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Table of Contents

Article **2**

International Workers – Conundrum of payment of Provident Fund 3

Notifications & Circulars **6**

Ratio Decidendi **11**

News Nuggets **18**

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Article

International Workers – Conundrum of payment of Provident Fund

By **Asish Philip Abraham and Astha Sinha**

The article in this issue of Corporate Amicus discusses the issues relating to the liability to pay Provident Fund (PF) on salaries paid to expats, based on recent judicial developments. The article examines the Supreme Court decision in *Northern Operating Systems Pvt. Ltd.* which held foreign employees working with an Indian company are not to be considered as employees of the Indian Company, and thus created uncertainty with respect to the position of law with respect to the payment of PF to International Workers. The article also considers as recent Karnataka High Court decision in *Stone Hill Education Foundation*, which has struck down the provisions relating to payment of PF on salaries of International Workers. The authors note that currently the Code on Social Security, 2020 too is silent on the topic of International Workers. According to them, the position may be clarified once the Employees Provident Fund scheme under the new Labour Code is published.

International Workers – Conundrum of payment of Provident Fund

By Asish Philip Abraham and Astha Sinha

The recent judicial developments have led to certain legal uncertainties and contradictions for compliance in case of deputation and secondment. The factual matrix of employment will have to be determined based on legal jurisprudence.

India is quickly fastening itself to be not only the hub of IT and outsourcing services but also the epicenter of manufacturing activities. The Make in India initiative by the Government has led to various global businesses setting up manufacturing facilities in India leading to a significant increase in expat employment in the country. The multi-fold increase in Global Capability Centers / Global In-house Centers has also generated various expat employment opportunity in the country. In the said background, the decision of the Karnataka HC in *Stone Hill Education Foundation* v. *Union of India and Others*[1] and Supreme Court in *Northern Operating Systems*[2] has opened a number of issues in relation to legal compliances. In this article we will examine the liability to pay PF on salaries paid to expats based on recent judicial developments.

International Workers - Indian PF compliance

In October of 2008, Paragraph 83 was inserted in the Scheme[3] introducing the concept of an 'International Worker'. The Scheme defines an International Worker as a person holding a foreign passport working for an establishment in India. The Scheme prescribed that PF shall be applicable to International Workers on their full salary without any wage ceiling (as applicable for domestic workers) and the components of salary to be included for calculation of salary must be the same as domestic workers[4]. The only exemption to the said contributions has been provided to employees from countries with whom India has signed a Social Security Agreement[5].

[1] *Stone Hill Education Foundation* v. *Union of India and Others* [W.P. No. 18486 of 2012 decided on April 25, 2024],
[2] *C.C., C.E. & S.T. - Bangalore (Adjudication)* v. *Northern Operating Systems Pvt. Ltd.* - 2022 SCC OnLine SC 658
[3] GSR 706(E) dated 1st October 2008
[4] *'Compliance in respect of International Workers – regarding'*, Notification No. IWU/7(17)2009/ dated 25.05.2012
[5] *Para 83 (1) 'Excluded Employees'*, The Employee Provident Scheme, 1952

Valuation of perquisite for calculation PF for expats

Controversy on calculation of PF for IW arose when the Supreme Court pronounced the judgment in the case of *Regional Provident Fund Commissioner (II), West Bengal and Ors.* v. *Vivekananda Vidyamandir and Ors*[6] which stated that allowances that are payable to all employees cannot be excluded from wages for calculation of PF, there were a series of investigations initiated by the EPFO with respect to PF calculation including quantum of PF paid to International Workers. While by way of a Circular[7], EPFO had directed that there unless there is a prima-facie case, there should be no roving inquiries, various companies have received notices and inquiries with respect to quantum of PF paid for International Workers.

SC on nature of employment services by expats

The Supreme Court, subsequently, in the indirect tax case of *Bangalore (Adjudication)* v. *Northern Operating Systems Pvt. Ltd.*[8] held that secondment of employees is in the nature of 'manpower supply' and not 'employment'. In other words, foreign employees working with an Indian company will not be considered to be employees of the Indian Company. This judgment of the Supreme Court has far reaching implications beyond the realm of indirect tax laws as if an International Worker is not considered to be an employee of an Indian Company, it unfastens the liability on the Company to contribute to PF of the International Workers. The Courts are yet to test the argument of dual employment and implications of the same in the case of International Workers.

While the *Northern Operating Systems* case has not been tested in the court of law in the context of social security payments to be made by Indian Companies, as this is a Supreme Court Judgement, it is the law of the land. This created uncertainty with respect to the position of law and the validity of the inquiries by the EPFO with respect to the payment of PF to International Workers.

Karnataka HC on applicability of PF provisions to expats

In April 2024, the Karnataka High Court, in the case of *Stone Hill Education Foundation* v. *Union of India and Others*[9] struck

[6] *The Regional Provident Fund Commissioner (II), West Bengal and Ors. v. Vivekananda Vidyamandir and Ors,* [AIR2019SC1240].
[7] Circular no. C-11/20/76/Misc./2020/CBE/TN/1027 dated February 02, 2020
[8] *C.C., C.E. & S.T. - Bangalore (Adjudication)* v. *Northern Operating Systems Pvt. Ltd.* - 2022 SCC OnLine SC 658
[9] *Stone Hill Education Foundation* v. *Union of India and Others* [W.P. No. 18486 of 2012 decided on April 25, 2024],

down Para 83 of the Employees Provident Fund Scheme, 1995 as unconstitutional and arbitrary as the provisions are violative of Article 14 of the Indian Constitution. The Court held that International Workers drawing higher salaries cannot be forced to contribute towards PF on their entire salary without any wage ceiling while a wage ceiling of fifteen thousand has been prescribed for domestic workers. It is a settled position of law that any High Court's decision with respect to a central legislation has a binding effect on all other High Court's in the country unless it is stayed or overruled by the Supreme Court. In light of the same, the provisions with respect to payment of PF on salaries of International Workers stand struck down as on date.

Considering the above judgement, Companies can explore the option of claiming refund of PF paid to International Workers. Companies can also contest any probing enquiries being by the EPFO with respect to the same before the court of law.

Way forward

The series of judicial precedents with respect to International Workers has created an inherent contradiction on the position of law with respect to PF payment to International Workers. On one hand there are ongoing inquires on the payment and quantum of payment of PF on the salaries of International Workers specifically questioning whether allowances have been included in the calculation of wages while discharging PF. On the other hand, the requirement to pay PF on the wages to International Workers has been struck down by the Karnataka High Court judgment and the employee status of an International Worker was disregarded by the Supreme Court in tax matters. This contradiction in the position of law creates ambiguity on the compliance requirements from the companies. More clarity is awaited when pending matters are heard by the Supreme Court.

Currently, the Code on Social Security, 2020 too is silent on the topic of International Workers. The position of law may be clarified once the Employees Provident Fund scheme under the new labour code is published.

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Notifications & Circulars

- SEBI issues Master Circular for ESG Rating Providers
- SEBI issues Circular on industry standards for verification of market rumours
- SEBI issues Circular on restrictions on sharing real-time price data with third parties
- SEBI streamlines intimation of PPM changes for AIFs
- RBI issues Fair Practices Code for lenders for charging of interest
- Foreign Exchange Management (Deposit) (Fourth Amendment) Regulations, 2024 notified
- RBI allows regularisation of partly paid units issued to foreign residents

SEBI issues Master Circular for ESG Rating Providers

SEBI *vide* SEBI/HO/DDHS/POD3/P/CIR/2024/45 dated 16 May 2024 has provided a comprehensive framework for ESG Rating Providers ('**ERPs**') in India. The circular outlines the procedures for regulations, registration, approval changes, and surrender of certificates for ERPs in India. The circular also notifies the procedures and disclosure requirements that the ERPs must follow. Further, ERPs are required to comply and should have the necessary infrastructure in place. This approach will protect the investors/clients, promote development, and regulate the securities market. The circular provides that SEBI will monitor compliance through yearly internal audits mandated for ERPs. It details the different types of ESG ratings ERPs can offer, the presentation (including a rating scale of 0-100), and disclosures against the rating rationale. The circular covers how ERPs should handle situations where issuers are not cooperative and how conflicts of interest should be managed. Additionally, it also clarifies the guidelines for ESG ratings of instruments/products that fall under the purview of other financial regulators.

Details of regulatory communication with SEBI including the contact details of the compliance officer must be given. In terms of outsourcing, ERPs can outsource some activities but not core business functions or compliance. The circular also establishes comprehensive guidelines to manage conflicts of interest for ERPs and their associates. These guidelines include requiring ERPs to establish policies and procedures for identifying and dealing with conflicts, disclosing potential conflicts to clients, and maintaining high standards of integrity. It also outlines the industry classification standards for the ERPs to follow for rating exercises and research activities.

SEBI issues Circular on industry standards for verification of market rumours

SEBI *vide* Circular SEBI/HO/CFD/CFD-PoD-2/P/CIR/2024/52 dated 21 May 2024 has provided a streamlined verification process for market rumours. This circular establishes a collaborative approach involving industry associations and stock exchanges. The Industry Standards Forum, composed of representatives from ASSOCHAM, CII, and FICCI, has formulated industry standards for verifying market rumours. These standards, developed in consultation with SEBI, aim to ensure the effective implementation of

Regulation 30(11) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR Regulations), which specifies the manner of dealing with rumours in the mainstream media.

To ensure compliance, all listed entities are mandated to follow the industry standards. The implementation will be phased, starting with the top 100 listed companies from 1 June 2024. Subsequently, the requirement will extend to the next top 150 listed entities by 1 December 2024, bringing the total to 250 companies. This phased approach aligns with a previous SEBI Circular dated 25 January 2024, in relation to the 'timeline for verification of market rumours by listed entities.'

SEBI issues Circular on restrictions on sharing real-time price data with third parties

SEBI observed that online platforms (websites, apps, etc.) are offering virtual stock trading or fantasy games that rely on real-time share price data of listed companies. Some platforms are even offering monetary incentives based on the performance of the virtual stock portfolio. In this backdrop, SEBI *vide* Circular SEBI/HO/MRD/MRD-PoD-3/P/CIR/2024/56 dated 24 May 2024, which shall take effect 30 days after issuance, require Market Infrastructure Institutions ('**MII**') to implement necessary systems, update regulations, and inform market participants to protect investors and promote a healthy, regulated securities market by preventing the misuse of real-time price data by third parties.

Stock exchanges, clearing corporations, depositories, and market intermediaries can no longer share real-time price data with any third party, including online platforms. Exceptions exist only for activities deemed necessary for the smooth functioning of the market or regulatory compliance. Even in permitted cases, data sharing requires establishing formal agreements outlining the purpose (with justification for orderly market functioning). The list of entities and activities for which real-time data is shared must be reviewed annually by the governing board of the MII or market intermediary. Further, the Circular permits the sharing of market price data for investor education and awareness purposes without offering any kind of monetary incentive to the participants, with a lag of one day in the data provided. MIIs and market intermediaries are obligated to conduct thorough due diligence before sharing real-time price data. Legal agreements must include provisions to prevent any misuse of the data by the receiving entities. According to the circular, MIIs and intermediaries are expected to take all reasonable steps to prevent misuse of price data by those they share it with.

SEBI streamlines intimation of PPM changes for AIFs

SEBI *vide* Circular SEBI/HO/AFD/PoD/CIR/2024/028 dated 29 April 2024 has simplified the process for Alternative Investment Funds (AIFs) to notify changes in their Private Placement Memorandum (PPM). SEBI's Master Circular dated 31 July 2023 ('**Master Circular**') required AIFs to submit all PPM changes to SEBI through a merchant banker, along with a due diligence certificate. The Master Circular was reviewed, and SEBI identified specific PPM changes that AIFs can now directly file with SEBI, bypassing the merchant banker requirement. This aims to ease the process for AIFs and reduce their compliance costs. The Circular provides that Large Value Funds for Accredited Investors (LVFs) are entirely exempted from the requirement to notify PPM changes through a merchant banker.

The Circular lists down the terms of PPM for which changes may be filed directly with SEBI in **Annexure A**. The LVFs can directly file any PPM changes with SEBI, along with a signed undertaking from the AIF manager's CEO/equivalent and Compliance Officer (format for this is provided in **Annexure B** of the Circular).

RBI issues Fair Practices Code for lenders for charging of interest

The Reserve Bank of India has issued guidelines on the Fair Practices Code to Regulated Entities (REs) since 2003, emphasizing fairness and transparency in interest charging by lenders while allowing freedom in loan pricing policy. However, during onsite examinations of REs for the period ending 31 March 2023, the RBI discovered instances of unfair interest charging practices. These include:

a) Charging interest from the date of loan sanction or loan agreement execution, not from the actual disbursement date. Similarly, interest was charged from the date of the cheque issuance, not from when it was handed over to the customer.

b) Charging interest for the entire month instead of only for the period the loan was outstanding when disbursed or repaid during the month.

c) Collecting one or more installments in advance but calculating interest based on the full loan amount.

The RBI has advised REs to refund excess interest and charges to customers. REs are encouraged to adopt online account transfers for loan disbursals instead of issuing cheques in some cases. REs

are directed to review their loan disbursal methods, interest and charge application practices, and make necessary corrective actions, including system changes, to ensure fairness and transparency. This directive is effective immediately.

Foreign Exchange Management (Deposit) (Fourth Amendment) Regulations, 2024 notified

RBI has *vide* Notification No. FEMA 5(R)/(4)/2024-RB notified the Foreign Exchange Management (Deposit) (Fourth Amendment) Regulations, 2024 ('**Deposit Regulations**'). This brings amendments to the Deposit Regulations by adding sub-clause (6) to Clause 7 of the Deposit Regulations, which deals with 'Other deposits made or held by an authorised dealer. It provides that now an authorised dealer in India may allow a person resident outside India to open, hold, and maintain an interest-bearing account in Indian Rupees and/or foreign currency for the purpose of posting and collecting margin in India, for a permitted derivative contract entered into by such person in terms of Foreign Exchange Management (Margin for Derivative Contracts) Regulations, 2020, dated 23 October 2020.

RBI allows regularisation of partly paid units issued to foreign residents

RBI has *vide* A.P. (DIR Series) Circular No. 7 dated 21 May 2024 clarified the amendments to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 applicable to Authorized Dealer (AD) Category - I banks. These amendments by Foreign Exchange Management (Non-debt Instruments) (Second Amendment) Rules, 2024, effective 14 March 2024, permit the issuance of partly paid units to foreign residents by investment vehicles.

To address issuances of partly paid units by Alternative Investment Funds to foreign residents prior to this amendment, the Reserve Bank of India (RBI) has decided to facilitate regularization through compounding under the Foreign Exchange Management Act, 1999. AD Category-I banks are advised to ensure that all necessary administrative actions, including reporting such issuances to the RBI *via* the Foreign Investment Reporting and Management System (FIRMS) Portal, are completed before seeking compounding.

Ratio Decidendi

- Insolvency – No claims admissible after approval of resolution plan by CoC even if approval by Adjudicating Authority pending – NCLT, Mumbai
- Winding up proceedings pending before High Courts, that are not at an advanced stage, ought to be transferred to NCLT – Delhi High Court
- Insurance contracts operate under principles of 'utmost good faith' – Insured is under an obligation to disclose all material facts in proposal form - National Consumer Dispute Redressal Commission
- Arbitration – Composition of a Tribunal cannot be a ground for non-enforcement of a Foreign Arbitral Award, when the issue was not raised before the Tribunal or the Seat Court – Delhi High Court
- Arbitration proceedings determine the seat of arbitration in case of absence of a clause specifying the seat – Delhi High Court

Insolvency – No claims admissible after approval of resolution plan by CoC even if approval by Adjudicating Authority pending

The National Company Law Tribunal ('**NCLT**') Mumbai Bench has dismissed the application filed by Mr. Jay Kumar Rai and Mrs. Supriya Saxena ('**Applicants**'), against M/s. Monarch Brookefields LLP ('**Corporate Debtor'**) stating that a Resolution Plan cannot go back and forth merely because it is pending approval before the Adjudicating authority under Section 31 of the Insolvency and Bankruptcy Code.

The Corporate Insolvency Resolution Process ('**CIRP**') was initiated against the Corporate Debtor. The Public Notice by Interim Resolution Professional mentioned the last date for submissions of claims as 7 December 2019. The Applicants have filed their claims on 18 November 2021 with the Resolution Professional ('**Respondent**') for an amount of INR 98,83,932/- including interest.

The claim was rejected by the Respondent on the grounds of delay in filing for the claim and as the Resolution Plan was already approved by the CoC.

The Applicants cited the judgment of the Hon'ble National Company Law Appellate Tribunal in the case of *Puneet Kaur* v. *K.V. Developers Pvt. Ltd.*, 2022 SCC Online NCLAT 245 wherein it was held that extinguishment of claims take place only upon approval of the resolution plan by the Adjudicating Authority and not otherwise. The Applicants contended that their claim is liable to be admitted by the Respondent as the Resolution Plan was yet to receive approval from the Adjudicating Authority.

On the contrary, Respondent relied on the verdict of the Supreme Court in *R.P.S. Infrastructure Limited* v. *Mukul Kumar and Anr.* Civil Appeal No. 5590 of 2021 and *Committee of Creditors of Essar Steel India Limited through authorized signatory* v. *Satish Kumar Gupta and Ors.* (2020) 8 SCC 534) to contend that one cannot compel a Resolution Professional to admit claims that are received after the approval of the Resolution Plan by the CoC.

The Hon'ble NCLT Mumbai Bench, after considering the rival contentions, has decided not to concur with the contentions of the Applicants. The Bench noted that CIRP is a process that must be completed in a time-bound manner to maximize the value for all creditors. It was further observed that in view of the Supreme Court's judgment in *R.P.S. Infrastructure Ltd.* v. *Mukul Kumar & Anr.* (*Supra*) the claim of the Applicants cannot be sustained since the CoC had already approved the Resolution plan and

was merely pending for approval before the Adjudicating Authority. Thereby, the NCLT Mumbai Bench dismissed the Interim Application filed by the Applicants.

[*Jai Kumar Rai and Mrs. Supriya Saxena* v. *Arun Kapoor* – Interim Appeal (IA) No. 3014 of 2021 In CP (IB) 2517(MB) of 2018, Judgement dated 24 April 2024]

Winding up proceedings pending before High Courts, that are not at an advanced stage, ought to be transferred to NCLT

The Delhi High Court has held that the winding up proceedings pending before the High Court, which are at a nascent stage and have not progressed to an advanced stage, ought to be transferred to the NCLT. The Hon'ble Court observed that in the present instance, only the initial appointment of the Liquidator had taken place, and no substantive orders were passed towards the winding up, therefore the present petition did not reach an advanced stage.

It was the case of Petitioner that they had duly supplied the goods as per the orders and thus raised invoices. The Respondent had made a partial payment, but later defaulted on the payment of the balance amount. The Respondent failed to comply with the demand of the Petitioner and respond to the Legal Notice under Section 434 of the Companies Act, 1956. Hence, the Petitioner approached the Delhi High Court for winding up of the Respondent.

The High Court noted that the Respondent had failed to pay its debt, hence it could be wound up under the provisions of the Companies Act, 1956. The Court examined the case and found that the company petition was accepted on 14 August 2018, and the Official Liquidator was appointed to wind-up the Respondent company. However, no significant progress or orders were made in advancing the winding-up process since then. In essence, the Court observed that there was no progress beyond the initial appointment of the Liquidator.

Relying on the Hon'ble Supreme Court's ruling in *Action Ispat and Citicorp International Limited* v. *Shiv-Vani Oil & Gas Exploration Services Limited*, (2021) 2 SCC 641, the Delhi High Court observed that winding up cases that are in their nascent stages should be transferred to the NCLT. Considering the said principle, the Court directed the present case to be transferred to NCLT.

[*Arabian Oilfield Suppliers and Services* v. *Greka Drilling [India] Limited* – 2024 LiveLaw [Del] 637, Judgement dated 17 May 2024, Delhi High Court]

Insurance contracts operate under principles of 'utmost good faith' – Insured is under an obligation to disclose all material facts in proposal form

The National Consumer Dispute Redressal Commission ('**NCDRC**') has dismissed the claim pertaining to the rejection of a death claim by Aviva Life Insurance Co Ltd. ('**Respondent**'). Further, the Hon'ble Commission observed that the Appellant's husband ('**Deceased Life Assured/ DLA**') had failed to disclose all the material facts to the Respondent in the Policy Proposal. Considering the same, DLA has violated the principle of *ubberima fidei* or 'Utmost good faith'.

The DLA had taken two life insurance policies from the Respondent, one on 22 October 2011 and another on 24 October 2011, for amounts of INR 2,07,297/- and INR 75,00,000/- respectively, with the Appellant named as the nominee. The DLA died in December 2011. After the death of DLA, a First Information Report **('FIR')** was filed with the Police following which a Postmortem was conducted. Though the Postmortem Report did not specify the cause of death, the Appellant's insurance claims were denied by the Respondent based on an investigation by M/s. Sharp Eagle West Patel Nagar ('**Investigator**'). As per the findings of the Investigator, the DLA had failed to disclose criminal charges and prior medical treatments, and thereby violated the principle of utmost good faith. The Appellant's complaint to the State Commission was dismissed, leading to the present appeal seeking to set aside the dismissal, approve the insurance claims with 18% interest, and award compensation for mental agony and litigation costs.

Before the NCDRC, the Appellant contended that there was no nexus between the pre-existing disease allegedly suppressed by the DLA and the cause of death. Further, the Postmortem Report did not conclusively determine the cause of death, and the forensic report found no poison, indicating no fraud or suppression of material facts.

Conversely, the Respondent relied on the policy proposal requiring disclosure of criminal cases, prior hospitalization, and alcohol consumption by the DLA. The DLA's non-disclosures on these points contrasted with the Investigators' findings which supported the Respondent's conclusion that the DLA had willfully suppressed material facts, violating the principle of utmost good faith.

The Hon'ble NCDRC referred to the Supreme Court's decision in the case of *P C Chacko* v. *Chairman, LIC of India*, 2008 (1) SCC 321 and *Satwant Kaur Sandhu* v. *New India Assurance Co. Ltd.*, 2009 (8) SCC 316, wherein it was held that insurance contracts require utmost good faith, obligating the insured to fully disclose all relevant information. The reliance was also placed on *Reliance Life Insurance Co. Ltd.* v. *Rekhaben Nareshbhai Rathod*, (2019) 6 SCC 175, wherein the Hon'ble Apex Court had affirmed that non-disclosure of any substantial information entitles the insurer to repudiate the claim.

Relying on the aforementioned judgments, the NCDRC rejected the Appellant's contention that the cause of death was unrelated to the undisclosed facts. Further, the NCDRC also opined that it was the duty of the Appellant's husband to disclose all known material facts, regardless of their relation to the cause of death. The investigation by the Respondent revealed undisclosed facts and thus the decision to repudiate the Appellant's claim was upheld by the Hon'ble NCDRC.

[*Shalini Srivastava* v. *Aviva Life Insurance Co. Ltd.* – 2024 SCC OnLine NCDRC 74, Judgement dated 23 April 2024]

Arbitration – Composition of a Tribunal cannot be a ground for non-enforcement of a Foreign Arbitral Award, when the issue was not raised before the Tribunal or the Seat Court

A Single Judge Bench of the Delhi High Court has upheld the enforcement of a foreign award and rejected the objection regarding the constitution of the Tribunal. The Hon'ble Bench further opined that public policy grounds for resisting enforcement of foreign awards are constrained to narrow international standards.

Arbitral proceedings were initiated concerning three charter party agreements since the issues raised were similar in nature, the three cases have been heard together, although separate arbitral awards were passed. Aggrieved by the arbitral awards passed, Dredging Corporation India Limited ('**Judgement Debtor**') challenged their enforcement before the Delhi High Court. However, the same was rejected by the High Court on the ground that the seat of arbitration was in London and Delhi High Court lacked jurisdiction to entertain proceedings for setting aside the awards. The Judgement Debtor thereafter filed a petition for setting aside the awards, under Section 68 of the

English Arbitration Act, 1996 before the High Court of England and Wales ('**Seat Court**') which was also dismissed.

Subsequently, Mercator Ltd. ('**Award Holder**') filed an enforcement petition before the Hon'ble High Court regarding the three arbitral awards. However, the Judgement Debtor contended that the arbitrators were not appointed as per the agreed-upon rules of the London Maritime Arbitrators Association. Further, the Judgement Debtor claimed that the arbitration proceedings were violative of substantive provisions of Indian laws, which is contrary to public policy of Inda under Section 48 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'). It was the case of the Award Holder that no such grounds were raised by the Judgement Debtor during the course of arbitration, nor in the applications filed by them for setting aside the award before the Seat Court.

Considering the contentions of both sides, the High Court held that enforcement of foreign award should not be declined on the grounds relating to the composition of the Tribunal, which could have been raised before the Tribunal and before the Seat Court, but were not so raised. The High Court relied on the Supreme Court judgment of *Avitel Post Studioz Ltd. And Ors.* v. *HSBC PL Holdings (Mauritius) Ltd.*, Civil Appeal Nos. 3825-3836 of 2024, wherein it was held that the seat court has exclusive supervisory jurisdiction to determine claims regarding the arbitrator's jurisdiction or allegations of bias, and such claims have to be made in a timely fashion and should not be used to delay the enforcement process. The High Court further opined that no point of public policy arises, so as to defeat the enforcement on this ground. The Hon'ble High Court finally rejected the claims of the Judgement Debtor and directed them to deposit the outstanding amount to the Award Holder.

[*Mercator Ltd.* v. *Dredging Corporation of India Ltd.* – O.M.P.(EFA)(COMM.) 2/2019 Judgement dated 30 April 2024, Delhi High Court]

Arbitration proceedings determine the seat of arbitration in case of absence of a clause specifying the seat

The Delhi High Court dismissed a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, ('**Arbitration Act**') challenging an arbitral award passed by Micro and Small Enterprises Facilitation Council, Pathankot ('**MSEFC**'). The Hon'ble High Court held that in the absence of an exclusive jurisdiction clause specifying the seat of arbitration in the arbitration agreement, the seat of arbitration will be determined

on the basis of connection with the arbitral proceedings, and not the cause of action for the underlying disputes.

The Respondent registered as a medium enterprise under the Micro Small Medium Enterprise Development Act, 2006 (**'MSMED Act**') situated in Pathankot entered into an agreement with the Delhi Tourism and Transport Development Corporation ('**Petitioner**'), for the construction of a bus depot in Delhi ('**Agreement**'). Disputes arose between the parties and the Respondent claimed dues before the MSEFC. Despite the objections made by the Petitioner as to the jurisdiction of the MSEFC, the MSEFC conducted arbitration in Pathankot and awarded the Respondent a sum of INR 4,11,55,845/- payable by the Petitioner.

Aggrieved by the award passed by the MSEFC, the Petitioner approached the Hon'ble Delhi High Court ('**High Court**') and appealed the said award. The Respondent challenged the territorial jurisdiction of the High Court in entertaining the appeal against the arbitral award, and further contended that only MSEFC has jurisdiction under Section 18(4) of the MSMED Act.

In contrary, the Petitioner contended that the Hon'ble High Court has jurisdiction under Section 34 of the Arbitration and Conciliation Act, and the exclusive jurisdiction clause in the Agreement's Integrity Pact which designated the territorial jurisdiction to the courts in Delhi. However, the Hon'ble High Court pointed out that the parties did not expressly decide on the seat of arbitration for disputes arising out of the Agreement and left the venue for arbitration to be decided by the sole arbitrator. To this, the Petitioner contended that Delhi should be considered the seat of arbitration as the entire cause of action transpired in Delhi.

The High Court relied on the cases of *BGS SGS Soma JV* v. *NHPC*, (2020) 4 SCC 234 and *Inox Renewables Ltd.* v. *Jayesh Electricals Ltd.*, (2023) 3 SCC 733, wherein it was held that the seat of arbitration is where the arbitral proceedings have taken place and held that the seat of arbitration is determined based on where the arbitral proceedings originated rather than where the cause of action arose.

[*Delhi Tourism & Transportation Development Corporation* v. *Satinder Mahajan* – O.M.P. (COMM) 337 of 2021, Judgement dated 1 May 2024, Delhi High Court]

News Nuggets

- Foreign funds at GIFT City can take full investments from non-resident Indians
- SEBI mulls tighter rules for the listing of small businesses
- LIC granted a 3-year extension from meeting MPS requirements
- Short-weighted packages lead to penalties for a major biscuit manufacturer
- Government mulls strengthening the underwriting model to help MSMEs obtain loans from banks and NBFCs

Foreign funds at GIFT City can take full investments from non-resident Indians

The Securities and Exchange Board of India (**SEBI**) has allowed the foreign funds set up in the GIFT City, Gujarat to take full investments from non-resident Indians and other Indian-origin citizens. However, these foreign funds will be required to make disclosures about the investors where a foreign fund holds more than 33% of its equity assets under management (**AUM**) in a single Indian group or where a foreign fund along with its investor group holds more than 250 billion rupees (USD 3 billion) of equity AUM in the Indian markets.

[*Source:* Reuters, published on 30 April 2024]

SEBI mulls tighter rules for the listing of small businesses

As per reports, SEBI is considering raising the minimum offer size for the listing of Small and Medium Enterprises (**SMEs**) to INR 30-50 crore. Notably, as of date, there are no current requirements of a minimum issue size prescribed but companies listing on the SME platform are required to have a post-issue capital of INR 25 crore. It is believed that the introduction of the minimum issue size will help ensure that serious companies are accessing the capital markets and thereby reduce the alleged misuse of the SME platform.

[*Source:* Monety Control, published on 14 May 2024]

LIC granted a 3-year extension from meeting MPS requirements

SEBI has granted a 3-year extension to the Life Insurance Corporation of India (**LIC**) to achieve the statutory 10% minimum public shareholding ('**MPS**'). Accordingly, the revised timeline for LIC to meet the MPS requirements on or before 16 May 2027. This extension would now allow additional time for public participation and attract more investors.

[*Source:* Upstox, published on 15 May 2024]

Short-weighted packages lead to penalties for a major biscuit manufacturer

The Thrissur District Consumer Dispute Redressal Forum (**Forum**) has directed a major biscuit manufacturer and Chakkiri Royal Bakery (**Seller,** *in the present issue*) to pay an amount of INR 60,000 as compensation and penalty for selling short-weighed biscuit packages to a consumer. The shortage in weight of the packages which was also confirmed by the Legal Metrology department was considered as a serious lapse of

service on the part of both the manufacturer and the Seller, inviting wrath of the Forum.

[*Source:* The New Indian Express, published on 16 May 2024]

Government mulls strengthening the underwriting model to help MSMEs obtain loans from banks and NBFCs

As per reports, the Government of India is actively looking at strengthening the underwriting model for MSMEs in order to make it easier for them to access loans from banks and other financial institutions. Notably, there is no requirement for collaterals with respect to banks and financial institutions lending towards the MSMEs which increases the risks of defaults thereby making the financial institutions averse to the idea of lending to MSMEs. In this backdrop, the intensifying of the underwriting model aims at lowering defaults by the MSMEs and increasing ways of financing for these smaller businesses.

[*Source:* Mint, published on 16 May 2024]

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