CLIENT UPDATE

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J U R I S L E G A L

1. ARBITRATION & LITIGATION

PETITION UNDER SECTION 9 OF THE ARBITRATION AND CONCILIATION ACT, 1996 (THE "ACT") IS NOT MAINTAINABLE AFTER THE AWARD IF THE CLAIM HAS BEEN DISMISSED

In the case of ***Dirk India Private Limited v. Maharashtra State Electricity Generation Company Limited***[1], a Division Bench of the Bombay High Court has held that a petition under Section 9 of the Act is not maintainable after the award if the claim has been dismissed by the arbitrators. Section 9 of the Act states as below:

> *"a party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36 apply for interim relief…"*

The Bombay High Court was concerned with a case where the arbitrator had originally granted interim relief under Section 17 of the Act, but subsequently had dismissed the claim. The claimant filed a petition under Section 34, and also filed an application for interim protection under Section 9 of the Act. The learned Single Judge hearing the application gave limited interim protection, leaving the question of maintainability of the Section 9 application open. The matter came before the Division Bench through cross-appeals against this order. The Division Bench held that an application under Section 9 of the Act is not maintainable at the behest of a claimant after the award, if the claim has been dismissed by the arbitrator.

[1] Appeal No.114 OF 2013 in Arbitration Petition No.355 of 2011

2. BANKING & FINANCE

THE RESERVE BANK OF INDIA ("RBI") GUIDELINES FOR LICENSING OF NEW BANKS IN THE PRIVATE SECTOR

RBI has released guidelines for "Licensing of New Banks in the Private Sector". The key features of these guidelines are as follows:

a) **Eligible Promoters:** Entities/groups in the private sector, entities in public sector and Non-Banking Financial Companies ("**NBFCs**") shall be eligible to set up a bank through a wholly-owned Non-Operative Financial Holding Company ("**NOFHC**").

b) **'Fit and Proper' criteria:** Entities/groups should have a past record of sound credentials and integrity, be financially sound with a successful track record of 10 years. For this purpose, RBI may seek feedback from other regulators and enforcement and investigative agencies.

c) **Corporate structure of the NOFHC:** The NOFHC shall be wholly owned by the promoter/ promoter group. The NOFHC shall hold the bank as well as all the other financial services entities of the group.

d) **Minimum voting equity capital requirements for banks and shareholding by NOFHC:** The initial minimum paid-up voting equity capital for a bank shall be INR 5 billion. The NOFHC shall initially hold a minimum of 40 % of the paid-up voting equity capital of the bank which shall be locked in for a period of five years and which shall be brought down to 15 % within 12 years. The bank shall get its shares listed on the stock exchanges within three years of the commencement of business by the bank.

e) **Regulatory framework:** The bank will be governed by the provisions of the relevant Acts, relevant Statutes, Directives, Prudential regulations and other Guidelines/Instructions issued by RBI and other regulators. The NOFHC shall be registered as a non-banking finance company ("**NBFC**") with the RBI and will be governed by a separate set of directions issued by RBI.

f) **Foreign shareholding in the bank:** The aggregate non-resident shareholding in the new bank shall not exceed 49% for the first 5 years after which it will be as per the extant policy.

g) **Corporate governance of NOFHC:** At least 50% of the directors of the NOFHC should be independent directors. The corporate structure should not impede effective supervision of the bank and the NOFHC on a consolidated basis by RBI.

h) **Prudential norms for the NOFHC:** The prudential norms will be applied to NOFHC both on stand-alone as well as on a consolidated basis and the norms would be on similar lines as that of the bank.

i) **Exposure norms:** The NOFHC and the bank shall not have any exposure to the promoter group. The bank shall not invest in the equity/debt capital instruments of any financial entities held by the NOFHC.

3. INTELLECTUAL PROPERTY

INDIA JOINS MADRID PROTOCOL SYSTEM

The Government of India has submitted its instrument of accession to the Madrid Protocol for the International Registration of Marks at World Intellectual Property Organization ("**WIPO**") on April 8, 2013 and it will come into force on July 8, 2013.

Controlled by WIPO, an international registration under the Madrid System produces the same effects as an application for registration of the mark in each of the contracting parties designated by the applicant. The trademark holder may thus protect a mark in all member countries (including the European Union with its Community Trade Mark) by filing one application, in one language (English, French or Spanish), with one set of fees, in one currency. However before seeking international protection, the applicants are required to apply for trademark protection in a relevant national or regional trademark office.

If the protection is not denied by the trademark office of a designated contracting party, the status of the mark is the same as if it had been registered by that office. Thereafter, the international registration can be maintained and renewed through a single system.

GUIDELINES FOR PROCESSING OF PATENT APPLICATIONS RELATING TO TRADITIONAL KNOWLEDGE AND BIOLOGICAL MATERIAL

The Controller General of Patents, Designs & Trade Marks has published the final version of the Guidelines for Processing of Patent Applications Relating to Traditional Knowledge and Biological Material on December 18, 2012 (the "**Guidelines**"). These Guidelines seek to simplify the processing of patent applications relating to traditional knowledge and/or biological material. The Guidelines contain the process and instruction relating to:

a) Screening of patent applications relating to traditional knowledge;

b) Allotment of patent applications relating to traditional knowledge and/or biological material;

c) Examination of patent applications relating to traditional knowledge and/or biological material;

d) Permission from National Biodiversity Authority; and

e) Publication of traditional knowledge related patent applications.

4. TAXATION

CAPITAL GAINS ARISING OUT OF TRANSFER OF SHARES OF A NON-RESIDENT COMPANY BETWEEN TWO NON-RESIDENTS NOT TAXABLE IN INDIA

In the case of ***Sanofi Pasteur Holding SA*** (the "**Assessee**" or "**Sanofi**") ***v The Department of Revenue***[2], the Andhra Pradesh High Court has overruled the earlier order passed by the Authority for Advance Rulings (AAR) in November, 2011 and held that capital gains arising out of transfer of a French company's shares by the French corporate shareholders to the Assessee will not be taxable in India, under the beneficial provisions of the Double Taxation Avoidance Agreement ("**DTAA**") between India and France. Further, it was held that the retrospective amendments to provisions of the Income-tax Act, 1961 do not have any effect on the interpretation of the DTAA provisions; consequentially, the Department of Revenue's order under Section 201 of the Act holding Sanofi as 'an Assessee-in-default', is not maintainable.

[2] TS-57-HC-2013 (AP)

5. TRADE & INVESTMENT

FOREIGN DIRECT INVESTMENT POLICY FOR 2013

The Department of Industrial Policy and Promotion ("**DIPP**") has released the sixth edition of the consolidated Foreign Direct Investment Policy ("**FDI Policy**") for 2013. The new FDI policy has been effective from April 05, 2013.

The key changes brought about by the FDI Policy, 2013 are as below:

a) **Who can invest**: Pursuant to the FDI Policy, 2013, a citizen of Pakistan or an entity incorporated in Pakistan has been permitted, only under the Government route, to invest in sectors/activities other than defence, space and atomic energy and sectors or activities prohibited for foreign investment.

b) Following addition has been made under the heading "**Issue Price of Shares**":

"*Where non-residents (including NRIs) are making investments in an Indian company in compliance with the provisions of the Companies Act, 1956, 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.*"

c) **Downstream investment by banking companies**: A note has been added under the head "*Downstream Investment by an Indian Company which is not Owned and/or Controlled by Resident Entities*" that any downstream investment made by Banking Companies (as defined in Section 5(c) of the Banking Regulation Act, 1949) incorporated in India, which are owned and/or controlled by non-residents/ a non-resident entity/ non-resident entities, under Corporate Debt Restructuring (CDR), or other loan restructuring mechanism, or in trading books, or for acquisition of shares due to defaults in loans will not count towards indirect foreign investment. However, their 'strategic downstream investment' will count towards indirect foreign investment. For this purpose, 'strategic downstream investments' will mean investment by these banking companies in their subsidiaries, joint ventures and associates.

d) **FDI in broadcasting carriage services**: FDI in teleports, direct to home (DTH), cable networks (Multi System Operators ("**MSOs**")) operating at national or state or district level and undertaking up-gradation of networks towards digitalization and addressability) and mobile TV has been permitted up to 74%. FDI up to 49% is permitted under the automatic route. FDI beyond 49% and up to 74% is permitted subject to approval of Government.

e) **FDI in cable networks**: FDI in cable networks (other MSOs not undertaking up-gradation of networks towards digitalization and addressability and local cable operators) has been permitted up to 49 % under automatic route.

f) **FDI in Asset Reconstruction Company ("ARC")**: FDI in ARCs has been permitted up to 74% of paid-up capital of ARC under Government route. Earlier FDI in ARCs was restricted to 49% of paid-up capital of ARC.

g) **FDI in Power Exchanges**: FDI in power exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 has been permitted up to 49% (FDI &FII) under Government approval route.

h) **Retail Trading**:

(i) Removal from prohibited sectors: Retail trading has been removed from the list of sectors where FDI is prohibited.

(ii) **Single Brand Retail**: FDI Policy, 2013 provides that only one non-resident entity, (whether owner of the brand or otherwise) will be permitted to undertake single brand product retail trading in the country, for the specific brand. This should be done through a legally tenable agreement with the brand owner for undertaking single brand product retail trading in respect of the specific brand for which approval is being sought. The onus for ensuring compliance with this condition will rest with the Indian entity carrying out single-brand product retail trading in India. The investing entity is required to provide evidence to this effect at the time of seeking approval, including a copy of the licensing/ franchise/sub-licence agreement. Under the FDI Policy, 2012 it was a requirement that the foreign investor should be the owner of the brand. The following modifications have been made with respect to procurement of indigenous goods:

FDI Policy, 2012: In respect of proposals involving FDI beyond 51%, mandatory sourcing of at least 30% of the value of products sold would have to be done from Indian small industries/ village and cottage industries, artisans and craftsmen'. 'Small industries' would be defined as industries which have a total investment in plant & machinery not exceeding USD 1 million. This valuation refers to the value at the time of installation, without providing for depreciation. Further, if at any point in time, this valuation is exceeded, the industry will not qualify as a 'small industry' for this purpose. The compliance of this condition will be ensured through self-certification by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts, which the company will be required to maintain.	FDI Policy, 2013: In respect of proposals involving FDI beyond 51%, sourcing of 30% of the value of goods purchased will be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors from the duly certified accounts which the company will be required to maintain. This procurement requirement would have to be met, in the first instance, as an average of 5 years total value of the goods purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of FDI for the purpose of carrying out single-brand product retail trading.

(iii) Retail trading, in any form, by means of e-commerce will not be permissible, for companies with FDI, engaged in the activity of single-brand retail trading.

(iv) FDI in multi brand retail trading: FDI in multi brand retail trading has been permitted to the extent of 51% under the Government approval route subject to the conditions specified in the FDI Policy, 2013.

i) **FDI in NBFCs** (setting up of subsidiaries):

FDI Policy, 2012: 100% foreign owned NBFCs with a minimum capitalization of USD 50 million can set up step down subsidiaries for specific NBFC activities, without any restriction on the number of operating subsidiaries and without bringing in additional capital.	**FDI Policy, 2013:** NBFCs (i) *having foreign investment more than 75% and up to 100%*; and (ii) with a minimum capitalization of USD 50 million, can set up step down subsidiaries for specific NBFC activities, without any restriction on the number of operating subsidiaries and without bringing in additional capital.

j) **Civil Aviation**: FDI in Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital.

FDI Policy, 2012: No foreign airline was allowed to participate directly or indirectly in the equity of an Air Transport Undertaking engaged in operating Scheduled and Non-Scheduled Air Transport Services except Cargo airlines.	**FDI Policy, 2013:** Foreign airlines have been permitted to invest, in the capital of Indian companies, operating Scheduled and Non-Scheduled air transport services, up to the limit of 49% of their paid-up capital under the Government approval route. The 49% limit will subsume FDI and FII investment. Some of the other conditions subject to which this investment can be made have been set out in the FDI Policy, 2013.