

# UPDATE

This Update has been prepared by Suhana Islam Murshedd, Subhashree Pani, Milind Anand, and Namasvi Karia

## Corporate Law: Regulatory Updates

### Shaping Investment Horizons: Liberalisation of FDI Policy in the Space Sector

Foreign direct investment (FDI) in the space sector has so far been permitted only in respect of establishment and operation of satellites under the Government Approval route. In 2020, the Government of India (GOI) established the Indian National Space Promotion and Authorization Center (IN-SPACE) to encourage greater private participation in the space sector and to act as the nodal, single window clearance agency for projects under the aegis of the Department of Space.

Subsequently, on 20 April 2023, GOI issued the Indian Space Policy 2023 which *inter alia* aimed to create a dynamic framework to facilitate private participation across the value chain in the space sector, encourage research and development and create an ecosystem for a thriving space economy.

In order to align the extant Consolidated FDI Policy and the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 (together, "FDI Policy") with the Indian Space Policy 2023, the Union Cabinet, on 21 February 2024, has liberalised entry routes and thresholds for various sub-sectors and activities within the space sector. The proposed entry route for various activities under the amended policy are as follows:

| Sl. No. | Activity   | Per cent of FDI Allowed and Entry Route  |
|---------|--|--|
| 1.      | Manufacturing of components and systems/ sub-systems for satellites, ground segment and user segment.                | Upto 100% under the Automatic Route  |
| 2.      | Satellites-manufacturing and operation, satellite data products and ground segment and user segment.                 | Upto 74% under the Automatic Route<br><b>Note:</b> FDI beyond 74% will require prior approval under the government route |
| 3.      | Launch vehicles and associated systems or subsystems, creation of spaceports for launching and receiving spacecraft. | Upto 49% under the Automatic Route<br><b>Note:</b> FDI beyond 49% will require prior approval under the government route |

As next step, the aforementioned relaxations need to be formally included in the FDI Policy in order to give a binding effect to the amendments.

**Analysis:** Though the amendment is yet to be notified, the aforementioned change provides much-needed legislative clarity with regard to foreign investments in India's space sector. These amendments strike a balance between investment requirements of the developing Indian private space ecosystem, the nation's strategic autonomy, and the overarching goal of developing indigenous capabilities across the value chain in the space sector.

## Navigating the Legal Landscape: Unravelling the Limited Liability Partnership (Significant Beneficial Owners) Rules, 2023

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The Ministry of Corporate Affairs (“MCA”), on 9 November 2023, notified the Limited Liability Partnership (Significant Beneficial Owners) Rules, 2023 (“SBO Rules”) to strengthen the mechanism for identifying individuals having a beneficial interest in Limited Liability Partnerships (“LLPs”). The SBO Rules were issued in pursuance of MCA’s Notification, G.S.R. 110(E) dated 11 February 2022 which extended the applicability of S 90 of the Companies Act, 2013 (“CA 2013”) to all LLPs, *vide* which LLPs were mandated to identify the significant beneficial owners.

The SBO Rules are uniformly applicable to all LLPs save and except for those which are specifically exempted such as those which are government-owned or government-controlled or to the extent contribution in any LLP is held by an investment vehicle registered with the Securities and Exchange Board of India (AIFs, REITs, InVITs, etc) or the Reserve Bank of India, or certain other identified regulators.

Definition of Significant Beneficial Owners (“SBO”): According to R 3(k) of the SBO Rules, an SBO in an LLP means an individual who, acting alone or together or through one or more persons or trust, possesses one or more of the following rights or entitlements namely, (i) holds indirectly or together with any direct holdings, not less than 10% of the contribution; (ii) holds indirectly or together with any direct holdings, not less than 10% of voting rights in respect of the management or policy decisions; (iii) has right to receive or participate in not less than 10 % of the total distributable profits, or any other distribution, in a financial year through indirect holdings alone or together with any direct holdings; or (iv) has right to exercise or actually exercises, significant influence or control, in any manner other than through direct-holdings alone.

By virtue of the implementation of the SBO Rules, the following additional compliances are required to be followed:

- (1) Every eligible LLP is obligated to send a notice in Form No. LLP BEN-4 to all its existing non-individual partners holding at least 10% of contribution/voting rights/profit rights, seeking information with respect to such person’s beneficial holding in the LLP. [Ref: R 4(2) of SBO Rules]
- (2) Every individual who qualifies as an SBO will be required to file a declaration in Form No. LLP BEN-1 to the reporting LLP within 90 (ninety) days from the date of commencement of the SBO rules i.e. 9 November 2023. Further, the individual will also be required to inform the LLP about any change in her/his status as an SBO within 30 (thirty) days of the change. [Ref: R 5 of SBO Rules]
- (3) The reporting LLP shall file a return in Form No. LLP BEN-2 with the Registrar within a period of 30 (thirty) days from receipt of the declaration by SBO. [Ref: R 6 of SBO Rules]
- (4) The reporting LLP shall maintain a register of SBO in Form No. LLP BEN-3. [Ref: R 7 of SBO Rules]

Consequence for non-contravention: As per R 9 of the SBO Rules, when a person fails to give information of significant beneficial ownership or has provided unsatisfactory information, the reporting LLP should approach the National Company Law Tribunal which can then, at its discretion, restrict the transfer of interest, suspend voting rights, restrict the right to receive profits/distributions or any other restrictions as it may deem fit. Further, as per S 74 of the Limited Liability Partnership Act, 2008, if the reporting LLP contravenes the provisions of the SBO Rules, it shall be liable for a penalty amounting to INR 5000 (Indian Rupees Five Thousand only).

Analysis: With LLPs gaining acceptance as a form of business entity or investment vehicle in India, this is a welcome move to ensure transparency and curb illicit financing. By introducing the latest rules, MCA aims to strengthen corporate governance and ensure a clearer understanding of ownership structures within these entities.

## Corporate Law: Case Law Updates

### Group of Company Doctrine in Arbitration Proceedings

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The constitution bench of the Hon'ble Supreme Court of India in the case of **Cox & Kings Ltd v. SAP India Pvt Ltd ("Cox & Kings")**<sup>1</sup> recognized the group of companies' doctrine ("**Group Company Doctrine**") as a part of the arbitration process by which a non-signatory to the arbitration agreement can be bound based on the common intention of the parties, ascertainable from the circumstances that indicate the intent to bind such non-signatories.

The Group Company Doctrine is a way of identifying the common intent of the parties that bind non-signatories to an arbitration agreement by analyzing the legal relationship amongst the parties. This doctrine is especially helpful as it allows the courts to go beyond the objective formal consent in the agreement and determine whether the non-signatories are bound by the arbitration agreement basis their intention before, during, or after the execution of the contract.

The applicability and interpretation of the Group Company Doctrine has been checkered prior to the Cox & Kings ruling with various inconsistent approaches being adopted over the years. For example, in **Sukanya Holdings v. Jayesh H Pandya**<sup>2</sup>, the Supreme Court rejected an application under S 8 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") on the ground that the non-signatories could not be parties to the arbitration agreement. A similar position was followed by the Supreme Court in the **Indowind**<sup>3</sup> case. Thereafter, in the case of **Chloro Controls**<sup>4</sup>, the Supreme Court, taking a wide interpretation, held that a non-signatory may be made a party to the arbitration agreement provided that the intention of the parties justify such inclusion thereby, effectively doing away with the concept of a formal consent. The intention of parties would, as per the **Chloro Controls** case, be determined basis the composite nature of the transaction, direct commonality of subject matter, and direct relationship of the non-signatory to the signatory parties. This position was subsequently followed by the Supreme Court in several cases.<sup>5</sup>

In its order dated 6 December 2023, the Hon'ble Supreme Court settled the inconsistent positions by concluding as under:

- a) The definition of "parties" under S 2(1)(h) read with S 7 of the Arbitration Act includes both the signatory as well as non-signatory parties, and non-signatories may be made a party to the arbitration agreement basis the concept of consent, determinable basis various factors.
- b) The Group Company Doctrine cannot be read into the phrase "claiming through or under" in S 8 of the Arbitration Act but is an independent principle of law that can be ascertained from a harmonious reading of S 2(1)(h) with S 7 of the Arbitration Act. The Group Company Doctrine is used to identify a non-signatory who shall be bound to the arbitration in its own right and shall not be "claiming through or under" a signatory. The court held that the approach of the Supreme Court in **Chloro Controls**<sup>6</sup> wherein it traced the Group Company Doctrine to S 8 was erroneous and against the principle of contract and commercial laws.
- c) The Group Company Doctrine should only be applied in the cases where there is a "*tight group structure with strong organizational and financial links, so as to constitute a single economic entity*" as well as by identifying the common intention of the parties in the same subject matter which forms part of the

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<sup>1</sup> Cox & Kings Ltd v. SAP India Pvt Ltd., 2023 SCC OnLine SC 1634

<sup>2</sup> Sukanya Holdings v. Jayesh H Pandya (2003) 5 SCC 531

<sup>3</sup> Indowind Energy Ltd v. Wescare (I) Ltd, (2010) 5 SCC 306

<sup>4</sup> Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc, (2013) 1 SCC 641

<sup>5</sup> Cheran Properties Ltd v. Kasturi and Sons Ltd, (2018) 16 SCC 413, Mahanagar Telephone Nigam Ltd. v. Canara Bank 2020) 12 SCC 767, and Oil and Natural Gas Corporation Ltd v. Discovery Enterprises Pvt. Ltd (2022) 8 SCC 42

<sup>6</sup> Supra, 4

composite transaction. A composite transaction essentially means that the subject matter of the agreement is so interlinked that the performance of the same shall not be possible without the “aid, execution and performance of the supplementary or ancillary agreements.” However, being a ‘single economic entity’ cannot be the sole reason to invoke and apply the Group Company Doctrine that shall bind the non-signatory.

- d) The true test lies with the court to see through the layers of complex commercial arrangements to find the intent of binding a party who was not formally part of the agreement and to determine the nature of the consent of the non-signatories. It further held that the non-signatories are “veritable parties” if they actively participated in the “conclusion, performance, and termination of the contracts”.<sup>7</sup> Further, the court laid down factors to determine whether a non-signatory shall be bound by the arbitration agreement which are: (i) the intention of the parties, (ii) the legal relationship of the non-signatory with the signatory, (iii) the direct commonality of the subject matter, (iv) the agreement being a composite transaction, and (v) performance of the transaction.<sup>8</sup>

This judgment strikes a balance between the necessary concept of party consent in arbitration proceedings as well as the commercial realities of companies and their operations.

## Nominees v/s Successors: SC settles the debate of rights

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In December 2023, the division bench of the Hon’ble Supreme Court of India in the case of **Shakti Yezdani and Ors. v. Jayanand Jayant Salgaonkar and Ors**<sup>9</sup> held that successors, and not nominees of company shares are entitled to absolute ownership rights in the devolution of the shares.

The appellants, in this case, were the nominees to the deceased’s investments in mutual funds and fixed deposits who had filed a suit for administration of the assets on the ground that the nomination made under S 109A of the Companies Act, 1956 (“**1956 Act**”) grants then full and exclusive ownership over the securities due to the non-obstante clause of the provision. S 109A of the 1956 Act (which is para materia to S 72 of the Companies Act, 2013) provided that every shareholder shall nominate a person and such nomination shall confer on such person the right to vest the shares in the event of death of the shareholder.

The key questions being examined by the Hon’ble Supreme Court in the present instance included the following:

- (1) Whether a nominee of securities appointed under S 109A of the 1956 Act read with the byelaws under the Depositories Act, 1996 is entitled to the beneficial ownership of the securities?
- (2) Whether such nominee is entitled to all rights in respect of the securities to the exclusion of all other persons or whether he continues to hold the securities in trust and in a capacity as a beneficiary for the legal representatives who are entitled to inherit securities or shares under the law of inheritance?
- (3) Whether a bequest made in a will executed in accordance with the Indian Succession Act, 1925 in respect of shares or securities of the deceased supersedes such nomination made under the provisions of the 1956 Act?

The court concluded as follows:

- a) Nomination under S 109A of the 1956 Act does not confer absolute ownership and confers only limited and temporary rights over the shares. The nominees assume the role of an agent or a trustee upon vesting and such vesting does not create a third mode of succession.
- b) The non-obstante clause must be interpreted with the context and scheme of the legislation which implies that the shares are temporarily vested to the nominees excluding other persons to discharge

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<sup>7</sup> Dow Chemical v. Isover Saint Gobain, Interim Award, ICC Case No. 4131, 23 September 1982

<sup>8</sup> Supra, 4

<sup>9</sup> Shakti Yezdani and Ors. v. Jayanand Jayant Salgaonkar and Ors., 2023 SCC OnLine SC 1679

the liabilities and governance rights, until the legal heirs have settled their claims and are prepared for the final transfer of shares.

- c) A bequest made in a will executed in accordance with the Indian Succession Act, 1925 in respect of securities of the deceased would supersede the nomination made under the provision of the 1956 Act relating to the appointment of nominees.

This case brought an end to the debate on the rights of nominees and successors by ruling that the court had adopted an incorrect view, in ***Harsha Nitin Kokate v. The Saraswat Co-operative Bank Limited and Ors***<sup>10</sup>, which held that the rights of the nominee would prevail over the rights of the successor. The court herein clarified the confusion regarding the difference between a nominee who is a holder of assets on one hand and the legal heir who is an absolute owner of the assets.

This Update has been prepared by Suhana Islam Murshedd, Subhashree Pani, Milind Anand and Namasvi Karia who can be reached at [suhana.islam@aquilaw.com](mailto:suhana.islam@aquilaw.com), [subhashree.pani@aquilaw.com](mailto:subhashree.pani@aquilaw.com), [milind.anand@aquilaw.com](mailto:milind.anand@aquilaw.com) and [namasvi.karia@aquilaw.com](mailto:namasvi.karia@aquilaw.com). This Update is only for informational purposes and is not intended for solicitation of any work. Nothing in this Update constitutes legal advice and should not be acted upon in any circumstance.

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<sup>10</sup> Harsha Nitin Kokate v. The Saraswat Co-operative Bank Limited and Others, 2010 SCC OnLine Bom 615