CONSOLIDATED FOREIGN DIRECT INVESTMENT POLICY

The Government of India through Ministry of Commerce & Industry recently issued its consolidated Foreign Direct Investment Policy Circular of 2015 ("**Circular of 2015**") updating the Foreign Direct Investment Policy ("**FDI Policy**"). The Circular of 2015 has been put into effect from 12th May 2015 and supersedes all Press Notes/Press Releases/ Clarifications/ Circulars issued by Department of Industrial Policy and Promotion ("**DIPP**"). This Circular of 2015 will remain in force until superseded in totality or in part thereof. This article discusses the key amendments/ clarifications introduced by the Circular of 2015.

Most Recent Policy Measures

The Circular of 2015 have introduced the following amendments/ clarifications:

- **Pharmaceuticals-Medical Devices**

Under the Circular of 2015, FDI up to 100 (hundred) percent under the automatic route is now permitted for manufacturing of medical devices. Therefore the conditions with respect to greenfield and brownfield projects of this industry i.e. Pharmaceuticals, is not applicable to Medical Devices. Further the Circular of 2015 provides an exhaustive definition of the term 'Medical Device'.

- **Insurance**

Under the Circular of 2015, the sectoral cap is now raised to 49 (forty nine) percent from 26 (twenty six) percent. Further the Circular of 2015 states that FDI upto 26 (twenty six) percent is allowed under automatic route and beyond 26 (twenty six) percent and up to 49 (forty nine) percent is through government route. No Indian insurance company shall allow the aggregate holdings by way of total foreign investment in its equity shares by foreign investors, including portfolio investors, to exceed 49 (forty nine) percent of the paid up equity capital of such Indian insurance company.

- **Telecom**

Under the Circular of 2015, the sectoral cap is now raised to 100 (hundred) percent from 74 (seventy four) percent. Further the Circular of 2015 states that FDI up to 49(forty nine) percent is allowed under the automatic route and beyond 49 (forty nine) percent through government route, subject to observance of licensing and security conditions by licensee as well as investors as notified by the Department of Telecommunications (DoT) from time to time.

- **Railway Infrastructure**

Under the Circular of 2015, FDI upto 100 (hundred) percent under the automatic route is permitted for construction, operation and maintenance of the following: (i) Suburban corridor projects through PPP, (ii) High speed train projects, (iii) Dedicated freight lines, (iv) Rolling stock including train sets, and locomotives/coaches manufacturing and maintenance facilities, (v) Railway Electrification, (vi) Signaling systems, (vii) Freight terminals, (viii) Passenger terminals, (ix) Infrastructure in industrial park pertaining to railway line/sidings including electrified railway lines and connectivities to main railway line and (x) Mass

Rapid Transport Systems.

FDI in the abovementioned activities is open to private sector participation including FDI is subject to sectoral guidelines of the Ministry of Railways. Further proposals involving FDI beyond 49 (forty nine) percent in sensitive areas from security point of view, will be brought by the Ministry of Railways before the Cabinet Committee on Security ("**CCS**") for consideration on a case to case basis.

- **Defence**

Under the Circular of 2015, FDI in this sector is now liberalized upto 49 (forty nine) percent under the automatic route as opposed to 26 (twenty six) percent under the FDI Policy of 2014. Further the Circular of 2015 states that FDI up to 49 (forty nine) percent is allowed under the government route and FDI beyond 49 (forty nine) has to be referred to CCS on case to case basis, wherever it is likely to result in access to modern and 'state of art' technology in the country. Further the FDI limit of 49 (forty nine) percent is composite and includes all kinds of foreign investments i.e. FDI, Foreign Institutional Investors (FIIs), Foreign Portfolio Investors (FPIs), Non Resident Indians (NRIs), Foreign Venture Capital Investors (FVCI) and Qualified Foreign Investors (QFIs).

- **Non-Banking Finance Companies**

Under the Circular of 2015, FDI in this sector is upto 100 (hundred) percent under the automatic route. The Circular of 2015 clarifies that Leasing and Finance covers only financial leases and not operating leases. FDI in operating leases is permitted up to 100 (hundred) percent through the automatic route.

- **Optionality Clause**

The Circular of 2015, has given effect to Reserve Bank of India's ("**RBI**") circular that allowed Indian companies to issue equity shares, fully, compulsorily and mandatorily convertible preference shares with optionality clause, subject to conditions as specified in the Circular of 2015. The FDI Policy reiterates the RBI's stand that foreign investors are not permitted to exit with an 'assured return'.

- **Depository Receipt Scheme**

The Circular of 2015, has incorporated various provisions of the Depository Receipt Scheme, 2014 ("**DR Scheme**") issued by the Ministry of Finance. A person can issue Depository Receipts, if it is competent to issue eligible instruments to person resident outside India under Schedules 1, 2, 2A, 3, 5 and 8 of Notification No. FEMA 20/2000-RB dated May 3, 2000, as amended from time to time. Further the issue of depository receipts as per DR Scheme shall be reported to RBI by the domestic custodian as per the reporting guidelines for DR Scheme i.e. Form DRR to be filed within 30 (thirty) days from the date of closure of issue/ programme.

- **Pricing of Shares**

Under the Circular of 2015, the price of the shares will be determined on the fair valuation of shares done by a merchant banker registered with the Securities and Exchange Board of India (SEBI) or by a chartered accountant as per any internationally accepted pricing methodology on arm's length basis, incase of the shares of the company are not listed in any recognised stock exchange in India.

- **Transfer of Shares and Convertible Debentures**

Under the Circular of 2015, shares and convertible debentures can be transferred from one non-resident to another non-resident without prior approval of government or RBI in sectors which are under the automatic route. However, approval of government will be required for transfer of stake from one non-resident to another non-resident in sectors which are under government approval route.

- **Reporting for Issue of Shares**

Under the Circular of 2015, issue of equity shares against any other funds payable by the investee company and remittance of which does not require any prior permission of the government or of RBI under Foreign Exchange Management Act, 1999 or any rules/ regulations framed or directions issued thereunder, is permitted. Further the equity shares shall be issued in accordance with the existing FDI guidelines on sectoral caps, pricing guidelines etc. as amended by RBI, from time to time.

- **Acquisition of Shares under Scheme of Merger/Demerger/Amalgamation**

Under the Circular of 2015, it has been clarified that Foreign Investment Promotion Board's ("**FIPB**") approval would not be required in case of mergers and acquisitions taking place in sectors under the automatic route.

- **Reporting of Partly Paid up Shares**

Under the Circular of 2015, an investee company issuing partly paid up shares has to furnish a report not later than 30 (thirty) days from the date of receipt of each call payment and file a report in form FC-GPR to the extent they become paid up.

- **Approvals for cases under Government Route**

Under the Circular of 2015, Finance Minister (in-charge of FIPB) would consider the recommendations of FIPB on proposals with total foreign equity inflow of and below Rs. 2000 (two thousand) crores. Further the recommendations of FIPB on proposals with total foreign equity inflow of more than Rs. 2000 (two thousand) crores would be placed for consideration of the Cabinet Committee on Economic Affairs ("**CCEA**"). The CCEA would also consider the proposals which may be referred to it by the FIPB/ Finance Minister.

CONCLUSION

The relaxation provided under the Circular of 2015 by the Government of India has been aimed to boost foreign investment flows into India. The liberalization brought about by this Circular of 2015 may indeed provide lot of comfort to the foreign investors and will encourage the present government's initiative under 'make in India campaign'.

Highlights of the Companies Amendment Act, 2015

In 2013, theerstwhile Companies Act, 1956 wasreplaced by the Companies Act, 2013 (**"the Act"**) with the aim of ensuring a systemic move towards better regulation of corporate housesin India. However, in just over a year's time, the Act has received its first amendment rationalizing the existing provisions.The Companies (Amendment) Bill, 2014 was passed by the Lok Sabha on December 17, 2014 and the same was approved by the Rajya Sabha on May 13, 2015. The Bill has received the assent of the President and has been notified in the Official Gazetteon May 26, 2015.

In addition to the aforesaid, the Ministry of Corporate Affairs (**"MCA"**) on May 29, 2015 issued a notificationamending certain provisions under the following Rules:

- Companies (Registration Offices and Fees) Rules, 2014.
- Companies (Share Capital and Debentures) Rules, 2014.
- Companies (Declaration and Payment of Dividend) Rules, 2014, and
- Companies (Incorporation) Rules, 2014.

Some of the key amendments include:

- The definition of a 'Private' as well as a'Public' company has been amended. The minimum requirement of paid up capital being Rs. 1 lakh in case of a private company and Rs. 5 lakh in case of a public company has been eliminated. This is expected to encourage start-up companies as it shall reduce the entry costs and trim down the burden of maintaining the minimum capital amount.
- Under the Act all newly incorporated companies were required to file INC 21 and obtain certificate of commencement of business from the concerned ROC. The requirement of the said declaration by the directors has now been done away with, consequently implying that the registration of a company and the commencement of business operations shall now be a speedier process.
- The use of common seal has been made optional. The amendment now provides that incase a company does not have a common seal, any authorization may be done either by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary. The erstwhile provisions were archive and not commensurate with the modern times, the change is a huge relief and eases procedural norms under the Act.
- The Act did not prescribe punishment(s) for contraventions previously; however severe punishments have now been introduced for contravening the norms relating to acceptance of deposit. A new section, Section 76 A has been inserted which, *inter alia*, provides as below:
  - The company would, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with a fine which would not be less than Rs 1 crore but which may extend to Rs 10 crore, and;
  - The defaulting officers of the company would be punishable either with imprisonment which may extend upto 7 years or with a fine which should not be less than Rs 25 lakh but which may extend to Rs 2 crore, or with both;
  - In cases where it has been proved that the defaulting officer has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, he would be held liable for action under Section 447 of the 2013 Act which deals with punishment for fraud.

This section has been introduced with the intent ofprotecting the investors. Going forward the companies are expected to adopt a more cautious approach because of the stringent punishments prescribed under the new provision.

- No person shall be entitled to inspect a board resolution filed with the ROC and also, no person shall be entitled to inspect or obtain copies of the resolutions. Prior to the amendment, certain resolutions were part of the public documents which was available for inspection. This move is to ensure the maintenance of confidentiality of the decisions made by the board of directors. Insofar as the question of ensuring ease in business is concerned, the utility of this move is questionable.

- A provision for setting off previous losses and depreciation against the profit of the current year before declaring dividend has been introduced in the Act and the same has been deleted from the Companies (Declaration and Payment of Dividend) Rules, 2014.
- The Act provides for transferring equity shares to the Investor Education and Protection Fund with unclaimed and unpaid dividends. The amendment provides that in case dividends are paid or claimed for any year during the period of seven consecutive years, the shares shall not be transferred to the Investor Education and Protection Fund. This is a clarificatory amendment and was much required.
- Provisions prescribing thresholds for reporting fraud to the Central Government and Audit Committee/ Board have been enabled which are as follows.
  - The auditors are allowed to report the Central Government only in cases where the involved amount exceeds the prescribed amount. In case of a fraud involving an amount which is less than the specified amount, the auditor is required to report the matter to the audit committee (if constituted) or to the Board;
  - Where the auditors have reported fraud to the audit committee or to the Board but not to the Central Government, the company should disclose the details about such fraud in the Board's report in the prescribed manner;

This categorization shall enable the Government to concentrate on important matters whilst the Audit Committee can oversee the remaining matters.

- The Audit Committee is now empowered to give omnibus approvals for related party transactions subject to the prescribed conditions.This is in line with clause 49 of the Listing Agreement.
- Section 185 shall not be applicable where loans are given to wholly owned subsidiaries and guarantees/securities on loans are taken from banks by subsidiaries.
- As per Section 188 of the Act, a company is required to pass a special resolution in case of related party transactions. However, this provision has been amended. The amendment provides that a company can now approve a related party transaction through a resolution, thus only a resolution and not a special resolution shall be required to approve related party transactions. Further, related party transactions between a holding and wholly owned subsidiary shall be exempted from the requirement of shareholders' approval provided the accounts of the wholly owned subsidiary are consolidated with the holding company and are placed before the shareholders at the general meeting for approval.
- The ROC was required to notify the company/directors about the removal of the name of a company from the register of companies where the subscribers to the memorandum did not pay the subscription. This provisionhas now been omitted. With the elimination of the minimum capital requirement this provision has also been removed from the Act.
- Winding up cases shall be taken up by a 2 member bench instead of a 3 member bench.
- Special courts shall now adjudicate only those offences which carry an imprisonment of two years or more. This move shall reduce the burden of Special courts.
- The procedure for presenting draft notifications, beforethe Parliamentfor exemptions and/orclarificationsand/or modifications of provisions of the Act has been simplified.

CONCLUSION:

The Amendments are certainly a step in the right direction. A majority of the Amendments have been made to ensure greater speed and furthermore to ensure ease of doing business in India. Some key clarifications have also been included. As stated before, these Amendments rationalize the existing provisions however, if it is felt that the changes still do not fit the bill, we can expect further changes in the coming few days. In the words of the Minister for Corporate Affairs, Mr. Arun Jaitley "*A broad-based committee will continue to go into this question for the next few months as to where the shoe pinches and this may not be the last amendments which we are bringing in*."

SUPREME COURT APPROVES SETTING UP OF COMPANY LAW TRIBUNALS

Introduction:

The five-judge Constitutional Bench of the Hon'ble Supreme Court of India vide its order dated May 14,2015 in Madras Bar Association v. Union of Indiaupheld the Constitutional validity of National Company Law Tribunal (**NCLT**) and National Company Law Appellate Tribunal (**NCLAT**). This would give a go ahead to setting up of the a Tribunal, constituted to replace the Company Law Board (**CLB**), the Board for Industrial and Financial Reconstruction (**BIFR**) and the Appellate Authority for Industrial and Financial Reconstruction (**AAIFR**).

Background and Verdict:

Videamendment made under the erstwhile Companies Act, 1956 ("Old Act") in 2002 by Companies (Second Amendment) Act, 2002, certain provisions relating to NCLT and NCLAT were incorporated under Part 1B and 1C.

The constitutional validity of these provisions was challenged in a writ petition filed by the Madras Bar Association ("**MBA**") in the Madras High Court.However, at thesame time, the High Court pointed out certain defects in various provisions of Part 1B and Part 1C of the Old Act, declaring that those provisions, as existed, offended the basicconstitutional scheme of separation of powers, and it was held that unlessthese provisions are appropriately amended by removing the defects which were also specifically spelled out, it would be unconstitutional toconstitute NCLT and NCLAT to exercise the jurisdiction which is being exercised by the High Court or the CLB.

A further appeal by Union of India as well as MBA was filed against the Judgment of Madras High Court which was decided by the Constitution Bench. The same was filed as MBA felt aggrieved by the part of the judgment vide which establishments of NCLT and NCLAT was held to be constitutional, whereas the Union of India felt dissatisfied by the other part judgment where provisions contained in part 1B and 1 C of the Old Act was perceived as suffering from various legal and constitutional infirmities.The said appeals were disposed by partly allowing them via Union of India v. R Gandhi, President, Madras Bar Association, [2010] 11 SCC 1 popularly known as **Judgment 2010** whereby it was held that:

- Creation of Tribunal and vesting in them, the powers and jurisdiction exercised by the High Court in regard to company law matters, were not unconstitutional.

- Parts 1B and 1C of the Act were found to be unconstitutional; however, they may be made operational by making suitable amendments**.**

Though the verdict came in the year 2010, upholding the creation of NCLT and NCLAT, these two bodies could not be created and made functional immediately thereafter.

Pursuant to the observations of the Supreme Court in the aforesaidcase, the requisite changes were introduced to the scheme of NCLT under the new Companies Act, 2013 **("Act, 2013").**

However, another round of litigation ensued *inter alia* on the ground that not with standing various directions given in Judgment 2010, the new provisions in the Act, 2013 are almost on the same lines as were incorporated in the Act, 1956 and, therefore, these provisions suffer from the vice of unconstitutionality.

Hence, the current ruling of the Supreme Court is essentially an effort to examine the provisions of the 2013 Act and to consider whether it faithfully adheres to its previous ruling inJudgment 2010. While the court finds that the 2013 Act broadly does so, it also identifies some discrepancies.

In this light, the Court pronounced its ruling on three principal issues:

1) **Validity of the constitution of NCLT and NCLAT**

On this issue, the Court essentially reverberates its decision in *R. Gandhi* on the ground that all arguments pertaining to constitutionality were already addressed by the Court in that case and it "specifically rejected the contention that transferring judicial function, traditionally performed by the Courts, to the Tribunals offended the basic structure of the Constitution".

2) **Qualifications and Other Terms of the President and Members of the NCLT as well as Chairman and Members of NCLAT**

In order to empower CJ H. L.Dattu's emphasis on the principles of independence of judiciary and separation of powers, the following order was passed with respect to "Principal issues (ii) and (iii)". The first order was to hold Section 409(3)[1] (a) and (c) of the Companies Act, 2013 as invalid, since these provisions suffered from unconstitutionality. Likewise, Section 411(3)[2], which provided for qualifications of Technical Members, was also held invalid. Simultaneously, para 120 of 2010 Judgment will have to be scrupulously followed in respect of the appointment of Technical members to the NCLT.

Also, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as Technical members of the National Company Law Tribunal and only persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having expertise in rehabilitation/ revival of Companies and therefore, eligible for being considered for appointment as Technical Members.

3) **Structure of the Selection Committee for appointment of President /Chairperson /Members.**

The 2013 Act provided for a 5-member committee without a casting vote to the Chief Justice of India (or nominee) which was found at fault by the Constitution Bench in 2010 judgment. The Court specificallyremarked that instead of 5 member Selection Committee, it should be 4member Selection Committeeand even the composition of such aSelection Committee was mandated in Direction No.(viii) of para 120 of 2010 Judgment.

Hence, with the new insertions and directions provided by the Court, it is observed that the Selection Committee shall broadly be on the following lines:
(a) Chief Justice of India or his nominee – Chairperson (with a casting vote);
(b) A senior Judge of the Supreme Court or Chief Justice of High Court – Member;
(c) Secretary in the Ministry of Finance and Company Affairs - Member; and
(d) Secretary in the Ministry of Law and Justice -Member.

However, now, in the new round of litigation, more provisions have been struck down. The present Judgment indicated that the legal hurdles for setting up the Tribunals are far from over. While concluding the Judgment, the court observed that since the functioning of these Tribunals has not started yet and it's high time that they start functioning now without any further delay, therefore the government has been asked to modify the rules according to the recommendations made in the Judgment at the earliest.

Implications

By this Judgment, the Supreme Court has not only paved the way for the establishment of the NCLT, but it may also potentially lead to the notification of the remaining sections of the 2013 Act so as to make the entire legislation effective.

At a broader level, this development is significant as it might likely alter the face of corporate litigation in India. While matters such as amalgamations, winding-up, and similar cases being taken out of the regular Court system, one can expect greater efficiency in resolution of corporate disputes. Similarly, the most-discussed class action mechanism could potentially alter corporate behavior.The establishment and constitution of NCLT and NCLAT as exclusive Tribunals for the administration of all matters arising out of the Companies Act will definitely reduce, if not wipe out the grave delay involved in the company law proceedings, avoid multiplicity of litigation before various forums, streamline the process of appeal and reduce the burden on High Courts.

1. Section 409: Qualification of President and Members of Tribunal
2. Section 411: Qualifications of chairperson and Members of Appellate Tribunal