Emerging Legal Aspects for Expanding An Entrepreneurship Globally

Abhishek Baplawat

"An entrepreneur is one who always searches for change, responds to it andexploits it as an opportunity. Innovation is the basic tool of entrepreneurs, the means bywhich they exploit change as an opportunity for different business of service".

Historically, India has been a country of the self-employed and not of employees. Even with the influx of large corporate organisations into the economy, the bulk of the income generation in the country today is centred on small and medium business owners. These businesses are the largest contributors to national income & employment, and have increasingly been courted by financial institutions and policy makers.

The self employed are the backbone of the nation. From the corner tea shop, mom-and-pop grocery, scrap dealer and the internet start-up, all these entrepreneurs need encouragement and help to be able to compete in the global economy, and the Government of India has been at the forefront to promote private entrepreneurship by providing the right socio-economic ecosystem for innovation & development.

Till 1991, India's economic integration and entrepreneurships with the rest of the world was very limited. But the new economic policy and the liberalisation measures so introduced made way for the globalisation of Indian entrepreneurship. Earlier, exports were a predominant way of expanding business abroad and hence the emphasis was on export promotion strategies with restrictions on cash outflows so as to conserve our foreign exchange reserves. But over the years, its being realised that for expansion and growth of Indian companies, it is necessary that they increase their share in the world market not only by exporting their products but also by acquiring overseas assets and establishing their presence abroad.

An entrepreneur can successfully expand and grow its business abroad by taking into account the basic legal framework of the home country as well as of the particular foreign country. It is necessary for him to abide by such laws and regulations in order to ensure efficient and healthy functioning of the organisation and face the various challenges that he may encounter abroad. In India, the most important law which regulates all foreign exchange transactions including

investments abroad is the Foreign Exchange Management Act (FEMA), 1999. Under the Act, Reserve Bank of India (RBI) has been authorised to frame various rules, regulations and norms pertaining to overseas investments in consultation with the Central Government. Disputes resolving between Indian entrepreneur and foreign party for smooth conduction of expansion there is a law of Mediation, Arbitration and Conciliation.

In this research paper the emphasize will be given on legal aspects of following challenges which is often faced by an entrepreneurs who indulge in foreign trade and transects in Abroad with foreign Companies. These aspects are following.

- Legal aspects relating to Dispute Resolution
- Legal aspects relating to Finance
- Legal aspects relating to Risk Cover (Insurance)

In order to encourage capital inflows and provide safe business environment for all investments abroad, many countries have entered into bilateral investment treaties or agreements. Arbitration and Condition Act, 1996 is another law which provides solution to business legal disputes for an entrepreneur. Arbitration is an alternative dispute resolution mechanism in which the parties get their disputes settled through the intervention of a third person and without having recourse to the court of law.

Legal Aspect relating to Dispute Resolution

According to William Sheffield "*Disputes among business entrepreneurs should be mediated or arbitrated, not litigated*" Litigation is always grossly expensive, requires huge commitments of time, saps vital corporate energy which can be much better used elsewhere. Litigation is a divorce which forever ends the relationship the disputing entrepreneurs may have had in the future. Surely there must be a better, more wholesome, more positive way of resolving disputes.

Enterprises, the word over, now conduct business on a dramatically more on international scale. The growth of the world economies is directly connected with the millions of commercial contracts, which are becoming more international in character owing to global integration. Centuries ago international traders learned that business disputes were inevitable. Disputes arose over failure to ship or deliver goods, over the quality of merchandise, over interpretations of terms of agreement which set forth the risks of seller and buyer etc., The scientific and technical

revolution of modern times has not only increased radically the exchange of goods between different regions of the world but also enhanced the quality andcharacter of these disputes.

Boarders of Nations are collapsing in the world of commercial contracts and therefore varying business cultures and legal cultures more and more meet or even amalgamate. Companies do not limit themselves to business on their side of the border and they are expanding their operations and investments abroad. However, international contracts do entail their own challenges; legal issues not being the least of them. In order to protect your interests as much as possible, it is advisable to draft clear agreements which take into account the international character of the relationship. A common but important legal pitfall is the dispute settlement mechanism the parties agree upon. We can understand this by this following example:

An example: An Indian Company purchases machines from an Australian supplier. In the purchase agreement, the parties have stipulated that the Indian courts have exclusive jurisdiction to settle any disputes arising from or in connection with the agreement. After delivery of the machines, the Indian buyer notices that the machines are defective. This ultimately results in a dispute between the Indian buyer and the Australian supplier that cannot be resolved in good faith between the parties. The Indian buyer decides to take legal action and, in accordance with the jurisdiction clause in the contract, starts proceedings before the Indian court. The Indian court rules in favour of the Indian buyer and the Indian buyer expects it will finally be able to force the Australian supplier to resolve the matter.

However, a great disappointment may be in store for the Indian buyer. If the Australian supplier does not voluntarily comply with the Indian judgment, the Indian buyer needs to enforce the judgment in Australia. And that is where the Indian buyer will run up against difficulties. The India has not concluded treaties or conventions with every country in the world on the subject matter of recognition and enforcement (or execution) of each other's judicial decisions, a so-called convention relating to civil procedure. If such treaties have not been entered into with a particular country, judgments from the Indian court are not recognized and therefore cannot be enforced in that specific country, even if the foreign counterparty appeared in court and put forward a defense. (Of course, judgments from courts in that particular country are also not

recognized in the India and therefore cannot be enforced in the India either.) The India has not entered into such a convention with some important nations in international trade, like Australia and, as a matter of fact.

An arbitration clause could provide a solution. The internationally known New York Convention, 1958 to which the India is party, provides for the recognition and enforcement of arbitral awards abroad. An award that is the result of arbitration can therefore be enforced outside the India (if the country where the other party has its registered office is also party to the convention of course). All important nations in international trade like Australia and the United States, with which the India have not concluded a convention relating to civil procedure, are parties to the New York Convention. Therefore, in such cases, the parties would be better off including arbitration as the dispute resolution mechanism in their agreement**.**

The importance of arbitration as a means of resolution of business disputes has been increasing with the advent of globalization and liberalization of trade-in-goods, services and ideas during the last decade. The General Assembly of the United Nations has recommended that all countries give due consideration to the model law on International Commercial Arbitration and Conciliation Rules adopted by the UNCITRAL. The Government of India has also enacted the Arbitration and Conciliation Act, 1996 to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards.

1958, forty five countries, including India and the United States, participated in the U.N conference that culminated in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958(the New York Convention). The Convention encourages the recognition and enforcement of international arbitration agreements and awards.

Arbitration is an alternative dispute resolution mechanism in which the parties get their disputes settled through the intervention of a third person and without having recourse to the court of law. It is a mode in which the dispute is referred to a nominated person who decides the issue in a quasi-judicial manner after hearing both sides. For instance, reference of a dispute to 'panch' or 'panchayat' is a form of arbitration. Generally, the disputing parties refer their case to an arbitral tribunal and the decision arrived at by the tribunal is known as an 'award'. Arbitration is used

mainly in business sectors like construction projects, shipping and transportation, patents, trademarks and brands, financial services including banking and insurance, foreign collaborations, partnership disputes, etc.

Conciliation is the process of amicable settlement of disputes by the parties, with the assistance of a conciliator. It differs from arbitration in the sense that in arbitration the award is the decision of the third party or the arbitral tribunal while in the case of conciliation the decision is of the parties which arrive at with the mediation of the conciliator.

Such modes of dispute resolution have several advantages over a law suit: - (i) they are less costly than a suit in a court of law; (ii) they are very simple and more expeditious, saving the parties from waste of time; (iii) as the proceedings are conducted in closed doors, the dispute is not publicised ensuring confidentiality; (iv) the award/decision is generally final because the appeal is permitted only in certain cases.

The Arabitration and Conciliation Act, 1996 provides statutory recognition to Arbitration as a distinct mode of dispute settlement and contains detailed procedure governing arbitration and conciliation proceedings. It consolidates and amends the laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also defines the law relating to conciliation, providing for matters connected therewith and incidental thereto on the basis of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985.

In India, The Indian Council of Arbitration (ICA) established in 1965 is the apex arbitral organisation at the national level which provides facilities for arbitration of commercial disputes. Its main objective is to promote an amicable and quick settlement of industrial and trade disputes by arbitration. It also provides facilities for settlement of international commercial disputes by arbitration.

International disputes be resolved by arbitration in India

International disputes can be arbitrated in India and it is advantageous to have India as the venue for international arbitration, if the resultant award is to be executed in India. If one of the parties to

the agreement is an Indian and the other party a foreigner, either by its nationality or its incorporation as a body corporate or its management and control is exercised in any other country or it is the Government of a foreign country, it will be styled as 'international commercial arbitration.' The arbitration pursuant to such an agreement may take place in India or outside. If it takes place in India the resultant award would be considered as a 'domestic award' and would be governed by the provisions of Part I of 1996 Act and the award so rendered can be executed as a deemed decree. On the other hand, if the arbitration takes places outside India the resultant award would be a 'foreign award' governed by the provisions of Part II of 1996 Act and it can be enforced only under the Geneva / New York convention, by making it a decree of the Indian court.

The Government of India, the Federation of Indian Chambers of Commerce and Industry, the other important Chambers of Commerce and trade associations in India as well as export promotion councils, public sector undertakings, companies and firms are in its membership. Its 'Rules of Arbitration' are of international standard and they provide a guarantee for quick and just settlement of the dispute. It maintains a panel of arbitrators consisting of Retd. Judges, Advocates, Shipping Experts, Chartered accountants, Chartered Engineers, Businessmen, Foreign Nationals and Executives having specialization in more than 20 fields.

In order to provide arbitration services under the Rules of Foreign Arbitral Organizations, ICA has entered into International Mutual Co-operation Agreements with important foreign arbitral institutions in more than 40 countries.

The Indian Arbitration and Conciliation Act, 1996 is broadly compatible with the ICC rules. The Indian Act is comprehensive, in that, it also contains provisions in regard to domestic arbitration with some modifications.

This Act gives freedom to the parties subject to minimal restrictions in carrying out the Arbitration Agreement. The Act strengthens the powers of Arbitrators while the court's role is limited to cases where either the arbitral process needs assistance or there has been or is likely to be a clear denial of justice. Therefore, to some extent, court's interference pending arbitral proceeding is possible.

We can divide the Arbitral Awards under two heads :

1. International Commercial Awards passed within the Country.

2. International Commercial Awards passed outside the Country.

International Commercial Awards passed within the Country

According to section 2 (1) (f) of the Act of 1996 “International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) An individual who is a national of, or habitually resident in, any country other than India; or

(ii) A body corporate which is incorporated in any country other than India; or

(iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) The Government of a foreign country;

Provisions Relating to Arbitration in the Arbitration and Conciliation Act 1996

The parties to a present dispute may make an agreement called as the 'arbitration agreement' that instead of going to the court; they shall refer the dispute to arbitration. The parties to the agreement may refer to arbitration, a dispute:-

- Which has arisen or which may arise between them,

- In respect of a defined legal relationship, whether contractual or not.

Thus, all matters of civil nature whether they relate to present or future disputes may form the subject matter of reference. Even disputes such as infringement of intellectual property rights shall also be covered.

1 Although no formal document is prescribed, an arbitration agreement/clause must be in writing. If the arbitration agreement/clause is contained in a document, the document must be signed by the concerned parties. Besides, the agreement may be established by:- (i) an exchange of letters, telex, telegram or other means of telecommunications; or (ii) an exchange of statements of claims and defence in which the agreement is alleged by one party and is not denied by the other.

2 The disputes that cannot be referred to arbitration are:-

- Insolvency proceedings.
- Lunacy proceedings.
- Proceedings for appointment of a guardian to a minor.
- Question of genuineness or otherwise of a will or matter relating to issue of a probate.
- Matter of criminal nature.
- Matters concerning public charitable trusts.
- Disputes arising from and founded on an illegal contract.

3 The agreement mandatorily requires the appointment of an arbitrator. An arbitrator is a person appointed, with or without mutual consent of the contending parties, for the purpose of investigation and settlement of a difference or dispute referred to him. The arbitral tribunal may be constituted by one or more arbitrators. The parties are free to fix the number of arbitrators by agreement. Accordingly, the reference may be made either to a single arbitrator or a panel of odd number (i.e. 3,5,7etc) of arbitrators. If there is no agreement, the reference shall be made to a sole arbitrator.

4 Unless otherwise agreed by the parties, an arbitrator may be of any nationality. In case of an international commercial arbitration, where the parties belong to different nationalities, the Chief Justice of India may appoint an arbitrator of a nationality other than that of the parties.

5 The parties are free to agree on a procedure for appointing the arbitrator or arbitrators. If there is such an agreement, the appointment has to be made in accordance with it. The agreement may provide for the number of arbitrators, qualifications of arbitrator, procedure of appointment, procedure of challenging the appointment, termination of appointment, procedure to be followed by arbitrators, place of arbitration, language, etc.

6 The Duties of the Arbitral Tribunal are:- (i) to act independently and impartially and treat the parties equally; (ii) to give each party full opportunity to present his case.

7 The parties may agree on the procedure to be followed by the arbitral tribunal in

conducting its proceedings. In the absence of such agreement, the arbitral tribunal may conduct the proceedings in the manner it considers appropriate and shall be empowered to determine the admissibility, relevance, materiality and weight of any evidence. The tribunal shall decide whether to hold oral hearings for presentation of evidence or for oral argument, or whether to conduct the proceedings on the basis of documents and other materials.

8 An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal. The award shall state its date and place of arbitration. The arbitral award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or in case of award on a settlement between the parties. A signed copy of the award shall be delivered to each party.

9 An arbitral award is itself enforceable as a decree of the court, normally after three months from the date on which it was received by the parties, provided no application for setting aside the award is made or if it is made the same has been rejected. The arbitral award shall be final and binding on the parties and persons claiming under them respectively.

10 The arbitral proceedings shall be terminated when:-

- The final arbitral award is made,
- The claimant withdraws his claim, and the respondent does not object to it,
- The parties agree on the termination,

The continuation of proceedings has for any other reason become unnecessary or impossible.

International Commercial Awards passed outside the Country

Enforcement of Foreign Awards is governed by Part II of the Arbitration and Conciliation Act 1996 (“1996 Act”). Part II of the 1996 Act gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and Convention on the Execution of Foreign Arbitral Awards (“Geneva Convention”).

Since the Geneva Convention is virtually otiose and India still not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. (“ICSID Convention” or “Washington Convention”), this article limits its discussion only to provisions dealing with enforcement of awards falling under the auspices of the New York Convention as

enshrined in the 1996 Act.

Foreign Award defined:

“Foreign Award” has been defined under Section 44 of the 1996 Act as an expression which must fulfil the following ingredients:

It must be an award on difference arising out of legal relationships considered as commercial under the law in force in India,It must have been made on or after 11th October 1960,It must have been made in pursuance of an agreement in writing for arbitration to which the New York Convention (set forth in the First Schedule of the 1996 Act) applies; and It must have been made in one of the reciprocating contracting states notified by the Central Government.

With regard to the first ingredient stated above, the Supreme Court in the matter of Comed Chemicals Ltd. v/s C.N. Ramchand discussed and reiterated its decision in R.M. Investment & Trading Co. Pvt. Ltd. v/s Boeing Co. and Another.

While construing the expression “commercial” in Section 2 [10] of the Act it has to be borne in mind that the “Act is calculated and designed to sub serve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction.” Conditions for enforcement of a foreign award:

The conditions for enforcement of a foreign award under the 1996 Act stem from Article V of the New York Convention. However, the Explanation to Section 48(2)(b) of the 1996 Act adds:

Explanation – Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

The Indian courts have narrowly construed the ground of public policy in relation to foreign awards vis-à-vis domestic awards. In the matter of Renu sagar Power Co. v/s General Electric Corporation, the Supreme Court held:

This would mean that “public policy” in Section 7(1)(b)(ii) [15] has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India applying the said criteria it must be held

that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality

Grounds for refusal of enforcement:

Incapacity:

If a party to an arbitration agreement is (under the law applicable to him) under some incapacity, then the Indian courts can refuse to enforce such awards.

Invalid Arbitration Agreement:

If an arbitration agreement is not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made, it is not liable for enforcement.

Due process:

If a party to an arbitration agreement has not been given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case this would be in violation of the principles of natural justice and consequently, a ground for refusing enforcement.

Legal aspects relating to Finance for an Entrepreneur

A business firm requires finance to commence its operations, to continue its operations and for its expansion and growth. Indian companies need financial support in order to make their investments abroad. There must be continuous flow of funds in and out of business. They need funds to meet their various capital requirements; to make equity participation in overseas ventures as well as to acquire foreign companies or businesses. Sound plans, efficient production and marketing are all dependent on smooth flow of finance.

The policy for regulating overseas investments by Indian entrepreneurs and all other related aspects like finance and insurance is governed by the circulars and guidelines issued by the Reserve Bank of India from time to time. Guidelines and circulars are defined as the documents notified by the Reserve Bank for the purpose of clarifying and interpreting the various provisions of a law or regulation. For example, Foreign Exchange Management Act (FEMA) is an umbrella Act regulating all foreign exchange transactions including investments abroad. It is under this Act

that the Reserve Bank of India is authorised to issue various circulars, guidelines, rules and notifications, etc. for managing the various aspects of capital outflows. One of the most important guidelines relating to doing business abroad is the "Guidelines for Indian direct investment in Joint Ventures and Wholly Owned Subsidiaries abroad".

These circulars and guidelines are broadly aimed to ensure:-

- A transparent policy framework in order to enable Indian businessmen to plan their business and to be able to react to potential collaborators outside the country. Such transparency is also required to enable the financial institutions and banks to assess their support through professional judgement in the context of financial sector reforms.
- A formal recognition of the changing global reality which include:- close relationship between flow of investment and trade; success in the domestic economy as a precursor to success in the international arena; the importance of continuously updating the technology through cross investments; more dynamic relation between market seeking and resource seeking investments; tendency for skill and service intensity rather than material intensity in the international flows.
- Capturing of Indian realities which include: - strengthening globalisation of Indian economy by allowing the Indian entrepreneurship to go global; being a capital importing country, the need to avoid large capital outflows; visualising the global economic relationship well beyond physical exports and ensuring that Indian industry and business attain strategic positions in certain areas or regional blocs.

Bilateral Investment Promotion and Protection Agreement (BIPA)

With the opening up of the economies world over, each country has been trying to attract foreign capital through liberalised investment policies. In such a scenario, all investors are seeking those investment destinations which provide most protective, hospitable and profitable climate for their investments. Hence, many countries have entered into bilateral investment treaties or agreements which not only encourage capital flows into their own countries but also provide safe business environment for their own investors abroad.

Bilateral Investment Promotion and Protection Agreement (BIPA) is one such bilateral treaty

which is defined as an agreement between two countries (or States) for the reciprocal encouragement, promotion and protection of investments in each other's territories by the companies based in either country (or State). The purpose of these agreements is to create such conditions which are favourable for fostering greater investments by the investors of one country in the territory of the other country. Such agreements are beneficial for both the countries because they stimulate their business initiatives and thus enhance their prosperity.

Generally, these bilateral agreements have, by and large, standard elements and provide a legal basis for enforcing the rights of the investors in the countries involved. They give assurance to the investors that their foreign investments will be guaranteed fair and equitable treatment, full and constant legal security and dispute resolution through international mechanism.

India has entered into bilateral investment treaties with a number of countries including Australia, France, Japan, Korea, the UK, Germany, Russian Federation, The Netherlands, Malaysia, Denmark and OPIC of the U.S.. Each agreement makes provision for settlement of disputes between an investor of one contracting party and an investor of the other contracting party through negotiation, conciliation and arbitration. India is a party to the Convention establishing the Multilateral Investment Guarantee Agency (MIGA), which provides for settlement of disputes between parties of members states under the Convention and the MIGA through negotiation, conciliation and arbitration.

With liberalisation of the foreign investment policy of India, the Government undertook negotiations with a number of countries and entered into Bilateral Investment Promotion & Protection Agreements (BIPAs) with them. This was done with a view to provide predictable investment climate to foreign investments in India as well as to protect Indian investments abroad. The Government of India has, so far, signed BIPAs with 68 countries out of which 53 BIPAs have already come into force and the remaining agreements are in the process of being enforced. In addition, agreements have also been finalised and/ or being negotiated with a number of other countries.

The important features of the Bilateral Investment Promotion and Protection Agreements (BIPAs) signed by India are:-

- The agreements apply to all investments made by the investors of each contracting party in the territory of the other contracting party in accordance with their laws and regulations.
- Under the agreement, investment has been defined to include every kind of asset established or acquired together with changes in the form of such investments in accordance with the national laws of the contracting parties. In particular, it includes the following :-
    - Movable and immovable property as well as other rights such as mortgages, liens or pledges;
    - Shares in the stocks and debentures of a company and any other similar forms of participation in a company;
    - Rights to money or to any performance under the contract having a financial value;
    - Intellectual property rights, goodwill, technical processes and know how in accordance with the relevant laws of the respective contracting party;
    - Business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals.

- Investments and returns of the investors of each contracting party shall at all times be accorded fair and equitable treatment in the territory of the other contracting party.
- The agreements guarantee that the investments from the contracting parties shall receive treatment atleast as favourable as the treatment which the host country grants to investments by nationals and companies from any third State.
- Each contracting party shall permit all funds of an investor of the other contracting party related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis. Such funds may include: -
    - Capital and additional capital amounts used to maintain and increase investments;
    - Net operating profits including dividends and interests in proportion to their

share-holdings;

- Repayments of any loan including interest thereon, relating to the investment;
- Payment of royalties and service fees relating to the investment;
- Proceeds from sales of their shares;
- Proceeds received by investors in case of sale or partial sale or liquidation;
- The earnings of citizens/nationals of one contracting party who work in connection with the investments in the territory of the other contracting party.

All such transfers shall be permitted in the currency of the original investment at the current exchange rate prevailing in the market on the date of transfer.

- The agreement contains elaborate provisions for resolution of disputes between the investor and a contracting party as well as between the contracting parties. In the former case, flexibility is provided for settlement of disputes either under the domestic laws or under international arbitration. In the latter case, if the dispute relates to interpretation or application of the agreement, it shall, as far as possible, be settled through negotiations. If it is not settled within 6 months from the time the dispute arose, it shall be submitted to an Arbitral Tribunal. The decision of the tribunal shall be binding on both the contracting parties.
- The agreement shall initially be valid for a period of ten years and thereafter continue indefinitely unless either of the contracting parties give a written notice of its intention to terminate the agreement. The agreement shall stand terminated one year from the date of receipt of such a written notice. In the event of termination of the agreement, investments made prior to the termination will continue to enjoy the provisions of the agreement for a further period of 15 years.

Significance of Foreign Exchange Management Act (FEMA) in promoting business outside the India

When a business enterprise imports goods from other countries, exports its products to them or makes investments abroad, it deals in foreign exchange. Foreign exchange means 'foreign currency' and includes: - (i) deposits, credits and balances payable in any foreign currency; (ii) drafts, travellers' cheques, letters of credit or bills of exchange, expressed or drawn in Indian

currency but payable in any foreign currency; and (iii) drafts, travellers' cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency.

In India, all transactions that include foreign exchange were regulated by Foreign Exchange Regulations Act (FERA), 1973. The main objective of FERA was conservation and proper utilisation of the foreign exchange resources of the country. It also sought to control certain aspects of the conduct of business outside the country by Indian companies and in India by foreign companies. It was a criminal legislation which meant that its violation would lead to imprisonment and payment of heavy fine. It had many restrictive clauses which deterred foreign investments.

In the light of economic reforms and the liberalised scenario, FERA was replaced by a new Act called the Foreign Exchange Management Act (FEMA), 1999.The Act applies to all branches, offices and agencies outside India, owned or controlled by a person resident in India. FEMA emerged as an investor friendly legislation which is purely a civil legislation in the sense that its violation implies only payment of monetary penalties and fines. However, under it, a person will be liable to civil imprisonment only if he does not pay the prescribed fine within 90 days from the date of notice but that too happens after formalities of show cause notice and personal hearing. FEMA also provides for a two year sunset clause for offences committed under FERA which may be taken as the transition period granted for moving from one 'harsh' law to the other 'industry friendly' legislation.

Broadly, the objectives of FEMA are: (I) to facilitate external trade and payments; and (ii) To promote the orderly development and maintenance of foreign exchange market. The Act has assigned an important role to the Reserve Bank of India (RBI) in the administration of FEMA. The rules, regulations and norms pertaining to several sections of the Act are laid down by the Reserve Bank of India, in consultation with the Central Government. The Act requires the Central Government to appoint as many officers of the Central Government as Adjudicating Authorities for holding inquiries pertaining to contravention of the Act. There is also a provision for appointing one or more Special Directors (Appeals) to hear appeals against the order of the

Adjudicating authorities. The Central Government also establish an Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the Adjudicating Authorities and the Special Director (Appeals). The FEMA provides for the establishment, by the Central Government, of a Director of Enforcement with a Director and such other officers or class of officers as it thinks fit for taking up for investigation of the contraventions under this Act.

FEMA permits only authorised person to deal in foreign exchange or foreign security. Such an authorised person, under the Act, means authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised by Reserve Bank. The Act thus prohibits any person who:-

- Deal in or transfer any foreign exchange or foreign security to any person not being an authorized person;
- Make any payment to or for the credit of any person resident outside India in any manner;
- Receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner;
- Enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person is resident in India which acquires, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

Legal aspects relating to Risk Cover (Insurance)

Indian entrepreneurs while investing abroad may face various commercial and political risks. The commercial risks may arise due to insolvency of the buyer; failure of the buyer to make the payment due within the specified period; or buyer's failure to accept the goods, subject to the given conditions. While, the political risks may be due to imposition of restrictions by the Government of the buyer's country or any Government action which may block or delay the transfer of payment made by the buyer; war, civil war, revolution or civil disturbances in the buyer's country.

Other unforeseen incidents like new import restrictions or cancellation of a valid import license in the buyer's country; interruption or diversion of voyage outside India resulting in payment of additional freight or insurance charges which cannot be recovered from the buyer; and any other

cause of loss occurring outside India not normally insured by general insurers.

Hence, in order to ensure safe and successful overseas expansion plans it is necessary to provide a comprehensive insurance cover against all such risks faced by an entrepreneur. Such an insurance facility seeks to create a favourable climate in which investors including exporters can get timely and liberal credit facilities from banks at home.

Accordingly, Export Credit Guarantee Corporation of India Limited (ECGC) was established by the Government of India under the administrative control of the Ministry of Commerce & Industry in order to strengthen the export promotion drive by covering the risk of exporting on credit. It provides a range of credit risk insurance covers to exporters against loss in export of goods and services as well as offers guarantees to banks and financial institutions to enable exporters to obtain better facilities from them. Its objectives are to provide insurance cover to:- (i) exporters against political and commercial risks; (ii) exporters against the risk of exchange rate fluctuations; (iii) banks against export credit and guarantees extended by them; (iv) Indian investors abroad against political risks.

Conclusion and Suggestions

Overseas business by entrepreneurs refers to undertaking and expanding its commercial activities across the national borders. It encompasses diverse nature of activities like trading (exporting and importing its goods and services); manufacturing and marketing as well as outsourcing for production and marketing. The main reason for making such overseas investments is to explore business opportunities abroad and take advantage of such opportunities. Foreign markets in both developed and developing countries provide enormous growth opportunities, so avoiding the expensive and lengthy procedure of litigation and for smooth conduction of business in the case of any dispute, young entrepreneurs must adopted the way of Arbitration and Conciliation procedure which has been discussed in the paper.

For expanding the business in abroad and for promoting the transnational transaction between our entrepreneurs and foreign companies and for the smooth conduction of the business to promote entrepreneurs following points also must be kept in consideration**:**

- Encourage access to capital, especially for small-scale entrepreneurs, through loans,

competitions, and risk-sharing mechanisms for investors.

- Provide high-quality education and vocational training to develop the skills in business, science, technology, engineering, and mathematics to individuals interested in pursuing opportunities in knowledge-based industries.
- Consider lowering tariffs on imported raw materials and equipment into the country of origin to help entrepreneurs begin transnational businesses.
- Establish mechanisms that encourage regular consultations with professionals.
- Make it very clear that entrepreneurs are welcome in their countries of origin.
- Adopt policies that make it easy for business owners or investors to come and go between their country of origin and their country of settlement.

There must be maximum use of Alternative Disputes Resolution Techniques for dispute resolution.

***Assistant Professor,**
Faculty of Law,
Jagannath University, Jaipur*

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