

### **‘India – the most open economy in the world’ - Recent amendments in FDI policy**

In the last two years, the Government of India has significantly liberalized Indian economy in order to welcome foreign investments and to be positioned as an attractive FDI destination. After its recent leg of reforms, India is now touted as the ‘most open economy in the world’. Few of the sectors liberalized under this latest reform include food products, defense, aviation, single-brand retail and pharmaceutical. Therefore, most of the sectors are now liberalized with the exception of a few sectors which are under a negative list.

In terms of a press release given by the Government, it was stated that the liberalization measures undertaken in the last two years have resulted in massive inflows of capital into India. As per statistical figures, FDI inflows during the financial year 2015-16 were recorded at US\$ 55.46 billion, as against US\$ 36.04 billion during the financial year 2013-14. However, it is felt that there is a potential to attract far more foreign investment which can be achieved by further liberalizing and simplifying the FDI regime. In view of this, the Government has announced the following amendments in the FDI Policy vide DIPP Press Note No. 5 dated June 24, 2016:

#### **Defense**

This sector had a cap of 49% under the automatic route. For government approval route, FDI above 49% was permitted on a case to case basis on the condition that it should result in access to modern and ‘state of art technology’ in the country. In this regard, foreign investors had been known to have complaints that term ‘state of art technology’ was ambiguous.

Therefore, the government decided to do away with the term ‘state of art technology’. It has now been prescribed that FDI beyond 49% has now been permitted through government approval route, in cases resulting in access to modern technology in the country or for other reasons to be recorded. Also, it is now permissible to have FDI in manufacturing of small arms and ammunitions.

#### **Broadcasting**

The government has now permitted 100 per cent FDI through automatic route in broadcasting carriage services like teleports, direct-to-home and mobile TV. Earlier, this sector was subject to government approval for FDI beyond 49%.

#### **Pharmaceutical**

The government has now decided to allow 74% FDI under automatic route for existing pharmaceutical ventures which are commonly referred to as ‘brownfield projects’. For investments beyond 74%, government approval route will continue to be applicable.

#### **Civil aviation**

The government has now decided to allow 100% FDI under automatic route for existing airports which are commonly referred to as ‘brownfield projects’. Earlier a limit of 74% was prescribed. This is expected to lead to development and modernization of airports across the country.

For airlines, the government has prescribed an FDI limit of 100% under automatic route for scheduled carriers with NRI investors. Earlier this limit was 74%. The government has already

revamped its National Civil Aviation Policy in order to permit domestic carriers to fly abroad in the near future. Listed airlines such as Spice Jet, Jet Airways etc. can now expect some respite from their woes as infusion of capital into their business from foreign shores has become easier.

#### **Private security agencies**

The sectoral cap for private security agencies has been increased from 49% to 74%. Whilst FDI upto 49% is permitted through automatic route, a government approval shall be required for investment beyond 49%.

#### **Branch/Liaison/Project Offices**

With respect to an entity engaged in the prescribed sectors i.e. defense, telecom, private security or information and broadcasting, the approval of Reserve Bank of India or any separate security clearance shall not be required for setting up branch/liaison/project offices in those cases where FIPB approval or license/permission has already been granted by the concerned Ministry/Regulator.

#### **Animal husbandry**

Earlier, FDI in animal husbandry (including breeding of dogs), pisciculture, aquaculture and apiculture was allowed upto a limit of 100% under automatic route under controlled conditions. Pursuant to the amendment, this requirement of 'controlled conditions' for FDI in these activities has been done away with.

#### **Single-brand retailing**

The government has decided to relax local sourcing norms up to three years and has permitted a relaxed sourcing regime for another five years for entities undertaking single brand retail trading. In this regard, the following has been prescribed:

*“Sourcing norms will not be applicable for upto three years from commencement of the business i.e. opening of the first store for entities undertaking single brand retail trading of products having ‘state of art’ and ‘cutting edge’ technology and where local sourcing is not possible.”*

After the exemption period, in the next five years, domestic sourcing shall be done for 30% of the goods purchased as an average of five years' total value of the goods purchased. Thereafter, the company has to comply with the norm on an annual basis.

Whilst the government has made it easier for companies like Apple Inc to set up shop in India by easing the local sourcing norms, it has also lent an opportunity for development of local expertise by requiring that 30 per cent procurement requirement would have to be met as an average of five years' total value of the goods purchased. This will promote the 'Make in India' initiative started by government by ensuring that the companies engage in other activities beyond trading.

#### **Food products manufactured in India**

For any food products manufactured in India, 100% FDI is now permitted under government approval route for trading activities. Further, trading includes e-commerce activities.

#### **CONCLUSION**

It is noteworthy that these decisions on FDI reforms were taken at a high-level meeting chaired by Prime Minister Narendra Modi. The government has indicated that these reforms are meant to liberalize and simplify the FDI policy so as to provide ease of doing business in the country leading to larger FDI inflows that contribute to growth of investment, incomes and employment. Indian economy is definitely under global watch for its immense potential. The reforms made by the government have done away with quite a few complexities and unnecessary shackles that were holding back certain sectors. Simplification of these policies is being witnessed, which is of great value to potential foreign investors.

### GAMING WHEN GAMBLING

The Oxford dictionary defines the word ‘gamble’ as playing a game of chance for money or a bet. Therefore, gambling is essentially a game. However, it is commonly understood to be a game that involves a significant element of chance and one in which a risk is assumed by staking certain amount as wager.

#### *Legislative background of gambling laws in India:*

In India, gambling is a state subject. It is covered under Entry No. 34 of List II (State List) of the Seventh Schedule of the Constitution of India. Therefore, it is an exclusive state subject and each state has its own regulations that allow or restrict activities in the nature of gambling.

Pre Independence, gambling in India was regulated by the Public Gambling Act (“**Gambling Act**”) constituted in the year 1867. However, post-independence, when some of the states adopted the said enactment, other chose to introduce a legislative framework. The principle adopted in the enactments are more or less similar with an objective to ban or restrict gambling in the respective territories.

For instance, the state legislature of Delhi has enacted the Delhi Public Gambling Act, 1955 (“**Delhi Gambling Act**”) which prohibits gambling in the union territory of Delhi, but excludes from its purview the “games of mere skill” wherever played. Similarly, the State of Goa has enforced special enactments for the purpose of allowing gambling but imposes certain restrictions as well. Most of these gambling laws were enacted prior to advent of virtual gaming and therefore they primarily regulate physical gaming and gambling in physical premises defined as “gaming or common gaming houses”.

Whilst there is no precise definition of gambling within the aforesaid gambling laws, they all provide that the restrictions imposed under these laws would not apply to games of “mere skill”.

Lotteries have been expressly excluded from the purview of the Gambling laws and are governed under the central enactments namely – Lotteries (Regulation) Act, 1998 and the Lottery (Regulation) Rules, 2010 and State-specific rules (together the “**Lottery Laws**”). The Lottery Laws allow the State

Governments to organise, conduct or promote a lottery, subject to the conditions specified in the central enactments

***What is Gambling?***

As stated above, the legal provisions with respect to gambling laws specifically exclude “games of mere skill” from their purview. Whether a game is of chance or skill is a question of fact is to be decided on the facts and circumstances of each case.

While the Gambling Act itself doesn’t distinguish between gaming and gambling, the Supreme Court the Supreme Court of India in the year 1996, while dealing with *Dr. K.R. Lakshmanan v/s. State of Tamil Nadu and Anr.* (“**Lakshmanan Case**”) observed as follows:

*“The competitions where success depends on substantial degree of skill are not “gambling” and despite there being an element of chance if a game is preponderantly a game of skill it would nevertheless be a game of “mere skill”.*

On the basis of the aforementioned judgement, we may say that the Supreme Court has interpreted the words “mere skill” to include games which are preponderantly of skill and have laid down that:

- The competitions where success depends on substantial degree of skill will not fall into category of ‘gambling’; and
- Despite there being an element of chance, if a game is preponderantly a game of skill, it would nevertheless be a game of “mere skill”.

*Thus, the key test of determining if a game is ‘gambling’, is whether the dominant element is chance or skill.*

***Landmark cases on Gaming and Gambling:***

*Horse racing and horse race betting are not gambling:* The Hon’ble Supreme Court of India’s judgement in an appeal on horse racing has held that betting on horse races is a game of skill as it involves judging the breed and form of the horse, form of the jockey, and the conditions amongst other factors. The Hon’ble Supreme Court held that the expression gaming should be interpreted to mean activities which substantially depends on skill and is not gambling. Thus chance is the controlling factor in gambling. Gaming means wagering or betting on games of chance and would not include games of skill like horse racing.

Also, in Lakshmanan Case, the Supreme Court held that horse racing is a game of skill and playing for stakes in a game of skill shall not be considered illegal.

*Rummy is a game of skill:* Further, in the case of *State of Andhra Pradesh v/s. K. Satyanarayana & Others*, the Supreme Court held that Rummy is not a game of chance but rather a game of skill. The Hon’ble Court stated that Rummy requires a certain amount of skill because the fall of the cards has to be memorized and even the building up of cards requires a considerable skill in holding and discarding them.

***States that allow gambling:***

*Goa allows the operation of casinos:* In Goa, there was an amendment enacted to the Goa, Daman and Diu Public Gambling Act, 1976 that allowed the setting up of casinos at five star hotels and offshore vessels after taking due permission from the Government.

*Sikkim allows the operation of casinos, online gambling and sports betting:* In Sikkim, an enactment called the Sikkim Casino Games (Control and Tax Rules), 2002 authorize the grant of licenses by Government for setting up casinos. Thereafter, the enactment of the Sikkim Regulation of Gambling (Amendment) Act, 2005 gave Government the power to license gambling either on certain days or to certain gambling houses. Further, the Sikkim Online Gaming (Regulation) Act, 2008 was also passed with an object to impose a tax on such games in the State of Sikkim as well as to specifically deal with issues pertaining to online gaming. The aforementioned act was followed by the Sikkim Online Gaming (Regulation) Rules, 2009. The Government authority to grant licenses under these enactments is the Sikkim State Lotteries Department.

The Sikkim online gambling enactment regulate a number of different games like roulette, blackjack, punto, bingo, poker, baccarat as well as sports betting on games including football, cricket, tennis, horse-racing, chess etc. Sikkim is the only state in India which permits online gambling and sports betting.

***The rise of online gaming/gambling:***

All in all, the legal situation on using online gaming sites in India is unclear. Except the state of Maharashtra, none of the other states have enacted a legislation which state that it is illegal to gamble online. Most of the gambling laws were enacted in a period when the internet was not as widespread and online gaming was not popular. Therefore, the gambling laws mostly deal with physical gambling of the kind which is done in casinos etc. However, some of the online games which may be construed as gambling would be online poker, online casinos and online bingo.

***Current legal and regulatory issues faced by online gaming industry:***

Many industry experts in India are of the view that online gaming and fantasy sports websites are not complying with applicable laws and regulations. Whilst there is no clear mandate or statutory provisions for popular online games, in the Indian landscape, there are certain legal requirements that must be complied in order to save the entities in this industry from any legal troubles.

It is pertinent to take note of the following regulations that are applicable to online gaming:

- ***IT (Intermediaries Guidelines) Rules, 2011:***

The aforementioned guidelines have been framed specifically for the regulation of Internet Service Providers (“ISPs”) and for casting certain duties on them to maintain due diligence in their user agreements etc. The ISPs have to observe due diligence and publish rules and regulations and user agreements for access or usage of the bandwidth provided by the ISP. It has been mandated that the rules and regulations and user agreements should include terms which explicitly prohibit gambling, or display of obscene content etc. or any other

unlawful content. These rules therefore discourage gambling that may be unlawful under the gambling laws in India.

- ***Payment and Settlement Act, 2007:***

Payment and settlement systems in India are regulated by the Payment and Settlement Systems Act, 2007. The aforementioned act includes certain provisions for the regulation and supervision of payment systems in India and designates the Reserve Bank of India as the authority for the purpose of these transactions and for connected matters. The Reserve Bank of India is responsible for smooth progress of the payments system. Payment and Settlement Systems Act, 2007 also regulates any payments that are made through the medium of prepaid instruments such as e-wallets. These are quite popular these days. Any online gaming website shall have to set up a payment system and consider different categories of prepaid instruments. Certain payment systems can't be operated without authorization and due licensing from the Reserve Bank of India.

***FDI in gaming industry:***

It is pertinent to note that, as per the "Consolidated FDI Policy Circular 2016", FDI is prohibited in lottery business including Government/private lottery, online lotteries etc. and gambling and betting including casinos etc. Further, foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for lottery business and gambling and betting activities. Whether online-gaming will be covered under this sector is not entirely clear and is a question that is open to debate.

***Need for Central Government to clarify the legality of Online Gaming:***

The legal position on online gaming is not clear. The contentious question is that whether it is legally permissible as a form of gaming or shall be construed as a form of gambling. The answer to this question is not limited to determination of use of skill. The Central Government and the Supreme Court of India have so far refrained from commenting on the legality of online games in India. Recently this issue came up before the Supreme Court in the case of *Mahalakshmi Cultural Association v/s. The Director, Inspector General of Police & Others*. However, the Supreme Court refused to deliver a verdict on the issue of legality of online gaming. Whilst the previous judgments on the legality of rummy had clearly concluded that it was a skill based game and therefore not amounting to gambling, the Supreme Court held that the previous orders had not dealt with online rummy and therefore they cannot be taken into consideration in this case. The petitions of the gaming websites were dismissed. Also, during the course of these proceedings, the Supreme Court indicated its stand that it shall not give any verdict on this issue in the absence of any clarification or policy by Central Government pertaining to the legality of online games.

Pursuant to this case, the online gaming websites continue to thrive and drive business. However, a question has been created in the industry with respect to this issue and a dilemma has arisen that remains to be answered. Clearly, online gaming has been distinguished from physical gaming and shall require a different evaluation or set of rules to redeem itself from these questions and doubts.

**Conclusion:**

More and more countries are actively taking a step forward to legalize online-gambling. Lately online casinos have experienced a steady growth in terms of popularity. Few countries like Australia, New Zealand, United Kingdom legalizes online sports bets, playing poker and casino games. However, the world of internet gambling is strictly regulated, therefore it is important to note that different countries may allow different online gambling.

**Commercial Disputes Litigation- the changing Scenario in 2016 for good or ‘status-quo’?**

A few changes have emerged in India to deal with commercial disputes, namely, the Commercial Courts & National Company Law Tribunal have been established, the newly amended Arbitration & Conciliation Act is in force and the parliament has passed the Insolvency & Bankruptcy Code 2016. Given this background, will the Indian Courts deal with commercial disputes within the time frame prescribed under the new regulations.

To answer the aforesaid, we briefly look at the new legislations.

**Establishment of Commercial Courts:**

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2016 (“Act”) has come into force.

The key features of the Act are:-

- Setting of the Commercial Court in all the High Courts having Ordinary Original Jurisdiction, such being - High Courts at Bombay, Calcutta, Delhi, Himachal Pradesh and Madras, which will have the Commercial Division. In other States, the State Government is empowered to set up Commercial Court in Consultation with the Chief Justice of the respective High Court.
- Setting up of the Commercial Appellate Division, while the Act providing for limited grounds of appeal under the Act.
- Definition of “Commercial Dispute” has been widened to include, *inter-alia*, ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents; carriage of goods; construction and infrastructure contracts, including tenders; agreements relating to immovable property used exclusively in trade or commerce; franchising agreements; distribution and licensing agreements; joint venture agreements; shareholders agreements; subscription and investment agreements pertaining to the services industry including outsourcing services and financial services; partnership agreements intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuit.
- The specified value of the subject-matter of the commercial dispute under the Act has been prescribed to Rs. 1 Crore (Rupees Ten Million).

- Provision to transfer of pending disputes to the Commercial Division.
- Arbitration matter, being within the ambit of Commercial Court.
- Procedure for quick disposal of cases including time-line and costs.
- Amendment to the Code of Civil Procedure.

***National Company Law Tribunal (“NCLT”) and the National Company Law Appellate Tribunal (“NCLAT”):***

The NCLT and the NCLAT has come into force from June 1, 2016. The key feature of establishment of NCLT is to overcome and curb the practice of litigant-company using forum-shopping, with the intent to delay and complicate the matter. Another key aspect is that the application filed before the NCLT is expected to dispose of the applications within 3 months with an extension of 90 days. An appeal before NCLAT from the order of the NCLT has been prescribed to be filed within 45 days. While earlier the company matters were scattered before the Company Law Board (“CLB”), the High Court and the Board for Industrial and Financial Reconstruction, now with the setting up of the NCLT, all of these matters will be under one umbrella. Also to note is that before the setting up of the NCLT, the High Court had jurisdiction in matters such as reduction of share capital, winding-up of companies, scheme of compromise & arrangement etc., however, now upon constitution of the NCLT, NCLT shall have jurisdiction to entertain such matters and all such matters will stand transferred from the High Court to NCLT.

Similarly, wherein earlier the CLB entertained disputes pertaining to oppression & mismanagement, calling of annual general meeting, etc., which matters will also be transferred to and dealt by NCLT now.

The NCLT will also entertain class-action suits, removal of auditors, matters pertaining to the incorporation of companies etc.

***Insolvency & Bankruptcy Code 2016:***

The Code seeks to address issues faced in case of insolvency, winding up, bad-loans of a company and also seeks to regulate the mechanism and timelines for proceedings in case of trigger of any such event. The Code attempts to address cross border insolvency.

The Code mainly deals with two stage process i.e. Insolvency Resolution Process (IRP) and Liquidation. During the IRP, the key aspect that is ascertained is the viability of debtor’s business to continue and viable options to execute debtor’s revival. Thereafter, for liquidation of a company in financial distress, atleast 75% of its creditors are to pass an insolvency resolution, subsequent to which sanction of the NCLT is required.

Upon passing of the order of liquidation, key aspects involved are - assets of the company to vest with the liquidation estate; protection of workers of the debtor company; where debtor has assets abroad, power (of the Indian government) to enforce the same with the help of the foreign government.

***Conclusion:***



The steps such as setting up of the Commercial Court and the NCLT are welcome moves. However, the biggest challenge being faced by the judiciary is the pendency of cases. In order to resolve the same effectively we need to increase the strength and infrastructure of our judicial system. The Commercial Courts Act, for instance is an ambitious effort towards fast and effective disposal of commercial disputes and the success of the same would also be instrumental in assuring the business and investors about our judicial set up. Yet, given the way in which most of the courts across our country work, a genuine doubt remains over the successful working of the new Commercial Courts. The effective implementation is as important as enacting the law itself. The objective of bringing Commercial Courts act is to establish specialized courts. On the contrary today most of the regular courts dealing with civil disputes have been converted into Commercial Courts. This would defeat the entire purpose of the Act. Also, we need to have specialized benches to deal with a particular kind arising out of a particular kind of industry. For instance it may be possible that judges won't be able to understand the nuances of a dispute concerning aviation sector, or maritime laws or technology development agreement etc. In such growing and highly complex set up of commercial laws today we need to have judges abreast with the working of a particular kind of commercial transaction. Hence, no one can deny the importance of such laws in changing scenario but we have to wait and see as to whether these new enactments have heralded a new change to dispose-off commercial disputes in a fast track manner or it is a '*status-quo*'.