



NEWSLETTER

Legal, Compliance and ESG

07 January 2020

Dear Readers,

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A) LEGAL AND REGULATORY UPDATES:

I. Availability of National Electronic Funds Transfer (NEFT) System on 24x7 basis¹

Reserve Bank of India (“RBI”) vide its circular dated December 06, 2019 has notified that the Availability of National Electronic Funds Transfer (NEFT) System facility shall be made available on 24 x 7 basis with effect from December 16, 2019 with the first settlement taking place after 00:30 hours on December 16, 2019 (i.e. night of December 15, 2019).

a. There will be 48 half-hourly batches every day. The settlement of first batch will commence after 00:30 hours and the last batch will end at 00:00 hours.

- b. The system will be available on all days of the year, including holidays.
- c. NEFT transactions after usual banking hours of banks are expected to be automated transactions initiated using ‘Straight Through Processing (STP)’ modes by the banks.
- d. The existing discipline for crediting beneficiary’s account or returning the transaction (within 2 hours of settlement of the respective batch) to originating bank will continue.
- e. Member banks will ensure sending of positive confirmation message (N10) for all NEFT credits.
- f. All provisions of NEFT procedural guidelines will be applicable for NEFT 24x7 transactions as well.

¹

Further, RBI vide its circular dated December 16, 2019 has notified that its member banks shall not levy any charges on their savings bank account holders for funds transfers done through NEFT system which are initiated online (viz. internet banking and/or mobile apps of the banks).

The International Financial Services Centres Authority Act, 2019²

The International Financial Services Centres Authority Act, 2019 covering 6 chapters & 34 sections, has received the assent of the President on the 19th December 2019. As the banking, capital markets and insurance sectors in IFSC are being regulated by multiple regulators viz. RBI, SEBI, Pension Fund Regulatory and Development Authority (PFRDA) & IRDAI. The Act seeks to amend 14 Acts, including the SEBI Act, the IRDA Act, and the PFRDA Act. The Authority will regulate financial products (such as securities, deposits or contracts of insurance), financial services, and financial institutions which have been previously approved by any appropriate regulator (such as RBI or SEBI), in an IFSC. It will follow all processes which are applicable to such financial products, financial services, and financial institutions under their respective laws. The appropriate regulators are listed in a Schedule to the Bill, and includes the RBI, SEBI, IRDAI, and PFRDA. The central government may amend this schedule through a notification. Other functions of the Authority include regulating any other financial products, financial services, or financial institutions in an

IFSC, which may be notified by the central government, and recommending any other financial products, financial services, or financial institutions to the central government, which may be permitted in an IFSC.

Apart from regulating all financial services and products, the authority can also recommend any other financial products to the central government. The first IFSC in India has been set up at GIFT City in Gujarat's Gandhinagar. IFSCs can be set up in an SEZ or as an SEZ after approval from the Centre. IFSCs would also provide Indian companies easier access to global financial markets and also enable the development of financial markets in India.

III. Enforcement of Chapter IV-A of SARFAESI Act, 2002

Govt. of India vide notification dated 12th August 2016 had inserted Chapter IV –A in the SARFAESI Act, 2002. The same will be in force w.e.f 24th of January 2020 as notified in Govt of India Gazette No.4133 dated 26th December 2019.

SALIENT FEATURES OF CHAPTER IV-A:

- a. Creditors other than Secured Creditors (as defined under section 2(1)zd of SARFAESI Act), in whose favour security interest is created have to file the same with CERSAI.
- b. Filing of security interest with CERSAI shall be deemed to constitute a Public notice from the date & time of filing with CERSAI.
- c. Attachment orders issued by Revenue Authorities for recovery

- of Govt. dues are required to be filed with CERSAI. Attachment orders issued in favour of any person, by Courts/Tribunals are required to be filed with CERSAI.
- d. Attachment orders issued in favour of any person, by Courts/Tribunals are required to be filed with CERSAI.
 - e. Secured Creditors [as defined under section 2(1)(zd)] shall be entitled to enforce securities under SARFAESI Act only if the security interest is filed with CERSAI.
 - f. Filing of Security interest or attachment orders with CERSAI shall have priority over any subsequent security interest created upon such property.
 - g. After registration of security interest with CERSAI by secured creditors, their dues will be paid in priority over Govt. dues.
 - h. Penalty provisions for default in filing, modifying and satisfaction of security interest (section 27) is no longer applicable.
 - i. 30-day time period for filing the transactions of creation/modification of security interest with CERSAI (section 23) is no longer applicable.

B) REMEDIES UNDER ARBITRATION

Interim Remedies

The arbitral tribunal is empowered to grant interim reliefs during the arbitral proceedings until the making of an award. A party can apply to the arbitral tribunal for the appointment of a guardian for a minor person or a person of unsound mind for the purposes of arbitral proceedings or for an interim measure of protection in respect of any of the following matters:

- The preservation, interim custody or sale of goods which are the subject matter of the proceedings.
- Securing the amount in dispute in the arbitration.
- The detention, preservation or inspection of any property which is the subject matter of the dispute in arbitration.
- Interim injunction.
- The appointment of receivers.

Ex parte

If a party fails to appear before the arbitral tribunal despite having notice of the constitution of the arbitral tribunal, the arbitral tribunal can grant ex parte interim relief.

Security

The arbitral tribunal can grant orders to provide security for any amount, goods or property in dispute in the arbitration.

Standards applicable to the grant of interim reliefs by the Arbitral Tribunal under Section 17:

The jurisprudence in India relating to the standards to be applied by an arbitral tribunal while granting interim reliefs under Section 17 is sparse at best. International authors have suggested that an arbitral tribunal should be guided by arbitral case law, comparative analysis of arbitration rules, and scholarly opinions while granting interim measures. The standards applied

by national courts while granting interim measures would have no bearing on arbitral tribunals. Arbitral tribunals have normally required a party arable harm; (b) urgency; and (c) no prejudgment of the merits of the case. In some cases, tribunals have also considered whether the party has established a prima facie case and that the balance of convenience weighed in favour of the party.

As discussed, courts in India have at times shied away from importing principles contained in Order XXXVII Rule 5 and Order XXXIX Rule 1 & 2 to the grant of interim reliefs under Section 9. When such principles are not necessarily applicable in proceedings before a court; it is inconceivable for the same to apply to flexible and tailor-made dispute resolution process like arbitration. That said, in Intertole ICS (Cecons) O &M Company v. NHAI, the Delhi High Court held that that an arbitral tribunal would have to ascertain whether the petitioner has made out a case as per Order XXXVIII Rule 5, prior to granting an interim relief furnishing security for the amount claimed. However, the interim measures were not granted by the arbitral tribunal solely because the applicant was unable to establish a prima facie case. In a recent judgement, the Delhi High Court, in observing the similarity between the objects of Sections 9(1)(ii)(b) and 17(1)(ii)(b) of the Act with that of Order XXXVIII Rule 5 of the CPC, held that the arbitral tribunal and court, while granting interim reliefs under the said provisions of the Act, must be satisfied that it is “necessary” to pass order to secure the amount in dispute.

What final remedies are available from the tribunal?

The arbitral tribunal has the power to grant:

- Declarations.
- Injunctions.
- Payment of money.
- Specific performance.

Damages can only be compensatory in nature and punitive damages are not permitted. Where an arbitral award is for the payment of money, the arbitral tribunal can also include interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. An arbitral tribunal can also make a suitable award on costs.

C) VENUE CAN BE THE SEAT OF ARBITRATION

The Hon’ble Apex court in its recent judgement held in BGS SGS SOMA JV vs NHPC Limited³, has opined that whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place.

Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then conclusively show that such a clause designates a “seat”

³ Civil Appeal no. 9307 OF 2019

of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the “stated venue”, which then becomes the “seat” for the purposes of arbitration.

D) ESG: IMPORTANCE OF CONFIDENTIALITY IN MATTERS RELATING TO POSH

Section 16 of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 prohibits the disclosure of following information to public, press or media in any manner:

1. Contents of the complaint
2. Identity and address of the aggrieved women
3. Recommendations of the internal/ local complaints committee
4. Action taken by the employer/ district officer under the provisions of this act

Information regarding the justice secured to any victim of sexual harassment without disclosing the name, identity, address or any other particulars calculated to lead to the identification of the aggrieved woman and witnesses may be disseminated.

Exception under the Right to Information Act, 2005

All information received in the course of the examination and inquiry into a complaint of sexual harassment shall be held in trust by the committee and the same are not available pursuant to an application under the Right to Information Act, 2005. Such information shall constitute an exception under Section 8(1) (e) of the Right to Information Act, 2005, as the same is held by the committee in a fiduciary relationship and the nondisclosure of the same will not be against public interest. To the contrary disclosure of such information may endanger the life or physical safety of the complainant or any of the witnesses. An exception to this rule can be in the circumstances when the complainant herself applies for information under the Right to Information Act, 2005.