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Corporate & Commercial

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New remuneration regime for Independent Directors

The Ministry of Corporate Affairs (**MCA**) has recently notified amendments to Sections 149(9) and 197(3) of Companies Act, 2013 (**Act**) , inserted by the Companies (Amendment) Act, 2020 vide a notification dated 28 September 2020 which came into effect from March 18, 2021, in order to facilitate companies that are struggling with inadequacy or lack of profits, to pay certain minimum guarantee remuneration to its Independent Directors (**IDs**). The Ministry also issued another notification amending Schedule V of the Act which prescribes the scale of remuneration to be paid to IDs based on the company's effective capital.

Prior to these amendments, Sec 197(3) of the Act only dealt with Managing Directors, Whole-time Directors and Mangers, excluding IDs from its ambit. The section specified the amount that could be paid as remuneration to people holding these positions, both in case of profits and inadequate profit to the company. However, in both the situations, IDs were entitled only to the sitting fees for attending Board meetings and nothing more. This led to a grossly inadequate remuneration framework for IDs in loss-making companies, which was not proportionate to the crucial role that the IDs were expected to play in the company so as to ensure better corporate governance.

The new remuneration policy for IDs, according to Schedule V of the Act, states that companies are now allowed to award remuneration to IDs irrespective of their net profits. In case of inadequacy of profits, it is the approval of the Board and recommendation of the Nomination and Remuneration Committee that are a pre-requisite for payment of remuneration to IDs. This approval is also required if the company owes debts to financial institutions, banks, debenture holders and secured creditors. Further, the limits prescribed by the Schedule can be exceeded once the approval of shareholders is sought through a special resolution.

It is noteworthy to mention that Sec 149(9) of the Act had entirely restricted granting of Employee Stock Ownership Plan (**ESOP**) to IDs as it could compromise their credibility.

The amendment has also brought about liberalization in the remuneration structure of IDs working in companies that have undergone resolution process under the Insolvency and Bankruptcy Code, 2016. According to this structure, such companies can pay any amount of remuneration to its IDs for the duration of five years effective from the date on which the resolution plan was approved.

The proposed amendments are a welcome step. It is expected that these changes will ultimately lead to more competent professionals joining the Board as IDs and bring consistency to the remuneration framework by improving the remuneration framework of IDs who contribute their valuable time and experience towards the smooth governance of the company.

ECB Policy – Relaxation in the period of parking of unutilised ECB proceeds in Term Deposits

The RBI has stated that unutilized External Commercial Borrowing (**ECB**) proceeds drawn down before March 1, 2020, can be parked in Term Deposits with banks in India prospectively up to March 1, 2022, in a relief to borrowers who could not utilize the proceeds due to lockdown.

Under the extant ECB framework, borrowers are allowed to place ECB proceeds in Term Deposits with banks in India for a maximum period of 12 months. However, in view of the difficulty faced by borrowers in utilizing already drawn down ECBs due to Covid-19 pandemic induced lockdown and restrictions, RBI took this decision to relax the stipulation as a one-time measure.

Accordingly, unutilized ECB proceeds drawn down on or before March 1, 2020, can be parked in Term Deposits with AD category-I banks in India prospectively up to March 1, 2022. The central bank will be issuing guidelines in this regard separately.

Indian insurance regulator permits investment in debt securities by insurers of InvITs/REITs

The Insurance Regulatory and Development Authority of India (**IRDAI**) irecently amends the Investment Master Circular enacted under Finance Act, 2021 to permit insurers to make investment in debt securities of Real Estate Investment Trusts (**REITs**) and Infrastructure Investment Trusts (**InvITs**).

The Investment Master Circular permits insurers to invest in units of listed InvITs and REITs on satisfaction of certain conditions such as maintenance of at least AA rating, investment not exceeding prescribed concentration limits, restrictions on related or promoter group investment, etc. The Finance Act, 2021 was amended with the intent of increasing the depth of investment and offer monetization to partially completed real estate and infrastructure projects by permitting investment vehicles (InvITs/REITs) to issue debt securities for raising capital.

Debt securities investment by insurers of InvITs/REITs

Insurers keen to subscribe to debt securities of InvITs/REITs are obligated to follow certain conditions, such as:

- Debt instruments of InvIT/REIT are rated atleast 'AA' as approved investments and if such instruments are downgraded below 'AA', they are characterised as Other Investments with the prescribed codes
- Insurer cannot invest over 10 per cent of outstanding debt instruments including current issue in a single InvITs/REITs issue
- Cumulative investment in units and debt instruments of InvITs and REITs are always less than 3 per cent of total fund size of the Insurer
- Investment by related or promoter groups is restricted in debt instruments of InvITs/REITs Sponsor
- Investment in debt securities is valued either under Fixed Income Money Market And Derivatives Association of India or at applicable market yield rates published by a SEBI-registered Rating Agency Investment in Debt Securities of:
  - InvIT is regarded as Infrastructure Investments
  - REIT is regarded as part of industry group Real Estate activities
- Concurrent Auditor to the Audit Committee/Board of the Insurer to ensure compliance of the said norms in its Quarterly Report

The extension of investment by insurers to access established investment vehicles being InvITs/REITs is likely to support the objective of the Indian Government to improve liquidity and promote capital raising for infrastructure projects and help mobilize funds into the capital intensive sector. The proposition will also permit fixed income returns to the insurers focusing on safe investments offering them investment alternatives.

SEBI issues a Circular on Regulatory Reporting by AIFs to review and rationalize the existing regulatory reporting requirements

By virtue of powers conferred under Section 11(1) of the Securities Exchange Board of India Act, 1992, Securities Exchange Board of India (**SEBI**) issued a circular dated April 07, 2021 bearing Circular no. SEBI/HO/IMD/IMD-I/DOF6/CIR/2021/549. In order to provide ease of compliance, the regulatory reporting requirements as provided under AIF Regulations and paragraph 3.2 of the Circular No. CIR/IMD/DF/10/2013 dated July 29, 2013, has been reviewed and rationalized.

The circular provides for two key changes:

- Firstly, it requires all AIFs to submit report on their activity as an AIF to the SEBI on quarterly basis and within ten calendar days from the end of each quarter in a revised format which is specified in the Annexure I of the Circular. Further, Category III AIFs (those which employ diverse or complex trading strategies with a view to making short-term returns and include hedge funds) are required to submit report on leverage undertaken, on a quarterly basis in a revised format which is specified in the Annexure II of the Circular. Earlier, Category III AIFs which undertake leverage were required to submit reports on a monthly basis.
- Secondly, changes in terms of private placement memorandum and in the documents of the fund/scheme are required to be intimated to investors and SEBI on a consolidated basis, within one month of the end of each financial year.

It was further clarified that reporting requirements would be applicable for quarter ending December 31, 2021 onwards and provisions regarding changes in private placement memorandum would come into effect immediately.

SEBI directs companies to separate the roles of Chairperson and Managing Director

SEBI has asked Indian companies to work towards separating the roles of chairperson and managing director (**MD**).

The deadline is a year away, but the market regulator is hinting that it will no longer extend it. Listed entities were initially required to separate the roles of chairperson and MD/CEO from April 01, 2020 onwards. However, based on industry representations, an additional time period of two years was allowed for compliance. The regulation will now be applicable to the top 500 listed entities by market capitalization, with effect from April 01, 2022. As at the end of December 2020, only 53 % of the top 500 listed entities had complied with this provision. He said the rule is not to weaken the position of promoters but to improve corporate governance.

RBI extends the 'Interest Equalization Scheme for Pre and Post Shipment Rupee Export Credit' for another 3 months up to June 30, 2021

The RBI vide a notification dated April 12, 2021 bearing no. RBI/2021-22/21 DOR.CRE.REC.06/04.02.001/2021-22 has provided an extension of the Interest Equalization Scheme for Pre and Post Shipment Rupee Export Credit (**Scheme**). The Scheme which was ending on March 31, 2021 has been extended for a period of three months with effect from April 01, 2021 and ending on June 30, 2021. The scope and coverage of the scheme shall remain the same during this extended period and the extant operational instructions issued by the RBI under the Scheme shall continue to remain in force till June 30, 2021.

This Scheme was first introduced in 2015 to provide rebate of interest on pre and post shipment export credit like packing credit to eligible exporters. The eligible exporters under the Scheme can claim the benefit from the banks on the basis of a certification by an external auditor in this regard. The banks can then claim a reimbursement of the same from the RBI.

International Financial Services Centres Authority (Finance Company) Regulations, 2021

The International Financial Services Centres Authority (**IFSCA**)[1] has issued the International Financial Services Centres Authority (Finance Company) Regulations, 2021 (**Regulations**) dated March 25, 2021 to provide a framework for finance companies in an International Financial Services Centre (**IFSC**) in India. The Regulations are aimed at providing a competitive regulatory environment to non-banking financial institutions to complement the role of banking in providing finance, innovative products and services from the IFSC.

Salient features of the Regulations

A Finance Company (**FC**) or a Finance Unit (**FU**) can commence business after obtaining the certificate of registration from IFSCA. FCs and FUs are defined as financial institutions under Section 3(1)(c) of the International Financial Services Centres Authority Act, 2019. Whilst a FC can be set up as a separate incorporated entity, a FU is set up as a branch as permitted under the Regulations to deal in one or more of the permissible activities specified under regulation 5(1) of the Regulations, provided that:

- They do not accept public deposit from resident/non-resident as defined under the Regulations
- They are not registered with IFSCA as a Banking Unit[2]

[1] IFSCA is a regulatory authority established under the International Financial Services Centres Authority Act, 2019 for regulating financial institutions, financial services and financial products in an IFSC in India.

[2] 'Banking Unit' means a financial institution under clause Section 3 (1) (c) of the Act that is licensed by the Authority to undertake permissible activities under International Financial Services Centres Authority (Banking) Regulations, 2020.

Setting up of FC or FU

The FC can be set up either as a subsidiary, a JV or as a newly incorporated company under the Companies Act, 2013. Entities set-up as limited liability partnership or trust intending to carry out either one or more non-core activities as mentioned in the Regulations are also eligible to apply. Further, if an investing entity in an FC is carrying out a regulated financial activity in its home jurisdiction, it shall obtain a no-objection certificate from its home country regulator for setting up a FC in the IFSCs.

A FU can be set up if the investing entity or the ultimate parent of the investing entity is carrying out a regulated financial activity in its home jurisdiction and has obtained the no-objection certificate from the home country regulator for setting up a FU in the IFSCs.

An entity seeking registration under the Regulations needs to inter alia fulfil the following conditions:

- In case the applicant is seeking registration as a FC, it shall have and maintain minimum owned fund, depending on the activity proposed to be undertaken by it, OR in case the applicant is seeking registration as a FU, its parent shall provide and maintain minimum owned fund, on unimpaired basis at all times, depending on the activity proposed to be undertaken by the FU, as specified in Schedule of the Regulations, or such other higher amount as may be specified by the IFSCA
- The FC/FU or its promoters, seeking registration, shall be from a Financial Action Task Force (**FATF**) compliant jurisdiction and comply with international standards set by the FATF to combat money laundering and terrorist financing

Prudential regulatory requirements

The FC/FU will be required to adhere to the prudential norms prescribed by the IFSCA. Some of the prudential norms to be complied with are:

- Capital Ratio
- Liquidity Coverage Ratio
- Exposure Ceiling

Permissible activities

- The permissible activities for FC/FU are divided in three broad categories: (i) Specialised activities, (ii) Core activities, and (iii) Non-core activities, which have been listed under Chapter IV of the Regulations
- The FC/FU intending to undertake aircraft lease transactions shall be in conformity to the Cape Town Convention and Protocol
- The FC/FU intending to undertake either a single or a combination of non-core activities, shall fulfil the following conditions:
  - It shall carry out each such activity through separately identifiable department (**SID**)
  - It shall ensure a fire wall between various non-core activities so that no conflict of interest situation arises
  - It shall formulate Board approved grievance redressal and customer compensation policy to deal with such complaints
- The FC/FU may undertake transactions in financial products and financial services as part of permissible activities with both residents and non-residents, subject to compliance of the provisions of Foreign Exchange Management Act, 1999
- The FC/FU carrying out non-core activities may also undertake derivative transactions only for the purpose of hedging their underlying exposures
- The FC/FU shall not undertake or fund any speculative transaction
- The source of funds for FC/FU shall be from residents and non-residents, subject to compliance of the provisions of Foreign Exchange Management Act, 1999

Other compliances

- An FC/FU shall carry out its operations in a freely convertible foreign currency. However, FC/ FU may be permitted to conduct such business, transactions denominated in Indian National Rupee (**INR**) as may be specified by the IFSCA, subject to settlement of those business transactions in freely convertible foreign currency.
- An FC/ FU shall be permitted to have an INR account out of the freely convertible foreign currency to settle their administrative and statutory expenses and for such other purposes as may be specified by the IFSCA.
- Any mergers, acquisitions, takeovers or change in management of a FC, which results in its change in control of at least 20% of total share capital, or of business decisions under an agreement, shall be subject to prior approval and such other requirements as may be specified by the IFSCA. Further, any mergers, acquisitions, takeovers or change in management in the parent of a FU shall be intimated to the IFSCA within a period of 15 days from the date of such event.
- Every FC/FU will follow the know your customer guidelines as specified for Banking Unit in IFSCs.
- Every FC/FU shall adhere to the guidelines on corporate governance and disclosure requirements to be specified by the IFSCA.
- Every FC/FU shall furnish information relating to its operations to the IFSC, in such manner, interval and form, as may be specified by the IFSCA. All such reporting shall be in US Dollar, unless otherwise specified by the IFSCA.

Conclusion

The Regulations on functioning of finance companies in an IFSC are aimed at further strengthening the financial ecosystem in the IFSC by promoting participation of non-banking financial institutions alongside the banking units and provide opportunities to non-banking financial institutions to set up units in the IFSC to undertake a wide range of financial services related activities (including, among others, aircraft / ship leasing). Further, The Regulations seeks to expand the list of 'permissible activities' of the finance companies to include several non-core activities which are connected to the financing activities. Additionally, the ability of maintaining LCR/ prudential norms at the Parent level should provide operational flexibility to the finance companies.

RBI's key monetary policy announcements

With the aim of boosting digital economy in the county, some major changes have been proposed in the Monetary Policy by the RBI on April 07, 2021.

The key changes as per the policy are:

- The maximum end of day outstanding balance for payments banks is proposed to be increased to INR 2 lakh from INR 1 lakh. This is done with a view to incentivise the migration of Pre Payment Instruments (PPI) to full-KYC
- Money transfer facilities like NEFT and RTGS have been proposed to be extended to non-banking payment system operators which was earlier limited only to banks with exceptions to CCIL and development institutions
- It further proposed to make interoperability mandatory for full-KYC PPIs and all payment acceptance infrastructure such as wallets and pre-paid cards
- Cash withdrawal is now proposed to be permitted for full-KYC PPIs issued by non-banks, which was earlier restricted to full-KYC PPIs issued by banks only

These transformative changes are welcoming steps towards bringing level-playing field for non-banking entities and boosting digital economy of the country.

Sale of apartments only on the basis of Carpet Area – HARERA

Earlier, developers/builders quantified area on the basis of Super Area and charged thereon, thereby attaining huge profit margins. Super Area as defined in various agreements between builder and buyer is usually vague and ambiguous. This is a misleading practice that can cause confusion and lead to avoidable litigation. Whilst the customer is contractually forced to pay for the apartment on the basis of Super Area, the loading on the actual area that the customer actually gets is usually not known. The shock dawns when the customer later discovers that the loading is exorbitantly high. In fact, the Supreme Court in the recent case of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors v. NBCC (India) Ltd*[3] remarked that the homebuyers could not be charged with an extra amount towards an arbitrary increase in the name of 'super built-up area'. Such situations are avoided when the sale happens on a Carpet Area basis where the customer pays only for the Carpet Area.

In a recent move that comes as a much-needed respite to the homebuyers in Haryana, the Haryana Real Estate Regulatory Authority (**H-RERA**), Gurugram deriving genesis from the Act and the State Rules has directed the developers to sell apartments only on the basis of the Carpet Area. In a press conference held on April 27, 2021, H-RERA unequivocally stated that the sale of property on the basis of Super Area or any other basis is illegal and conveyance deeds in the district can be executed only on Carpet Area basis. The Authority further remarked that the practice of the sale of property on a Super Area basis is misleading, ambiguous, opaque, and gives rise to confusion and complexities, and sometimes results in avoidable litigation. The recent complaints from a large number of homebuyers that the property developers charge them for the Super Area and not the Carpet Area forced this move.

[3] 2021 SCC OnLine SC 253.

Dr. K. K. Khandelwal, Chairman, H-RERA, Gurgaon, asserted that these regulations were issued to ensure that the sale of property or real estate projects were done in an efficient and transparent manner and to protect the interest of consumers. H-RERA, Gurugram, warned that the sale agreement of any real estate, if not registered only on the basis of carpet area, will constitute an unfair trade practice and attract appropriate action as per the relevant provisions of the Act. Such a sale would also be declared null and void by H-RERA.

As per the HARERA Act, which came into force in 2017, developers are allowed to sell property only on actual Carpet Area and not the Super Area, but they have often gotten away with it due to vague definitions. He noted that there was a lack of legal certainty surrounding the term Carpet Area before the RERA Act, 2016 came into existence. The definition of Carpet Area as provided under Section 2(k) of the RERA Act means the net usable floor area. All walls which are constructed or provided on the external face of an apartment shall be regarded as external walls, and all walls or independent columns constructed or provided within an apartment shall be regarded as internal partition walls. While externals walls, service shafts, balcony, veranda, and open terrace have to be excluded from the definition, the internal partition walls of the apartment are not excluded as they form a part of the integral structure, that is, Carpet Area.

The registration of the conveyance deeds is to be done only on the basis of the Carpet Area. While in a case where the conveyance deed of the units has not been executed, the promoter shall also indicate the Carpet Area in addition to the Super Area and its details/constituents.

As per the norms, the total price/cost will remain unaltered even if the unit is to be registered on a Carpet Area basis and will not alter the sale consideration. It is only for the purpose of disclosure and the exact description of the apartment.

Succinctly put, the legislative mandate emanating from the Act was clearly manifest that now the property can be sold only on the basis of Carpet Area. The mandatory draft Agreement to sell provided by the Rules also reinforced the determinant of Carpet Area. Therefore, it is really surprising that such mandatory provisions are not being complied with. Will such acts and omissions pass the judicial muster, only time would tell but we have serious doubts.

Copyright (Amendment) Rules, 2021

The government has notified Copyright (Amendment) Rules, 2021 and included a new provision that eliminates the requirement of publication in the Official Gazette. To encourage accountability and transparency, new provisions have been introduced to deal with the undistributed royalty amounts and use of electronic and traceable payment methods while collection and distribution of royalties.

The compliance requirements for registration of software works have been reduced and the applicant can file the first 10 and last 10 pages of source code, or the entire source code if less than 20 pages, with no blocked out or redacted portions.

In India, the copyright regime is governed by the Copyright Act, 1957 and the Copyright Rules, 2013. The Copyright Rules, 2013 were last amended in the year 2016. The amendments have been introduced with the objective of bringing the existing rules in parity with other relevant legislations. As per the amendments, a

new rule has been introduced, whereby the copyright societies will be required to draw up and make public an Annual Transparency Report for each financial year and is aimed to reinforce transparency in working of copyright societies.

The amendments have harmonized the Copyright Rules with the provisions of Finance Act, 2017 whereby the Copyright Board has been merged with Appellate Board. Now that the newly notified Tribunals Reforms (Rationalization and Conditions of Service) Ordinance, 2021, has abolished the IPAB, all the powers that are supposed to vest with the IPAB as per the Rules, are actually vesting with the High Courts.

The time limit for the Centre to respond to an application made before it for registration as a copyright society is extended to 180 days, so that the application can be more comprehensively examined. As per the statement, the move aims to ensure smooth and flawless compliance in the light of the technological advancement in the digital era by adopting electronic means as primary mode of communication and working in the Copyright Office.

Payment Banks - Enhancement of maximum balance limit from INR 1 lakh to INR 2 lakh

The Reserve Bank of India (**RBI**) vide circular dated April 08, 2021 bearing no. DoR.LIC.REC.5/16.13.218/2021-22 and in pursuance of paragraph 3 of the 'Statement on Developmental and Regulatory Policies' dated April 07, 2021, enhanced the limit of the maximum balance that an individual customer can hold in their payment bank accounts at the end of the day from INR 1 lakh to INR 2 lakh.

Earlier, the maximum balance limit for payment banks was capped at INR 1 lakh per customer at the end of the day. This restriction has been enhanced and extended keeping in view the progress made by the payment banks in furthering financial inclusion and with the objective of giving more flexibility to payment banks.

HSA media corner

India Business Law Journal

IBC decides the fate of PPA's in Insolvency

Authors: Abhirup Dasgupta, Partner and Bhawana Sharma, Associate

Summary: The landmark judgment of Supreme Court in case of *Gujarat Urja Vikas Nigam Ltd v. Amit Gupta & Ors* has decided the fate of Power Purchase Agreements (**PPAs**) in case of insolvency proceedings. The court held that PPAs cannot be terminated solely on ground of initiation of Corporate Insolvency Resolution Process. The judgment ensures that the continuity of PPAs and brings considerable relief to lenders of power generators that are currently undergoing insolvency proceedings.

Click here to read more.

#Simplified video series

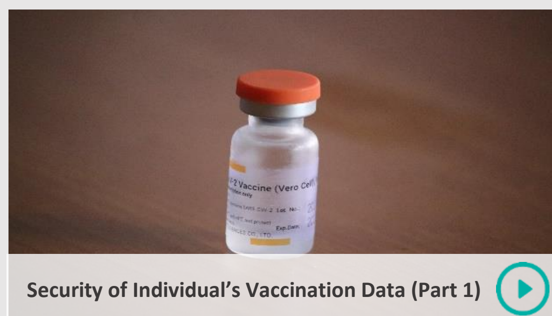
Education Sector in India: A Legal Perspective

In this video our sector expert discusses various development in the Education sector. The focus is on various legal aspects around the sector and how the sector is likely to shape up in this financial sector.

Education Sector in India: A Legal Perspective

Security of Individual's Vaccination Data

As vaccination drive opens for all, concerns regarding the security of individual's data electronically collected exists. In this two part video series, our sector expert discusses some of the key issues and liabilities with respect to leak or loss of an individual's vaccination data electronically collected.


Security of Individual's Vaccination Data (Part 1)

Security of Individual's Vaccination Data (Part 2)

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