

# Newsletter

July 2016

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## Welcome to the July edition of the Clasis Law newsletter.

This edition brings to our readers a featured article on “Radical changes in FDI regime”.

“The Union Government has further liberalized the FDI regime by way of Press No. 5 (2016 Series) as issued by the Department of Industrial Policy & Promotion, which reforms include increase of sectoral caps, bringing more sectors under the automatic route and easing of conditionalities for foreign investment.”

We continue to highlight certain key judgements passed by the Hon’ble Supreme Court of India as well as changes in Corporate and Commercial matters, and updates in Projects, Energy and Natural Resources and IP sector.

Your inputs and feedback are always welcome and we look forward to our interactions with you.



## Radical changes in FDI regime

It is observed that India has the potential to attract even more foreign investment which could be achieved by liberalizing and simplifying the Foreign Direct Investment (FDI) regime. With such intent, the Union Government has brought its second major reform (after the last changes having been announced in November 2015) by liberalizing the FDI regime with its focus on employment and job creation in India. With such reforms and most of the sectors falling under the automatic route, India is now one of the most open economies in the world for FDI according to several international agencies.

The reforms introduced to the Consolidated FDI Policy of 2016 by way of Press No. 5 (2016 Series) as issued by the Department of Industrial Policy & Promotion include increase of sectoral caps, bringing more sectors under the automatic route and easing of conditionalities for foreign investment. These measures are expected to help in creating headroom for foreign capital to come in, especially in sectors such as defence and civil aviation that are capital intensive.

Following are the key highlights of the reforms:

### 1. Defence sector

The erstwhile FDI regime permitted 49% FDI under the automatic route and FDI above 49% was permitted through approval route on a case to case basis wherever it was likely to result in access to modern and 'state-of-art' technology.

Now, foreign investment beyond 49% has been permitted through approval route in cases resulting in access to modern technology in the country or for other reasons to be recorded. The condition of access to 'state-of-art' technology in the country has been done away with. Further, the FDI limit for defence has also been made applicable to Manufacturing of Small Arms and Ammunitions covered under Arms Act, 1959.

### 2. Broadcasting carriage services

Broadcasting carriage services consisting of: (i) teleports; (ii) direct to home (DTH); (iii) cable networks; (iv) mobile TV; and (v) headend in the sky broadcasting service, were earlier permitted up to 49% FDI under automatic route and FDI beyond 49% was through approval route.

Now, 100% FDI has been permitted under automatic route, however, infusion of fresh foreign investment beyond 49% in a company not seeking license/permission from the Ministry, which results in change in the ownership pattern

or transfer of stake by existing investor to new foreign investor will require approval of the Foreign Investment Promotion Board (FIPB).

### 3. Pharmaceutical sector

The erstwhile FDI policy permitted 100% FDI under the automatic route in greenfield pharma and FDI upto 100% under approval route in brownfield pharma. For further development in this sector, it has now been decided to permit up to 74% FDI under automatic route in brownfield pharma, and approval route beyond 74% would continue.

### 4. Civil aviation sector

The former FDI policy permitted 100% FDI under the automatic route in greenfield airport projects and FDI upto 74% under the automatic route in brownfield airport projects, with FDI beyond 74% being under the approval route. It has now been decided to permit 100% FDI under automatic route in brownfield airport projects. Further, it has been decided to permit FDI up to 100% in scheduled air transport service/domestic scheduled passenger airline and regional air transport service, with FDI up to 49% being permitted under automatic route and FDI beyond 49% through approval route.

### 5. Food products

For promoting food products manufactured or produced in India, it has been decided to permit 100% FDI under approval route for trading activity, including through e-commerce.

### 6. Private security agencies

The erstwhile FDI policy permitted 49% FDI under approval route, however, now FDI upto 49% is permitted under automatic route, and FDI beyond 49% and up to 74% would be permitted under approval route.





## 7. Animal husbandry

The policy continues to allow 100% FDI in animal husbandry, however, the requirement of 'controlled conditions' has been done away with.

## 8. Establishment of branch office, liaison office or project office

To establish a branch office, liaison office or project office or any other place of business, if the principal business of the applicant is defence, telecom, private security or information and broadcasting, the approval of Reserve Bank of India or separate security clearance would not be required in cases where FIPB approval or license/permission by the concerned Ministry/Regulator has already been granted.

## 9. Single brand retail trading

As per the erstwhile FDI policy, sourcing of 30% of the value of goods purchased was required to be achieved from India (preferably from MSMEs, village and cottage industries, artisans and craftsmen) in respect of proposals involving FDI beyond 51%. This procurement requirement was required to be met, in the first instance, as an average of five years' total value of the goods purchased, beginning 1st April of the year of the commencement of the business. It has now been decided to relax local sourcing norms up to three years and a relaxed sourcing regime for another five years for entities having 'state-of-art' and 'cutting edge' technology.

## Conclusion

The aforementioned amendments to the FDI Policy is yet another step towards the ease of doing business in India which paves the way for larger FDI inflows that will contribute to the rise in investment and incomes. The Government seems to be confident that the FDI reforms would result in growth and employment generation, and that these changes should not only dispel doubts in the minds of investors but should also revive employment hopes.

In such a significant reform move, these decisions will make India more investor friendly and an attractive destination for foreign investment. With the highest ever FDI inflows post reform measures in November 2015 and with the latest policy in place, India should continue to attract further foreign investments and it will be amongst the preferred destinations for FDI investments, as already being rated by several international agencies.

For any clarification or further information, please contact:

### Vineet Aneja

Partner

E: [vineet.aneja@clasislaw.com](mailto:vineet.aneja@clasislaw.com)

### Prateek Sethi

Associate

E: [prateek.sethi@clasislaw.com](mailto:prateek.sethi@clasislaw.com)



## Legal alerts

### Litigation

Civil Appeal before the Hon'ble Supreme Court of India for interpreting Section 69(3) of the Indian Partnership Act, 1932 with reference to its applicability to arbitral proceedings.

*M/s. Umesh Goel v. Himachal Pradesh Cooperative Group Housing Society Ltd. Civil Appeal No. 7916 of 2009*

Recently, the Hon'ble Supreme Court of India considered and adjudicated upon an important question of law relating to the interpretation of the term "other proceedings" as mentioned under Section 69(3) of the Indian Partnership Act, 1932 ('Act'). Section 69 of the Act provides as under:

#### Section 69- Effect of non-registration

1. No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the register of firms as a partner in the firm
2. No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the register of firms as partners in the firm
3. The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not effect
  - a. The enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm
  - b. The powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner

4. This section shall not apply

- a. To firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories, are situated in areas to which, by notification under section 56, this Chapter does not apply
- b. To any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882 (5 of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim

#### Brief facts:-

Himachal Pradesh Cooperative Group Housing Society Ltd. ('Respondent') invited tenders for construction of 102 dwelling units. M/s Umesh Goel ('Appellant'), an unregistered partnership firm submitted its bid in response and was subsequently declared as the successful bidder and awarded the contract

- Thereafter, owing to some delay in getting the plan sanctioned, a dispute arose between the Appellant and the Respondent, which necessitated the Appellant to move the Delhi High Court under Section 9 of the Arbitration and Conciliation Act 1996 for seeking interim reliefs
- Accordingly, the Respondent appointed an Arbitrator in relation to adjudication of the dispute. In view whereof, although the Appellant had earlier moved an application under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an independent arbitrator, the same was subsequently withdrawn



- The Appellant and Respondent participated in the arbitration proceedings before the Arbitrator, advanced their respective claims and counter claims and finally the arbitral award was passed in favour of the Appellant. The Respondent, while resisting the claim of the Appellant did not raise any plea of the effect of non-registration of a firm Section 69 of the Act
- However, the Respondent challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996 Act before the Delhi High Court. The Respondent's application under Section 34 of the Arbitration and Conciliation Act, 1996 was dismissed. Consequently, the Respondent filed a review, which was also dismissed. In view of the aforesaid, the Respondent preferred an appeal before this Hon'ble Court

It was contended on behalf of the Respondent that the term "other proceedings" under Section 69(3) of the Act also includes arbitral proceedings. The aforesaid argument was substantiated by *inter-alia* contending that the interpretation of the term "Court" in light of Section 14 of the Indian Limitation Act, 1963 makes it clear that arbitral proceedings also fall under the umbrella of "Civil Proceedings" and thus arbitral proceedings are included in the term "other proceedings" as mentioned under Section 69(3) of the Act.

The Respondent concluded its arguments by stating that the Arbitrator should be held to be a Court and the proceedings pending before it are to be treated as a suit and consequently "other proceedings" as mentioned under Section 69 (3) of the Act.

Thereafter, it was contended on behalf of the Appellant that the expression "other proceedings" mentioned in Section 69(3) of the Act should be with reference to other proceedings connected with a suit in a Court and cannot be read in isolation. It was further contended that an Arbitrator by himself is not a Court for the purpose of Section 69 of the Act. Further, the Arbitrator does not derive its judicial powers from the State but from the agreement of the parties under the contract and therefore cannot be held to be a Court under Section 69 of the Act.

The Ld. Senior counsel for the Appellant also shed light on Section 36 of the Arbitration and Conciliation Act, 1996 while submitting that the aforesaid section is only a statutory fiction by which for the purpose of enforcement, the award is deemed to be a decree and it cannot be enlarged to an extent to mean that by virtue of the said award to be deemed as a decree, the Arbitrator can be held to be a Court.

After hearing both the parties in detail, the Hon'ble Supreme Court accepted the contentions of the Appellant and rejected the contentions of the Respondent. The Hon'ble Court *inter-alia* observed the following:

1. The pending proceeding must be a suit instituted in a Court and in that suit a claim of set off or other proceedings will also be barred by virtue of the provisions contained in Section 69 (1) and (2) as specifically stipulated in sub-section (3)
2. Having regard to the manner in which the expressions are couched in sub-section (3), a claim of set off or other proceedings cannot have independent existence
3. Prohibition under Section 69 of the Act will have no application to the post award proceedings as they do not fall under the expression "other proceedings" of Section 69(3) of the Act
4. A reading of Section 69 of the Act as a whole does not permit any interpretation that would cover Arbitral proceedings

The Hon'ble Court while accepting the arguments advanced on behalf of the Appellant allowed the appeal and held that Arbitral proceedings will not come under the expression "other proceedings" of Section 69(3) of the Act. Consequently, the ban imposed under the said Section cannot have any application to Arbitral proceedings as well as the Arbitral award.





## Corporate and commercial

### **National company law tribunal constituted**

The Ministry of Corporate Affairs has issued a notification for the constitution of the National Company Law Tribunal (“NCLT”) and National Company Law Appellate Tribunal (“NCLAT”) with effect from 1st June, 2016. With the constitution of the NCLT, the Company Law Board constituted under the Companies Act, 1956 stands dissolved. Hon’ble Justice S.J. Mukhopadhaya, Judge (Retd.), Supreme Court of India has joined as the Chairperson of the NCLAT and Hon’ble Justice M.M. Kumar, Judge (Retd.) has joined as the President of the NCLT. Initially, NCLT will have eleven Benches, two at New Delhi and one each at Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai.

### **Consolidated FDI policy 2016**

Department of Industrial Policy and Promotion (“DIPP”) on June 7, 2016 has issued the Consolidated FDI Policy Circular of 2016 which subsumes and supersedes all Press Notes/Press Releases/Clarifications/Circulars issued by DIPP. This Circular accordingly will take effect from June 07, 2016 and will remain in force until superseded in totality or in part thereof.

### **Foreign exchange management (Foreign currency accounts by a person resident in India) Regulations, 2015: Amendments viz a viz start ups**

The Reserve Bank of India through notification dated June 23, 2016 has amended the Foreign Exchange Management (Foreign currency accounts by a person resident in India) Regulations, 2015 to permit an Indian startup or any other entity as may be notified by the Reserve Bank in consultation with the Central Government, having an overseas subsidiary, to open a foreign currency account with a bank outside India for the purpose of crediting to it foreign exchange earnings out of exports/sales made by the said entity and/or the receivables, arising out of exports/sales, of its overseas subsidiary.

The balances in such an account would be repatriated subject to the conditions specified in the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 dated January 12, 2016. In addition, payments received in foreign exchange by an Indian startup arising out of sales/export made by the startup or its overseas subsidiaries will be a permissible credit to the Exchange Earners Foreign Currency account maintained in India by the startup.

### **Amendments in companies (Acceptance of deposit) amendment rules, 2016**

The Ministry of Corporate Affairs on June 29, 2016 has issued the Companies (Acceptance of Deposits) Amendment Rules, 2016 whereby expanding the ambit of exempted deposits. From now on, compulsory convertible bonds or debentures convertible within a period of ten years and non-interest bearing amount held in trusts would also be included within the category of ‘*exempt deposits*’.

Further, limits for accepting or renewing any deposit from members of a public company has been increased from 25% to 35% of the aggregate of the paid-up share capital and free reserves of the company. For private companies, a separate limit has been prescribed for acceptance of deposits from its members. Private companies may accept from its members, deposits not exceeding 100% of the aggregate of the paid up share capital, free reserves and securities premium account. For public companies, securities premium account is not available in calculating such limits.



## Projects, energy and natural resources

### **GSPC Likely to start commercial production from its blocks in Krishna-Godavari Basin by end 2016**

Gujarat State Petroleum Corporation (GSPC) is likely to start commercial production from Krishna Godavari OSN 2001/3 block by the end of 2016. The initial output is estimated to be 70-80 million cubic feet per day. The fifth development well D5 is expected start commercial production by October 2016 i.e., after its completion. These wells will use the fracking method costing nearly USD 60-USD 70 million for each well for which the GSPC would use the services of global oilfield services firms like Haliburton and Schlumberger.

### **Govt approves the draft plan for phased expansion of Delhi Airport**

Government has approved the expansion plan for the international airport in the national capital that would see addition of fourth runway as well as increase its passenger handling capacity.

The international aerodrome in the national capital is operated by Delhi International Airport (P) Ltd – a public private partnership where diversified group GMR, Airports Authority of India (AAI) and Germany's Fraport are the stakeholders.

### **ONGC invites tenders for integrated development of B-127 cluster fields**

ONGC has invited bids for the integrated development of the B-127 cluster fields and the additional development of the B-55 project in Western Off-shore Mumbai.

The scope of the tender includes survey, design, engineering, procurement, fabrication, commissioning etc of the entire facility.

### **Govt to offer toll-able roads to private sector for long-term lease**

The Ministry of Road Transport and Highways has planned a target to raise Rs 60,000 crore, over the next six months, by offering as many as 104 existing tollable projects on a 20 years lease to private players including global funds. The construction target set for next year at 15000km is approximately two and a half times more than the last fiscal year.

Reportedly under the proposed toll-operate-transfer (TOT) model, bidders will make an upfront payment to the government and recoup their investments and returns--by collecting toll over a 20-year lease period. After the lease tenure expires, these projects would return to the government's fold.

It is also reported that presentations have been made to 20 global funds with long-term capital including Nomura, Goldman Sachs, Macquarie, Abu Dhabi Investment Bank, Canadian Pension Fund and American Pension Fund.

The government has decided to club 5-6 projects so as to attract investments from these global funds valued at approximately USD 150 million.



## IP update

### 1. IP and health

The United National Human Rights Council (UNHRC) adopted the Resolution on “**Access to medicines in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health**”.

The underlying principle of the text stresses on the “primacy of human rights over international trade, investment and intellectual property regimes.” The Resolution appeals the developing nations to make full use of the flexibilities available under the various international instruments to prioritise access to “comprehensive and cost-effective prevention, treatment and care, .... including, inter alia, increased access to affordable, safe, efficacious and quality medicines.”

Sponsored by 13 developing countries including India, Brazil, China, Egypt, and others, the Resolution eventually gathered more than 70 co-sponsors. However, Switzerland, the US, the UK and the EU voiced their objections to substantial parts of the text.

### 2. 20th ratification and realization of Marrakesh Treaty

The much awaited Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, will come into effect on 30th September 2016.

On June 30, 2016 Canada ratified the Marrakesh Treaty putting into effect Article 18 of the Treaty which provides that the Treaty shall come into force three months after the 20th country ratifies it. The treaty allows countries that have ratified it to share and exchange accessible format copies across national borders.

The 20 countries that have ratified the treaty are India, El Salvador, United Arab Emirates, Mali, Uruguay, Paraguay, Singapore, Argentina, Mexico, Mongolia, South Korea, Australia, Brazil, Peru, North Korea, Israel, Chile, Ecuador, Guatemala and Canada. United States, however, is not a part of the treaty yet.

### 3. UNDP released guidelines for examination of pharmaceutical patents

With the aim of promoting incorporation of public health perspective in the procedures for granting pharmaceutical patents, the UNDP has released Guidelines for examination of pharma patents. This is a welcome step towards acknowledgement of the need to maintain appropriate balance between protecting the rights of the innovators and incentivizing innovation, on the one hand, and promoting accessible and affordable treatments, on the other.

Emphasizing the flexibilities given under the TRIPS Agreement, whereby the members are free to determine the scope of the term ‘invention’, the Guidelines encourage the member nations to set appropriate patentability standards aligning with the nations’ social and economic conditions. The Guidelines address specific issues and claims relevant to pharmaceutical patents and provide recommendations that may be adopted by member nations to assist their patent examiners in correct application of the set patentability standards. The Guidelines include examination of the initiatives taken by some countries, such as Argentina, Ecuador, India and Philippines, and have occasionally relied upon the Revised Draft Guidelines for Examination of Patent Applications in the Field of Pharmaceuticals released by the Office of Controller General of Patents, Designs and Trademarks, India.

### 4. An injunction issued for HERCEPTIN biosimilar

In an unusual event, Delhi High Court while issuing an injunction against the Biocon-Mylan prescribed strict conditions on the sale on their biosimilar version of Roche’s breast cancer drug, Herceptin. Plaintiffs alleged that Biocon-Mylan were “passing off” their biosimilar as equivalent to the Plaintiffs’ Herceptin, even though they had not complied with the testing requirements as per the Guidelines in Similar Biologics, released by the office of DCGI. Ruling in favour of the Plaintiffs, Justice Manmohan Singh restrained the defendants from using the Plaintiffs’ trademark ‘Herceptin’ in their promotional materials and allowed judicial intervention, in what was essentially a challenge to the validity of DCGI’s approval to the biosimilar.





## 5. IP regime and implications of Brexit

Much has been spoken about the UK referendum to exit the European Union. Yet the actual implication of Brexit is uncertain at present. The UK will enter into a negotiation period that will last two years following the UK's submission of official request to leave EU.

Even though the UK won't be a part of the EU, by virtue of it being a signatory to the European Patent Convention, a UK patent could still be obtained via the EPC system.

However, immediate impact could be visible with regard to the unitary patent system, as entities would have to obtain a separate UK patent in addition to the unitary patent to obtain pan-Europe protection. Community rights, as under community designs and EU trade marks will no longer have effect in the UK once its exit is in effect. The future of such rights and more will be clear only during the negotiations conducted during the notice period – watch this column for more updates.



## Recent events

### **Navigating entry into growth markets**

**13 July 2016, London**

Vineet Aneja, Partner, Clasis Law spoke about the challenges of entering into growth markets by way of start-up, acquisition, joint venture etc, at an event organized by Clyde & Co in London. This was a unique opportunity to discuss about regional developments, set-up and structuring options and challenges post set-up.



### **The search for growth**

**13 July 2016, London**

Vineet Aneja, Partner, Clasis Law was a speaker in the conference organised by Clyde & Co in London. Some of the senior figures from the London insurance market were invited for the discussion. The idea behind the theme was to discuss growth options across the globe including India.

### **Conference on container infrastructure & logistics in India**

**20-21 July 2016, New Delhi**

Rajeev Mishra, Counsel, Clasis Law attended the 10th annual conference on container infrastructure & logistics in India organized by India Infrastructure which was held at Hyatt Regency. The conference was focused upon various topics pertaining to the backbone of the supply chain i.e. Infrastructure for the logistics industry. It gives a major thrust upon the govt. initiatives to boost the infrastructure in the country and as a big enabler of growth.

**New Delhi**

14th Floor  
Dr. Gopal Das Bhawan  
28, Barakhamba Road  
New Delhi 110 001

T: +91 11 4213 0000  
F: +91 11 4213 0099

**Mumbai**

1st Floor, Bajaj Bhawan  
226, Nariman Point  
Mumbai - 400 021

T: +91 22 4910 0000  
F: +91 22 4910 0099

**London**

The St Botolph Building  
138 Houndsditch  
London EC3A 7AR

T: +44 (0)20 7876 4847  
F: +44 (0)20 7875 5132

[info@clasislaw.com](mailto:info@clasislaw.com)  
[www.clasislaw.com](http://www.clasislaw.com)

New Delhi | Mumbai | London