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RESERVE BANK OF INDIA

Foreign Exchange Management (Cross Border Merger)

The Reserve Bank of India ("**RBI**") on March 20, 2018 issued the *Foreign Exchange Management (Cross Border Merger) Regulations, 2018* ("**Regulations**") after extensive public consultations.

The key provisions of the Regulations are as follows:

1. Inbound Merger

   a. In the event of an inward merger the resultant Indian company has to comply with the applicable foreign exchange regulations, in addition to the provisos provided as under:

> *"(i) where the foreign company is a joint venture (JV)/ wholly owned subsidiary (WOS) of the Indian company, it shall comply with the conditions prescribed for transfer of shares of such JV/ WOS by the Indian party as laid down in Foreign Exchange Management (Transfer or issue of any foreign security) Regulations, 2004;*
>
> *(ii) where the inbound merger of the JV/WOS results into acquisition of the Step down subsidiary of JV/ WOS of the Indian party by the resultant company, then such acquisition should be in compliance with Regulation 6 and 7 of Foreign Exchange Management (Transfer or issue of any foreign security) Regulations, 2004."*

b. The resultant company shall confirm to the to the External Commercial Borrowing norms or Trade Credit norms or other foreign borrowing norms, as laid down under Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 or Foreign Exchange Management (Borrowing or Lending in Rupees) Regulations, 2000 or Foreign Exchange Management (Guarantee) Regulations, 2000, as applicable, within a period of two (2) years to bring the overseas borrowings which are being taken on by the resultant Indian company, in line with the borrowing regulations stipulated therein.

c. The Indian company may acquire and hold any asset outside India of the foreign company (pursuant to a cross border merger), which an Indian company is permitted to acquire under the Foreign Exchange Management Act, 1999 ("**FEMA**"). Such assets can be transferred by the Indian company if such a transaction is permitted under FEMA.

d. If the Indian company is barred under FEMA from acquiring and holding any asset/security, then such Indian company shall have to sell such asset/security within two years from the date of sanction of the merger by the National Company Law Tribunal and the sale proceeds must be repatriated to India immediately through banking channels.

2. Outward Merger

In an Outbound Merger, an Indian company will merge into a foreign company and accordingly, all properties, assets, liabilities and employees of the Indian company will be transferred to the foreign company.

a. The fair market value of the securities should be within the limits prescribed under the Liberalised Remittance Scheme laid down in the Act and the rules and regulations framed thereunder have to be complied in order for a resident individual to acquire securities outside India.

b. Pursuant to the Regulations, the Indian office of the resultant company may be deemed to be a branch office after the sanction of the scheme of cross border merger.

c. Whilst the guarantees or outstanding borrowings of the Indian company would become the liabilities of the resultant foreign company, the Regulations stipulates that foreign companies shall not acquire liability in rupees payable to Indian lenders which are not FEMA compliant, and a no-objection certificate to this effect must be obtained from the Indian lenders.

d. The timeframe for sale of assets not permitted to be acquired or held by a foreign company under FEMA, has been increased from one hundred and eighty (180) days to two (2) years from the date of sanction of the scheme.

3. Reporting Requirements

The companies involved in cross border transactions are required to furnish reports from time to time as prescribed by the RBI.

4. With regards to the deemed approval of the RBI, the Regulations provides under:

> *"Any transaction on account of a cross border merger undertaken in accordance with these Regulations shall be deemed to have prior approval of the Reserve Bank as required under Rule 25A of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016."*

THE PAYMENT OF GRATUITY (AMENDMENT) BILL, 2017

The Payment of Gratuity (Amendment) Bill, 2017 ("**The Bill**") was introduced in the Lok Sabha by the Minister for Labour and Employment Mr. Santosh Kumar Gangwar on December 18, 2017. The Bill was passed by the Rajya Sabha on March 22, 2018 and the Lok Sabha on March 15, 2018. The Bill makes amendments to the Payment of Gratuity Act, 1972 ("**Principal Act**").

The following Amendments were made to the Principal Act:

1. The definition of "notification" has been substituted under Section 2 (k) as follows:

> *"(k) "notification" means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly;'."*

2. In Section 2A (2) (iv) Explanation makes a substitution of the word "*twelve weeks*" to "*such period as may be notified by the Central Government from time to time*"

   The maximum maternity leave under the Maternity Benefit Act, 1961 was changed from twelve (12) weeks to twenty-six (26) weeks by the Maternity Benefit (Amendment) Act, 2017. The Bill sought to remove the reference of twelve (12) weeks in the Principal Act and empowers the government to notify the maximum maternity leave.

3. In Section 4 (3) for the words "ten lakh rupees" the words "such amount as may be notified by the Central Government from time to time" shall be substituted.

   The Bill has also proposed to double the upper ceiling of tax-free gratuity amount payable to an employee from Rs. 10, 00, 000 (Rupees Ten Lakhs) to Rs. 20, 00, 000 (Rupees Twenty Lakhs).

The main purpose of this Bill is to ensure harmony between the Public and Private Sector employees. The Bill is awaiting Presidential assent.

INSOLVENCY AND BANKRUPTCY CODE OF INDIA

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2018

The Insolvency and Bankruptcy Board of India ("**IBBI**") has notified the *Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2018* ("**Amendment Regulations**") on March 28, 2018. The Amendment Regulations have come into force from April 01, 2018.

Some important amendments made to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**Principal Regulations**") are as follows:

1. The *Explanation* in the Regulation 33 of the Principal Regulations shall be substituted by:

> *"Explanation. - For the purposes of this regulation, "expenses" include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional."*

2. The Explanation in Regulation 34 of the Principal Regulation states that the regulations provide that the expenses to be incurred on or by the resolution professional shall be fixed / ratified by the Committee of Creditors and such fixed / ratified expense will form part of insolvency resolution process costs.

3. Insertion of Regulation 34A to the Principal Regulations state that the interim resolution professional or the resolution professional shall disclose item wise insolvency resolution process costs in such manner, as may be required by the Board.

4. The Principal Regulations provide timelines for various activities in a resolution process. Insertion of Regulation 35A of the Amendment Regulations now requires the resolution professional to identify the prospective resolution applicants on or before the 105th day from the insolvency commencement date.

Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2018

The following amendments were made to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Principal Liquidation Regulations**") by the *Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2018* ("**Liquidation Amendment Regulations**") on March 28, 2018:

1. Insertion of the following clause after Regulation 2 (e) of the Principal Liquidation Regulations:

> *"(ea) "liquidation cost" under sub-section (16) of section 5 means(a) fee payable to the liquidator under regulation 4; (b) remuneration payable by the liquidator under regulation 7; (c) cost incurred by the liquidator under regulation 24; and (d) interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower."*

2. The Principal Liquidation Regulations allow a liquidator to sell an asset on a standalone basis. These also allow the liquidator to sell the assets in a slump sale, a set of assets collectively, or the assets in parcels. The Liquidation Amendment Regulations makes a provision in addition to allow the liquidator to sell the corporate debtor as a going concern.

3. The Liquidation Amendment Regulations comes to force from April 01, 2018.

CENTRAL ELECTRICITY REGULATORY COMMISSION

Indian Wind Power Association Versus National Load Despatch Center

The Hon'ble Central Electricity Regulatory Commission ("**CERC**") has pronounced its *Order dated March 01, 2018* in the matter of Indian Wind Power Association ("**Petitioner**") versus the National Load Despatch Center ("**Respondent**"/ "**NLDC**").

Background

The Petitioner had filed the following petition on behalf of its members to seek relaxation in filing of the grant for Renewable Energy Certificates ("**REC**") from the Respondent. The members of the Petitioner were aggrieved as they were unable to upload the REC application for FY 16-17 as the NLDC portal does not accept such applications after the completion of the stipulated six (6) months of generation. The Petitioner had further submitted that its members are affected due to such non-acceptance of REC applications by the NLDC. It was held by the Petitioner that due to long delay caused in granting the Open Access Permissions ("**OA Permissions**") the credit injection report could not have been obtained. Petitioner's members therefore, could not make the REC Application for energy injected from the month of July, 2016 to NLDC. Despite various Orders, the Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**") refused to process the OA Permissions and grant the credit notes in a timely manner.

The Petitioner proposed that the required six (6) months should be counted from the date of issuance of energy injection report by the MSEDCL as the energy injection reports can be obtained only once OA Permissions are issued.

Decision

The main issue which arose before the Hon'ble CERC was whether the members of the Petitioner were entitled to be granted with the RECs for FY 16-17. Answering in the affirmative, the Hon'ble CERC held that it would go against the very objective of promoting the generation of renewable energy if the RECs were denied on grounds of procedural delay which were not attributable to the Petitioner. Regulation 15 of the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 ("**REC Regulation 2010**") gives the Hon'ble CERC power to relax any provision of the REC Regulation 2010. By virtue of the same the Hon'ble CERC directed the Respondent to entertain the application of the Petitioner and issue the RECs for the concerned period.

SUPREME COURT OF INDIA

Board of Control for Cricket in India versus Kochi Cricket Private Limited and etc.

The Hon'ble Supreme Court of India ("**SC**") on March 20, 2018 pronounced its decision in the matter of *Board of Control for Cricket and India ("**Petitioner**") versus Kochi Cricket Private Limited ("**Respondent**").* The Hon'ble SC while interpreting Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act**") adjudicated on the question of whether the substitution to Section 36 of the Arbitration and Conciliation Act, 1996 ("**Act**") made by the Amendment Act would apply even to appeals under Section 34 of the Act filed before the commencement of the Amendment Act i.e. October 23, 2015.

The Hon'ble SC observed and held as under:

Section 26 of the Amendment Act must be read in two parts which are distinct and separate. The relevant provision has been extracted below for reference:

> *"26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*

The *First* part of the Section expressly applies to 'arbitral proceedings' under Section 21 of the Act unless the contrary has been agreed by the parties.

The *Second* part of the Section conspicuously makes a provision that it will apply to proceedings which arise 'in relation to' arbitral proceedings which cover arbitral proceedings before Court and are not controlled applications under Section 21 of the Act.

Further with reference to the issue in hand the Hon'ble SC held as under:

> *"39. From a reading of Section 26 as interpreted by us, it thus becomes clear that in all cases where the Section 34 petition is filed after the commencement of the Amendment Act, and an application for stay having been made under Section 36 therein, will be governed by Section 34 as amended and Section 36 as substituted."*

The Hon'ble SC held that Section 36 of the Amendment Act refers to the execution of an award as if it were a decree, attracting the provisions of Order XXI and Order LXI, Rule 5 of the Code of Civil Procedure, 1908 and would, therefore, be a provision dealing with the execution of arbitral awards. The Hon'ble SC also clarified that since execution of a decree pertains to the realm of procedure, and that there is no substantive right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of the commencement of the Amendment Act.

Hence it was held by the Hon'ble SC that:

- Applicability of the Amendment Act will be prospective in nature unless an exception is carved out.
- Amendment Act with respect to proceedings under Section 34 and Section 36 of the Act will apply.

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Warm Regards,

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