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Companies (Corporate Social Responsibility Policy) Rules, 2014

Corporate Social Responsibility ("CSR") as a formal concept did not exist in India prior to the enactment of the **Companies Act, 2013**. The concept evolved with the liberalization of the economy and the advent of various welfare centric laws such as Labour laws and Environment protection laws, etc. Recently, the concept of CSR has been formalized in the Companies Act, 2013 under section 135. The Ministry of Corporate Affairs has also published a notification known as the **Companies (Corporate Social Responsibility Policy) Rules, 2014** to come into effect on 1st April 2014 to give effect to the aforesaid provisions in the companies Act, 2013. These developments in the field of Corporate Social Responsibility are important steps to create awareness and social consciousness among companies in India.

CSR mandatory under the Companies Act

Section 135 of the Companies Act makes it mandatory for companieshaving net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year to comply to the provisions laid out therein.The companies fulfilling the above criteria must constitute a CSR Committee according to the provisions of the said section. The Committee is entrusted with the function of preparing and formulating the CSR Policy of the company which shall disclose the activities, whether undertaken individually or in the form of a project or programme by the Company. It shall also allocate the expenditure to be incurred in such activities and design an efficient and transparent monitoring mechanism to be followed by the Board to ensure that the activities listed in the Policy are implemented by the company. The Board is required to approve the CSR Policy and ensure that the expenditure incurred in the activities stated are at least 2% of the average net profits of the Company in the immediately preceding three financial years.

CSR Rules effecting provisions under Section 135

The abovementioned Rulesunder **Rule 5** lays down specific provisions regarding the composition of the CSR Committee for unlisted public or private companies and foreign companies covered under the Rule. Under **Rule 4** the CSR activities may be implemented by a Company in collaboration with a trust, society or company according to the specifications laid down under the Rules. These activities must fall under any of the heads contained in **Schedule VII** of the Companies Act, 2013 which includes eradicating extreme hunger, promotion of education, environmental sustainability amongst others. The rules specifically provide that the activities which do not fall under the enlisted heads under Schedule VII and the expenditures incurred in activities performed in the normal course of business shall not be considered as CSR expenditure. Moreover under **Rule 6**, surplus arising out of

CSR activities will not form a part of the business profit of the Company. Additionally CSR activities undertaken outside India or for the benefit of its employees and their families as well as any direct or indirect donations or contributions made to political parties shall not amount to CSR expenditure.

For effective implementation of the above provisions **Rule 8** read along with the Annexure provided at the end of the Rules provide for a detailed report to be submitted with the Annual Report of the Company including the projects and programmes undertaken during that financial year and the detailed break-up of the expenditure incurred on the same. In case of failure to spend the prescribed minimum 2%, the Report must include reasons for such failure. **Rule 9** also provides for disclosure of the CSR Policy of the Company along with the projects and programmes undertaken by it on its website if any.

The provisions of the CSR encourages companies to volunteer to engage in welfare activities and activities to improve their surroundings and local areas and is recognized as an important step towards achieving global standards of business excellence. However, the CSR Rules and provisions although mandatory do not prescribe any penalty for its non-compliance.

Supreme Court Revisits The Laws Governing Arbitration Agreement

Introduction

Recently, Supreme Court of India in *Enercon India vs Enercon GmBH*[1] revisited the laws which are largely applicable to the arbitration agreement. In this case, the arbitration agreement contained the following clause:

"A proceedings in such arbitration shall be conducted in English. ***The venue of the arbitration proceedings shall be in London.*** *The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable-fees of counsel) to the Party (ies) that substantially prevail on merit.* ***The provisions of Indian Arbitration and Conciliation Act, 1996 shall apply.*** *(emphasis added)"*

The Supreme Court of India, whilst analyzing an ideal arbitration clause in an arbitration agreement, kept in mind that there are three potential laws applicable to an arbitration agreement:

- The proper law of the agreement containing arbitration clause, which is the substantive law;
- The law of the arbitration agreement, which is the governing law; and
- The law of the seat of arbitration, which is regarded as the procedural law.

An ideal arbitration agreement will contain each of the aforesaid laws. However, in case the governing law is not defined, the substantial law is regarded as the

governing law. This principle was held by the Supreme Court in *National Thermal Power vs Singer Company & Ors.*[2]

Validity of arbitration agreement

The Supreme Court found that an arbitration agreement cannot be void on the basis that there is no concluded contract between the parties. In case the arbitration agreement is 'null and void, inoperative or incapable of being performed, the parties have the right to avoid it. The Supreme Court further held that if the contract containing the arbitration clause is null and void, the arbitration agreement will still remain enforceable and valid. Therefore, it can be inferred that the arbitration agreement is a separate agreement between the parties than the underlying contract which contains the arbitration agreement. It was also held in this case that in the absence of a "*fundamental legal impediment*", whether the underlying contract is a concluded contract or not is required to be left to the arbitral tribunal. The apex court held that the arbitration agreement remains valid in case the intention to arbitrate has continued without waiver.

Incapable or unworkable arbitration clause

Whilst determining the issue of whether an arbitration agreement is unworkable or incapable of being performed, the Supreme Court relied upon *Lord Diplock's*statement in *Salen Rederiema*[3] wherein it was held that "*If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense…*". The Court held that this reasonable business person's approach has its legal mandate under section 5 of the Arbitration and Conciliation Act, 1996 which bars the judicial intervention in arbitration proceedings. The Court, therefore held that the clause '*each party shall appoint an arbitrator… making it in all three arbitrators*' was not unworkable; and the missing line that *'the two Arbitrators appointed by the parties shall appoint the third Arbitrator'* can be read into the arbitration clause and that the court would be well within its rights to set right an obvious omission.

'Venue' and 'Seat' of arbitration

The Supreme Court this case tried to apply the closest connection test inversely. The aforesaid dispute resolution clause clearly designated Indian law as the substantive law. It further contained the Indian Arbitration and Conciliation Act, 1996 as the applicable law. However, the clause also stated that the *venue* for the arbitration proceedings would be London. The issue before the Supreme Court was to consider if the word 'venue' was intended to be used interchangeably with 'seat' or 'place' of arbitration or whether London was designated as only the venue of the hearings as against the 'seat' or 'place' of arbitration.

Keeping reliance upon the decisions of *Naviera Amazonica v. Compania*

Internacional[4], C v. D[5] and the decision in *Sulamerica*[6] , the apex court concluded that since the governing law was Indian and the Indian Arbitration Act was expressly made applicable, all three laws in the arbitration agreement with potential applicability were Indian and therefore, it was only reasonable that parties intended New Delhi be the seat of arbitration and vesting the courts in India with exclusive supervisory jurisdiction. It appears that the Court assumed that by expressly making the Indian Arbitration Act applicable, Indian law was recognized as both the governing law and the curial law. The basis of this decision is as follows-

- the court opined that the word 'venue' was used in reference to London; and
- the Court further said that an "absurd" situation would arise as "the Indian Arbitration Act, 1996 would apply to the process of appointment under Section 11; English Arbitration Act, 1996 would apply to the arbitration proceedings (despite the choice of the parties to apply Chapter V to the Part I of the Indian Arbitration Act, 1996); challenge to the award would be under English Arbitration Act, 1996 and not under the Part I of the Indian Arbitration Act, 1996; Indian Arbitration Act, 1996 (Section 48) would apply to the enforcement of the award."

The apex court stated that the parties "*would not have intended to have created an exceptionally difficult situation, of extreme complexities*" by mentioning London as the seat of arbitration, therefore, the court found that London was designated only as a convenient place for hearings by virtue of the use of the word 'venue'.

Conclusion

This judgment appears to be a result of the pro-arbitration position of the Indian courts in the post-BALCO era of Indian arbitration. The Supreme Court emphasized on the necessity of the concept of separability of the arbitration agreement addressing the issues with respect to the conclusion of the contract and the implication of dispute resolution clause. This decision also suggests to specifically mention the 'seat' of arbitration proceedings in the arbitration agreement.

1. Civ. App. 2086/7 of 2014
2. 1993 AIR SC 998
3. [1988] 1 AC 191
4. [(1988) 1 Lloyd's Rep 116]
5. [(2007) EWHC 1541]
6. [(2012) EWHC 42]

News 10 @ a glance

MCA notifies 183 sections of the New Companies Act, 2013

MCA has on 27th March, 2014 notified an additional 183 sections (after the 100 sections notified

earlier) out of the 470 sections of the Companies Act, 2013 which has come into effect on 1st April, 2014. These sections include the essential provisions relating to incorporation, management, board functioning accounts and audit.

RBI guidelines on Revitalising of Distressed Assets

Owing to the slowdown in the performance of the Indian economy, many Indian companies are under great stress and are striving against bankruptcy and spiraling into heavy debts. This resulted in difficulties in the banking sector in the form of increase in the Non-Performing Assets (NPA) and restructured accounts. In order to enable early identification of such Distressed Assets, restructuring of viable accounts and timely resolution of unviable accounts, the RBI has issued a Framework on January 30th 2014 known as the Framework for Revitalising of Distressed Assets in the Economy and further issued guidelines on Joint Lenders' Forum (JLF) and Corrective Action Plan (CAP) on 26th February 2014.

Finance Act, 2014 enacted

The Finance Bill which was passed by both the Houses of Parliament was assented by the president on 4th March 2014 called the Finance Act 2014 (Act No. 11 of 2014). The Act is an Act to continue to enforce the existing rates of income tax for the financial year 2014- 2015.

Rate of Conversion of Foreign Currency determined by CBEC

The Central Board of Excise and customs, pursuant to the provisions of section 14 of the Customs Act, 1962 and its powers mentioned therein issued a Notification dated 6th March 2014 and in super session of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.13/2014-CUSTOMS (N.T.), dated the 20th February, 2014 vide number S.O.496 (E), dated the 20th February, 2014, except as respects things done or omitted to be done before such super session, the Central Board of Excise and Customs, declared that the rate of exchange of conversion with respect to each of the foreign currencies mentioned in Schedule I and II shall be according to the rates mentioned against them with respect to export and import of goods.

CBDT extends due date for filing TDS returns for government deductors only

The CBDT vide its **circ**ular No. 07/2014 F. No. 275/27/2013-IT(B)in which CBDT extends the due date for filing return for F.Y.2012-13 (for 2nd to 4th quarter) and F.Y.2013-14(for 1st to 3rd quarter). This will reduce the stress on Government deductors as they were being issued notices from the Income Tax Department to pay late

filing fees of TDS/TCS returns.

Government approves increase in interest on EPF deposits

The Government through the Central Board of Trustees decided to increase the interest on EPF deposits from 8.5% to 8.75%for the fiscal year 2013 – 2014. This 20% increase in interest shall benefit over 5 crore subscribers of the EPFO.

RBI liberalizes third party payments for import of goods

RBI vide its circular No. 100 on February 4th 2014 has made certain changes to its Circular 70 dated 8th November 2013 which permits third party payments for export of goods and software / import of goods subject to the conditions stated therein. This Circular issued under section 10(4) and 11(1) of the Foreign Exchange Management Act, 1999, relaxes certain rules relating to the procedures and limit on payment by third party for export/import transactions.

New Companies Act effective this April

The Companies Act, 2013 shall come in to effect on 1st April 2014. The Ministry of Corporate Affairs has cleared all working items which are in the old format.

CCI Approves Lenovo – IBM Deal

In what may be called one of the biggest acquisitions by a Chinese firm in the technology industry, the Global Technology major, Lenovo Group's deal to acquire IBM the US based companies x86 server business has been approved by the Competition Commission of India. This acquisition will involve transfer of assets, contracts and employees associated with the server business. According to the order passed by the CCI, Lenovo is a welcome competitor in the server market in India.

DGCA Issues New Safety Norms

DGCA has formulated new safety norms pertaining to non-scheduled flight operations such as pertaining to helicopters and small aircrafts. The regulator has directed the flight crew to ensure that local authorities coordinate properly with them. It has also issued safety norms to be followed during the election period. It also prescribes strict penalties for non-compliance of these regulations.