

AJC NEWSLETTER

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Introduction

We here at Agarwal Jetley & Co. (AJC) are happy to bring a new edition of the newsletter. We in this edition cover the various important aspects that are valuable and important legal information. This effort is another step to simplify the understanding for our various readers. We would be happy to hear from you about the 'AJC NEWSLETTER', the hits and misses, inputs and any clarifications that you all require and deem necessary. We thank you in advance and are happy to continue this trend of keeping everyone "Legally Up to Date".

Aspects covered in this issue

In this issue we firstly cover the importance and link between the aspects of the Indian Evidence Act and the Information Technology Act and how the certificates for providing evidence are necessary for 'evidence'. Then in a series of decisions by the Supreme Court we look firstly at the validity of cheques, then on service of summons via a online mode and finally on limit of period of arbitration.

As a final part, our associate Shambhavi Singh looks into the aspect of how the 74% FDI in defence may be approved.

Certificate under section 65B of the Evidence Act is condition precedent to the admissibility of evidence by way of electronic records - Supreme Court¹

Introduction

A reference to deal with the interpretation of Section 65B of the Indian Evidence Act, 1872 (“**Evidence Act**”) was recently on July 14, 2020 answered by three (3) judges bench of Hon’ble Supreme Court (“**SC**”) in *Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal and Ors.*, (Civil Appeal Nos. 20825-20826 of 2017) to iron out the conflicting views expressed by two judgments *Anvar P.V. vs P.K. Basheer & Ors.* ((2014) 10 SCC 473) (a three judge bench decision of SC) (“**Anvar case**”) and *Shafhi Mohammad vs State of Himachal Pradesh* ((2018) 2 SCC 801)(a Division Bench judgment of SC) (“**Shafhi case**”).

Reference answered

The reference answered by the SC as follows:

- (a) The certificate under Section 65B (4) of the Evidence Act is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1) of the Evidence Act, together with the requisite certificate under Section 65B(4) of the Evidence Act.
- (b) General directions were issued to cellular companies and internet service providers to maintain CDRs and other relevant records for the concerned period (in tune with Section 39 of the Evidence Act) in a segregated and secure manner if a particular CDR or other record is seized during investigation in the said period. Concerned parties can then summon such records at the stage of defence evidence, or in the event such data is required to cross-examine a

particular witness. This direction shall be applied, in criminal trials, till appropriate directions are issued under relevant terms of the applicable licenses or under Section 67C of the Information Technology Act, 2000 (“**IT Act**”).

The general directions issued shall be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67C of the Information Technology Act, 2000 IT Act and data retention conditions are formulated for compliance by telecom and internet service providers.

- (c) Appropriate rules and directions should be framed in exercise of the IT Act by exercising powers such as in Section 67C of the IT Act, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption. Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed after considering the report of the Committee constituted by the Chief Justice’s Conference in April, 2016.

Conclusion

The certificate required under Section 65B(4) of the Evidence Act is a condition precedent to the admissibility of evidence by way of electronic record. Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) of the Evidence Act is a mandatory requirement of the law. Section 65B(4) of the Evidence Act clearly state that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) of the Evidence Act otiose. However, certificate under Section 65B(4) of the Evidence Act is unnecessary if the original document itself is produced. The SC issued

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general directions to courts that deal with electronic evidence till rules and directions are framed under the IT Act and to formulate rules for the retention of data involved in trial of offences.

Thus, with the technological advancement and its acceptability by court gives strength to the judicial system when the law is uniformly practiced throughout the country as 'Rule of Law' and the reference answered by the SC is a step towards achieving the said goal.

Supreme Court refused to extend the validity of chequesⁱⁱ

The Supreme Court ("SC") recently passed an order on July 10, 2020 in a *Suo Moto Writ Petition (C) no. 3/2020*, where SC took up the issue of period of limitation expiring under the various laws amidst the lockdown.

The SC on an issue of extension of time period of validity of cheque, refused to extend the time period and held that the period of three (3) months is the

period prescribed by the Reserve Bank of India (RBI) under Section 35 of the Banking Regulation Act, 1949 and is not prescribed under any statute and hence it would not be appropriate for the SC to interfere, as the entire banking system runs on the period so prescribed by the RBI.

The SC clarified that the RBI may in its own discretion, can change the time period of validity of cheque.

Supreme Court allows service of summons and pleadings via online / electronic modeⁱⁱⁱ

Considering the difficulty faced by the litigating parties in service of summons, notices, pleadings and documents through the usual mode of services *i.e.* by post, courier or in person during the time of pandemic COVID-19, the Hon'ble Supreme Court ("SC") vide its Order dated July 10, 2020 in *Suo Moto Writ Petition (C) No.3/2020*, as an alternative, has allowed the service of summons/notices and exchange of pleadings/ documents to other party via electronic mode. The SC has permitted parties to make services via FAX, E-Mail or instant messaging application widely used such as WhatsApp,

Telegram etc. However, if the serving party affects the service via instant messaging application, it also has to mandatorily effect the service to the other party vide email on the very same day. This is a very impactful decision made by the SC as it will not only save cost but will also save considerable amount of time of the litigating parties.

Supreme Court further clarifies limitation extension issues pertaining to arbitration^{iv}

In addition to its earlier orders dated March 23, 2020 and May 06, 2020 wherein the period of limitation prescribed under the Arbitration and Conciliation Act, 1996 ("Act") was extended w.e.f. March 15, 2020 till further order, the Supreme Court recently in *Suo Moto Writ Petition (C) No.3/2020* vide order dated July, 10, 2020 clarified that its earlier orders extending limitation would also apply on Section 29A of the Act,

which provides time limit to pass Arbitral Award, thus extended the time limit for passing of an Arbitral Award if time has expired or was to expire on March 15, 2020. Further, the earlier orders for extension of limitation were also made applicable to Section 23(4) of the Act, which prescribes outer limit of six (6) month for completion of submission of claims and defence.

DPIIT approaches Government for 74% FDI 'automatic route' in defence sector^v

Introduction

As a part of the Prime Minister's Atmanirbhar Bharat economic stimulus package of twenty lakh crore rupees (Rs. 20 lakh crore) the Government of India ("Government") had promised to raise the Foreign Direct Investment (FDI) in defence manufacturing through automatic route to seventy four per cent (74%) from the existing forty nine per cent (49%).

Even though the push is for FDI, the aim is to attract investment by in defence sector for manufacturing within India. This becomes very important from the aspect that the Government had stated that they would put out a list of weapons and platforms that will only be purchased from domestic industries and not from foreign vendors. This list will be expanded every year in consultation with the armed forces. This would promote indigenization of defence equipment since the draft Defence Procurement Procedure 2020 (DPP 2020) also includes provisions for greater use of indigenous military materials and software, the latter being a strong forte of Indian software industry.

At present, a large proportion of the materials used for domestic arms production are imported. The reforms aim to reduce India's massive 'Defence Import Bill'.

Evolution of the FDI Policy on the defence sector

The Department of Industrial Policy and Promotion, Ministry of Commerce and Industry (DPIIT) vide Press Note No. 5 of 2016 Series dated June 24, 2016 notified review of FDI Policy on various sectors which included conditions related to FDI in defence. According to the guidelines, the FDI Cap in the defence sector was raised to one hundred per cent (100%). FDI up to forty nine per cent (49%) was allowed through automatic route and above forty nine per cent (49%) under the Government approval route.

At present, the DPIIT has been given the responsibility of overseeing the applications in order to the work of grant approval for foreign investment under the extant FDI Policy and to forward the same to the concerned administrative ministry. DPIIT has finalized a Standard Operating Procedure (SOP) for examination of foreign investment proposals by administrative ministries.

Conditions for Government approval for FDI in defence manufacturing sector

Under the Government route, foreign investors have to take prior approval of the respective ministry/department, while in the automatic route, the investor just has to inform the Reserve Bank of India (RBI) after the investment is made. The conditions for such prior approval included:

- i. Infusion of fresh foreign investment within the permitted automatic route level, in a company not seeking industrial licence, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, will require Government approval;
- ii. License applications will be considered and licenses given by the DPIIT in consultation with Ministry of Defence and Ministry of External Affairs;
- iii. Foreign investment in the sector is subject to security clearance and guidelines of the Ministry of Defence;
- iv. Investee company should be structured to be self-sufficient in areas of product design and development. The investee/joint venture company along with manufacturing facility should also have maintenance and life cycle support facility of the product being manufactured in India.

Setting of realistic General Staff Qualitative Requirements (GSQR)

In order to support contract management, a realistic setting of GSQR of weapons would take place as usually unrealistic GSQR are established and a lot of time is spent searching for suppliers to meet all those requirements.

A new category 'Buy (Global – Manufacture in India)' has been suggested and may be introduced as a prioritized procurement category in DPP 2020 with minimum fifty per cent (50%) indigenous content on cost basis of total contract value. Only the minimum quantity of necessary equipment will be bought from abroad while the balance quantities will be manufactured in India. This would promote the 'Make in India' initiative in the armed forces, providing an opportunity to the foreign vendors to manufacture in

India through their subsidiaries. It appears that in such cases where the requirement for bidding, complying etc. (especially for those defence requirements which require only Indian bidders or Indian companies) are to be met domestically, Indian companies with FDI up to 74% may also be entertained.

Benefits of raising FDI through automatic route

The move of the Government to increase automatic FDI to 74% would encourage private players to invest in India which would realize the twin objectives of handsome returns on investment and making India, Asia's third largest economy self-reliant in defence manufacturing. This would also help in achieving the two (2) broad objectives of the proposed DPP 2020 including fastening the procurement process by removing procedural bottlenecks and promoting 'Make in India' in the armed forces.

India has inaugurated two (2) defence industrial corridors, in Tamil Nadu and in Uttar Pradesh, to boost the flagship 'Make in India' programme that in turn would attract investments as well as encourage employment generation. It was also announced that for

the time-bound DPP and faster decision-making, project management unit (PMU) to support contract management will be set up. The post contract management clause introduced in DPP 2020 would facilitate and provide clear guidelines for issues arising during the contract period as defence contracts last for a long period.

Conclusion

Through the twin plan of increasing FDI and 'Make in India', foreign companies would be directly involved with day-to-day operations of defence manufacturing in India. Therefore, they wouldn't just pump money into the economy, but also knowledge, skills and technology. This would massively turn around the situation for the domestic industries. India has the basic infrastructure like Ordnance Factories and various civil industries in place. The requirement as on date is to streamline the procurement process by making it faster and user-friendly. There also needs to be a hand holding mechanism with the industries to instill confidence in them to encourage for more research and development as well as produce the world class equipment.

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