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SAGUS SPEAKS

This Newsletter covers key Regulatory & Policy Updates, Government Notifications and Judicial Pronouncements.

REGULATORY & POLICY UPDATES

SEBI issued a circular to facilitate investments by Indian Mutual Funds in overseas Mutual Funds/Unit Trusts with exposure to Indian securities.

The Securities Exchange Board of India ("SEBI") through its circular dated 04.11.2024[1] ("Mutual Funds Circular") has allowed Indian Mutual Funds ("IMFs") to invest in overseas Mutual Funds/ Unit Trusts ("OMFs") having limited exposure to Indian securities. The Mutual Funds Circular aims to facilitate ease of investment in OMFs, to bring transparency in the manner of investment, and to enable IMFs to diversify their overseas investments. The Mutual Funds Circular came into effect on 04.11.2024.

The key highlights under the Mutual Funds Circular are as follows:

i. IMFs can now invest in OMFs that have exposure to Indian securities provided that the total exposure to Indian securities by such OMFs shall not be more than 25% (twenty-five percent) of their assets. Additionally, while investing IMFs are required to abide by the following conditions: (i) all investors' contributions to OMFs must be pooled into a single investment vehicle with no side vehicles; and (ii) the corpus of the OMFs should be in a common pool with no segregated portfolios, ensuring that all investors have *pari-passu* and pro-rata rights in the fund; and (iii) Such OMFs are managed by an independent manager/fund manager who is actively involved in making investment decisions for such MFs ; and (iv) such OMFs

[1] SEBI Mutual Funds Circular 04.11.2024.

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disclose their portfolios to the public at least on a quarterly basis to maintain transparency; and (v) to prevent conflict of interest the relevant OMFs and IMFs shall not have any advisory agreements amongst themselves.

ii. IMFs are required to ensure at the time of making investments (both fresh and subsequent) that the relevant OMFs do not breach the 25% (twenty-five percent) threshold. In the event exposure of the underlying OMFs exceeds the above-mentioned threshold subsequent to any investment, an observation period of 6 (six) months from the date of publicly available information of such a breach shall be allowed for the IMFs to rebalance the assets. During this observation period, the IMFs shall not be allowed to undertake any fresh investment in such OMFs and shall only be liable to resume their investments in such OMFs upon the exposure to Indian securities by such OMFs falls below the limit of 25% (twenty-five percent).

iii. If the portfolio of the relevant OMFs is not rebalanced within the 6 (six) months observation period, then the relevant IMFs shall be required to liquidate their investment in such OMFs within the next 6 (six) months from the end of the observation period i.e. liquidation period.

iv. If the IMFs fail to rebalance the portfolio in compliance with the afore-mentioned requirements within the 6 (six) months of liquidation period, then such IMFs shall not be permitted to; (i) accept any fresh subscription in the concerned IMF scheme; and (ii) launch any new scheme; and (iii) to levy any exit load on investors exiting such scheme.

SEBI issues circular to simplify the registration for Foreign Portfolio Investors.

SEBI through its circular dated 12.11.2024[2] ("FPI Circular") has amended and simplified the procedure for registration for the Foreign Portfolio Investors ("FPIs"). The FPI Circular shall come into effect after three months from the date of notification, i.e. - 12.02.2025. The key highlights of the FPI Circular are as follows:

i. SEBI through its extant Master Circular for FPIs dated 30.05.2024 inter-alia mandated every FPI applicant to submit a duly filled and signed Comon Application Form ("CAF") and annexure to CAF supported by required documents for registration. Under the FPI Circular, SEBI highlighted that for certain categories of FPI applicants, information is already captured in the depositories CAF module, such as: (a) funds operated by investment managers who are already registered as FPIs; or (b) sub-funds of a master fund already registered as FPIs; or (c) sub-funds or classes of shares or equivalent structures with segregated portfolios of funds, wherein such fund or any of its sub-fund or separate class of shares or equivalent structure with segregated portfolio, is already registered as FPI; or (d) schemes of insurance companies where the parent company is already registered as FPI.

ii. FPI applicants which fall under the above-mentioned categories shall have the option to either fill entire CAF or an abridged version of CAF, where the applicant shall only be required to fill the fields which are unique to such FPI applicants.

iii. FPI applicants opting for the abridged form of CAF, the remaining fields shall either be auto populated from the information available in CAF module or shall be disabled, as applicable. While auto populating the available information, an explicit consent from the FPI applicant shall be obtained confirming that all the details other than those mentioned in the abridged version of CAF remain unchanged.

iv. The pilot Custodians and Designated Depository Participants Standards Setting Forum ("CDSSF") shall issue the relevant implementation standards along with the fields that can be auto populated from CAF module or disabled, in consultation with SEBI.

RBI issues directions for the operational framework for reclassification of FPI investments to FDI.[3]

The Reserve Bank of India ("RBI") through its notification dated 11.11.2024 ("FPI FDI Circular") has issued the operational framework for reclassification of FPI investments to Foreign Direct Investments ("FDIs") on breaching the prescribed limit of 10% (ten percent) under the FEMA (Non-Debt Instrument) Rules, 2019. The FPI FDI Circular came into effect 11.11.2024. The key highlights of the FPI FDI Circular are as follows:

i. The FEMA (Non-Debt Instruments) Rules, 2019 ("NDI Rules") prescribes that any investment made by FPIs shall be less than 10% (ten percent) of the total paid-up capital in an Indian entity. Any FPI breaching the prescribed limit shall have the option to either divest the excess holdings or reclassify the investment as FDI within 5 (five) trading days from the date of settlement of the trades causing the breach subject to the conditions specified by RBI and SEBI.

ii. The facility of reclassification of FPI investment to FDI shall not be permitted in any sector prohibited for FDI.

iii. The concerned FPI opting for reclassification will have to obtain necessary approvals from the government and the concurrence of the relevant Indian investee company to enable such company to ensure compliance with conditions pertaining to sectors prohibited for FDI, sectoral caps and government approvals, wherever applicable, under the NDI Rules.

[2] SEBI FPI Circular 12.11.2024.

[3] RBI FPI to FDI Circular 11.11.2024.

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iv. For reclassification, the investment held by such FPI shall be reported within the timelines as specified under Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, in the following manner:
   (a) By the Indian company in form FC-GPR where the investment beyond the prescribed limit is resulting from fresh issuance of equity instruments by an Indian company to such FPI.
   (b) By the FPI in form FC-TRS, where the investment beyond the prescribed limit is due to the acquisition of equity instruments by such FPI in the secondary market.
   (c) The authorised dealer bank concerned shall report the amount of reclassified foreign portfolio investment as divestment under the LEC (FII) reporting.

v. Post above-mentioned reclassification, the relevant FPIs are required to approach their custodian with a request for transferring the equity instruments of the Indian entity from their demat account maintained for holding foreign portfolio investments to the demat account maintained by such entity for holding FDI. After ensuring that the reporting for reclassification has been duly completed, the custodian shall unfreeze the equity instrument and process the request. It was clarified that the date of investment causing a breach in all such cases shall be considered as the date of reclassification.

GOVERNMENT NOTIFICATIONS

Ministry of MSME mandates onboarding for MSMEs with a turnover of INR 250 crores.[4]

The Ministry of Micro, Small and Medium Enterprises ("Ministry of MSME") through its notification dated 07.11.2024 has notified that all the companies registered under the Companies Act, 2013 with a turnover of more than INR 250 crores and all Central Public Sector Enterprises (as recognized by the Ministry of MSME) shall be required to get themselves registered on the Trade Receivables Discounting System platforms ("TReDS"). TReDS is an electronic platform set up for facilitating the financing /discounting of trade receivables of Micro, Small and Medium Enterprises through multiple financiers to unlock working capital for such Micro, Small and Medium Enterprises. The onboarding and registration process on TReDS shall be completed compulsorily by 31.03.2025.

JUDICIAL PRONOUNCEMENTS

Liabilities arising out of electricity bill dues accrued before the enforcement of the Electricity Act would not be barred by the 2-year limitation period prescribed under Section 56 of the Electricity Act – Supreme Court.

The Supreme Court by its judgment dated 04.11.2024 in the matter of *The Madhya Pradesh Madhya Kshetra Vidyut Vitaran Nigam Limited & Ors. v. Bapuna Alcobrew Private Limited & Anr.*,[5] held that the liability arising out of the electricity bill dues which accrued before the enforcement of the Electricity Act, 2003 ("2003 Act") would not be barred by the 2-year limitation period prescribed under Section 56 of the 2003 Act.

In the present case, Madhya Pradesh Madhya Kshetra Vidyut Vitaran Nigam issued show cause notices to the Bapuna Alcobrew Private Limited ("BAPL") quantifying its liability to pay the 'minimum guarantee charges' including the liabilities accrued before 2003 Act. BAPL challenged the show cause notices before the High Court of Madhya Pradesh ("MP High Court"). The MP High Court held that the BAPL is obligated to pay the minimum guaranteed charges.

The Supreme Court while setting aside the order passed by the MP High Court observed that Section 185 (5) of the 2003 Act read with Section 6 of General Clauses Act 1897 would lead to the inescapable conclusion that the limitation period of 2 years prescribed for recovery of dues under Section 56 of the 2003 Act would apply to liabilities arising under the 2003 Act, and not prior to the enforcement thereof. Thus, it was held that the MP High Court manifestly erred in holding that the liability incurred by the first respondent prior to the enforcement of the 2003 Act would still be barred by the provisions of Section 56(2) thereof.

Supreme Court holds that a press release on a cabinet decision without publication of the statutory notice cannot be considered as 'Change in Law'.

The Supreme Court in its judgment dated 05.11.2014 in the matter of *Nabha Power Limited & Anr. v. Punjab State Power Corporation Limited & Anr*,[6] held that a press release issued by the Government of India on a cabinet decision regarding change in policy cannot be treated as a 'law' and consequently the issuance of the press release cannot constitute as "change in law" under the terms of the Power Purchase Agreement ("PPA") entered into amongst the parties and claim benefits on that basis.

[4] MSME Notification 07.11.2024.
[5] Civil Appeal No. 1095 of 2013.
[6] Civil Appeal No. 8478 of 2014.

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The issue pertained to goods imported for setting up a Mega Power Project had, in a notification dated 11.12.2009 under Section 25 of the Customs Act, 1962 been granted certain exemptions from custom duty, however, the press release regarding the same was issued on 01.10.2009. The appellant contended that press release dated 01.10.2009 had the effect of amending the existing law.

The Supreme Court while rejecting the appeal held that a press release issued by the Government of India does not result in change in the existing 'law' or policy. At best, a press release could be considered a promise by Government and cannot be construed to be an alteration of the *law proprio vigore* (by its own force). Further, the Supreme Court held that the law is only amended when a statutory notification is issued by the government.

Supreme Court held that the timely implementation of Resolution Plan is one of the core objectives of the Insolvency and Bankruptcy Code.

The Supreme Court through its judgement dated 07.11.2024 in the matter of *State Bank of India and Ors. v. Consortium of Mr. Murari Lal Jalan and Mr. Florian Fritsch and Anr.*,[7] while addressing the critical issue of unnecessary delays in the implementation of a resolution plan under the Insolvency and Bankruptcy Code, 2016 ("IBC") held that such delays not only diminish the value of the assets of the corporate debtor but also undermines one of the core objectives of IBC, i.e. - facilitating timely resolution of distressed entities.

The Supreme Court while analyzing Rule 15 of the National Company Law Tribunal ("NCLT") Rules of 2016 ("NCLT Rules") and of the National Company Law Appellate Tribunal ("NCLAT") Rules of 2016 ("NCLAT Rules"), respectively, granting NCLT/ NCLAT the power to extend the timelines to extend the time limits for doing any act which have been fixed, either by the rules or by an order, 'as the justice of the case may require' held that the powers granted to NCLT and NCLAT must be exercised carefully to prevent unnecessary extensions that could undermine economic viability and lead to increased debt and operational expenses for the corporate debtor even during the corporate insolvency resolution process.

Supreme Court held that unilateral arbitrator appointment clauses in public-private contracts are violative of Article 14 of the Constitution of India emphasizing impartiality and equality.

The Supreme Court by its judgement dated 08.11.2024 in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML*[8] held that, government entities and Public Sector Undertakings ("PSUs") cannot unilaterally appoint arbitrators in terms of public-private arbitration agreements as such clauses violate the principle of equality under Article 14 of the Constitution of India. The majority upheld the view that while PSUs can maintain a panel of potential arbitrators, they cannot compel the other party to select its arbitrators from the said panel maintained by such PSU.

In the present matter a dispute arose between Central Organization for Railway Electrification ("CORE") and ECI-SPIC-SMO-MCML ("ECI"), pursuant to which CORE terminated the contract and as a result ECI invoked the arbitration clause under the contract. As per the arbitration clause between the parties, CORE sent two lists comprising of serving and retired railway officers and called upon ECI to select any two arbitrators for the constitution of the arbitration tribunal.

The Supreme Court was of the opinion that a clause which allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Furthermore, the Supreme Court opined that a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrator. The Supreme Court also emphasized that the principle of parity enshrined in Section 18 of the Arbitration and Conciliation Act, 1996 should govern all stages of arbitration, including the appointment of arbitrators.

Supreme Court held that withdrawal of application seeking appointment of arbitrator in the absence of any liberty being granted at the time of such withdrawal to file afresh, makes that party ineligible to file a second application on the same cause of action.

The Supreme Court by its judgement dated 07.11.2024 in the case of *M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad*[9] held that, when a party seeking appointment of an arbitrator unconditionally withdraws its application without taking liberty to file afresh, then the subsequent application for an appointment of arbitrator on the same cause of action would be barred.

In the present case the respondent initially filed an arbitration application under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("A&C Act") and then withdrew it, without the court's permission to apply afresh. Thereafter, the respondent filed a new application seeking appointment of an arbitrator, which was opposed by the appellant citing Order 23 Rule 1 of the Civil Procedure Code, 1908 ("CPC") which stipulates that a suit may only be withdrawn with permission

[7] Civil Appeal No. 5023-5024 of 2024.

[8] Civil Appeal Nos. 9486-9487 of 2019.

[9] Civil Appeal No. 12233 of 2024.

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to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit.

The court observed that the respondent had abandoned the arbitration proceeding, becoming ineligible to file a second application on the same cause of action. Thus, the second application filed under Section 11(6) of the A&C Act would not be maintainable as no permission to file a fresh application was granted at the time of withdrawal of the first application under Section 11(6) of the A&C Act.

Supreme Court held that all private properties cannot be distributed by the state as 'material resources of the community' for the common good under Article 39(b) of the Constitution of India.

The Supreme Court in its judgment dated 05.11.2024 in *Property Owners Association v. State of Maharashtra*[10] by a majority of 7 to 2 held that not all private properties mandatorily qualify as a 'material resource of the community' that the state may distribute equitably under Article 39(b) of the Constitution of India ("Constitution"). Only properties that truly serve the community's interest and possess significant material value are covered under the term 'material resource of the community'.

The Supreme Court emphasized a context specific approach towards the interpretation of the term 'material resource of the community' and held that the same should be subject to a non-exhaustive list of factors such as the nature of the resource and its characteristics, the impact of the resource on the well-being of the community; the scarcity of the resource and the consequences of such a resource being concentrated in the hands of private players. For example - resources that have a significant ecological or public welfare role such as forests, wetlands, minerals, or spectrum, may be subject to regulation or control by the State under Article 39(b) of the Constitution. Principles such as the public trust doctrine evolved by the Supreme Court may also help identify resources which fall within the ambit of the phrase 'material resource of the community'.

High Court of Delhi held that exclusion provided for time spent in bona fide proceedings before competent court jurisdiction under Section 14 of the Limitation Act shall not be computed while calculating the limitation period under Arbitration and Conciliation Act.

The High Court of Delhi through its judgement in the matter of *JKR Techno Engineer Pvt. Ltd. ("JKR Techno") v JMD Limited ("JMD Limited")*[11] held that a party's claim in a petition under Section 11(6) of the A&C Act, cannot be dismissed solely on the ground that it had spent time in bona fide proceedings before a court without jurisdiction and the petition under Section 11(6) of A&C Act is barred by limitation. The exemption available under Section 14 of the Limitation Act, 1963 shall accrue and the petition shall not be barred by limitation.

JKR Techno in this case had earlier filed an application under Section 12(a) of the Commercial Court Act, 2015, requesting pre-litigation mediation which was the competent court to adjudicate disputes under the Commercial Court Act, 2015. However, the application was disposed of by a non-starter report on the ground that despite issuance of notice, JMD Limited had failed to appear in the proceedings. Consequently, pursuant to a Section 8 Application, the dispute was referred to arbitration on the ground of existence of arbitration agreement in the works contract executed amongst JKR Techno and JMD Limited.

The High Court of Delhi while allowing the petition and appointing an arbitrator thereto in its judgment observed that Section 14 of the Limitation Act, 1963 which provides for exclusion of time spent on *bona fide* court proceedings without jurisdiction shall be squarely applicable in this case. JKR Techno had approached the commercial court which was the competent court to adjudicate disputes of commercial nature. Therefore, the claim of JKR Techno was not *ex-facie* a dead claim and rejected the contention raised by JMD Limited.

High Court of Bombay held that party cannot claim ineligibility of unilateral appointment of arbitrator for the first time under Section 34 of the Arbitration and Conciliation Act.

The High Court of Bombay through its judgement dated 11.11.2024 in the matter of *M/S Truly Pest Solution Private Limited ("Truly Pest") v. Principal Chief Mechanical Engineering (P.C.M.E.) Central Railway ("Railways")*[12] held that once an express agreement in writing agreeing to waive off applicability of Section 12(5) of the A&C Act is executed, the party waiving the right is prohibited from claiming ineligibility of the arbitrator under the applicable provisions of A&C Act.

In the present case, the petition was filed by Truly Pest under Section 34 of the A&C Act, seeking quashing and setting aside the arbitral award, passed by the sole arbitrator who was appointed by the Railways as per the terms of contract

[10] Civil Appeal No. 1012 of 2002.
[11] Arbitration Petition No. 1457 of 2024.
[12] Arbitration Petition No. 43 of 2023.

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executed amongst the parties. Truly Pest stated that the sole arbitrator being an employee of the Railways was appointed by the Railways themselves, hence under the provisions of Section 12(5) read with Schedule VII of the A&C Act, the award passed by the sole arbitrator who was himself *de jure* ineligible to be an arbitrator, renders the award *void ab initio.* However, as Truly Pest had already signed a 'waiver off agreement', with the Railways expressly agreeing to waive off applicability of Section 12(5) of the A&C Act, the exemption provided under proviso to Section 12(5) of the A&C Act shall be squarely applicable and therefore, the challenge to the appointment under Section 12(3) of the A&C Act shall not be applicable.

The High Court of Bombay while rejecting the petition held that since Truly Pest by express agreement in writing had waived the applicability of Section 12(5) of A&C Act and had numerous occasions to challenge the appointment of the arbitrator including by filing an application under Section 11 of the A&C Act, therefore Truly Pest at the stage of Section 34 of A&C Act is barred from taking up a ground under Section 12(5) of A&C Act for challenging the award passed by the arbitrator in this case.

Maharashtra Electricity Regulatory Commission held that there is no formal requirement of change in law notice if the other party has been duly made aware of the occurrence of change in law event.

Maharashtra Electricity Regulatory Commission ("MERC") by its order dated 11.11.2024 in the matter of *M/S Kasturi Electricals & Engineering v. Maharashtra State Electricity Distribution Co. Ltd*[13]., held that there is no requirement of a specific change in law notice as per the provisions of the power purchase agreement executed amongst the parties if the other party is made aware of such event of change in law.

MERC observed that considering that the Petitioner had already highlighted the change in law event on account of GST notifications and sought consideration of the same in tariff adoption proceedings filed by MSEDCL, there was no formal requirement of sending change in law notice under the provisions of the power purchase agreement executed amongst the parties and the same have deemed to be complied with as per the provisions of the power purchase agreement executed amongst the parties.

[13] Case No. 222 of 2023

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