with filing and disposing of commitment applications.

A commitment application is one that is filed by a commitment applicant before the CCI, making commitments with regards to proceedings set in motion under Section 26 of the Competition Act, 2002. Such proceedings are initiated because of contravention of Sections 3 or 4 of the Competition Act, 2002.

7. The CCI notifies the CCI (Determination of Turnover or Income) Regulations, 2024. [Link]

The CCI has released the CCI (Determination of Turnover or Income) Regulations, 2024. It deals with the determination of turnover or income for enterprises as well as the determination of income for individuals for the purpose of penalty.

8. The CCI releases the CCI (Determination of Monetary Penalty) Guidelines, 2024. [Link]

The CCI has released the CCI (Determination of Monetary Penalty) Guidelines, 2024. The guidelines provide the methodology for the determination of penalties to be levied on enterprises or individuals found in contravention of the Competition Act, 2002.

MISCELLANEOUS

1. The Reserve Bank of India ("RBI") releases the omnibus framework for recognising self-regulatory organisations ("SROs") for regulated entities ("REs") of the RBI. [Link]

The RBI has introduced the omnibus framework for recognising SROs for REs of the RBI. The framework clearly outlines the characteristics of an ideal SRO, like regulatory compliance, contributing to the sustainable development of its sector, and operation with objectivity and credibility. The framework further lays down the objectives and responsibilities of the SROs towards their members and the RBI.

An entity aiming to operate as an SRO must fulfil the criteria laid down in the framework. Some of the main criteria are that the applicant must be a non-for-profit company registered under Section 8 of the Companies Act, 2013, and no entity shall hold 10% or more of its paid-up share capital, either singly or acting in concert.

2. The Department for Promotion of Industry and Internal Trade ("DPIIT") notifies amendments to foreign direct investment ("FDI") policy on space sector. [Link]

On 21 February 2024, the government of India proposed amendments to the FDI policy in the space sector for its liberalization. Recently, on 5 March 2024, the DPIIT notified those amendments. Now, 100% FDI is allowed in making components of a satellite. Further, up to 74% FDI is allowed through the automatic route for satellite manufacturing & operation, satellite data products, and ground segment & user segment. Beyond 74%, government approval is required. For launch vehicles and associated systems or subsystems, creation of spaceports for launching and receiving spacecraft, 49% FDI is allowed through the automatic route.

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