



MONTHLY CORPORATE LAW UPDATES

OCTOBER, 2022

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

1. Insolvency & Bankruptcy Board of India (“IBBI”) (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations Amended [\[Link\]](#)

Earlier, IBBI had passed an amendment that allowed Insolvency Professionals (“IP”) entities to become professional members. In light of this, IBBI has notified that IP entities cannot be enrolled as professional members unless they're eligible to be IPs. Additionally, IP agencies are now required to disclose details of the partners or directors of the IP entities in the registry of professional members.

2. Reserve Bank of India (“RBI”) permits Asset Reconstruction Companies (“ARC”) to act as Resolution Applicants (“RA”) under the Insolvency and Bankruptcy Code, 2016 (“IBC”) [\[Link\]](#)

Previously, at one occasion ARCs were declined to act as Resolution Professionals keeping the business of ARCs merely to securitisation and asset reconstruction. Changing its view, RBI has now allowed ARCs to act as RA and file resolution plans in accordance with the IBC. However, to qualify RA, the central bank has amongst other things mandated ARCs to maintain a net owned fund and formulate a board-approved policy on the role of RA.

3. Related parties of a financial creditor can be considered as RA: National Company Law Tribunal (“NCLT”). *[Trimex Industries Pvt. Ltd. v M/S. Sathavahana Ispat Ltd. & Ors.]* [\[Link\]](#)

Under this case, the NCLT has ruled that the related parties of the financial creditor are not prohibited from submitting a resolution plan as per the IBC. The adjudicating authority (“AA”) opined that the resolution plan cannot be termed as 'unsustainable' simply because the RA was a related party of a financial creditor. The same does not also have any statutory basis. Therefore, the Committee of Creditors cannot be denied the right to consider the resolution plan submitted by the related party if any financial creditor.

4. Jurisdiction to pass liquidated damages lies with the civil court and not the AA: NCLT. [*Samith R. Arasa v. Bijendra Kumar Agarwal*] [\[Link\]](#)

In this case, the NCLT has held that it does not have the jurisdiction to grant liquidated damages to the petitioner. Furthermore, the AA concluded that it is not empowered to pass a liquidation order as the right to grant liquidated damages lies with the civil court.

5. Past tax liabilities shall stand extinguished from date of approval of resolution plan, if they are not considered as a part of the resolution plan: NCLT. [*Subodh Kumar Agrawal v Taguda Pte. Limited*]. [\[Link\]](#)

The NCLT has held that past liabilities that arose from government levies or tax dues and don't form the part of the resolution plan, shall be considered as 'extinguished'. The liabilities stand to be extinguished from the date of approval of the resolution plan. Additionally, the AA ruled that tax liability on income from implementation of the resolution plan, is to be waived off on account of writing back of the creditor's unpaid dues.

6. A pre-existing dispute cannot be determined by the principle of 'balance of probabilities': Supreme Court ("SC") [*Rajratan Babulal Agarwal v Solartex India Pvt. Ltd. & Ors*]. [\[Link\]](#)

The standards of proving a fact in a civil case is through the test of preponderance of probability. In the present case, the SC has held that the standards on treatment of pre-existing disputes under the IBC cannot be equated with the burden of proof required for deciding a civil suit. Therefore, any pre-existing dispute must be employed as per the jurisdiction of IBC and not treated as a civil matter.

1. Governing Council for Social Stock Exchanges (“SSE”): Securities & Exchange Board of India (“SEBI”). [\[Link\]](#)

SEBI has notified that every SSE shall constitute a Social Stock Exchange Governing Council (“SGC”) to oversee its functioning. The SGC will provide guidance to the SSE with regards to registration, fundraising and disclosures by the SSE. The SGC shall comprise of at least 7 individuals who have the relevant expertise to contribute towards the development of the SSE.

2. Guidelines for Portfolio Managers (“PM”): SEBI [\[Link\]](#)

The SEBI (Portfolio Managers) Regulations, 2020 provides that every PM shall be responsible for the safekeeping of the funds and securities of their clients. SEBI has now issued guidelines that need to be complied with by the PMs in pursuance of these regulations. PMs shall put in place a written down policy providing for the structure of the teams engaged in the management of client funds. Further, they have to prepare a specific policy for any contingencies that may arise with regard to the funds. PMs shall also form a dealing team to oversee the placement and execution of all orders.

3. Guidelines for Credit Rating Agencies (“CRA”) : SEBI [\[Link\]](#)

SEBI had earlier this month, cancelled the license of Brickwork Agency, a CRA and directed it to wind up its operations within six months. SEBI cited repeated failures in the functioning of the CRA as the reason for the order. SEBI has now issued guidelines in case of cancellation/ surrender/ suspension of the license of a CRA. The concerned CRA is required to disclose the order of cancellation/ request for surrender of its license on its website. Further, the CRA should facilitate the orderly migration of assignments to other CRAs as directed by its clients.

4. Enhanced Regulatory Framework for Initial Public Offerings (“IPO”): SEBI [\[Link\]](#)

SEBI approved various changes with regard to IPOs in its board meeting dated September 30, 2022. The issuers of an IPO are now required to make disclosure of key performance indicators and price per share of the issuer based on their past transactions in their offer document. Furthermore, issuers have been given the option to pre-file offer documents. Pre-filing will help issuers to safeguard sensitive business information.

1. Central government notifies Legal Metrology (General) Amendment Rules, 2022: Nomination of operations officer. [\[Link\]](#)

The central government has amended Legal Metrology (General) Rules, 2011 to allow companies having different establishments or different units in an establishment or branch, to nominate officers. Such officers shall have the authority and responsibility over the operations of the company's establishment or branch. Additionally, the format of the notice of nomination has been amended to include details of the operations officer.

1. Court is required to conduct a preliminary inquiry to decide if the matter is arbitrable under Section 11 of the Arbitration & Conciliation Act, 1996 (“A&C”): SC [*Emaar India Ltd. v. Tarun Aggarwal Projects LLP*] [[Link](#)]

Section 11 of the A&C act empowers a party in an arbitration agreement to appoint an arbitrator when the other party fails to do so. In this regard, parties to a contract may agree to exclude certain matters from the purview of arbitration. The SC held that matters which fall within the ‘excepted category’ in a contract are outside the scope of arbitration. Therefore, the court is required to conduct a preliminary inquiry to determine whether the dispute is an ‘excepted matter’ before the appointment of an arbitrator.

2. The Member/s of a Joint Venture (“JV”) cannot invoke Arbitration Clause in its individual capacity: Delhi High Court (“HC”) [*Esha Kedia v. Milan R. Parekh & Ors.*] [[Link](#)]

The members of a JV together constitute a “party” if they enter into an agreement with another party. None of the members can be considered as a party in their individual capacity. If the members have entered into an agreement as a JV, it cannot be their intention to permit member/s to invoke the arbitration clause individually. Therefore, the Delhi HC held that the member/s of a JV cannot invoke the arbitration clause within an agreement in its individual capacity.

3. A confirming party can invoke the arbitration clause: Delhi HC [*Ansal Properties & Infrastructure Ltd. & Anr. v. Dowager Maharanis Residential Accommodation Welfare & Amenities Trust & Anr.*] [[Link](#)]

The Delhi HC held that a confirming party can invoke the arbitration within the agreement even if it is not a signatory to the same. The court reasoned that the fact that the confirming party had signed the agreement. This act implied that the party has consented to the arbitration clause within the agreement.

4. The period of limitation shall commence only after the failure of the pre-arbitration mechanism: Delhi HC [*Welspun Enterprises Ltd. v. NCC Ltd.*] [[Link](#)]

The limitation period within the A&C is applicable only after the arbitration clause is invoked. And in case where the agreement provides for a pre-arbitration mechanism, the party can invoke arbitration only after the failure of the said mechanism. Therefore, the Delhi HC held that the period of limitation shall commence only after the failure of the pre-arbitration dispute resolution mechanism as provided by the agreement between the parties.

1. Equalisation levy is not payable on advertising payments where advertisers or the intended audience are situated outside of India: Income Tax Appellate Tribunal (“ITAT”), Jaipur Bench. [\[Link\]](#)

Recently, ITAT Jaipur bench dealing with a case of foreign remittance observed that equalisation levy is not attracted on internet ads. Equalisation levy is a type of direct tax, which is collected for receiving a service from the recipient. This is with regards to the ads where advertisers or the target audience are located outside India. This is because equalisation levy is imposed for specified services to a non-resident from a resident in India.

2. RBI has made computation of late submission fees (“LSF”) uniform throughout all the functions. [\[Link\]](#)

The RBI has released a circular that makes computation of LSF uniform for all the transactions relating to certain functions. These functions involve documentation of Foreign Investment, External Commercial Borrowing and Overseas Investment transactions. This was done because there in order to reduce lengthy compliance and consequent delay.

3. E-invoicing for the taxpayers having aggregate turnover exceeding to Rs. 10 Crore: CBIC (“Central Board of Excise and Customs”) [\[Link\]](#)

The CBIC, on recommendation of RBI Council, has amended the cap for e-invoicing for the taxpayers. Prior to this notification, the cap was for taxpayers having turnover exceeding Rs. 20 Crore which has now become Rs. 10 Crore. The change will be in effect from 1st October 2022.

4. General Public Utility (“GPU”) done as business cannot be treated as ‘Charitable Purpose’ for Income Tax exemption: SC *[Assistant Commissioner of Income Tax vs Ahmedabad Urban Development Authority and connected cases]* [\[Link\]](#)

Recently, SC has ruled that GPU, when engaged as a trade, business, commerce or profit earning cannot be considered for an exemption to Income Tax. This activity can be granted exemption as GPU only for an incidental profit of amount not exceeding 20%. Further the court interpreted the true essence of Charitable Profit under Income Tax Act. It was of the view that the act does not consider charity as a pure

performance without any consideration. Therefore, activity in the nature of trade, commerce or business which makes incidental profit up to certain percentage is also considered as an exemption from income tax.

5. The Competition Commission of India (“CCI”) penalised MakeMyTrip, Go-Ibibo and Oyo for anti-competitive practices. [\[Link\]](#)

Recently, companies like MakeMyTrip, Oyo and Go-Ibibo could not shy away from CCI for their anticompetitive business tactics. They had set up an average room price with FabHotels, a hotel. Thus, their market performance was not based on efficiency but on deep-pockets. It resulted in a situation of predatory pricing. Therefore, CCI has imposed a monetary penalty of Rs. 223.48 Crores on Make My Trip and Go-Ibibo and penalty of Rs. 168.88 Crores on Oyo



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