Vedanta Law Chambers

Monthly Newsletter

MONTHLY NEWSLETTER

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1st Floor, SSK House B-62, Sahkar Marg,
Lal Kothi, Jaipur - 302015

0141-2740911, 4014091

vedantalawchambers@gmail.com

Branches:
Jodhpur, Delhi & Ahmedabad

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Newsletter Highlights:

From the Partner's Desk

Dear Readers,

With the commencement of the new decade by the arrival of year 2021, we all are full of hope and commitment for the coming year with lots of reforms in multiple areas of our economy being put to action or about to come into force in the coming months. Just on a note of remembering 3 laws for the Agriculture sector, 3 laws in the Labour sector, 2 laws in Securities and so on. Each of them is expected to bring major changes in the way we perceive, understand and implement the work and its resulting impact on the economy.

Today I am discussing in brief the major amendments in the Labour Code which is proposed to be notified shortly. Some of the key changes/additions introduced by the Industrial Relations Code Bill, 2020 are discussed in the first series (Part I) hereunder. On September 23, 2020, the Parliament of India passed 3 (three) long awaited labour codes, namely (a) the Industrial Relations Code Bill, 2020; the Code on Social Security Bill, 2020; and the Occupational Safety, Health and Working Conditions Code Bill, 2020. The labour codes subsequently received the Presidential assent on September 29, 2020, marking a major milestone in ushering reforms in the labour sector.

The Central Government has amalgamated the existing labour laws, namely, the Trade Unions Act, 1926, the Industrial Employment (Standing Orders) Act, 1946 ("**SO Act**"), and the Industrial Disputes Act, 1947 ("**ID Act**"), under a new legislation enacted as 'the Industrial Relations Code, 2020' ("**Code**") on September 29, 2020. This Code will come into effect from a date to be notified by the Central Government.

Broadly speaking, the Code seeks to benefit both employers and their workers. It streamlines the dispute resolution mechanism, protects fixed-term workers,

Adv Nivedita Sarda,
Partner

requires all large industrial establishments to implement standing orders, creates a re-skilling fund for retrenched workers, and enhances penalties to deter non-compliance. It adopts a business-friendly approach to promote industrial harmony through the prescription of a single negotiating body and greater flexibility to employers to take operational decisions.

An overview of key changes introduced in the Code:

Industry:

The term 'Industry' has been redefined under the code which means any systematic activity carried on by co-operation between an employer and worker (whether employed directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature) but does not include the following:

1. institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service;

2. activities of the appropriate Government relatable to the sovereign functions of the appropriate Government including all activities carried on by the Central Government departments dealing with defence research, atomic energy and space;

3. any domestic service; or

any other activity as may be notified by the Central Government.

Thus, it does not differentiate whether the activity is pursued with a profit motive or has capital investment.

Wage Ceiling

The threshold for including supervisory employees within the ambit of worker has been enhanced from INR 10000 to INR 18000, thus, the employer may, amongst others, need to follow the retrenchment requirements to terminate their services.

Wages

The Code has redefined the term 'wages' to mean all remuneration whether by way of salary, allowances or otherwise, which would, if the terms of employment (express or implied) are fulfilled, be payable to a person employed in respect of his/her employment, and includes basic pay, dearness allowance and retaining allowance but doesn't inter alia include any bonus, which doesn't form part of the remuneration, value of any house accommodation, or the supply of light, water, medical attendance, any conveyance allowance, overtime allowance etc. A proviso to the definition however stipulates that in the event the excluded components under the definition, exceed fifty (50) percent of the entire remuneration paid, then the amount in excess of this fifty (50) percent, shall be construed within the 'wages'. This change is to ensure that the wage proportion remains at fifty (50) percent.

Fixed Term Employment

The Code has introduced a new term 'fixed term employment' which means engagement of a worker for a fixed period based on a written contract. A worker employed for a fixed term would be (a) entitled to the same benefits available to a permanent worker doing the same or similar work; (b) eligible for statutory benefits available to a permanent worker proportionate to the service period rendered and irrespective of whether the employment period does not fulfil the qualifying period under the statute; and (c) eligible for gratuity if service is rendered for a period of one (1) year. Termination of employment by way of expiry of the fixed term would not qualify as retrenchment under the Code.

Threshold for Standing Orders

Only the industrial establishments defined under the SO Act needed to formulate standing orders and get them certified ("CSO") if they had 100 or more workers. Certain States had reduced this applicability threshold to 50 workers. The Code provides a broader definition of 'industrial establishment' and increases the applicability threshold for CSO to 300 or more workers. This will bring uniformity and remove the CSO requirement for new smaller industrial establishments. However, industrial establishments that have CSO will continue to be governed by the same insofar as the provisions thereof are not inconsistent with the Code. Hence, unless specific or conditional exemption is granted under the Code, Information Technology (IT)/Information Technology-enabled Services (ITeS) units will need to have CSO. Further, commercial establishments, such as offices that do not fall within the purview of 'industrial establishment' for purposes of the SO Act, may get covered by the wide definition of 'industrial establishment' under the Code and need to have CSO in place.

Arbitrary Strikes and Lock-outs

Under the present Law, workers of only public utility services may go on strike after the 14th day of their 42 days' advance notice of strike. The Code, however, requires workers of all industrial establishments to give 60 days' advance notice of strike. Similar requirements have been prescribed for employers in relation to lock-outs.

Further, the Code expands the definition of "strike" to include concerted or mass casual leave by 50% or more workers on a given day. Thus, by expanding the scope of strikes and imposing a prior notice requirement, the Code seeks to deter workers and employers from indulging in arbitrary strikes and lock-outs, balancing the interests of all parties affected by such strikes and lock-outs.

Disciplinary Proceedings for Misconduct by Workers

The Code introduces a time limit of 90 days for the completion of an investigation or inquiry into any misconduct by a worker that involves his suspension by the employer. This will protect the interest of workers.

Grievance Redressal Machinery

Under the Code, a maximum of 10 members is required to constitute a grievance redressal committee ("**GRC**") as against the maximum of 6 members required under the existing law. The GRC also needs to have adequate representation of women workers. Now, a limitation period of 1 year has been prescribed for presenting grievances to the GRC. Further, if a grievance remains unresolved by the GRC, or a worker is aggrieved by the GRC's decision, the process no longer remains internal to the industrial establishment, as the worker has recourse to conciliation proceedings. Since non-constitution of a GRC is punishable with a fine of up to INR 100,000, the employers will need to take serious note of such compliance.

Notice of Change in Conditions of Service

IR Code has introduced a new provision whereby an advance notice of any change in conditions of service of a worker will not be required if 'such change is effected in accordance with the orders of the appropriate government'. This clause may be particularly useful to employers in a situation akin to a government-mandated lockdown or imposition of any other such embargo on conducting of business.

Central and State Recognition of Trade Unions

The IR Code empowers the Central Government and State Governments to recognise a trade union or a federation of trade unions as a central trade union or state trade union, respectively.

Considering that the IR Code has raised the threshold for lay-off/retrenchment requiring prior government approval from the existing one hundred (100) workmen to three hundred (300) workmen industry, it is likely to provide more flexibility to employers for hiring and firing workers without government permission. Also, by raising the threshold for requirement of a standing order in industrial establishments to over three hundred (300) workers imply that industrial establishments with up to three hundred (300) workers will not be required to furnish a standing order. The IR Code also has also introduced new conditions for carrying out a legal strike. The changes introduced through the IR Code is intended to provide much needed flexibility of operation to industry. However, many trade unions have expressed displeasure on the new IR Code asserting that the new code will promote hire and fire policy by industries and would enable industries to introduce arbitrary service conditions for workers and is therefore anti-workmen.

Compounding of Offences

The Code allows for compounding of offences provided such offences are not punishable under the Code with imprisonment only, or with imprisonment and fine. For offences punishable with fine only, the offence may be compounded for a sum of fifty (50) per cent of the maximum fine. For offences punishable with imprisonment for a term which is not more than one year or with fine, compounding is allowed for a sum of seventy-five (75) per cent of the maximum fine. This rule will however not apply to offences repeated within three (3) years of the commission of the first violation.

Interestingly, the Code Bill, as introduced in 2019, stipulated that the offences punishable with fine only could be compounded. From a review of the penalty provisions, it appears that the maximum duration of imprisonment for offences under the Code is six (6) months or fine and therefore, it appears that all offences under the Code are compoundable. Additionally, all amounts realized from the compounding of offences are required to be credited to the social security fund which is to be created under the Code on Social Security Bill, 2020.

Legal Updates

- **The Arbitration and Conciliation (Amendment) Ordinance, 2020:**

The Ordinance was promulgated on 04.11.2020. The Ordinance provides that during the pendency of an Application under the provisions of Section 34 for setting aside an award, the Court can grant a stay on operation of award if it is satisfied that the relevant arbitration agreement or contract or the making of award was induced or effected by fraud or corruption. The said amendment shall come in force with effect from the date on which Arbitration and Conciliation (Amendment) Act, 2015 came into force. Further by way of this Ordinance, Schedule VIII to the principal Act is also omitted which provided for qualification for Arbitration and by way of this Amendment it is stated that the qualifications of an Arbitrator will be specified by regulations.

- **The Code on Social Security, 2020:**

The Code on Social Security came in force with effect from 28.09.2020. The main aim of the Code is to provide better social security benefits such as Provident Fund, Insurance and Gratuity to workers, and to set up a Board for purpose of welfare of gig workers, among other. It extends the reach of the Employees' State Insurance Corporation and the Employees' Provident Fund Organization (which regulate benefits such as provident fund, insurance, pension, etc.) to the workers in the unorganised sector and the platform and gig workers. The Code further stipulates gratuity benefit for fixed term employees without any condition for minimum service period as envisaged under the current regime. The Code subsumes nine (9) labour laws relating to social security, namely, the Employees' Compensation Act, 1923, the Employees' State Insurance Act, 1948, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the Employment Exchanges (Compulsory

Adv Ishita Rawat,
Senior Associate

Notification of Vacancies) Act, 1959, the Maternity Benefit Act, 1961, the Payment of Gratuity Act, 1972, the Cine-Workers Welfare Fund Act, 1981, the Building and Other Construction Workers' Welfare Cess Act, 1996 and the Unorganised Workers Social Security Act, 2008. The said Code seeks to ease the compliance and ensure uniformity in labour laws.

- **The Occupational Safety, Health and Working Conditions Code, 2020:**

This Code came into force on 28.09.2020. This Code aims to regulate the occupational safety, health and working conditions of workers employed in establishments. It attempts to promote gender equality by allowing women workers to work at night subject to obtaining the consent. The Code further introduces the concept of deemed registration of establishments to circumvent the prolonged delays in administrative processes and provides that if an establishment is registered under any concerned law, it shall be deemed to be registered under this Code. The OSH Code subsumes the thirteen (13) labour laws relating to safety, health and working conditions, namely, the Factories Act, 1948, the Contract Labour (Regulation and Abolition) Act, 1970, the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, the Mines Act, 1952, the Dock Workers (Safety, Health and Welfare) Act, 1986, the Plantations Labour Act, 1951, the

Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955, the Working Journalists (Fixation of Rates of Wages) Act, 1958, the Motor Transport Workers Act, 1961, the Sales Promotion Employees (Conditions of Service) Act, 1976, the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 and the Cine-Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981.

- **The Industrial Relations Code, 2020:**

This Code came into force with effect from 28.09.2020. The Code aims to streamline the laws regulating industrial disputes and trade unions in India. For the benefit of the employers, the Code has introduced various aspects such as increasing the threshold of workers to three hundred (300) for obtaining the consent of the concerned government in case of lay off, retrenchment or closure of the establishment, notice of change not required to be given subject to the conditions stipulated in the Code, increasing the wage threshold to INR 18,000 (Indian Rupees Eighteen Thousand) for exclusion from the definition of worker, etc. The Industrial Relations Code also introduces the concept of deemed certification of standing orders. The Code subsumes three labour laws relating to industrial relations, namely, the Trade Unions Act, 1926, the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947.

- **Foreign Exchange Management (Export and Import of Currency) (Second Amendment) Regulations, 2020:**

The Reserve Bank of India in exercise of the powers conferred by clause (ga) of sub- section (2) of Section 47 of the Foreign Exchange Management Act, 1999 makes the amendments to the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015. The said amendment included a new regulation, i.e. Regulation.

"10. **Reserve Bank's power to restrict export or import of currency:** Notwithstanding anything contained in these regulations, the Reserve Bank, may, in public interest and in consultation with the Central Government, restrict the amount of Indian currency notes of Government of India and/or of Reserve Bank, and/or foreign currency, on case-to-case basis, that a person may bring into or take outside India and prescribe such conditions as it may deem necessary."

- **Computation of fee payable for delay in filings under regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**

IBBI has made it clear from the sub-regulation (4) of regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) that a fee has to be paid for delay after 1st October, 2020. The said regulation reads as under:

"The filing of a Form under this regulation after due date of submission, whether by correction, updation or otherwise, shall be accompanied by a fee of five hundred rupees per Form for each calendar month of delay after 1st October, 2020."

- **Insolvency And Bankruptcy Board Of India (Model Bye- Laws And Governing Board Of Insolvency Professional Agencies) Regulations, 2016**

In exercise of the powers conferred by sections 196, 203 and 205 read with section 240 of the Insolvency and Bankruptcy Code, 2016, the Insolvency and Bankruptcy Board of India makes the Regulations called the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016.

Article: FDI Routes

Preferred investment route for investment by foreign investors

Adv Rachit Sharma,
Senior Associate

The Funds from foreign countries could be invested in shares, properties, ownership / management or collaboration with the Indian entities and can be infused in External Commercial Borrowings. Based on this, Foreign Investments are classified as below.

- **Foreign Investment (FI):** Any investment made by a person resident outside India on a repatriable basis in capital instruments of an Indian company or to the capital of an LLP.

- **Foreign Direct Investment (FDI):** the investment through capital instruments by a person resident outside India (a) in an unlisted Indian company; or (b) in 10 percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company.

- **Foreign Portfolio Investment (FPI):** any investment made by a person resident outside India in capital instruments where such investment is (a) less than 10 percent of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company or (b) less than 10 percent of the paid up value of each series of capital instruments of a listed Indian company.

- **External Commercial Borrowings (ECB):** Any sum of money received from foreign sources or commercial loans obtained by Indian companies. It is one of the ways to bring funds into Indian entity or organisation. ECB can be made by way of commercial loans, **buyer's credit, supplier's credit, FCCB's and preference shares** with a minimum average maturity of 3 years.

NOTE: ECB means foreign funding which is not in the form of equity. When it is used in the form of equity capital, then it is called Foreign Direct Investment (FDI) in the form of contribution towards core capital of an organisation such as equity shares, convertible preference shares or convertible debentures. The convertible instruments are covered under the FDI Policy.

Routes of receiving Foreign Investment by Indian Companies:

a. **Automatic Route:** Foreign Investment is allowed under the automatic route without prior approval of the Government or the Reserve Bank of India, in all activities/ sectors as specified in the Regulation 16 of FEMA 20 (R).

b. **Government / Approval Route:** Foreign investment in activities not covered under the automatic route requires prior approval of the Government.

Instruments permitted for receiving foreign investment / funds:

Equity shares: Equity shares are those issued in accordance with the provisions of the Companies Act, 2013 and will include partly paid equity shares issued on or after July 8, 2014.

Share warrants: Share warrants issued on or after July 8, 2014 will be considered as capital instruments.

Debentures: Debentures' means fully, compulsorily and mandatorily convertible debentures.

Preference shares: 'Preference' shares means fully, compulsorily and mandatorily convertible preference shares.

ECB: Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; FCCBs; FCEBs and Financial Lease.

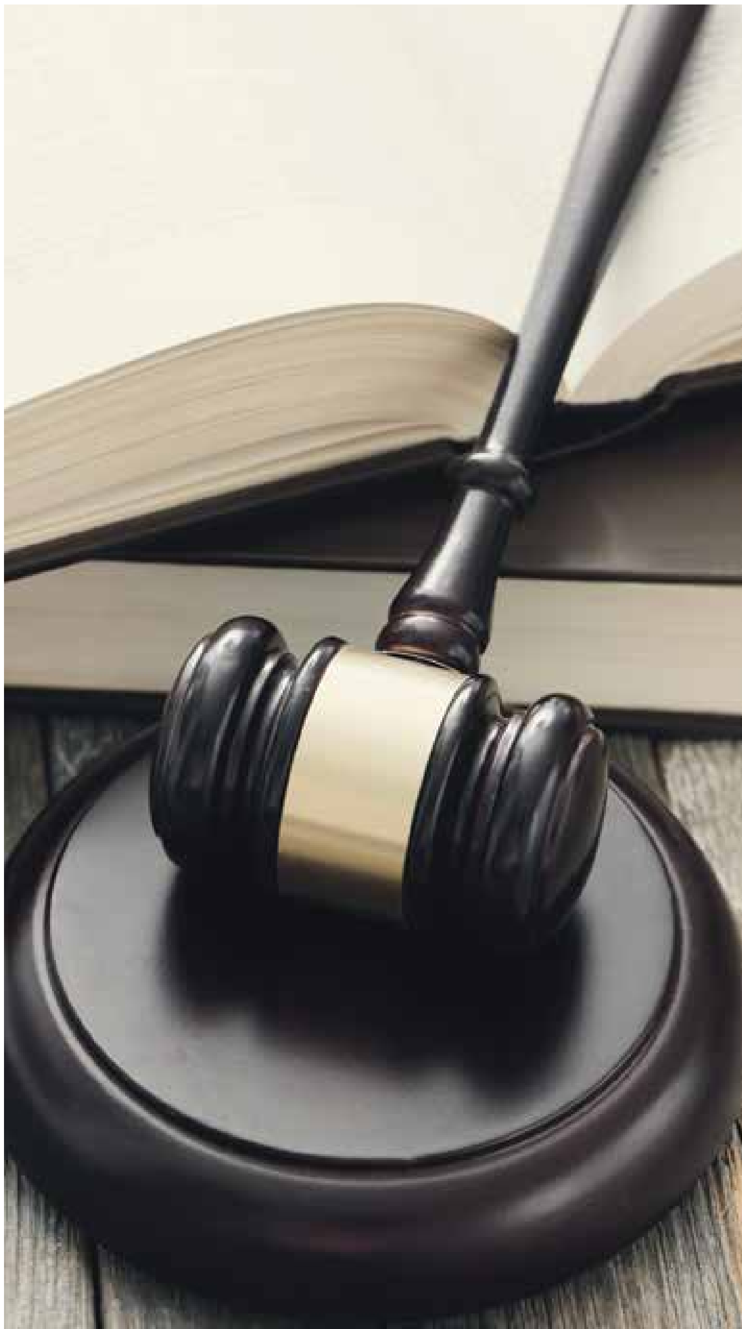
The year 2020 was full of uncertainties. The Indian Corporate sector had diverted a little from the route of issue of equity Shares and raised more than 11 Public issues of Non-Convertible Debentures (NCDs) and more than 1,600 Private Placements of corporate bonds in India. Further the increasing number of Mergers and Acquisitions also now involve NCDs as a form of funding in India. The rising issue of NCD's is due to hedging of the risk in the equity market as the same has resulted in the potential returns till date.

Non-Convertible Debentures (NCDs):

NCDs are basically pure debt instruments having a specified redemption period provides certain benefits to the investors, e.g., unlike equity instruments, NCDs are not subject to valuation and pricing requirements, lock-in requirements applicable to equity instruments with optionality clauses or limitations regarding rate of return/coupon. Bankruptcy laws in India also favours the issue of NCD by treating it as a Financial debt and accordingly, an NCD holder enjoys the status and benefits of a financial creditor which in the event of corporate liquidation the NCD holders (secured and unsecured) rank higher than equity shareholders. Although the NCD holders as compared to Equity shareholders do not have any shareholder voting rights, affirmative / negative covenants which provides some degree of control in decision making although due to volatility in the market and valuation concerns the issue of NCDs becomes popular choice among foreign investors, including foreign portfolio investors registered under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019 (SEBI FPI Regulations, and such entities, FPIs).

Governing Law:

This Article provides an overview of the investment route for foreign (or non-resident) investors in NCDs and are governed by **Companies Act, 2013, Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 and Master Direction of External Commercial Borrowings, Trade Credits and Structured Obligations** read with Sub-Section 3 of Section 6 of the Foreign Exchange Management Act, 1999 (FEMA).



Framework of ECB / Non-Convertible Debentures (NCDs):

Sr. No.	Parameters	FCY denominated ECB	INR denominated ECB
i	Currency of borrowing	Any freely convertible Foreign Currency	Indian Rupee (INR)
ii	Forms of ECB	Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; FCCBs; FCEBs and Financial Lease.	Loans including bank loans; floating/ fixed rate notes/bonds/ debentures/ preference shares (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; and Financial Lease.
iii	End-uses (Negative list)	The negative list, for which the ECB proceeds cannot be utilized includes the following: a) Real estate activities. b) Investment in capital market. c) Equity investment. d) Working capital purposes, except in case of ECB mentioned at v(b) and v(c) above. e) General corporate purposes, except in case of ECB mentioned at v(b) and v(c) above. Repayment of Rupee loans, except in case of ECB mentioned at v(d) and v(e) above. On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at v(c), v(d) and v(e) above.	
iv	Forms of ECB	All entities eligible to receive FDI. Further, the following entities are also eligible to raise ECB: i. Port Trusts; ii. Units in SEZ; iii. SIDBI; and iv. EXIM Bank of India.	All entities eligible to raise FCY ECB; and Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/ cooperatives and Non-Government Organisations.
v	Recognised lenders	The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECB. However, a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders;	

Sr. No.	Parameters	FCY denominated ECB	INR denominated ECB
		b) Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/ debentures listed abroad; and c) Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY ECB (except FCCBs and FCEBs).	
vi	Minimum Average Maturity Period (MAMP)	MAMP for ECB will be 3 years.	

Therefore, keeping in view of the favourable conditions overseas such as low interest rates and liquidity, the ECB is the preferred choice, to bring investment/ loan for new projects, permitted use by RBI. The overseas market is expected to be favourable market for the foreseeable future, and therefore it is expected to lead to higher borrowings by India Inc. With RBI's check on the ECB, making industry specific distinctions for automatic route and approval route, clearly establishing the end-use restriction and minimum average maturity period etc., it is expected that the ECBs are going to be the priority for bringing investment in India.

With RBI allowing the use of ECB proceeds for repayment of loans, the Indian GDP is expected to keep its stability intact and at the same time allows the Indian Corporates to seek required funds (which may not be allowed through local banks/ NBFC) from the overseas market with lesser interest rates.

Legal Decisions

Adv Aditya Bohra,
Senior Associate

1. Indian Contract Act, 1872

M/s Padia Timber Company (P) Limited versus The Board of Trustees of Vishakhapatnam Port Trust through its Secretary.

(Civil Appeal no. 7469/2008 vide order dated 05.01.2021)

Held: The Supreme Court has held that when a party to the contract puts in a new condition in a contract that has already been signed by another party, then the said contract is not a concluded contract till the time the new condition is not accepted by the other party.

Facts: The present Appeal was filed against the Order dated 10.10.2006 passed by High Court at Hyderabad wherein the main question involved was whether the acceptance of a conditional offer with a further condition results in a concluded contract, irrespective of whether the offerer accepts the further condition proposed by the acceptor. The respondent trust floated a tender for supply of wooden sleepers and invited bids for the same. The appellant thereafter submitted its bid and placed a condition that the respondent had to inspect the goods at the depot of the appellant company itself and with such terms and conditions, the appellant deposited an earnest amount of Rs. 75,000/-. The respondent accepted the condition of the appellant and stated that one inspection committee shall inspect the goods at the depot of appellant company and thereafter the same had to be supplied at the port site by road where the final inspection of wooden sleepers would take place. The appellant company rejected the proposal of respondent port and requested for refund of the earnest money. Thereafter the port trust filed a case for recovery of Rs. 33,19,991/- on account damages for breach of contract. The appellant also filed a suit claiming refund of earnest money along with interest @24%. The Trial Court as well as the High Court held that the appellant company breached the terms of the contract and therefore upheld the claim of the respondent trust.

The Supreme Court held that the High Court overlooked the provisions of section 7 of the Contract and therefore held that offer and acceptance must be absolute and there cannot be any room for doubt. The offer and acceptance must be based or founded on three components, that is, certainty, commitment and communication. However, when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that condition.

2. Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013.

Rajendra s/o Ganpatrao Ambhore versus The Union of India and Others.

(Civil Appeal no. 7469/2008 vide order dated 05.01.2021)

Held: The Bombay High Court in a significant ruling has held that the propagation for sale by advertisement of any article by giving it name as Yantra or otherwise, by attaching the name of any God to such article including the name of Lord Hanuman or any Baba with representation that these articles have special, miraculous and supernatural properties / qualities and making representation that these articles will help human being to become happy, to make progress in business, to make progress in profession, to make advancement in career, to make improvement in performance in education, to get recovery from any disease etc., is illegal and such propagation, advertisement falls under Section 3 of the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013.

Facts: In the present case the Petitioner came across advertisements on TV channels that were propagating that there were special, miraculous and supernatural properties / qualities in Hanuman Chalisa Yantra and other similar products. The purpose of the advertisement was to promote the sale of said Yantra. It is contended that this was a false propaganda and the propaganda is made to exploit the persons, who are superstitious by nature and to exploit them. Based on the unearth falsity in aforesaid propaganda, the Petitioner had placed order for purchase of one such Yantra and paid amount of Rs. 5,200/- and Yantra was also the High Codelivered to him. Aggrieved by the products received by the petitioner which had no nexus with the powers as shown in the advertisements, the petitioner approached High Court. The High Court allowed the petition and passed the following operative directions:

1. It is hereby declared that the propagation for sale by advertisement of any article by giving it name as Yantra or otherwise, by attaching the name of any God to such article including the name of Lord Hanuman or any Baba with representation that these articles have special, miraculous and supernatural properties / qualities and making representation that these articles will help human being to become happy, to make progress in business, to make progress in profession, to make advancement in career, to make improvement in performance in education, to get recovery from any disease etc., is illegal and such propagation, advertisement falls under Section 3 of the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013.

2. It is hereby declared that the telecast of advertisement, which propagates the things mentioned in clause (II) of the operative part of this judgment is illegal.

3. Direction is hereby given to the State and to Vigilance Officers appointed under the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013, to register crimes by giving reports against the persons, who are making such advertisement and who are selling such articles.

4. Direction is hereby given to the State Government and the Central Government to create Cells in Mumbai to see that no such advertisements are telecast on TV channels by separate advertisement or in the name of programmes in the State of Maharashtra. The State Government is hereby directed to see that the telecast of such advertisement on TV channels is stopped immediately in coordination with the authority created by the Central Government under the Cable

Television Networks (Regulation) Act, 1995. If such authority is not in place, the Central Government needs to appoint such authority within one month from today and if such authority is not appointed within this period, the State Government is entitled to use the provisions of the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013 for stopping the telecast of such advertisement.

5. It is hereby declared that the TV channel, which is telecasting such advertisement, is also liable under the provisions of the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013.

6. The State Government and the Central Government to inform this Court within 30 days from the date of this judgment about the steps taken to implement this judgment.

3. Indian Penal Code, 1860, Motor Vehicles Act.

Kirti & Anr. Etc. versus Oriental Insurance Company Ltd.

(Civil Appeal no. 7469/2008 vide order dated 05.01.2021)

Held: The Supreme Court observed that even if the counsel for a party concedes before the Court that does not throw away the legal rights or cannot enter into arrangements contrary to law.

Facts: The present SLP was filed against the Order dated 17.07.2017 passed by Delhi High Court through which the award to the tune of Rs. 40.71 lakhs awarded by the Motor Accident Claim Tribunal was reduced to Rs. 22 lakhs. It was contended by the Insurance company that the counsel for the private party conceded for reduction of the insurance amount by re-calculation of on the basis of minimum wages payable to worker in the State of Haryana.

In the present Appeal, the Supreme Court held that any concession made in this regard cannot bind the parties, as it is legally settled that advocated cannot throwaway legal rights or enter into arrangements contrary to law. the Supreme Court further enhanced the compensation to Rs. 33.20 lakhs.

4. Arbitration and Conciliation Act, 1996 and special enactments enacted by States concerning public works contract.

Bhaven Construction versus Executive Engineer Sardar Sarovar Narmada Nigam Ltd. & Anr

(Civil Appeal no. 7469/2008 vide order dated 05.01.2021)

Held: The Supreme Court observed that powers under Articles 226/227 of the Constitution of India should be used sparingly and only in exceptional rarity by Hon'ble High Courts when it comes to interfering with arbitral process, that is, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties.

Facts: The Appellant, Bhaven Construction had entered into a contract with Respondent, Executive Engineer of Sardar Sarovar Narmada Nigam to manufacture and supply bricks. The contract had an arbitration clause. When a dispute arose between the two, the appellant appointed a sole arbitrator to settle the same. Respondent preferred an application under Section 16 of the Arbitration and Conciliation Act of 1996 disputing jurisdiction of the arbitrator. The arbitrator dismissed the same whereupon the respondent preferred a special civil application under Articles 226 and 227 of the Constitution before the Gujarat High Court. The single-judge dismissed the same and the respondent preferred a Letters Patent Appeal which was allowed by a Division Bench of the High Court. In its order passed on 17.09.2012, the Division bench set aside the appointment of sole arbitrator. Aggrieved by that order, the

Appellant moved the Hon'ble Supreme Court by way of filling Civil Appeal. The Hon'ble Apex Court noted that the Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions, the Apex Court observed. But that said, the Hon'ble Court also acknowledged that the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. Respondent was not successful in showing exceptional circumstance or 'bad faith' on the part of the Appellant, to invoke the remedy under Article 227 of the Constitution. Therefore, the Hon'ble Apex Court set aside the judgment passed by Hon'ble Gujarat High Court but granted liberty to the Respondent to raise any legally permissible objections regarding the jurisdictional question in the pending Section 34 proceedings.

5. Indian Penal Code, 1860, Code of Criminal Procedure, 1974, Prize Chits Money Circulation Scheme (Banning Act), 1978, Information and Technology Act, 2000.

Kamlesh Choudhary versus State of Rajasthan

(Civil Appeal no. 7469/2008 vide order dated 05.01.2021)

Held: The Supreme Court observed that an accused who was released on default bail cannot be re-arrested on filling of chargesheet by police authorities.

Facts: In this case, the Appellant, Kamlesh was accused of committing offences under Sections 406, 409, 420, 467, 468, 471, 477-A, 201, 120-B of Indian Penal Code and Section 5 of the Prize Chits Money Circulation Scheme(Banning Act), 1978 and Section 65 of the Information and Technology Act. His application for default bail under Section167(2) of the Code of Criminal Procedure on the ground that charge sheet was not filed within the prescribed period, was allowed by the Hon'ble Rajasthan High Court. While granting bail, the High Court held that the accused can be re-arrested after the charge sheet is filed. Thereafter, the Appellant herein approached the Hon'ble Apex Court challenging the part of the High Court order which directed re-arrest on filing of the charge sheet. The contention was that the same is contrary to the law laid down in Bashir v. State of Haryana [(1977) 4 SCC 410] wherein it was held that it is open to the prosecution to file an application for cancellation of bail on the grounds known to law and the receipt of the charge sheet in Court can by itself be no ground for cancellation of bail. Opposing his plea, the state contended that the High Court has the power to impose any condition while granting bail under Section 437(3) and 439(2) of Cr.P.C.

While allowing the appeal, the bench observed that filing of charge sheet by itself cannot be a ground for cancellation of bail. Bail granted under Section 167 Cr.P.C. can be cancelled on other grounds available in law to the prosecution.

6. The Real Estate (Regulation and Development) Act, 2016.

Taruchaya Colonisers LLP versus Vaibhav Bansal and 6 connected matters.

(Civil Appeal no. 7469/2008 vide order dated 05.01.2021)

Held: The Rajasthan RERA in a first of its kind order uphold the rights of builders by observing that it is the duty of Flat buyers to adhere with the payment schedule as mentioned in the Agreement to Sale and in case the same is not adhered to, the Seller has a right to cancel Agreement to Sale.

Facts: In the present case, the Flat owner booked a flat for a total sale consideration of

Rs. 41,16,000/- out of which despite various reminders, the buyer paid only a sum of Rs. 5,00,000/-. The Builder approached RERA praying to uphold the rights of Builder as mentioned in RERA as the Buyer has not adhered to its liability to pay the instalments on time as agreed in the registered Agreement to Sale. The Authority therefore upheld the rights of Builder by observing that if a flat buyer fails to pay the instalments on time, as prescribed in the Agreement to Sale, then the Builder has all the rights to cancel the Agreement to Sale and refund be issued to the buyers after making deductions as prescribed under Agreement to Sale.

The Hon'ble Authority was further pleased to observe that it is the solemn duty of the Authority to take care of interest of the Allottees and the Authority would be failing in its duty if the interest of the Developers and colonizers are not safeguarded in situations where the Allottees do not adhere to the terms and conditions of the Agreement they have entered into or do not fulfil their duties as expected under the Act.

Adv. Gunjan Pathak along with Adv. Aditya Bohra and Adv. Ishita Rawat appeared for Vedanta Law Chambers, Jaipur appeared on behalf of the Builder/Developer.

Article

Can an Operational Creditor in an Insolvency Proceeding claim interest as per the provisions of the MSMED Act, 2006

Adv Siddharth Nagotia,
Associate

Section 16 of the Micro, Small and Medium Enterprises Development Act, 2006 (the "**MSMED Act, 2006**") provides that "*the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.*" This section gives rise to an interesting question of law – that whether the section 16 of the MSMED Act, 2006 will be applicable to proceedings/ disputes that are not governed by the provisions of the MSMED Act, 2006. This article will discuss whether an Operational Creditors can claim the benefit of Section 16 of the MSMED Act, 2006 under the insolvency proceedings initiated under the Insolvency and Bankruptcy Code, 2016 (the "**IBC**").

The Hon'ble NCLT, New Delhi in a judgment, titled '*Swastik Enterprises v. Gammon India Limited*', C.P. No. 1297/I&BC/NCLT/MB/MAH/2017, dated 01.02.2018, considered the question that whether on receiving the principal operational debt amount during the pendency of the Petition before NCLT, the Petitioner can press for the admission of the Petition only in respect of the Interest amount alleged to be outstanding, firstly without revising the claim of Outstanding Debt and secondly when the eligibility of Interest claim is challenged by the Operational Debtor. The Hon'ble NCLT dismissed the petition since "*when the Principal amount of Debt had admittedly been paid and duly accepted by the Petitioner and the claim of Interest remained unsubstantiated in the absence of cogent evidence, the "Operational Debt" in question remained unascertainable, as a consequence, the Petition under section 9 of the Code is not maintainable.*"

The Hon'ble NCLT, Delhi also pertinently observed that "*the charging of Interest on an outstanding Debt ought to be an Actionable Claim so that admissible under the eyes of Law. Claim of Interest is therefore within the ambits of an Actionable Claim which is enforceable under Law. At the cost of repetition, a claim is enforceable under Law if it is supported by cogent admissible evidence, therefore, as far as the question of present controversy related to charging of Interest is concerned, the same is enforceable if it is properly documented and agreed upon. It is also necessary that the rate of Interest should also be agreed upon between the Parties. In the present case, these basic requirements appear to be missing. Rather, the Petitioner had not established to the hilt the eligibility of claim of Interest. Merely a filing of a calculation sheet, that too a computer generated statement, is on our humble opinion, a self-serving document and not a cogent evidence admissible under the law.*"

This judgment seems to indicate that a claim for interest under Section 9 of the Code must be ascertainable and undisputed. This raises an interesting point, that whether the interest given under MSMED Act, 2006 would be considered ascertainable and undisputed if the parties have not agreed upon it in writing, or otherwise.

Similarly, the Hon'ble NCLAT, in a judgment titled '*S.S. Polymers v. Kanodia Technoplast Limited'*, Company Appeal (AT) (Insolvency) No. 1227 of 2019 adjudicated a claim under Section 9 wherein only Interest was claimed as 'debt'. The Hon'ble NCLAT observed that "*the Appellant relied on 'Invoices' to suggest that in the 'Invoices', the claim was raised for payment of interest. However, we are not inclined to accept such submission as they were one side Invoices raised without any consent of the 'Corporate Debtor*" and that "*before the admission of an application under Section 9 of the I&B Code, the 'Corporate Debtor' paid the total debt. The application was pursued for realisation of the interest amount, which, according to us is against the principle of the I&B Code, as it should be treated to be an application pursued by the Applicant with malicious intent (to realise only Interest) for any purpose other than for the Resolution of Insolvency, or Liquidation of the 'Corporate Debtor' and which is barred in view of Section 65 of the I&B Code.*" The appeal was accordingly dismissed. This decision seems to indicate that the interest on outstanding debt should be agreed upon both the parties. As such, it is difficult to accept that the Hon'ble NCLAT in an appropriate case would consider granting interest as per MSMED Act, 2006 without explicit agreement between the parties.

The Hon'ble NCLAT in '*M/s Steel India v. Theme Developers Pvt. Ltd.*', Company Appeal (AT) (Insolvency) No. 1014 of 2019 while dealing with a claim of outstanding amount which was towards interest on the delayed payments, for which there was a pre-existing dispute, held that "*[t]he alleged claim amount, towards interest on loan alone, cannot be termed as an Operational Debt*" since "*[b]efore the issuance of the second demand notice, the dispute relating to the payment of interest was existing".*

Interestingly, the Hon'ble NCLT, Hyderabad Bench in a judgment titled '*Shri Shrikrishna Rail Engineers Private Limited v. Madhucon Projects Limited',* CP (IB) No. 305/9/HDB/2017 directly dealt with the question whether the Operational Creditor can claim interest as per Section 16 of the MSMED Act, 2006. The Corporate Debtor contended that: firstly, there was no concluded contract; secondly, there is no provision for payment of interest; and thirdly, the Operational Creditor cannot claim interest MSME Act. The Hon'ble NCLT held that "[t]he Operational Creditor is entitled for interest even though there is no provision in LOI for payment of interest for delayed payment. The Corporate Debtor is liable to pay the outstanding balance and in the normal course, Operational Creditor is entitled to charge interest for delayed payment. Claiming interest is not against law. Even though Operational Creditor had not approached Council under MSME Act, yet Operational Creditor is otherwise entitled to claim interest". However, this decision cannot be considered to be good law since the Hon'ble NCLAT has clearly held that the unpaid/outstanding interest which is not agreed by the parties in writing (or otherwise) is not an "operational debt" under Section 9.

The Hon'ble NCLAT (or the Hon'ble Supreme Court) has till yet not given an authoritative ruling on this aspect, however, in light of the foregoing judgments it seems difficult to accept that the Courts would be willing to grant interest as per the MSMED Act, 2006 unless the parties explicitly agree upon it. Further, a reading of the provisions of MSMED Act, 2006 reinforces the fact that interest under Section 16 can only be claimed in a reference made to the MSME Council. In other words, the benefits of Section 16 cannot be claimed in proceedings initiated under the IBC, 2016. Section 16 of the MSMED Act, 2006 is applicable "notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force." However, the rulings of the Hon'ble NCLT and NCLAT highlighted above seem to suggest that interest cannot be claimed unless it is explicitly agreed between the parties and no dispute has been raised regarding the same.

In addition, it is vital to take note of Sections 16 and 17 of the MSMED Act, 2006 which provides as follows:

"17. Recovery of amount due.—For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.

18. Reference to Micro and Small Enterprises Facilitation Council.—(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council." [Emphasis Supplied]

Section 18 of the MSMED Act, 2006 unequivocally suggests that in order recover any amount due as per section 17 (which in turn refers to the claim of interest under section 16), a party in a dispute has to make a reference the MSME Council. In other words, under the scheme of the MSMED Act, 2006, interest as per Section 16 can only be claimed in proceedings initiated under MSMED Act, 2016, and not outside the four corners of the said Act.

Therefore, it is unlikely that an Operational Creditor will be able to successfully claim interest as per the section 16 of the MSMED Act, 2006 in proceedings initiated under the IBC, 2016. However, as stated earlier, the Hon'ble NCLAT or the Hon'ble Supreme Court has till yet not considered this question of law and it remains to be seen how the Courts would interpret the provisions of the MSMED Act, 2006 and IBC, 2016.

Quote of the month:

"It is better to fail in originality than to succeed in imitation."

This newsletter is authored collectively by:-

1) Adv Nivedita Sarda (Partner)
2) Adv Aditya Bohra (Senior Associate)
3) Adv Ishita Rawat (Senior Associate)
4) Adv Rachit Sharma (Senior Associate)
5) Adv Siddharth Nagotia (Associate)