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Foreign Direct Investment ("FDI") in Limited Liability Partnership ("LLP")

Reserve Bank of India ("RBI") *vide* notification dated April 16, 2014 has permitted LLP formed and registered under the Limited Liability Partnership Act, 2008 to accept FDI subject to the certain conditionality as listed below –

- **Eligibility of LLP** - The LLP shall be operating in sectors wherein 100% FDI is permitted under automatic route.
- **Entry Route** - Any form of FDI in a LLP shall require prior Government/FIPB approval.
- **Pricing** -FDI in an LLP by way of capital contribution would have to be more than or equal to the fair price as worked out with any valuation norm which is internationally accepted as per market practice and a valuation certificate to that effect shall be issued by a Chartered Accountant.
- **Reporting -** LLPs shall report to the Regional Office concerned of RBI, through an AD Category – I bank, the details of the receipt of the amount of consideration for capital contribution in prescribed Form, together with a copy of the FIRC evidencing the receipt of the remittance along with the KYC report on the non-resident investor and valuation certificate as issued by a Chartered Accountant with regards to pricing, at the earliest but not later than 30 days from the date of receipt of the amount of consideration.

Revised SC guidelines in cases of Cheque Bouncing under section 138 of the Negotiable Instruments Act, 1881

The Supreme Court in the case of *Indian Bank Association & Ors vs. Union of India & Ors (WP (CIVIL) NO.18 of 2013)* issued certain guidelines in cases involving bouncing of cheques coming under the purview of Section 138 of the Negotiable Instruments Act, 1881.

The Court stated that it felt that directions given by various High Courts involving the aforesaid section were "worthy of emulation". These directions were as follows:

(1) The Magistrate/Judicial Magistrate shall examine the complaint under section 138 on the very day it is submitted. Further, if it is accompanied by an affidavit, and the affidavit and the documents, if any, are found to be in order, the Magistrate/Judicial Magistrate shall take cognizance and direct issuance of summons.

(2) The court stated that the Magistrate/Judicial Magistrate should adopt a practical approach and be realistic in their outlook while issuing summons. In addition to

being sent by post, summon must also be sent by e-mail to the alleged defaulter The assistance of the police or the nearby Court to serve notice to the accused ought to be taken if the Court deems it necessary. For notice of appearance, a short date is to be fixed. If the summons is received back un-served, immediate follow up action be taken.

(3) Court may indicate in the summon that if the accused makes an application for compounding of offences at the first hearing of the case, the Court may pass appropriate orders at the earliest.

(4) When the accused appears to furnish a bail bond, the Court should direct him, to appear in the trial and take notice under section 251 of the Criminal Code of Procedure (Cr.P.C.) to enable him to enter a plea of defence. This will fix the case for defence evidence, unless an application is made by the accused under section 145(2) for re-calling a witness for cross-examination.

(5) The Court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant are conducted within three months of assigning the case. The Court may accept affidavits of the witnesses, instead of examining them in Court. Witnesses to the complaint and accused must be available for cross-examination when the Court so directs.

Non-payment of advance costs in Arbitration - Whether Repudiatory breach of Agreement?

In *BDMS Ltd v Rafael Advance Defence Systems [2014] EWHC 451 (Comm)*, the London High Court addressed the issue of non-payment of advance costs. In this case, the Claimants and Respondent were parties to a Consultancy Agreement ("Agreement"). The Agreement provided for ICC Arbitration clause seated in London. According to the ICC Rules it is mandatory for parties at the commencement of Arbitration to pay the advance on costs involved in the Arbitration which is generally paid in equal shares by both the parties. The question that was considered and decided in the instant case was whether non-payment of the advance on costs is a repudiatory breach of a contract.

In this case the Claimant, BDMS paid its share of the advance, however Rafael refused to pay its share unless BDMS put down sufficient security for it. BDMS refused to put down the security and refused to pay Rafaels share of the advance on costs. Consequently ICC ruled that the claims stand withdrawn under Article 30(4) of the ICC Rules. The Claimant at this time had instituted proceedings at the High Court (London) on the ground that Rafael having refused to pay advance on cost had committed a breach of the Arbitration Agreement, therefore repudiating it and making it inoperative. The Respondent Rafael was however actively

participating in the Arbitration prior to its withdrawal and applied for a mandatory stay of the proceedings in the High Court pursuant to Article 9 of the Arbitration Act.

The Court in its decision stated that although it was mandatory under the ICC Rules to pay the advance of costs and that the failure to pay the same resulted in a breach of the Agreement, it did not constitute a repudiation of the Agreement or make it inoperative and the Claimant ought to have continued the Arbitration proceedings by depositing sufficient security or paying Rafael's share of the advance on costs. There was also no restriction on the claim being brought again at a future time. Accordingly, the Court stayed the proceedings and directed it to be decided according to the Arbitration agreement. The Hon'ble court also observed that in deciding whether the non-payment of advance on costs will result in repudiation of the Arbitration Agreement or not also depends on whether the party responsible for non-payment has actively engaged and cooperated in the Arbitration proceedings and if that was not the case, the agreement may be considered as inoperative.

Statutory Contracts vis-à-vis Doctrine of Frustration of Contract: Analysis of Marry vs State of Kerala

Recently, the Supreme Court of India decided the case of *Marry Vs. State of Kerala &Anr (CIVIL APPEAL NO.9466 OF 2003)*, which involved an appeal filled by Marry ("Appellant") against an order dated 13.6.2002 by virtue of which State of Kerala &Anr. ("Respondent") was allowed to forfeit the amount deposited by the Appellant against a contract entered between the two parties for vending arrack, and claim the remaining balance amount with interest.

The case involved two main legislations, the Indian Contract Act ("ICA"), 1872 and Kerala Abkari Shops (Disposal in Auction), Rules, 1974. The Appellant had, as per Rule 5 (10), made a deposit which was considered to be as security deposit as per Rule 5(19). However, by the subsequent outburst of the religious communities Appellant claimed frustration of contract for the same became impossible to perform as per Sec 56 of ICA and claimed refund of the deposits.

The main issue before the court was whether the doctrine of frustration of contracts will be applicable to a statutory contract. The Appellant submitted the same shall be applicable on a statuary contract for which reliance was placed on the judgment of*Sushila Devi v. Hari Singh*,[1] along with *Har Prasad Choubey v. Union of India*[2]. The Appellant, submitted that as held in the judgments above, if the existing circumstances are of such nature that they render the very performance of contract impossible or useless the contract can be said to be frustrated and declared void, as was in the given case were due to public outburst the functioning of the abkari was rendered impossible, thus the state authority were wrong in forfeiting of the

deposit amount.

The Respondent argued that the rights and privileges under the contract were governed by the said Rules and as per Rule 5(15) as the Appellant failed to fulfil the requirements of Rule 5(10) where under she was required to enter into a permanent agreement, the amount deposited was liable for forfeiture.

The Supreme Court held that the given case involves a situation where, in absence of any provision in the contract regarding consequences of non-performance, the statutory rules itself governs the consequences of non-performance of the contract and therefore the doctrine of frustration of contract cannot be applied and thus the forfeiture of the deposits is right on all accounts.

When faced with this argument the Appellant, questioned the validity of Rule 5(15) &(16), by stating that they fail to fulfil the requirement of fairness and reasonability, for which reliance was made on the judgment in *Central Inland Water Transport Corporation Limited and Another v. BrojoNathGanguly and Another etc*[3], which specified that if the contract results into unequal bargaining power, the same shall be declared unreasonable and void, for further emphasis the judgment of *Delhi Transport Corporation v. D.T.C.Mazdoor Congress and Another*[4] was relied on.

Further, the Respondent replied by relying on the judgment of *Assistant Excise Commissioner and Others v. Issac Peter and Others*[5] wherein, the court held that, when the contract is being entered into voluntarily, the question of unequal barraging power does not arise, also doctrine of fairness and reasonability cannot be applied to amend/alter a contract even though the contract involves statutory provisions. Further, the court also mentioned that the judgments referred by the Appellant, specifically excluded the application of the doctrine of fairness and reasonability to the contracts of commercial in nature. Thus, relying on the above mentioned grounds the court upheld the validity of Rule 5(15) &(16).

Thus the appeal was dismissed without cost.

The court though by relying on the precedent laid down the judgment, but it failed to consider a major issue of government inability. The court itself recognized the inability of the government for providing the subject property for a peaceful possession to the Appellant in pursuance of the contract. Where the government who itself failed to comply with its obligation of transfer of possession should not be allowed to take advantage of any statutory rules.

1. (1971) 2 SCC 288
2. (1973) 2 SCC 746
3. (1986) 3 SCC 156
4. 1991 Supp (1) SCC 600
5. (1994) 4 SCC 104

Corporate Identification Number to be stated on letterheads from 1st April, 2014

As per Section 12 of the Companies Act, 2013 which took effect from 1st April, 2014, every company is required to mention its Corporate Identification Number (CIN) along with the name and address of registered office on letterheads, invoices, notices and on all official correspondence and publications. Additionally, contact details, email and website address, if any, must be incorporated in such documents. Failure to do so would result in a penalty of Rs 1,000 per day on the defaulter and on every officer in default for every day during which the default continues. However, maximum penalty imposable shall not exceed Rs 100,000.

CCI makes stricter rules on mergers and acquisitions structures

The Competition Commission of India has tightened the rules to ensure that companies do not escape scrutiny through innovative structuring of mergers and acquisitions. The Competition Commission of India (CCI) has clarified that it will look at the substance of the transaction and not just the structure while approving any mergers.

Investment through Alternative Investment Funds – Clarification

on Calculation of NOF of an NBFC

A clarification on the calculation of net owned funds (NOF) of a Non Banking Financial Company (NBFC) was issued on April 7, 2014. while arriving at the NOF figure, investment made by an NBFC in entities of the same group concerns shall be treated alike, whether the investment is made directly or through an AIF / VCF, and when the funds in the VCF have come from the NBFC to the extent of 50% or more; or where the beneficial owner, in the case of Trusts is the NBFC, if 50% of the funds in the Trusts are from the concerned NBFC.

Resident Director must be appointed by each company w.e.f. 1st April, 2014

The Ministry of Corporate Affairs (MCA) has notified that effective April 1, 2014, every company must have at least one Resident Director (a director who has stayed in India for not less than 182 days in the previous calendar year). This needs to be complied immediately and there is no transition timeline in this and the provision applies to all Companies including private companies. Foreign Companies with Indian Subsidiaries which have only foreign directors will now have to appoint Resident Directors on their Boards. In case of any contravention, a penalty of up to INR 10,000 will be imposed on the

company and every officer of the company. In case of continuing default, a fine of INR 1,000 per day till the date this default continues is applicable.

New Master Circular for Depositories

Master Circular no. CIR/MRD/DP/11 /2014 for Depositories has been prepared by SEBI. It is a compilation of the circulars/communications issued by SEBI up to March 31, 2014 and shall come into force from the date of its issue. The Circular supersede previous Master Circular CIR/MRD/DP/13/2013 dated April 15, 2013.

Amendments to Clauses 35B and 49 of the Equity Listing Agreement dealing with Corporate Governance in listed entities

CIRCULAR No. CIR/CFD/POLICY CELL/2/2014 dated April 17, 2014 was issued by SEBI amending clauses 35B and 49 of the Equity Listing Agreement to review the provisions of the Listing Agreement to align it with the provisions of the Companies Act, 2013, adopt best practices on corporate governance and to make the corporate governance framework more effective.

Foreign Direct Investment (FDI) Policy (Circular 1 of 2014) released

The Consolidated FDI Policy was released by the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry. The New Policy primarily serves to provide clarifications to align the New Policy with existing laws. However, some flaws include the non-inclusion of FDI norms in Limited Liability Partnerships, continued references to the Companies Act, 1956 despite its coming into effect from 1st April 2014, and continued reference to 'Venture Capital Funds' instead of 'Alternate Investment Funds'.

Clarification issued with regard to FDI in Pharmaceuticals sector

An RBI notification was issued stating that the existing policy in pharmaceutical sector would continue with the condition that a 'non-compete' clause would not be allowed except in special circumstances and with the approval of the Foreign Investment Promotion Board of the Government of India.

CAG has the power to audit accounts of private telecom companies

The Supreme Court on April 17 in the case of Association of Unified Telecom Service Providers of India Versus Union of India & Others ruled that the Comptroller and Auditor General (CAG) is empowered to examine the accounts of private telecom

companies. The court held that such a scrutiny was imperative to ensure that the government, which has accorded the private companies licenses of the valuable natural resources, was receiving its "legitimate share."

Whistleblowers Act, 2011 receives President's assent

On 13th May 2014, the President gave his assent to the Whistleblower's Protection Bill which had been pending before the Parliament since 2011. The Act provides protection to whistleblowers making complaints in good faith against public authorities, but excludes armed forces and the private sector from its ambit.