

June 2014

Highlights

- Change in reporting mechanism for Form FC-TRS.
- Prior approval for acquisition/ transfer of control of NBFCs.
- Simplified procedure for ECB from Foreign Equity Holder.
- RBI disallows levy of pre-payment penalty on floating rate term loan.
- SEBI releases discussion paper on new delisting norms.
- Delegation of Powers under Companies Act, 2013.
- Supreme Court: lays down guidelines for expeditious disposal of complaints u/s 138 of the Negotiable Instruments Act, 1881.
- Arbitrations proceedings cannot be stayed in view of pendency of criminal proceedings between the parties, and allegations of nullity of the underlying contract.

Corporate Brief**➤ Change in reporting mechanism for Form FC-TRS.**

From September, 2013 onwards a non-resident (NR) [including a Non Resident Indian (NRI)], who has acquired and continues to hold control in an Indian company in accordance with SEBI (Substantial Acquisition of shares and Takeover) Regulations, has been permitted, under the FDI scheme, to acquire shares of that company on a stock exchange in India through a registered broker. [See A.P. (DIR Series) Circular No. 38 dated September 6, 2013]

Earlier, the onus of submission of form FC-TRS the AD Category I Bank (within 60 days from date of receipt of amount of consideration) was upon the transferor/transferee, whoever is resident in India.

Rationalizing the existing procedure, RBI has notified that in cases where the NR investor including an NRI acquires shares on the stock exchanges in terms of the aforesaid A.P. (DIR Series) Circular No. 38 dated September 6, 2013, the investee company would have to file form FC-TRS with the AD Category-I bank.

[See RBI/2013-14/ 577 A.P. (DIR Series) Circular No.127 dated May 2, 2014 for complete text and other conditions.]

➤ Prior approval for acquisition/transfer of control of NBFCs.

To enable the Reserve Bank of India (RBI) to ensure that the 'fit and proper' character of the management of NBFCs, both deposit accepting and non-deposit accepting, is continuously maintained, the RBI issued 'Non-Banking Financial Companies (Approval of Acquisition or Transfer of Control) Directions, 2014', specifying that prior written permission of RBI shall be required in the following instances: (i) any takeover or acquisition of control of an NBFC, whether by acquisition of shares or otherwise; (ii) any merger/amalgamation of an NBFC with another entity or any merger/amalgamation of an entity with an NBFC that would give the acquirer/another entity control of the NBFC; (iii) any merger/amalgamation of an NBFC with another entity or any merger/amalgamation of an entity with an NBFC which would result in acquisition/transfer of shareholding in excess of 10 percent of the paid up capital of the NBFC; (iv) Before approaching the Court or Tribunal under Section 391-394 of the Companies Act, 1956 or Section 230-233 of Companies Act, 2013 seeking order for mergers or amalgamations with other companies or NBFCs.

[See Notification No. DNBS.(PD) 275/GM(AM)-2014 dated May 26, 2014 for complete text and other conditions].

➤ Simplified procedure for ECB from Foreign Equity Holder.

Under the extant External Commercial Borrowings (ECB) policy, ECBs from direct foreign equity holders (FEHs) are considered both under Automatic and Approval routes, as the case may be. ECBs from indirect equity holders and group companies and ECBs from direct FEH for general corporate purpose are, however, considered under the Approval route. Further, any request for change of ECB lender in case of FEH requires RBI's approval. To simplify the existing procedure, RBI has delegated powers to Authorized Dealer banks to approve the following cases under Automatic route:

- Proposals for raising ECB by companies belonging to manufacturing, infrastructure, hotels, hospitals and software sectors from indirect equity holders and group companies;
- Proposals for raising ECB for companies in miscellaneous services from direct / indirect equity holders and group companies;
- Proposals for raising ECB by companies in manufacturing, infrastructure, hotels, hospitals and software sectors for general corporate purpose ; and
- Proposals involving change of lender when the ECB is from FEH – direct / indirect equity holders and group company.

[See RBI/2013-14/594 A.P. (DIR Series) Circular No.130 dated May 16, 2014, for complete text and other conditions]

➤ RBI disallows levy of pre-payment penalty.

RBI has directed all Primary (Urban) Co-operative Banks, State and Central Co-operative Banks not to charge foreclosure charges/ pre-payment penalties on all floating rate term loans sanctioned to individual borrowers, with immediate effect.

[See: RBI/2013-14/612RPCD.CO.RCBD.RRB.BC.No.102 /07.51.013 /2013-14 dated May 27, 2014; also RBI/2013-14/603 UBD.CO.BPD.PCB. Cir. No.64/12.05.001/2013-14 dated May 26, 2014]

➤ SEBI releases discussion paper on new delisting norms.

In a discussion paper inviting public feedback, Securities and Exchange Board of India (SEBI), India's capital market regulator, has proposed to overhaul the extant SEBI (Delisting of Equity Shares) Regulations, 2009 ("Regulations") to eliminate the risk of price manipulation/speculation ahead of delisting and to speed up the time-consuming process of delisting. Currently, the delisting process takes about 137 days which is proposed to be reduced to 64 days.

[See SEBI Discussion Paper-Review of Delisting Regulations dated May 09, 2014].

➤ Delegation of Powers under Companies Act, 2013.

The Central Government has delegated to the Regional Directors, Registrar of Companies at Mumbai, Kolkata, Chennai, Noida, Ahmedabad, Hyderabad and Shillong, various powers and functions under Companies Act, 2013.

[See Notification F/No/1/6/2014-CL.V dated May 21, 2014 for complete text and other conditions].

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Litigation Brief

➤ *Supreme Court: lays down guidelines for expeditious disposal of complaints u/s 138 of the Negotiable Instruments Act, 1881.*

In *Indian Bank Association and Ors v. Union of India and Ors.* (Judgment, dated 21.04.2014), the Petitioners had filed a Writ Petition under Article 32 of the Constitution of India before the Hon'ble Supreme Court, seeking directions/guidelines to be adopted by the competent Courts for expeditious disposal of complaints under Section 138 of the Negotiable Instruments Act, 1881 ("Act"). The Petitioners were aggrieved by inordinate delay caused in disposal of such cases, despite the Legislature had inserted specific provisions for summary trial of such cases. The Hon'ble Supreme Court, after re-visiting the provisions already contained under the Act, laid down following guidelines, to be adopted by all Courts dealing with Complaints u/s 138 of the Act.

The Court shall take cognizance of the matter on the same day when the Complaint is presented, if the documents are in order.

The Court should adopt a pragmatic and realistic approach while issuing summons. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken.

The Court should indicate in the summons that the Accused can make a request for compounding of offence, on the date of his appearance.

The Court should direct the Accused to furnish bail bond on the first date of his appearance, to ensure his participation in the trial.

The Court should allow the parties to lead Evidence by Affidavits, and the Evidence must be concluded within three months of assigning the case.

There is no denying the fact that there is a huge pendency of 138 Complaints across the Courts in India, and inordinate delay is caused in disposal of the cases, for numerous reasons. The aforesaid Guidelines are a welcome move and it would go a long way in ensuring the expeditious disposal of the Complaints.

➤ *Arbitrations proceedings cannot be stayed in view of pendency of criminal proceedings between the parties, and allegations of nullity of the underlying contract.*

In *Swiss Timing Ltd. V. Organizing Committee, Commonwealth Games* (Judgment, dated 28.05.2014), the Petitioner had filed a Petition under Section 11 of the Arbitration and Conciliation Act, 1996 ("Act") for constitution of an Arbitral Tribunal, to adjudicate the disputes arisen between the petitioner and the Respondent.

The Petitioner was appointed as a Service Provider, vide an Agreement, which contained an Arbitration Clause for adjudication of the disputes arising out of the Agreement. By way of the present Petition, the Petitioner sought constitution of an Arbitral Tribunal to adjudicate certain disputes which arose out of the Written Agreement.

The Respondent objected the Petition on the ground that the Written Agreement was vitiated by fraud and misrepresentation on the part of the Petitioner, and as such, it was void ab initio. It was further contended that since the underlying contract itself was void ab initio, the Arbitration Clause was void and hence, there is no valid Arbitration Agreement between the parties. The Respondent sought reliance upon judgment of the Hon'ble Supreme Court in *N. Radhakrishnan v. Maestero Engineers & Ors., 2010 (1) SCC 72*, in support of this contention. The Respondent further contended that criminal proceedings are already pending against the representatives of both the parties, and hence continuation of Arbitration proceedings may lead to conflicting findings.

The Hon'ble Supreme Court, after hearing the submissions of both the parties, held that the contentions regarding the underlying contract being void should be summarily rejected unless there is clear indication that the defence has a reasonable chance of success. The Hon'ble Court also relied upon the doctrines of Separability and Competence enshrined u/s 16 of the Act, and held that even if the underlying contract is vitiated by fraud that does not automatically invalidate the Arbitration Agreement between the parties. In such view, the Hon'ble Court overruled the aforesaid Radhakrishnan case, as per incuriam. As regards the pendency of the criminal case, the Hon'ble Court held that mere pendency of the criminal proceedings cannot be a ground for stay on arbitration proceedings. The Hon'ble Court observed that if criminal proceedings ultimately resulted in conviction of Petitioner's officials rendering the underlying contract void, the Respondent would be at liberty to take the necessary plea on the basis of such conviction to resist the execution/enforcement of the arbitral award. Furthermore, there was no inherent risk of prejudice to any party by permitting arbitration proceedings simultaneous to criminal proceedings.

Very often than not, it is observed that the Respondent invariably challenges the Agreement between the parties, on the grounds that the same is vitiated by fraud and hence void ab initio, in order to delay the adjudication of the disputes inter se. This Judgment lends credence to the sanctity of Arbitration Proceedings, as a potent form of alternative forum for adjudication of disputes.

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