Highlights

- SEBI consolidates disclosure and reporting norms for AIFs.
- SEBI releases discussion paper on Crowdfunding.
- MCA clarifies resident director requirements, deposit insurance requirements, etc.
- Pledge of shares for business purposes in favor of NBFCs.
- SC clarifies pre-BALCO law on applicability of Part I of the Arbitration & Conciliation Act, 1996, to International Commercial Arbitrations held outside India
- LinkedIn Profiles not Hearsay Evidence; admissible as evidence

Corporate Brief

➲ *SEBI consolidates disclosure and reporting norms for Alternative Investment Funds.*

The Securities Exchange Board of India ("SEBI") has recently consolidated guidelines governing disclosure mechanisms and reporting mechanisms for Alternative Investment Funds ("AIF"), and has clarified various provisions of SEBI (Alternative Investment Funds) Regulations, 2012 ("AIF Regulations"). Disclosure norms have been tightened for increased investor protection. Importantly, SEBI has directed fund managers to provide fee structure and charges applicable on the investor as well as how the distribution waterfall is structured in the final placement memorandum. Regarding changes to be made to the placement memorandum, the Circular stipulates that any such change is required to be notified to all unit holders within 7 days of such change as well as SEBI. In a bid to increase transparency, AIFs will now be required to include details of the 'disciplinary history' of the fund, its sponsor, manager, directors, partners, promoters and associates in its placement memorandum. *[See Circular No. CIR/IMD/DF/14/2014 dated June 19, 2014]*

➲ *SEBI releases discussion paper on Crowdfunding.*

In a consultation paper inviting public feedback, Securities and Exchange Board of India (SEBI), India's capital market regulator, has analysed the benefits and risks involved in introducing crowdfunding (i.e. means of solicitation of funds from multiple investors through small financial contributions from numerous persons on a web-based platform for a specific project, business venture or social cause) as an alternative and innovative source of raising capital for start-ups and SMEs in India who have limited access to capital or have exhausted other available sources of capital. SEBI has clarified that in India, companies displayed on crowdfunding platforms will not be treated as 'Listed Companies'. SEBI has also proposed creation of a separate class of funds under Category I Alternative Investment Funds as 'Category I AIF- Crowd Funds'. Such Category I AIF-Crowd Funds would be required to register with SEBI under the SEBI (AIF) Regulations, 2012. Registered Crowd Funds would then be entitled to be displayed on Crowdfunding Platforms and raise funds from a maximum of 1000 accredited investors (including QIBs, Companies and HNIs). Such crowdfunding platforms may in turn charge a nominal fee from both entities seeking funds and the accredited investors.

Disclosure requirements (viz. fees and charges conflicts of interest, investments and leverage, etc.) are proposed to be similar to disclosure requirements of Category I AIF-Venture Capital Funds.

[See www.sebi.gov.in/cms/sebi_data/attachdocs/1403005615257.pdf dated June 17, 2014.]

➲ *MCA clarifies resident director requirements, deposit insurance requirements, etc.*

(i) **Under** Companies Act, 2013, Section 149(3) mandates every company to have one 'Resident Director' who has stayed in India for not less than 182 days in the previous calendar year. To clarify concerns on applicability of this provision in the current financial/calendar year, Ministry of Corporate Affairs (MCA) recently clarified that the 'residency requirement' would be reckoned from the date of commencement of the new Act i.e. April 01, 2014. It has been clarified that the first 'previous calendar year' for compliance of these provisions would be Calendar Year, 2014 and the period to be taken into account will be period between 1st April, 2014 to 31st December, 2014, and on proportionate basis the director(s) would need to be resident in India during calendar year 2014 for more than 136 days. Companies incorporated in the period April 01, 2014 to September 30, 2014 should have a resident director either at the time of incorporation itself or within 6 months of their incorporation. Companies incorporated after September 30, 2014 will be required to have a resident director from the date of incorporation itself. [*See General Circular No.25/2014 dated June 26, 2014*].

(ii) **To** give a transitional period to companies for complying with deposit insurance requirements under Companies Act, 2013, MCA has clarified that companies will be allowed to accept deposits without any deposit insurance for one year (i.e. up to March 31, 2015). *[See Press Release No.1/8/2013-CL-V dated June 10, 2014.]*

(iii) **Shares** held by a company in another company in a 'fiduciary capacity' shall not be counted for the purpose of determining the relationship of an 'associate company' under Section 2(6) of the Companies Act, 2013 (Act)**.** With a view to allow relief to companies facing difficulties in repayment of deposits, provisions of section 74(2) & (3) of the Act have been bought into force with effect from 6th June, 2014. Further, the Company Law Board (CLB) has been allowed to grant further time to companies for repayment of deposits / interests in certain cases. *[See General Circular No.24/2014 dated June 25, 2014.]*

(iv) **A** company incorporated outside India is not barred from incorporating a subsidiary, either as a public company or a private company, under Companies Act, 2013. An existing company, being a subsidiary of a company incorporated outside India, registered under the Companies Act, 1956, either as private company or a public company, will continue as a private company or public company, as the case may be, without any change in its incorporation status. *[See General Circular No.23/2014 dated June 25, 2014.]*

➲ *Pledge of shares for business purposes in favour of NBFCs.*

Equity shares of an Indian company held by non-resident investor/s in accordance with extant FDI Policy, can be pledged in favour of NBFCs, whether listed or not, to secure credit facilities extended to resident investee company for bona-fide business purposes/operations, subject to compliance with conditions such as (i) equity shares should be listed on a recognized stock exchange in India; (ii) Indian company has to follow SEBI disclosure norms; (iii) Authorized Dealer Banks may obtain a board resolution or certificate from statutory auditor of the investee company, that the loan proceeds received consequent to pledge of shares, have been utilized by investee company for the declared purpose, etc. *[See RBI/2013-14/633 A.P.(DIR Series) Circular No.141 dated June 06, 2014].*

Litigation Brief

➲ *SC clarifies pre-BALCO law on applicability of Part I of the Arbitration & Conciliation Act, 1996, to International Commercial Arbitrations held outside India.*

The pre-BALCO law regarding applicability of Part I of the Arbitration & Conciliation Act, 1996 ("Act"), to international commercial arbitrations having their seat outside India has been once again clarified by the Supreme Court in the case of *Reliance Industries Limited & Anr* v *Union of India [2014(2) ARBLR 423 (SC)]*. Overturning the decision of the High Court of Delhi, the Supreme Court has held that where the seat of arbitration in international arbitrations lies outside India and the parties have expressly selected a foreign law to govern the arbitration agreement, notwithstanding choice of Indian law as governing law of the substantive contract, Part I of the Act would stand impliedly excluded and Indian courts will not have jurisdiction to supervise such arbitrations.

In this case, the Supreme Court acknowledged that the decision in BALCO applied prospectively only, therefore, for the present dispute it was bound by the pre-BALCO jurisprudence. However, basis the facts of the case, the Supreme Court held that since the parties had consciously agreed that the arbitration agreement would be governed by English law and the juridical seat of the arbitration would be at London, they had impliedly excluded Part I of the Act and, resultantly, the jurisdiction of Indian Courts. Mere fact that the governing law of the contract was Indian was not held to be sufficient to confer supervisory jurisdiction on Indian Courts.

The Supreme Court clarified that during the entire process of arbitration, the following relevant laws had to be considered: (i) the law of the contract which would govern the substantive disputes between the parties; (ii) the law governing the arbitration agreement which would determine the obligation of the parties to arbitrate their disputes; and (iii) the curial law governing the conduct of the arbitration proceedings.

The Supreme Court observed that the High Court had failed to distinguish between the law applicable to the main contract and the law applicable to the arbitration agreement and, by conferring jurisdiction on Indian Courts, had arrived at a decision that would lead to a "chaotic situation where the parties would be left rushing between India and England for redressal of their grievances". It was held that any challenge to an award rendered in the present arbitration proceedings would be subject to the provisions of the English Arbitration Act, 1996.

➲ *LinkedIn Profiles not Hearsay Evidence; admissible as evidence.*

The Income Tax Appellate Tribunal in the case of *GE Energy Parts Inc v. Addl. Director of Income Tax ITA* [*ITA No. 671/Del/2011*] ruled that LinkedIn profiles are not in nature of hearsay evidence and the details disclosed in the profiles are akin to admissions made by the concerned persons.

The ITAT took this view while examining the admissibility of additional evidence submitted by the Income Tax Department comprising LinkedIn profiles of various employees of GE. It was contended by GE that LinkedIn profiles have no probative value as they are in the nature of hearsay evidence.

The division bench of ITAT rejected the contention of GE and held that LinkedIn profiles of the employees are not in the nature of hearsay evidence since all the relevant details relating to the said employees contained therein have been provided by the employees themselves and no third party is involved in the creation of the LinkedIn profiles. Accordingly, the LinkedIn profiles were held to be admissible as evidence.

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