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Article

Regulating the foreign contribution: Changing regime

By **Sudish Sharma and Shikha Thakkar**

The Foreign Contribution (Regulation) Act, 2010 ('**FCRA**') was enacted to regulate the acceptance and utilization of foreign contribution. Foreign contribution refers to the donation, delivery or transfer of any article, currency or security by any foreign source.

The annual inflow of foreign contribution has doubled between the years 2010 and 2019, but it was observed that this foreign contribution was not utilized corresponding to the purpose for which they were registered or granted prior permission. With an objective to streamline the provisions under FCRA by enhancing transparency and accountability in the receipt and utilization of foreign contributions, the Foreign Contribution (Regulation) Amendment Bill, 2020 ('**Amendment Bill**') was passed by the Lok Sabha and Rajya Sabha on 21-09-2020 and 23-09-2020, respectively.

The key changes proposed by the Amendment Bill are as follows:

(a) Prohibition to accept foreign contribution:

The Amendment Bill has widened the list of persons prohibited to accept foreign contributions by inclusion of '*public servant, Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government*'. This amendment is aimed towards preventing any influence on the decision-making of aforesaid persons from discharging public duty.

(b) Prohibition to transfer foreign contribution:

While under the FCRA, foreign contribution could be transferred to persons who have been registered and granted certificate or obtained prior permission under FCRA, the Amendment Bill has altogether restricted transfer of foreign contributions to any person. This amendment will impact many organizations collaborating for execution of projects and programmes. This is a step aimed at keeping a watch on the utilization of foreign contribution by the recipient organization itself.

(c) Capping administrative expenditure[1]:

The Amendment Bill has reduced the limit of foreign contribution that can be utilized for meeting administrative expenditure from 50% to 20% (of the amount of contribution) thereby ensuring that maximum foreign contribution is utilized towards the purpose for which it is received. While

[1] The term 'administrative expenses', *inter alia,* includes all expenses towards hiring of personnel for management of the activities of the person and salaries, wages or any kind of remuneration paid to such personnel, cost of accounting and administering funds, all expenses related to consumables like electricity and water charges, etc.

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on one hand this amendment will address the issue relating to misuse of foreign contribution, on the other hand, it will impact the ability of organizations to effectively meet administrative expenses such as payment of salaries, travel and other expenditure.

(d) Opening of a FCRA account:

- With a view to generate greater transparency and centralize the flow of foreign contribution, the Amendment Bill makes it mandatory to receive foreign contribution only in an account designated as '*FCRA Account*' by the bank, which shall be opened in such branch of the State Bank of India ('**SBI**') at New Delhi, as the Central Government may, by notification, specify in this behalf.
- However, for ease of fund flow, flexibility is also given to such person to open another '*FCRA Account*' in any of the scheduled bank of his choice for the purpose of keeping or utilizing the foreign contribution which has been received from the above designated '*FCRA Account*' with SBI.

(e) Consequences of contravention:

The Amendment Bill empowers the Central Government to direct any person who has been granted prior permission and has contravened any of the provisions of FCRA to not utilize the unutilized foreign contribution or receive the remaining portion of foreign contribution which has not been received or any additional foreign contribution, as the case may be, without prior approval of the Central Government. In other words, the Central Government may freeze the FCRA account in case of contravention of the provisions of the FCRA.

(f) Submission of information while making application:

The Amendment Bill requires that an application for (i) registration or (ii) renewal of such registration or (iii) prior permission for receiving foreign contribution must be accompanied with (a) Aadhaar number of all its office bearers, directors or key functionaries, as an identification document; and (b) in case of a foreigner, a copy of the passport or the Overseas Citizen of India card for identification. This amendment will assist the Government in maintaining a central database of individuals receiving or controlling the organizations which receive foreign contribution.

(g) Surrender of certificate:

While FCRA does not stipulate any provision for surrender of certificate, however, in order to provide an easy exit to the genuine person, the Amendment Bill proposes to introduce a new provision for surrender of certificate if the Government is satisfied that such person has not contravened any provisions of the FCRA.

Conclusion

In order to curb malpractices and increase transparency and accountability in relation to foreign contribution, the Government has taken

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various steps which forms part of the Amendment Bill. Structural changes such as reducing the administrative expenditure and restricting the transferability of the amount, would go a long way in administering the NGOs/ organizations with FCRA registration. It appears that the measures will enhance the compliance requirements of the organizations.

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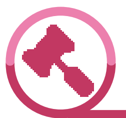

Notifications and Circulars

Companies (Amendment) Act, 2020 – Salient features: The Companies (Amendment) Bill, 2020 which was passed by Lok Sabha and Rajya Sabha on 19-09-2020 and 22-09-2020 respectively, has received presidential assent on 28-09-2020. Certain amendments are pursuant to the report of Company Law Committee dated 14-11-2019 which proposed decriminalising certain offences under the Companies Act, 2013. Some of the other salient features of the amendments are as follows:

a) The Central Government has been empowered to exclude certain companies, based on listing of certain securities on recognized stock exchanges, as may be provided by rules, in consultation with SEBI, from the definition of listed companies.

b) A class of public companies, as may be prescribed, will be allowed to list certain class of securities on stock exchanges in permissible foreign jurisdictions or such other jurisdictions. By a notification, the Central Government can exempt any class or classes of public companies from any of the provisions of Chapter III (Prospectus and Allotment of Securities), Chapter IV (Share Capital and Debentures), Section 89 (Declaration in respect of beneficial interest in any share), section 90 (Register of significant beneficial owners in a company) or section 127 (Punishment for failure to distribute dividends) of the Companies Act, 2013.

c) The Central Government is now empowered to prescribe class of Non-Banking Financial Companies (NBFCs) and Housing Finance Companies (HFCs) exempted from filling resolutions under Section 117 (Resolutions and agreements to be filed) for grant of loans or give guarantees or to provide security in respect of loans in the ordinary course of their business.

d) The companies which incur expenditure towards Corporate Social Responsibility (CSR) in excess of the requirement, can set off such excess amount out of their obligation in the succeeding financial years after complying with the prescribed rules. The requirement of constitution of

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CSR Committee shall not be applicable, in case the amount required to be spent on CSR does not exceed Rs. 50 lakhs. The Board shall discharge such functions in such cases.

e) A new section has been inserted to empower the Central Government to prescribe such class or classes of unlisted companies to prepare periodical financial results of the company, audit or limited review thereof and their filing with Registrar within 30 days from the end of that period as may be specified.

f) Non-Executive Directors can be paid remuneration even in case of loss or inadequate profits under Schedule V as applicable to managing or whole-time directors earlier.

g) A new chapter XXIA has been inserted to deal with producer companies.

h) The Central Government may, by notification, can now exempt any class of foreign companies; companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India, as may be specified in the notification, from any of the provisions of this Chapter XXII (Companies incorporated outside India) of the Companies Act, 2013.

Start-ups – Companies (Acceptance of Deposit) Rules, 2014 amended: The Ministry of Corporate Affairs ('MCA'), *vide* notification dated 7-9-2020, has amended the Companies (Acceptance of Deposit) Rules, 2014. A start-up company can receive an amount of INR Twenty-five lakh or more, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding ten years from the date of issue) in a single tranche, from a person. The earlier time limit was five years. A 'start-up company' means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with Notification No. G.S.R. 127 (E), dated 19-02-2019 issued by the Department for Promotion of Industry and Internal Trade.

Foreign Direct Investment Policy in Defence Sector – Press Note No. 4 of 2020: The Ministry of Commerce and Industry has *vide* notification dated 17-09-2020 reviewed the Foreign Direct Investment ('**FDI**') Policy in relation to defence sector. As per the extant FDI Policy, 100% overseas investments are permitted in the defence industry with 49% under the automatic route, while beyond that limit government approval is required. Now, under Press Note No. 4 of 2020, the limit under automatic route has been revised to 74% for companies seeking new industrial licenses. Further, infusion of fresh foreign investment up to 49%, in a company not seeking industrial license or which already has Government approval for FDI in Defence, shall require mandatory submission of a declaration with the Ministry of Defence, in case of change in equity/shareholding pattern or transfer of stake by existing investor to new foreign investor for FDI up to 49%, to be submitted within 30 days of such change. Proposals for raising FDI beyond 49% from such companies will require Government approval. The changes shall come into force on date of corresponding notification under FEMA.

Relaxation with respect to validity of SEBI Observations and revision in issue size: The Securities and Exchange Board of India ('**SEBI**'), *vide* Circular dated 21-04-2020, had given certain relaxations with respect to validity of SEBI Observations and filing of fresh offer document in

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case of increase or decrease of issue size beyond a particular threshold. *Vide* the said Circular, an issuer was permitted to increase or decrease the fresh issue size by up to 50% of the estimated issue size without requiring filing fresh draft offer document with SEBI, with validity till 31-12-2020. The validity has now been extended up to 31-03-2021. Further, as per Circular SEBI/HO/CFD/DIL1/CIR/P/2020/188, dated 29-09-2020 (effective from 01-10-2020), the validity of the SEBI Observations expiring between 1-10-2020 and 31-03-2021 has been extended up to 31-03-2021, subject to an undertaking from lead manager to the issue confirming compliance with Schedule XVI (Nature of changes in the offer document requiring filing of updated offer document) of the SEBI Issue of Capital and Disclosure Requirements (ICDR) Regulations, 2018 while submitting the updated offer document to SEBI.

Timeline for listing of securities issued on a private placement basis standardised: SEBI has prescribed time within which securities issued on private placement basis under SEBI (Issue and Listing of Debt Securities) Regulations, 2008, SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013, SEBI (Public Offer and Listing of Securitised Debt Instruments and Security Receipts) Regulations, 2008 (SEBI SDI), and SEBI (Issue and Listing of Municipal Debt Securities) Regulations, 2015 (SEBI ILDM) need to be listed after completion of allotment. As per Circular dated 05-10-2020, the stipulated timelines are as follows:

Details of Activity	Due Date
Closure of issue	T day
Receipt of funds	T + 2 trading day
Allotment of securities	T + 2 trading day
Issuer making listing application to stock exchanges	T + 4 trading day
Listing permission from stock exchanges	T + 4 trading day

It may be noted that the Circular also provides for payment of penal interest of 1% p.a. over the coupon rate for the period of delay, to the investor (i.e. from date of allotment to the date of listing), in case of delay.

Further, according to the Circular which comes into effect from 01-12-2020, depositories shall activate the International Securities Identification Numbers ('ISINs') of debt securities issued on private placement basis only after the Stock Exchange(s) have accorded approval for listing of such securities.

Asset allocation of Multi-Cap Mutual Funds: SEBI, *vide* Circular dated 11-09-2020, has modified portfolio allocation rules applicable to multi cap mutual funds. Multi-Cap schemes had flexibility in terms of allocation to large, mid and small cap stocks. However, it was noted that some Multi-Cap Schemes have skewed portfolios, with over 80% of investment in large cap stocks akin to Large Cap schemes, and some Multi-Cap schemes have near zero or insignificant asset allocation to small cap companies. In this context, SEBI has issued the aforesaid circular requiring Multi Cap Schemes to invest a minimum of 25% each in Large, Mid and Small Cap stocks, with the balance 25% giving flexibility to the fund manager. Mutual Funds are required to comply with the requirements by 31-01-2021.

Product Labelling in Mutual Fund schemes - Risk-o-meter: SEBI, *vide* Circular dated 5-10-2020, has introduced modifications to existing product labelling guidelines for mutual funds. A

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new category of risk – 'very high risk' has been introduced in the Risk-o-meter. Risk-o-meter shall be evaluated on a monthly basis and Mutual Funds/Asset Management Companies (AMCs) shall disclose the Risk-o-meter along with portfolio disclosure for all their schemes on their respective website and on Association of Mutual Funds in India ('**AMFI**') website within 10 days from the close of each month. Mutual Funds shall disclose the risk level of schemes as on March 31 of every year, along with number of times the risk level has changed over the year, on their website and AMFI website. The changes shall come into force on 01-01-2021.

Labelling norms for dividend options of mutual funds introduced: SEBI, *vide* Circular dated 5-10-2020, has introduced labelling norms for dividend options of mutual funds. All existing and proposed schemes of mutual funds shall name and rename dividend options in following manner:

Option / Plan	Name
Dividend Payout	Payout of income distribution cum capital withdrawal option
Dividend Reinvestment	Reinvestment of income distribution cum capital withdrawal option
Dividend Transfer Plan	Transfer of income distribution cum capital withdrawal plan

Asset Management Companies shall ensure that whenever distributable surplus is distributed, a clear segregation between income distribution (appreciation on NAV) and capital distribution (Equalization Reserve) shall be suitably disclosed in the Consolidated Account Statement provided to investors. The circular shall come into force on 1-04-2021.

Ratio Decidendi

Resolution Plan cannot be withdrawn once approved by Committee of Creditors

The National Company Law Appellate Tribunal ('**NCLAT**') has upheld that, a Resolution Plan, once approved by the Committee of Creditors ('**CoC**'), cannot be withdrawn by the successful Resolution Applicant, even if pending approval by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 ('**IBC, 2016**'/ '**Code**').

Brief Facts:

The Appellant herein is the successful Resolution Applicant, in the Corporate Insolvency Resolution Process ('**CIRP**') initiated against one Astonfield Solar (Gujarat) Pvt. Ltd. ('**Corporate Debtor**') before National Company Law Tribunal ('**NCLT**'), New Delhi Bench. After approval of the Resolution Plan by the CoC of the Corporate Debtor, the Appellant, *vide* an Interlocutory Application, filed before the NCLT, had sought withdrawal of its Resolution Plan and

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cancellation/ revocation/ return/ refund of the Performance Bank Guarantee given. However, the said IA was dismissed by the NCLT, stating that the Adjudicating Authority, under the Code, has no powers to allow for such withdrawal. Aggrieved, the Appellant preferred the present Company Appeal before the NCLAT.

Submissions by the Appellant:

a) There is no basis for the finding that the Adjudicating Authority has no power or jurisdiction to allow withdrawal of a Resolution Plan post approval from the CoC. This has already been upheld by the NCLT, Mumbai Bench, in *Deccan Value Investors LP & Anr.* v. *Deustche Bank AG & Ors.,* MA No. 1272/2018 in CP 1555(IB)/MB/2017, which was upheld by the NCLAT in Company Appeal (AT) No.1276/2019.

b) The Code does not contain any provisions to compel specific performance of a Resolution Plan by an unwilling Resolution Applicant and a plea for withdrawal of a plan will have to be accepted, if the plan is found to be unviable, or is based on incorrect assumptions. It was submitted that, in the instant case the approved Resolution Plan has been rendered commercially unviable on account of delay in conclusion of CIRP.

Submissions by the Respondents:

a) The Appeal is not maintainable in view of the judgment of NCLAT in *Committee of Creditors of Educomp Solutions Ltd.* v. *Ebix Singapore Pte. Ltd. & Anr.*, Company Appeal (AT) (Insolvency) No.203 of 2020, wherein it was held that after approval of the Resolution Plan by the CoC, the Adjudicating Authority has no jurisdiction to entertain or permit withdrawal of the Plan and that Adjudicating Authority cannot enter into the arena of the majority decision of the CoC.

b) There is no provision in the Code which allows withdrawal of an approved Resolution Plan, and provisions in the Regulations made thereunder for submission of Performance Bank Guarantee by a Resolution Applicant is a provision to discourage the Resolution Applicant from withdrawal.

c) The Resolution Plan of Appellant was approved in preference to two other Resolution Applicants for maximizing the value of Corporate Debtor and the Appellant cannot be permitted walk away, which will push the Corporate Debtor into liquidation. Once the Resolution Plan has been approved, it becomes a binding contract between the parties and the successful Resolution Applicant cannot be permitted to withdraw the same.

Decision:

a) The Appellate Tribunal re-iterated that primacy is given to the CoC, to take a business decision in regard to feasibility and viability of a Resolution Plan based on their commercial wisdom, as held in various decisions of Supreme Court, including the recent case of *K Shashidhar* v. *Indian Overseas Bank and Ors.* [(2019) SCCOnline SC 257].

b) The process of approval of the Resolution Plan, is in the nature of a bidding process where, with regard to financial matrix, capacity of the Resolution Applicant to generate funds, infusion of funds, upfront payment, the distribution mechanism and the period over which the claims of various stake holders are to be satisfied besides the feasibility and viability of the Resolution Plan, a Resolution Applicant emerges as the highest bidder eliminating the Resolution Plans of other Resolution Applicants. This

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contains contractual terms that are binding on the Resolution Applicant, but it is not a contract of personal service which may be legally unenforceable. Therefore, even though the final approval rests with the Adjudicating Authority, successful Resolution Applicant cannot withdraw from the CIRP, after being declared the successful bidder by the CoC.

c) There is no express provision in the Code allowing a successful Resolution Applicant to withdraw the Plan once approved. The principle of estoppel applies to the said Resolution Applicant.

d) Decision in Company Appeal (AT) No.1276/2019 was not applicable, as in that case the Resolution Plan approved by the CoC was found to be violative of Section 30(2)(e) of the Code, and in that context, the Adjudicating Authority could not compel specific performance of a plan. The said decision was held not to be a precedent on this issue.

[*Kundan Care Products Limited* v. *Mr. Amit Gupta, Resolution Professional & Ors.,* – Judgment dated 30-09-2020 in Company Appeal No. 653 of 2020, NCLAT]

Enforcement Court can only 'refuse' enforcement of Foreign Arbitral Awards and cannot set it aside

Limitation period for filing applications for enforcement under Section 47 of Arbitration and Conciliation Act, 1996 shall be governed by Article 137 of the Limitation Act

The Supreme Court has recently elaborated on the powers of an enforcement court, under Part II of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'), and the various laws applicable to an international commercial arbitration.

Brief Facts:

For developing petroleum resources, the Appellant had flouted a tender, to which the Respondents herein *viz.*, Vedanta Limited ('**Respondent No. 1**'), Ravva Oil (Singapore) Pte. Ltd. ('**Respondent No. 2**') and Videocon Industries Limited ('**Respondent No. 3**'), had submitted their bids. Subsequently, a Production Sharing Contract ('**PSC**') dated 28-10-1994 was executed between the Appellant and the Respondents. The said contract was to be governed by the laws of India. The unresolved disputes covered by the PSC were agreed to be referred to an arbitral tribunal. The venue for the arbitration was to be in Kuala Lumpur, Malaysia and the arbitration agreement was to be governed by the laws of England.

Disputes arose between the parties and the matter was referred to arbitration. An award was passed in 2011 by the arbitral tribunal adjudicating the matter in favour of the Respondents herein ('**Arbitral Award**'). The Appellant challenged the said Arbitral Award under the Malaysian Arbitration Act, 2005, before the Malaysian High Court, which was subsequently rejected by the said High Court in 2014, and thereafter before the Malaysian Court of Appeal as well as leave to appeal before the Malaysian Federal Court, which was dismissed and rejected, respectively, by the said Courts. During the pendency of the leave to appeal by the Appellant before the Malaysian Federal Court, the Respondents, in the year 2014, preferred a Misc. Petition under Section 47 read with section 49 of the Arbitration Act seeking enforcement of the Arbitral Award ('**Enforcement Petition**'), before the Delhi High Court, along with an application for condonation of delay. The said Petition was resisted by the Appellant herein, *vide* an Interlocutory Application (IA) under Section 48 of the Arbitration Act, stating that: (a) the Petition was beyond the period of limitation,

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(b) the Arbitral Award was contrary to public policy of India, and that (c) the Award contains decisions beyond the scope of submission to arbitration. The said IA was dismissed by the Delhi High Court and delay was condoned, stating that the Petition would be governed by Article 136 of the Limitation Act, 1963 ('**Limitation Act**') which deals with execution applications for enforcement of a decree of a civil court and permits preferring of the same within 12 years from the cause of action. Aggrieved, the Appellant preferred the present appeal before the Supreme Court of India.

Submissions by the Appellant:

a) The Enforcement Petition is barred by limitation. Since there is no specific provision in the Limitation Act for enforcement of foreign awards, it would necessarily fall under the residuary provision – Article 137 of the Limitation Act, which provides a period of 3 years from 'when the right to apply accrues'. This is to be computed from the date of making the Arbitral Award, which is, in the present case, 18-01-2011, and the Petition was filed by the Respondents on 14-10-2014, beyond period prescribed.

b) An execution petition, for the purposes of the Limitation Act, has to be treated as an application under the provisions of Order XXI of the Code of Civil Procedure, 1908 (CPC), which deals with execution of decrees, as held in *BCCI* v. *Kochi Cricket (P) Ltd*., (2018) 6 SCC 287. Therefore, Section 5 of the Limitation Act, which excludes the extension of prescribed period of limitation in case of applications under Order XXI of the CPC, is applicable to the Petition and delay cannot be condoned.

c) However, Article 136 of the Limitation Act, which deals with applications for execution of any decree of the civil court, cannot apply to a foreign arbitral award and only Article 137 must apply. A foreign award does not become a decree until and unless it passes the criteria under Sections 47 to 49 of the Arbitration Act.

d) The PSC was to be governed and interpreted in accordance with Indian law. The Malaysian Courts, at the seat of arbitration, had erroneously applied the Malaysian Arbitration Act while deciding the challenge to the Arbitral Award, in terms of *Reliance Industries* v. *Union of India* [(2014) 7 SCC 603].

Submissions by the Respondents:

a) As per Section 49 of the Arbitration Act, the foreign award becomes a decree of an Indian Court after the objections to the award are adjudicated by the enforcement court under Section 47. Therefore, Article 136 of the Limitation Act would be the appropriate provision for execution of the Arbitral Award.

b) In the alternative, if Article 137 of the Limitation Act is held to be applicable for the enforcement of foreign awards, the limitation period would commence from 'when the right to apply accrues', which does not necessarily mean the date of the award. The period of limitation would commence from the date when the award attained finality at the seat of arbitration.

c) Section 5 of the Limitation Act is applicable to any appeal, or any application. The application for enforcement / execution was filed by the Respondent under Sections 47 and 49 of the Arbitration Act, which is a composite application, as per the judgments in *Fuerst Day Lawson Limited* v. *Jindal Exports Limited,* 2001 (6) SCC 356 and *LMJ International Limited* v. *Sleepwell Industries*

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Co. Ltd, 2019 (5) SCC 302, and not under Order XXI of CPC.

d) Even though Section 36 of the Arbitration Act refers to the enforcement of a domestic award in accordance with the provisions of the CPC and a domestic award to be treated as a 'decree', Section 49 does not refer to the CPC.

e) The parties had voluntarily chosen Malaysia as the seat of arbitration. The Appellant cannot invite Indian courts to revisit the merits of its case under the guise of Indian public policy, as per *Bharat Aluminium Co.* v*. Kaiser Aluminium Technical Services Inc.,* (2012) 9 SCC 648.

Decision:

a. Various High Courts have held conflicting views so far on applicability of limitation period for applications under Section 47 of the Arbitration Act. The issue of limitation for enforcement of foreign awards being procedural in nature, is subject to the *lex fori* i.e. the law of the forum (State) where the foreign award is sought to be enforced. The time limit may be specifically provided in the national legislation for recognition or enforcement of Convention awards, or it may be a general rule applicable to court proceedings.

b. Section 43 of the Arbitration Act provides that the Limitation Act shall apply to arbitrations, as it applies to proceedings in court. However, while Section 36 of the Arbitration Act creates a statutory fiction for the limited purpose of enforcement of a 'domestic award' as a decree of the court, this is restricted to treat only a domestic award as a decree of the court for the purposes of execution.

c. Foreign awards/ decrees are not decrees of an Indian court and therefore, Article 136 of the Limitation Act cannot be applicable to the Arbitral Award in the instant case and only Article 137 is applicable. Accordingly, the exclusion under Section 5 of the said Act, for execution petitions, shall also not be applicable to the present case. Conclusively, the appeal was dismissed and the delay on part of the Respondents condoned.

d. For the purpose of understanding, the Supreme Court examined the various stages of enforcement, as considered by it in *Fuerst Day Lawson Ltd.* v*. Jindal Exports Ltd.,* (2001) 6 SCC 356, as per which there is 'recognition' as well as 'enforcement' of awards, by way of a common petition.

e. The Court, based on the wordings of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, held that the enforcement Court cannot 'set aside' a foreign award, even if the conditions under Section 48 are made out. The power to set aside a foreign award vests only with the court at the seat of arbitration, since the supervisory or primary jurisdiction is exercised by the curial courts at the seat of arbitration. The enforcement court cannot correct the errors in the award under Section 48 or undertake a review on the merits of the award, but can merely 'refuse' to enforce the foreign arbitral award.

f. Even though the substantive law governing the PSC was the Indian laws, the courts having jurisdiction to annul or suspend a New York Convention arbitral award are the courts of the State where the award was made or is determined to have been made i.e. at the seat of arbitration.

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g. The Court recognized that there are 4 types of laws which apply to international commercial arbitration, being:

(a) the governing law of the commercial contract which determines the substantive rights and obligations of the parties,

(b) the substantive law governing the arbitration agreement, which would determine the validity and extent of the arbitration agreement; limits of party autonomy, the jurisdiction of the tribunal, etc.,

(c) the curial law of the arbitration determined by the seat of arbitration, which governs the procedure of the arbitration, the commencement of the arbitration, appointment of arbitrator/s in exercise of the default power by the court, grant of provisional measures, collection of evidence, hearings, and challenge to the award etc., and

(d) the national laws of the Courts where the award is sought to be enforced, which is regarding limitation periods applicable for recognition and enforcement proceedings, the date from which the limitation period would commence, whether there is power to extend the period of limitation etc. and the legal remedies available to the parties for enforcement of the foreign award.

h. As per the Apex Court, merely because the Malaysian Courts have upheld the award, it would not be an impediment for the Indian courts to examine whether the award was opposed to the public policy of India under Section 48 of the Indian Arbitration Act and refuse to enforce the same. However, the award cannot be decided on merits by the enforcement court.

[*Government of India* v. *Vedanta Limited & Ors.* – Order dated 16-09-2020 in Civil Appeal No. 3185 of 2020, Supreme Court of India]

News Nuggets

Stamp duty on property lease – No difference between property owned by Government and private person

The Bombay High Court has rejected the contention of the stamp duty authorities that as the leased property was owned by Mumbai Metropolitan Region Development Authority, the market value of the said property cannot be decided and hence stamp duty needs to be paid on 100% of the amount paid for the lease instead of 90% of the market value as contemplated under Article 36(iv) of Schedule I to the Maharashtra Stamp Act, 1958. The Court was of the view that reliance placed by the statutory authorities on Explanation I to Article 36(iv) was wholly misconceived. The Explanation stipulated that any consideration in the form of premium or money advanced or to be advanced, or security deposit, by whatever name called shall, for the purpose of market value, be treated as consideration

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passed on. Rejecting the contention, the Court noted that the Explanation does not derogate from the fact that in a lease exceeding 29 years, the stamp duty leviable thereon would be as if it is a conveyance under Clauses (a), (b) or (c) of Article 25, on 90% of the market value of the said property. Quashing the impugned order which sought to make a distinction between a property owned by the Government or its instrumentality on the one hand and a private property on the other and thus demanding differential stamp duty, the Court in the case *Goisu Realty Private Limited v. State of Maharashtra* [Judgement dated 05-10-2020] observed that no such distinction was carved out in law.

Companies Fresh Start Scheme 2020 extended till 31-12-2020

Given the large-scale disruptions due to COVID-19, the Ministry of Corporate Affairs ('**MCA**') has extended the validity of the Companies Fresh Start Scheme 2020 ('**CFS Scheme**') till 31-12-2020, *vide* Circular No. 30/2020, dated 28-09-2020. The CFS Scheme was initiated in March 2020 *vide* Circular No. 12/2020, dated 30-03-2020 with the purpose to condone the delay in filing of documents and provide a one-time waiver to companies from prosecution and imposition of additional fee, in order to enable such companies to file all their documents, and was to remain in force till 30-09-2020. All other terms of CFS Scheme stand unmodified.

LLP Settlement Scheme, 2020 extended till 31-12-2020

The MCA has extended the validity of the Limited Liability Partnership (LLP) Settlement Scheme ('**Settlement Scheme**') till 31-12-2020 *vide* Circular No.31/2020, dated 28-09-2020. As per the terms of the said scheme, the defaulting LLPs are permitted to file the delayed documents with the MCA and will not be subjected to prosecution by the Registrar for such defaults. It may be noted that this Scheme, which was earlier applicable till 30-09-2020, is not available to LLPs which have made applications for striking off their names from the register, as per provisions of Rule 37(1) of the LLP Rules, 2009.

Scheme for relaxation of time for filing forms related to creation or modification of charges under the Companies Act, 2013, extended

The MCA, *vide* Circular No. 23/2020 had introduced a Scheme, namely 'Scheme for relaxation of time for filing forms related to creation or modification of charges under the Companies Act, 2013' for the purpose of condoning the delay in filing certain forms related to creation/ modification of charges, with validity till 30-09-2020. The validity of the said scheme has now been extended till 31-12-2020 vide General Circular No. 32/2020, dated 29-09-2020.

EGMs through VC or OAVM or transactions through postal ballot – Framework extended till 31-12-2020

The MCA has *vide* General Circular No. 33/2020, dated 28-09-2020 extended till 31-12-2020, the framework provided by Circular Nos. 14/2020 and 17/2020 for holding extraordinary general meetings ('EGMs') through video conferencing ('VC') or other audio visual means ('OAVM') or passing of certain items only through postal ballot without requirement of a general meeting. The framework was earlier available till 30-09-2020. Similarly, MCA has further extended the relaxation for the companies to conduct the Board meetings for approval of financial statements, Board's report, prospectus, through Video Conferencing (VC) / Other Audio-Visual Means (OAVM), up to 31-12-2020.

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Registration of independent directors – Time limit extended

In the backdrop of continuing pandemic, MCA has further extended the last date for registration of details of Independent Directors in the ID Data Bank for further three months, i.e. thirteen months from 01-12-2019. The earlier timeline was ten months from 01-12-2019, i.e. till 30-09-2020. Companies (Appointment and Qualification of Directors) Rules, 2014 have been amended for the purpose by Notification dated 28-09-2020.

Labour Codes on Industrial Relations, Occupational Safety and Social Security, enacted

The Parliament has passed three labour codes namely, (i) Industrial Relations Code, 2020 (ii) Code on Occupational Safety, Health & Working Conditions Code, 2020 & (iii) Social Security Code, 2020, subsuming 25 existing labour laws. The said Codes have received Presidential assent on 28-09-2020. The provisions of each Code may come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different provisions of the Codes. The Central Government is expected to come up with draft Rules under each Code for public consultation before notifying the dates of enforcement. The three labour codes are in addition to Code on Wages, 2019 which was enacted in 2019.

Bilateral Netting of Qualified Financial Contracts Act, 2020

The Bilateral Netting of Qualified Financial Contracts Act, 2020 has received Presidential assent on 28-09-2020. The enactment provides enforceability of bilateral netting of qualified financial contracts. Netting is defined as meaning determination of net claim or obligations after setting off or adjusting all the claims or obligations based or arising from mutual dealings between the parties to qualified financial contracts and includes close-out netting. The Central Government has notified 1-10-2020 as the date on which all the provisions of the said Act have come into force.

Initiation of corporate insolvency process – Further extension of suspension

The Central Government, *vide* Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, had suspended initiation of corporate insolvency process under Sections 7, 9, and 10 of Insolvency and Bankruptcy Code, 2016 for a default arising on or after 25-03-2020 for a period of six months from the said date i.e., upto 24-09-2020. MCA, *vide* Notification dated 24-09-2020, has now extended the suspension for a further period of three months from 25-09-2020.

Extension of limitation period for preferring appeal/application – Supreme Court clarifies its earlier Order

The Supreme Court has clarified that what was extended by way of the Order dated 23-03-2020 of the Court, in Suo Motu Writ Petition (Civil) No.3 of 2020 was only 'the period of limitation' for preferring any application, appeal, etc. and not the period up to which delay can be condoned in exercise of discretion conferred by the statute. The Appellants herein owned shares in a Corporate Debtor and on behalf of the said debtor had moved a Petition for voluntary liquidation before the NCLT. The said Petition was dismissed *vide* an Order dated 25-10-2019, against which an appeal was preferred, along with an application for condonation of delay, on 20-07-2020. The NCLAT dismissed the aforesaid appeal for being time-barred and beyond the maximum period of 45 days allowed

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for condoning, which expired on 18-03-2020. The Supreme Court in its Order dated 18-09-2020 in the case *Sagufa Ahmed v. Upper Assam Plywood Products Pvt. Ltd.* also held that the expression 'prescribed period' under the Limitation Act, 1963 cannot be construed to mean anything other than the period of limitation, and any period beyond the prescribed period, during which the Court or the Tribunal has the discretion to allow a person to institute the proceedings cannot be taken to be 'prescribed period'.

Promoters-directors of a wilful defaulter-Corporate Debtor, who are also guarantors of company, are 'connected persons' under Section 29A(j) and not entitled to immunity under Section 14 of IBC

The Calcutta High Court has held that Section 29A or 31 of the IBC, 2016 would not provide a shield against the operation of Section 14(3)(b), in case of promoter-directors of a Corporate Debtor that is also a 'wilful defaulter' in terms of Section 29A(b) of the Code. In the instant case, the Petitioners were the erstwhile promoters-directors of one company undergoing Corporate Insolvency Resolution Process ('CIRP') under IBC, 2016, as initiated before the NCLT, Kolkata Bench. The Petitioners, at the same time, were also guarantors to the said Company, in regard to the loans received by the Company. On default on repayments, the bank issued show cause notices to both the Corporate Debtor and the Petitioners for 'wilful defaulter' proceedings. The High Court in its Order dated 15-09-2020 in the case *Sandip Kumar Bajaj v. State Bank of India* upheld that in light of Section 128 of the Indian Contract Act, 1872 which deals with the co-extensive liability of a surety with the principal debtor, the argument that Section 29A or 31 of the Code would provide a shield against the operation of Section 14(3)(b) and that the Petitioners would come under the immunity-blanket of Section 14 is contrary to the law governing insolvency resolution process and the RBI guidelines dealing with wilful defaults of corporate entities.

Appellate Authority under IBC does not have powers to 'review' its own judgments

The NCLAT has clarified that it does not have the authority to review its own judgments, both under IBC, 2016, as well as the NCLAT Rules, 2016 which allow for inherent powers of the NCLAT. It also held that a party also cannot rely on Section 420(2) of the Companies Act, 2013, which deals with rectification of errors, to seek a review of the judgment. The Review Applicant in the instant case had alleged that there were 'errors apparent on the face of record' in the order passed by the NCLAT, in dismissing the appeal preferred by the Review Applicant against the order of the NCLT, Bengaluru Bench, under Section 7 of the IBC, 2016. The NCLAT in its Order dated 17-09-2020 concluded that the power to 'review' is a creation of statute and that a 'Review Jurisdiction' cannot be pressed into service as an 'Appellate Jurisdiction'. Further, as per the Appellate Tribunal, any error must be a 'patent error' and not a mere 'wrong decision'. It also held that no error can be said to be an error 'on the face of record' if it is not self-evident and requires an examination or argument to establish it.

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