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Securities and Exchange Board of India

Circular on IFSC

Securities and Exchange Board of India **("SEBI")** has issued a Circular dated September 28, 2020 for amendment in Operating Guidelines for Investment Advisers in International Financial Services Centre **("Operating Guidelines for IAs in IFSC")**.

1. SEBI vide its *circular dated January 09, 2020* bearing issued Operating Guidelines for Investment Advisers in IFSC. Further certain clarifications and developments in Operating Guidelines for IAs in IFSC were amended by SEBI circulars dated February 28, 2020 and August 21, 2020 respectively.

2. Now, it has been decided to amend the provisions of the aforesaid Operating Guidelines for IAs in IFSC as follows:

   i. Clause 3 of the Operating Guidelines for IAs in IFSC read with para 3 of the circular dated February 28, 2020 is amended as follows-

   "3. The following persons shall be eligible to apply to the Board for registration as an Investment Adviser in IFSC:

   a. Any entity, being a Company or a Limited Liability Partnership **("LLP")** or any other similar structure recognised under the laws of its parent jurisdiction, desirous of operating in IFSC as an Investment Adviser, may form a Company or LLP to provide investment advisory services.

   b. The formation of a separate Company or LLP shall not be applicable in case the applicant is already a Company or LLP in IFSC.

   ii. Clause 4 of the Operating Guidelines for IAs in IFSC is amended as follows-

   "4. Persons seeking registration under the Investment Adviser Regulations read with these Guidelines shall provide investment advisory services only to those persons referred in Clause 9 (3) of the IFSC Guidelines. Further, IAs shall ensure to comply with the applicable guidelines issued by the relevant overseas regulator/ authority, while dealing with person's resident outside India and non-resident Indians seeking investment advisory services from them."

iii. Clause 8(c) of the Operating Guidelines for IAs in IFSC is amended as follows-

"c. The IA/ parent entity shall fulfil the aforesaid net worth requirement, separately and independently for each activity undertaken by it under the relevant regulations."

iv. Clause 9 of the operating guidelines for IAs in IFSC is amended as follows-

"9. An IA shall ensure to conduct annual audit in respect of compliance with Investment Adviser Regulations and these guidelines from a chartered accountant or a company secretary."

3. This Circular is issued in exercise of powers conferred under Section 11(1) of the Securities and Exchange Board of India Act, 1992 to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

Securities Exchange Board of India - Circular on Mutual Funds

The Securities Exchange Board of India (**"SEBI"**), in exercise of powers conferred under Section 11 (1) of the Securities and Exchange Board of India Act, 1992, read with the provisions of Regulation 77 of SEBI (Mutual Funds) Regulations, 1996, issued a *Circular dated September 17, 2020* to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. This Circular shall come into effect from **January 1, 2021**.

1. Uniformity in applicability of Net Asset Value ("NAV") across various schemes upon realization of funds

SEBI has directed fund-houses that in respect of purchase of units of mutual fund schemes (except liquid and overnight schemes), closing NAV of the day will be applicable on which the funds are available for utilisation irrespective of the size and time of receipt of such application. This would bring uniformity in applicability of NAV across various schemes on realisation of funds.

However, the existing provision on NAV applicability for liquid and overnight funds and cut-off timings for all schemes remains unchanged.

2. Trade Execution and Allocation

Asset Management Company (**"AMC"**) shall put in place a written down policy which inter-alia detail the specific activities, role and responsibilities of various teams engaged in fund management, dealing, compliance, risk management, back-office, etc., with regard to order placement, execution of order, trade allocation amongst various schemes and other related matters.

2.1. For orders pertaining to equity and equity related instruments

AMCs shall use an automated Order Management System **("OMS")**, wherein the orders for equity and equity related instruments of each scheme shall be placed by the fund manager(s) of the respective schemes. In case a fund manager is managing multiple schemes, the fund manager shall necessarily place scheme wise order.

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2.2. Requirements with respect to investments in all instruments

Besides, all conversations of the dealer shall be only through the dedicated recorded telephone lines. No mobile phones or any other communication devices other than the recorded telephone lines shall be allowed inside the dealing room.

2.3. Monitoring of Compliance

AMC shall use a system-based monitoring mechanism to ensure fair trade. Audit trails of activities will be available in the system. Any non-compliance should be reported to trustees on quarterly basis. The trustees should then report to SEBI in the half yearly trustee report.

The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020

The *Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020* (hereinafter referred to as "**IBC Bill 2020**") was a Bill introduced in the Parliament to further amend the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). The Bill has been passed by both House of the Parliament on September 21, 2020 replacing the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 of June 05, 2020.

The relevant amendments made to the IBC by the IBC Bill, 2020 have been enumerated as follows:

1. Insertion of Section 10A(1) suspends the application for the initiation of corporate insolvency resolution process ("**CIRP**") for defaults arising on or after March 25, 2020 for a period of six (6) months till further notified.

The proviso to this section further clarifies that the suspension does not apply to the defaults which arose prior to March 25, 2020 and hence, CIRP can still be initiated against them .

2. Insertion of Section 66(3) bars the Resolution Professional ("**RP**") from making any applications under Section 66(2) of the IBC to the Adjudicating Authority against such defaults for which the initiation of the CIRP has been suspended under Section 10A.

Prior to the suspension under Section 10A, the RP could initiate proceedings against such personnel for wrongful or fraudulent trading under Section 66(2) of the IBC.

In a more recent update regarding the suspension period imposed under Section 10A which was to end on September 25, 2020, a further extension of three (3) months has been imposed via a *Ministry of Corporate Affairs notification dated September 24, 2020.*

It is evident that the above amendments are made in light of the ongoing COVID-19 crisis to provide a reprieve to the Corporate Debtors.

Ministry of Corporate Affairs

Ministry of Corporate Affairs ("**MCA**") notifies Companies (Acceptance of Deposits) Amendment Rules, 2020 vide *Notification dated September 7, 2020* and amended rule 2, in sub-rule (1), in clause (c), in sub-clause (xvii) of Companies (Acceptance of Deposits) Rules, 2014 **("Deposit Rules").**

1. (1) These rules may be called the Companies (Acceptance of Deposits) Amendment Rules, 2020.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the **Deposit Rules**, in rule 2, in sub-rule (1), in clause (c), in sub-clause (xvii), –

(i) for the words "five years", the words "ten years" shall be substituted;

(ii) in the Explanation, in clause I, for the letters, figures, brackets and words "G.S.R. 180 (E) dated February 17, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry", the letters, figures, brackets and words "G.S.R. 127 (E), dated the February 19, 2019 issued by the Department for Promotion of Industry and Internal Trade" shall be substituted.

3. In the said **Deposit Rules**, in rule 3, in sub-rule (3), in the second proviso, in clause (i), for the words "five years", the words, "ten years" shall be substitute.

Ministry of Corporate Affairs

The Ministry of Corporate Affairs (**"MCA"**) had received representations from various stakeholders**,** requesting to grant an extension of the last date of filling Form CRA-4 (form for filling of cost audit report) for FY 2019-20 under the Companies Act, 2013 owing to the impact of COVID -19 pandemic.

MCA vide its *General Circular dated September 10, 2020* therefore, relaxed the additional fees payable on late filing of the form and also extended the last date of filling the said form as under:

1. The cost audit report for the financial year 2019-20 submitted by the cost auditor to the Board of Directors of the companies by September 30, 2020 shall not be viewed as a violation of rule 6(5) of the Companies (Cost Records and Audit) Rules, 2014.

2. Also, the cost audit report for the financial year ended March 31, 2020 shall be filed in e-form CRA-4 within 30 days from the date of receipt of the copy of the cost audit report by the company.

3. In case any company has availed an extension of time for holding Annual General Meeting (**"AGM"**) then e-form CRA-4 can be filed within the timeline provided under the proviso to rule 6(6) of the Companies (Cost Records and Audit) Rules, 2014.

MINISTRY OF POWER

Vide *Notification dated September 09, 2020*, the Government of India vide Ministry of Power, has notified the Draft Electricity (Rights of Consumers) Rules, 2020 ("**Draft Rules**") for invitation of comments by the public within twenty one (21) days from the date of the publication of this notification.

The Draft Rules mention a vide variety of rules, some of which are mentioned below for ready reference:

Sub clause (9) of Section 6. Billing and Payment states the following:

> *(9) The Distribution Licensee shall not generate more than two provisional bills for a consumer during one financial year and if the provisional billing continues for more than two billing cycles except under extraordinary condition due to force majeure, the consumer may refuse to pay the dues until bill is issued by the distribution licensee as per actual meter reading.*

Sub clause (12) of Section 6- Billing and Payment is mentioned below:

> *(12) Payment of bills*
>
> *b) Bill amount of more than Rs. 1,000 or an amount specified by the Commission shall mandatorily be paid online. Commission shall specify a suitable incentive/rebate for payment through online system.*
>
> ……..
>
> *8. Reliability of Supply*
>
> *1) The Distribution Licensee shall supply 24x7 power to all consumers. However, the Commission may specify lower hours of supply for some categories of consumers like agriculture……*
>
> …….
>
> *3) The Distribution Licensee shall put in place a mechanism, preferably with automated tools to the extent feasible, for monitoring and restoring outages.*
>
> …..

12. Grievance Redressal Mechanism

(1) The distribution licensee shall create Consumer Grievance Redressal forum (CGRF) under sub-section (5) of Section 42 of the Act at different levels i.e. sub-division, division, circle, zone, company level etc. The Forum shall be headed by an officer of the licensee of appropriate seniority and have two to three members as consumer representatives from other than the employees of the distribution licensee. The forum may be assigned different types of grievances depending on the nature of the grievance and the level at which it can be best resolved. ….

……..

The abovementioned rules have been formed to increase the ease of business and aims at stringent provisions regarding timelines for new connections, mandates relating to new and existing connections, etc.

Case Laws

1. Civil Appeal No. 3185 of 2020 (Arising out of SLP (Civil) No. 7172 of 2020) in ***Government of India vs Vedanta Limited & Ors.*** dated September 16, 2020

The Hon'ble Supreme Court of India **("Supreme Court")** vide its Order dated September 16, 2020, clarified the law relating to limitations for filing Petitions for enforcement and execution of foreign awards in India. The Hon'ble Supreme Court held that aforementioned Petitions should be filed within three (3) years from the date when the right to reply begins and in the event there is any delay, the same can be condoned under Section 5 of the Limitation Act, 1963 **("Limitation Act").**

FACTS OF THE CASE:

The Government of India **("Appellant"),** Cairn Energy India Proprietary Limited, Ravva Oil (Singapore) Proprietary Limited, Videocon Industries Limited (together **"Respondents"**) and Oil and Natural Gas Corporation Limited entered into a Product Sharing Agreement **("PSC")** in 1994 for the purpose of inter alia exploring and developing petroleum reserves. As per the PSC, the Respondents were entitled to recover monies as its base for development costs. However, as the Respondents incurred higher costs than contractually agreed upon, the Respondents sought to recover the same from the Appellant.

Accordingly, disputes arose and the parties referred to arbitration, seated at Kuala Lampur, Malaysia. An award passed in 2011, pursuant to which the Respondents were directed to credit the Appellant development costs recovered provided in the PSC and were also entitled to recover the entire base development costs incurred for the contract years **("Award")**

The Award was challenged before the Malaysian High Court and Malaysian Court of Appeal by the Appellant, and was dismissed by the respective courts for lack of merit found to intervene with the Award.

Pursuant to that, the Respondents filed a Petition for enforcement of the award under Section 47, read with Section 49 of the Arbitration and Conciliation Act, 1996 **("Arbitration Act"),** with an application for condonation of delay. The Appellant filed an application under Section 48 of the Arbitration Act challenging the enforcement of the Award. The contention placed was that the enforcement Petition was filed beyond the time stated in the Limitation Act and hence, was against the public policy of India. The application filed under Section 48 of the Arbitration Act was disposed off and the High Court directed the Award be enforced and accepted the Condonation of Delay.

The Appellant appealed against the abovementioned Order of Hon'ble Delhi High Court in the Hon'ble Supreme Court.

DECISION:

The Hon'ble Supreme Court was posed with the important question that has been a topic of debate for years. Whether the application under Section 47 read with Section 49 of the Arbitration Act is valid in the above case or is it bound by the Limitation Act is the one of the main topics of contention. Section 48 of the Arbitration Act lays down the reasons wherein the enforcement of a foreign award could be resisted by the party against whom it is enforced.

Section 49 of the Arbitration Act is applicable once the foreign award is deemed a decree.

It is important to note that the Arbitration Act and Section 47, Section 48 and Section 49 of the Arbitration Act do not mention any time period as limitation for filing a Petition.

The Limitation Act, under Article 136 provides twelve (12) years as the time period from the date of such decree becoming enforceable, for execution of a decree.

Article 137 of the Limitation Act provides three (3) years as from the date of right to reply begins, for filing such applications where no time period of limitations is specified.

However, there seems to be a difference of opinions between the validity of Article 136 and Article 137. Some courts are of the view that Article 136 would enforce a foreign award while some Courts are of the opinion that Article 137 would govern the enforcement of Petitions for foreign awards.

In ***Louis Dreyfous Commodities Suisse S.A. v Sakuma Exports Limited dated October 06, 2015 in Arbitration Petition No. 47 of 2015 and Noy Vallesina Engineering Spa vs Jindal Drugs Limited dated June 05, 2006***, the Hon'ble Bombay High Court held that a foreign award does not become a decree as soon as it is pronounced, it is only counted as a decree after the court records its satisfaction of the enforceable award and hence would be enforceable under Article 137 of the Limitation Act. It would be enforceable under Article 137 only after the award is deemed to be a decree of the Court and valid under Section 49 of the Arbitration Act. A contrary view was taken in Hon'ble Bombay High Court in consonance with an Order passed by the Hon'ble Supreme Court in ***Feurst Day Lawson v Jindal Exports Limited dated July 08, 2011 in SLP (civil) no. 11945 of 2010*** and the Hon'ble Madras High Court in ***M/s Compania Naviera 'SODNOC' vs Bharat Refineries Limited dated March 5, 2007.*** The view taken by the Hon'ble Madras High Court was that since a foreign award is stamped as a decree, it is applicable under Article 136 wherein the time period of limitation is twelve (12) years.

OPERATIVE PART OF THE ORDER:

1. The Hon'ble Supreme Court held that the foreign award is not a decree of an Indian Civil Court and is only a 'deemed decree' of the Court. The phrase "that court" in Section 49 of the Arbitration Act refers to the Indian Court which adjudicated upon the Petition filed under Section 47. In view thereof, the Article 136 of the Limitation Act would not be applicable for enforcement of the Award since the foreign award is not a decree under a Civil Court in India.

2. Accordingly, Article 137 of the Limitation Act would be applicable for enforcement of the Award which provides a period of three (3) years to file a Petition for enforcement/execution from the time when the right to reply accrues.

In view thereof, the above petition is disposed.

2. *Nazir Mohamed v. J Kamala & Ors. in Civil Appeal No. 2842-2844 of 2010*

FACTS OF THE CASE:

Recently, the Hon'ble Supreme Court of India **("Supreme Court")** that while dealing question relating to second appeals under Section 100 of Civil Procedure Code, 1908 **("CPC")** held that formulation of substantial question by the High Court is mandatory and mere reference to the ground mentioned in the Memorandum of Second Appeal cannot satisfy the mandate.

The Respondent (Plaintiff in suit) had filed a suit inter alia seeking (i) declaration of ownership of suit premises; (ii) direction to Appellant (Defendant to the suit) to deliver the possession of the suit premises; (iii) decree of Rs. 900/- as payment of arrears of rent / occupation charges and (iv) payment of future profits. The Trial Court vide its judgment dismissed the suit holding that the Respondent failed to prove that the suit property has been purchased by his father. Being aggrieved by Trial Courts' decision, Respondent filed the First Appeal. The First Appellate Court allowed the appeal and through its Order held that Respondent is owner of portion of suit premises, was entitled to declaration of title but not recovery of possession, since the Appellant had been enjoying the suit premises for long period of time.

However, both the parties preferred Second Appeals before the Hon'ble Madras High Court, whereby Appellant's second appeal was dismissed, by holding Respondent entitled to half of the suit property. Nonetheless, Appellant filed Civil Appeal before Hon'ble Supreme Court. The Appellant argued that no substantial question of law was involved in either of Second Appeals as warranted by Section 100.

DECISIONS:

In the course of its judgment, Hon'ble Supreme Court referred to plethora of its decisions, viz., ***Sir Chunilal v. Mehta & Sons Limited. v. Century Spg. & Mfg. Company Limited dated March 05, 1962 in Civil Appeal No. 417 of 1957, Hero Vinoth v. Seshammal dated May 08, 2006 in Civil Appeal No. 4715 of 2000, Panchagopal Barua v. Vinesh Chandra Goswami dated February 12, 2007, Santosh Hazari v. Purushottam Tiwari dated February 08, 2001 in Civil Appeal No. 1117 of 2001 and Kondiba Dagadu Kadam v. Savitribai Sopan Gujar dated April 16, 1999 in Civil Appeal No. 2329 of 1999.***

After analyzing these judgments, Hon'ble Supreme Court noted at paragraph no. 37, by enunciating the relevant principles relating to Section 100 of the CPC as follows:

An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

The Hon'ble Madras High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

The general rule is, that the High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognized exceptions are where (i) the courts below have ignored the material evidence or acted on no evidence; (ii) the courts have drawn wrong inference from proved facts by applying the law erroneously; or (iii) decision is based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

DECISION:

Setting aside the judgment of Hon'ble Madras High Court, Hon'ble Supreme Court held that condition precedent for entertaining and deciding a second being the existence of a substantial question of law, whenever a question is framed by the High Court, the High Court will have to show that the question is one of law and not just a question of facts, it also has to show that the question is a substantial question of law.

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Warm Regards,

Dipali Sarvaiya Sheth

Founder

ETERNITY LEGAL
Advocates & Solicitor
Patent & Trademark Attorneys

D-226, Neelkanth Business Park,

Vidyavihar (West), Mumbai– 400086

Email: contact@eternitylegal.com Tel no.: +91 22 2515-9001

Website: www.eternitylegal.com