



## NEWSLETTER

### Legal, Compliance and ESG

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08 January 2020

Dear Readers,

We bring to your reading and attention following topics:

<b>A. LEGAL AND REGULATORY UPDATES:</b>	<b>1</b>
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#### A. LEGAL AND REGULATORY UPDATES:

~ Anand Asawa, Suprabhat Pathak, Saurav Agarwal

#### I. Notification section 10A of the Insolvency and Bankruptcy Code, 2016<sup>1</sup>

The Central Government vide its notification dated December 22, 2020 has in view of COVID 19 pandemic, extended the period of suspension of the initiation of insolvency proceedings for fresh defaults from March 25, 2020 till March 25, 2021.

RBI/2020- 21/70 has decided to make RTGS available round the clock on all days of the year with effect from 00:30 hours on December 14, 2020.

The directive is issued under Section 10 (2) read with Section 18 of Payment and Settlement Systems Act, 2007.

#### II. 24x7 Availability of Real Time Gross Settlement (RTGS) System<sup>2</sup>

Reserve Bank of India vide its notification dated December 04, 2020 bearing reference no.

#### III. Declaration of dividends by banks<sup>3</sup>

Reserve Bank of India vide its notification dated December 04, 2020 bearing reference no RBI/2020- 21/75 has decided that banks shall

<sup>1</sup><https://ibbi.gov.in/uploads/legalframework/df55d4f612f270d6c637ee4b3c8131c8.pdf>

<sup>2</sup><https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11998&Mode=0>

<sup>3</sup><https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12003&Mode=0>

not make any dividend payment on equity shares from the profits pertaining to the financial year ended March 31, 2020 in order to further strengthen the banks' balance sheets, while at the same time support lending to the real economy.

#### **IV. Dividend Distribution Policy for NBFCs**

Unlike banks, currently there are no guidelines in place with regard to distribution of dividend by NBFCs. Keeping in view the increasing significance of NBFCs in the financial system and their interlinkages with different segments, it has been decided to formulate guidelines on dividend distribution by NBFCs.

In view of the above, RBI released [Draft Circular on Declaration of Dividend by NBFCs on December 9, 2020](#)<sup>4</sup> for comments from public by December 24, 2020.

#### **V. Amendment to Master Direction (MD) on KYC – Centralized KYC Registry – Roll out of Legal Entity Template & other changes<sup>5</sup>**

RBI vide their circular No. RBI/2020-21/80 DOR.AML.BC.No.31/14.01.001/2020-21 dated December 18, 2020 issued circular on Amendment to Master Direction (MD) on KYC – Centralized KYC Registry (CYKCR) – Roll out of Legal Entity Template & other changes.

##### Key Highlights:

- As the CKYCR is now fully operational for individual customers, it has been decided to extend the CKYCR to Legal Entities (LEs). Accordingly, REs shall upload the KYC data pertaining to accounts of LEs opened on or after April 1, 2021, on to CKYCR in terms of Rule 9 (1A) of the PML Rules. The LE Template and the Annex thereof are attached as Annex "A" and Annex "B" respectively to this circular. The LE Template would be released by CERSAI well in advance so that REs start using it from the notified date. REs shall also ensure that in case of accounts of LEs opened prior to April 1, 2021, the KYC records are uploaded on to

CKYCR during the process of periodic updation as specified in Section 38 of the Master Direction, or earlier when the updated KYC information is obtained/received from the customer in certain cases. REs shall ensure that during periodic updation, the customers' KYC details are migrated to current Customer Due Diligence (CDD) standards.

- In order to ensure that all existing KYC records of individual customers are incrementally uploaded on to CKYCR, REs shall upload the KYC data pertaining to accounts of individuals opened prior to January 01, 2017, at the time of periodic updation as specified in Section 38 of the Master Direction, or earlier when the updated KYC information is obtained/received from the customer in certain cases. REs shall ensure that during periodic updation, the customers' KYC details are migrated to current CDD standard.
- Where a customer, for the purpose of establishing an account based relationship, submits a KYC Identifier to a RE, with an explicit consent to download records from CKYCR, then such RE shall retrieve the KYC records online from CKYCR using the KYC Identifier and the customer shall not be required to submit the same KYC records or information or any other additional identification documents or details, unless – (i) there is a change in the information of the customer as existing in the records of CKYCR; (ii) the current address of the customer is required to be verified; (iii) the RE considers it necessary in order to verify the identity or address of the customer, or to perform enhanced due diligence or to build an appropriate risk profile of the client.
- Once KYC Identifier is generated by CKYCR, the REs shall ensure that the same is communicated to the individual/legal entity as the case may be.

<sup>4</sup><https://rbidocs.rbi.org.in/rdocs/Content/PDFs/DECLARATIONNBFCs2B8209A722B248CB9869F12BB33D1A3A.PDF>

<sup>5</sup><https://rbidocs.rbi.org.in/rdocs/notification/PDFs/CKYCRLEB3990A3432AC4BAB95D7A77854CE011F.PDF>

## **VI. Introduction of Legal Entity Identifier for Large Value Transactions in Centralised Payment Systems<sup>6</sup>**

The Reserve Bank of India issued a Circular dated January 5, 2021 with respect to “Introduction of Legal Entity Identifier (LEI) for Large Value Transactions in Centralised Payment Systems”.

LEI is a 20 digit number used to uniquely identify parties to financial transactions worldwide. It was introduced by the RBI in a phased manner for participants in the over the counter (OTC) derivative and non-derivative markets as also for large corporate borrowers.

RBI has decided to introduce the LEI system for all payment transactions of value Rs.50 crore and above undertaken by entities (non-individuals) using Real Time Gross Settlement (RTGS) and National Electronic Funds Transfer (NEFT). In preparation for the introduction of the LEI system across all payment transactions, member banks should:

1. advise entities who undertake large value transactions (Rs.50 crore and above) to obtain LEI in time, if they do not already have one;
2. include remitter and beneficiary LEI information in RTGS and NEFT payment messages (details of the identified fields in the messaging structures of RTGS and NEFT for inclusion of LEI information are at Annex to the Circular);
3. maintain records of all transactions of Rs.50 crore and above through RTGS and/or NEFT.

Entities can obtain LEI from any of the Local Operating Units accredited by the Global Legal

Entity Identifier Foundation (GLEIF). LEI can be obtained from Legal Entity Identifier India Ltd. (<https://www.ccilindia-lei.co.in>), which is also recognised as an issuer of LEI by the RBI under the Payment and Settlement Systems Act, 2007.

These directions will come into effect from April 1, 2021.

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<sup>6</sup><https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NEFT65551DCFBD1E41E6ACBD1B5D89F01329.PDF>

**B. Case Study: Chittaranjan Maity Vs. Union of India**

***Can an arbitrator award pendente lite interest when parties had agreed to contrary under the terms of agreement?*<sup>7</sup>**

The Hon'ble Supreme Court of India in case titled Chittaranjan Maity Vs. Union of India decided on 03.10.2017, has reaffirmed the position under Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 ("Act") that when parties had agreed under the terms of the agreement that pendente lite interest shall not be payable, the Arbitrator cannot award interest between the date on which the cause of action arose till the date of the award.

Facts of the case:

The Supreme Court granted leave to appeal challenging the legality and correctness of the judgment dated 29.09.2011 passed by the Division Bench of the Calcutta High Court wherein the Division Bench had set aside the judgment and order of the Single Bench dated 27.01.2009.

The matter involved two questions of law as below:

1. Whether the Division Bench was justified in considering the arbitrability of the dispute raised by the Respondent for the first time in the appeal on the basis of a "No Claims Certificate" issued by the Appellant to the Respondent; and
2. Whether the Arbitral Tribunal was justified in awarding interest on the delayed payments in favour of the Appellant in view of specific clause in the agreement prohibiting award of pre-award interest.

In the present case, the Appellant's tender in response to the invitation of the Respondent for execution of balance of earth work for formation of banks for laying railway line, roads, platforms and miscellaneous work in connection with the new goods terminal yard of South-Eastern Railway at Sankrail in Howrah District was accepted. An agreement was entered into by and between the Appellant and the Respondent on 22.08.1991, wherein the General Conditions of the Contract (GCC) were incorporated and the parties were bound by the terms and conditions thereof. Disputes and differences arose between the parties regarding execution of work and its purported abandonment and accordingly the Appellant demanded reference of the dispute to arbitration. Ultimately, the Appellant filed an application under Section 11(6) of the Act for appointment of an arbitrator before the Calcutta High Court and pursuant to the Order, the Arbitral Tribunal was constituted which adjudicated the disputes raised by the parties.

The Arbitral Tribunal passed an award on 20.09.2006 in favour of the Appellant. The Respondent moved an application under Section 34 of the Act for setting aside the award. The Single Bench of the Calcutta High Court dismissed the application which was again challenged by the Respondent before the Division Bench.

In the appeal before the Division Bench it was contended that the Appellant had issued a "No Claims Certificate" to the Respondent for the first time, thereby forfeiting their right for any claim from the Respondent.

In regards to award of pendente lite interest it was contended that in view of Clause 16(2) of the GCC, no interest could have been awarded to the Appellant. Clause 16(2) of the GCC read as follows:  
"16(2) – No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposit in terms of sub-clause (1) of this clause will be repayable (with) interest accrued thereon."

The Division Bench by its judgment set-aside the judgment of the Single Bench by allowing the appeal of the Respondent.

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<sup>7</sup> Source: Whitespan Advisory

Being aggrieved and dissatisfied with the order dated 29.09.2011, the Appellant preferred Special Leave Petitions before the Hon'ble Supreme Court.

Judgment:

The Supreme Court partly allowed the Appeal and decided the issue of arbitrability of the claim in light of the issuance of the "No Claims Certificate" in favour of the Appellant whereas on the issue of award of interest relied upon the specific agreement between the parties prohibiting award of pendente lite interest to hold that the Appellant was not entitled to any interest up to the date of the award.

On the issue of "No Claims Certificate" the Supreme Court accepted the position of law laid down in National Insurance and Mcdermott International Inc. to hold that the Division Bench was not justified while considering the arbitrability of the disputes for the first time, particularly, when the Respondent had not urged the issue relating to "No Claims Certificate" before the Chief Justice of the Calcutta High Court, the Arbitral Tribunal or before the Single Judge.

On the issue of awarding of pendente lite interest, the Supreme Court compared the position of law as prevailing under the Arbitration Act, 1940 with the provision contained in Section 31(7)(a) of the Act. The Supreme Court noted that a specific provision has been created under the Act whereby if the agreement prohibits award of interest for the pre-award period (i.e. pendente lite period), the Arbitrator cannot award interest for the said period.

The specific bar contained in Clause 16(2) of the GCC was also considered: Hon'ble Court observed that in view of specific provision contained in Section 31(7)(a) of the Act, award of interest has been made subject to any agreement to the contrary between the parties. In the present case, Clause 16(2) of the GCC expressly barring award of interest would therefore prevail over the power of the Arbitrator to award interest. Hence, it was held that the Appellant was not entitled to any pendente lite interest.

### C. Important judgements on arbitration from August to December 2020<sup>8</sup>

- Vidya Drolia and others v Durga Trading Corporation  
[Judgment dated 14.12.2020 in CIVIL APPEAL NO. 2402 OF 2019]

The Supreme Court overruled the ratio laid down in Himangni Enterprises v. Kamaljeet Singh Ahluwalia and held that the tenancy disputes are arbitrable as the Transfer of Property Act, 1882 does not foreclose arbitration, save and except for those tenancy disputes which are governed by rent control legislations as specific forums have been given exclusive jurisdiction to decide the special rights and obligations of the parties.

- Vijay Karia v. Prysmian Cavi E Sistemi SRL & Ors.  
[Judgment dated 13.02.2020 in Civil Appeal No. 1544 of 2020]

The Court held that if a foreign award fails to determine a material issue which goes to the root of the matter, the award may shock the conscience of the Court and may be set aside. Also, there should be minimal interference while dealing with foreign awards u/s 48.

- Mankastu Impex Private Limited v. Airvisual Limited  
[Judgment dated 05.03.2020 in Arbitration Petition No. 32 of 2018]

Significance of seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award.

- National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.  
[Judgment dated 22.04.2020 in Civil Appeal No.667 of 2012]

The Supreme Court allowed the appeal and held that the award would be unenforceable as the contract was rendered unenforceable under Section 32 of the Contract Act, due to which NAFED cannot be held liable to pay damages under foreign award. It was observed that export without permission of the government would have violated the law, thus, enforcement of such award would be violative of the public policy of India.

- Avitel Post Studioz Limited & Ors. Vs. HSBC PI Holdings (Mauritius) Limited  
[Judgment dated 19.08.2020 in Civil Appeal No. 5145 of 2016]

The Court held that serious allegations of fraud arise only in two situations 1) if it can be clearly concluded that the arbitration clause or agreement itself does not exist 2) cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or malafide conduct, thus necessitating the hearing of the case by a writ court.

- Government of India v. Vedanta Ltd & Ors.  
[Judgment dated: 16.09.2020 in Civil Appeal No. 3185 of 2020]

The Court held that the period of limitation for filing for enforcement of a foreign award under Sec.47 & 49, would be governed by Art.137 of the Limitation Act, 1963 which prescribes for period of 3 years from when right to apply accrues.

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<sup>8</sup> Source: <https://www.barandbench.com/columns/20-important-judgments-arbitration-indian-courts-2020>