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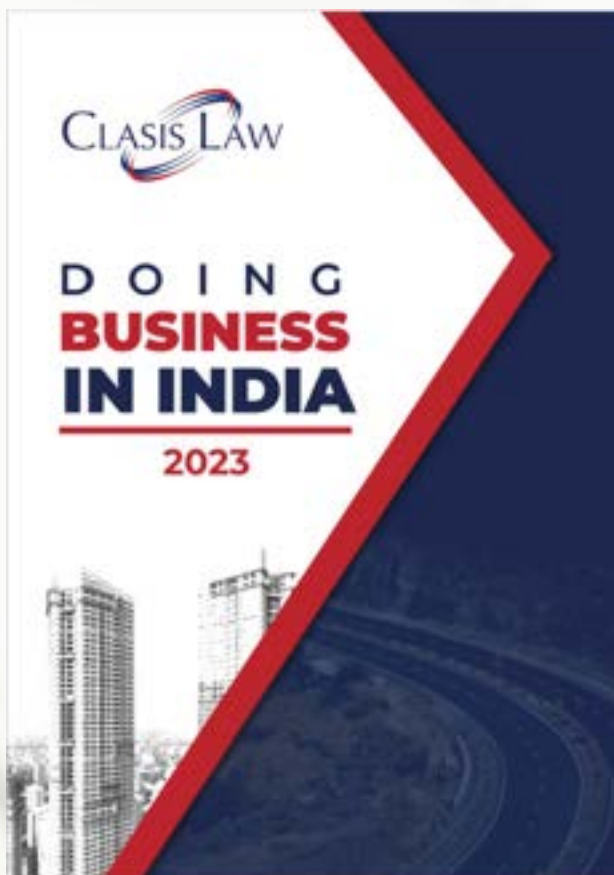
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DOING BUSINESS IN INDIA

We are pleased to share the **Fifth Edition** of our e-book titled

"Doing Business in India".

The book intends to give the reader an overview of the various aspects of doing business in India including but not limited to the applicable legislations, compliances and processes.



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FEATURED ARTICLE



A snapshot of the Overseas Investment Framework : Equity-based Incentive Schemes by Foreign Entities

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In recent years, foreign entities have increasingly adopted to equity-based benefit schemes such as employee stock ownership plan (**ESOP**), employee benefit scheme (**EBS**) and sweat equity shares to incentivize and retain the employees of their Indian subsidiaries or joint ventures. These schemes provide opportunities to employees to own stocks in foreign entity and thus encourages long-term commitment.

In India, the provisions of Foreign Exchange Management (Overseas Investment) Regulations 2022, and Foreign Exchange Management (Overseas Investment) Rules, 2022, and the Foreign Exchange Management (Overseas Investment) Directions, 2022 (**OI Framework**) would need to be taken into account by the foreign entity in relation to the ESOP/EBS/sweat equity shares offered to the Indian resident individuals.

While the OI Framework does not define the term ESOP, it does provide a clear definition for EBS. The term 'EBS' has been defined to mean any compensation or incentive given to the directors or employees of any entity which gives such directors or employees ownership interest in a foreign entity through ESOP or any similar scheme. Therefore, EBS may include various schemes including (i) restricted stock unit schemes, (ii) retirement benefit schemes, (iii) stock appreciation rights schemes, (iv) share incentive plan, (v) general employee benefits schemes, and (vi) employee stock purchase schemes.

The term 'sweat equity shares' has been defined under the OI Framework to mean equity shares that are issued by a foreign entity to its directors or employees at a discount or for consideration other than cash, for providing their know-how or making available rights like intellectual property rights or value additions, by whatever name called. The expansive definition allows foreign parent entity to structure schemes, that aligns with their specific commercial requirements in accordance with the OI Framework.

In this note, we have set out some of the key considerations that foreign entities should keep in mind while offering ESOP/EBS/sweat equity shares to Indian resident individuals.

(a) Eligibility

The OI Framework permits grant of ESOP/EBS/sweat equity shares by a foreign entity to an Indian resident individual provided that such individual is an employee or a director of, (i) an

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office in India, or (ii) branch of such foreign entity, or (iii) a subsidiary in India of such foreign entity, or (iv) an Indian entity in which such foreign entity has direct or indirect equity holding (**Indian entity**). The foreign entity may have indirect equity holding in the Indian entity through a special purpose vehicle or a step-down subsidiary.

According to OI Framework, acquisition of shares or interest, less than ten (10) percent of the equity capital and without control of foreign entity (*both listed or unlisted*), under ESOP/EBS/sweat equity shares would be treated as overseas portfolio investment (**OPI**). However, any investment not meeting the above mentioned criteria would qualify as overseas direct investment (**ODI**) requiring compliances with other provisions (*including valuation*) of the OI Framework.

(b) **Mode of offering**

The OI Framework requires that the ESOP/EBS (*being offered to the Indian resident individuals*) must be offered globally on a uniform basis, though no such requirement is specified for sweat equity shares. Additionally, the Reserve Bank of India (**RBI**) has not provided any guidance or clarification on the meaning of 'globally on a uniform basis'. However, the common view is that the terms of ESOP/EBS must be same for all the employees to whom such ESOP/EBS are offered by the foreign parent entity. In the event that the terms of ESOP/EBS being offered to the Indian resident individuals are not at par with the stock options offered by the foreign parent entity to its employees/its group entity's employees outside India, the Indian resident individuals will have to comply with other provisions of the OI Framework related to the overseas direct investment to acquire shares of such foreign parent entity.

Under the OI Framework, ESOP/EBS can be structured as either cashless or cash-based schemes. While under the erstwhile regime^[1] cashless ESOP that did not involve any remittance from India was not required to comply with the mandatory requirement of 'global uniformity', the OI Framework does not distinguish cashless or cash-based schemes. As a result, it appears that cashless schemes must now comply with both the global uniformity requirement and the associated reporting obligations.

(c) **Compliance with remittance limit**

The authorized dealer bank (**AD Bank**) may allow remittances (*in cash-based scheme*) towards acquisition of the shares/interest under ESOP/EBS/sweat equity shares offered directly by the foreign entity or indirectly through a special purpose vehicle/ step down subsidiary. The Indian resident individual participating in cash-based schemes would need to adhere to the annual remittance limit set forth in the liberalized remittance scheme (**LRS**). At present, the LRS limit is USD 2,50,000 in a financial year without prior approval of the RBI.

It has been seen that where the Indian entity undertakes to remit funds on behalf of its Indian resident individuals towards acquisition of shares/interest in the foreign parent entity under the stock option schemes, the AD Bank requires the Indian entity to furnish a declaration along

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with LRS remittance data of the concerned Indian resident individuals. The AD Bank may also require the Indian entity to give an undertaking to indemnify the AD Bank for any loss (*in case any proceedings are initiated by the RBI against the AD bank and/or its officials*) due to any wrong/incorrect declaration. To safeguard its interests, the Indian entity may consider obtaining back-to-back, duly signed declaration along with undertaking to indemnify from each concerned Indian resident individual.

The AD Bank will collect tax at source (**TCS**) at twenty (20) percent, if the remittance under LRS is above INR seven (7) lakh in a financial year at the time of remittances of funds to foreign parent entity. In case, the Indian entity remit funds on behalf of Indian resident individuals, the Indian entity may also collect an additional amount equivalent to the applicable rate/amount of TCS for the concerned Indian resident individuals vis-à-vis his/her outward remittances.

(d) Reporting requirements

For investments that qualify as OPI, the Indian entity would be required to submit half yearly reports in the Form OPI to the AD bank within sixty (60) days from the end of the half-year in which the acquisition of shares occurred where investment qualifies as OPI, specifically as of September or March-end (*i.e. 30 November and 31 May*). If the investment qualifies as ODI, the Indian resident individual concerned shall report the investments in Form FC.

(e) Taxation

Under the Indian taxation law, the ESOP/EBS/sweat equity shares are subject to taxation both at the time of allotment and upon the sale of shares. The difference between fair market of foreign entity's shares value (*determined by the merchant banker*) on the date of allotment/acquisition of shares, and the offer price at which the Indian resident individuals will be taxable as perquisite in the hands of Indian resident individuals. Therefore, the Indian entity may be under obligation to deduct such applicable tax deducted at source (**TDS**) from the salaries or remuneration payable by the Indian entity to its employees (*on the concession/benefit accrued to the Indian employees*).

Additionally, at the time of sale of shares of foreign entities by an Indian employee, any profit or gain arising on such sale may be treated as capital gain in the hands of such Indian resident individuals and accordingly, the tax implications would need to be assessed.

Conclusion

The ESOP/EBS/sweat equity shares are valuable tools for foreign parent entities to incentivize and retain Indian resident individuals. However, non-compliance with the OI Framework may attract penal implications. To avoid such risks, it is crucial to ensure that these schemes are carefully structured in alignment with Indian laws and that all necessary filings are submitted on time to the authorities.

[1] Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004.

JUDGEMENTS



Arbitrator to decide the existence of an arbitration clause contained in Terms & Conditions of invoices.

In a recent decision[1], the Delhi High Court held that a Court at pre-arbitration stage has a limited jurisdiction to decide the validity of an arbitration clause contained in an invoice issued by one party. Court further observed that at reference stage it has to only form a prima facie view in regard to the existence of an arbitration clause for referring the dispute to arbitration.

Brief Facts

The petitioner, who is a manufacturer and supplier of corrugated boxes and packaging materials, supplied goods to the respondent on the terms and conditions mentioned in the invoices. However, the respondent failed to make the payments against the invoices in full.

Thereafter, the petitioner through its counsel issued a legal notice and called upon the respondent to pay the balance amount. The petitioner also invoked the arbitration clause contained in the invoices and proposed the name of the arbitrator. The respondent responded to the said notice and denied the existence of the arbitration agreement. Subsequently, the petitioner filed a petition (“**Petition**”) under Section 11 of the Arbitration and Conciliation Act (“**Act**”), 1996 and sought the appointment of an arbitrator. The petitioner claimed that it had supplied goods to the respondent between June 2021 and September 2023 and had raised invoices which included an arbitration clause.

Despite receiving the goods and signing the invoices, the respondent allegedly failed to pay a sum of ₹1,25,80,425, prompting the petitioner to invoke the arbitration clause through a legal notice on November 6, 2023. The respondent neither filed its reply to the Petition nor filed its written submissions in terms of the Court orders.

Thus, the question that arose for the consideration before the Court was “Whether an arbitration clause contained in an invoice issued by one party, can be relied upon for the purposes of Section 7 of the Act”.

Contentions

The petitioner, primarily argued that the arbitration clause in the invoices constituted a valid arbitration agreement under Section 7 of the Act. Reliance was made on previous judgments by coordinate benches of the Delhi High Court, specifically *Swastik Pipe Ltd. v. Shri Ram Autotech Pvt. Ltd.*[2] and *Swastik Pipe Ltd. v. Ms. Dimple Verma*. [3], wherein, the Court upheld the existence of arbitration agreement contained in the invoices more so when it was evident that the terms were accepted and acted upon by both parties. The petitioner further submitted that despite being served with notices and specific court directions, the respondent failed to appear or file replies, thereby accepting the petitioner’s contentions. The petitioner further contented

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that the arbitration clause was a part of every invoice accepted by the respondent, establishing a consistent course of dealing between the parties.

The Court noted the stand taken by the respondent in its reply dated December 5, 2023, challenging the validity of the arbitration agreement. It was further contended that the signatures on the invoices were not indicative of acceptance of the terms and conditions but were merely acknowledgments of receipt of goods and that there was no separate arbitration agreement or written consent to arbitrate disputes as required under the Act.

Analysis

After considering the submissions and documents on record, the Court observed that the arbitration clause in the invoices could prima facie be considered a valid arbitration agreement. The Court further opined that at the pre-reference stage under Section 11 of the Act, a Court is only required to form a prima facie view regarding the existence of an arbitration agreement and not conduct a detailed examination.

The Court further relied on the Supreme Court's ruling in *Vidya Drolia v. Durga Trading Corpn*[1], wherein it was clarified that the Court should refer disputes to arbitration unless there is no vestige of doubt about the non-existence of the arbitration agreement and in doubtful cases proper course would be to refer the dispute to arbitration, leaving the question open for adjudication by the Tribunal/ Arbitrator.

Conclusion

In accordance with the aforementioned principles of law, the Court held that when the clauses mentioned in the invoices are consistently acknowledged and not refuted, in those cases the arbitration clause contained in the invoices can be considered to be the arbitration agreement valid under the Act. Accordingly, the Court referred the matter to the sole arbitrator under the aegis of the Delhi International Arbitration Centre (DIAC), who then will have discretion to adjudicate upon the existence of the arbitration agreement.

[1] *M/S Dhawan box sheet containers pvt. ltd. v. M/S Sel manufacturing co. ltd.* [ARB.P. 26/2024]

[2] 2021 SCC OnLine Del 3604.

[3] Arb. P. 100/2021

CORPORATE REGULATORY UPDATES

CCI has come out with the Competition Commission of India (Combinations) Regulations, 2024

On September 9, 2024, the Competition Commission of India (“**CCI**”) introduced the Competition Commission of India (Combinations) Regulations, 2024 (“**CCI Combinations Regulations**”), which became effective on September 10, 2024. The CCI Combinations Regulations aim to simplify the process of mergers, acquisitions, and amalgamations by defining key terms such as "parties to the combination" and "relevant date." They also outline how to assess transaction values, taking into account factors like cash payments, deferred payments, and technology assistance.

Additionally, the regulations establish criteria related to user base, gross merchandise value, and turnover, which are particularly relevant for evaluating substantial business operations in India, especially in the digital services sector. These measures are part of CCI's broader effort to promote transparency and ensure compliance in M&A activities within the Indian market.

SEBI Streamlines Bonus Share Trading via New Regulations Effective from October 1, 2024

On September 16, 2024, Securities and Exchange Board of India (“**SEBI**”) introduced a new regulatory framework to expedite the trading of bonus shares. This updated framework aims to streamline the process and improve market efficiency. As part of SEBI’s ongoing efforts to enhance the bonus share issuance process, and in consultation with market participants, the time required for the credit and trading of bonus shares has been reduced. This change affects the period starting from the record date of the bonus issue under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018.

In terms of new guidelines, companies issuing bonus shares must adhere to revised timelines for document submission and record date notifications. Additionally, bonus shares will now be credited directly to the permanent ISIN, eliminating the need for temporary ISINs. This circular will apply to all bonus issues announced on or after October 1, 2024.

Prime Minister Launches IFSCA’s Single Window IT System to Enhance Business Efficiency

On September 16, 2024, the Hon’ble Prime Minister inaugurated Single Window IT System (“**SWIT System**”) of International Financial Services Centres Authority (“**IFSCA**”), a digital

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platform designed to streamline the regulatory approval process for businesses in the International Financial Services Centre (“IFSC”). The SWIT System integrates multiple government agencies and financial regulators, including the Department of Commerce, Department of Revenue, Reserve Bank of India (“RBI”), SEBI, and the Insurance Regulatory and Development Authority of India (“IRDAI”), into a unified portal, facilitating a more efficient and secure application process. The key features include a common application form, API integration with SEZ Online, and real-time data validation. This initiative is expected to significantly reduce processing times and costs, enhancing the ease of doing business in GIFT IFSC.

Foreign Exchange (Compounding Proceedings) Rules, 2024

On September 12, 2024, the Ministry of Finance (“MoF”) issued the Foreign Exchange (Compounding Proceedings) Rules, 2024. As part of a broader initiative to streamline and rationalize existing rules and regulations to facilitate ease of doing business, the compounding proceedings rules were comprehensively reviewed in consultation with the RBI. The emphasis has been on enabling provisions to expedite and streamline the processing of compounding applications, introducing digital payment options for application fees and compounding amounts, and focusing on simplification and rationalization of the provisions to eliminate ambiguity and clarify the process.

Amendments in SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021

SEBI notified the SEBI (Issue and Listing of Non-Convertible Securities) (Second Amendment) Regulations, 2024 on September 17, 2024, to further amend the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021. The amendments concern timelines for filing draft offer documents, advertisements for public issues, and the period of subscription. Key amendments include:

- Draft offer documents must be posted on stock exchange websites for 5 days instead of 7.
- Issuers with nationwide trading terminals must post the draft for 1 day immediately after filing.
- Issuers can advertise electronically (via online newspapers, websites, etc.).
- Advertisements must also appear in English and regional dailies with a QR code for full details.
- The minimum subscription period for public issues is reduced to 2 working days, while the maximum remains 10 days. Revised price bands or yields require at least a 1-day extension.

CORPORATE REGULATORY UPDATES

Amendments in CIRP Regulations

On September 24, 2024, the Insolvency and Bankruptcy Board of India (**IBBI**) issued the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2024, amending certain provisions under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations).

A key amendment includes changes to Regulation 16A of the CIRP Regulations:

- The choice of an insolvency professional to act as an authorised representative by a financial creditor in a class (in Form CA) shall not be considered if the Form CA is received after the time stipulated in the public announcement.
- Until the appointment of the authorised representative for a class of creditors is confirmed by the Adjudicating Authority, the insolvency professional selected under sub-regulation (1) shall act as an interim representative for the class of creditors, with the same rights and duties as an authorised representative, including the ability to attend committee meetings.

Amendments in SEBI (Delisting of Equity Shares) Regulations, 2024

On September 25, 2024, SEBI issued the notification, SEBI (Delisting of Equity Shares) (Amendment) Regulations, 2024. In the amendment regulations, SEBI introduced a fixed price delisting option alongside the Reverse Book Building ("**RBB**") route. The minimum fixed price must be 15% above the floor price, applicable only for frequently traded shares. The floor price is calculated based on the highest VWAP over 52 weeks, recent acquisition prices, and independent valuation. Counter-offers are not permitted under the fixed price route, while RBB allows them under specific conditions. Investment Holding Companies (IHCs) can also delist through an NCLT-approved scheme if they meet certain criteria, requiring a two-thirds vote from public shareholders.

The amendment regulations are effective from September 25, 2024, and apply to any delisting offer whose initial public announcement is made on or after September 25, 2024. Acquirers also have the option to make a delisting offer under the pre-amended delisting regulations for a period of 60 days from September 25, 2024.



Off Beat Section

World Space Week : Celebrating Humanity's Journey Beyond Earth

Every year, from October 4th to 10th, World Space Week, an event established by the United Nations in 1999, is celebrated globally to honour the contributions of space science and technology to the betterment of humanity. For 2024, the chosen theme is "Space & Climate Change," celebrating the transformative impact of space technology in the fight against climate change.

Space technology plays a proactive role in enhancing our understanding of Earth's climate, from satellite monitoring systems that track environmental changes to innovations that inform climate action. This year's World Space Week underscores how advancements in space exploration can be utilized to tackle one of humanity's greatest challenges—climate change. Let's delve into a few interesting facts about this event:

1

World Space Week commemorates two pivotal space events: the launch of Sputnik 1 on October 4, 1957, marking the start of the space age, and the signing of the Outer Space Treaty on October 10, 1967, which promotes peaceful space exploration.

2

World Space Week is organized annually through the coordination of the World Space Week Association and the United Nations.

3

It is the largest annual space-related event on Earth, with thousands of events held in over 95 countries, ranging from educational workshops to public stargazing sessions. The theme "Space & Climate Change" invites event organizers worldwide to foster innovative environmental solutions through a variety of activities, including interactive sessions and panel discussions.



Notable Recognitions & Accolades



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