Issue 19

NEWSLETTER

Legal, Compliance and ESG

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Dear Readers,

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A. LEGAL AND REGULATORY UPDATES:

~ Anand Asawa

I. Review of Regulatory Framework for Housing Finance Companies (HFCs)

RBI vide its notification dated October 22, 2020 has issued a revised set of guidelines for housing finance companies.

RBI has issued revised regulatory framework for HFCs with the changes in the Principal business and housing finance i.e. definition of "Housing finance company" and "Housing Finance"; Net Owned Fund (NOF) Requirement; Applicability of directions issued by Reserve Bank and Exposure of HFCs to group companies engaged in real estate business.

HFCs are exempted from section 45-IB (prescribing maintenance of percentage of assets) and section 45-IC (prescribing Reserve fund) of the Reserve Bank of India Act. Necessary Notification in this regard will be issued in due course.

II. Consolidated FDI Policy, 2020[1]

Department for Promotion of Industry and Internal Trade Ministry of Commerce and Industry, Government of India, released the consolidated FDI Policy with respect to FDI in various sectors wef October 15, 2020.

Foreign Direct Investment (FDI) is considered as a major source of non-debt financial resource

[1] https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_1.pdf

for the economic development. FDI flows into India have grown consistently since liberalization and are an important component of foreign capital since FDI infuses long term sustainable capital in the economy and contributes towards technology transfer, development of strategic sectors, greater innovation, competition and employment creation amongst other benefits. Therefore, it is the intent and objective of the Government of India to attract and promote FDI in order to supplement domestic capital, technology and skills for accelerated economic growth and development. FDI, as distinguished from Foreign Portfolio Investment, has the connotation of establishing a 'lasting interest' in an enterprise that is resident in an economy other than that of the investor.

The present consolidation subsumes and supersedes all Press Notes/Press Releases/Clarifications/Circulars issued by the DPIIT, which were in force as on October 15, 2020 and reflects the FDI Policy as on October 15, 2020. This Circular accordingly will take effect from October 15, 2020 and will remain in force until Consolidated FDI Policy 2020 Department for Promotion of Industry and Internal Trade 6 superseded in totality or in part thereof. Reference to any statute or legislation made in this Circular shall include modifications, amendments or re-enactments thereof.

III. The Arbitration and Conciliation (Amendment) Ordinance 2020[2]

The Central Government on November 04, 2020 has issued the Arbitration and Conciliation (Amendment) Ordinance, 2020 to further amend the Arbitration and Conciliation Act, 1996

The following amendments have been made:

1. Section 36 (3), which specifies the award given after the arbitration proceeding, has been inserted, namely:

"Provided further that where the Court is satisfied that a prima facie case is made out:

(i) that the arbitration agreement or contract which is the basis of the award; or

(ii) the making of the award

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award."

2. Section 43J, which specifies the norms of the arbitrators, has been substituted, namely:

"The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations."

IV. New Labour Codes 2020[3]

The Parliament passed three new labour code bills on 23 September 2020:

a. The Occupational Safety, Health and Working Conditions Code, 2020;
b. The Industrial Relations Code, 2020; and
c. The Code on Social Security, 2020

merging 24 central labour laws in a major boost to labour reforms.

The Government has now merged 29 central laws into four codes. In August 2019, Parliament had passed the first of the codes, the Wage Code, 2019.

Key Highlights of the three codes:

1. The Industrial Relations Code, 2020:

- Standing orders on matters related to workers' classification, holidays, paydays, and wage rates, termination of employment and grievance redressal mechanisms is mandated to establishments with at least 300 workers, instead of 100 workers.
- Prior permission of the government before closure, lay-off, or retrenchment mandated to establishments with at least 300 workers, instead of 100 workers.

[2] https://www.prsindia.org/sites/default/files/bill_files/Arbitration%20and%20Conciliation%20%28Amendment%29%20Ordinance%2C%202020.pdf

[3] https://www.prsindia.org/billtrack/overview-labour-law-reforms

- The threshold for negotiating council of trade unions have been reduced from 75% workers as members to 51% of workers
- Workers may apply to the Industrial Tribunal in case of dispute - 45 days after the application.

2. Code on Social Security, 2020:

- Social security funds for unorganised workers, gig workers and platform workers, with state governments setting up separate social security funds for unorganised workers. Any aggregator may set aside funds between 1-2% of the annual turnover as decided by govt for such social security funds - not exceeding 5%
- Definition of employees expanded to include more workers like - inter-state migrant workers, platform worker, film industry workers and construction workers.
- Gratuity period for working journalists reduced from five to three years.
- Penalty for unlawfully deducting the employer's contribution from the employee's wages is only Rs 50,000 fine with no imprisonment.
- Central government may defer or reduce the employer's or employee's contributions (under PF and ESI) for a period of up to three months in the case of a pandemic, endemic, or national disaster. Representation of central government officials in the National Social Security Board for unorganised workers increased to 10 members.

3. Code on Occupational Safety, Health and Working Conditions, 2020:

- Factory definition expanded to 20 workers for premises where the process uses power and 40 workers where the process uses no power.
- Manpower limit on hazardous conditions removed and mandates applying Code on contractors employing 50 or more workers instead of 20.
- Daily work hour limit fixed at maximum of 8 hours per day
- women will be entitled to be employed in all establishments for all types of work and employer required to provide adequate safeguards in hazardous conditions.
- Workers earning a maximum of Rs 18,000 per month, or such higher amount deemed as inter-state migrant workers and will be allowed to avail benefits like Public distribution system (PDS), building cess, insurance and provident fund.
- Central and state governments to maintain or record the details of inter-state migrant workers in a portal.

V. New Agricultural Bill 2020

The Government of India has passed three new Agricultural laws, namely:

a. Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020:

This bill 2020 lets the intra and interstate farmers produce even outside the premises of APMC markets without paying any extra market free, cess or levy as State governments are prohibited from levying any of those.

b. Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services Bill 2020;

This bill 2020 aims for framing contractual farming between a buyer and farmer, through an agreement. This should be done before the production of any agro product. Three-tier dispute settlement framework is provided here – Sub-Divisional Magistrate, the conciliation board and Appellate Authority

c. The Essential Commodities (Amendment) Bill:

This bill empowers the Government of India to control the supply of particular agro-food products under unusual situations like war. In case of a steep hike of price, stock limits can be applied on farm products.

B. Case Study: C. Bright vs. The District Collector [Civil Appeal No. 3441 OF 2020][4]

~ Saurav Agarwal[5]

SARFAESI: Time Limit Stipulation for District Magistrates to Deliver Possession of Secured Asset Is Not Mandatory: Supreme Court

The Supreme Court has held that time limit stipulation in Section 14 of the SARFAESI Act mandating the District Magistrate to deliver possession of a secured asset, is directory and not mandatory and that the inability to take possession within time limit does not render the District Magistrate Functus Officio.

The bench comprising Justices L. Nageswara Rao, Hemant Gupta and Ajay Rastogi upheld a judgment of Division Bench of Kerala High Court which held that Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, mandating the District Magistrate to deliver possession of a secured asset within 30 days, extendable to an aggregate of 60 days upon reasons recorded in writing, is a directory provision.

Section 14 of the Act provides the procedure for Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. The proviso empowers the authority to pass suitable orders for the purpose of taking possession of the secured asset within a period of thirty days from the date of application. Second Proviso states that, if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such period not exceeding in the aggregate sixty days

To hold that this stipulation is not mandatory, the High court had noted that, it is not the borrower, guarantor or lessee, who will be adversely affected or prejudiced, in any manner, whether such applications are decided in 60, 70 or 80 days, but it would be the secured creditor who will be adversely affected if the provision is construed as mandatory and not directory. The court held that such a construction would delay the process of taking physical possession of assets instead of expediting such process by entailing the filing of another application for such purpose.

Agreeing with this view, the bench observed that the time limit stipulation is to instil a confidence in creditors that the District Magistrate will make an attempt to deliver possession. It also rejected the contention of the appellant that if the District Magistrate is not able to take decision within 60 days, the secured creditor has to find its remedy elsewhere and not in terms of Section 14 of the Act. The court said:

> *"Keeping the objective of the Act in mind, the time limit to take action by the District Magistrate has been fixed to impress upon the authority to take possession of the secured assets. However, inability to take possession within time limit does not render the District Magistrate Functus Officio. The secured creditor has no control over the District Magistrate who is exercising jurisdiction under Section 14 of the Act for public good to facilitate recovery of public dues. Therefore, Section 14 of the Act is not to be interpreted literally without considering the object and purpose of the Act. If any other interpretation is placed upon the language of Section 14, it would be contrary to the purpose of the Act. The time limit is to instil a confidence in creditors that the District Magistrate will make an attempt to deliver possession as well as to impose a duty on the*

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[4] https://main.sci.gov.in/supremecourt/2019/46087/46087_2019_35_1501_24580_Judgement_05-Nov-2020.pdf

[5] Source: https://www.livelaw.in/amp/top-stories/time-limit-stipulation-sarfaesi-act-for-deliver-possession-of-secured-asset-is-directory-165525?s=0

District Magistrate to make an earnest effort to comply with the mandate of the statute to deliver the possession within 30 days and for reasons to be recorded within 60 days. In this light, the remedy under Section 14 of the Act is not rendered redundant if the District Magistrate is unable to handover the possession. The District Magistrate will still be enjoined upon, the duty to facilitate delivery of possession at the earliest."

Interim orders should generally not be passed without hearing the secured creditor. The court also observed that the High Courts should be extremely careful and circumspect in exercising its discretion to grant stay in SARFAESI Matters. While upholding the High Court judgment, the court said:

"Even though, this Court in United Bank of India v. Satyawati Tondon & Ors. held that in cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which will ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Hindon Forge Private Limited has held that the remedy of an aggrieved person by a secured creditor under the Act is by way of an application before the Debts Recovery Tribunal, however, borrowers and other aggrieved persons are invoking the jurisdiction of the High Court under Articles 226 or 227 of the Constitution of India without availing the alternative statutory remedy. The Hon'ble High Courts are well aware of the limitations in exercising their jurisdiction when affective alternative remedies are available, but a word of caution would be still necessary for the High Courts that interim orders should generally not be passed without hearing the secured creditor as interim orders defeat the very purpose of expeditious recovery of public money."

C. Case Study: Sundaram Finance Vs. Abdul Samad & Anr. (Civil Appeal No 1650 of 2018)[6]

~ Saurav Agarwal

~Appropriate Jurisdiction of the Court for Enforcement of an Arbitration Award.

In the case of Sundaram Finance Vs. Abdul Samad & Anr., decided on 15.02.2018, the Hon'ble Supreme Court of India has clarified the anomaly with regard to the appropriate jurisdiction for enforcement of an arbitral award. The Hon'ble Supreme Court has held that enforcement of an Arbitral Award under the Arbitration and Conciliation Act, 1996 may be filed in any jurisdiction in the country, for execution, where such decree is capable of being executed.

Facts: The Appellant in the present case initiated arbitration proceedings against respondents for breach of a loan agreement. An ex-parte award was passed in favour of the appellant. When the Award was filed for execution before the District Court, Morena, Madhya Pradesh, the respondents sought to contest the proceedings inter alia on the ground that the vehicle against which the loan was obtained was stolen, but the District Court, rejected the execution proceedings on the ground that it lacked jurisdiction. The District Court took the view that the appellant was required to file the execution proceedings first before the court of competent jurisdiction in Tamil Nadu, obtain a transfer of the decree and only then could the proceedings be filed in the District Court at Morena. This view adopted by the District Court, Morena was in turn based on the judgment of the Madhya Pradesh High Court and the opinion of the Karnataka High Court while it is pleaded that the view of the Rajasthan High Court and the Delhi High Court were to the contrary. The Appellant filled a Special Leave Petition and preferred an appeal directly to the Hon'ble Supreme Court due to the divergence in the views of the Madhya

[6] Source: Whitespan Newsletter dated 31 October 2020

Pradesh High Court and Himachal Pradesh High Court from some of the other High Courts, while dealing with the issue of jurisdiction for enforcement of arbitral awards.

Issue: Whether an arbitral award can be filed only in the court, within whose jurisdiction the arbitration proceedings were carried out or whether the arbitral award could be directly executed in the jurisdiction where the assets of the judgement debtor are located?

The Supreme Court observed that while an award passed by the arbitral tribunal is deemed to be a decree under Section 36 of the said Act, there was no deeming fiction anywhere to hold that the Court within whose jurisdiction the arbitral award was passed should be taken to be the Court, which passed the decree. The Arbitration and Conciliation Act, 1996 actually transcends all territorial barriers.

Conclusion: The Hon'ble Supreme Court with this decision has not only provided clarity on enforcement of Arbitral Award but also has removed another hindrance experienced by the parties while adopting Arbitration as a mean for dispute resolution. It is clear that enforcement of an Arbitral Award under the Arbitration and Conciliation Act, 1996 may be filed in any jurisdiction in the country, for execution, where such decree is capable of being executed and there is no requirement of obtaining a transfer of the decree from the court which has jurisdiction over the arbitration proceedings.

D. ESG: Benefits of Corporate Social Responsibility[7]

~ Saurav Agarwal

Corporate social responsibility (CSR) refers to initiatives taken up by companies to give back to society. The Financial Times defines it as a business approach that contributes to sustainable development by delivering economic, social and environmental benefits for all stakeholders. It is the company's "sense of responsibility" towards the community and surrounding in which it operates. Also called corporate citizenship, it is a self-regulating business model developed by companies with the aim to create a positive impact on society.

CSR addresses various issues like human rights, education, health, and safety. It also covers corporate governance, working conditions, environmental sustainability and more. Along with economic development, CSR also focuses on social and environmental development (the triple bottom line).
India, too, is actively involved in practicing corporate social responsibility. Section 135 of the Indian Companies Act mandates companies to "CSR spend of 2 percent of average net profits … during the three immediately preceding financial years." Effective from 2013, this rule is applicable for all companies "having net worth of rupees five billion or more, or turnover of rupees ten billion or more or a net profit of rupees fifty million or more during any financial year."

The Benefits of Corporate Social Responsibility for Businesses:
Deloitte says "organizations are no longer assessed based only on traditional metrics such as financial performance, or even the quality of their products or services. They are increasingly judged… their impact on society at large—transforming them from business enterprises into social enterprises."
Corporate Social Responsibility initiatives benefit both the company as well as the environment (ecological and social) in which they live in.

a. Improves Brand Value: Being socially responsible brings recognition into the company. It shows that your company is more than just profits. More people start knowing about your company and the good work that it is doing. Customers start trusting your business and it builds an overall positive image of the brand.

b. Builds Customer Loyalty: A research shows that 55 percent of consumers are willing to pay more for products from socially responsible companies. Your customers want to feel that they are a part of

[7] https://blog.vantagecircle.com/foster-your-business-with-corporate-social-responsibility/

something. Even if not directly, they feel good to be part of a company with a vision and the willingness to do good.

c. Engages Millennials: "7 in 10 young adults consider themselves social activists." Everyone wants to feel they are part of a bigger cause that helps shape lives. They want employers who match their ideals and are doing something to help those in need. A survey found that 78 percent of millennials said that CSR directly influences their decision to join an organization.

d. Helps Attract and Retain Talent: When employees feel they are part of an organization that is more than just about profits, they'll definitely want to stick around. To help them achieve this, a lot of companies are now providing their employees with the benefit of taking time off to volunteer in their organizations of choice.

e. Increases Employee Engagement: CSR requires employee assistance. Right from designing and developing the CSR program to actually volunteering for a cause. So, when you include your employees in such important events, they feel valued and appreciated. It helps improve your relationship with them, helps build the team's dynamics and increases the overall engagement level of the workforce.

Companies with the Best CSR Reputation:
These multinational corporations have changed the way how business operates. Their CSR strategies have helped them build a name for themselves and contribute hugely to society.

IKEA: The Swedish-house multinational group that designs furniture has been actively involved to create safe places for children in conflict zones. Their initiatives include –
Let's Play for Change to enable children to "play and develop, even in the most difficult circumstances."
Brighter Lives for Refugees for which they have donated "€30.8 million to help the UNHCR bring light and renewable energy to refugee camps across Asia, Africa and Middle East."

COCA-COLA: Coca Cola focuses on empowering young women entrepreneurs. Their #5by20 program aims to bring 5 million women into the company as bottlers or distributors by 2020. Their other programs are centered around providing clean drinking water and for the development of the disadvantaged youth.

LEVI'S: For Levi's, just one thing matters- Is the jeans contributing to water scarcity? Since the inception of their Water<Less program in 2011, they have saved more than 1 billion litres of water. They have reduced the usage of water for manufacturing for some of their styles by 96 percent. They have also worked to support people with HIV/AIDS and decrease their contribution to climate change.

LEGO: Although new to this field, Lego already ranks as number 1 on 2017 Global CSR RepTrak. Lego's aim is to use sustainable materials in all its products and packaging by 2030. They have decided to manufacture some of their products from plant-based plastics this year.

GOOGLE: Google is the world's largest corporate buyer of renewable power. In 2017, they reached their target of 100 percent renewable energy in their data centres and offices. They also provide Google Ads Grants to non-profits to advertise for free using Google Ads.

MICROSOFT: Microsoft started its CSR initiatives back in 1983. Being in the game for a long time, they still rank as one of the most "giving" organizations. Their Microsoft Philanthropies works with non-profits, public and private agencies to empower people as well as local communities.

But the most meaningful and timeless return to being socially responsible is the sheer joy and satisfaction that comes with doing something good for the society. I think we all sleep better when we know we helped someone smile today.