

EXECUTIVE PROGRAMME

UPDATE

FOR

ECONOMIC AND

COMMERCIAL LAWS

(Relevant for Students appearing in June, 2017)

MODULE 1 - PAPER 3

Disclaimer-

This document has been prepared purely for academic purposes only and it does not necessarily reflect the views of ICSI. Any person wishing to act on the basis of this document should do so only after cross checking with the original source.

Economic and Commercial Laws- Update

Contents	Page No.
Foreign Exchange Management	3
Foreign Trade Policy and Procedures	67
Law relating to Arbitration and Conciliation	119

**LESSON I
FOREIGN EXCHANGE MANAGEMENT
SECTION I**

FOREIGN EXCHANGE MANAGEMENT (POSSESSION AND RETENTION OF FOREIGN CURRENCY) REGULATIONS, 2015

Introduction

In exercise of the powers conferred by clause (a) and clause (e) of Section 9, clause (d) and clause (g) of sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999, the Reserve Bank of India notified Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015.

Limits for possession and retention of foreign currency or foreign coins:-

For the purpose of clause (a) and clause (e) of Section 9 of the Act, the Reserve Bank specifies the following limits for possession or retention of foreign currency or foreign coins, namely :-

- i) Possession without limit of foreign currency and coins by an authorised person within the scope of his authority;
- ii) Possession without limit of foreign coins by any person;
- iii) Retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques not exceeding US\$ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques;
 - was acquired by him while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or
 - was acquired by him, from any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation; or
 - was acquired by him by way of honorarium or gift while on a visit to any place outside India; or
 - represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

It may be noted that 'To possess' or 'to retain' means to possess or to retain in physical form and the words 'possession' or 'retention' shall be construed accordingly.

Economic and Commercial Laws- Update

Possession of foreign exchange by a person resident In India but not permanently resident

A person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and travellers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the regulations made under the Act.

It may be noted that 'not permanently resident' means a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.

**FOREIGN EXCHANGE MANAGEMENT
(REALISATION, REPATRIATION AND SURRENDER OF FOREIGN EXCHANGE)
REGULATIONS, 2015**

Introduction

In exercise of the powers conferred by Section 8, sub-section (6) of Section 10, clause (c) of sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 notified the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015, relating to the manner of, and the period for, realisation of foreign exchange, repatriation of realised foreign exchange to India and its surrender.

Duty of persons to realise foreign exchange due

A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank, take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

- a. that the receipt by him of the whole or part of that foreign exchange is delayed;
or
- b. that the foreign exchange ceases in whole or in part to be receivable by him.

Manner of Repatriation

On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and -

- a. sell it to an authorised person in India in exchange for rupees; or
- b. retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
- c. use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

Economic and Commercial Laws- Update

It may be noted that 'foreign exchange due' means the amount which a person has a right to receive or claim in foreign exchange;

Period for surrender of realised foreign exchange

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person within the period specified below:-

- foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;
- in all other cases within a period of ninety days from the date of its receipt.

Period for surrender in certain cases

Any person not being an individual resident in India who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under sub-section (5) of Section 10 of the Act does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the provisions of the Act or the rules or regulations or direction or order made there under, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of sixty days from the date of its acquisition or purchase by him.

Where the foreign exchange acquired or purchased by any person not being an individual resident in India from an authorised person is for the purpose of foreign travel, then, the unspent balance of such foreign exchange shall, save as otherwise provided in the regulations made under the Act, be surrendered to an authorised person -

- within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and
- within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques.

It may be noted that 'surrender' means the selling of foreign exchange to an authorised person in India in exchange of rupees.

Period for surrender of received/ realised/ unspent/ unused foreign exchange by Resident individuals

A person being an individual resident in India shall surrender the received/realised/unspent/unused foreign exchange whether in the form of currency

Economic and Commercial Laws- Update

notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be.

Exemption

Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015 shall not apply to foreign exchange in the form of currency of Nepal or Bhutan.

**FOREIGN EXCHANGE MANAGEMENT (EXPORT AND IMPORT OF CURRENCY)
REGULATIONS, 2015**

In exercise of the powers conferred by clause (g) of sub-section (3) of Section 6, subsection (2) of Section 47 of the Foreign Exchange Management Act, 1999 Reserve Bank notified the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015.

Export and import of Indian currency and currency notes

a) Any person resident in India,

- i. may take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000 (Rupees Twenty Five Thousand only) per person.
- ii. may take or send outside India (other than to Nepal and Bhutan) commemorative coins not exceeding two coins each.

It may be noted that 'Commemorative Coin' includes coin issued by Government of India Mint to commemorate any specific occasion or event and expressed in Indian currency.

- iii. who had gone out of India on a temporary visit, may bring into India at the time of his return from any place outside India (other than from Nepal and Bhutan), currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000 (Rupees Twenty Five Thousand only) per person.

b) Any person resident outside India, not being a citizen of Pakistan or Bangladesh, and visiting India,

- i. may take outside India currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000 (Rupees Twenty Five Thousand only) per person
- ii. may bring into India currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000 (Rupees Twenty Five Thousand only) per person

Import of Foreign Exchange into India

A person may send into India without limit foreign exchange in any form other than currency notes, bank notes and travellers cheques;

Economic and Commercial Laws- Update

A person may bring into India from any place outside India without limit foreign exchange (other than unissued notes) subject to the condition that such person makes, on arrival in India, a declaration to the Customs authorities in Currency Declaration Form (CDF). It shall not be necessary to make such declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or travellers

cheques brought in by such person at any one time does not exceed US\$10,000 (US Dollars ten thousand) or its equivalent and/ or the aggregate value of foreign currency notes brought in by such person at any one time does not exceed US\$ 5,000 (US Dollars five thousand) or its equivalent.

Export of Foreign Exchange and Currency Notes

- i. An authorised person may send out of India foreign currency acquired in normal course of business,
- ii. any person may take or send out of India, -
 - a. Cheques drawn on foreign currency account maintained in accordance with Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000;
 - b. foreign exchange obtained by him by drawal from an authorised person in accordance with the provisions of the Act or the rules or regulations or directions made or issued there under;
 - c. currency in the safes of vessels or aircrafts which has been brought into India or which has been taken on board a vessel or aircraft with the permission of the Reserve Bank;
- iii. any person may take out of India, -
 - a. foreign exchange possessed by him in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000 ;
 - b. unspent foreign exchange brought back by him to India while returning from travel abroad and retained in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000 ;
- iv. any person resident outside India may take out of India unspent foreign exchange not exceeding the amount brought in by him and declared in Currency Declaration Form (CDF).

Export and Import of currency to or from Nepal and Bhutan

- i. A person may take or send out of India to Nepal or Bhutan, currency notes of Government of India and Reserve Bank of India notes (other than notes of denominations of above Rs.100 in either case) provided that an individual travelling from India to Nepal or Bhutan can carry Reserve Bank of India

Economic and Commercial Laws- Update

currency notes of denomination Rs.500/- and/or Rs.1000/- up to a limit of Rs.25,000/- ;

- ii. A person may bring into India from Nepal or Bhutan, currency notes of Government of India and Reserve Bank of India notes (other than notes of denominations of above Rs.100 in either case) ;
- iii. A person may take out of India to Nepal or Bhutan, or bring into India from Nepal or Bhutan, currency notes being the currency of Nepal or Bhutan.

Prohibition on Export of Indian Coins

A person shall not take or send out of India the Indian coins which are covered by the Antique and Art Treasure Act, 1972.

FOREIGN EXCHANGE MANAGEMENT (EXPORT OF GOODS & SERVICES) REGULATION, 2015

Introduction

Export trade is regulated by the Directorate General of Foreign Trade (DGFT) and its regional offices, functioning under the Ministry of Commerce and Industry, Department of Commerce, Government of India. Policies and procedures required to be followed for exports from India are announced by the DGFT, from time to time. AD Category – I banks may conduct export transactions in conformity with the Foreign Trade Policy in vogue and the Rules framed by the Government of India and the Directions issued by Reserve Bank from time to time

In exercise of the powers conferred by clause (a) of sub-section (1), sub-section (3) of Section 7 and sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) the Reserve Bank of India vide Notification No. FEMA 23(R)/2015-RB, dated January 12, 2016 notified the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 in respect of Export of Goods and Services from India,

Important Definitions

'**Act**' means the Foreign Exchange Management Act, 1999

'**Authorised dealer**' means a person authorised as an authorised dealer under sub-section (1) of section 10 of the Act, and includes a person carrying on business as a factor and authorised as such under the said section 10.

'**EXIM Bank**' means the Export-Import Bank of India established under the Export-Import Bank of India Act, 1981.

'**Export**' includes the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire-purchase, or under any other arrangement by whatever name called, and in the case of software, also includes transmission through any electronic media ;

'**Export value**' in relation to export by way of lease or hire-purchase or under any other similar arrangement, includes the charges, by whatever name called, payable in respect of such lease or hire-purchase or any other similar arrangement;

'**Software**' means any computer programme, database, drawing, design, audio/video signals, any information by whatever name called in or on any medium other than in or on any physical medium ;

Economic and Commercial Laws- Update

'Specified authority' means the person or the authority to whom the declaration as specified in Regulation 3 is to be furnished;

Declaration of exports

Regulation 3(1) provides that in case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing –

- the full export value of the goods or software; or
- if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.

Declarations shall be executed in sets of such number as specified.

It may be noted that in respect of export of services to which none of the Forms specified in the Regulations apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

Exemptions from furnishing declaration

In terms of Regulation 4, export of goods / software may be made without furnishing the declaration in the following cases, namely:

- a) trade samples of goods and publicity material supplied free of payment;
- b) personal effects of travellers, whether accompanied or unaccompanied;
- c) ship's stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this

Economic and Commercial Laws- Update

behalf or of the military, naval or air force authorities in India for military, naval or air force requirements;

d) by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value

e) aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their re import into India after overhauling /repairs, within a period of six months from the date of their export;

f) goods imported free of cost on re-export basis;

g) the following goods which are permitted by the Development Commissioner of the Special Economic Zones, Electronic Hardware Technology Parks, Software Technology Parks or Free Trade Zones to be re-exported, namely:

1) imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators;

2) goods imported from foreign suppliers/collaborators on loan basis;

3) goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations.

(ga) goods listed at items (1), (2) and (3) of clause (i) to be re-exported by units in Special Economic Zones, under intimation to the Development Commissioner of Special Economic Zones / concerned Assistant Commissioner or Deputy Commissioner of Customs

(h) replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.

(i) goods sent outside India for testing subject to re-import into India;

(j) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.

(k) exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission.

Economic and Commercial Laws- Update

Indication of importer-exporter code number

Regulation 5 states that the importer-exporter code number allotted by the Director General of Foreign Trade under Section 7 of the Foreign Trade (Development & Regulation) Act, 1992 shall be indicated on all copies of the declaration forms submitted by the exporter to the specified authority and in all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.

Authority to whom declaration is to be furnished and the manner of dealing with the declaration

Regulation 6 deals with the authority to whom declaration is to be furnished and the manner of dealing with the declaration.

Declaration in Form EDF

(i) The declaration in form EDF shall be submitted in duplicate to the Commissioner of Customs.

(ii) After duly verifying and authenticating the declaration form, the Commissioner of Customs shall forward the original declaration form/data to the nearest office of the Reserve Bank and hand over the duplicate form to the exporter for being submitted to the authorised dealer.

Declaration in Form SOFTEX

(i) The declaration in Form SOFTEX in respect of export of computer software and audio/video/ television software shall be submitted in triplicate to the designated official of Ministry of Information Technology, Government of India at the Software Technology Parks of India (STPIs) or at the Free Trade Zones (FTZs) or Special Economic Zones (SEZs) in India.

(ii) After certifying all three copies of the SOFTEX form, the said designated official shall forward the original directly to the nearest office of the Reserve Bank and return the duplicate to the exporter. The triplicate shall be retained by the designated official for record.

Duplicate Declaration Forms to be retained with Authorised Dealers

On the realisation of the export proceeds, the duplicate copies of export declaration forms viz. EDF and SOFTEX and Exchange Control copies of the shipping bills shall be retained by the Authorised Dealers.

Economic and Commercial Laws- Update

Evidence in support of declaration

As per Regulation 7 the Commissioner of Customs or the postal authority or the official of Department of Electronics, to whom the declaration form is submitted, may, in order to satisfy themselves of due compliance with Section 7 of the Foreign Exchange Management Act and the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, require such evidence in support of the declaration as may establish that –

- a) the exporter is a person resident in India and has a place of business in India;
- b) the destination stated on the declaration is the final place of the destination of the goods exported;
- c) the value stated in the declaration represents –
 - 1) the full export value of the goods or software; or
 - 2) where the full export value of the goods or software is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods in the overseas market.

It may be noted that 'final place of destination' means a place in a country in which the goods are ultimately imported and cleared through Customs of that country.

Manner of payment of export value of goods

Regulation 8 states that unless otherwise authorised by the Reserve Bank, the amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 as amended from time to time.

It may be noted that re-import into India, within the period specified for realisation of the export value, of the exported goods in respect of which a declaration was made under Regulation 3, shall be deemed to be realisation of full export value of such goods.

Period within which export value of goods/software/ services to be realised

In terms of Regulation 9(1), the amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months from the date of export, provided

- a. that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is

Economic and Commercial Laws- Update

realised and in any case within fifteen months from the date of shipment of goods;

- b. further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be.

Regulation 9 (2) (a) provides that where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months from the date of export.

Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months.

As per Regulation 9(2)(b), the Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by sub-regulation (2);

Provided that no such direction shall be given unless the unit has been given a reasonable opportunity to make a representation in the matter.

Regulation 9(2)(c) states that on such direction, the said exporter/s shall be governed by the provisions of sub-regulation (1), until directed otherwise by the Reserve Bank.'

It may be noted that the "date of export" in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.

Submission of export documents

Regulation 10 provides that the documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, within 21 days from the date of export, or from the date of certification of the SOFTEX form:

Provided that, subject to the directions issued by the Reserve Bank from time to time, the authorized dealer may accept the documents pertaining to export submitted after the expiry of the specified period of 21 days, for reasons beyond the control of the exporter.

Economic and Commercial Laws- Update

Transfer of documents

In terms of Regulation 11, without prejudice to Regulation 3, an authorised dealer may accept, for negotiation or collection, shipping documents including invoice and bill of exchange covering exports, from his constituent (not being a person who has signed the declaration in terms of Regulation 3) :

Provided that before accepting such documents for negotiation or collection, the authorised dealer shall –

a) where the value declared in the declaration does not differ from the value shown in the documents being negotiated or sent for collection, or

b) where the value declared in the declaration is less than the value shown in the documents being negotiated or sent for collection, require the constituent concerned also to sign such declaration and thereupon such constituent shall be bound to comply with such requisition and such constituent signing the declaration shall be considered to be the exporter for the purposes of these Regulations to the extent of the full value shown in the documents being negotiated or sent for collection and shall be governed by these Regulations accordingly.

Payment for the Export

Regulation 12 states that in respect of export of any goods or software for which a declaration is required to be furnished under Regulation 3, no person shall except with the permission of the Reserve Bank or, subject to the directions of the Reserve Bank, permission of an authorised dealer, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing –

(i) that the payment for the goods or software is made otherwise than in the specified manner; or

(ii) that the payment is delayed beyond the period specified under these Regulations; or

(iii) that the proceeds of sale of the goods or software exported do not represent the full export value of the goods or software subject to such deductions, if any, as may be allowed by the Reserve Bank or, subject to the directions of the Reserve Bank, by an authorised dealer;

Provided that no proceedings in respect of contravention of these provisions shall be instituted unless the specified period has expired and payment for the goods or software representing the full export value, or the value after deductions allowed under clause (iii), has not been made in the specified manner within the specified period.

Economic and Commercial Laws- Update

(iv) Export of services to which no Form specified in these Regulations apply, the exporter may export such services without furnishing any declaration, (i), (ii) & (iii) above shall apply.

Certain Exports requiring prior approval: - Exports under trade agreement/rupee credit etc.

Regulation 13 deals with Certain Exports requiring prior approval. It says that:

(i) Export of goods under special arrangement between the Central Government and Government of a foreign state, or under rupee credits extended by the Central Government to Govt. of a foreign state shall be governed by the terms and conditions set out in the relative public notices issued by the Trade Control Authority in India and the instructions issued from time to time by the Reserve Bank.

(ii) An export under the line of credit extended to a bank or a financial institution operating in a foreign state by the Exim Bank for financing exports from India, shall be governed by the terms and conditions advised by the Reserve Bank to the authorised dealers from time to time.

Delay in Receipt of Payment

Regulation 14 states that where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,

(a) the payment therefor if the goods or software has been sold and

(b) the sale of goods and payment thereof, if goods or software has not been sold or reimport thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf ;

Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

Advance payment against exports

Regulation 15(1) provides that where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that –

Economic and Commercial Laws- Update

- i) the shipment of goods is made within one year from the date of receipt of advance payment;
- ii) the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
- iii) the documents covering the shipment are routed through the authorised dealer through whom the advance payment is received;

However, in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

As per Regulation 15(2), notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

Issue of directions by Reserve Bank in certain cases

Regulation 16(1) states that without prejudice to the provisions of Regulation 3 in relation to the export of goods or software which is required to be declared, the Reserve Bank may, for the purpose of ensuring that the full export value of the goods or, as the case may be, the value which the exporter having regard to the prevailing market conditions expects to receive on the sale of goods or software in the overseas market, is received in proper time and without delay, by general or special order, direct from time to time that in respect of export of goods or software to any destination or any class of export transactions or any class of goods or software or class of exporters, the exporter shall, prior to the export, comply with the conditions as may be specified in the order, namely ;

- a) that the payment of the goods or software is covered by an irrevocable letter of credit or by such other arrangement or document as may be indicated in the order ;
- b) that any declaration to be furnished to the specified authority shall be submitted to the authorised dealer for its prior approval, which may, having regard to the circumstances, be given or withheld or may be given subject to such conditions as may be specified by the Reserve Bank by directions issued from time to time.
- c) that a copy of the declaration to be furnished to the specified authority shall be submitted to such authority or organisation as may be indicated in the order for

Economic and Commercial Laws- Update

certifying that the value of goods or software specified in the declaration represents the proper value thereof.

As per Regulation 16(2), no direction under sub-regulation (1) shall be given by the Reserve Bank and no approval under clause (b) of that sub-regulation shall be withheld by the Authorised Dealer, unless the exporter has been given a reasonable opportunity to make a representation in the matter.

Project exports

Regulation 17(1) provides that where an export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract, the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval of the approving authority, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank of India from time to time.

Regulation 17(2) states that in case a guarantee is required to be given prior to post award approval, the same may be issued by an authorized dealer bank/ a person resident in India being an exporting company, for performance of a project outside India, or for availing of credit facilities, whether fund-based or non-fund based, from a bank or a financial institution outside India in connection with the execution of such project, provided that the contract / Letter of Award stipulates such requirements.
Explanation:

It may be noted that 'approving authority' means the EXIM Bank of India or the authorised dealer.

FOREIGN EXCHANGE MANAGEMENT (ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY OUTSIDE INDIA) REGULATION, 2016

Introduction

The Foreign Exchange Management Act, 1999 (FEMA) empowers the Reserve Bank to frame regulations to prohibit, restrict or regulate the acquisition or transfer of immovable property outside India by persons residents in India. Foreign Exchange Management (Acquisition and Transfer of Immovable Property outside India) Regulations, 2016 notified by Reserve Bank of India vide Notification No. FEMA 7(R)/2015-RB dated January 21, 2016 governing acquisition and transfer of immovable property outside India

A person resident in India can, acquire property outside India if so permitted under the FEMA or the regulations framed thereunder or with the general or special permission of the Reserve Bank.

These restrictions, however, do not apply to the property held by a person resident in India who is a foreign national or if the property was acquired by a person resident in India on or before July 8, 1947 and continued to be held by him with the permission of the Reserve Bank. The restrictions also do not apply to acquisition of property outside India by a person resident in India on a lease not exceeding five years.

Definitions

Some key terms used in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property outside India) Regulations, 2016 are given below:

'Relative'

Relative in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

'Liberalised Remittance Scheme'

Liberalised Remittance Scheme is a facility available to resident individuals for making remittances outside India as per the conditions mentioned in the Master Direction on Liberalised Remittance Scheme.

Modes of acquiring property outside India by a resident

1. According to section 6(4) of the FEMA, a person resident in India can hold, own, transfer or invest in any immovable property situated outside India if such property was acquired, held or owned by him/ her when he/ she was resident outside India or inherited from a person resident outside India.

Economic and Commercial Laws- Update

2. A resident can acquire immovable property outside India by way of gift or inheritance from:

a. a person resident in India can hold, own, transfer or invest in any immovable property situated outside India if such property was acquired, held or owned by him/her when he/ she was resident outside India or inherited from a person resident outside India section 6(4) of the FEMA ; or

b. a person resident in India who had acquired such property on or before July 8, 1947 and continued to be held by him with the permission of the Reserve Bank.

c. a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.

3. A resident can purchase immovable property outside India out of foreign exchange held in his/ her Resident Foreign Currency (RFC) account.

4. A resident can acquire immovable property outside India jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India.

Acquisition under the Liberalised Remittance Scheme (LRS)

A resident individual can send remittances under the Liberalised Remittance Scheme for purchasing immovable property outside India.

Companies having overseas offices

A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, provided total remittances do not exceed the following limits prescribed for initial and recurring expenses, respectively:

- 15 per cent of the average annual sales/ income or turnover of the Indian entity during the last two financial years or up to 25 per cent of the net worth, whichever is higher;
- 10 per cent of the average annual sales/ income or turnover during the last two financial years.

FOREIGN EXCHANGE MANAGEMENT (ESTABLISHMENT IN INDIA OF A BRANCH OFFICE OR A LIAISON OFFICE OR A PROJECT OFFICE OR ANY OTHER PLACE OF BUSINESS) REGULATION, 2016

Important Definitions

'Authorised Dealer' means a person authorised as an authorised dealer under sub-section (1) of section 10 of the Act.

'Foreign company' means a body corporate incorporated outside India and includes a firm or other association of individuals.

'Branch Office' in relation to a company, means any establishment described as such by the company.

'Liaison Office' means a place of business to act as a channel of communication between the principal place of business or Head Office or by whatever name called and entities in India but which does not undertake any commercial /trading/ industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel.

'Project Office' means a place of business in India to represent the interests of the foreign company executing a project in India but excludes a Liaison Office.

'Site Office' means a sub-office of the Project Office established at the site of a project but does not include a Liaison Office.

'Stand-alone basis' means such branch offices would be isolated and restricted to the Special Economic Zone alone and no business activity/ transaction will be allowed outside the Special Economic Zones in India which includes branches/subsidiaries of its parent office in India.

Prohibition against opening a branch office or a liaison office or a project office or any other place of business in India(Regulation 3)

No person resident outside India shall without prior approval of the Reserve Bank open in India a branch office or a liaison office or a project office or any other place of business by whatever name called except as laid down in these Regulations.

Provided that

a. A banking company resident outside India shall not require any approval under these Regulations for establishing any office in India if such company has obtained necessary approval under the provisions of the Banking Regulation Act, 1949.

Economic and Commercial Laws- Update

b. An insurance company resident outside India shall not require any approval under these Regulations for establishing any office in India if such company has obtained approval from the Insurance Regulatory and Development Authority established under section 3 of the Insurance Regulatory and Development Authority Act, 1999.

c. A company resident outside India shall not require any approval under these Regulations to establish a branch office in the Special Economic Zones (SEZs) to undertake manufacturing and service activities, subject to the conditions that:

- i. such branch offices are functioning in those sectors where 100% FDI is permitted;
- ii. such branch offices comply with Chapter XXII of the Companies Act, 2013; and
- iii. such branch offices function on a stand-alone basis.

Approval for opening a branch office or a liaison office or a project office or any other place of business in India

Eligibility

Regulation 4(a) provides that a person resident outside India can establish a branch office or a liaison office in India provided it meets the following criterion:

- i. For Branch Office — a profit making track record during the immediately preceding five financial years in the home country and net worth of not less than USD 100,000 or its equivalent.
- ii. For Liaison Office — a profit making track record during the immediately preceding three financial years in the home country and net worth of not less than USD 50,000 or its equivalent.

Provided that a person resident outside India that is not financially sound and are subsidiaries of other companies may submit a Letter of Comfort from their parent company subject to the condition that the parent company satisfies the prescribed criterion for net worth and profit.

Permissible activities

Regulation 4(b) states that a person resident outside India permitted by the Reserve Bank under the Regulations to establish a branch or liaison office in India may undertake or carry on any activity specified in Schedule I or II, as the case may be, but shall not undertake or carry on any other activity unless otherwise specifically permitted by the Reserve Bank.

A Liaison Office can undertake the following activities in India:

Economic and Commercial Laws- Update

- i. Representing in India the parent company / group companies.
- ii. Promoting export / import from / to India.
- iii. Promoting technical/financial collaborations between parent/group companies and companies in India.
- iv. Acting as a communication channel between the parent company and Indian companies.

Companies incorporated outside India and engaged in manufacturing or trading activities are allowed to set up Branch Offices in India with specific approval of the Reserve Bank. *Such Branch Offices are permitted to represent the parent / group companies and undertake the following activities in India:*

- i. Export / Import of goods.
- ii. Rendering professional or consultancy services.
- iii. Carrying out research work, in areas in which the parent company is engaged.
- iv. Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
- v. Representing the parent company in India and acting as buying / selling agent in India.
- vi. Rendering services in information technology and development of software in India.
- vii. Rendering technical support to the products supplied by parent/group companies.
- viii. Foreign airline / shipping company.

Normally, the Branch Office should be engaged in the activity in which the parent company is engaged.

- b) Retail trading activities of any nature is not allowed for a Branch Office in India.
- c) A Branch Office is not allowed to carry out manufacturing or processing activities in India, directly or indirectly.
- d) Profits earned by the Branch Offices are freely remittable from India, subject to payment of applicable taxes.

Application form

Under Regulation 4(c), a person resident outside India desiring to establish a branch office or a liaison office or a project office or any other place of business in India shall submit an application in Form FNC to an Authorised Dealer Category-I bank who may, subject to the provisions of Regulation 5, grant approval as per the directions and/or guidelines issued by the Reserve Bank in this regard. In case no office is opened by the person resident outside India within six months from the date of approval letter, the

Economic and Commercial Laws- Update

approval for establishing the office in India shall be cancelled. In cases where the person resident outside India is not able to open the office within the stipulated time frame due to reasons beyond their control, the Authorised Dealer Category-I bank may consider granting extension of time for setting up the office by a further period of six months. Any further extension of time shall require the prior approval of the Reserve Bank in this regard.

Extension of the validity period for liaison office

According to Regulation 4(d):

I. A person resident outside India may establish in India under these Regulations a liaison office for a period of three years subject to the provisions of Regulation 4 d (III). The non-resident entity may apply to the Authorised Dealer Category-I bank concerned for extension of the validity period of approval, and upon receipt of such an application, the Authorised Dealer Category-I bank concerned may extend the validity period of approval for a period of three years from the date of expiry of the original approval / extension granted, subject to such directions issued by the Reserve Bank in this regard.

II. The application for extension of the validity period of the liaison office of banks and entities engaged in insurance business has to be directly submitted to the Department of Banking Regulation (DBR), Reserve Bank and the Insurance Regulatory and Development Authority (IRDA) respectively.

III. Entities engaged in construction and development sectors and which are Non-Banking Finance Companies are permitted to open a Liaison Office for two years only. No further extension would be considered for liaison offices of entities which are Non-Banking Finance Companies and those engaged in construction and development sectors (excluding infrastructure development companies). Upon expiry of the validity period, the offices shall have to either close down or be converted into a Joint Venture / Wholly Owned Subsidiary in conformity with the extant Foreign Direct Investment policy.

Additional offices

Regulation 4(e) states that a person resident outside India desiring to establish additional branch office or liaison office may submit to the Authorised Dealer Category-I bank a fresh FNC Form along with the justification for the need for additional office/s.

Project office

As per Regulation 4(f), a foreign company may open project office/s in India provided it has secured from an Indian company, a contract to execute a project in India, and

Economic and Commercial Laws- Update

- i. the project is funded directly by inward remittance from abroad; or
- ii. the project is funded by a bilateral or multilateral International Financing Agency; or
- iii. the project has been cleared by an appropriate authority; or
- iv. a company or entity in India awarding the contract has been granted term loan by a Public Financial Institution or a bank in India for the Project.

Explanation:

For the purpose of this Regulation,

- i. 'a bilateral or multilateral International Financing Agency' means the World Bank or the International Monetary Fund or similar other body.
- ii. "Public Financial Institution" is a public financial institution as defined in Section 4A of the Companies Act, 1956.

A person from any country other than Pakistan who has been awarded a contract for a project by a Government authority/ Public Sector Undertaking may open a bank account with an Authorised Dealer Category-I bank without any prior approval from the Reserve Bank.

Registration with State Police Authorities

Regulation 4(g) provides that a person from Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau opening a branch office or a liaison office or a project office or any other place of business in India shall have to register with the concerned State Police Authorities. Copy of approval letter for 'persons' from these countries shall be marked by the AD Category-I bank to the Ministry of Home Affairs, Internal Security Division-I, Government of India, New Delhi.

Fund/non-fund based facilities

As per Regulation 4(h), Authorised Dealer Category-I bank may extend fund and/or non-fund based facilities to branch office and project offices based on the guidelines issued by the Reserve Bank in this regard.

Remittance of profit or surplus

According to Regulation 4(i), Branch office may remit outside India profit of the branch net of applicable Indian taxes, on production of the following documents to the satisfaction of the Authorised Dealer Category-I bank through whom the remittance is effected:

Economic and Commercial Laws- Update

- i. A certified copy of the audited Balance Sheet and Profit and Loss account for the relevant year.
- ii. A Chartered Accountant's certificate certifying
 1. the manner of arriving at the remittable profit;
 2. that the entire remittable profit has been earned by undertaking the permitted activities and
 3. that the profit does not include any profit on revaluation of the assets of the branch.

Authorised Dealer Category – I bank may permit intermittent remittances by project offices pending winding up / completion of the project subject to submission of the following:

- i. certified copy of the final audited project accounts;
- ii. the statutory auditor's certificate showing the manner of arriving at the remittable surplus and confirming that sufficient provisions have been made to meet the liabilities in India including Income Tax, etc.; and
- iii. An undertaking from the project office that the remittance will not, in any way, affect the completion of the project in India and that any shortfall of funds for meeting any liability in India will be met by inward remittance from abroad.

Acquisition of property

Regulation 4 (j) provides that acquisition of property by branch office/project office shall be governed by the guidelines issued under Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations.

Transfer of assets

A person resident outside India permitted under these Regulations to establish a branch office or liaison office or project office may apply to the concerned Authorised Dealer Category-I bank for transfer of its assets to a Joint Venture/Wholly Owned Subsidiary or any other entity in India. Authorised Dealer Category-I bank shall be guided by the instructions laid down by Reserve Bank in this regard {Regulation 4 (k)}.

Annual Activity Certificate (AAC)

The branch office/liaison office may submit the Annual Activity Certificate as at the end of March 31 along with the audited financial statements including receipt and payment account on or before September 30 of that year. In case the annual accounts of the office are finalized with reference to a date other than March 31, the AAC along with the audited financial statements may be submitted within six months from the due date of

Economic and Commercial Laws- Update

the Balance Sheets to the Authorised Dealer Category-bank and the Director General of Income Tax (International Taxation), Drum Shape Building, I.P. Estate, New Delhi 110002.

AAC from a Chartered Accountant showing the project status and certifying that the accounts of the project office have been audited and the activities undertaken are in conformity with the general/ specific permission given by the Reserve Bank may be submitted by the project office to the designated Authorised Dealer Category-I bank{Regulation 4 (l)}.

Closure of office and remittance of winding up proceeds

I. Requests for closure of the branch office/liaison office may be submitted to the Authorised Dealer Category - I bank along with the following documents:

i. Copy of the Reserve Bank's/Authorised Dealer Category-I bank's approval for establishing the office.

ii. Auditor's certificate:

1. indicating the manner in which the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets;
2. confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc. of the office have been either fully met or adequately provided for;
3. confirming that no income accruing from sources outside India (including proceeds of exports) has remained unrepatriated to India.

iii. Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending against the office and there is no legal impediment to the remittance.

iv. A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the branch office/liaison in India.

v. Any other document/s, specified by the Reserve Bank/Authorised Dealer Category-I bank while granting approval.

II. Remittance of winding up proceeds of branch or liaison office established in India shall be governed by the guidelines issued under Foreign Exchange Management (Remittance of assets) Regulations{Regulation 4 (m)}.

Economic and Commercial Laws- Update

Approval of the Reserve Bank in certain cases for establishment of branch office, liaison office or project office or any other place of business in India

As per Regulation 5, any application from a person resident outside for opening of a branch office or a liaison office or a project office or any other place of business in India shall require prior approval of Reserve Bank in the following cases where

- a. the applicant is a citizen of or is registered/incorporated in Pakistan;
- b. the applicant is a citizen of or is registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau and the application is for opening a liaison, branch or project office in Jammu and Kashmir, North East region and Andaman and Nicobar Islands;
- c. the principal business of the applicant falls in the four sectors namely Defence, Telecom, Private Security and Information and Broadcasting:

Provided that in the case of proposal for opening a project office relating to defence sector, no separate reference or approval of Government of India shall be required if the said non-resident applicant has been awarded a contract by/ entered into an agreement with the Ministry of Defence or Service Headquarters or Defence Public Sector Undertakings.

- d. The applicant is a Non-Government Organisation, Non-Profit Organisation, Body/ Agency/ Department of a foreign government.

Such applications shall be forwarded to the Reserve Bank, Foreign Exchange Department, Central Office Cell, New Delhi by the Authorised Dealer Category-I bank and be considered in consultation with the Government of India.

**FOREIGN EXCHANGE MANAGEMENT (CURRENT ACCOUNT TRANSACTIONS)
AMENDMENT RULES, 2015**

Prior approval of Reserve Bank for certain transaction

As per Rule 5 of the Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015, every drawal of foreign exchange for transactions included in Schedule III shall be governed as provided therein:

Provided that this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

Transactions included in Schedule III

Facilities for individuals—

1. Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India.

- (i) Private visits to any country (except Nepal and Bhutan)
- (ii) Gift or donation.
- (iii) Going abroad for employment
- (iv) Emigration
- (v) Maintenance of close relatives abroad
- (vi) Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
- (vii) Expenses in connection with medical treatment abroad
- (viii) Studies abroad
- (ix) Any other current account transaction

Provided that for the purposes mentioned at item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (here in after referred to as the said Liberalised Remittance Scheme) if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

Provided further that if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual

Economic and Commercial Laws- Update

would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

Provided also that for a person who is resident but not permanently resident in India and

(a) is a citizen of a foreign State other than Pakistan; or

(b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company,

may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Explanation: For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident:

Provided also that a person other than an individual may also avail of foreign exchange facility, mutatis mutandis, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

Facilities for persons other than individual -

2. The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India.

(i) Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for-

(a) creation of Chairs in reputed educational institutes,

(b) contribution to funds (not being an investment fund) promoted by educational institutes; and

(c) contribution to a technical institution or body or association in the field of activity of the donor Company.

(ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.

(iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

(iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses."

3. Procedure

The procedure for drawal or remit of any foreign exchange under this schedule shall be the same as applicable for remitting any amount under the said Liberalised Remittance Scheme.

Liberalised Remittance Scheme (LRS)

Under Liberalised Remittance Scheme allow remittances by a resident individual up to USD 250,000 per financial year for any permitted current or capital account transaction or a combination of both. If an individual has already remitted any amount under the LRS, then the applicable limit for such an individual would be reduced from the present limit of USD 250,000 for the financial year by the amount already remitted. The permissible capital account transactions by an individual under LRS are:

- i) opening of foreign currency account abroad with a bank;
- ii) purchase of property abroad;
- iii) making investments abroad;
- iv) setting up Wholly owned subsidiaries and Joint Ventures abroad;
- v) extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.

The Scheme cannot be made use for making remittances for any prohibited or illegal activities such as margin trading, lottery, etc.

Requirements to be complied with by the remitter under LRS

The resident individual seeking to make the remittances should furnish an application cum declaration in the prescribed format to the Authorised Dealer / full fledged money changer (FFMC) concerned regarding the purpose of the remittances and declaration to the effect that the funds belong to the remitter and will not be used for the prohibited purposes referred to in Para 4 above. Resident individuals can also purchase foreign exchange from a full fledged money changer (FFMC) for private/business visits. Foreign exchange thus purchased from an FFMC should also be reckoned within the overall LRS limit USD 250,000 and declared accordingly in the application-cum-declaration form submitted to the Authorise Dealer bank.

FOREIGN DIRECT INVESTMENT POLICY 2016

INTENT AND OBJECTIVE

It is the intent and objective of the Government of India to attract and promote foreign direct investment in order to supplement domestic capital, technology and skills, for accelerated economic growth. Foreign Direct Investment, as distinguished from portfolio investment, has the connotation of establishing a 'lasting interest' in an enterprise that is resident in an economy other than that of the investor.

The Government has put in place a policy framework on Foreign Direct Investment, which is transparent, predictable and easily comprehensible. This framework is embodied in the Circular on Consolidated FDI Policy, which may be updated every year, to capture and keep pace with the regulatory changes, effected in the interregnum. The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India makes policy pronouncements on FDI through Press Notes/Press Releases which are notified by the Reserve Bank of India as amendments to the Foreign Exchange Management (Transfer or Issue of Security by Persons Resident Outside India) Regulations, 2000 (notification No. FEMA 20/2000-RB dated May 3, 2000). These notifications take effect from the date of issue of Press Notes/ Press Releases, unless specified otherwise therein. In case of any conflict, the relevant FEMA Notification will prevail. The procedural instructions are issued by the Reserve Bank of India vide A.P. (DIR Series) Circulars. The regulatory framework, over a period of time, thus, consists of Acts, Regulations, Press Notes, Press Releases, Clarifications, etc.

DEFINITIONS

'AD Category-I Bank' means a bank(Scheduled Commercial, State or Urban Cooperative) which is authorized under Section 10(1) of FEMA to undertake all current and capital account transactions according to the directions issued by the RBI from time to time.

'Authorized Bank' means a bank including a co-operative bank (other than an authorized dealer) authorized by the Reserve Bank to maintain an account of a person resident outside India.

'Authorized Dealer' means a person authorized as an authorized dealer under sub-section (1) of section 10 of FEMA.

'Authorized Person' means an authorized dealer, money changer, offshore banking unit or any other person for the time being authorized under sub-section (a) of section 10 of FEMA to deal in foreign exchange or foreign securities.

'Capital' means equity shares; fully, compulsorily & mandatorily convertible preference

Economic and Commercial Laws- Update

shares; fully, compulsorily & mandatorily convertible debentures and warrants.

The equity shares issued in accordance with the provisions of the Companies Act, as applicable, shall include equity shares that have been partly paid. Preference shares and convertible debentures shall be required to be fully paid, and should be mandatorily and fully convertible. Further, 'warrant' includes Share Warrant issued by an Indian Company in accordance to provisions of the Companies Act, as applicable.

'Capital account transaction' means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6 of FEMA.

'Control' shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements. For the purposes of Limited Liability Partnership, 'control' will mean right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of the LLP.

'Depository Receipt' (DR) means a negotiable security issued outside India by a Depository bank, on behalf of an Indian company, which represent the local Rupee denominated equity shares of the company held as deposit by a Custodian bank in India. DRs are traded on Stock Exchanges in the US, Singapore, Luxembourg, etc. DRs listed and traded in the US markets are known as American Depository Receipts (ADRs) and those listed and traded anywhere/elsewhere are known as Global Depository Receipts (GDRs).

"Employees' Stock Option" means the option given to the directors, officers or employees of a company or of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price.

'Erstwhile Overseas Corporate Body'(OCB) means a company, partnership firm, society and other corporate body owned directly or indirectly to the extent of at least sixty percent by non-resident Indians and includes overseas trust in which not less than sixty percent beneficial interest is held by non-resident Indians directly or indirectly but irrevocably and which was in existence on the date of commencement of the Foreign Exchange Management (Withdrawal of General Permission to Overseas Corporate Bodies (OCBs)) Regulations, 2003 (the Regulations) and immediately prior

Economic and Commercial Laws- Update

to such commencement was eligible to undertake transactions pursuant to the general permission granted under the Regulations.

'Foreign Currency Convertible Bond' (FCCB) means a bond issued by an Indian company expressed in foreign currency, the principal and interest of which is payable in foreign currency. FCCBs are issued in accordance with the Foreign Currency Convertible Bonds and ordinary shares (through depository receipt mechanism) Scheme, 1993 and subscribed by a non-resident entity in foreign currency and convertible into ordinary shares of the issuing company in any manner, either in whole, or in part.

'FDI' means investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000.

'FEMA' means the Foreign Exchange Management Act, 1999 (42 of 1999).

'FIPB' means the Foreign Investment Promotion Board constituted by the Government of India.

'Foreign Institutional Investor'(FII) means an entity established or incorporated outside India which proposes to make investment in India and which is registered as a FII in accordance with the Securities and Exchange Board of India (SEBI) (Foreign Institutional Investor) Regulations 1995.

'Foreign Portfolio Investor'(FPI) means a person registered in accordance with the provisions of Securities and Exchange Board of India (SEBI) (Foreign Portfolio Investors) Regulations, 2014, as amended from time to time.

'Foreign Venture Capital Investor' (FVCI) means an investor incorporated and established outside India, which is registered under the Securities and Exchange Board of India (Foreign Venture Capital Investor) Regulations, 2000 {SEBI(FVCI) Regulations} and proposes to make investment in accordance with these Regulations.

'Government route' means that investment in the capital of resident entities by non-resident entities can be made only with the prior approval of Government (FIPB, Department of Economic Affairs (DEA), Ministry of Finance or Department of Industrial Policy & Promotion, as the case may be).

'Group Company' means two or more enterprises which, directly or indirectly, are in a position to:

Economic and Commercial Laws- Update

- i. exercise twenty-six percent or more of voting rights in other enterprise; or
- ii. appoint more than fifty percent of members of board of directors in the other enterprise.

'Holding Company' would have the same meaning as defined in Companies Act, as applicable.

'Indian Company' means a company incorporated in India under the Companies Act, as applicable.

'Indian Venture Capital Undertaking' (IVCU) means an Indian company:

- (i) whose shares are not listed in a recognised stock exchange in India;
- (ii) Which is engaged in the business of providing services, production or manufacture of articles or things, but does not include such activities or sectors which are specified in the negative list by the SEBI, with approval of Central Government, by notification in the Official Gazette in this behalf

'Investment Vehicle' shall mean an entity registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose and shall include Real Estate Investment Trusts (REITs) governed by the SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (InvIts) governed by the SEBI (InvIts) Regulations, 2014 and Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012.

'Investing Company' means an Indian Company holding only investments in other Indian company/(ies), directly or indirectly, other than for trading of such holdings/securities.

'Investment on repatriable basis' means investment, the sale proceeds of which, net of taxes, are eligible to be repatriated out of India and the expression 'investment on non-repatriable basis' shall be construed accordingly.

'Joint Venture' (JV) means an Indian entity incorporated in accordance with the laws and regulations in India in whose capital a non-resident entity makes an investment.

'Limited Liability Partnership' means a Limited Liability Partnership firm, formed and registered under the Limited Liability Partnership Act, 2008.

'Manufacture', with its grammatical variations, means a change in a non-living physical

Economic and Commercial Laws- Update

object or article or thing- (a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or (b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure.

'Non-resident entity' means a 'person resident outside India' as defined under FEMA.

'Non-Resident Indian' (NRI) means an individual resident outside India who is a citizen of India or is an 'Overseas Citizen of India' cardholder within the meaning of section 7 (A) of the Citizenship Act, 1955. 'Persons of Indian Origin' cardholders registered as such under Notification No. 26011/4/98 F.I. dated 19.8.2002 issued by the Central Government are deemed to be 'Overseas Citizen of India' cardholders'

A company is considered as **'Owned'** by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and / or Indian companies, which are ultimately owned and controlled by resident Indian citizens. A Limited Liability Partnership will be considered as owned by resident Indian citizens if more than 50% of the investment in such an LLP is contributed by resident Indian citizens and/or entities which are ultimately 'owned and controlled by resident Indian citizens' and such resident Indian citizens and entities have majority of the profit share.

'Person' includes-

- i. an individual,
- ii. a Hindu undivided family,
- iii. a company,
- iv. a firm,
- v. an association of persons or a body of individuals whether incorporated or not,
- vi. every artificial juridical person, not falling within any of the preceding sub-clauses, and
- vii. any agency, office, or branch owned or controlled by such person.

'Person of Indian Origin' (PIO) means a citizen of any country other than Bangladesh or Pakistan, if

- i. he at any time held Indian Passport; or
- ii. he or either of his parents or any of his grandparents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or
- iii. the person is a spouse of an Indian citizen or a person referred to in sub-clause (i) or (ii).

'Person resident in India' means-

- (i) a person residing in India for more than one hundred and eighty-two days

Economic and Commercial Laws- Update

during the course of the preceding financial year but does not include-

- (A) A person who has gone out of India or who stays outside India, in either case-
- a) for or on taking up employment outside India, or
 - b) for carrying on outside India a business or vocation outside India, or
 - c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
- (B) A person who has come to or stays in India, in either case, otherwise than-
- a) for or on taking up employment in India; or
 - b) for carrying on in India a business or vocation in India, or
 - c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
- (ii) any person or body corporate registered or incorporated in India,
 - (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
 - (iv) an office, branch or agency outside India owned or controlled by a person resident in India.

'Person resident outside India' means a person who is not a Person resident in India.

'Portfolio Investment Scheme' means the Portfolio Investment Scheme referred to in Schedules 2, 2A & 3 of FEMA (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000.

'RBI' means the Reserve Bank of India established under the Reserve Bank of India Act, 1934.

'Resident Entity' means 'Person resident in India' excluding an individual.

'Resident Indian Citizen' shall be interpreted in line with the definition of 'person resident in India' as per FEMA, 1999, read in conjunction with the Indian Citizenship Act, 1955.

'SEBI' means the Securities and Exchange Board of India established under the Securities and Exchange Board of India Act, 1992.

'SEZ' means a Special Economic Zone as defined in Special Economic Zone Act, 2005.

'SIA' means Secretariat of Industrial Assistance in DIPP, Ministry of Commerce & Industry, Government of India.

'Sweat Equity Shares' means such equity shares as issued by a company to its directors

Economic and Commercial Laws- Update

or employees at a discount or for consideration other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

'Transferable Development Rights' (TDR) means certificates issued in respect of category of land acquired for public purposes either by the Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole.

'Unit' shall mean beneficial interest of an investor in the Investment Vehicle and shall include shares or partnership interests.

'Venture Capital Fund' (VCF) means an Alternative Investment Fund which invests primarily in unlisted securities of start-ups, emerging or early-stage venture capital undertakings mainly involved in new products, new services, technology or intellectual property right based activities or a new business model and shall include an angel fund as defined under Chapter III-A of SEBI (AIF) Regulations, 2012.

ELIGIBLE INVESTORS

A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, a citizen of Bangladesh or an entity incorporated in Bangladesh can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space and atomic energy and sectors/activities prohibited for foreign investment.

NRIs resident in Nepal and Bhutan as well as citizens of Nepal and Bhutan are permitted to invest in the capital of Indian companies on repatriation basis, subject to the condition that the amount of consideration for such investment shall be paid only by way of inward remittance in free foreign exchange through normal banking channels.

OCBs have been derecognized as a class of investors in India with effect from September 16, 2003. Erstwhile OCBs which are incorporated outside India and are not under the adverse notice of RBI can make fresh investments under FDI Policy as incorporated non-resident entities, with the prior approval of Government of India if the investment is through Government route; and with the prior approval of RBI if the investment is through Automatic route.

A company, trust and partnership firm incorporated outside India and owned and controlled by NRIs can invest in India with the special dispensation as available to NRIs under the FDI Policy.

Foreign Institutional Investor (FII) and Foreign Portfolio Investors (FPI) may in terms

Economic and Commercial Laws- Update

of Schedule 2 and 2A of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations, as the case may be, respectively, invest in the capital of an Indian company under the Portfolio Investment Scheme which limits the individual holding of an FII/FPI below 10% of the capital of the company and the aggregate limit for FII/FPI investment to 24% of the capital of the company. This aggregate limit of 24% can be increased to the sectoral cap/statutory ceiling, as applicable, by the Indian company concerned through a resolution by its Board of Directors followed by a special resolution to that effect by its General Body and subject to prior intimation to RBI. The aggregate FII/FPI investment, individually or in conjunction with other kinds of foreign investment, will not exceed sectoral/statutory cap.

Only registered FIIs/FPIs and NRIs as per Schedules 2,2A and 3 respectively of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, can invest/trade through a registered broker in the capital of Indian Companies on recognised Indian Stock Exchanges.

A SEBI registered Foreign Venture Capital Investor (FVCI) may contribute up to 100% of the capital of an Indian company engaged in any activity mentioned in Schedule 6 of Notification No. FEMA 20/2000, including startups irrespective of the sector in which it is engaged, under the automatic route. A SEBI registered FVCI can invest in a domestic venture capital fund registered under the SEBI (Venture Capital Fund) Regulations, 1996 or a Category- I Alternative Investment Fund registered under the SEBI (Alternative Investment Fund) Regulations, 2012. Such investments shall also be subject to the extant FEMA regulations and extant FDI policy including sectoral caps, etc. The investment can be made in equities or equity linked instruments or debt instruments issued by the company (including start-ups and if a startup is organised as a partnership firm or an LLP, the investment can be made in the capital or through any profit-sharing arrangement) or units issued by a VCF or by a Category-I AIF either through purchase by private arrangement either from the issuer of the security or from any other person holding the security or on a recognised stock exchange. It may also set up a domestic asset management company to manage its investments. SEBI registered FVCIs are also allowed to invest under the FDI Scheme, as non-resident entities, in other companies, subject to FDI Policy and FEMA regulations.

A Non- Resident Indian may subscribe to National Pension System governed and administered by Pension Fund Regulatory and Development Authority (PFRDA), provided such subscriptions are made through normal banking channels and the person is eligible to invest as per the provisions of the PFRDA Act. The annuity/ accumulated saving will be repatriable.

ELIGIBLE INVESTEE ENTITIES

FDI in an Indian Company

Indian companies can issue capital against FDI.

Economic and Commercial Laws- Update

FDI in Partnership Firm/Proprietary Concern

- (i) A Non-Resident Indian (NRI) or a Person of Indian Origin (PIO) resident outside India can invest in the capital of a firm or a proprietary concern in India on non-repatriation basis provided;
 - (a) Amount is invested by inward remittance or out of NRE/FCNR(B)/NRO account maintained with Authorized Dealers/Authorized banks.
 - (b) The firm or proprietary concern is not engaged in any agricultural/plantation or real estate business or print media sector.
 - (c) Amount invested shall not be eligible for repatriation outside India.
- (ii) Investments with repatriation option: NRIs/PIO may seek prior permission of Reserve Bank for investment in sole proprietorship concerns/partnership firms with repatriation option. The application will be decided in consultation with the Government of India.
- (iii) Investment by non-residents other than NRIs/PIO: A person resident outside India other than NRIs/PIO may make an application and seek prior approval of Reserve Bank for making investment in the capital of a firm or a proprietorship concern or any association of persons in India. The application will be decided in consultation with the Government of India.
- (iv) Restrictions: An NRI or PIO is not allowed to invest in a firm or proprietorship concern engaged in any agricultural/plantation activity or real estate business or print media.

FDI in Trusts

FDI is not permitted in Trusts other than in 'VCF' registered and regulated by SEBI and 'Investment vehicle'.

FDI in Limited Liability Partnerships (LLPs)

- i. FDI in LLPs is permitted subject to the following conditions:
- ii. FDI is permitted under the automatic route in Limited Liability Partnership (LLPs) operating in sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI-linked performance conditions.
- iii. An Indian company or an LLP, having foreign investment, is also permitted to

Economic and Commercial Laws- Update

make downstream investment in another company or LLP in sectors in which 100% FDI is allowed under the automatic route and there are no FDI-linked performance conditions. FDI in LLP is subject to the compliance of the conditions of LLP Act, 2008.

'Investment Vehicle'

An entity being 'investment vehicle' registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose including Real Estate Investment Trusts (REITs) governed by the SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (InvIts) governed by the SEBI (InvIts) Regulations, 2014, Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012 and notified under Schedule 11 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 is permitted to receive foreign investment from a person resident outside India (other than an individual who is citizen of or any other entity which is registered / incorporated in Pakistan or Bangladesh), including an Registered Foreign Portfolio Investor (RFPI) or a non-resident Indian (NRI).

ENTRY ROUTES FOR INVESTMENT

Investments can be made by non-residents in the equity shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares of an Indian company, through the Automatic Route or the Government Route. Under the Automatic Route, the non-resident investor or the Indian company does not require any approval from Government of India for the investment. Under the Government Route, prior approval of the Government of India is required. Proposals for foreign investment under Government route, are considered by FIPB.

Foreign investment in sectors/activities under government approval route will be subject to government approval where:

- (i) An Indian company is being established with foreign investment and is not owned by a resident entity or
- (ii) An Indian company is being established with foreign investment and is not controlled by a resident entity or
- (iii) The control of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non-

Economic and Commercial Laws- Update

- resident entities through amalgamation, merger/demerger, acquisition etc. or
- (iv) The ownership of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non-resident entities through amalgamation, merger/demerger, acquisition etc.
 - (v) It is clarified that Foreign investment shall include all types of foreign investments, direct and indirect, regardless of whether the said investments have been made under Schedule 1 (FDI), 2 (FII), 2A (FPI), 3 (NRI), 6 (FVCI), 9 (LLPs), 10 (DRs) and 11(Investment Vehicles) of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations. FCCBs and DRs having underlying of instruments which can be issued under Schedule 5, being in the nature of debt, shall not be treated as foreign investment. However, any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned as foreign investment.
 - (vi) Investment by NRIs under Schedule 4 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations will be deemed to be domestic investment at par with the investment made by residents.
 - (vii) A company, trust and partnership firm incorporated outside India and owned and controlled by non-resident Indians will be eligible for investments under Schedule 4 of FEMA (Transfer or issue of Security by Persons Resident Outside India) Regulations and such investment will also be deemed domestic investment at par with the investment made by residents.

Caps on Investments

Investments can be made by non-residents in the capital of a resident entity only to the extent of the percentage of the total capital as specified in the FDI policy.

Entry Conditions on Investment

Investments by non-residents can be permitted in the capital of a resident entity in certain sectors/activity with entry conditions. Such conditions may include norms for minimum capitalization, lock-in period, etc.

Other Conditions on Investment besides Entry Conditions

Besides the entry conditions on foreign investment, the investment/investors are required to comply with all relevant sectoral laws, regulations, rules, security conditions, and state/local laws/regulations.

PROHIBITED SECTORS

FDI is prohibited in:

- Lottery Business including Government/private lottery, online lotteries, etc.
- Gambling and Betting including casinos etc.
- Chit funds
- Nidhi company
- Trading in Transferable Development Rights (TDRs)
- Real Estate Business or Construction of Farm Houses

‘Real estate businesses shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.

- Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
- Activities/sectors not open to private sector investment e.g.(I) Atomic Energy and (II) Railway operations(other than permitted activities).

FDI- PERMITTED SECTORS

- Floriculture, Horticulture, Apiculture and Cultivation of Vegetables & Mushrooms under controlled conditions;
- Development and Production of seeds and planting material;
- Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture, under controlled conditions; and
- Services related to agro and allied sectors
- Tea sector including tea plantations
- Mining and Exploration of metal and non-metal ores
- Coal & Lignite
- Petroleum & Natural Gas
- Manufacture of items reserved for production in Micro and Small Enterprises (MSEs)
- Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951
- Broadcasting Carriage Services
- Broadcasting Content Services
- Print Media
- Civil Aviation
- Airports

Economic and Commercial Laws- Update

- Air Transport Services
- Courier services
- Construction Development: Townships, Housing, Built-up Infrastructure
- Industrial Parks
- Satellites- establishment and operation
- Private Security Agencies
- Telecom Services
- Cash & Carry Wholesale Trading/Wholesale Trading
- E-commerce activities
- Single Brand product retail trading
- Multi Brand Retail Trading
- Railway Infrastructure
- Asset Reconstruction Companies
- Banking- Private Sector
- Banking- Public Sector
- Commodity Exchanges
- Credit Information Companies (CIC)
- Infrastructure Company in the Securities Market
- Insurance
- Non-Banking Finance Companies (NBFC)
- Pharmaceuticals
- Power Exchanges.

TYPES OF INSTRUMENTS

1. Indian companies can issue equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares subject to pricing guidelines/valuation norms prescribed under FEMA Regulations. The price/conversion formula of convertible capital instruments should be determined upfront at the time of issue of the instruments. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such instruments, in accordance with the extant FEMA regulations [as per any internationally accepted pricing methodology on arm's length basis for the unlisted companies and valuation in terms of SEBI (ICDR) Regulations, for the listed companies.

Optionality clauses are allowed in equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares under FDI scheme, subject to the following conditions:

Economic and Commercial Laws- Update

(a) There is a minimum lock-in period of one year which shall be effective from the date of allotment of such capital instruments.

(b) After the lock-in period and subject to FDI Policy provisions, if any, the non-resident investor exercising option/right shall be eligible to exit without any assured return, as per pricing/valuation guidelines issued by RBI from time to time.

2. Other types of Preference shares/Debentures i.e. non-convertible, optionally convertible or partially convertible for issue of which funds have been received on or after May 1, 2007 are considered as debt. Accordingly all norms applicable for ECBs relating to eligible borrowers, recognized lenders, amount and maturity, end-use stipulations, etc. shall apply. Since these instruments would be denominated in rupees, the rupee interest rate will be based on the swap equivalent of London Interbank Offered Rate (LIBOR) plus the spread as permissible for ECBs of corresponding maturity.
3. The inward remittance received by the Indian company vide issuance of DRs and FCCBs are treated as FDI and counted towards FDI.
4. *Acquisition of Warrants and Partly Paid Shares* - An Indian company may issue warrants and partly paid shares to a person resident outside India subject to terms and conditions as stipulated by the Reserve Bank of India in this behalf, from time to time.
5. *Issue of Foreign Currency Convertible Bonds (FCCBs) and Depository Receipts(DRs)*
 - a) FCCBs/DRs may be issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and DR Scheme 2014 respectively, as per the guidelines issued by the Government of India there under from time to time.
 - b) DRs are foreign currency denominated instruments issued by a foreign Depository in a permissible jurisdiction against a pool of permissible securities issued or transferred to that foreign depository and deposited with a domestic custodian.
 - c) In terms of Notification No. FEMA.20/2000-RB dated May 3, 2000 as amended from time to time, a person will be eligible to issue or transfer eligible securities to a foreign depository, for the purpose of converting the securities so purchased into depository receipts in terms of Depository Receipts Scheme, 2014 and guidelines issued by the Government of India thereunder from time to time.

Economic and Commercial Laws- Update

- d) A person can issue DRs, if it is eligible to issue eligible instruments to person resident outside India under Schedules 1, 2, 2A, 3, 5 and 8 of Notification No. FEMA 20/2000-RB dated May 3, 2000, as amended from time to time.
- e) The aggregate of eligible securities which may be issued or transferred to foreign depositories, along with eligible securities already held by persons resident outside India, shall not exceed the limit on foreign holding of such eligible securities under the relevant regulations framed under FEMA, 1999.
- f) The pricing of eligible securities to be issued or transferred to a foreign depository for the purpose of issuing depository receipts should not be at a price less than the price applicable to a corresponding mode of issue or transfer of such securities to domestic investors under the relevant regulations framed under FEMA, 1999.
- g) The issue of depository receipts as per DR Scheme 2014 shall be reported to the Reserve Bank by the domestic custodian as per the reporting guidelines for DR Scheme 2014.
6. (i) *Two-way Fungibility Scheme*: A limited two-way Fungibility scheme has been put in place by the Government of India for ADRs/GDRs. Under this Scheme, a stock broker in India, registered with SEBI, can purchase shares of an Indian company from the market for conversion into ADRs/GDRs based on instructions received from overseas investors. Re-issuance of ADRs/GDRs would be permitted to the extent of ADRs/GDRs which have been redeemed into underlying shares and sold in the Indian market.
- (ii) *Sponsored ADR/GDR issue*: An Indian company can also sponsor an issue of ADR/GDR. Under this mechanism, the company offers its resident shareholders a choice to submit their shares back to the company so that on the basis of such shares, ADRs/GDRs can be issued abroad. The proceeds of the ADR/GDR issue are remitted back to India and distributed among the resident investors who had offered their Rupee denominated shares for conversion. These proceeds can be kept in Resident Foreign Currency (Domestic) accounts in India by the resident shareholders who have tendered such shares for conversion into ADRs/GDRs.

PROVISIONS RELATING TO ISSUE/ TRANSFER OF SHARES

The capital instruments should be issued within 180 days from the date of receipt of the inward remittance received through normal banking channels including escrow account

Economic and Commercial Laws- Update

opened and maintained for the purpose or by debit to the NRE/FCNR (B) account of the non-resident investor. In case, the capital instruments are not issued within 180 days from the date of receipt of the inward remittance or date of debit to the NRE/FCNR (B) account, the amount of consideration so received should be refunded immediately to the non-resident investor by outward remittance through normal banking channels or by credit to the NRE/FCNR (B) account, as the case may be. Non-compliance with the above provision would be reckoned as a contravention under FEMA and would attract penal provisions. In exceptional cases, refund of the amount of consideration outstanding beyond a period of 180 days from the date of receipt may be considered by the RBI, on the merits of the case.

Issue price of shares

Price of shares issued to persons resident outside India under the FDI Policy, shall not be less than –

- a. the price worked out in accordance with the SEBI guidelines, as applicable, where the shares of the company are listed on any recognised stock exchange in India;
- b. the fair valuation of shares done by a SEBI registered Merchant Banker or a Chartered Accountant as per any internationally accepted pricing methodology on arm's length basis, where the shares of the company are not listed on any recognised stock exchange in India; and
- c. the price as applicable to transfer of shares from resident to non-resident as per the pricing guidelines laid down by the Reserve Bank from time to time, where the issue of shares is on preferential allotment.

However, where non-residents (including NRIs) are making investments in an Indian company in compliance with the provisions of the Companies Act, as applicable, by way of subscription to its Memorandum of Association, such investments may be made at face value subject to their eligibility to invest under the FDI scheme.

Foreign Currency Account

Indian companies which are eligible to issue shares to persons resident outside India under the FDI Policy may be allowed to retain the share subscription amount in a Foreign Currency Account, with the prior approval of RBI.

Transfer of shares and convertible debentures

- (i) Subject to FDI sectoral policy (relating to sectoral caps and entry routes), applicable

Economic and Commercial Laws- Update

laws and other conditionalities including security conditions, non-resident investors can also invest in Indian companies by purchasing/acquiring existing shares from Indian shareholders or from other non-resident shareholders. General permission has been granted to non-residents/NRIs for acquisition of shares by way of transfer subject to the following:

- (a) A person resident outside India (other than NRI and erstwhile OCB) may transfer by way of sale or gift, the shares or convertible debentures to any person resident outside India (including NRIs). Government approval is not required for transfer of shares in the investee company from one non-resident to another non-resident in sectors which are under automatic route. In addition, approval of Government will be required for transfer of stake from one non-resident to another non-resident in sectors which are under Government approval route.
- (b) NRIs may transfer by way of sale or gift the shares or convertible debentures held by them to another NRI.
- (c) A person resident outside India can transfer any security to a person resident in India by way of gift.
- (d) A person resident outside India can sell the shares and convertible debentures of an Indian company on a recognized Stock Exchange in India through a stock broker registered with stock exchange or a merchant banker registered with SEBI.
- (e) A person resident in India can transfer by way of sale, shares/ convertible debentures (including transfer of subscriber's shares), of an Indian company under private arrangement to a person resident outside India, subject to the specified guidelines.
- (f) General permission is also available for transfer of shares/convertible debentures, by way of sale under private arrangement by a person resident outside India to a person resident in India, subject to the specified guidelines.
- (g) The above General Permission also covers transfer by a resident to a non-resident of shares/convertible debentures of an Indian company, engaged in an activity earlier covered under the Government Route but now falling under

Economic and Commercial Laws- Update

Automatic Route, as well as transfer of shares by a non-resident to an Indian company under buyback and/or capital reduction scheme of the company.

- (h) The Form FC-TRS should be submitted to the AD Category-I Bank, within 60 days from the date of receipt of the amount of consideration. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor/transferee, resident in India. However, in cases where the NR investor, including an NRI, acquires shares on the stock exchanges under the FDI scheme, the investee company would have to file form FC-TRS with the AD Category-I bank.

- (ii) The sale consideration in respect of equity instruments purchased by a person resident outside India, remitted into India through normal banking channels, shall be subjected to a Know Your Customer (KYC) check by the remittance receiving AD Category-I bank at the time of receipt of funds. In case, the remittance receiving AD Category-I bank is different from the AD Category-I bank handling the transfer transaction, the KYC check should be carried out by the remittance receiving bank and the KYC report be submitted by the customer to the AD Category-I bank carrying out the transaction along with the Form FC-TRS.

- (iii) A person resident outside India including a Non-Resident Indian investor who has already acquired and continues to hold the control in accordance with the SEBI (Substantial Acquisition of Shares and Takeover) Regulations can acquire shares of a listed Indian company on the stock exchange through a registered broker under FDI scheme provided that the original and resultant investments are in line with the extant FDI policy and FEMA regulations in respect of sectoral cap, entry route, mode of payment, reporting requirement, documentation, etc.

- (iv) *Escrow*: AD Category-I banks have been given general permission to open Escrow account and Special account of non-resident corporate for open offers/exit offers and delisting of shares. The relevant SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (SAST) Regulations or any other applicable SEBI Regulations/provisions of the Companies Act, as applicable will be applicable. AD Category-I banks have also been permitted to open and maintain, without prior approval of RBI, non-interest bearing Escrow accounts in Indian Rupees in India on behalf of residents and/or non-residents, towards payment of share purchase consideration and/or provide Escrow facilities for keeping securities to facilitate FDI transactions subject to the terms and conditions specified by RBI. SEBI authorised Depository Participants have also been permitted to open and maintain, without prior approval of RBI, Escrow accounts for securities subject to the terms and conditions as specified by RBI. In both cases, the Escrow agent shall necessarily

Economic and Commercial Laws- Update

be an AD Category-I bank or SEBI authorised Depository Participant (in case of securities' accounts). These facilities will be applicable for both issue of fresh shares to the non-residents as well as transfer of shares from/to the non-residents.

PRIOR PERMISSION OF RBI IN CERTAIN CASES FOR TRANSFER OF CAPITAL INSTRUMENTS

In the following cases require prior approval of RBI:

- (i) Transfer of capital instruments from resident to non-residents by way of sale where:
 - a) Transfer is at a price which falls outside the pricing guidelines specified by the Reserve Bank from time to time.
 - b) Transfer of capital instruments by the non-resident acquirer involving deferment of payment of the amount of consideration. Further, in case approval is granted for a transaction, the same should be reported in Form FC-TRS, to an AD Category-I bank for necessary due diligence, within 60 days from the date of receipt of the full and final amount of consideration.
- (ii) Transfer of any capital instrument, by way of gift by a person resident in India to a person resident outside India. While forwarding applications to Reserve Bank for approval for transfer of capital instruments by way of gift, the specified documents should be enclosed. Reserve Bank considers the following factors while processing such applications:
 - (a) The proposed transferee (donee) is eligible to hold such capital instruments under Schedules 1, 4 and 5 of Notification No. FEMA 20/2000-RB dated May 3, 2000, as amended from time to time.
 - (b) The gift does not exceed 5 per cent of the paid-up capital of the Indian company/each series of debentures/each mutual fund scheme.
 - (c) The applicable sectoral cap limit in the Indian company is not breached.
 - (d) The transferor (donor) and the proposed transferee (donee) are close relatives as defined in Section 2 (77) of Companies Act, 2013, as amended from time to time.

Economic and Commercial Laws- Update

- (e) The value of capital instruments to be transferred together with any capital instruments already transferred by the transferor, as gift, to any person residing outside India does not exceed the rupee equivalent of USD 50,000 during the financial year.
- (f) Such other conditions as stipulated by Reserve Bank in public interest from time to time.
- (iii) Transfer of shares from NRI to non-resident.

IN THE FOLLOWING CASES, APPROVAL OF RBI IS NOT REQUIRED

- A. Transfer of shares from a Non-Resident to Resident under the FDI scheme where the pricing guidelines under FEMA, 1999 are not met provided that:**
 - i. The original and resultant investment are in line with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation, etc.;
 - ii. The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations/guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/substantial acquisition/SEBI SAST, buy back); and
 - iii. Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations/guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.
- B. Transfer of shares from Resident to Non-Resident:**
 - i) where the transfer of shares requires the prior approval of the Government conveyed through FIPB as per the extant FDI policy provided that:**
 - a) the requisite approval of the FIPB has been obtained; and
 - b) the transfer of shares adheres with the pricing guidelines and documentation requirements as specified by the Reserve Bank of India from time to time.
 - ii) where the transfer of shares attract SEBI (SAST) Regulations** subject to the adherence with the pricing guidelines and documentation requirements as

Economic and Commercial Laws- Update

specified by Reserve Bank of India from time to time.

iii) where the transfer of shares does not meet the pricing guidelines under the FEMA, 1999 provided that:

- a) The resultant FDI is in compliance with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation etc.;
- b) The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations/guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/substantial acquisition/SEBI SAST); and
- c) Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations/guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

iv) where the investee company is in the financial sector provided that:

- a) Any 'fit and proper/due diligence' requirements as regards the non-resident investor as stipulated by the respective financial sector regulator, from time to time, have been complied with; and
- b) The FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, pricing, etc.), reporting requirements, documentation etc., are complied with.

CONVERSION OF ECB/LUMP SUM FEE/ROYALTY ETC. INTO EQUITY

(i) Indian companies have been granted general permission for conversion of External Commercial Borrowings (ECB) (excluding those deemed as ECB) in convertible foreign currency into equity shares/fully compulsorily and mandatorily convertible preference shares, subject to the following conditions and reporting requirements:

- (a) The activity of the company is covered under the Automatic Route for FDI or the company has obtained Government approval for foreign equity in the company;
- (b) The foreign equity after conversion of ECB into equity is within the

Economic and Commercial Laws- Update

sectoral cap, if any;

- (c) Pricing of shares is as per the Issue price of shares;
 - (d) Compliance with the requirements prescribed under any other statute and regulation in force; and
 - (e) The conversion facility is available for ECBs availed under the Automatic or Government Route and is applicable to ECBs, due for payment or not, as well as secured/unsecured loans availed from non-resident collaborators.
- (ii) General permission is also available for issue of shares/preference shares against lump sum technical know-how fee, royalty due for payment, subject to entry route, sectoral cap and pricing guidelines (as per the Issue price of shares) and compliance with applicable tax laws. Further, issue of equity shares against any other funds payable by the investee company, remittance of which does not require prior permission of the Government of India or Reserve Bank of India under FEMA, 1999 or any rules/ regulations framed or directions issued thereunder is permitted, provided that:
- (I) The equity shares shall be issued in accordance with the extant FDI guidelines on sectoral caps, pricing guidelines etc. as amended by Reserve bank of India, from time to time;

Explanation: Issue of shares/convertible debentures that require Government approval in terms of paragraph 3 of Schedule 1 of FEMA 20 or import dues deemed as ECB or trade credit or payable against import of second hand machinery shall continue to be dealt in accordance with extant guidelines;

- (II) The issue of equity shares under this provision shall be subject to tax laws as applicable to the funds payable and the conversion to equity should be net of applicable taxes.
- (iii) Issue of equity shares under the FDI policy is allowed under the Government route for the following:
- (I) import of capital goods/ machinery/ equipment (excluding second-hand machinery), subject to compliance with the following conditions:
 - (a) Any import of capital goods/machinery etc., made by a resident in India, has to be in accordance with the Export/Import Policy issued by Government of India/as defined by DGFT/FEMA provisions relating to

Economic and Commercial Laws- Update

imports.

- (b) The application clearly indicating the beneficial ownership and identity of the Importer Company as well as overseas entity.
 - (c) Applications complete in all respects, for conversions of import payables for capital goods into FDI being made within 180 days from the date of shipment of goods.
- (II) pre-operative/pre-incorporation expenses (including payments of rent etc.), subject to compliance with the following conditions:
- (a) Submission of FIRC for remittance of funds by the overseas promoters for the expenditure incurred.
 - (b) Verification and certification of the pre-incorporation/pre-operative expenses by the statutory auditor.
 - (c) Payments should be made by the foreign investor to the company directly or through the bank account opened by the foreign investor as provided under FEMA Regulations.
 - (d) The applications, complete in all respects, for capitalization being made within the period of 180 days from the date of incorporation of the company.

General conditions:

- All requests for conversion should be accompanied by a special resolution of the company.
- Government's approval would be subject to pricing guidelines of RBI and appropriate tax clearance.

ISSUE OF RIGHTS/BONUS SHARES

FEMA provisions allow Indian companies to freely issue Rights/Bonus shares to existing non-resident shareholders, subject to adherence to sectoral cap, if any. However, such issue of bonus/rights shares has to be in accordance with other laws/statutes like the Companies Act, as applicable, SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (in case of listed companies), etc. The offer on right basis to the persons resident outside India shall be:

Economic and Commercial Laws- Update

- (a) in the case of shares of a company listed on a recognized stock exchange in India, at a price as determined by the company;
- (b) in the case of shares of a company not listed on a recognized stock exchange in India, at a price which is not less than the price at which the offer on right basis is made to resident shareholders.

Prior permission of RBI for Rights issue to erstwhile OCBs

OCBs have been de-recognised as a class of investors from September 16, 2003. Therefore companies desiring to issue rights share to such erstwhile OCBs will have to take specific prior permission from RBI. As such, entitlement of rights share is not automatically available to erstwhile OCBs. However bonus shares can be issued to erstwhile OCBs without the approval of RBI.

Additional allocation of rights share by residents to non-residents

Existing non-resident shareholders are allowed to apply for issue of additional shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares over and above their rights share entitlements. The investee company can allot the additional rights share out of unsubscribed portion, subject to the condition that the overall issue of shares to non-residents in the total paid-up capital of the company does not exceed the sectoral cap.

Acquisition of shares under Scheme of Merger/Demerger/Amalgamation

Mergers/demergers/ amalgamations of companies in India are usually governed by an order issued by a competent Court on the basis of the Scheme submitted by the companies undergoing merger/demerger/amalgamation. Once the scheme of merger or demerger or amalgamation of two or more Indian companies has been approved by a Court in India, the transferee company or new company is allowed to issue shares to the shareholders of the transferor company resident outside India, subject to the conditions that:

- (i) the percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the sectoral cap, and
- (ii) the transferor company or the transferee or the new company is not engaged in activities which are prohibited under the FDI policy.

Economic and Commercial Laws- Update

Note: FIPB approval would not be required in case of mergers and acquisitions taking place in sectors under automatic route.

Issue of Non convertible/redeemable bonus preference shares or debentures

Indian companies are allowed to issue non-convertible/redeemable preference shares or debentures to non-resident shareholders, including the depositories that act as trustees for the ADR/GDR holders, by way of distribution as bonus from its general reserves under a Scheme of Arrangement approved by a Court in India under the provisions of the Companies Act, as applicable, subject to no-objection from the Income Tax Authorities.

Issue of Employees Stock Option Scheme (ESOPs) / Sweat Equity

An Indian company may issue “employees’ stock option” and/or “sweat equity shares” to its employees/directors or employees/directors of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries who are resident outside India, provided that :

- a. The scheme has been drawn either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the Companies (Share Capital and Debentures) Rules, 2014 notified by the Central Government under the Companies Act 2013, as the case may be.
- b. The “employee’s stock option”/ “sweat equity shares” issued to non-resident employees/directors under the applicable rules/regulations are in compliance with the sectoral cap applicable to the said company.
- c. Issue of “employee’s stock option”/ “sweat equity shares” by a company where foreign investment is under the approval route shall require prior approval of the Foreign Investment Promotion Board (FIPB) of Government of India.
- d. Issue of “employee’s stock option”/ “sweat equity shares” under the applicable rules/regulations to an employee/director who is a citizen of Bangladesh/Pakistan shall require prior approval of the Foreign Investment Promotion Board (FIPB) of Government of India.
- e. The issuing company shall furnish to the Regional Office concerned of the Reserve Bank of India under whose jurisdiction the registered office of the company operates, within 30 days from the date of issue of employees’ stock option or sweat equity shares, a return as per the Form-ESOP.

Share Swap

In cases of investment by way of swap of shares, irrespective of the amount, valuation of the shares will have to be made by a Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country. Approval of the Government will also be a prerequisite for investment by swap of shares for sector under Government approval route. No approval of the Government is required for investment in automatic route sectors by way of swap of shares.

Pledge of Shares

(A) A person being a promoter of a company registered in India (borrowing company), which has raised external commercial borrowings, may pledge the shares of the borrowing company or that of its associate resident companies for the purpose of securing the ECB raised by the borrowing company, provided that a no objection for the same is obtained from a bank which is an authorised dealer. The authorized dealer, shall issue the no objection for such a pledge after having satisfied itself that the external commercial borrowing is in line with the extant FEMA regulations for ECBs and that:

- i) the loan agreement has been signed by both the lender and the borrower,
- ii) there exists a security clause in the Loan Agreement requiring the borrower to create charge on financial securities, and
- iii) the borrower has obtained Loan Registration Number (LRN) from the Reserve Bank:

and the said pledge would be subject to the following conditions:

- a) the period of such pledge shall be co-terminus with the maturity of the underlying ECB;
- b) in case of invocation of pledge, transfer shall be in accordance with the extant FDI Policy and directions issued by the Reserve Bank;
- c) the Statutory Auditor has certified that the borrowing company will

Economic and Commercial Laws- Update

utilized/has utilized the proceeds of the ECB for the permitted end use/s only.

(B) Non-residents holding shares of an Indian company, can pledge these shares in favour of the AD bank in India to secure credit facilities being extended to the resident investee company for bonafide business purpose, subject to the following conditions:

- i. in case of invocation of pledge, transfer of shares should be in accordance with the FDI policy in vogue at the time of creation of pledge;
- ii. submission of a declaration/ annual certificate from the statutory auditor of the investee company that the loan proceeds will be / have been utilized for the declared purpose;
- iii. the Indian company has to follow the relevant SEBI disclosure norms; and
- iv. pledge of shares in favour of the lender (bank) would be subject to Section 19 of the Banking Regulation Act, 1949.

(C) Non-residents holding shares of an Indian company, can pledge these shares in favour of an overseas bank to secure the credit facilities being extended to the non-resident investor/non-resident promoter of the Indian company or its overseas group company, subject to the following:

- (i) loan is availed of only from an overseas bank;
- (ii) loan is utilized for genuine business purposes overseas and not for any investments either directly or indirectly in India;
- (iii) overseas investment should not result in any capital inflow into India;
- (iv) in case of invocation of pledge, transfer should be in accordance with the FDI policy in vogue at the time of creation of pledge; and
- (v) submission of a declaration/annual certificate from a Chartered Accountant/ Certified Public Accountant of the non-resident borrower that the loan proceeds will be / have been utilized for the declared purpose.

REMITTANCE AND REPATRIATION

Remittance of sale proceeds/Remittance on winding up/Liquidation of Companies:

- (i) Sale proceeds of shares and securities and their remittance is 'remittance of asset' governed by The Foreign Exchange Management (Remittance of Assets) Regulations, 2000 under FEMA.
- (ii) AD Category-I bank can allow the remittance of sale proceeds of a security (net of applicable taxes) to the seller of shares resident outside India, provided the security has been held on repatriation basis, the sale of security has been made in accordance with the prescribed guidelines and NOC/tax clearance certificate from the Income Tax Department has been produced.

Remittance on winding up/liquidation of Companies

AD Category-I banks have been allowed to remit winding up proceeds of companies in India, which are under liquidation, subject to payment of applicable taxes. Liquidation may be subject to any order issued by the court winding up the company or the official liquidator in case of voluntary winding up under the provisions of the Companies Act, , as applicable. AD Category-I banks shall allow the remittance provided the applicant submits:

- a. No objection or Tax clearance certificate from Income Tax Department for the remittance.
- b. Auditor's certificate confirming that all liabilities in India have been either fully paid or adequately provided for.
- c. Auditor's certificate to the effect that the winding up is in accordance with the provisions of the Companies Act, as applicable.
- d. In case of winding up otherwise than by a court, an auditor's certificate to the effect that there are no legal proceeding pending in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

Economic and Commercial Laws- Update

Repatriation of Dividend

Dividends are freely repatriable without any restrictions (net after Tax deduction at source or Dividend Distribution Tax, if any, as the case may be). The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

Repatriation of Interest

Interest on fully, mandatorily & compulsorily convertible debentures is also freely repatriable without any restrictions (net of applicable taxes). The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

REPORTING OF FDI

Reporting of Inflow

- (i) An Indian company receiving investment from outside India for issuing shares/convertible debentures/preference shares under the FDI Scheme, should report the details of the amount of consideration to the Regional Office concerned of the Reserve Bank not later than 30 days from the date of receipt in the Advance Reporting Form.
- (ii) Indian companies are required to report the details of the receipt of the amount of consideration for issue of shares/convertible debentures, through an AD Category-I bank, together with a copy/ies of the FIRC/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor from the overseas bank remitting the amount. The report would be acknowledged by the Regional Office concerned, which will allot a Unique Identification Number (UIN) for the amount reported.

Explanation: An Indian company issuing partly paid equity shares, shall furnish a report not later than 30 days from the date of receipt of each call payment.

Reporting of issue of shares

- (iii) After issue of shares (including bonus and shares issued on rights basis and shares issued under ESOP)/fully, mandatorily & compulsorily convertible debentures/fully, mandatorily & compulsorily convertible

Economic and Commercial Laws- Update

preference shares, the Indian company has to file Form FC-GPR, not later than 30 days from the date of issue of shares.

(iv) Form FC-GPR has to be duly filled up and signed by Managing Director/Director/Secretary of the Company and submitted to the Authorized Dealer of the company, who will forward it to the Reserve Bank. The following documents have to be submitted along with the form:

(a) A certificate from the Company Secretary of the company certifying that:

(A) all the requirements of the Companies Act, as applicable, have been complied with;

(B) terms and conditions of the Government of India approval, if any, have been complied with;

(C) the company is eligible to issue shares under these Regulations; and

(D) the company has all original certificates issued by authorized dealers in India evidencing receipt of amount of consideration.

Note: For companies with paid up capital with less than Rs.5 crore, the above mentioned certificate can be given by a practicing company secretary.

(b) A certificate from SEBI registered Merchant Banker or Chartered Accountant indicating the manner of arriving at the price of the shares is India to the persons resident outside India.

(c) The report of receipt of consideration as well as Form FC-GPR have to be submitted by the AD Category-I bank to the Regional Office concerned of the Reserve Bank under whose jurisdiction the registered office of the company is situated.

Note: An Indian company issuing partly paid equity shares shall file a report in form FC-GPR to the extent they become paid up.

(d) Annual return on Foreign Liabilities and Assets should be filed on an annual basis by the Indian company, directly with the Reserve Bank. This is an annual return to be submitted by 15th of July every year, pertaining to all investments by way of direct/portfolio investments/reinvested earnings/other capital in

Economic and Commercial Laws- Update

the Indian company made during the previous years (i.e. the information submitted by 15th July will pertain to all the investments made in the previous years up to March 31). The details of the investments to be reported would include all foreign investments made into the company which is outstanding as on the balance sheet date. The details of overseas investments in the company both under direct/portfolio investment may be separately indicated.

- (e) Issue of bonus/rights shares or stock options to persons resident outside India directly or on amalgamation/merger/demerger with an existing Indian company, as well as issue of shares on conversion of ECB/royalty/lumpsum technical know-how fee/import of capital goods by units in SEZs, has to be reported in Form FC-GPR.

Reporting of transfer of shares

Reporting of transfer of shares between residents and non-residents and vice-versa is to be done in Form FC-TRS. The Form FC-TRS should be submitted to the AD Category-I bank, within 60 days from the date of receipt of the amount of consideration. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor/transferee, resident in India. However, in cases where the NR investor, including an NRI, acquires shares on the stock exchanges under the FDI scheme, the investee company would have to file form FC-TRS with the AD Category-I bank. The AD Category-I bank, would forward the same to its link office. The link office would consolidate the Form FC-TRS and submit a monthly report to the Reserve Bank.

Reporting of Non-Cash

Details of issue of shares against conversion of ECB have to be reported to the Regional Office concerned of the RBI, as indicated below:

In case of **full conversion** of ECB into equity, the company shall report the conversion in Form FC-GPR to the Regional Office concerned of the Reserve Bank as well as in Form ECB-2 to the Department of Statistics and Information Management (DSIM), Reserve Bank of India, Bandra-Kurla Complex, Mumbai- 400 051, within seven working days from the close of month to which it relates. The words "ECB wholly converted to equity" shall be clearly indicated on top of the Form ECB-2. Once reported, filing of Form ECB-2 in the subsequent months is not necessary.

Economic and Commercial Laws- Update

In case of **partial conversion** of ECB, the company shall report the converted portion in Form FC-GPR to the Regional Office concerned as well as in Form ECB-2 clearly differentiating the converted portion from the non-converted portion."The words "ECB partially converted to equity" shall be indicated on top of the Form ECB-2. In the subsequent months, the outstanding balance of ECB shall be reported in Form ECB-2 to DSIM.

Reporting of FCCB/DR Issues

The domestic custodian shall report the issue/transfer of sponsored/unsponsored depository receipts as per DR Scheme 2014 in 'Form DRR' within 30 days of close of the issue/ program.

ADHERENCE TO GUIDELINES/ORDERS AND CONSEQUENCES OF VIOLATION

FDI is a capital account transaction and thus any violation of FDI regulations are covered by the penal provisions of the FEMA. Reserve Bank of India administers the FEMA and Directorate of Enforcement under the Ministry of Finance is the authority for the enforcement of FEMA. The Directorate takes up investigation in any contravention of FEMA.

PENALTIES

If a person violates/contravenes any FDI Regulations, by way of breach/non-adherence/non-compliance/contravention of any rule, regulation, notification, press note, press release, circular, direction or order issued in exercise of the powers under FEMA or contravenes any conditions subject to which an authorization is issued by the Government of India/FIPB/Reserve Bank of India, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contraventions where such amount is quantifiable, or up to two lakh Rupees where the amount is not quantifiable, and where such contraventions is a continuing one, further penalty which may extend to five thousand Rupees for every day after the first day during which the contraventions continues.

Where a person committing a contravention of any provisions of this Act or of any rule, direction or order made there under is a company (company means any body corporate and includes a firm or other association of individuals as defined in the Companies Act), every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to

Economic and Commercial Laws- Update

be proceeded against and punished accordingly.

Any Adjudicating Authority adjudging any contraventions under 3.1(i) above, may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government.

ADJUDICATION AND APPEALS

For the purpose of adjudication of any contravention of FEMA, the Ministry of Finance as per the provisions contained in the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 appoints officers of the Central Government as the Adjudicating Authorities for holding an enquiry in the manner prescribed. A reasonable opportunity has to be given to the person alleged to have committed contraventions against whom a complaint has been made for being heard before imposing any penalty.

The Central Government may appoint as per the provisions contained in the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, an Appellate Authority/ Appellate Tribunal to hear appeals against the orders of the adjudicating authority.

COMPOUNDING PROCEEDINGS

Under the Foreign Exchange (Compounding Proceedings) Rules 2000, the Central Government may appoint 'Compounding Authority' an officer either from Enforcement

Directorate or Reserve Bank of India for any person contravening any provisions of the FEMA. The Compounding Authorities are authorized to compound the amount involved in the contravention to the Act made by the person. No contravention shall be compounded unless the amount involved in such contravention is quantifiable. Any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention. The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings. The Compounding Authority shall pass an order of compounding after affording an opportunity of being heard to all the concerns as expeditiously and not later than 180 days from the date of application made to the Compounding Authority. Compounding Authority shall issue order specifying the provisions of the Act or of the rules, directions, requisitions or orders made there under in respect of which contravention has taken place along with details of the alleged contraventions.

LESSON 2

FOREIGN TRADE POLICY AND PROCEDURES

SECTION I

FOREIGN TRADE POLICY AND PROCEDURES

2015-20

INTRODUCTION

India's Foreign Trade Policy (FTP) has, conventionally, been formulated for five years at a time and reviewed annually. The focus of the FTP has been to provide a framework of rules and procedures for exports and imports and a set of incentives for promoting exports. The FTP for 2015-2020 seeks to achieve the following objectives:

- (i) To provide a stable and sustainable policy environment for foreign trade in merchandise and services;
- (ii) To link rules, procedures and incentives for exports and imports with other initiatives such as "Make in India", "Digital India" and "Skills India" to create an "Export Promotion Mission" for India;
- (iii) To promote the diversification of India's export basket by helping various sectors of the Indian economy to gain global competitiveness with a view to promoting exports;
- (iv) To create an architecture for India's global trade engagement with a view to expanding its markets and better integrating with major regions, thereby increasing the demand for India's products and contributing to the government's flagship "Make in India" initiative;
- (v) To provide a mechanism for regular appraisal in order to rationalise imports and reduce the trade imbalance.

Exports should not merely be a function of marketable surplus but should also reflect an enhancement of economic capacity and development. Foreign Trade Policy envisages:

- Employment creation in both manufacturing and services through the generation of foreign trade opportunities
- Zero defect products with a focus on quality and standards;
- A stable agricultural trade policy encouraging the import of raw material where required and export of processed products;

Economic and Commercial Laws- Update

- A focus on higher value addition and technology infusion;
- Investment in agriculture overseas to produce raw material for the Indian industry;
- Lower tariffs on inputs and raw materials; and
- Development of trade infrastructure and provision of production and export incentives.

Focus of the Foreign Trade Policy (FTP)

The Foreign Trade Policy is primarily focused on accelerating exports. This is sought to be implemented through various schemes intended to exempt and remit indirect taxes on inputs physically incorporated in the export product, import capital goods at concessional duty, stimulate services exports and focus on specific markets and products. The Policy attempts to dovetail these schemes with the specific market access openings that India has achieved through negotiations with its trading partners for various bilateral and regional trading arrangements.

Legal Basis of Foreign Trade Policy (FTP)

The Foreign Trade Policy 2015-20, is notified by Central Government, in exercise of powers conferred under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992, as amended. The Foreign Trade Policy, 2015-20 came into force with effect from 01.04.2015

Amendment to Foreign Trade Policy (FTP)

Central Government, in exercise of powers conferred by Section 5 of FT (D&R) Act, 1992, as amended from time to time, reserves the right to make any amendment to the FTP, by means of notification, in public interest.

Duration of Foreign Trade Policy (FTP)

The Foreign Trade Policy (FTP), 2015-2020, incorporating provisions relating to export and import of goods and services, shall come into force with effect from the date of notification and shall remain in force up to 31st March, 2020, unless otherwise specified. All exports and imports made upto the date of notification shall, accordingly, be governed by the relevant FTP, unless otherwise specified.

Transitional Arrangements

Any License / Authorisation / Certificate / Scrip / any instrument bestowing financial or fiscal benefit issued before commencement of FTP 2015-20 shall continue to be valid for the purpose and duration for which such License/Authorisation/ Certificate / Scrip

Economic and Commercial Laws- Update

/ any instrument bestowing financial or fiscal benefit Authorisation was issued, unless otherwise stipulated.

In case an export or import that is permitted freely under FTP is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted, notwithstanding such restriction or regulation, unless otherwise stipulated. This is subject to the condition that the shipment of export or import is made within the original validity period of an irrevocable commercial letter of credit, established before the date of imposition of such restriction and it shall be restricted to the balance value and quantity available and time period of such irrevocable letter of credit. For operationalising such irrevocable letter of credit, the applicant shall have to register the Letter of Credit with jurisdictional Regional Authority (RA) against computerized receipt, within 15 days of the imposition of any such restriction or regulation.

DEFINITIONS

For purpose of Foreign Trade Policy, unless context otherwise requires, the following words and expressions shall have the following meanings attached to them:-

"Accessory" or "Attachment" means a part, sub-assembly or assembly that contributes to efficiency or effectiveness of a piece of equipment without changing its basic functions.

"Act" means Foreign Trade (Development and Regulation) Act, 1992 (No.22 of 1992) [FT (D&R) Act] as amended from time to time.

"Actual User" is a person (either natural or legal) who is authorized to use imported goods in his/its own premise which has a definitive postal address.

(a) "Actual User (Industrial)" is a person (either natural & legal) who utilizes imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit which has a definitive postal address.

(b) "Actual User (Non-Industrial)" is a person (either natural & legal) who utilizes the imported goods for his own use in:

(i) any commercial establishment, carrying on any business, trade or profession, which has a definitive postal address; or

(ii) any laboratory, Scientific or Research and Development (R&D) institution, university or other educational institution or hospital which has a definitive postal address; or

(iii) any service industry which has a definitive postal address.

Economic and Commercial Laws- Update

"**AEZ**" means Agricultural Export Zones notified by Director General of Foreign Trade (DGFA) in Appendix 2V of Appendices and Aayat Niryat Forms of FTP 2015.

"**Appeal**" is an application filed under section 15 of the Act and includes such applications preferred by DGFT officials in government interest against decision by designated adjudicating/appellate authorities.

"**Applicant**" means person on whose behalf an application is made and shall, wherever context so requires, includes person signing the application.

"**Authorization**" means permission as included in Section 2 (g) of the Act to import or export as per provisions of FTP.

"**Capital Goods**" means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological up-gradation or expansion. It includes packaging machinery and equipment, refrigeration equipment, power generating sets, machine tools, equipment and instruments for testing, research and development, quality and pollution control.

Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in services sector.

"**Competent Authority**" means an authority competent to exercise any power or to discharge any duty or function under the Act or the Rules and Orders made there under or under FTP.

"**Component**" means one of the parts of a sub-assembly or assembly of which a manufactured product is made up and into which it may be resolved. A component includes an accessory or attachment to another component.

"**Consumables**" means any item, which participates in or is required for a manufacturing process, but does not necessarily form part of end-product. Items, which are substantially or totally consumed during a manufacturing process, will be deemed to be consumables.

"**Consumer Goods**" means any consumption goods, which can directly satisfy human needs without further processing and includes consumer durables and accessories thereof.

"**Counter Trade**" means any arrangement under which exports/imports from /to India are balanced either by direct imports/exports from importing/exporting country or through a third country under a Trade Agreement or otherwise. Exports/ Imports under Counter Trade may be carried out through Escrow Account, Buy Back arrangements, Barter trade or any similar arrangement. Balancing of exports and imports could wholly or partly be in cash, goods and/or services.

Economic and Commercial Laws- Update

"Developer" means a person or body of persons, company, firm and such other private or government undertaking, who develops, builds, designs, organises, promotes, finances, operates, maintains or manages a part or whole of infrastructure and other facilities in SEZ as approved by Central Government and also includes a co-developer.

"Development Commissioner" means Development Commissioner of Special Economic Zone (SEZ).

"Domestic Tariff Area (DTA)" means area within India which is outside SEZs and Export Oriented Undertaking (EOU) / Electronic Hardware Technology Park (EHTP) / Software Technology Park (STP) Biotechnology Park (BTP).

"Drawback on deemed export" in relation to any goods manufactured in India and supplied as deemed exports, means the rebate of duty or tax, as the case may be, chargeable on any imported materials or excisable materials used or taxable services used as input services in the manufacture of such goods.

"EOU" means Export Oriented Unit for which a letter of permit has been issued by Development Commissioner.

"Excisable goods" means any goods produced or manufactured in India and subject to duty of excise under Central Excise and Salt Act 1944 (1 of 1944).

"Export" is as defined in FT (D&R) Act, 1992, as amended from time to time.

"Exporter" means a person who exports or intends to export and holds an IEC number, unless otherwise specifically exempted.

"Export Obligation" means obligation to export product or products covered by Authorisation or permission in terms of quantity, value or both, as may be prescribed or specified by Regional or competent authority.

"Free" as appearing in context of import/export policy for items means goods which do not need any 'Authorisation'/ License or permission for being imported into the country or exported out.

"FTP" means the Foreign Trade Policy which specifies policy for exports and imports under Section 5 of the Act.

"Import" is as defined in FT (D&R) Act, 1992 as amended from time to time.

"Importer" means a person who imports or intends to import and holds an Import Export Numbered (IEC) number, unless otherwise specifically exempted.

ITC (HS) refers to Indian Trade Classification (Harmonized System) at 8 digits.

Economic and Commercial Laws- Update

"Jobbing" means processing or working upon of raw materials or semi-finished goods supplied to job worker, so as to complete a part of process resulting in manufacture or finishing of an article or any operation which is essential for aforesaid process.

"Licensing Year" means period beginning on the 1st April of a year and ending on the 31st March of the following year.

"Managed Hotel" means hotels managed by a three star or above hotel/ hotel chain under an operating management contract for a duration of at least three years between operating hotel/ hotel chain and hotel being managed. Management contract must necessarily cover the entire gamut of operations/ management of managed hotel.

"Manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, re-packing, polishing, labelling, Re-conditioning repair, remaking, refurbishing, testing, calibration, re-engineering.

Manufacture, for the purpose of FTP, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining.

"Manufacturer Exporter" means a person who exports goods manufactured by him or intends to export such goods.

"Merchant Exporter" means a person engaged in trading activity and exporting or intending to export goods.

"NC" means the Norms Committee in the Directorate General of Foreign Trade for approval of adhoc input -output norms in cases where SION does not exist and recommend SION to be notified in DGFT.

"Notification" means a notification published in Official Gazette.

"Order" means an Order made by Central Government under the Act.

"Part" means an element of a sub-assembly or assembly not normally useful by itself, and not amenable to further disassembly for maintenance purposes. A part may be a component, spare or an accessory.

"Person" means both natural and legal and includes an individual, firm, society, company, corporation or any other legal person including the DGFT officials.

"Policy" means Foreign Trade Policy (2015-2020) as amended from time to time.

"Prescribed" means prescribed under the Act or the Rules or Orders made there under or under FTP.

Economic and Commercial Laws- Update

"Prohibited" indicates the import/export policy of an item, as appearing in ITC (HS) or elsewhere, whose import or export is not permitted.

"Public Notice" means a notice published under provisions of paragraph 2.04 of FTP.

"Quota" means the quantity of goods of a specific kind that is permitted to be imported without restriction or imposition of additional Duties.

"Raw material" means input(s) needed for manufacturing of goods. These inputs may either be in a raw/natural/ unrefined/ unmanufactured or manufactured state.

"Regional Authority" means authority competent to grant an Authorisation under the Act / Order.

"Registration-Cum-Membership Certificate" (RCMC) means certificate of registration and membership granted by an Export Promotion Council / Commodity Board / Development Authority or other competent authority as prescribed in FTP or Handbook of Procedures.

"Restricted" is a term indicating the import or export policy of an item, which can be imported into the country or exported outside, only after obtaining an authorization from the offices of DGFT.

"Rules" means Rules made by Central Government under Section 19 of the FT (D&R) Act.

"SCOMET" is the nomenclature for dual use items of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET). Export of dual-use items and technologies under India's Foreign Trade Policy is regulated. It is either prohibited or is permitted under an authorization.

"Services" include all tradable services covered under General Agreement on Trade in Services (GATS) and earning free foreign exchange. "Service Provider" means a person providing:

- (i) Supply of a 'service' from India to any other country; (Mode1- Cross border trade)
- (ii) Supply of a 'service' from India to service consumer(s) of any other country; (Mode 2-Consumption abroad)
- (iii)Supply of a 'service' from India through commercial presence in any other country. (Mode 3 – Commercial Presence.)
- (iv)Supply of a 'service' from India through the presence of natural persons in any other country (Mode 4- Presence of natural persons.)

"Ships" mean all types of vessels used for sea borne trade or coastal trade, and shall include second hand vessels.

Economic and Commercial Laws- Update

"**SION**" means Standard Input Output Norms notified by DGFT.

"**Spares**" means a part or a sub-assembly or assembly for substitution that is ready to replace an identical or similar part or sub- assembly or assembly. Spares include a component or an accessory.

"**Specified**" means specified by or under the provisions of this Policy through Notification / Public Notice.

"**Status holder**" means an exporter recognized as One Star Export House/ Two Star Export House / Three Star Export House / Four Star Export House/ Five Star Export House by DGFT/ Development Commissioner.

"**Stores**" means goods for use in a vessel or aircraft and includes fuel and spares and other articles of equipment, whether or not for immediate fitting.

(a) "**Supporting Manufacturer**" is one who manufactures goods/products or any part/accessories/components of a good/product for a merchant exporter or a manufacturer exporter under a specific authorization.

(b) "**Supporting Manufacturer**" for the EPCG Scheme shall be one in whose premises/factory Capital Goods imported/ procured under EPCG authorization is installed.

State Trading Enterprises (STEs), for the purpose of this FTP, are those entities which are granted exclusive right / privileges export and / or import as per FTP.

"**Third-party exports**" means exports made by an exporter or manufacturer on behalf of another exporter(s).

In such cases, export documents such as shipping bills shall indicate name of manufacturing exporter /manufacturer and third party exporter(s). Bank Realisation Certificate, Self Declaration Form (SDF), export order and invoice should be in the name of third party exporter.

"**Transaction Value**" is as defined in Customs Valuation Rules of Department of Revenue.

GENERAL PROVISIONS REGARDING IMPORTS AND EXPORTS

Exports and Imports – 'Free', unless regulated

(a) Exports and Imports shall be 'Free' except when regulated by way of 'prohibition', 'restriction' or 'exclusive trading through State Trading Enterprises (STEs)' as laid down in Indian Trade Classification (Harmonised System) [ITC (HS)] of Exports and Imports.

(b) Further, there are some items which are 'free' for import/export, but subject to conditions stipulated in other Acts or in law for the time being in force.

Economic and Commercial Laws- Update

Indian Trade Classification (Harmonised System) [ITC (HS)] of Exports and Imports

(a) ITC (HS) is a compilation of codes for all merchandise / goods for export/ import. Goods are classified based on their group or sub-group at 2/4/6/8 digits.

(b) ITC (HS) is aligned at 6 digit level with international Harmonized System goods nomenclature maintained by World Customs Organization ([http://www. wcoomd.org](http://www.wcoomd.org)). However, India maintains national Harmonized System of goods at 8 digit level which may be viewed by clicking on 'Downloads' at <http://dgft.gov.in>.

(c) The import/export policies for all goods are indicated against each item in ITC (HS). Schedule 1 of ITC (HS) lays down the Import Policy regime while Schedule 2 of ITC (HS) details the Export Policy regime.

(d) Except where it is clearly specified, Schedule 1 of ITC (HS), Import Policy is for new goods and not for the Second Hand goods. For Second Hand goods, the Import Policy regime is given in Para 2.31 in this FTP.

Compliance of Imports with Domestic Laws

(a) Domestic Laws/ Rules/ Orders/ Regulations / Technical specifications/ environmental/ safety and health norms applicable to domestically produced goods shall apply, mutatis mutandis, to imports, unless specifically exempted.

(b) However, goods to be utilized/ consumed in manufacture of export products, as notified by DGFT, may be exempted from domestic standards/quality specifications.

Authority to specify Procedures

Director General of Foreign Trade (DGFT) may specify procedure to be followed by an exporter or importer or by any licensing/Regional Authority (RA) or by any other authority for purposes of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and FTP. Such procedure, or amendments, if any, shall be published by means of a Public Notice.

IMPORTER-EXPORTER CODE (IEC) NUMBER / E-IEC

An IEC is a 10-digit number allotted to a person that is mandatory for undertaking any export/import activities. Now the facility for IEC in electronic form or e-IEC has also been operationalised.

(a) Application for obtaining IEC can be filed manually and submitting the form in the office of Regional Authority (RA) of DGFT. Alternatively, Exporters / Importers shall file an application in ANF 2A format for grant of e-IEC. Those who have digital signatures can sign and submit the application online along with the requisite documents. Others may take a printout of the application, sign the undertaking/declaration, upload the

Economic and Commercial Laws- Update

same with other requisite documents and thereafter submit the signed copy of the online application form to concerned jurisdictional Regional Authorities (RA) either through post or by hand.

(b) Deficiency in the application form has to be removed by re-logging onto “Online IEC application” on DGFT website and filling the form again by paying the requisite application processing charges.

(c) When an e-IEC is approved by the competent authority, applicant is informed through e-mail that a computer generated e-IEC is available on the DGFT website. By clicking on “Application Status” after having filled and submitted the requisite details in “Online IEC Application” webpage, applicant can view and print his e-IEC.

Briefly, following are the requisite details /documents (scanned copies) to be submitted/ uploaded along with the application for IEC:

(i) Details of the entity seeking the IEC:

(1) PAN of the business entity in whose name Import/Export would be done (Applicant individual in case of Proprietorship firms).

(2) Address Proof of the applicant entity.

(3) LLPIN /CIN/ Registration Certification Number (whichever is applicable).

(4) Bank account details of the entity. Cancelled Cheque bearing entity’s pre-printed name or Bank certificate in prescribed format ANF2A(I).

(ii) Details of the Proprietor/ Partners/ Directors/ Secretary or Chief Executive of the Society/ Managing Trustee of the entity:

(1) PAN (for all categories)

(2) DIN/DPIN (in case of Company /LLP firm)

(iii) Details of the signatory applicant:

(1) Identity proof

(2) PAN

(3) Digital photograph

(d) In case the applicant has digital signature, the application can also be submitted online and no physical application or document is required. In case the applicant does not possess digital signature, a print out of the application filed online duly signed by the applicant has to be submitted to the concerned jurisdictional RA, in person or by post.

Economic and Commercial Laws- Update

No Export/Import without IEC:

No export or import shall be made by any person without obtaining an IEC number unless specifically exempted.

(a) The following categories of importers or exporters are exempted from obtaining IEC.

IEC Number Exempted Categories:

Sl. No.	Categories Exempted from obtaining IEC
(i)	Importers covered by clause 3(1) [except sub- clauses (e) and (l)] and exporters covered by clause 3(2) [except sub-clauses (i) and (k)] of Foreign Trade (Exemption from application of Rules in certain cases) Order, 1993.
(ii)	Ministries /Departments of Central or State Government
(iii)	Persons importing or exporting goods for personal use not connected with trade or manufacture or agriculture.
(iv)	Persons importing/exporting goods from/to Nepal, Myanmar through Indo-Myanmar border areas and China (through Gunji, Namgaya Shipkila and Nathula ports), provided CIF value of a single consignment does not exceed Indian Rs.25,000. In case of Nathula port, the applicable value ceiling will be Rs. 1,00,000/-

Further, exemption from obtaining IEC shall not be applicable for export of Special Chemicals, Organisms, Materials, Equipments and Technologies (SCOMET) as listed in Appendix - 3, Schedule 2 of ITC (HS) except in case of exports by category (ii) above.

(b) Following permanent IEC numbers shall be used by non – commercial Public Sector Undertaking (PSUs) and categories or importers / exporters mentioned against them for import / export purposes:

Sr. No.	Permanent IEC	Categories of Importer / Exporter
1	0100000011	All Ministries / Departments of Central Government and agencies wholly or partially owned by them.
2	0100000029	All Ministries / Departments of any State Government and agencies wholly or

Economic and Commercial Laws- Update

		partially owned by them.
3	0100000037	Diplomatic personnel, Counsellor officers in India and officials of UNO and its specialised agencies.
4	0100000045	Indians returning from / going abroad and claiming benefit under Baggage Rules.
5	0100000053	Persons /Institutions /Hospitals importing or exporting goods for personal use, not connected with trade or manufacture or agriculture.
6	0100000061	Persons importing/exporting goods from /to Nepal
7	0100000070	Persons importing / exporting goods from / to Myanmar through Indo-Myanmar border areas
8	0100000088	Ford Foundation.
9	0100000096	Importers importing goods for display or use in fairs/ exhibitions or similar events under provisions of ATA carnet. This IEC number can also be used by importers importing for exhibitions/fairs as per Paragraph 2.63 of Handbook of Procedures
10	0100000100	Director, National Blood Group
11	0100000126	Individuals /Charitable Institution /Registered NGOs importing goods, which have been exempted from Customs duty under Notification issued by Ministry of Finance for bonafide use by victims affected by natural calamity.

Economic and Commercial Laws- Update

12	0100000134	Persons importing/exporting permissible goods as notified from time to time, from /to China through Gunji, Namgaya Shipkila and Nathula ports, subject to value ceilings of single consignment as given in a (iv) above.
13	0100000169	Non-commercial imports and exports by entities who have been authorised by Reserve Bank of India.

Only one IEC against one Permanent Account Number (PAN)

Only one IEC is permitted against on Permanent Account Number (PAN). If any PAN card holder has more than one IEC, the extra IECs shall be disabled.

MANDATORY DOCUMENTS FOR EXPORT/IMPORT OF GOODS FROM/INTO INDIA

(a) Mandatory documents required for export of goods from India:

1. Bill of Lading/Airway Bill
2. Commercial Invoice cum Packing List*
3. Shipping Bill/Bill of Export

(b) Mandatory documents required for import of goods into India

1. Bill of Lading/Airway Bill
2. Commercial Invoice cum Packing List*
3. Bill of Entry

*[Note: *(i) As per CBEC Circular No. 01/15-Customs dated 12/01/2015. (ii) Separate Commercial Invoice and Packing List would also be accepted.]*

(c) For export or import of specific goods or category of goods, which are subject to any restrictions/policy conditions or require NOC or product specific compliances under any statute, the regulatory authority concerned may notify additional documents for purposes of export or import.

(d) In specific cases of export or import, the regulatory authority concerned may electronically or in writing seek additional documents or information, as deemed necessary to ensure legal compliance.

Economic and Commercial Laws- Update

PRINCIPLES OF RESTRICTIONS

DGFT may, through a Notification, impose restrictions on export and import, necessary for: -

- (a) Protection of public morals;
- (b) Protection of human, animal or plant life or health;
- (c) Protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
- (d) Prevention of use of prison labour;
- (e) Protection of national treasures of artistic, historic or archaeological value;
- (f) Conservation of exhaustible natural resources;
- (g) Protection of trade of fissionable material or material from which they are derived;
- (h) Prevention of traffic in arms, ammunition and implements of war.

EXPORT/IMPORT OF RESTRICTED GOODS/SERVICES

Any goods /service, the export or import of which is 'Restricted' may be exported or imported only in accordance with an Authorisation / Permission or in accordance with the procedure prescribed in a Notification / Public Notice issued in this regard.

EXPORTS FROM INDIA SCHEMES

The objective of the Export from India Schemes is to provide rewards to exporters to offset infrastructural inefficiencies and associated costs involved and to provide exporters a level playing field.

There shall be following two schemes for exports of Merchandise and Services respectively:

- (i) Merchandise Exports from India Scheme (MEIS).
- (ii) Service Exports from India Scheme (SEIS).

Nature of Rewards

Duty Credit Scrips shall be granted as rewards under MEIS and SEIS. The Duty Credit Scrips and goods imported / domestically procured against them shall be freely transferable. The Duty Credit Scrips can be used for:

Economic and Commercial Laws- Update

(i) Payment of Customs Duties for import of inputs or goods, except items listed in Appendix 3A of Appendices and Aayat Niryat Forms of FTP 2015-2020.

(ii) Payment of excise duties on domestic procurement of inputs or goods, including capital goods as per Department of Revenue (DoR) notification.

(iii) Payment of service tax on procurement of services as per DoR notification.

(iv) Payment of Customs Duty and fee as per Foreign Trade Policy.

Merchandise Exports from India Scheme (MEIS)

The objective of Merchandise Exports from India Scheme (MEIS) is to offset infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced/manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India's export competitiveness.

Entitlement under MEIS:

Exports of notified goods/products with ITC [HS] code, to notified markets as listed in Appendix 3B of Appendices and Aayat Niryat Forms of FTP 2015-2020, shall be rewarded under MEIS. Appendix 3B also lists the rate(s) of rewards on various notified products [ITC (HS) code wise]. The basis of calculation of reward would be on realised FOB value of exports in free foreign exchange, or on FOB value of exports as given in the Shipping Bills in free foreign exchange, whichever is less, unless otherwise specified.

Export of goods through courier or foreign post offices using e-Commerce:

(i) Exports of goods through courier or foreign post office using e-commerce, as notified in Appendix 3C of Appendices and Aayat Niryat Forms) of FTP 2015-2020, of FOB value upto Rs. 25000 per consignment shall be entitled for rewards under MEIS.

(ii) If the value of exports using e-commerce platform is more than Rs 25000 per consignment then MEIS reward would be limited to FOB value of Rs.25000 only.

(iii) Such goods can be exported in manual mode through Foreign Post Offices at New Delhi, Mumbai and Chennai.

(iv) Export of such goods under Courier Regulations shall be allowed manually on pilot basis through Airports at Delhi, Mumbai and Chennai as per appropriate amendments in regulations to be made by Department of Revenue. Department of Revenue shall fast track the implementation of Electronic Data Interchange (EDI) mode at courier terminals.

Ineligible categories under MEIS:

The following exports categories /sectors shall be ineligible for Duty Credit Scrip entitlement under MEIS

Economic and Commercial Laws- Update

- (i) EOUs / EHTPs / BTPs/ STPs who are availing direct tax benefits / exemption.
- (ii) Supplies made from DTA units to SEZ units
- (iii) Export of imported goods covered;
- (iv) Exports through trans-shipment, meaning thereby exports that are originating in third country but trans-shipped through India;
- (v) Deemed Exports;
- (vi) SEZ/EOU/EHTP/BPT/FTWZ products exported through DTA units;
- (vii) Items, which are restricted or prohibited for export under Schedule-2 of Export Policy in ITC (HS), unless specifically notified in Appendix 3B.
- (viii) Service Export.
- (ix) Red sanders and beach sand.
- (x) Export products which are subject to Minimum export price or export duty.
- (xi) Diamond Gold, Silver, Platinum, other precious metal in any form including plain and studded jewellery and other precious and semi-precious stones.
- (xii) Ores and concentrates of all types and in all formations.
- (xiii) Cereals of all types.
- (xiv) Sugar of all types and all forms.
- (xv) Crude / petroleum oil and crude / primary and base products of all types and all formulations.
- (xvi) Export of milk and milk products.
- (xvii) Export of Meat and Meat Products.
- (xviii) Products wherein precious metal/diamond are used or Articles which are studded with precious stones.
- (xix) Exports made by units in Free Trade and Warehousing Zone(FTWZ) .

Service Exports from India Scheme (SEIS)

The objective of Service Exports from India Scheme (SEIS) is to encourage export of notified Services from India.

Eligibility:

(a) Service Providers of notified services, located in India, shall be rewarded under SEIS, subject to conditions as may be notified. The notified services and rates of rewards are listed in Appendix 3D of Appendices and Aayat Niryat Forms of FTP 2015-2020. Following Services shall be eligible:

Economic and Commercial Laws- Update

- (i) Supply of a 'service' from India to any other country; (Mode1- Cross border trade)
- (ii) Supply of a 'service' from India to service consumer(s) of any other country; (Mode 2-Consumption abroad).
- (b) Such service provider should have minimum net free foreign exchange earnings of US\$15,000 in preceding financial year to be eligible for Duty Credit Scrip. For Individual Service Providers and sole proprietorship, such minimum net free foreign exchange earnings criteria would be US\$10,000 in preceding financial year.
- (c) Payment in Indian Rupees for service charges earned on specified services, shall be treated as receipt in deemed foreign exchange as per guidelines of Reserve Bank of India. The list of such services is indicated in Appendix 3E of Appendices and Aayat Niryat Forms of FTP 2015-2020.

(d) Net Foreign exchange earnings for the scheme are defined as under:

Net Foreign Exchange = Gross Earnings of Foreign Exchange minus Total expenses / payment / remittances of Foreign Exchange by the IEC holder, relating to service sector in the Financial year.

(e) If the IEC holder is a manufacturer of goods as well as service provider, then the foreign exchange earnings and Total expenses / payment / remittances shall be taken into account for service sector only.

(f) In order to claim reward under the scheme, Service provider shall have to have an active IEC at the time of rendering such services for which rewards are claimed.

Ineligible categories under SEIS:

(1) Foreign exchange remittances other than those earned for rendering of notified services would not be counted for entitlement. Thus, other sources of foreign exchange earnings such as equity or debt participation, donations, receipts of repayment of loans etc. and any other inflow of foreign exchange, unrelated to rendering of service, would be ineligible.

(2) Following shall not be taken into account for calculation of entitlement under the scheme

(a) Foreign Exchange remittances:

I. Related to Financial Services Sector

- (i) Raising of all types of foreign currency Loans;
- (ii) Export proceeds realization of clients;
- (iii) Issuance of Foreign Equity through ADRs / GDRs or other similar instruments;
- (iv) Issuance of foreign currency Bonds;
- (v) Sale of securities and other financial instruments;

Economic and Commercial Laws- Update

(vi) Other receivables not connected with services rendered by financial institutions;
and

II. Earned through contract/regular employment abroad (e.g. labour remittances);

(b) Payments for services received from EEFC Account;

(c) Foreign exchange turnover by Healthcare Institutions like equity participation, donations etc.

(d) Foreign exchange turnover by Educational Institutions like equity participation, donations etc.

(e) Export turnover relating to services of units operating under SEZ / EOU / EHTP / STPI / BTP Schemes or supplies of services made to such units;

(f) Clubbing of turnover of services rendered by SEZ / EOU /EHTP / STPI / BTP units with turnover of DTA Service Providers;

(g) Exports of Goods.

(h) Foreign Exchange earnings for services provided by Airlines, Shipping lines service providers plying from any foreign country X to any foreign country Y routes not touching India at all.

(i) Service providers in Telecom Sector.

Entitlement under SEIS:

Service Providers of eligible services shall be entitled to Duty Credit Scrip at notified rates on net foreign exchange earned.

STATUS HOLDER

(a) Status Holders are business leaders who have excelled in international trade and have successfully contributed to country's foreign trade. Status Holders are expected to not only contribute towards India's exports but also provide guidance and handholding to new entrepreneurs.

(b) All exporters of goods, services and technology having an import-export code (IEC) number shall be eligible for recognition as a status holder. Status recognition depends upon export performance. An applicant shall be categorized as status holder upon achieving export performance during current and previous two financial years, as indicated in Foreign Trade Policy. The export performance will be counted on the basis of FOB value of export earnings in free foreign exchange.

(c) For deemed export, FOR value of exports in Indian Rupees shall be converted in US\$ at the exchange rate notified by CBEC, as applicable on 1st April of each Financial Year.

Economic and Commercial Laws- Update

(d) For granting status, export performance is necessary in at least two out of three years.

Status Category

Status Category	Export Performance FOB / FOR (as converted) Value (in US \$ million)
One Star Export House	3
Two Star Export House	25
Three Star Export House	100
Four Star Export House	500
Five Star Export House	2000

Grant of double weightage

(a) The exports by IEC holders under the following categories shall be granted double weightage for calculation of export performance for grant of status.

(i) Micro, Small & Medium Enterprises (MSME) as defined in Micro, Small & Medium Enterprises Development (MSMED) Act 2006.

(ii) Manufacturing units having International Organisation for Standardisation (ISO) / Bureau of Indian Standards (BIS).

(iii) Units located in North Eastern States including Sikkim and Jammu & Kashmir.

(iv) Units located in Agri Export Zones.

(b) Double Weightage shall be available for grant of One Star Export House Status category only. Such benefit of double weightage shall not be admissible for grant of status recognition of other categories namely Two Star Export House, Three Star Export House, Four Star export House and Five Star Export House.

(c) A shipment can get double weightage only once in any one of above categories.

Economic and Commercial Laws- Update

Other conditions for grant of status

- (a) Export performance of one IEC holder shall not be permitted to be transferred to another IEC holder. Hence, calculation of exports performance based on disclaimer shall not be allowed.
- (b) Exports made on re-export basis shall not be counted for recognition.
- (c) Export of items under authorization, including SCOMET items, would be included for calculation of export performance.

Privileges of Status Holders

A Status Holder shall be eligible for privileges as under:

- (a) Authorisation and Customs Clearances for both imports and exports may be granted on self-declaration basis;
- (b) Input-Output norms may be fixed on priority within 60 days by the Norms Committee;
- (c) Exemption from furnishing of Bank Guarantee for Schemes under FTP, unless specified otherwise anywhere in FTP or Hand Book of Procedure (HBP);
- (d) Exemption from compulsory negotiation of documents through banks. Remittance / receipts, however, would be received through banking channels;
- (e) Two star and above Export houses shall be permitted to establish Export Warehouses as per Department of Revenue guidelines.
- (f) Three Star and above Export House shall be entitled to get benefit of Accredited Clients Programme (ACP) as per the guidelines of CBEC (website: <http://cbec.gov.in>).
- (g) The status holders would be entitled to preferential treatment and priority in handling of their consignments by the concerned agencies.
- (h) Manufacturers who are also status holders (Three Star/Four Star/Five Star) will be enabled to self-certify their manufactured goods (as per their Industrial Entrepreneurial Memorandum (IEM)/ Industrial Licensing (IL)/ Letter of Intent (LOI) as originating from India with a view to qualify for preferential treatment under different preferential trading agreements (PTA), Free Trade Agreements (FTAs), Comprehensive Economic Cooperation Agreements (CECA) and Comprehensive Economic Partnership Agreements (CEPA). Subsequently, the scheme may be extended to remaining Status Holders.
- (i) Manufacturer exporters who are also Status Holders shall be eligible to self-certify their goods as originating from India as per of Hand Book of Procedures.

Economic and Commercial Laws- Update

(j) Status holders shall be entitled to export freely exportable items on free of cost basis for export promotion subject to an annual limit of Rs 10 lakh or 2% of average annual export realization during preceding three licencing years whichever is higher.

DUTY EXEMPTION / REMISSION SCHEMES

Duty Exemption / Remission Schemes enable duty free import of inputs for export production, including replenishment of input or duty remission.

Schemes:

(a) Duty Exemption Schemes.

The Duty Exemption schemes consist of the following:

(i) Advance Authorisation (AA) (which will include Advance Authorisation for Annual Requirement).

(ii) Duty Free Import Authorisation (DFIA).

(b) Duty Remission Scheme.

Duty Drawback (DBK) Scheme, administered by Department of Revenue.

ADVANCE AUTHORISATION

(a) Advance Authorisation is issued to allow duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is consumed / utilised in the process of production of export product, may also be allowed.

(b) Advance Authorisation is issued for inputs in relation to resultant product, on the following basis:

(i) As per Standard Input Output Norms (SION) notified (available in Hand Book of Procedures); OR

(ii) On the basis of self declaration as per of Handbook of Procedures.

Advance Authorisation for Spices

Duty free import of spices covered under Chapter-9 of ITC (HS) shall be permitted only for activities like crushing / grinding / sterilization / manufacture of oils or oleoresins. Authorisation shall not be available for simply cleaning, grading, re-packing etc.

Eligible Applicant / Export / Supply

(a) Advance Authorisation can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer.

Economic and Commercial Laws- Update

(b) Advance Authorisation for pharmaceutical products manufactured through Non-Infringing (NI) process (as indicated in Handbook of Procedures) shall be issued to manufacturer exporter only.

(c) Advance Authorisation shall be issued for:

(i) Physical export (including export to SEZ);

(ii) Intermediate supply; and/or

(iii) Supply of goods to the categories mentioned in paragraph 7.02 (b), (c), (e), (f), (g) and (h) of this FTP (Category of Supply under Deemed Exports).

(iv) Supply of 'stores' on board of foreign going vessel / aircraft, subject to condition that there is specific Standard Input Output Norms in respect of item supplied.

Advance Authorisation for Annual Requirement

(i) Advance Authorisation for Annual Requirement shall only be issued for items notified in Standard Input Output Norms (SION), and it shall not be available in case of adhoc norms under FTP.

(ii) Advance Authorisation for Annual Requirement shall also not be available in respect of SION where any item of input appears in Appendix 4-J of Appendices and Aayat Niryat Forms) of FTP 2015-2020.

Eligibility Condition to obtain Advance Authorisation for Annual Requirement

(i) Exporters having past export performance (in at least preceding two financial years) shall be entitled for Advance Authorisation for Annual requirement.

(ii) Entitlement in terms of CIF value of imports shall be upto 300% of the FOB value of physical export and / or FOR value of deemed export in preceding financial year or Rs 1 crore, whichever is higher.

Value Addition

Value Addition for the Duty Exemption / Remission Schemes (except for Gems and Jewellery sector for which value addition is prescribed in of FTP) shall be:-

$$A - B$$

VA = ----- x 100, where

$$B$$

A = FOB value of export realized / FOR value of supply received.

Economic and Commercial Laws- Update

B = CIF value of inputs covered by Authorisation, plus value of any other input used on which benefit of DBK is claimed or intended to be claimed.

Minimum Value Addition

(i) Minimum value addition required to be achieved under Advance Authorisation is 15%.

(ii) Export Products where value addition could be less than 15% are given in Appendix 4D of Appendices and Aayat Niryat Forms of FTP 2015-2020.

(iii) For physical exports for which payments are not received in freely convertible currency, value addition shall be as specified in Appendix 4C of Appendices and Aayat Niryat Forms of FTP 2015-2020.

(iv) Minimum value addition for Gems & Jewellery Sector is given in paragraph 4.61 of Handbook of Procedures.

(v) In case of Tea, minimum value addition shall be 50%.

Details of Duties exempted

Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, wherever applicable. However, Import against supplies covered under certain category of supply under Deemed Exports of FTP will not be exempted from payment of applicable Anti-dumping Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any.

Admissibility of Drawback

Drawback as per rate determined and fixed by Central Excise authority shall be available for duty paid imported or indigenous inputs (not specified in the norms) used in the export product. For this purpose, applicant shall indicate clearly details of duty paid input in the application for Advance Authorisation. As per details mentioned in the application, Regional Authority shall also clearly endorse details of such duty paid inputs in the condition sheet of the Advance Authorisation.

Actual User Condition for Advance Authorisation

(i) Advance Authorisation and / or material imported under Advance Authorisation shall be subject to 'Actual User' condition. The same shall not be transferable even after completion of export obligation. However, Authorisation holder will have option to dispose of product manufactured out of duty free input once export obligation is completed.

Economic and Commercial Laws- Update

(ii) In case where CENVAT credit facility on input has been availed for the exported goods, even after completion of export obligation, the goods imported against such Advance Authorisation shall be utilized only in the manufacture of dutiable goods whether within the same factory or outside (by a supporting manufacturer). For this, the Authorisation holder shall produce a certificate from either the jurisdictional Central Excise Authority or Chartered Accountant, at the option of the exporter, at the time of filing application for Export Obligation Discharge Certificate to Regional Authority concerned.

(iii) Waste / scrap arising out of manufacturing process, as allowed, can be disposed off on payment of applicable duty even before fulfillment of export obligation.

Validity Period for Import

(i) Validity period for import of Advance Authorisation shall be 12 months from the date of issue of Authorisation.

(ii) Advance Authorisation for Deemed Export shall be co-terminus with contracted duration of project execution or 12 months from the date of issue of Authorisation, whichever is more.

Importability / Exportability of items that are Prohibited/Restricted/ State Trading Enterprise (STE)

(i) No export or import of an item shall be allowed under Advance Authorisation / DFIA if the item is prohibited for exports or imports respectively. Export of a prohibited item may be allowed under Advance Authorisation provided it is separately so notified, subject to the conditions given therein.

(ii) Items reserved for imports by STEs cannot be imported against Advance Authorisation / DFIA. However those items can be procured from STEs against ARO or Invalidation letter. STEs are also allowed to sell goods on High Sea Sale basis to holders of Advance Authorisation / DFIA holder. STEs are also permitted to issue "No Objection Certificate (NOC)" for import by Advance Authorisation / DFIA holder. Authorisation Holder would be required to file Quarterly Returns of imports effected against such NOC to concerned STE and STE would submit half-yearly import figures of such imports to concerned administrative Department for monitoring with a copy endorsed to DGFT.

(iii) Items reserved for export by STE can be exported under Advance Authorisation /Duty Free Import Authorisation (DFIA) only after obtaining a 'No Objection Certificate' from the concerned STE.

(iv) Import of restricted items shall be allowed under Advance Authorisation/ Duty Free Import Authorisation (DFIA).

(v) Export of restricted / Special Chemicals, Organisms, Materials, Equipment and Technology (SCOMET) items however, shall be subject to all conditionalities or

Economic and Commercial Laws- Update

requirements of export authorisation or permission, as may be required, under Schedule 2 of ITC (HS).

Free of Cost Supply by Foreign Buyer

Advance Authorisation shall also be available where some or all inputs are supplied free of cost to exporter by foreign buyer. In such cases, notional value of free of cost input shall be added in the CIF value of import and FOB value of export for the purpose of computation of value addition. However, realization of export proceeds will be equivalent to an amount excluding notional value of such input.

Domestic Sourcing of Inputs

(i) Holder of an Advance Authorisation / Duty Free Import Authorisation can procure inputs from indigenous supplier/ State Trading Enterprise in lieu of direct import. Such procurement can be against Advance Release Order (ARO), Invalidation Letter, and Back-to-Back Inland Letter of Credit.

(ii) When domestic supplier intends to obtain duty free material for inputs through Advance Authorisation for supplying resultant product to another Advance Authorisation / Duty Free Import Authorisation (DFIA) / Export Promotion Capital Goods (EPCG) Authorisation, Regional Authority shall issue Invalidation Letter.

(iii) Regional Authority shall issue Advance Release Order if the domestic supplier intends to seek refund of duty through Deemed Exports mechanism of FTP.

(iv) Regional Authority may issue Advance Release Order or Invalidation Letter at the time of issue of Authorisation simultaneously or subsequently.

(v) Advance Authorisation holder under Domestic Tariff Area (DTA) can procure inputs from EOU / EHTP / BTP / STP / SEZ units without obtaining Advance Release Order or Invalidation Letter.

(vi) Duty Free Import Authorisation holder shall also be eligible for Advance Release Order / Invalidation Letter facility.

(vii) Validity of Advance Release Order / Invalidation Letter shall be co-terminous with validity of Authorisation.

Currency for Realisation of Export Proceeds

(i) Export proceeds shall be realized in freely convertible currency except otherwise specified.

(ii) Export to Rupee Payment Area (RPA) (for which payments are not received in freely convertible currency) shall be subject to minimum value addition as specified in Appendix-4C.

Economic and Commercial Laws- Update

(iii) Export to SEZ Units shall be taken into account for discharge of export obligation provided payment is realised from Foreign Currency Account of the SEZ unit.

(iv) Export to SEZ Developers / Co-developers can also be taken into account for discharge of export obligation even if payment is realised in Indian Rupees.

(v) Authorisation holder needs to file Bill of Export for export to SEZ unit / developer / co-developer in accordance with the procedures given in SEZ Rules, 2006.

Export Obligation

(i) Period for fulfilment of export obligation under Advance Authorisation shall be 18 months from the date of issue of Authorisation or as notified by DGFT.

(ii) In cases of supplies to turnkey projects in India under deemed export category or turnkey projects abroad, the Export Obligation period shall be co-terminus with contracted duration of the project execution or 18 months whichever is more.

(iii) Export Obligation for items falling in categories of defence, military store, aerospace and nuclear energy shall be 24 months from the date of issue of authorization or co-terminus with contracted duration of the export order whichever is more.

(ii) Export Obligation Period for specified inputs, from the date of clearance of each consignment, is given in Appendix 4-J of Appendices and Aayat Niryat Forms of FTP 2015.

Export Obligation Period (EOP) Extension for units under Board of Industrial and Financial Reconstruction (BIFR)/ Rehabilitation

A company holding Advance Authorisation and registered with BIFR / Rehabilitation Department of State Government or any firm / company acquiring a unit holding Advance Authorisation which is under BIFR / Rehabilitation, may be permitted export obligation extension for the Advance Authorisation(s) held by the acquired unit, as per rehabilitation package prepared by operating agency and approved by BIFR / Rehabilitation Department of State Government. If time-period upto which Export Obligation (EO) extension is to be granted is not specifically mentioned in the BIFR order, EO extension of two years from the date of expiry of Export Obligation Period (EOP) (including extended period) or the date of BIFR order, whichever is later, shall be granted without payment of composition fee.

Re-import of exported goods under Duty Exemption / Remission Scheme

Goods exported under Advance Authorisation / Duty Free Import Authorisation may be re-imported in same or substantially same form subject to such conditions as may be specified by Department of Revenue. Authorisation holder shall also inform about such re-importation to the Regional Authority which had issued the Authorisation within one month from date of re-import.

Economic and Commercial Laws- Update

DUTY FREE IMPORT AUTHORISATION SCHEME (DFIA)

(a) Duty Free Import Authorisation is issued to allow duty free import of inputs. In addition, import of oil and catalyst which is consumed / utilised in the process of production of export product, may also be allowed.

(b) Provisions of Accounting Imputes, Importability / Exportability of items that are Prohibited/Restricted/ STE, Domestic Sourcing of Inputs, Currency for Realisation of Export Proceeds and Re-import of exported goods under Duty Exemption / Remission Scheme of FTP shall be applicable to DFIA also.

Duties Exempted and Admissibility of CENVAT and Drawback

(i) Duty Free Import Authorisation shall be exempted only from payment of Basic Customs Duty.

(ii) Additional customs duty/excise duty, being not exempt, shall be adjusted as CENVAT credit as per DoR rules.

(ii) Drawback as per rate determined and fixed by Central Excise authority shall be available for duty paid inputs, whether imported or indigenous, used in the export product. However, in case such drawback is claimed for inputs not specified in SION, the applicant should have indicated clearly details of such duty paid inputs also in the application for Duty Free Import Authorization, and as per the details mentioned in the application, the Regional Authority should also have clearly endorsed details of such duty paid inputs in the condition sheet of the Duty Free Import Authorization.

Eligibility

(i) Duty Free Import Authorisation shall be issued on post export basis for products for which Standard Input Output Norms have been notified.

(ii) Merchant Exporter shall be required to mention name and address of supporting manufacturer of the export product on the export document viz. Shipping Bill / Airway Bill / Bill of Export / ARE-1 / ARE-3.

(iii) Application is to be filed with concerned Regional Authority before effecting export under Duty Free Import Authorisation.

Minimum Value Addition

Minimum value addition of 20% shall be required to be achieved. For items where higher value addition has been prescribed under Advance Authorisation in Appendix 4C of Appendices and Aayat Niryat Forms of FTP 2015, the same value addition shall be applicable for Duty Free Import Authorisation also.

Economic and Commercial Laws- Update

Validity & Transferability of DFIA

(i) Applicant shall file online application to Regional Authority concerned before starting export under DFIA.

(ii) Export shall be completed within 12 months from the date of online filing of application and generation of file number.

(iii) While doing export/supply, applicant shall indicate file number on the export documents viz. Shipping Bill / Airway Bill/ Bill of Export / ARE-1 / ARE-3, Central Excise certified Invoice.

(iv) After completion of exports and realization of proceeds, request for issuance of transferable Duty Free Import Authorisation may be made to concerned Regional Authority within a period of twelve months from the date of export or six months (or additional time allowed by RBI for realization) from the date of realization of export proceeds, whichever is later.

(v) Applicant shall be allowed to file application beyond 24 months from the date of generation of file number as per paragraph 9.03 of Hand Book of Procedures.

(vi) Separate DFIA shall be issued for each SION and each port.

(vii) Exports under DFIA shall be made from a single port as mentioned in paragraph 4.37 of Handbook of Procedures.

(viii) No Duty Free Import Authorisation shall be issued for an export product where SION prescribes 'Actual User' condition for any input.

(ix) Regional Authority shall issue transferable DFIA with a validity of 12 months from the date of issue. No further revalidation shall be granted by Regional Authority.

Sensitive Items under Duty Free Import Authorisation

(a) In respect of resultant products requiring following inputs, exporter shall be required to provide declaration with regard to technical characteristics, quality and specification in Shipping Bill:

“Alloy steel including Stainless Steel, Copper Alloy, Synthetic Rubber, Bearings, Solvent, Perfumes / Essential Oil/ Aromatic Chemicals, Surfactants, Relevant Fabrics, marble, Articles made of polypropylene, Articles made of Paper and Paper Board, Insecticides, Lead Ingots, Zinc Ingots, Citric Acid, Relevant Glass fibre reinforcement (Glass fibre, Chopped / Stranded Mat, Roving Woven Surfacing Mat), Relevant Synthetic Resin (unsaturated polyester resin, Epoxy Resin, Vinyl Ester Resin, Hydroxy Ethyl Cellulose), Lining Material”.

Economic and Commercial Laws- Update

(b) While issuing Duty Free Import Authorisation, Regional Authority shall mention technical characteristics, quality and specification in respect of above inputs in the Authorisation.

SCHEMES FOR EXPORTERS OF GEMS AND JEWELLERY

Import of Input

Exporters of gems and Jewellery can import / procure duty free input for manufacture of export product.

Items of Export

Following items, if exported, would be eligible:

- (i) Gold jewellery, including partly processed jewellery and articles including medallions and coins (excluding legal tender coins), whether plain or studded, containing gold of 8 carats and above;
- (ii) Silver jewellery including partly processed jewellery, silverware, silver strips and articles including medallions and coins (excluding legal tender coins and any engineering goods) containing more than 50% silver by weight;
- (iii) Platinum jewellery including partly processed jewellery and articles including medallions and coins (excluding legal tender coins and any engineering goods) containing more than 50% platinum by weight.

Schemes

The schemes are as follows:

- (i) Advance Procurement / Replenishment of Precious Metals from Nominated Agencies;
- (ii) Replenishment Authorisation for Gems;
- (iii) Replenishment Authorisation for Consumables;
- (iv) Advance Authorisation for Precious Metals.

Value Addition

Minimum Value Addition norms for gems and jewellery sector would be calculated as under:

$$A - B$$

$$VA = \frac{A - B}{A} \times 100, \text{ where}$$

Economic and Commercial Laws- Update

B

A = FOB value of the export realised / FOR value of supply received.

B = Value of inputs (including domestically procured) such as gold / silver / platinum content in export product plus admissible wastage along with value of other items such as gemstone etc. Wherever gold has been obtained on loan basis, value shall also include interest paid in free foreign exchange to foreign supplier.

DFIA not available

Duty Free Import Authorisation scheme shall not be available for Gems and Jewellery sector.

EXPORT PROMOTION CAPITAL GOODS (EPCG) SCHEME

Objective

The objective of the Export Promotion Capital Goods (EPCG) Scheme is to facilitate import of capital goods for producing quality goods and services to enhance India's export competitiveness.

EPCG Scheme

(a) EPCG Scheme allows import of capital goods for pre-production, production and post-production at Zero customs duty. Alternatively, the Authorisation holder may also procure Capital Goods from indigenous sources. Capital goods for the purpose of the EPCG scheme shall include:

(i) Capital Goods including in Completely Knocked down (CKD)/ Semi- Knocked Down (SKD) condition thereof;

(ii) Computer software systems;

(iii) Spares, moulds, dies, jigs, fixtures, tools & refractories for initial lining and spare refractories; and

(iv) catalysts for initial charge plus one subsequent charge.

(b) Import of capital goods for Project Imports notified by Central Board of Excise and Customs is also permitted under EPCG Scheme.

(c) Import under EPCG Scheme shall be subject to an export obligation equivalent to 6 times of duty saved on capital goods, to be fulfilled in 6 years reckoned from date of issue of Authorisation.

(d) Authorisation shall be valid for import for 18 months from the date of issue of Authorisation. Revalidation of EPCG Authorisation shall not be permitted.

Economic and Commercial Laws- Update

(e) In case countervailing duty (CVD) is paid in cash on imports under EPCG, incidence of CVD would not be taken for computation of net duty saved, provided CENVAT is not availed.

(f) Second hand capital goods shall not be permitted to be imported under EPCG Scheme.

(g) Authorisation under EPCG Scheme shall not be issued for import of any Capital Goods (including Captive plants and Power Generator Sets of any kind) for

(i) Export of electrical energy (power)

(ii) Supply of electrical energy (power) under deemed exports

(iii) Use of power (energy) in their own unit, and

(iv) Supply/export of electricity transmission services

(h) Import of items which are restricted for import shall be permitted under EPCG Scheme only after approval from Exim Facilitation Committee (EFC) at DGFT Headquarters.

(i) If the goods proposed to be exported under EPCG authorisation are restricted for export, the EPCG authorisation shall be issued only after approval for issuance of export authorisation from Exim Facilitation Committee at DGFT Headquarters.

Coverage of the Scheme

(a) EPCG scheme covers manufacturer exporters with or without supporting manufacturer(s), merchant exporters tied to supporting manufacturer(s) and service providers. Name of supporting manufacturer(s) shall be endorsed on the EPCG authorisation before installation of the capital goods in the factory / premises of the supporting manufacturer (s). In case of any change in supporting manufacturer (s) the RA shall intimate such change to jurisdictional Central Excise Authority of existing as well as changed supporting manufacturer (s) and the Customs at port of registration of Authorisation.

(b) Export Promotion Capital Goods (EPCG) Scheme also covers a service provider who is designated / certified as a Common Service Provider (CSP) by the DGFT, Department of Commerce or State Industrial Infrastructural Corporation in a Town of Export Excellence subject to provisions of Foreign Trade Policy/Handbook of Procedures with the following conditions:-

(i) Export by users of the common service, to be counted towards fulfilment of EO of the Common Service Provider shall contain the EPCG authorisation details of the Common Service Provider in the respective Shipping bills and concerned RA must be informed about the details of the Users prior to such export;

Economic and Commercial Laws- Update

(ii) Such export will not count towards fulfilment of specific export obligations in respect of other EPCG authorisations (of the CSP/User);

(iii) Authorisation holder shall be required to submit Bank Guarantee (BG) which shall be equivalent to the duty saved. BG can be given by Common Service Provider or by any one of the users or a combination thereof, at the option of the Common Service Provider.

Actual User Condition

Import of capital goods shall be subject to Actual User condition till export obligation is completed.

Export Obligation (EO)

Following conditions shall apply to the fulfilment of EO:-

(a) Export Obligation shall be fulfilled by the authorisation holder through export of goods which are manufactured by him or his supporting manufacturer / services rendered by him, for which the EPCG authorisation has been granted.

(b) Export Obligation under the scheme shall be, over and above, the average level of exports achieved by the applicant in the preceding three licensing years for the same and similar products within the overall EO period including extended period, if any; except for categories mentioned in paragraph 5.13(a) of Hand Book of Procedures (HBP). Such average would be the arithmetic mean of export performance in the preceding three licensing years for same and similar products.

(c) In case of indigenous sourcing of Capital Goods, specific EO shall be 25% less than the EO stipulated in EPCG scheme.

(d) Shipments under Advance Authorisation, DFIA, Drawback scheme or reward schemes under FTP; would also count for fulfillment of EO under EPCG Scheme.

(e) Export shall be physical export. However, deemed exports as specified FTP shall also be counted towards fulfillment of export obligation, alongwith usual benefits available under Actula user condition of EPCG scheme.

(f) Export Obligation can also be fulfilled by the supply of ITA-I items to DTA, provided realization is in free foreign exchange.

(g) Royalty payments received by the Authorisation holder in freely convertible currency and foreign exchange received for R&D services shall also be counted for discharge under EPCG.

Economic and Commercial Laws- Update

(h) Payment received in rupee terms for such Services as notified in Appendix 3E of Appendices and Aayat Niryat Forms of FTP 2015 shall also be counted towards discharge of export obligation under the EPCG scheme.

Provision for units under Board of Industrial and Financial Reconstruction(BIFR) /Rehabilitation

A company holding EPCG authorisation and registered with Board of Industrial and Financial Reconstruction (BIFR)/ Rehabilitation Department of State Government or any firm/ company acquiring a unit holding EPCG authorisation which is under BIFR / Rehabilitation, may be permitted EO extension for the EPCG authorisation(s) held by the acquired unit, as per rehabilitation package prepared by operating agency and approved by BIFR / Rehabilitation Department of State Government. If time-period upto which EO extension is to be granted is not specifically mentioned in the BIFR order, EO extension of 3 years from the date of expiry of EOP (including extended period) or the date of BIFR order, whichever is later, shall be granted without payment of composition fee.

Legal Undertaking (LUT)/Bond/ Bank Guarantee (BG)in case of Agro units

Legal Undertaking /Bond or 15% Bank Guarantee, as applicable, may be furnished for EPCG authorisation granted to units in Agri-Export Zones provided EPCG authorisation is taken for export of primary agricultural product(s) notified or their value added variants.

Indigenous Sourcing of Capital Goods and benefits to Domestic Supplier

A person holding an EPCG authorisation may source capital goods from a domestic manufacturer. Such domestic manufacturer shall be eligible for deemed export benefit under FTP. Such domestic sourcing shall also be permitted from EOUs and these supplies shall be counted for purpose of fulfilment of positive Net Foreign Exchange (NFE) by said EOU as provided in FTP.

Calculation of Export Obligation

In case of direct imports, Export Obligation shall be reckoned with reference to actual duty saved amount. In case of domestic sourcing, Export Obligation shall be reckoned with reference to notional Customs duties saved on FOR value.

Incentive for early EO fulfilment

With a view to accelerating exports, in cases where Authorisation holder has fulfilled 75% or more of specific export obligation and 100% of Average Export Obligation till date, if any, in half or less than half the original export obligation period specified, remaining export obligation shall be condoned and the Authorisation redeemed by

Economic and Commercial Laws- Update

Regional Authority(RA) concerned. However no benefit under Hand Book of Procedure (HBP) shall be permitted where incentive for early EO fulfilment has been availed.

Reduced Export Obligation for Green Technology Products

For exporters of Green Technology Products, Specific Export Obligation shall be 75% of Export Obligation. The list of Green Technology Products is given in Para 5.29 of Hand Book of Procedure (HBP).

Reduced Export Obligation for North East Region and Jammu & Kashmir

For units located in Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Jammu & Kashmir, specific Export Obligation shall be 25% of the Export Obligation.

Post Export EPCG Duty Credit Scrip(s)

(a) Post Export EPCG Duty Credit Scrip(s) shall be available to exporters who intend to import capital goods on full payment of applicable duties in cash and choose to opt for this scheme.

(b) Basic Customs duty paid on Capital Goods shall be remitted in the form of freely transferable duty credit scrip(s).

(c) Specific Export Obligation shall be 85% of the applicable specific EO under the EPCG Scheme. However, average Export Obligation shall remain unchanged.

(d) Duty remission shall be in proportion to the EO fulfilled.

(e) All provisions for utilization of scrips issued under FTP shall also be applicable to Post Export EPCG Duty Credit Scrip (s).

(f) All provisions of the existing EPCG Scheme shall apply insofar as they are not inconsistent with this scheme.

EXPORT ORIENTED UNITS (EOUs), ELECTRONICS HARDWARE TECHNOLOGY PARKS (EHTPs), SOFTWARE TECHNOLOGY PARKS (STPs) AND BIO-TECHNOLOGY PARKS (BTPs)

Introduction and Objective

(a) Units undertaking to export their entire production of goods and services (except permissible sales in DTA), may be set up under the Export Oriented Unit (EOU) Scheme, Electronics Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) Scheme for manufacture of goods, including repair, re-making, reconditioning, re-engineering, rendering of services, development of software, agriculture including agro-processing, aquaculture, animal

Economic and Commercial Laws- Update

husbandry, bio-technology, floriculture, horticulture, pisciculture, viticulture, poultry and sericulture. Trading units are not covered under these schemes.

(b) Objectives of these schemes are to promote exports, enhance foreign exchange earnings, attract investment for export production and employment generation.

Export and Import of Goods

(a) An EOU / EHTP / STP / BTP unit may export all kinds of goods and services except items that are prohibited in ITC (HS).

(b) Export of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) shall be subject to fulfilment of the conditions indicated in ITC (HS). In respect of an EOU, permission to export a prohibited item may be considered, by Board of Approval (BOA), on a case to case basis, provided such raw materials are imported and there is no procurement of such raw material from Domestic Tariff Area (DTA).

(c) Procurement and supply of export promotion material like brochure / literature, pamphlets, hoardings, catalogues, posters etc up to a maximum value limit of 1.5% of FOB value of previous years exports shall also be allowed.

(d) An EOU / EHTP / STP / BTP unit may import and / or procure, from Domestic Tariff Area or bonded warehouses in Domestic Tariff Area / international exhibition held in India, without payment of duty, all types of goods, including capital goods, required for its activities, provided they are not prohibited items of import in the ITC (HS). Any permission required for import under any other law shall be applicable. Units shall also be permitted to import goods including capital goods required for approved activity, free of cost or on loan / lease from clients. Import of capital goods will be on a self-certification basis. Goods imported by a unit shall be with actual user condition and shall be utilized for export production.

(e) State Trading regime shall not apply to EOU manufacturing units. However, in respect of Chrome Ore / Chrome concentrate, State Trading Regime as stipulated in export policy of these items, will be applicable to EOUs.

(f) EOU / EHTP / STP / BTP units may import / procure from Domestic Tariff Area, without payment of duty, certain specified goods for creating a central facility. Software EOU / DTA units may use such facility for export of software.

(g) An EOU engaged in agriculture, animal husbandry, aquaculture, floriculture, horticulture, pisciculture, viticulture, poultry or sericulture may be permitted to remove specified goods in connection with its activities for use outside bonded area.

(h) Gems and jewellery EOUs may source gold / silver / platinum through nominated agencies on loan / outright purchase basis. Units obtaining gold / silver / platinum from nominated agencies, either on loan basis or outright purchase basis shall export gold / silver / platinum within 90 days from date of release.

Economic and Commercial Laws- Update

(i) EOU / EHTP / STP / BTP units, other than service units, may export to Russian Federation in Indian Rupees against repayment of State Credit/ Escrow Rupee Account of buyer subject to RBI clearance, if any.

(j) Procurement and export of spares / components, upto 5% of FOB value of exports, may be allowed to same consignee / buyer of the export article, subject to the condition that it shall not count for Net Foreign Exchange (NFE) and direct tax benefits.

(k) BOA may allow, on a case to case basis, requests of EOU / EHTP / STP/ BTP units in sectors other than Gems & Jewellery, for consolidation of goods related to manufactured articles and export thereof along with manufactured article. Such goods may be allowed to be imported / procured from DTA by EOU without payment of duty, to the extent of 5% FOB value of such manufactured articles exported by the unit in preceding financial year. Details of procured / imported goods and articles manufactured by the EOU will be listed separately in the export documents. In such cases, value of procured / imported goods will not be taken into account for calculation of NFE and DTA sale entitlement. Such procured / imported goods shall not be allowed to be sold in DTA. BOA may also specify any other conditions.

Second hand Capital goods

Second hand capital goods, without any age limit, may also be imported duty free.

Leasing of Capital Goods

(a) An EOU / EHTP / STP / BTP unit may, on the basis of a firm contract between parties, source capital goods from a domestic / foreign leasing company without payment of customs / excise duty. In such a case, EOU / EHTP / STP / BTP unit and domestic / foreign leasing company shall jointly file documents to enable import / procurement of capital goods without payment of duty.

(b) An EOU / EHTP / BTP / STP unit may sell capital goods and lease back the same from a Non Banking Financial Company (NBFC), subject to the following conditions:

(i) The unit should obtain permission from the jurisdictional Deputy / Assistant Commissioner of Customs or Central Excise, for entering into transaction of 'Sale and Lease Back of Assets', and submit full details of the goods to be sold and leased back and the details of NBFC;

(ii) The goods sold and leased back shall not be removed from the unit's premises;

(iii) The unit should be NFE positive at the time when it enters into sale and lease back transaction with NBFC;

(iv) A joint undertaking by the unit and NBFC should be given to pay duty on goods in case of violation or contravention of any provision of the notification under which these goods were imported or procured, read with Customs Act, 1962 or Central Excise Act,

Economic and Commercial Laws- Update

1944, and that the lien on the goods shall remain with the Customs / Central Excise Department, which will have first charge over the said goods for recovery of sum due from the unit to Government under provision of Section 142(b) of the Customs Act, 1962 read with the Customs (Attachment of Property of Defaulters for Recovery of Govt. Dues) Rules, 1995.

Net Foreign Exchange Earnings

EOU / EHTP / STP / BTP unit shall be a positive net foreign exchange earner except for sector specific provision of Appendix 6 B of Appendices & ANFs, where a higher value addition shall be required. Net Foreign Exchange (NFE) Earnings shall be calculated cumulatively in blocks of five years, starting from commencement of production. Whenever a unit is unable to achieve NFE due to prohibition / restriction imposed on export of any product mentioned in Letter of Permit (LoP), the five year block period for calculation of Net Foreign Exchange (NFE) earnings may be suitably extended by Board of Approval. Further, wherever a unit is unable to achieve NFE due to adverse market condition or any grounds of genuine hardship having adverse impact on functioning of the unit, the five year block period for calculation of NFE earnings may be extended by Board of Approval for a period of upto one year, on a case to case basis.

Letter of Permission / Letter of Intent and Legal Undertaking

(a) On approval, a Letter of Permission (LoP) / Letter of Intent (LoI) shall be issued by DC / designated officer to EOU/ EHTP / STP / BTP unit. LoP / LoI shall have an initial validity of 2 years to enable the Unit to construct the plant & install the machinery and by this time the unit should have commenced production. In case the unit is not able to commence production in initial validity of 2 years, an extension of one year may be given by the DC for valid reasons to be recorded in writing. Subsequent extension of one year may be given by the Unit Approval Committee subject to condition that two-thirds of activities including construction, relating to the setting up of the Unit are complete and Chartered Engineer's certificate to this effect is submitted by the Unit. Further extension, if necessary, will be granted by the Board of Approval. Once unit commences production, LoP / LoI issued shall be valid for a period of 5 years for its activities. This period may be extended further by DC for a period of 5 years at a time.

(b) LoP / LoI issued to EOU / EHTP / STP / BTP units by concerned authority, subject to compliance of provision pertaining to export and import of goods under EOU / EHTP / STP / BTP Scheme above, would be construed as an Authorisation for all purposes.

(c) Unit shall execute an LUT with DC concerned. Failure to ensure positive NFE or to abide by any of the terms and conditions of LoP / LoI / IL / LUT shall render the unit liable to penal action under provisions of the FT (D&R) Act, as amended, and Rules and

Economic and Commercial Laws- Update

Orders made thereunder, without prejudice to action under any other law / rules and cancellation or revocation of LoP / LoI / IL.

Investment Criteria

Only projects having a minimum investment of Rs. 1 Crore in plant & machinery shall be considered for establishment as EOUs. However, this shall not apply to existing units, units in EHTP / STP / BTP, and EOUs in Handicrafts / Agriculture / Floriculture / Aquaculture / Animal Husbandry / Information Technology, Services, Brass Hardware and Handmade jewellery sectors. BOA may allow establishment of EOUs with a lower investment criteria.

Applications & Approvals

(a) Applications for setting up of units under EOU scheme shall be approved or rejected by the Units Approval Committee within 15 days as per criteria indicated in Handbook of Procedures (HBP).

(b) In other cases, approval may be granted by BOA set up for this purpose as indicated in HBP.

(c) Proposals for setting up EOU requiring industrial licence may be granted approval by DC after clearance of proposal by BOA and Department of Industrial Policy & Promotion(DIPP) within 45 days.

(d) Applications for conversion into an EOU / EHTP / STP / BTP unit from existing DTA units, having an investment of Rs. 50 crores and above in plant and machinery or exporting Rs. 50 crores and above annually, shall be placed before BOA for a decision.

DTA Sale of Finished Products / Rejects / Waste/ Scrap / Remnants and By-products

Entire production of EOU / EHTP / STP / BTP units shall be exported subject to following:

(a) Units, other than gems and jewellery units, may sell goods upto 50% of FOB value of exports, subject to fulfilment of positive NFE, on payment of concessional duties. Within entitlement of DTA sale, unit may sell in DTA, its products similar to goods which are exported or expected to be exported from units.

However, units which are manufacturing and exporting more than one product can sell any of these products into DTA, upto 90% of FOB value of export of the specific products, subject to the condition that total DTA sale does not exceed the overall entitlement of 50% of FOB value of exports for the unit, as stipulated above. No DTA sale at concessional duty shall be permissible in respect of motor cars, alcoholic liquors, books, tea (except instant tea), pepper & pepper products, marble and such other items as may be notified from time to time. Such DTA sale shall also not be permissible to

Economic and Commercial Laws- Update

units engaged in activities of packaging / labelling / segregation / refrigeration / compacting / micronisation / pulverization / granulation / conversion of monohydrate form of chemical to anhydrous form or vice-versa.

Sales made to a unit in SEZ shall also be taken into account for purpose of arriving at FOB value of export by EOU provided payment for such sales are made from Foreign Currency Account of SEZ unit. Sale to DTA would also be subject to mandatory requirement of registration of pharmaceutical products (including bulk drugs). An amount equal to Anti Dumping duty under section 9A of the Customs Tariff Act, 1975 leviable at the time of import, shall be payable on the goods used for the purpose of manufacture or processing of the goods cleared into DTA from the unit.

(b) For services, including software units, sale in DTA in any mode, including on line data communication, shall also be permissible up to 50% of FOB value of exports and /or 50% of foreign exchange earned, where payment of such services is received in foreign exchange.

(c) Gems and jewellery units may sell upto 10% of FOB value of exports of the preceding year in DTA, subject to fulfilment of positive NFE. In respect of sale of plain jewellery, recipient shall pay concessional rate of duty as applicable to sale from nominated agencies. In respect of studded jewellery, duty shall be payable as applicable.

(d) Unless specifically prohibited in LoP, rejects within an overall limit of 50% may be sold in DTA on payment of duties as applicable to sale under Sub - para 6.08 (a) on prior intimation to Customs authorities. Such sales shall be counted against DTA sale entitlement. Sale of rejects upto 5% of FOB value of exports shall not be subject to achievement of NFE.

(e) Scrap / waste / remnants arising out of production process or in connection therewith may be sold in DTA, as per SION notified under Duty Exemption Scheme, on payment of concessional duties as applicable, within overall ceiling of 50% of FOB value of exports. Such sales of scrap / waste / remnants shall not be subject to achievement of positive NFE. In respect of items not covered by norms, DC may fix ad- hoc norms for a period of six months and within this period, norms should be fixed by Norms Committee. Ad-hoc norms will continue till such time norms are fixed by Norms Committee. Sale of waste / scrap / remnants by units not entitled to DTA sale, or sales beyond DTA sale entitlement, shall be on payment of full duties. Scrap / waste / remnants may also be exported.

(f) There shall be no duties / taxes on scrap / waste / remnants, in case same are destroyed with permission of Customs authorities.

(g) By-products included in LoP may also be sold in DTA subject to achievement of positive NFE, on payment of applicable duties, within the overall entitlement of Sub - para 6.08 (a). Sale of by-products by units not entitled to DTA sales, or beyond entitlements of Sub-para 6.08 (a), shall also be permissible on payment of full duties.

Economic and Commercial Laws- Update

(h) EOU / EHTP / STP / BTP units may sell finished products, except pepper and pepper products and marble, which are freely importable under FTP in DTA, under intimation to DC, against payment of full duties, provided they have achieved positive NFE. An amount equal to Anti Dumping duty under section 9A of the Customs Tariff Act, 1975 leviable at the time of import, shall be payable on the goods used for the purpose of manufacture or processing of the goods cleared into DTA from the unit.

(i) In case of units manufacturing electronics hardware and software, NFE and DTA sale entitlement shall be reckoned separately for hardware and software.

(j) In case of DTA sale of goods manufactured by EOU / EHTP / STP / BTP, where basic duty and CVD is nil, such goods may be considered as non-excisable for payment of duty.

(k) In case of new EOUs, advance DTA sale will be allowed not exceeding 50% of its estimated exports for first year, except pharmaceutical units where this will be based on its estimated exports for first two years.

(l) Units in Textile and Granite sectors shall have an option to sell goods into DTA , on payment of an amount equal to aggregate of duties of excise leviable under section 3 of the Central Excise Act, 1944 or under any other law for the time being in force, on like goods produced or manufactured in India other than in an EOU, subject to the condition that they have not used duty paid imported inputs in excess of 3% of the FOB value of exports of the preceding year and they have achieved positive NFE. Once this option is exercised, the unit will not be allowed to import any duty free inputs for any purpose.

(m) Procurement of spares / components, up to 2% of the value of manufactured articles, cleared into DTA, during the preceding year, may be allowed for supply to the same consignee / buyer for the purpose of after-sale-service. The same can be cleared in DTA on payment of applicable duty but such clearances shall be within the overall entitlement of the unit for DTA sale at concessional rate of duty as prescribed under DTA Sale of Finished Products / Rejects / Waste/ Scrap / Remnants and By-products of EOU / EHTP / STP / BTP Scheme.

Other Supplies

Following supplies effected from EOU / EHTP / STP / BTP units will be counted for fulfilment of positive NFE. Such supplies shall not include "marble", except if such supply of marble is an inter unit supply as provided at Sub - para (c) below:

(a) Supplies effected in DTA to holders of Advance Authorisation / Advance Authorisation for annual requirement / DFIA under duty exemption / remission scheme / EPCG scheme. However, printing sector EOUs (or any other sector that may be notified in HBP), can't supply goods, where basic customs duty and CVD is nil or exempted otherwise, to holders of Advance Authorisation / Advance Authorization for annual requirement.

Economic and Commercial Laws- Update

(b) Supplies affected in DTA against foreign exchange remittance received from overseas.

(c) Supplies to other EOU / EHTP / STP / BTP / SEZ units, provided that such goods are permissible for procurement in terms of Export and Imports of Goods under EOU / EHTP / STP / BTP Scheme of FTP.

(d) Supplies made to bonded warehouses set up under FTP and / or under section 65 of Customs Act and free trade and warehousing zones, where payment is received in foreign exchange.

(e) Supplies of goods and services to such organizations which are entitled for duty free import of such items in terms of general exemption notification issued by MoF, as may be provided in HBP.

(f) Supplies of Information Technology Agreement (ITA-1) items and notified zero duty telecom / electronics items.

(g) Supplies of items like tags, labels, printed bags, stickers, belts, buttons or hangers to DTA unit for export.

(h) Supply of LPG produced in an EOU refinery to Public Sector domestic oil companies for being supplied to household domestic consumers at subsidized prices under the Public Distribution System (PDS) Kerosene and Domestic LPG Subsidy Scheme, 2002, as notified by the Ministry of Petroleum and Natural Gas vide notification No. E-20029/18/2001-PP dated 28.01.2003 (hereinafter referred to as PDS Scheme) subject to the following conditions:-

(i) Only supply of such quantity of LPG would be eligible for which Ministry of Petroleum and Natural Gas declines permission for export and requires the LPG to be cleared in DTA; and

(ii) The Ministry of Finance by a notification has permitted duty free imports of LPG for supply under the aforesaid PDS Scheme.

Export through others

An EOU / EHTP / STP / BTP unit may export goods manufactured / software developed by it through another exporter or any other EOU / EHTP / STP / SEZ unit subject to conditions mentioned in Para 6.19 of Hand Book of Procedure.

Entitlement for Supplies from the DTA

(a) Supplies from DTA to EOU / EHTP / STP / BTP units will be regarded as “deemed exports” and DTA supplier shall be eligible for relevant entitlements under chapter 7 of FTP, besides discharge of export obligation, if any, on the supplier. Notwithstanding the above, EOU / EHTP / STP / BTP units shall, on production of a suitable disclaimer from DTA supplier, be eligible for obtaining entitlements specified in chapter 7 of FTP. For

Economic and Commercial Laws- Update

claiming deemed export duty drawback, they shall get brand rates fixed by DC wherever All Industry Rates of Drawback are not available.

(b) Suppliers of precious and semi-precious stones, synthetic stones and processed pearls from DTA to EOU shall be eligible for grant of Replenishment Authorisations at rates and for items mentioned in HBP.

(c) In addition, EOU / EHTP / STP / BTP units shall be entitled to following:-

(i) Reimbursement of Central Sales Tax (CST) on goods manufactured in India. Simple interest @ 6% per annum will be payable on delay in refund of CST, if the case is not settled within 30 days of receipt of complete application (as in Para 9.10 (b) of HBP).

(ii) Exemption from payment of Central Excise Duty on goods procured from DTA on goods manufactured in India.

(iii) Reimbursement of duty paid on fuel procured from Domestic Oil Companies / Depots of Domestic Oil Public Sector Undertakings as per drawback rate notified by DGFT from time to time. Reimbursement of additional duty of excise levied on fuel under the Finance Acts would also be admissible.

(iv) CENVAT Credit on service tax paid.

Other Entitlements

Other entitlements of EOU / EHTP / STP / BTP units are as under:

(a) Exemption from industrial licensing for manufacture of items reserved for SSI sector.

(b) Export proceeds will be realized within nine months.

(c) Units will be allowed to retain 100% of its export earnings in the EEFC account.

(d) Unit will not be required to furnish bank guarantee at the time of import or going for job work in DTA, where:

(i) the unit has turnover of Rs. 5 crore or above;

(ii) the unit is in existence for at least three years; and

(iii) the unit:

(1) has achieved positive NFE / export obligation wherever applicable;

(2) has not been issued a show cause notice or a confirmed demand, during the preceding 3 years, on grounds other than procedural violations, under the penal provision of the Customs Act, the Central Excise Act, the Foreign Trade (Development & Regulation) Act, the Foreign Exchange Management Act, the Finance Act, 1994 covering

Economic and Commercial Laws- Update

Service Tax or any allied Acts or the rules made thereunder, on account of fraud / collusion / wilful mis-statement / suppression of facts or contravention of any of the provisions thereof;

(e) 100% FDI investment permitted through automatic route similar to SEZ units.

(f) Units shall pay duty on the goods produced or manufactured and cleared into DTA on monthly basis in the manner prescribed in the Central Excise Rules.

(g) The Units Approval Committee may consider on a case-to-case basis request for sharing of infrastructural facilities among EOUs and it shall forward its recommendation to the Board of Approval for its consideration. While accepting such proposals, the NFE obligations of the Units shall not be altered. Such facilities will be available to Units in EHTP / STP after getting approval from IMSC. However, sharing of facilities between EOUs and SEZ Units shall not be permitted.

Inter Unit Transfer

(a) Transfer of manufactured goods from one EOU / EHTP / STP / BTP unit to another EOU / EHTP / STP / BTP unit is allowed with prior intimation to concerned Development Commissioners of the transferor and transferee units as well as concerned Customs authorities, following procedure of in-bond movement of goods. Transfer of manufactured goods shall also be allowed from EOU / EHTP / STP / BTP unit to a SEZ developer or unit as per procedure prescribed in SEZ Rules, 2006.

(b) Capital goods may be transferred or given on loan to other EOU / EHTP / STP / BTP / SEZ units, with prior intimation to concerned DC and Customs authorities. Such transferred goods may also be returned by the second unit to the original unit in case of rejection or for any reason without payment of duty.

(c) Goods supplied by one unit of EOU / EHTP / STP / BTP to another unit shall be treated as imported goods for second unit for payment of duty, on DTA sale by second unit.

(d) In respect of a group of EOUs / EHTPs / STPs / BTP Units which source inputs centrally in order to obtain bulk discount and / or reduce cost of transportation and other logistics cost and / or to maintain effective supply chain, inter unit transfer of goods and services may be permitted on a case-to-case basis by the Unit Approval Committee. In case inputs so sourced are imported and then transferred to another unit, then value of the goods so transferred shall be taken as inflow for the unit transferring these goods and as outflow for the unit receiving these goods, for the purpose of calculation of NFE.

Sub – Contracting

(a) (i) EOU / EHTP / STP / BTP units, including gems and jewellery units, may on the basis of annual permission from Customs authorities, sub - contract production

Economic and Commercial Laws- Update

processes to DTA through job work which may also involve change of form or nature of goods, through job work by units in DTA.

(ii) These units may sub - contract upto 50% of overall production of previous year in value terms in DTA with permission of Customs authorities.

(b) (i) EOU may, with annual permission from Customs authorities, undertake job work for export, on behalf of DTA exporter, provided that goods are exported directly from EOU and export document shall jointly be in name of DTA / EOU. For such exports, DTA units will be entitled for refund of duty paid on inputs by way of brand rate of duty drawback.

(ii) Duty free import of goods for execution of export order placed on EOU by foreign supplier on job work basis, would be allowed subject to condition that no DTA clearance shall be allowed.

(iii) Sub - contracting of both production and production processes may also be undertaken without any limit through other EOU / EHTP / STP / BTP / SEZ units, on the basis of records maintained in unit.

(iv) EOU / EHTP / STP / BTP units may sub - contract part of production process abroad and send intermediate products abroad as mentioned in LoP. No permission would be required when goods are sought to be exported from sub - contractor premises abroad. When goods are sought to be brought back, prior intimation to concerned DC and Customs authorities shall be given.

(c) Scrap / waste / remnants generated through job work may either be cleared from job worker's premises on payment of applicable duty on transaction value or destroyed in presence of Customs / Central Excise authorities or returned to unit. Destruction shall not apply to gold, silver, platinum, diamond, precious and semi-precious stones.

(d) Sub - contracting / exchange by gems and jewellery EOUs through other EOUs or SEZ units or units in DTA, shall be as per procedure indicated in Hand Book of Procedure.

Sale of Unutilized Material

(a) In case an EOU / EHTP / STP / BTP unit is unable to utilize goods and services, imported or procured from DTA, it may be:

(i) Transferred to another EOU / EHTP / STP / BTP / SEZ unit; or

(ii) Disposed of in DTA with approval of Customs authorities on payment of applicable duties and submission of import authorization; or

(iii) Exported.

Economic and Commercial Laws- Update

Such transfer from EOU / EHTP / STP / BTP unit to another such unit would be treated as import for receiving unit.

(b) Capital goods and spares that have become obsolete / surplus, may either be exported, transferred to another EOU / EHTP / STP / BTP / SEZ unit or disposed of in DTA on payment of applicable duties. Benefit of depreciation, as applicable, will be available in case of disposal in DTA only when the unit has achieved positive NFE taking into consideration the depreciation allowed. No duty shall be payable in case capital goods, raw material, consumables, spares, goods manufactured, processed or packaged, and scrap / waste / remnants / rejects are destroyed within unit after intimation to Customs authorities or destroyed outside unit with permission of Customs authorities. Destruction as stated above shall not apply to gold, silver, platinum, diamond, precious and semi-precious stones.

(c) In case of textile sector, disposal of left over material / fabrics upto 2% of CIF value or quantity of import, whichever is lower, on payment of duty on transaction value, may be allowed, subject to certification of Central Excise / Customs officers that these are leftover items.

(d) Disposal of used packing material will be allowed on payment of duty on transaction value.

Reconditioning / Repair and Re - engineering

(a) EOUs shall be set up with approval of UAC to carry out reconditioning, repair, remaking, testing, calibration, quality improvement, upgradation of technology and re-engineering activities for export in foreign currency.

(b) EHTP/STP/BTP units shall be set up with approval of IMSC to carry out reconditioning, repair, remaking, testing, calibration, quality improvement, upgradation of technology and re-engineering activities for export in foreign currency.

Replacement / Repair of Imported / Indigenous Goods

(a) General provisions of FTP relating to export / import of replacement / repair of goods would also apply equally to EOU / EHTP / STP / BTP units. Cases not covered by these provisions shall be considered on merits by Development Commissioner (DC).

(b) Goods sold in DTA and not accepted for any reasons, may be brought back for repair / replacement, under intimation to concerned jurisdictional Customs / Central Excise authorities.

(c) Goods or parts thereof, on being imported / indigenously procured and found defective or otherwise unfit for use or which have been damaged or become defective subsequently, may be returned and replacement obtained or destroyed. In the event of replacement, goods may be brought back from foreign suppliers or their authorized

Economic and Commercial Laws- Update

agents in India or indigenous suppliers. The unit can take free of cost replacement (duty paid) from the authorized agents in India of foreign suppliers, provided the defective part is re - exported or destroyed. However, destruction shall not apply to precious and semi-precious stones and precious metals.

Exit from EOU Scheme

(a) With approval of Development Commissioner, an EOU may opt out of scheme. Such exit shall be subject to payment of Excise and Customs duties and industrial policy in force.

(b) If unit has not achieved obligations, it shall also be liable to penalty at the time of exit.

(c) In the event of a gems and jewellery unit ceasing its operation, gold and other precious metals, alloys, gems and other materials available for manufacture of jewellery, shall be handed over to an agency nominated by Department of Commerce (DoC), at price to be determined by that agency.

(d) An EOU / EHTP / STP / BTP unit may also be permitted by Development Commissioner to exit from the scheme at any time on payment of duty on capital goods under the prevailing EPCG Scheme for DTA Units. This will be subject to fulfilment of positive NFE criteria under EOU scheme, eligibility criteria under EPCG scheme and standard conditions indicated in Hand Book of Procedure.

(e) Unit proposing to exit out of EOU scheme shall intimate DC and Customs and Central Excise authorities in writing. Unit shall assess duty liability arising out of de-bonding and submit details of such assessment to Customs and Central Excise authorities. Customs and Central Excise authorities shall confirm duty liabilities on priority basis, subject to the condition that the unit has achieved positive NFE, taking into consideration the depreciation allowed. After payment of duty and clearance of all dues, unit shall obtain "No Dues Certificate" from Customs and Central Excise authorities.

On the basis of "No Dues Certificate" so issued by the Customs and Central Excise authorities, unit shall apply to Development Commissioner for final de-bonding. In case there is no proceeding pending under FT(D&R) Act, as amended, Development Commissioner shall issue final de-bonding order within a period of 7 working days. Between "No Dues Certificate" issued by Customs and Central Excise authorities and final de-bonding order by DC, unit shall not be entitled to claim any exemption for procurement of capital goods or inputs. However, unit can claim Advance Authorisation / DFIA / Duty Drawback. Since the duty calculations and dues are disputed and take a long time, a BG / Bond / Instalment processes backed by BG shall be provided for expediting the exit process.

(f) In cases where a unit is initially established as DTA unit with machines procured from abroad after payment of applicable import duty, or from domestic market after payment of excise duty, and unit is subsequently converted to EOU, in such cases removal of such capital goods to DTA after de-bonding would be without payment of

Economic and Commercial Laws- Update

duty. Similarly, in cases where a DTA unit imported capital goods under EPCG Scheme and after completely fulfilling export obligation gets converted into EOU, unit would not be charged customs duty on capital goods at the time of removal of such capital goods in DTA when de-bonding.

(g) An EOU / EHTP / STP / BTP unit may also be permitted by DC to exit under Advance Authorization as one time option. This will be subject to fulfilment of positive NFE criteria.

(h) A simplified procedure may be provided to fast track the De-bonding/ Exit of the STP / EHTP Unit which has not availed any duty benefit on procurement of raw material, capital goods etc.

Conversion

(a) Existing DTA units may also apply for conversion into an EOU / EHTP / STP / BTP unit.

(b) Existing EHTP / STP units may also apply for conversion / merger to EOU unit and vice-versa. In such cases, units will remain in bond and avail exemptions in duties and taxes as applicable.

Monitoring of NFE

Performance of EOU / EHTP / STP / BTP units shall be monitored by Units Approval Committee as per guidelines in HBP.

Export through Exhibitions / Export Promotion Tours / Showrooms Abroad / Duty Free Shops

EOU / EHTP / STP / BTP are permitted to:

(i) Export goods for holding / participating in Exhibitions abroad with permission of Development Commissioner.

(ii) Personal carriage of gold / silver / platinum jewellery, precious, semi-precious stones, beads and articles.

(iii) Export goods for display / sale in permitted shops set up abroad.

(iv) Display / sell in permitted shops set up abroad, or in showrooms of their distributors / agents.

(v) Set up showrooms / retail outlets at International Airports.

Personal Carriage of Import / Export Parcels including through Foreign Bound Passengers

Economic and Commercial Laws- Update

Import / export through personal carriage of gems and jewellery items may be undertaken as per Customs procedure. However, export proceeds shall be realized through normal banking channel. Import / export through personal carriage by units, other than gems and jewellery units, shall be allowed provided goods are not in commercial quantity. An authorized person of Gems & Jewellery EOU may also import gold in primary form, upto 10 Kgs in a financial year through personal carriage, as per guidelines prescribed by Reserve Bank Of India and Department of Revenue.

Export / Import by Post / Courier

Goods including free samples, may be exported / imported by airfreight or through foreign post office or through courier, as per Customs procedure.

Revival of Sick Units

Subject to a unit being declared sick by appropriate authority, proposals for revival of the unit or its take over may be considered by Board of Approval.

Approval of EHTP / STP

In case of units under EHTP / STP schemes, necessary approval / permission under relevant paras of this Chapter shall be granted by officer designated by Ministry of Communication and Information Technology, Department of Electronics & Information Technology, instead of Development Commissioner, and by Inter-Ministerial Standing Committee (IMSC) instead of Board of Approval.

Approval of BTP

Bio-Technology Parks (BTP) would be notified by DGFT on recommendations of Department of Biotechnology. In case of units in BTP, necessary approval / permission under relevant provisions of this chapter will be granted by designated officer of Department of Biotechnology.

Warehousing Facilities

An EOU which intends to set up warehousing facilities outside the EOU premises and outside the jurisdiction of Development Commissioner, at a place near to the port of export, to reduce lead time for delivery of goods overseas and to address unpredictability of supply orders, is permitted to do so subject to the provisions related to export warehousing as per terms and conditions of Notifications issued by the Department of Revenue.

QUALITY COMPLAINTS AND TRADE DISPUTES

Objective

Exporters need to project a good image of the country abroad to promote exports. Maintaining an enduring relationship with foreign buyers is of utmost importance, and complaints or trade disputes, whenever they arise, need to be settled amicably as soon as possible. Importers too may have grievances as well.

In an endeavour to resolve such complaints or trade disputes and to create confidence in the business environment of the country, a mechanism is being laid down to address such complaints and disputes in an amicable way.

Quality Complaints/ Trade Disputes

The following type of complaints may be considered:

- (a) Complaints received from foreign buyers in respect of poor quality of the products supplied by exporters from India;
- (b) Complaints of importers against foreign suppliers in respect of quality of the products supplied; and
- (c) Complaints of unethical commercial dealings categorized mainly as non-supply/ partial supply of goods after confirmation of order; supplying goods other than the ones as agreed upon; non-payment; non-adherence to delivery schedules, etc.

Obligation on the part of importer/ exporter

(a) Rule 11 of the Foreign Trade (Regulation) Rules, 1993, requires that on the importation into, or exportation out of, any customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the Bill of Entry or the Shipping Bill or any other documents prescribed under the Customs Act, 1962 (52 of 1962), state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents, are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe a declaration of the truth of such statement at the foot of such Bill of Entry or Shipping Bill or any other documents. Violation of this provision renders the exporter liable for penal action.

(b) Certain export commodities have been notified for Compulsory Quality Control & Pre-shipment Inspection prior to their export. Penal action can be taken under the Export (Quality Control & Inspection) Act, 1963 as amended in 1984, against exporters who do not conform to these standards and/ or provisions of the Act as laid down for such products.

Economic and Commercial Laws- Update

Provisions in FT (D&R) Act & FT (Regulation) Rules for necessary action against erring exporters/ importers

Action against erring exporters can be taken under the Foreign Trade (Development and Regulation) Act, 1992, as amended and under Foreign Trade (Regulation) Rules, 1993, as follows:-

(a) Section 8 of the Act empowers the Director General of Foreign Trade or any other person authorized by him to suspend or cancel the Importer Exporter Code Number for the reasons as given therein.

(b) Section 9 (2) of the Act empowers the Director General of Foreign Trade or an officer authorised by him to refuse to grant or renew a license, certificate, scrip or any other instrument bestowing financial or fiscal benefit granted under the Act.

(c) Section 9(4) empowers the Director General of Foreign Trade or the officer authorized by him to suspend or cancel any License, certificate, scrip or any instrument bestowing financial or fiscal benefit granted under the Act.

(d) Section 11(2) of the Act provides for imposition of fiscal penalty in cases where a person makes or abets or attempts to make any import or export in contravention of any provision of the Act, any Rules or Orders made there under or the Foreign Trade Policy.

Mechanism for handling of Complaints/ Disputes

(a) Committee on Quality complaints and Trade Disputes (CQCTD)

To deal effectively with the increasing number of complaints and disputes, a 'Committee on Quality Complaints and Trade Disputes' (CQCTD) will be constituted in the 22 offices of the Regional Authority(RA's) of DGFT.

(b) Composition of the CQCTD

The CQCTD would be constituted under the Chairpersonship of the Head of Office. The CQCTD may comprise of the following members:

1. Additional DGFT/Joint DGFT/ (H.O.O): Chairperson
2. Representative of Bureau of India Standard (BIS): Member
3. Representative of Agricultural and Processed Food Products Export Development Authority: Member

Economic and Commercial Laws- Update

4. Representative of the Branch Manager of the concerned Bank: Member
5. Representative of Federation of Indian Exporter Organisation / and OR Export Promotion Council: Member
6. Representative of Export Inspection Agency: Member
7. Nominee of Director of Industries of State Government: Member
8. Nominee of Development Commissioner of MSME: Member
9. Officer as nominated by Chairperson: Member Secretary
10. Any other agency, as co-opted by Chairperson: Member.

(c) Functions of CQCTD

The Committee (CQCTD) will be responsible for enquiring and investigating into all Quality related complaints and other trade related complaints falling under the jurisdiction of the respective RAs. It will take prompt and effective steps to redress and resolve the grievances of the importers, exporters and overseas buyers, preferably within three months of receipt of the complaint. Wherever required, the Committee (CQCTD) may take the assistance of the Export Promotion Councils/FIEO/Commodity Boards or any other agency as considered appropriate for settlement of these disputes.

Proceedings under CQCTD

CQCTD proceedings are only reconciliatory in nature and the aggrieved party, whether the foreign buyer or the Indian importer, is free to pursue any legal recourse against the other erring party.

Procedures to deal with complaints and trade disputes

The procedure for making an application for such complaints or trade disputes and the procedure to deal with such quality complaints and disputes is given in the Handbook of Procedures.

Corrective Measures

The Committee at RA level can authorize the Export Inspection Agency or any technical authority to assess whether there has been any technical failure of not meeting the standards, manufacturing/ design defects, etc. for which complaints have been received.

Economic and Commercial Laws- Update

Nodal Officer

Director General of Foreign Trade would appoint an officer, not below the rank of Joint Director General, in the Headquarters, to function as the 'Nodal Officer' for coordinating with various Regional Authorities of DGFT.

LESSON 5 LAW RELATING TO ARBITRATION AND CONCILIATION

INTRODUCTION

The history of the law of arbitration in India commences with Act VIII of 1859 which codified the procedure of Civil Courts. Sections 312 to 325 of Act VIII of 1859 dealt with arbitration between the parties to a suit while Sections 326 and 327 dealt with arbitration without the intervention of the Court. These provisions were in operation when the Indian Contract Act, 1872, came into force which permitted settlement of disputes by arbitration under Section 28 thereof. Act VIII of 1859 was followed by later codes relating to Civil Procedure, namely, Act X of 1877 and Act XIV of 1882 but not much change was brought about by the law relating to arbitration proceedings. It was in the year 1899 that an Indian Act entitled the Arbitration Act of 1899 came to be passed. It was based on the model of the English Act of 1899. The 1899 Act applied to cases where if the subject matter submitted to the arbitration was the subject of a suit, the suit could whether with leave or otherwise, be instituted in a Presidency town. Then came the Code of Civil Procedure of 1908. Schedule II to the said Code contained the provisions relating to the law of arbitration which extended to the other parts of British India.

The Civil Justice Committee in 1925 recommended several changes in the arbitration law. On the basis of the recommendations by the Civil Justice Committee, the Indian Legislature passed the Act, i.e., the Arbitration Act of 1940. This Act as its preamble indicates is a consolidating and amending Act and is an exhaustive code insofar as the law relating to arbitration is concerned. Arbitration may be without the intervention of a Court or with the intervention of a Court where there is no suit pending or it may be arbitration in a suit.

With the passage of time the 1940 Act became outmoded, and need was expressed by the Law Commission of India and various representative bodies of trade and industry for its amendment so as to be more responsive to the contemporary requirements, and to render Indian economic reforms more effective. Besides, arbitration, other mechanisms of settlement of disputes such as mediation or conciliation should have legal recognition and the settlement agreement reached between the parties as a result of such mechanism should have the same status and effect as an arbitral award on agreed terms.

Arbitration and Conciliation Act, 1996

With a view to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and also to provide for a law relating to conciliation and related matters, a new law called

Economic and Commercial Laws- Update

Arbitration and Conciliation Act, 1996 has been passed. The new Law is based on United Nations Commission on International Trade Law (UNCITRAL), model law on International Commercial Arbitration.

The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognizes the autonomy of parties in the conduct of arbitral proceedings by the arbitral tribunal and abolishes the scope of judicial review of the award and minimizes the supervisory role of Courts. The autonomy of the arbitral tribunal has further been strengthened by empowering them to decide on jurisdiction and to consider objections regarding the existence or validity of the arbitration agreement.

With the passage of time, some difficulties in the applicability of the Arbitration and Conciliation Act, 1996 have been noticed. Interpretation of the provisions of the Act by Courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of Courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, Arbitration and Conciliation (Amendment) Act, 2015 passed by the Parliament. Arbitration and Conciliation (Amendment) Act, 2015 facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

Important Definitions

Arbitration

Section 2(1) (a) of the Act, defines the term “arbitration” as to mean any arbitration whether or not administered by a permanent arbitral institution.

Arbitrator

The term “arbitrator” is not defined in the Arbitration and Conciliation Act. But “arbitrator” is a person who is appointed to determine differences and disputes between two or more parties by their mutual consent. It is not enough that the parties appoint an arbitrator. The person who is so appointed must also give his consent to act as an arbitrator. His appointment is not complete till he has accepted the reference. The arbitrator must be absolutely disinterested and impartial. He is an extra-judicial tribunal whose decision is binding on the parties.

Any interest of the arbitrator either in one of the parties or in the subject-matter of reference unknown to either of the parties or all the parties, as the case may be, is a disqualification for the arbitrator. Such disqualification applies only in the case of a concealed interest. Every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitration of any particular individual as regards his selection and fitness for the post ought to be made so that each

Economic and Commercial Laws- Update

party may have an opportunity of considering whether the reference to arbitration to that particular individual should or should not be made.

The parties may appoint whomsoever they please to arbitrate on their dispute. Usually the parties themselves appoint the arbitrator or arbitrators. In certain cases, the Court can appoint an arbitrator or umpire. The parties to an arbitration agreement may agree that any reference there under shall be referred to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

Arbitral Award

As per Section 2(1)(c), "arbitral award" includes an interim award. The definition does not give much detail of the ingredients of an arbitral award. However, taking into account other provisions of the Act, the following features are noticed:

1. An arbitration agreement is required to be in writing. Similarly, a reference to arbitration and award is also required to be made in writing. The arbitral award is required to be made on stamp paper of prescribed value (as applicable at the place of making the award) and in writing. An oral decision is not an award under the law.
2. The award is to be signed by the members of the arbitral tribunal. However, the signature of majority of the members of the tribunal is sufficient if the reason for any omitted signature is stated.
3. The making of an award is a rational process which is accentuated by recording the reasons. The award should contain reasons. However, there are two exceptions where an award without reasons is valid i.e.
 - (a) Where the arbitration agreement expressly provides that no reasons are to be given, or
 - (b) Where the award has been made under Section 30 of the Act i.e. where the parties settled the dispute and the arbitral tribunal has recorded the settlement in the form of an arbitral award on agreed terms.

The formulation of reasons is a powerful discipline and it may lead the arbitrator to change his initial view on the matter. Recording of reasons involves, analysis of the dispute to reach a logical conclusion. Award can be divided into four parts i.e. general, findings of fact, submissions of the parties and conclusions of the tribunal. The tribunal should explain its view of the evidence and reasons of its conclusions. The preamble of the award may contain reference to the arbitration agreement, constitution of the tribunal, procedure adopted by the tribunal etc. and the second part of the award may contain points at issue, argument for the claimant, argument for the respondent and findings of the tribunal. The points at issue may be divided into two heads i.e. issue of fact and issue of law.

4. The award should be dated i.e. the date of making of the award should be

Economic and Commercial Laws- Update

mentioned in the award.

5. Place of arbitration is important for the determination of rules applicable to substance of dispute, and recourse against the award. The arbitral tribunal is under obligation to state the place of arbitration as determined in accordance with Section 20. Place of arbitration refers to the jurisdiction of the Court of a particular city or State.
6. The arbitral tribunal may include in the sum for which award is made, interest upto the date of award and also a direction regarding future interest.
7. The award may also include decisions and directions of the arbitrator regarding the cost of the arbitration.
8. After the award is made, a signed copy should be delivered to each party for appropriate action like implementation or recourse against arbitral award.

Arbitral Tribunal

“Arbitral tribunal” means a sole arbitrator or a panel of arbitrators. [Section 2(1)(d)].

Court

Court means:-

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court. [Section 2(1)(e)]

International Commercial Arbitration

International commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

- i. an individual who is a national of, or habitually resident in, any country other than India; or
- ii. a body corporate which is incorporated in any country other than India; or

Economic and Commercial Laws- Update

- iii. an association or a body of individuals whose central management and control is exercised in any country other than India; or
- iv. the Government of a foreign country.[Section 2(1)(f)]

Legal Representative

Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting.[Section 2(1)(g)]

Party

Party means a party to an arbitration agreement. [Section 2(1)(h)]

Arbitration Agreement

“Arbitration agreement” means an agreement referred to in Section 7 [Section 2(1)(b)].

Under Section 7, the Arbitration agreement has been defined to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

- An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- An arbitration agreement shall be in writing.
- An arbitration agreement is in writing if it is contained in-
 - a document signed by the parties;
 - an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or
 - an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Power to refer parties to arbitration where there is an arbitration agreement

Section 8(1) provides that a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then,

Economic and Commercial Laws- Update

notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

Further sub-section (2) states that the application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

It may be noted that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

Sub-section (3) states that notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made.

Interim measures etc. by Court

Section 9(1) states that a party may, before, or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

- i. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- ii. for an interim measure of protection in respect of any of the following matters, namely:-
 - a. the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - b. securing the amount in dispute in the arbitration;
 - c. the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any part) or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
 - d. interim injunction or the appointment of a receiver;

Economic and Commercial Laws- Update

- e. such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

Further, sub-section (2) states that where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

Under sub-section (3) once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

Number of arbitrators

As per Section 10(1) of the Act, the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

Failing the determination referred to in Section 10(1) above, the arbitral tribunal shall consist of a sole arbitrator.

Appointment of Arbitrators

According to section 11(1) a person of any nationality may be an arbitrator, unless otherwise agreed by the parties. Section 11(2) states that subject to Section 11(6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

Section 11 (6) provides that where, under an appointment procedure agreed upon by the parties,-

- a. a party fails to act as required under that procedure; or
- b. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- c. a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Section 11 (3) states that failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator.

Economic and Commercial Laws- Update

Under Section 11 (4) if the appointment procedure in Section 11 (3) applies and-

- a. a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
- b. the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made upon request of a party, "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court".

Section 11 (5) says that failing any agreement referred to in Section 11 (2), in an arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court".

Section 11(6) provides that where, under an appointment procedure agreed upon by the parties,-

- a. a party fails to act as required under that procedure; or
- b. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- c. a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Section 11 (6A) states that the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11 (4) or Section 11 (5) or Section 11 (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.

Under Section 11 (6B) the designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

Section 11 (7) provides that a decision on a matter entrusted by Section 11 (4) or Section 11 (5) or Section 11 (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision

Section 11 (8) says that the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall

Economic and Commercial Laws- Update

seek a disclosure in writing from the prospective arbitrator in terms of section 12(1), and have due regard to-

- (a) any qualifications required for the arbitrator by the agreement of the parties; and
- (b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.";

Under Section 11 (9) in the case of appointment of sole or third arbitrator in an international commercial arbitration, "the Supreme Court or the person or institution designated by that Court" may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

Section 11 (10) provides that the Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by Section 11 (4) or Section 11 (5) or Section 11 (6), to it;

Section 11(11) states that where more than one request has been made under Section 11 (4) or subsection Section 11 (5) or Section 11 (6) to "different High Courts or their designates, the High Court or its designate to whom the request has been first made" under the relevant sub-section shall alone be competent to decide on the request.

Under Sub-section 12 (a) where the matters referred to in Section 11 (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court; and

Sub-section 12 (b) provides that where the matters referred to in Sub-section 11 (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "the Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in section 2(1)(e) of the Act is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.;

Section 11 (13) states that an application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavor shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

Section 11 (14) says that for the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation -For the removal of doubts, it is hereby clarified that Section 11 (14) stated shall not apply to international commercial arbitration and in arbitrations (other than

Economic and Commercial Laws- Update

international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.

Power of Central Government to amend Fourth Schedule

In terms of Section 11A of the Act, if the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, amend the Fourth Schedule and thereupon the Fourth Schedule shall be deemed to have been amended accordingly.

Grounds for challenge

Section 12(1) provides that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances-

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1- The grounds stated in the Fifth Schedule of the Act shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2- The disclosure shall be made by such person in the form specified in the Sixth Schedule of the Act.

According to Section 12 (2), an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub section (1) unless they have already been informed of them by him.

Section 12 (3) states an arbitrator may be challenged only if-

- a. circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
- b. he does not possess the qualifications agreed to by the parties.

Section 12(4) provides that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reason, of which he becomes aware after the appointment has been made.

Economic and Commercial Laws- Update

Section 12(5) states that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule of the Act shall be ineligible to be appointed as an arbitrator.

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

Challenge procedure

Section 13 of the Act contains detailed provisions regarding challenge procedure. Sub-section (1) provides that subject to provisions of Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator. Sub-Section (4) states that if a challenge under any procedure agreed upon by the parties or under the procedure under Sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. But at that stage, the challenging party has the right to make an application in the Court to set aside the award in accordance with Section 34 of the Act.

Sub-section (2) provides that failing any agreement referred to in sub-section (1) of Section 13, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. The tribunal shall decide on the challenge unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge. It is also provided that where an award is set aside on an application made under sub-section (5) of Section 13 of the Act, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

Failure or impossibility to act as an arbitrator

As per Section 14(1), the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if he becomes *de jure* or *de facto* unable to perform his functions, or fails to act without undue delay due to some other reasons. Mandate is also terminated, if he withdraws from his office, or the parties agree to the termination of his mandate.

Further, if there is a controversy about an arbitrator's inability to function or occurrence of undue delay, a party may seek intervention of the Court under Section 14(2).

According to Section 14(3) if, under section 14 or section 13(3), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an

Economic and Commercial Laws- Update

arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

Termination of Mandate and Substitution of Arbitrator

(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reasons; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to such appointment being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this Section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal [Section 15].

Competence of arbitral tribunal to rule on its jurisdiction

Section 16 deals with competence of arbitral tribunal to rule on its jurisdiction. According to section 16(1) the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

- a. an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
- b. a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

As per Section 16(2) a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator, (Sub-section 2).

Section 16(3) provides that a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

Economic and Commercial Laws- Update

The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified. Further, the arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

Interim measures ordered by arbitral tribunal

Section 17(1) provides that a party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

Sub-section (2) states that Subject to any orders passed in an appeal under section 37 of the Act, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.

Equal treatment of parties

According to Section 18 of the Act, the parties shall be, treated with equality and each party shall be given a full opportunity to present his case.

Determination of rules of procedure

Section 19 deals with determination of rules of procedure. It says that:

1. The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872
2. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
3. Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.
4. The power of the arbitral tribunal under sub- section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Place of arbitration

As per Section 20(1) the parties are free to agree on the place of arbitration and sub-section (2) states that if they fail to reach an agreement, the place of arbitration is determined by the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties. Section 20(3) introduces an option by providing that the arbitrator/tribunal may, unless otherwise agreed by the parties, may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

Commencement of arbitral proceedings

According to Section 21 of the Act, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Language

Section 22(1) provides that the parties are free to agree upon the language or languages to be used in the arbitral proceedings and under sub-section (2) if they fail to reach an agreement, the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

Sub-section (3) states that the agreement or determination, unless otherwise specified shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

Economic and Commercial Laws- Update

As per sub-section (4) the arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statements of claim and defence

Section 23(1) provides that within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

Sub-section (2) states that the parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

Sub-section (2A) provides that the respondent, in support of his case, may also submit a counter claim or plead a set -off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.

Sub-section (3) states that unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Hearings and written proceedings

Sub-section (1) of section 24 provides that unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause

Sub -section (2) state that the parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

Economic and Commercial Laws- Update

Sub-section (3) says that all statements, documents or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. (Section 24)

Default of a party

Section 25 provides that unless otherwise agreed by the parties, where, without showing sufficient cause,-

- a. the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;
- b. the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegation of the claimant and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited.
- c. a party fails to appear at an oral hearing or to produce documentary evidence. the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

Expert appointed by arbitral tribunal

Sub-section (1) of section 26 provides that subject to agreement between the parties, the arbitral tribunal may-

- a. appoint one or more expert to report to it on specific issues to be determined by the arbitral tribunal, and
- b. require a party to give the expert any relevant information or to produce or to provide access to, any relevant documents, goods or other property for his inspection.

Section 26 (2) states that if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Further Section 26 (3) provides that the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

Economic and Commercial Laws- Update

Court assistance in taking evidence

According to Section 27(1) the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.

Under Section 27 (2) the application shall specify-

- a. the names and addresses of the parties and the arbitrators,
- b. the general nature of the claim and the relief sought,-
- c. the evidence to be obtained, in particular,-
 - i. the name and addresses of any person to be heard as witness or expert witness and a statement of the subject- matter of the testimony required;
 - ii. the description of any document to be produced or property to be inspected.

Section 27 (3) provides that the Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal. Under Section 27 (4) the Court may, while making an order, issue the same processes to witnesses as it may issue in suits tried before it.

Section 27 (5) provides that persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court. As per Section 27 (6) the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

Rules applicable to substance of dispute

Section 28(1) provides that where the place of arbitration is situate in India,-

- a. in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
- b. in international commercial arbitration,-
 - i. the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

Economic and Commercial Laws- Update

- ii. any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
- iii. failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

As per Section 28(2) the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

Under Section 28(3) while deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

Decision making by panel of arbitrators

As per section 29 (1) unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

However section 29(2) states that notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

Time limit for arbitral award

Section 29A(1) provides that the award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.-For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

Section 29A(2) states that if the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

Under Section 29A(3) the parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

Section 29A(4) states that if the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Economic and Commercial Laws- Update

Provided that while extending the period under this subsection, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.

As per Section 29A(5) the extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

Section 29A (6) provides that while extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

Section 29A (7) states that in the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

Section 29A (8) provides that it shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

As per Section 29A (9) an application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.(Section 29A)

Fast track procedure

Section 29B(1) provides that notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

Section 29B (2) states that the parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

Section 29B (3) says that the arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

Economic and Commercial Laws- Update

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

Section 29B(4) states that the award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

Section 29B(5) provides that if the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

Section 29B (6) says that the fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.

Settlement

Section 30 (1) provides that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties; the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

Under Section 30 (2) if, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

As per Section 30 (3) an arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

Section 30 (4) states that an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Form and contents of arbitral award

As per section 31(1) an arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

Section 31(2) states that for the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated

Economic and Commercial Laws- Update

Under Section 31 (3) the arbitral award shall state the reasons upon which it is based, unless-

- a. the parties have agreed that no reasons are to be given, or
- b. the award is an arbitral award on agreed terms under section 30.

Section 31(4) provides that the arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

Section 31(5) says that after the arbitral award is made, a signed copy shall be delivered to each party.

Under Section 31(6) the arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

Under Section 31(7)

- a. Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
- b. A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation -The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978

As per Section 31(8) the cost of arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.

Regime for costs

Section 31A (1) provides that in relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908, shall have the discretion to determine-

- (a) whether costs are payable by one party to another;
- (b) the amount of such costs; and

Economic and Commercial Laws- Update

(c) when such costs are to be paid.

Explanation.-For the purpose of this sub-section, "costs" means reasonable costs relating to-

(i) the fees and expenses of the arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administration fees of the institution supervising the arbitration; and

(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

Under Section 31A (2) if the Court or arbitral tribunal decides to make an order as to payment of costs,-

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; or

(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

Section 31A (3) provides that in determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including-

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

Under Section 31A (4) the Court or arbitral tribunal may make any order under this section including the order that a party shall pay-

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

Economic and Commercial Laws- Update

(g) interest on costs from or until a certain date.

Section 31A (5) states that an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.

Termination of proceedings

As per section 32 (1) the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

Under section 32 (2) the arbitral tribunal shall issue an order for the termination of the arbitral proceedings where-

- a. the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in, obtaining a final settlement of the dispute,
- b. the parties agree on the termination of the proceedings, or
- c. the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

Section 32(3) says that the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. This is subject to the provisions of Sections 33 and 34(4) of the Act.

Correction and interpretation of award; additional award

Section 33(1) provides that within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties-

- a. a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
- b. if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

Further Section 33 (2) states that if the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

Further Section 33 (3) states that the arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

Economic and Commercial Laws- Update

Section 33 (4) provides that unless otherwise agreed by the parties, a party with notice to the other party may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

Section 33 (5) provides that if the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

Under Section 33 (6) the arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

Section 33 (7) states that section 31 shall apply to a connection or interpretation of the arbitral award or to an additional arbitral award made under this section.

Application for setting aside arbitral award

Section 34(1) provides that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

Section 34 (2) states that an arbitral award may be set aside by the Court only if-

- a. the party making the application furnishes proof that-
 - i. a party was under some incapacity, or
 - ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
 - iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
 - v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement

Economic and Commercial Laws- Update

was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;
or

b. the Court finds that-

- i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- ii. the arbitral award is in conflict with the public policy of India.

“Explanation I.-For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 ; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

As per Section 34 (2A) an arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of evidence.

Section 34 (3) provides that an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

Under Section 34 (4) on receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

Economic and Commercial Laws- Update

As per Section 34 (5) an application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

Under Section 34 (6) an application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

Finality of arbitral awards

Section 35 provides that an arbitral award made under the Act is final and binding on the parties and persons claiming under them respectively.

Enforcement

Section 36(1) provides that where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

Further Section 36(2) provides that where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

Section 36(3) states that upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

Appealable orders

Section 37(1) provides that an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

- (a) refusing to refer the parties to arbitration under section 8;
- (b) granting or refusing to grant any measure under section 9;
- (c) setting aside or refusing to set aside an arbitral award under section 34.

Economic and Commercial Laws- Update

Further Section 37(2) provides that appeal shall also lie to a court from an order of the arbitral tribunal-

- a. accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
- b. granting or refusing to grant an interim measure under section 17.

Section 37(3) states that no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Deposits

As per Section 38(1) the arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it: Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counterclaim.

Further Section 38 (2) states that the deposit referred to in sub-section (1) shall be payable in equal shares by the parties: Provided that where one party fails to pay his share of the deposit, the other party may pay that share: Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

Section 38 (3) provides that upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.

Lien on arbitral award and deposits as to costs

Section 39(1) provides that subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

Section 39 (2) states that if in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may

Economic and Commercial Laws- Update

consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

As per Section 39 (3) an application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal and the arbitral tribunal shall be entitled to appear and be heard on any such application.

Under Section 39 (4) the Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

Arbitration agreement not to be discharged by death of party thereto

Section 40 (1) provides that an arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or, as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

Section 40 (2) states that the mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

As per Section 40 (3) nothing in this section shall affect the operation or any law by virtue of which any right of action is extinguished by the death of a person.

Provisions in case of insolvency

As per Section 41(1) where it is provided by a term in a contract to which an insolvent is a party that any dispute arising there out or in connection therewith shall be submitted to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such dispute.

Further, Section 41 (2) states that where a person who has been adjudged an insolvent bad, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

Economic and Commercial Laws- Update

As per Section 41 (3) the expression "receiver" includes an Official Assignee.

Jurisdiction

Section 42 provides that notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

Limitations

Section 43 (1) provides that the Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

Section 43 (2) states that for the purposes of this section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in section 21.

As per Section 43 (3) where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some steps to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

Section 43 (4) states that where the Court orders that an arbitral award be set aside, the period between the commencement of the, arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

ENFORCEMENT OF CERTAIN FOREIGN ARBITRAL AWARDS

Chapters I and II of Part II of the Arbitration and Conciliation Act, 1996 deal with the enforcement of certain foreign awards made under the New York Convention and the Geneva Convention, respectively. Sections 44 and 53 of the Act define the foreign awards as to mean an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered commercial under the law in force in India made on or after the 11th day of October 1960 in the case of New York Convention awards and after the 28th day of July 1924 in the case of Geneva Convention awards.

Economic and Commercial Laws- Update

Awards made under New York convention or Geneva Convention

Any foreign award, whether made under New York Convention or Geneva Convention, which would be enforceable under the respective provisions of the Act applicable to the award, have been treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India.

Power of judicial authority to refer parties to arbitration

Section 45 provides that notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

When foreign award binding

Section 46 states that any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Evidence

Section 47 (1) provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court-

- a. the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- b. the original agreement for arbitration or a duly certified thereof; and
- c. such evidence as may be necessary to prove that the award is a foreign award.

Further Section 47 (2) states that if the award or agreement to be produced under subsection (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Economic and Commercial Laws- Update

Explanation.-In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.

Conditions for enforcement of foreign awards

Section 48 of the Act enumerates the conditions for enforcement of foreign awards and provides that the party, against whom the award is invoked, may use one or more of the following grounds for the purpose of opposing enforcement of a foreign award, namely:

- i. the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- ii. the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- iii. the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matter submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
- iv. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- v. the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or
- vi. the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
- vii. the enforcement of the award would be contrary to the public policy of India.

Explanation 1.-For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Economic and Commercial Laws- Update

Explanation 2 -For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Enforcement of foreign awards

As per section 49 where the Court is satisfied that the foreign award is enforceable, the award is executable as a decree of the Court.

Appealable orders

Section 50(1) provides that an appeal shall lie from the order refusing to-

- a. refer the parties to arbitration under section 45;
- b. enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order

Section 50(2) prohibits a second appeal from an order passed in appeal. However, any right of the parties to appeal to the Supreme Court is not affected or taken away by virtue of these provisions.

Power of judicial authority to refer parties to arbitration

Section 54 provides that notwithstanding anything contained in Part I of the Arbitration and Conciliation Act, 1996 or in the Code of Civil Procedure, 1908, a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case (he agreement or the arbitration cannot proceed or becomes inoperative.

Foreign awards when binding

Section 55 provides that any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Evidence

Section 56 (1) provides that the party applying for the enforcement of a foreign award shall, at the time of application produce before the Court-

Economic and Commercial Laws- Update

- a. the original award or a copy thereof duly authenticated. in the manner required by the law of the country in which it was made;
- b. evidence proving that the award has become final; and
- c. such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied.

Further Section 56 (2) provides that where any document requiring to be produced under sub- section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation 1-In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

Explanation 2.-In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.

Conditions for enforcement of foreign awards

Sub-section (1) of section 57 provides that in order that a foreign award may be enforceable under this Chapter, it shall be necessary that –

- a. the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- b. the subject-matter of the award is capable of settlement by arbitration under the law of India;
- c. the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- d. the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

Economic and Commercial Laws- Update

- e. the enforcement of the award is not contrary to the public policy or the law of India.

Explanation 1- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Further sub-section (2) provides that even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that,-

- a. the award has been annulled in the country in which it was made;
- b. the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
- c. the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

As per sub section (3) if the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Enforcement of foreign awards

Section 58 provides that where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

Appealable orders

Sub-section (1) of section 59 provides that an appeal shall lie from the order refusing-

- a. to refer the parties to arbitration under section 54; and
- b. to enforce a foreign award under section 57, to the court authorized by law to hear appeals from such order.

Further, sub-section (2) provides that no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

CONCILIATION

Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behaviour of the parties. The mediator uses a variety of skills and techniques to help the parties reach the settlement, but is not empowered to render a decision.

Basically, these processes can be successful only if the personality of the conciliator or the mediator is such that he is able to induce the parties to come to a settlement. The Act gives a formal recognition to conciliation in India. Conciliation forces earlier and greater hold of the case. It can succeed only if the parties are willing to re-adjust. According to current thinking conciliation is not an alternative to arbitration or litigation, but rather complements arbitration or litigation.

Application and scope

Section 61(1) provides that save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, Part III of the Arbitration and Conciliation Act, 1996 shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

As per Section 61 (2), Part III of the Arbitration and Conciliation Act, 1996 shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

Commencement of conciliation proceedings

Sub-section (1) of section 62 provides that the party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

Sub-section (2) states that Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate

Further sub –section (3) states that if the other party rejects the invitation, there will be no conciliation proceedings.

Sub-section (4) provides that if the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

Number of conciliators

Section 63(1) provides that there shall be one conciliator unless the parties agree that there shall be two or three conciliators.

Further, Section 63 (2) provides that where there is more than one conciliator, they ought, as a general rule, to act jointly.

Appointment of conciliators

Sub-section (1) of section 64 provides that subject to sub-section (2),-

- a. in conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;
- b. in conciliation proceedings with two conciliators, each party may appoint one conciliator;
- c. in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

Further sub-section (2) provides that parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular,-

- a. a party may respect such an institution or person to recommend the names of suitable individuals to act as conciliator, or

Economic and Commercial Laws- Update

- b. the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person:

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

Submission of statements to conciliator

Sub-section (1) of section 65 provides that the conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

Further sub-section (2) provides that the conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

Sub-section (3) states that at any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate

Explanation.-In this section and all the following sections of this Part, the term conciliator" applies to a sole conciliator, two or, three conciliators, as the case may be.

Conciliator not bound by certain enactments

Section 66 provides that the conciliator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

Role of conciliator

Sub-section (1) of section 67 provides that the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

Further Sub-section (2) provides that the conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

As per sub-section (3) the conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case,

Economic and Commercial Laws- Update

the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

Sub-section (4) states that the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

Administrative assistance

Section 68 provides that in order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

Communication between conciliator and parties

Sub-section (1) of section 69 provides that the conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

Further sub-section (2) states that unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

Disclosure of information

Section 70 provides that when the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate: Provided that when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

Co-operation of parties with conciliator

Section 71 provides that the parties shall in good faith co-operate with the conciliator and, in particular, shall endeavor to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

Suggestions by parties for settlement of dispute

Section 72 provides that each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Settlement agreement

Sub-section (1) of section 73 provides that when it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate

Economic and Commercial Laws- Update

the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

Further sub-section (2) provides that if the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

Sub-section (3) states that when the parties sign the settlement agreement, it shall be, final and binding on the parties and persons claiming under them respectively

As per sub-section (4) the conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

Status and effect of settlement agreement

Section 74 provides that the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

Confidentiality

Section 75 provides that notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Termination of conciliation proceedings

Section 76 provides that the conciliation proceedings shall be terminated-

- a. by the signing of the settlement agreement by the parties, on the date of the agreement; or
- b. by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
- c. by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
- d. by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Economic and Commercial Laws- Update

Resort to arbitral or judicial proceedings

Section 77 provides that the parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

Costs

Sub-section (1) of section 78 states that upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

Further, sub-section (2) states that for the purpose of sub-section (1), "costs" means reasonable costs relating to-

- a. the fee and expenses of the conciliator and witnesses requested by the conciliator, with the consent of the parties;
- b. any expert advice requested by the conciliator with the consent of the parties;
- c. any assistance provided pursuant to clause (b) of sub-section (2) of section 64 and section 68;
- d. any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

As per sub-section (3) the costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

Deposits

Sub-section (1) of section 79 states that the conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-section (2) of section 78 which he expects will be incurred.

Further, sub-section (2) states that during the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

As per sub-section (3) if the required deposits under sub-sections (1) and (2) are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

Economic and Commercial Laws- Update

Sub-sections (4) provide that upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

Role of conciliator in other proceedings

Section 80 provides that unless otherwise agreed by the parties,-

- a. the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;
- b. the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

Admissibility of evidence in other proceedings

Section 81 provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,-

- a. views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- b. admissions made by the other party in the course-, of the conciliation proceedings;
- c. proposals made by the conciliator;
- d. the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Power of High Court to make rules

Section 82 provides that the High Court may make rules consistent with this Act as to all proceedings before the Court under this Act.

Removal of difficulties

Sub-section (1) of section 83 provides that if any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date of commencement of this Act.

Further sub-section (2) provides that every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

Economic and Commercial Laws- Update

Power to make rules

Sub-section (1) of section 84 provides that the Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

Further sub-section (2) provides that every rule made by the Central Government under this Act shall be laid, as soon as may be, after it is made before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

There is a growing awareness that courts will not be in a position to bear the entire burden of justice system. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

There is, therefore, an urgent need to establish and promote ADR services for resolution of both domestic and international disputes in India.

These services need to be nourished on sound conceptions, expertise in their implementation and comprehensive and modern facilities. The International Centre for Alternative Dispute Resolution (ICADR) is a unique centre in this part of the world that makes provision for promoting teaching and research in the field of ADR as also for offering ADR services to parties not only in India but also to parties all over the world. The ICADR is a Society registered under Societies Registration Act, 1860, it is an independent non-profit making organisation. It maintains panels of independent experts in the implementation of ADR processes.

Areas in which ADR works

Almost all disputes including commercial, civil, labour and family disputes, in respect of which the parties are entitled to conclude a settlement, can be settled by an ADR procedure. ADR techniques have been proven to work in the business environment, especially in respect of disputes involving joint ventures, construction projects, partnership differences, intellectual property, personal injury, product liability,

Economic and Commercial Laws- Update

professional liability, real estate, securities, contract interpretation and performance and insurance coverage.
