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December 2016. Vol. IX, Issue XII

INDIAN LEGAL IMPETUS®





Manoj K. Singh
Founding Partner

Greetings for 2017!! It's our pleasure to present the December 2016 edition of Indian Legal Impetus. We are extremely grateful to our readers for their insightful comments and interesting queries that are posted to us. The same is encouraging and it seems that we are successfully able keep our readers abreast on latest legal and commercial news/developments in INDIA.

This edition starts with an article ***Certain Categories of Disputes to be Non-Arbitrable*** informing about various categories of disputes which are regarded as non-arbitrable under the Indian laws. The article delves specifically into the issue of arbitrability of fraud and takes a look into the distinctions the courts have made between a serious issue of fraud and a mere allegation of a fraud. The next article, ***Appellate Arbitration Not Contrary To Indian Law Says Supreme Court***, is a study of the recent case of ***M/s Centrotrade Minerals & Metal Inc. versus Hindustan Copper Ltd.*** This article sums up the views of the special bench of the Supreme Court with regard to public policy and a two-tier arbitration procedure. Another engaging article on the topic of Arbitration is ***Appointment of 'Interested Party' as an Arbitrator*** highlighting relevant amendments recently made to the Arbitration and Conciliation Act, 1966. The article in particular discusses the discretion of the Parties to choose a neutral Arbitrator before and after the said amendments with help of some recent judgments.

The corporate and commercial laws section includes an article about ***Regulations notified to set in motion the Insolvency and Bankruptcy Code, 2016***, apprising our readers on the objectives of the said Code such as timely resolution, certainty of recovery, amongst others and also the set of Regulations notified by the RBI. It is followed by an article on another important and recent development relating to ***Settlement Commission under GST Regime***.

Articles on: ***Recent Development in the Competition Laws with regard to Abuse of Dominance*** discusses the enthused role the Competition Appellate Tribunal in ensuring level-playing field in the Indian market and ***Scheme of Compromise & Arrangement under Companies Act, 1956*** relate to established principles with respect to the powers of the High Court to enforce and supervise compromise between a company, its members and creditors in the background of *Namit Malhotra v. Unitech Limited*.

Further, topics such as ***Closure of Evidence under Order 17 Rule 3 Civil Procedure Code (CPC)*** and ***Libel: The Quantum of Damages under Indian laws*** are discussed in the present edition.

Under the Intellectual Property Rights section, a recent case of ***Mylan Laboratories Ltd. Vs. Icos Corporation and Controller of Patents*** is reported which relates to surrender vis-à-vis revocation of a patent, further, ***Issues and Challenges in patenting life-forms: An Indian Perspective*** deliberates upon the complexities in patenting of life forms/living organisms. ***The DU photocopy case*** expands upon recent order by Delhi High Court relating to copyright over "study material" and fair-use in India.

Finally, the latest updates and important notices relating to patent prosecution, working statements, Labour laws and notification for Special Economic Zone have been included in the ***News bytes*** section of this edition.

We again take this opportunity to thank our esteemed readers for the all their encouragement and support in our endeavours and hoping for nothing short of but a brilliant new year ahead for you all.

Singh & Associates wishes you a very Happy New Year 2017!

Thank You.



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Volume IX, Issue XII

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CERTAIN CATEGORIES OF DISPUTES TO BE NON-ARBITRABLE

Vijay Kumar Singh

The Arbitral Tribunal is a private forum chosen by the parties to the dispute to get their civil or commercial disputes adjudicated. Every civil and commercial dispute is capable of being adjudicated by arbitration unless the jurisdiction of Arbitral Tribunal is barred. The Arbitration and Conciliation Act, 1996 (as amended) ("the Act") do not specifically exclude category of civil or commercial disputes from arbitrability.

Section 8 of the Act mandates that where an action is brought before a Judicial Authority in a matter, which is the subject of an arbitration agreement, the parties shall be referred by it to arbitration subject to exception given in Section 8 of the Act. Section 8 of the Act casts obligation on the Judicial Authority to refer to arbitration in terms of Arbitration Agreement. Evidently, the Act does not exclude the category of disputes which are to be treated as non-arbitrable. However, the courts in certain category of disputes refuse to refer the parties to arbitration under Section 8 of the Act. Some of the category of disputes which are reserved exclusively to be tried by Public fora (Courts and Tribunals) constituted under the law and which are generally considered as non-arbitrable disputes are as follows :-

- i. disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
- ii. matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
- iii. guardianship matters;
- iv. insolvency and winding-up matters;
- v. matters related to grant of probate, letters of administration and succession certificate;
- vi. matters related to eviction of tenants where tenant enjoys statutory protection against eviction by special statutes;
- vii. patent, trade-marks and copyright;
- viii. anti-trust/competition laws;
- ix. fraud

The issue of arbitrability of fraud has arisen for consideration by the Courts in India on several occasions. There exists conflicting decisions on this issue. The Supreme Court in the case titled "**N. Radhakrishnan v. Maestro Engineers & Ors.**"¹ held that an issue of fraud is not arbitrable. The Supreme Court in the case titled "**Meguin GmbH v. Nandan Petrochem Ltd.**"² appointed an arbitrator even though issues of fraud were involved. However, the Supreme Court in the case titled "**Swiss Timings Ltd. vs. Commonwealth Games 2010 Organizing Committee**"³ held that judgment in N. Radhakrishnan case (supra) is *per incuriam* and is not good law.

The courts have made distinctions between a serious issue of fraud and a mere allegation of fraud while deciding the categories of disputes as non-arbitrable. A serious issue of fraud has been held to be non-arbitrable. The allegations of fraud should be such that not only these allegations are serious but in normal course the allegations may have constituted criminal offences and are so complex in nature that the decision on these issues warrants detailed and elaborate evidence for which only Civil Courts would be proper and appropriate fora than the Arbitral Tribunals. The Supreme Court in the recent judgment titled "**A. Ayyasamy vs. A. Paramasivam & Ors.**"⁴ has occasion to consider previous judgments on the issue of non-arbitrability of certain category of disputes including category of dispute involving fraud. The Supreme Court held that mere allegation of fraud simpliciter is not a ground to hold that the disputes between the parties cannot be settled by arbitration agreement. It is only in those cases where the Courts find that there are very serious allegations of fraud, then only the Courts hold such disputes as non-arbitrable. Normally, a party sets up a plea of fraud to wriggle out of the arbitration agreement. The Courts are required to make strict and meticulous enquiry into the allegations of fraud. Only when the Courts are satisfied that the allegations are very serious and of complicated nature, the disputes are held to be non-arbitrable.

¹ (2010) 2 SCC 72

² (2014) 10 SCC 422

³ (2014) 6 SCC 677

⁴ (2016) 10 SCC 386



The recent judgment rendered by Supreme Court in **A. Ayyasamy case** (supra) has clarified the legal position with respect to the nature of fraud to be alleged for the disputes to be treated as non-arbitrable.



APPELLATE ARBITRATION NOT CONTRARY TO INDIAN LAW SAYS SUPREME COURT

Arunima Singh

In a recent case of **M/s Centrotrade Minerals & Metal Inc. versus Hindustan Copper Ltd.** arising out of Civil Appeal No. 2562 of 2006, a special bench of the Supreme Court (constituting of Hon'ble Justice Madan B. Lokur, Hon'ble Justice R. K. Agarwal and Hon'ble Justice D. Y. Chandrachud) has held that two tier arbitration will not be contrary to the Indian Laws even though such a process is not backed by any provision in the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

The following issues arose for the consideration of a three-judge bench of the apex court:

- (1) Whether a settlement of disputes or differences through a two-tier arbitration procedure as provided for in Clause 14 of the contract between the parties is permissible under the laws of India? and
- (2) Assuming a two-tier arbitration procedure is permissible under the laws of India, whether the award rendered in the appellate arbitration being a 'foreign award' is liable to be enforced under the provisions of Section 48 of the Arbitration and Conciliation Act, 1996 at the instance of Centrotrade? If so, what is the relief that Centrotrade is entitled to?

Clause 14 in issue no.1 is the arbitration agreement entered into between M/s Centrotrade Minerals Inc. (hereinafter referred to as "Centrotrade") and Hindustan Copper Ltd. (hereinafter referred to as "HCL"). The Arbitration clause 14 read as follows:

"14. Arbitration - All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance

with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in effect on the date hereof and the result of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction."

The matter was initially put up before a two judge bench of the Apex Court in 2006 wherein a difference of opinion arose between the two judges and therefore the matter went on to being referred to a special bench.

BRIEF FACTS OF THE CASE:

After disputes arose between the parties, Centrotrade invoked arbitration for resolution of those disputes. Thereafter, Indian Council of Arbitration appointed an arbitrator who rendered a Nil award. Aggrieved by this, Centrotrade invoked the second part of the arbitration clause and the arbitrator in London gave an award dated 29.09.2001 in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Centrotrade sought to invoke the said award under section 48 of the Act after which the controversy arose.

VIEW TAKEN BY THE HON'BLE SUPREME COURT:

The Apex Court, at the outset, noticed that it was necessary to appreciate the intention of the parties to opt for a two-step arbitration. Wherein the first step would be settlement of disputes by arbitration in India and the second attempt would be by arbitration in London; where this second arbitration was in the nature of an appeal against the first/previously passed arbitral award.

While considering the legal position, the Court also made an interesting observation with respect to the contentions of HCL. It said that HCL could not advance any such argument wherein it may contend that the contract is illegal because that would imply that HCL was aware that one of the provisions of the contract were contrary to Indian Law and with that knowledge, it entered into contract with Centrotrade thereby playing fraud on Centrotrade. The Apex Court noted that this would have serious ramifications for



international commercial contracts with an Indian party.

An argument raised on behalf of HCL was rendered unacceptable by the Apex Court wherein it was contended that acts which are mentioned in the statute are permissible and those not mentioned in the statute are not permissible. The special bench held that appellate arbitration not being provided in the Act was not of concern in the present case. The issue in this matter was not of a statutory appeal but a non-statutory process agreed upon by the parties that has nothing to do with court procedures.

ARBITRAL AWARDS BINDING IN LIMITED CONTEXTS

It was held that the “final and binding” clause in Section 35 of the Act does not mean final for all intents and purposes. Finality of an award shall always be subject to the intention of the parties to allow an aggrieved party, recourse to an arbitration of second instance.

PARTY AUTONOMY

The Apex Court has once again made it clear that party autonomy is the backbone of an arbitration proceeding. The case of **Bharat Aluminium Company v Kaiser Aluminium Technical Services Inc.** reported as (2016) 4 SCC 305 was relied upon by the Apex Court to hold that *the intention of the parties which will have to be taken into account when understanding the terms of the contract.* The special bench has clearly held that in an arbitration the choice of a) jurisdiction, b) procedural law and c) substantive law are all left to the contracting parties. In view of all these, parties are also autonomous enough to decide as to the route of an appeal which may be preferred before a court of law or be made in form of another arbitration before a separate arbitral tribunal.

PUBLIC POLICY AND TWO-TIER ARBITRATIONS

As per **Associate Builders versus Delhi Development Authority** reported as (2015) 3 SCC 49, it has been held that an award would be set aside if it is contrary to:

- a. Fundamental policy of India Law; or
- b. The interest of India; or
- c. Justice or morality; or
- d. If it is patently illegal.

The concern in the present case was only with the fundamental or public policy of India. The Court held that the parties to the contract have not by-passed any

mandatory provision of the Act. Further, the parties entered into the contract with the agreement that the first arbitral award shall not have a binding effect and instead shall be subject to another arbitration. If binding effect of an arbitral award can be agreed upon by the parties then an appellate arbitration can also be agreed upon by the contracting parties.

The entire judgment was made concise by the Special Bench in the following paragraph:

“The parties to the contract have not by-passed any mandatory provision of the A&C Act and were aware, or at least ought to have been aware that they could have agreed upon the finality of an award given by the arbitration panel of 35 (2015) 3 SCC 49 C.A. Nos.2562 of 2006 etc. Page 27 of 29 the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. Yet they voluntarily and deliberately chose to agree upon a second or appellate arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. There is nothing in the A&C Act that prohibits the contracting parties from agreeing upon a second instance or appellate arbitration – either explicitly or implicitly. No such prohibition or mandate can be read into the A&C Act except by an unreasonable and awkward misconstruction and by straining its language to a vanishing point. We are not concerned with the reason why the parties (including HCL) agreed to a second instance arbitration – the fact is that they did and are bound by the agreement entered into by them. HCL cannot wriggle out of a solemn commitment made by it voluntarily, deliberately and with eyes wide open.”

With the coming of this judgment, doors open for appellate arbitration or arbitration of second instance in India. However, amendment in the existing act would be required to facilitate appellate arbitration as a number of questions remain hanging. For instance, the situation in which the parties can apply for intervention of court in the event the parties fail to appoint arbitrators or whether there would be provision of an appeal from an award rendered in Appellate Arbitration. If the latter question is in affirmative then another question would arise as to the apt forum of such appeal; choices being High Court or Supreme Court.



APPOINTMENT OF 'INTERESTED PARTY' AS AN ARBITRATOR

Ruby Panchal

POSITION OF LAW BEFORE 2015 AMENDMENT

In arbitration, the parties have the freedom to appoint any person as an arbitrator to adjudicate any dispute arising between them. This freedom of choice is stipulated by section 10(1) of Arbitration and Conciliations Act, 1996 which provides that, 'parties are free to choose the number of arbitrators.' It provides discretion with respect to number of arbitrators forming the adjudicating panel of a dispute. Further it is pertinent to note that, the provisions of Arbitration Act are silent upon any specific qualification of the arbitrator, thereby giving power to parties to decide upon it. This can be discerned from section 12 of the act which provides that '*an arbitrator may be challenged if he does not possess the qualifications agreed by the parties.*'

The parties have the discretion to mutually agree upon qualification criteria for appointment of an arbitrator. As per the general practice in India, the General Condition of Contract provides for the provision of appointment of party who is a member of the awarding company in the tender agreements and concessionaire agreements in India. In such agreements, the contractor is awarded the work through letter of award; therefore there can be an implied inference that it lacks the power to negotiate on this particular aspect.

246TH LAW COMMISSION REPORT AND THE AMENDMENT ACT 2015

In the 246th Law Commission Report, an amendment was proposed to section 12 of the Act which stipulates the grounds for challenging the arbitrator. The report suggested that, being an 'interested party' i.e. party having relationship as an employee, consultant, advisor etc. with any of the party qualifies as a ground of challenging the appointment. The report further noted that this should be the rule for all types of arbitrations including family matters. However, this is a waivable clause for which parties would have to put in an express declaration in the agreement or after the dispute has arisen.

The Report imbibes this amendment from the provisions of the '*Waivable and Non-waivable Red List*' of the IBA Guidelines on Conflict of Interest.

This suggestion culminated into amendment of section 12 and addition of Schedule V and VII in the Arbitration and Conciliations (Amendment) Act 2015. Section 12(1)(b) read with Fifth Schedule mandates that the appointment made by any party which would give rise to justifiable doubts as to the independence or impartiality of arbitrator if he has a relationship with the parties or counsel or the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party, the same would give rise to justifiable doubts.

That further Section 12(5) read with Seventh Schedule provides that there shall not be any arbitrator's relationship with the parties or counsel who should also not be an employee, consultant, advisor or has any other past or present business relationship with a party. Such party should not be appointed as an arbitrator.

That applicability of the amended provisions is stipulated by section 1(2) read with 26 of the Amended Act by which provides that *firstly*, the amended provisions shall be deemed to have come into force on the 23rd October, 2015. And *secondly*, such amended provisions shall not apply to the arbitral proceedings commenced, before the amendment unless the parties otherwise agree.

RELEVANT CASE LAWS RELATING TO THE MATTER

The moot issue arises when agreement is pre-dated i.e. before 23rd October, 2015 and arbitration clause stipulates for appointment of an 'interested party' but the arbitration is invoked after amendment. Such case was first addressed by the Court in the case of *Assignia-VIL JV v. Rail Vikas Nigam Limited*,⁵ as decided on 29.04.2016, wherein the petitioner invoked arbitration clause on 26.10.2015 with respect to dissatisfaction with termination of the contract. The Respondent contested that these claims should be settled by the already constituted arbitral tribunal on 11.04.2014. The

⁵ *Assignia - VIL JV v. Rail Vikas Nigam Limited*, Arb. P. No. 677/2015.



clause provided that the presiding arbitrator shall necessarily be serving at railways. The Court held that, 'the request of respondent cannot be accepted as the arbitration is invoked after amended Act has come into operation. If the Respondent's request is allowed, the very purpose of amending the Act would be defeated.'

The *Assignia* case became the relying stone for *Orissa Concrete and Allied Industries Ltd. v. Union of India & Ors.*,⁶ decided on 23.05.2016. As per the facts the petitioner sent invocation notice to respondent on 5th February, 2016, pursuant to which no arbitrator was appointed within 30 days. It was again communicated to respondent on 18th March 2016, when they finally appointed GM of South Central Railway as per the agreement. The Court held that, 'as per the amended Act, the petitioner is entitled to the appointment of an independent and impartial Arbitral Tribunal in as much as the respondent has forfeited its right to appoint an Arbitral Tribunal of its choice in view of Amendment of the Act. The party is entitled to the appointment of an independent and impartial arbitral tribunal as per Section 11(8) of the Act, if the party would be able to cross the hurdle of Section 26 of the Amended Act.'

Further in the case of *Vijay Anand & Associates Pvt. Ltd. v. Aman Hospitality Pvt. Ltd.*,⁷ which was decided on 03.06.2016, the petitioner invoked the notice of arbitration on 27th January, 2016. The respondent appointed M/s Achal Kataria & Associates as the arbitrator to which petitioner did not agree on the basis of amendment of the Arbitration Act. The petitioner put forth that appointment of interested party after the amendment act would lead to failure of appointment process. Hence, party can approach court under Section 11. The Court held that, 'in case M/s Achal Kataria & Associates. The Court held that under no circumstances to exercise of power cannot be taken away the jurisdiction of this Court to appoint an arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996 as sought by the Petitioner.'

Thus, as per the amended position of law, an interested party cannot be appointed by the parties unless parties expressly agree for doing so. But this question also arose with respect to the arbitration invoked before this amendment. This was addressed in the case of *Era*

Infra Engineering Ltd. v. Aravali Power Company Pvt. Ltd.,⁸ which was decided on 29.07.2016. The arbitration was invoked prior to October 23, 2016. And as per the arbitration clause of GCC, CMD of NTPC was to be appointed as the arbitrator. But the petitioner in its invocation letter itself had requested for and independent arbitrator, other than CMD since he is involved in executive matter of the company. The Court held that, 'in the present case, no doubt, the invocation was on the basis of the un-amended Act but still under Section 12 of the Act would give the similar indication. The sole Arbitrator appointed by the respondent admittedly is CEO and Executive of the respondent – neutrality, to avoid any doubt in the mind of the petitioner and the reasons give in the petition, it would be appropriate that independent sole Arbitrator should be appointed as ultimately neutral person has merely to decide the dispute between the parties. Even, the object and scope of the Act says so, that an arbitration procedure should be fair and unbiased.'

Therefore, it can be concluded that developments in law of arbitration are converging to make the process fairer, efficient and progressive. As per the amended Act, the Parties cannot choose an 'interested party' as an arbitrator. Such choice would lead to failure of appointment procedure which would give right to other party to approach the Court under section 11 for appointment of unbiased and qualified arbitrator.

⁶ *Orissa Concrete and Allied Industries Ltd. v. Union of India & Ors.*, Arb. P. No. 174/2016.

⁷ *Vijay Anand & Associates Pvt. Ltd. v. Aman Hospitality Pvt. Ltd.*, Arb. P. 138/2016.

⁸ *Era Infra Engineering Ltd. v. Aravali Power Company Pvt. Ltd.*, Arb. P. 136/2016.



REGULATIONS NOTIFIED TO SET IN MOTION THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Kumar Deep

BACKGROUND

The Insolvency and Bankruptcy Code, 2016 ("**Code**") has been notified by the Government of India in May 2016. The Code provides an easy exit option for insolvent and sick companies.

The main highlight of the Code include speedily adjudication of cases for higher recovery of debt and money, allowing operational creditors like employees to call for insolvency resolution; propose Insolvency Regulator to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and informational utilities. The Code seeks to consolidate and amend laws relating to re-organization as well as insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner. The Code creates time-bound processes for insolvency resolution of companies and individuals. These processes will be completed within 180 days. It also provides that if insolvency cannot be resolved, the assets of the borrower may be sold off in order to repay the creditors.

Post enactment of the Code, the Insolvency and Bankruptcy Board of India ("**IBBI**" / "**Board**") has been established on October 1, 2016 in accordance with Section 188 (1) of Chapter I of Part IV of the Code by the Central Government under the Chairmanship of Mr. M.S. Sahoo. The other four-members of IBBI are Mr. Ajay Tyagi, Additional Secretary in Ministry of Finance, Mr. Amardeep Singh Bhatia, the Joint Secretary (Ministry of Corporate Affairs), Mr. G.S. Yadav, the Joint Secretary and Legal Adviser (Ministry of Law) and Mr. Unnikrishnan A., Legal Advisor to the Reserve Bank of India ("**RBI**").

REGULATIONS NOTIFIED BY IBBI

In pursuance to the powers conferred to the IBBI under Section 240 and other provisions of the Code, the IBBI has notified⁹ in the month of November and December 2016, the following sets of Regulations namely:

⁹ These Regulations are available at www.mca.gov.in and www.ibbi.gov.in.

- 1) The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016 (hereinafter referred as "**IPA Regulations**");
- 2) The Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (hereinafter referred as "**Model Bye-Laws Regulations**");
- 3) The Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (hereinafter referred as "**IP Regulations**");
- 4) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred as "**IRPC Regulations**"); and
- 5) The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter referred as "**Liquidation Process Regulations**").

THE KEY HIGHLIGHTS OF THE ABOVE SAID REGULATIONS ARE ENUMERATED AS BELOW:

1) THE IPA REGULATIONS

The IPA Regulations, notified by the IBBI on November 21, 2016, lay down the eligibility norms and procedure for grant of certificate of registration as an IPA along with the process and grounds for rejection, suspension and cancellation of such registration. The main provisions of the IPA Regulations are:

- i) Eligibility for Registration: A company incorporated as a not-for-profit company under Section 8 of the Companies Act, 2013 shall be eligible to be registered as Insolvency Professional Agency (IPA) which fulfills the certain conditions that:
- ii) The sole object of this section 8 company should be



to carry on the function of insolvency professional.

- a) Such company must has a minimum net worth of Rs. 10 crore
 - b) It must has the paid up share capital of Rs. 5 crores.
 - c) It should not be under the control of person resident outside India.
 - d) No person resident outside India should hold more than 49% (directly or indirectly) of the share capital of such company,
 - e) It should not be a subsidiary company of a body corporate through more than one layer.
 - f) Its directors, promoters and all persons holding more than 10% of its share capital, is required to be a 'fit and proper' person as to be determined by the Board.
- iii) Application for Registration: an application for registration is required to be made by the eligible company in prescribed Form A along with non refundable application fee of Rs. 10 Lakh. The said form may also be used for making application for the renewal of the registration.
- iv) Grant of certificate of registration: the IBBI after satisfied with the eligibility and other conditions of the applicant company grant certificate of registration in prescribed Form B within 60 days of receipt of the application.

The IPA Regulations further provide the procedure for rejection of an application, provisions relating to surrender of registrations, disciplinary proceedings by issue of show cause notice to the IPA and provisions relating to appeal to be filed with NCLT against any impugned order passed by the Board. Further, the IPA Regulation also provide for the In-principle registrations (i.e., temporary registrations) to be also available to IPs for a limited period of 1 year.

2) THE MODEL BYE-LAWS REGULATIONS

The Model Bye-laws Regulations was notified by the IBBI on November 21, 2016 which provide the model Bye-laws of IPA based on which, the IPAs are required to prepare their own bye-laws in consistence with the model Bye-laws and to be submitted the same with the Board along with application for registration as IPA.

Such bye-laws of the IPA should be published on its website alongwith the composition of all committees formed and all policies created by such IPA. The Model Bye-laws Regulations also provide that any amendment in the Bye-laws of the IPA shall be made by a resolution passed by the Governing Board in such a manner that the votes should be casted by the directors in favour being not less than three times the number of votes, if any, casted against the resolution, and such resolution should be filed with the IBBI within 7 days of passing the same. Further, the Model Bye-laws Regulations also provide the composition of the Governing Board consisting of minimum 7 directors out of which more than half of the directors shall be person resident in India and not more than one fourth of the directors shall be the IPs. Further, in the Governing Board more than half of the directors should be independent directors at the time of their appointment and at all times during the tenure as directors and no meeting of the Governing Board shall be held without the presence of at least one independent director. The person to be an independent director should meet the criteria provided under this Regulation.

3) THE IP REGULATIONS

The IP Regulations, notified by the Board on November 23, 2016 and became effective from November 29, 2016, inter alia provide for the eligibility, qualifications/ experience, registration, regulation and oversight of Insolvency Professionals under the Code. The salient features of the IP Regulations are as under:

- i) Provision for Insolvency Examinations: The IP Regulations provide that the Board shall conduct a 'National Insolvency Examination' (to test the knowledge and practical skills of individuals in the areas of insolvency, bankruptcy and allied subjects) and 'Limited Insolvency Examination' (to test the knowledge and application of knowledge of individuals in the areas of insolvency, bankruptcy and allied subjects). The syllabus, format and frequency of such examinations, including qualifying marks, shall be published by the Board on its website at least one month before the examinations.
- ii) Eligibility to become IP: An Indian resident individual who is not a minor and having qualifications and experience as provided under these Regulations shall be eligible to become an IP. However, such person should not be convicted for any offence punishable with imprisonment for a term



exceeding six months or for an offence involving moral turpitude and a period of five years has not elapsed from the date of expiry of the sentence.

- iii) Qualifications and experiences for IP: the IP regulations provides that Advocates, Chartered Accountants, Company Secretaries and Cost Accountants with 10 years of post-membership experience (practice or employment) or any graduate with 15 years of post-qualification managerial experience will be eligible to act as insolvency professionals after passing the Limited Insolvency Examination. Further, any other individual is also eligible to become an IP after passing the National Insolvency Examination. In addition, for a limited period, the IP Regulation provides for registration to act as IP without passing any examination for such Advocates, Chartered Accountants, Company Secretaries and Cost Accountants who are having 15 years of practice experience. However, such applications would have to be made by December 31, 2016 and such registration will be valid only for six months.
- iv) Recognition of IP entities: the IP Regulations provides the rules for recognizing an entity as IP entity. Accordingly, a limited liability partnership, a registered partnership firm and a company may be recognized as an IP entity if, majority of the partners or majority of the whole-time directors are registered as IP under the Code. Further, such IP entity should always comply this basic condition of recognition as mentioned above.
- v) Code of Conduct for IPs: the IP Regulations also provide, through schedule, the code of conduct for IPs in order to perform their functions with integrity and sincerity.

4) IRPC REGULATIONS

The IRPC Regulations was notified by the Board on November 30, 2016 and became effective from December 1, 2016. These regulations provides rules with respect to eligibility for resolution professional, public announcement, claims by operational creditors, financial creditors, workmen and employees, verification of claims, formation of committee of creditors, procedure for meetings of the committee & voting in such meetings, conduct of corporate insolvency process and resolution plans. The salient features of IRPC Regulations may be summarized as under:

- i) An insolvency professional may be appointed as a resolution professional for a Corporate Insolvency Resolution Process of a corporate debtor only if such IP is independent of that corporate debtor;
- ii) The IRCP Regulations also prohibit a resolution professional who is also a partner or director of an insolvency professional entity to continue as resolution professional if the insolvency professional entity or any other partner or director of such entity represent any of the other stakeholders in the same Corporate Insolvency Resolution Process;
- iii) The IRCP Regulations specify the contents of information memorandum and of resolution plan, including its implementation schedule, and the manner of determination of liquidation values and components of resolution process costs.

5) LIQUIDATION PROCESS REGULATIONS

The Liquidation Process Regulations were notified on December 15, 2016 to become effective immediately. These Regulations shall apply to the liquidation process as provided under Chapter III of Part II of the Code i.e. section 33 to section 54 of the Code. The salient features of the Liquidation Process Regulations are as under:

- i) As per these Regulations an IP is prohibited from acting as a liquidator for a corporate debtor if he/she is not independent of the corporate debtor. Further, the partners or directors of an insolvency professional entity, of which the IP is a partner or director, are also prohibited from representing other stakeholders in the same liquidation process.
- ii) The liquidator, and registered valuer(s) and professional(s) in the liquidation process are under obligation to make disclosures (initial and continuing) about pecuniary or personal relationship with any of the stakeholders entitled to distribution of assets.
- iii) The Liquidation Process Regulations also specify the manner and contents of public announcement by liquidator, receipt and verification of claims of stakeholders, proof of claim, providing security interest, realization of assets, reports and registers to be maintained, preserved and submitted by the liquidator etc.



CONCLUSION

The above mentioned Regulations were notified by the Insolvency and Bankruptcy Board of India to kick start the process of liquidation and insolvency process under the Insolvency and Bankruptcy Code, 2016. The objectives of the Code i.e. timely resolution, certainty of recovery, reduction in non-performing assets, speedy process of liquidation of companies etc., can be achieved through these Regulations. This is an another significant step of the Government to move forward its initiative of ease of doing business in India and warm welcoming by the intact industries in India.



SETTLEMENT COMMISSION UNDER GST REGIME

Daizy Chawla

Among the various mechanism of Alternate Dispute Resolution provided under GST to resolve the issues like advance ruling, etc, establishment of Settlement Commission is one such mechanism. The object behind the setting up of the Settlement Commission under any law is to create a channel whereby the cases can be settled expeditiously and in a spirit of conciliation rather than prolonging them through adversarial attitude. The idea is also to save the business from the uncertainties of prosecution in certain cases. In the present article we will discuss the relevant provisions of Settlement Commission under GST Regime.

Section 11 to Section 26 of Integrated Goods and Services Tax Act, 2016 (*herein after referred to as IGST/IGST Act*) deals with the provisions of Settlement Commission. At the moment Settlement Commission has not found its place under Central/States Goods and Services Tax Act, 2016 (*hereinafter referred to as CGST/CGST Act*), though there is Chapter VII A provided for it, which means that tax disputes arising on account of inter-state transactions can at the moment will be settled under Settlement Commissions.

CASES WHICH CAN BE REFERRED TO SETTLEMENT COMMISSION

Section 11 of IGST defines case which means any proceeding under the IGST Act for levy, assessment and collection of IGST:

- a) which is pending on the date on which an application for settlement is made before an IGST officer or before a First Appellate Authority in connection with such levy, assessment or collection of IGST;
- b) an order passed by an adjudicating authority for which the period of appeal has not expired will also be termed as proceedings;
- c) an appeal filed after the expiry of the period of appeal and the said appeal is not admitted will not be termed as proceeding for the purpose of reference to Settlement Commission;
- d) Similarly, where the adjudicating authority has remanded back the case to the lower authority this

will also not be treated as a proceeding pending and therefore no application for settlement can be made in such cases.

WHO CAN APPLY BEFORE SETTLEMENT COMMISSION

As per section 15 of the IGST Act, any taxable person can apply for settlement of a case in relation to which he has been issued one or more show cause notice(s) under the IGST Act and the same is pending before the adjudicating authority or the First Appellate Authority. It is to be noted where the case is pending before Appellate Authority or court, no application for settlement will be entertained. It is to be noted that the application once filed cannot be withdrawn.

PRE REQUISITE FOR MAKING AN APPLICATION BEFORE SETTLEMENT COMMISSION

The application must disclose the quantum of liability, additional amount of tax accepted to be payable, particulars such as misclassification, exemption notification because of which he admits to short payment, manner in which it is computed and other prescribed particulars including but not limited to all the disclosures of tax liability which has not been disclosed before the jurisdictional IGST officer. Further, no application will be accepted in case:

- a) The Applicant has not furnished requisite returns. However, the Settlement Commission may allow an application after recording the reasons if it is satisfied of the existence of circumstances owing to which no return was filed;
- b) A Show Cause Notice demand of tax or an order confirming the demand has been issued by the officer and the matter is pending before first appellate authority;
- c) The additional amount of tax accepted by the applicant in his application exceeds INR 5 Lakhs;
- d) The applicant had paid the additional amount of tax on his own account under Section 36 of CGST Act;



- e) The application is filed for the purpose of determination of any question having a bearing on the rate of tax or determination of liability to pay tax on goods and/or services under the Act.

ORDERS WHICH CAN BE PASSED BY THE SETTLEMENT COMMISSION

Settlement Commission constituted under IGST can pass an order providing for terms of settlement which can include:

- the amount of tax, interest, fine or penalty that is payable by the applicant;
- manner in which the sums due under the settlement shall be paid; (section 16)
- granting immunity from prosecution for any offence under the IGST Act if no proceedings for prosecution were instituted on the date of receipt of the application and if the Settlement Commission is satisfied that the applicant has made a full and true disclosure of his tax liability; (section 20);
- granting immunity from imposition of penalty either in full or part under the IGST Act; (section 20)

Every order passed by the Settlement Commission is conclusive and no matter covered by such order is, save as otherwise provided in the IGST Act, is eligible to be reopened under the IGST Act or under any other law for the time being in force (Section 22).

PROVISIONAL ATTACHMENT OF PROPERTY

Under Section 17 of IGST, Settlement Commission can order provisional attachment of property of the applicant during the pendency of any proceeding before it. Such provisional attachment shall cease to have effect, once sums due to the Central Government for which attachment order was made, stands discharged and the evidence to this effect is submitted to the Settlement Commission.

CONSEQUENCE OF NON COOPERATION WITH SETTLEMENT COMMISSION

- In case of amount so ordered by the Settlement Commission is not paid within the period of thirty (30) days or a further extended period of three months, then the said amount shall be recovered

along with interest as sums due to Central Government in accordance with section 54 of CGST Act (Section 16);

- Settlement Commission can send a case back to the jurisdictional IGST officer or the First Appellate Authority if it is of the opinion that the applicant has not cooperated with the Settlement Commission. Further, in such cases, the relevant adjudicating authority is entitled to use all material and information produced by taxable person before the Settlement Commission or the results of an inquiry held by the Settlement Commission (Section 21).

TIME PERIOD TO COMPLETE THE PROCEEDINGS BEFORE THE SETTLEMENT COMMISSION.

The Settlement Commission needs to pass an order within twelve (12) months from the date of application or by reason recorded in writing be extending the period by three (3) months otherwise the settlement proceedings will abate and the adjudicating authority or the first appellate authority as the case may be, before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of the act.

PROCEDURE TO ADJUDICATE AN APPLICATION OF SETTLEMENT.

- Notice:** Upon receipt of an application, the Settlement Commission is under an obligation to issued a notice within Seven (7) days requiring the application to explain as to why the application should be entertained. If no notice has been issued or no order has been passed within the period prescribed above, the application shall be deemed to have been allowed to be proceeded with;
- Admissibility of Application** After taking into consideration provided by the applicant, it shall within a period of Forty (45) days from the date of notice, by an order, allow the application to be proceeded with, or reject the application.

Where any application has been rejected, an opportunity to the application is required to be given to present its case.

A copy of every order passed, needs to be sent to the applicant as well as to the jurisdictional IGST officer.



- c) **Calling of Report and Relevant Records:** In case where the application is allowed, the Settlement Commission will within a period of Seven (7) days from the date of order will call a report along with the relevant records from the jurisdictional IGST officer. The IGST officer will in turn furnish its report within a period of Sixty (60) days of the receipt of the communication. In case the jurisdictional officer will fail in giving his report and the records as sought by the Settlement Commission within the period prescribed, the Settlement Commission will proceed further in the matter without the report of the said officer.
- d) **Enquiry or Investigation:** If after the receipt of the report, the Settlement Commission is of the opinion that further enquiry or investigation is required, then it may within 15 days from the date of such receipt of the report after recording reasons in writing will direct a designated officer to conduct the enquiry or investigation. The report of such enquiry or investigation needs to be furnished within a period of Ninety (90) days. If the designated officer fails to furnish its report within the period prescribed then the Settlement Commission will pass the order without such report.
- e) **Examination of Records and Reports from IGST Officer or designated officer:** After examination of the records and report from the Jurisdictional officer and the report if any from the designated officer (w.r.t enquiry or investigation), an opportunity will be given to the applicant and also to the Jurisdictional IGST officer to be heard either in person or through an authorised representative and after examining such further evidence the Settlement Commission will pass an order.

CAN THE ORDER PASSED BY SETTLEMENT COMMISSION CAN BE REVOKED?

Order of Settlement Commission shall be void if it is later found that it was obtained by fraud or misrepresentation of facts. Thereafter proceedings covered by the settlement shall stand revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and shall be concluded by the relevant original or appellate authority within two years from the date of receiving

such communication from the Settlement Commission. (Section 16)

Similarly, the order of Settlement Commission granting immunity from prosecution or payment of penalty can be withdrawn where it finds later that the applicant had concealed any facts or had given any false evidence or if he has failed to pay the sum specified in the settlement order in the prescribed time. (Section 20)

CAN A SETTLEMENT COMMISSION RE-OPEN ANY PROCEEDINGS?

As per Section 18 of IGST, if the Settlement Commission is of the opinion that for the proper disposal of the case pending before it, it is necessary or expedient to reopen any proceedings connected with the case but which has been completed under the Act before application is been made under Section 15. The said re opening of any proceedings needs to be duly reasoned and is with the concurrence of the applicant. No proceedings however, can be reopened by the Settlement Commission if five (5) years have been expired for the concluded proceedings from the date of application.

BAR ON SUBSEQUENT APPLICATION FOR SETTLEMENT IN CERTAIN CASES

The following persons cannot avail of the facility of Settlement Commission:

- No person can avail the facility of settlement more than twice (Section 23);
- where a person after passing of an order of settlement under sub-section (5) of Section 16, in relation to a case is convicted under the IGST Act in relation to that case; or
- in case of such person is sent back to the Jurisdictional IGST officer or the first Appellate Authority, as the case may be, by the Settlement Commission under Section 21 (non cooperation) then, he shall not be entitled to apply for settlement in relation to any other matter.



POWERS OF SETTLEMENT COMMISSION

The powers and procedures of Settlement Commission are given in sections 25 and 26 of IGST Act. It is vested with the powers of a civil court under the Code of Civil Procedure, 1908, for discovery and inspection, enforcing the attendance of a person and examining him on oath, and compelling production of books of account and other records. Settlement Commission is deemed to be a civil court for the purposes of section 195 of the Code of Criminal Procedure, 1973. Any proceeding before it shall be deemed to be a judicial proceeding under section 193 and 228 and for the purpose of section 196, of the Indian Penal Code, 1860. The Settlement Commission also has the power to regulate its own procedure.

AMENDMENT IN ANY ORDER PASSED BY SETTLEMENT COMMISSION

The Settlement Commission may amend any order passed by it within a period of three months from the date of order so as to rectify any mistake apparent from the record, if such mistake is noticed by the Settlement Commission on its own accord, or is brought to its notice by the Jurisdictional IGST officer or the applicant.

However, no rectification, which has the effect of enhancing the liability of the applicant, shall be made under this section, unless the Settlement Commission has given notice to the applicant and the jurisdictional IGST officer of its intention to do so. Further, a reasonable opportunity in that case will also be given to the applicant as well as the Jurisdictional IGST officer.

CONCLUSION

Though, the Settlement Commission has found its place under the IGST the procedure which will be adopted is still not clear as Section 26 of IGST Act, has given power to the settlement commission to regulate its own procedure in all matters arising out of the exercise of its power under the Act. Meaning thereby one has to wait till the Act is implemented and Settlement Commission have freezed the procedure. One more lacuna at the moment is of no clarity regarding intra state transactions and one has to also wait for the states legislature to formulate the same.



RECENT DEVELOPMENT IN THE COMPETITION LAWS WITH REGARD TO ABUSE OF DOMINANCE

Mahip Singh Sikarwar

INTRODUCTION

The Competition Appellate Tribunal (COMPAT) in November 2016 set aside an order of fair trade regulator Competition Commission of India (CCI) in a case of alleged abuse of dominant position and anti-competitive practices by the International Air Transport Association (IATA) and its Indian arm.

India has become more of an open market economy, wherein some enterprises may undermine the market by resorting to anti-competitive practices for short-term gains. Such practices can completely invalidate the benefits of a healthy competition. To match with the international trend and to cope up with the changing realities, India, consequently, enacted the *Competition Act, 2002*. Enacted specifically to deal with matters relating to the existence and regulation of competition and monopolies, the Act has thereby superseded and replaced the MRTP Act. It is procedure intensive and is structured in an uncomplicated manner that renders it more flexible and compliance-oriented.

The COMPAT's order came over an appeal filed by The Air Cargo Agents Association of India, challenging a CCI order passed on 4 June, 2015, which discharged IATA for alleged anti-competitive practices and abuse of dominance. COMPAT allowed the appeal by Air Cargo Agents Association of India and ordered the Director General (DG) of CCI to start a fresh investigation over alleged abuse of dominance.

ABUSE OF DOMINANT POSITION

Section 4 of the Act enjoins, "no enterprise shall abuse its **dominant position**". The term 'dominant position' has been defined in the Act as "a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour".¹⁰ The definition of the dominant

position provided in the Competition Act is similar to the one provided by the European Commission in **United Brand v Commission of the European Communities**¹¹ case. In the United Brands case the Court observed that "a position of strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitor, customers and ultimately of its consumers."¹²

Article 82 begins with the phrase "*any abuse by one or more undertakings of a dominant position*" and it was this phrase "one or more undertakings" which was used by Court of First Instance in **Italian Flat Glass case**¹³ to hold that "there is nothing in principle to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market."

Section 4 of the Act aims at "an enterprise" or "group". Section 4(1) presently reads "[N]o enterprise or group shall abuse its dominant position". There is nothing in the definition of enterprise under Section 2(h) or in the provisions of Section 4 to suggest that two or more independent entities can be clubbed together to constitute collective dominance.

Having said that, however, in the *DTH case*¹⁴ in 2011, the dissenting member had opined that an 'enterprise' has been defined in Section 2(h) of the Act¹⁵ as including a 'person'. A '[P]erson' has been defined under

11. *United Brands v Commission of the European Communities*; [1978] ECR 207

12. *Ibid*

13. *Judgment of the Court of First Instance (First Chamber) of 10 March 1992. - Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities* – EUR-Lex- 61989A0068

14. *Consumer Online Foundation v Tata Sky Ltd & Ors*, Case No. 2/2009, Order dated 24.03.2011 (Dissenting)

15. *The Competition Act, 2002* (12 of 2003)

10.. *Competition Act, 2001 explanation (a) to Section 4.*



Section 2(l) as including 'as association persons ... whether incorporated or not ...' and thus, the respondents in that case would together constitute an 'unincorporated association of persons', thereby making them an "enterprise" for the purposes of Section 4(1) of the Act.¹⁶

Out of the total 90 airlines operating to and from India, 62 airlines are members of IATA. An association cannot be charged under Section 4 as it is not an 'enterprise' under the Act. However, in view of the recent proposed amendment to this Act, under Section 4 an enterprise either jointly or group of enterprises acting singly or jointly can be charged under the said Section. Since, IATA is a group of airlines i.e., group of enterprises acting jointly, ACAAI submitted to the CCI that the conduct of IATA may be investigated under Section 4 also.

As contended by ACAAI, IATA as an "enterprise" under section 2(h) of the Act¹⁷ is clearly abusing its dominant position against cargo agents/ freight forwarders in India by making accreditation of IATA subject to acceptance of supplementary obligations relating to qualifications, minimum staff requirement, financial standing etc. under Resolution 801 and relating to waiver of claims and indemnification etc. under the proposed Resolution 815, which would otherwise not have been possible under normal commercial dealings and have no connection with the accreditation itself.

THE AIR CARGO AGENTS ASSOCIATION OF INDIA V/S COMPETITION COMMISSION OF INDIA AND ORS.¹⁸

IATA accredits air cargo agents in all the countries and runs the licensing system for cargo agents. It prescribes various registration and accreditation requirements and also enforcing many financial terms and conditions on cargo agents in India. The investigation has confirmed that the IATA airline membership of 240 odd airlines constitutes 84% of the airlines worldwide and thus it enjoys a market power to control and regulate the industry. The issue was taken by the association before the CCI by filing information on December, 2012 alleging that IATA is unilaterally prescribing the

regulatory system and arrogating to itself self-generated regulatory power for registering, accrediting and regulating the engagement of Cargo Agents by Airlines of India.

According to the association, this was without any authority in law by any legal provision runs the licensing system for the IATA registered Cargo Agents. However, the CCI closed the case against IATA saying that the IATA has not contravened any of provisions of the Competition Act. The ACAAI had complained to the CCI in 2012, with allegations of limiting and controlling the market and fixing rate of commission payable to cargo agents by airlines and abuse of dominance, against the IATA and IATA-India.

The CCI referred the complaint to its investigating arm and this arm – the Director General (DG) – reported back that the IATA's behavior did raise competition concerns but that the ACAAI's specific allegations on limiting and controlling the market and fixing commission rates were not proved. The CCI agreed with the DG and dismissed the complaint, without taking any decision on the other part of the complaint – the abuse of dominance.

Therefore, the Air Cargo Agents Association of India hereby filed information under Section 19 (1) of Act¹⁹ to investigate and accordingly decide whether the said Rules and conferences of IATA are anticompetitive or not and if so, to pass suitable orders.

COMPAT chairman G.S. Singhvi, setting aside the CCI's order²⁰, stated:

"the Commission is duty bound to record reasons, howsoever briefly, for closing a case under Section 26(2²¹), which has admittedly not been done while dealing with the information filed by the appellant. If the Commission was to pass an order under Section 26(2) in respect of the allegation of abuse of dominant position leveled against [IATA and IATA-India], the appellant could have challenged the same by filing an appeal under Section 53B(2) read with Section 53A(1) of the Act."

16. The Competition Act, 2002 (12 of 2003)

17. Ibid.

18. Competition Appellate Tribunal, New Delhi, Appeal No. 98 Of 2015 Under Section 53B of the Competition Act, 2002 against order dated 04.06.2015 passed by the Competition Commission of India in Case No.79 of 2012

19. The Competition Act, 2002

20. Under Section 53B of the Competition Act, 2002 against order dated 04.06.2015 passed by the Competition Commission of India in Case No.79 of 2012

21. The Competition Act, 2002



However, the fact of the matter is that no such order was passed by the Commission and as mentioned above, an order dated 21.03.2013 does not contain any indication about negation of the allegation of abuse of dominant position leveled by the appellant. On the basis of the above discussion, we hold that the DG committed serious illegality by not recording a finding on the allegation of abuse of dominant position.

COMPAT said *“the impugned order is set aside and the DG is directed to conduct fresh investigation into the allegations leveled by the appellant against the respondents and submit a report to the Commission a period of 60 days from the date of receipt of this order”*. It directed that if the DG is unable to submit fresh investigation report within sixty days, then he may approach the Commission for extension of time for submission of the fresh investigation report.

The COMPAT order holds that the *“DG committed serious illegality by not recording a finding on the allegation of abuse of dominant position and consequential violation of provisions of the Competition Act, 2002” by IATA and its Indian affiliate. The order added that the order is liable to be set aside because the Commission failed to take cognizance and decide the plea raised by the appellant in the context of the said illegality committed by the DG.*

CONCLUSION

Thus, by said setting aside the said impugned order of CCI, COMPAT has certainly taken a pro-active approach to ensure that the prime object of the Act, i.e., to facilitate healthy competition in the market. The abuse of dominance by IATA would have gone unchecked if the act would not have made necessary provision under Section 19 and thus the ACCAI got its right to a fair play and a market free from any such activities which can have an adverse affect on competition. The crucial question which gained more clarity in the said order of COMPAT was the meaning of “enterprise” which had been a bone of contention for many previous cases too. Apart from this, the COMPAT had achieved what we call fair regulation in its truest sense by setting aside CCI’s order on abuse of dominance.



SCHEME OF COMPROMISE & ARRANGEMENT UNDER COMPANIES ACT, 1956

Anandini Sood

Under the Companies Act 1956, Sections 391 to 393 deal with the scheme for obtaining court approval for compromise or arrangement between a company and its members and creditors. Essentially, a scheme can be used to bind a majority of creditors or members, as the court can sanction a scheme once it has been approved by a majority in number representing 75%.

Section 391 states that a compromise or arrangement can be proposed between the company and its creditors or members or any class of them. An application with regard to such a compromise or arrangement can be made by the company or by any creditor or member of the company, or, in the case of a company, which is being wound up, by the liquidator. The Court, thereafter, orders a meeting of the creditors or class of creditors or of the members or class of members as the case may be conducted in such manner as the Court directs.

Once such an application has been made to the Court, it may at any time stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of.

In the amendment to the Companies Act in 2013, section 230 corresponds to section 391. Only difference is that the power that is exercised by the Courts under section 391 will now be exercised by the tribunal under section 230 but the same has not been notified yet.

Section 392 deals with the power of High Court to enforce compromises and arrangements wherein it has the power to supervise the carrying out of the compromise or arrangement. Also, the court may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

Section 393 states the information that is to be provided to the creditors and members as to the compromise or

arrangement. That when a meeting of creditors or any class of creditors, or of members or any class of members, is called under section 391, along with the notice, a statement setting forth the terms of the compromise or arrangement and explaining its effects need also be provided. In particular, the material interests of the directors, managing director, managing agent, secretaries and treasurers or manager of the company, if any, have to be stated to them.

With regards to the above, a recent case wherein such scheme of compromise and arrangement has been allowed by the Court is that of *Namit Malhotra v. Unitech Limited*. In this ongoing matter the High Court of Delhi via various orders accepted the scheme of compromise and arrangement put forth by the unsecured creditors/home buyers of the respondent company viz. Unitech Limited. The home buyers were seeking directions of the court to convene and hold the meetings of the home buyers/unsecured creditors of the respondent company to consider and approve, with or without modification, the proposed Scheme of Compromise and Arrangement floated by them.

A brief background of the matter is that Unitech Limited was engaged in the business of real estate development, development of township and group housing schemes etc. The home buyers/ allottees provided advances to the company and were thereafter allotted a residential unit which was to be constructed and developed by Unitech but it failed to deliver the residential units to them within the stipulated period provided as per the agreement. Apart from the unsecured creditors, numerous other prospective buyers also approached the company for purchase of residential units/flats in the various projects undertaken by them and a large number of buyers already paid substantial parts of the agreed sale consideration towards the purchase of their respective residential flats/units. Despite assurances, Unitech was unable to complete the projects which now remain either in the partially developed or under-developed phase with delay in some projects running to over 4 years.



Following the above mentioned, a large number of home buyers filed cases against the company or its directors/officers in various forums like District Consumer Courts, State Commission, the National Consumer Disputes Redressal Commission (NCDRC) as well as in the Delhi High Court under Section 433 & 434 of the Companies Act, 1956 for winding up of the company.

The NCDRC awarded decrees in favour of various homebuyers and in some cases, also directed the company to refund the amount of the homebuyers along with an interest @ 18% p.a. Hence, the unsecured creditors apprehended that if such refunds are forced on the company and continue to be paid by the company, the construction activity of the company would very likely completely halt and the company very soon would be in a situation of zero liquidity and may even go into winding up at the instance of a few homebuyers and in that event the collective dreams of all the homebuyers of getting their residential units/flats would never materialize. They further apprehend that the properties of the company may also get attached and auctioned to pay the debts/loans of the banks and the financial institutions, which had advanced huge loans to the company, thus, leaving no substantive remedy to the mentioned home buyers since all them fell in the category of unsecured creditors of the company.

Therefore, the present scheme of compromise and arrangement was proposed by the unsecured creditors which if approved by the company and the class of homebuyers, who are unsecured creditors of the company, will ensure that the company will be able to complete the development of its projects, and eventually handover the residential units to its homebuyers.

As per the scheme, all legal proceedings initiated by the unit holders against the company and against the director-promoter or any officer of the company before any Court, Tribunal or before any Authority under the provisions of the Consumer Protection Act, 1986 and/or under any other legislation, code, law in force, if any, are to be withdrawn. Also, no fresh legal proceedings are to be instituted by any aggrieved person against the company in any court or tribunal.

Further, the major provision under the scheme is that all the homebuyers have been asked to make their final

payments to the company out of which a Designated Refund Account is formed for each project in which 10% of the proceeds from the customers of each project are transferred. Part of such final payments is to be used for the construction and completion of the projects so that units/flats can be handed over to the home buyers who are willing to take possession; other part is to be used to make payment of enhanced compensation and enhanced penalty to the home buyers who wish to exit the project. This way, all parties get to benefit.

Unitech Ltd. also supported the proposed scheme and stated vide affidavit dated 01.06.2016 that all necessary steps shall be taken to take this proposed scheme forward in terms of and in compliance with the applicable laws including submitting the same for consideration and approval of requisite majority as required by Section 391 of the Companies Act, 1956.

In the views of the Hon'ble High Court of Delhi as stated vide order dated 02.09.2016, the said section 391 is a code in itself and it, *inter alia*, envisages consideration of a Scheme of Arrangement or Compromise with a class of creditors which may be the shareholders, the board members, the secured creditors, the unsecured creditors or any sub-category within each class. The court also made a note of the fact that if the company is not granted an opportunity to carry forward its proposed Scheme of Compromise and Arrangement, the net effect would be that the company, in the absence of any opportunity to fulfill its projects, might face erosion of its net worth and suffer loss of credibility, putting it at the threshold of liquidation which would not be of any assistance to either party.

Hence, in this case, the court granted an opportunity to both the parties to give effect to the scheme of compromise and arrangement put forth by them by way of the establishment of 3 escrow accounts of the nature of Project Sales Escrow Account, Development Escrow Account and a General Escrow Account, the working of which shall be monitored by a Court Commissioner.

Certain principles in relation to the scope and interpretation of sections 391 to 393 have been laid down by the hon'ble apex court in the case of *Miheer H.*



*Mafatlal v. Mafatlal Industries Ltd.*²², and *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.*²³:

- That the provisions of the statute have been complied with;
- That each class has been fairly represented by those who attend the meeting and that the statutory majority are acting *bona fide*;
- That the arrangement is such as a 'man of business' would reasonably approve;
- That there is no lack of good faith on the part of the majority; and
- That the scheme is not contrary to public interest.

The aforementioned matter has introduced the concept of establishing escrow accounts under the ambit of compromise and arrangement under section 391 of the Companies Act, 1956. This section already has a very wide scope and is said to be a code in itself thus, the judiciary must make use of the provisions of this section in more and more cases so as to give a second chance to the parties to resolve the dispute.

22. AIR 1997 SC 506.

23. AIR 1995 SC 470.



CLOSURE OF EVIDENCE UNDER ORDER 17 RULE 3 CIVIL PROCEDURE CODE (CPC)

Ramya Verma

One of the major difficulties faced by the Courts at the stage of leading evidences is the lack of preparation by the Party leading evidence. In spite of provisions in CPC prescribing the rules/procedures relating to "leading of evidence" before a Civil Court, the judicial system continues to witness the never ending cycle of seeking and granting of adjournments for reasons which often seems not sufficiently justifiable. The infelicitous scenario is such that the predicament of the witnesses has become worse than the litigants themselves. The law enacted and settled by the Courts is to ensure timely delivery of justice.

ORDER 17 RULE 1 OF CPC STATES THAT:

The Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the suits.

The use of the word "may" clearly shows the discretion of the Court. It has been held in the case of **Thakur Sukhpal Singh v Thakur Kalyan Singh AIR 1963 SC 146, [1963] 2 SCR 733**, "What is sufficient cause is a question of fact in each case. The granting of adjournment being a matter within the discretion of the court, the Supreme Court will not interfere with its exercise nor the high court."

Also, the proviso in Rule 1 clearly states that the adjournment shall not be granted more than three times. The use of word "shall" in the proviso make it clear that the rule has to be followed strictly, if not mandatorily. The Hon'ble Supreme Court has clarified in **Salem Advocate Bar Association.(2) v. Union of India AIR 2005 SC 3353** that only in extreme and exceptional circumstances, this strict rule does not apply. However, even the three adjournments which have been allowed in the statute itself cannot be sought as a matter of right. The bar of granting only up

to three adjournments contained in the proviso to sub-rule (1) of Rule 1 in Order 17 does not mean that these can be claimed as a matter of right because grant of adjournment is in the discretion of the court. Therefore, even though the provision is not mandatory, but being a Rule of procedure, it must be ensured that the granting of adjournment does not abuse the objective of the statutory provisions and the precedents which are meant to meet the ends of justice.

ORDER 17 RULE 3 STATES THAT:

"Court may proceed notwithstanding either party fails to produce evidence etc

*— Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, * [the court may, notwithstanding such default—*

- (a) if the parties are present, proceed to decide the suit forthwith; or
- (b) if the parties are, or any of them is, absent, proceed under rule 2."

As held by the Hon'ble SC in **Prakash Chander Manchanda v Janki Manchanda (1986) 4 SCC 699**, "The Explanation to Rule 2 gives discretion to the court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined sufficient part of their evidence. It is, therefore, clear that if on the date fixed where one of the parties remain absent and for that party no evidence has been examined up to that date, the court has no option but to proceed to dispose of the matter in accordance with Order 17, Rule 2 in any one of the modes prescribed under Order 9 of the Code of Civil Procedure." ²⁴

24. **Prakash Chander Manchanda v Janki Manchanda (1986) 4 SCC 699**



The law was settled by the Supreme Court in the case of ***Shiv Cotex v. Tirgun Auto Plast P. Ltd. and ors.,*** wherein the Hon'ble Apex Court observed that,

"The High Court upset the concurrent judgment and decree of the two courts on misplaced sympathy and non-existent justification. The High Court observed that the stakes in the suit being very high, the plaintiff should not be non-suited on the basis of no evidence. But, who is to be blamed for this lapse? It is the plaintiff alone. As a matter of fact, the trial court had given more than sufficient opportunity to the plaintiff to produce evidence in support of its case. As noticed above, after the issues were framed on July 19, 2006, on three occasions, the trial court fixed the matter for the plaintiff's evidence but on none of these dates any evidence was let in by it. What should the court do in such circumstances? Is the court obliged to give adjournment after adjournment merely because the stakes are high in the dispute? Should the court be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward? It is sad, but true, that the litigants seek and the courts grant adjournments at the drop of the hat. In the cases where the judges are little pro-active and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realize that adjournments do dent the efficacy of judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit."

It was also observed by the Hon'ble Supreme Court that,

"No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is

not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained. When we say justifiable cause what we mean to say is, a cause which is not only sufficient cause as contemplated in sub-rule (1) of Order XVII CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit whether plaintiff or defendant must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril. Insofar as present case is concerned, if the stakes were high, the plaintiff ought to have been more serious and vigilant in prosecuting the suit and producing its evidence. If despite three opportunities, no evidence was let in by the plaintiff, in our view, it deserved no sympathy in second appeal in exercise of power under Section 100 CPC. We find no justification at all for the High Court in upsetting the concurrent judgment of the courts below. The High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed."

As observed by the Hon'ble Supreme Court in the above-mentioned case, the past conduct of the party is an important circumstance which the Courts must keep in view when a request for adjournment is made. In the present matter, the plaintiff-appellant has been unnecessarily trying to drag the litigation by seeking adjournments, putting forth additional claims by way of amendments, seeking documents from the Defendant-Respondent while failing to lead any evidence in support of their evidence and thereby also failing to disclose a cause of action. Seeking unnecessary adjournment on non-existent grounds with the oblique motive of arresting or obstructing the progress



of a case, '*are the instances of contumacious conduct, tending to interfere with administration of justice, inviting action for contempt*'²⁵.

The practice of unnecessarily seeking adjournments is nothing but a sheer abuse of the process of law. The grant of more than 3 adjournments in extreme and exceptional circumstances beyond the control of the party are meant for genuine litigants so that injustice is not caused to them. The plea of such circumstance cannot be taken by the Party who intentionally drags the litigation for the heck of it.

25. *Ramji Lal Sharma v Civil Judge AIR 1988 All 143*



LIBEL: THE QUANTUM OF DAMAGES

Shalini Sinha

Taking cue from the judgment in **Parshuram Babaram Sawant Vs. Times Global Broadcasting Co. Ltd.**²⁶, the present article attempts to make an analysis as to the factors for assessing quantum of damages under the defamation law in India.

Defamation is publication of a statement that makes a claim, expressly stated or implied to be factual, that may give an individual, group, business, product, government or nation a negative image and tends to lower the image in the estimation of the right-thinking members of society generally or tend to make them shun or avoid them.²⁷ It has to be understood in the context of reputation. Every man has a right to reputation inviolate. This right of reputation is acknowledged as an inherent personal right of every person as part of the right of personal security. If the degree of suffering occasioned by loss of character is compared to the loss of property, the former injury far exceeds the latter. This is when the law of defamation enters the picture. It provides for the balancing of interests. The wrong of defamation protects the reputation and defences to the wrong, viz, truth and privilege protect the freedom of speech. The existing law relating to defamation is a reasonable restriction on the fundamental right of freedom of speech and expression conferred by Article 19(1)(a) of the Indian Constitution.²⁸

The wrong of defamation may be committed either by way of writing or its equivalent, or by way of speech. The term 'libel' is used for the former kind of utterances and 'slander' for the latter.

Parshuram Babaram Sawant Vs. Times Global Broadcasting Co. Ltd. is a case of libel type of defamation. A libel is a publication of a false and defamatory statement tending to injure the reputation of another person without lawful justification or excuse. The statement must be expressed in some permanent form

e.g., writing, printing, pictures, statue, etc. A claimant has to prove that the defendant has published or is responsible for the publication of defamatory material, which is reasonably understood to refer to the claimant, either by name or by other means of identification so as to establish a claim of defamation.

In the abovementioned case, the Plaintiff, Mr. Parshuram Babaram Sawant, a former judge of the Supreme Court, the former chairman of the Press Council of India and the former president of the World Association of Press Councils sued Defendants No. 1 and No. 2 i.e., the Times Now Channel and the Editor in Chief, for damages of Rs. 100 Crores. According to the facts of the case, as the scandalous Provident Fund Scam (June/July 2008) of Gaziabad District Court involving a number of judges comprising the higher judiciary began to surface, the Times Now Channel began reporting all the developments related to it. The public at large and the legal fraternity across the world watched as it unfolded. Amongst the judges, Justice P.K.Samantha (Retd.) Judge of the Calcutta High Court was allegedly involved. On 10.9.2008, as the channel was telecasting news relating to this scam, a photograph of the Plaintiff i.e., Mr. P.B. Sawant was flashed as that of Justice P.K. Samantha. The flashing of photograph created a false impression amongst all viewers in India and abroad that Mr. P.B. Sawant was involved in the PF Scam, which is per se highly defamatory considering his stature in the society.

Though the said channel stopped publishing the photograph of the plaintiff when the mistake was brought to their notice, no corrective or remedial steps to undo the damage caused to the reputation of the Plaintiff were taken by the defendants on their own. Mr. P.B. Sawant vide a strongly worded letter called upon the Times Now Channel to apologize publicly and asked for damages of Rs. 50 crores for the harm caused to his reputation.

The channel then tendered an apology informing that it had published a corrigendum on 23.9.2008. It also conveyed that the showing of the photograph of the plaintiff as an accused in PF scam was an unintentional error. But the reply was completely silent about the

26. *In the Court of 6th Jt. Civil Judge Senior Division Pune (Special Civil Suit No. 1984/2008)*

27. http://www.legalservicesindia.com/article/print.php?art_id=1764

28. *Ratanlal and Dhirajlal: The Law of Torts, Eastern Book Company (Twenty-sixth edition) (reprinted 2012)*



damages demanded by the Plaintiff. Considering this to be a belated action taken by the defendant that caused him mental anguish and damaged his reputation, the Plaintiff made it known to the defendants that their apology or corrective action was neither earliest nor sincere. Hence, the Plaintiff demanded an enhanced compensation of Rs. 100 crores.

This quantum of damages was justified by the Plaintiff on basis of the status and financial ability of the defendant. Even though it has been held by a series of judgments by the Hon'ble High Court and the Supreme Court that damages should not be punitive and therefore, the financial soundness of the defendant should be a ground to justify this amount, it was argued that the measure of compensatory damages could be drawn by a comparison of the present case to that of RK Karanjia & Anr. V.K.M.D. Thackersey and ors. The learned judge Smt. V K Desmukh rejected this comparison. It was also put forth that the Plaintiff in defamation action is entitled to recover as general compensatory damages such a sum that will compensate him for the damage to his reputation; vindicate his good name and take into account of the distress, hurt and humiliation which the defamatory publication has caused. Reliance was also placed on the principle laid down in John v. MGN Ltd. (1996) 2 All Er 35 (CA) that a successful plaintiff may properly look to an award of damages to vindicate his reputation particularly when it is not based on truth.

Finally, the learned judge held that the amount of damages awarded in respect of vindication and inquiry to reputation and feelings depends on a number of factors, which are not exhaustive and are based on facts of different cases. These factors have been elaborated in ruling in First Appeal No. 192 of 2004 decided on 3.11.2009 by the Hon' Bombay High Court (2010 (1)ALL MR 74) and are as follows:

1. The gravity of the allegation
2. The size and influence of the circulation
3. The effect of the publication
4. The extent and nature of the claimant's reputation
5. The behavior of the defendant

6. The behavior of the claimant

An examination of these factors was done in the context of the case in the following corresponding manner:

1. The gravity of the allegation was observed to be extremely serious in view of the former positions Mr. P.B.Sawant had held.
2. The size and influence of the Times Now channel is undeniably large as a 24X7 hour current affairs news channel with a viewership in India and abroad.
3. With regard to this size and influence of the circulation, the effect of the publication was considered to be extremely damaging to the reputation of the plaintiff.
4. The extent and nature of the claimant's reputation is undisputed.
5. The behavior of the defendant was decidedly "extremely casual, callous and cavalier" as they had allowed the defamatory news to go uncorrected for about 13 days.
6. And as for the behavior of the plaintiff, the learned judge took note of how his PA had called the news channel the same day of the incident, although denied by the claimants, and how the Plaintiff patiently waited for remedial steps to be taken. Since these steps were not taken, the Plaintiff wrote a letter demanding a public apology and compensatory damages of Rs. 50 Crores from the defendants. But on observing their callous attitude to this, he enhanced the sum to Rs.100 Crores.

Taking into consideration these circumstances, the evidence and citations put forth before the learned judge, she held that the plaintiff is entitled to damages amounting to Rs 100 Crores.²⁹

Presuming that the liability was properly established in this case, the amount awarded in compensatory damages is far over any possible rational justification on ordinary common law principles. The sum of Rs.100

29. Judgement: Parshuram Babaram Sawant Vs. Times Global Broadcasting Co. Ltd. Special Suit No. 1984/2008



crores – £12 million, €14 million, US\$18.5 million approximately is an enormous sum from any perspective. It is even more extraordinary in an Indian context – in a country where the GDP per head is less than US\$1,500 it is 12,360 times that figure – an equivalent award in the UK would be £445 million. The judge seems to have placed great weight on the failure of the defendants to act quickly to apologise. However, this can at best be considered a minor aggravating feature. A failure to correct for 13 days may be rather difficult to describe as *“extremely casual, callous and cavalier”*. The Judge hasn’t given a clear explanation as to how she arrives at the figure of Rs 100 crores – the sum included by the plaintiff in his letter of claim.³⁰

Law of torts is mainly court developed law and also has its origin in England. So, in case of libel the Court of appeal has always had the power to set aside a jury award of damages on the ground that it is excessive but in the past the power was rarely exercised and the standard at which the court would interfere was set very high, where the award was such that it was *“divorced from reality”*. The very high award of damages in *John v. MGN Ltd.*, which is a leading case, compelled the court to reiterate this policy of restraint and to develop the law on the guidance that should be given to juries. Now it is proper to inform the jury by way of guidance of general range of damages for non-pecuniary loss in personal injury cases, although the loss of a leg cannot of course be directly compared with the loss of a reputation. Furthermore, an award of damages for defamation may include elements of aggravated or exemplary damages, i.e., the damages cannot be precisely quantified in monetary terms but the claimant is entitled to a substantial award for wrong committed against him.

The basis for the Judge’s award of compensatory damages in this case may not be entirely rational. Its *“chilling”* effect on freedom of expression is obvious. It is apparent that the defamation law in India is yet to be brought in line with modern standards – where proportionate awards are made to reflect the damage actually suffered by the plaintiff.

30. <https://inform.wordpress.com/2011/11/27/case-comment-sawant-v-times-global-broadcasting-limited-an-extraordinary-and-unjustified-award-of-compensatory-damages/>



MYLAN LABORATORIES LTD. VS. ICOS CORPORATION AND CONTROLLER OF PATENTS: DISCUSSING SECTION 63 AND SECTION 64 OF THE PATENTS ACT

Aayush Sharma

INTRODUCTION

Section 63 of the Patents Act, 1970, ("the Act") deals with the Surrender of Patents whereby a patentee may, at any time by giving notice in the prescribed manner to the Controller, offer to surrender his patent. Under Section 64, the Controller of Patents has the power to revoke a Patent on certain grounds as prescribed in the Act.

In a recent judgment, the Intellectual property Appellate Board (IPAB) has for the first time dealt with inter-linking of Section 63 and Section 64 under a single order.

In this article we will discuss regarding the case presented before the IPAB wherein two parties contend against the revocation of a patent.

FACTS OF THE CASE:

M/S MYLAN LABORATORIES LTD ("MYLAN") filed an application for revocation of patent No. **224314** ("patent") standing in name of ICOS CORPORATION ("ICOS") and removal of the same from the Register of Patents along with an award of costs to MYLAN. The grounds for revocation made by the MYLAN were under Section 64 (1) (d), (f), (h), (i), (k), and (m) of the Patents Act, 1970.

Upon deliberating on the submissions made by both the parties, IPAB found the grounds to be true and hence ordered for revocation of the impugned patent. In the meantime, ICOS, the patentee of the impugned patent, while being respondent in the above proceedings, also filed a request under Section 63 for surrender of its patent at the Patent Office. ICOS pleaded that they are no longer interested in the patent and do not intend to maintain the patent at the Patent Office. They categorically stated that they no longer have business interests in maintaining the said patent due to the presence of many generic products in the

Indian market and further stated that they do not intend to maintain the impugned patent any longer. ICOS also argued that it would be unnecessary for IPAB to spend their valuable time and effort on the present revocation proceeding and IPAB, in view of the request to surrender, may directly close the revocation proceedings.

Accordingly, ICOS intended to save their patent from revocation proceedings in view of their request for surrender of patent. MYLAN, on the other hand, insisted that proceedings under Section 63 for surrender of patent will be undertaken at the Patent Office and before the allowance of said request to surrender, any party (read MYLAN) can validly file a petition for revocation of said patent under Section 64.

Upon hearing both the parties, IPAB had to deliberate and ascertain whether the Controller can accept the ICOS's plea to surrender his patent while a revocation suit is pending before the IPAB or vice versa, i.e., whether revocation petition is valid by MYLAN as long as request for surrender of patent is not accepted?

DECISION

Upon hearing both the parties, the IPAB ordered for revocation of the patent. The said decision was supported by below explanation:

- a. The readings of the above said provisions makes it abundantly clear that in the event of offer of surrender of a patent by a respondent, the Controller has to follow the procedure contemplated under section 63 of the Act. Therefore, as long as the said surrender proceedings are pending and unless and until the Controller accepts the offer of surrender, the impugned patent was termed to be live or in existence and continued to be in the register of patents. Accordingly, suggesting that the instant petition for revocation is validly filed before the IPAB.



- b. The instant application filed for revocation of the impugned patent has been filed as per provision under section 64 of the Indian Patents Act. As we have already pointed out the grounds raised by the applicant MYLAN has not been contented by the respondent ICOS and more particularly the respondent having clearly and categorically stated in their communication dated February 09, 2016 to the IPAB Registry and the Controller of Patents that they no longer has interest in the impugned patent and they are surrendering the impugned patent to the Patent Office.

In view of the above, the IPAB dealt with the revocation proceedings independently, without considering the pending request for surrender of patent before the Controller. The IPAB gave a categorical observation that as long as the patent is live, in the present case as long as the request for surrender is pending at the Patent Office, the IPAB can proceed with deciding on the revocation petition filed against the patent.



ISSUES AND CHALLENGES IN PATENTING LIFE-FORMS: AN INDIAN PERSPECTIVE

Saipriya Balasubramanian

INTRODUCTION

The Patenting of life-forms or living organisms plays a critical role in the advancement of research in Biotechnology. The major difference between the patenting practices of India and other developed countries like United States and Countries of European Union is that India does not allow patenting of life forms that already exist in nature but genetically modified versions of the same with significant amount of human intervention are patentable.

This article explores the evolution of patenting living organisms in India in the context of TRIPS Agreement, its feasibility and the legal issues as well as the challenges involved in patenting the same.

THE CONCEPT OF BIO-PATENTS:

The term 'bio-patent' refers to the patents granted on living matters/organisms such as micro-organisms, genetically modified plants and animal species, genes, cell-lines, etc. Patentability of life-forms / living organisms are judged no differently to any other invention therefore such inventions must be novel, non-obvious and capable of industrial use although the extent to which the living organisms are patentable differs to varying extent in different countries.

INVENTION-DISCOVERY CONUNDRUM:

According to the Draft Patent Manual of India (2008) there is a difference between discovery and invention. A discovery adds to the amount of human knowledge by disclosing something already existent, which has not been seen before, whereas an invention adds to the human knowledge by creating a new product or processes involving a technical advance as compared to the existing knowledge.

In a landmark case ***Diamond Vs Chakrabarty*** (1980)³¹, the U.S Supreme Court ruled that life forms can be

patented if they are the products of human ingenuity. In this case the Court held that a hybridized bacterium that metabolizes oil is a human, intervention even though the inventor Chakrabarty, used a natural process (bacterial replication) to produce the modified organism. The Court recognized that discoveries of naturally occurring organisms are not-patentable, but it held that Chakrabarty's bacteria are patentable because they resulted from human ingenuity and research. Therefore, the major point to be concluded from such invention/discovery debates is that whether sufficient human intervention has occurred to create an organism which is distinct and independent in existence from the previously occurring.

ROLE OF TRIPS AGREEMENT IN PATENTING LIFE FORMS/LIVING-ORGANISMS:

Trade Related Aspects of Intellectual Property (TRIPS) Agreement was established in 1994 which is enforced through World Trade organization (WTO). TRIPS sets down minimum standards for many forms of intellectual property (IP) regulation in more than 162 member states. Section 5 of the Agreement is devoted to patents and states that inventions in all fields of technology should be patentable.

The TRIPS Agreement requires member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to the normal tests of novelty, inventiveness and industrial applicability. It is also required that the patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced³².

There are three permissible exceptions to the basic rule on patentability. One is for inventions contrary to public order or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. The

31. <https://supreme.justia.com/cases/federal/us/447/303/case.html>

32. Article 27.1 of TRIPS



use of this exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of order public or morality³³.

The second exception is that members may exclude from patentability of diagnostic, therapeutic and surgical methods for the treatment of humans and animals³⁴.

The third is that Members may exclude plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any country excluding plant varieties from patent protection must provide an effective *sui generis* system of protection. Moreover, the whole provision is subject to review four years after entry into force of the Agreement³⁵.

This includes life forms, which is highly controversial. Under Article 27.3(b) of the TRIPs, WTO member states must provide patent protection over micro-organisms and microbiological processes, such as those used in biotechnology. Countries are free to exclude plants and animals from their patent laws. However, all nations must provide intellectual property titles over plant varieties, either through patents or through an 'effective *sui generis* system'. The Agreement allows Member countries not to patent higher organisms, whether plants or animals, and "essentially biological processes for the production of plants and animals". However, Members must generally provide patent protection for micro-organisms and for "non-biological and microbiological processes". Countries have to protect plant varieties by patents, by an effective *sui generis* system or by any combination thereof.

MICRO-ORGANISMS, PLANTS AND ANIMALS:

Under Article 27.3(b), micro-organisms are mandatorily patentable. Micro-organisms are commonly defined as any microscopic organism, including bacteria, viruses, unicellular algae and protozoans, and microscopic fungi. They are considered to be a category of life different from the kingdoms of plants and animals. Non-biological and micro-biological processes include

the transformation of cells or tissue with recombinant DNA or the process of genetic engineering.

In Article 27.3(b), Members are provided the option to exclude plants and animals from being protected by IPR. However, there is a single exception. Members are obliged to provide protection for one particular classification, i.e plant varieties, either by patents as laid down by the TRIPS Agreement, by an effective *sui generis* system, or by any combination thereof. Cells and tissues from higher plants and animals are the subject of microbiology, but they are not micro-organisms. Under the concept of "essentially biological processes", classical plant breeding methods would be excluded from patentability but genetic engineering methods would be patentable.

INDIAN SCENARIO: PATENTING OF LIFE FORMS / LIVING ORGANISMS:

In India before 2002, amendment the understanding is that there is no patent protection for invention relating to life forms. But in **Dimminaco A.G v. Controller of Patents and Design**³⁶, the Calcutta High Court held that a process for preparation of vaccine containing live virus is patentable since the term "manufacture" covers even living organism. So according to the Court even if the end product contains a live virus the process involved in bringing out the end product becomes an invention.

The Indian Patents Act, 1970 has been amended with effect from January 2005 to comply with the TRIPS Agreement. The main provision of the Act is to allow the grant of product patents in the field of chemical, pharmaceutical, food and biotechnology. Patentable biotechnological inventions can be broadly categorized as products in the form of chemicals, microorganisms, plant extracts, fermented material; processes/methods for using useful products and compositions/formulations of product such as vaccines, proteins and hormones. The overall expansion of patentability criteria increased the inflow of patent applications filed and patents granted in the field of biotechnology.

Further, in the field of Biotechnology, to meet the test of 'sufficiency of disclosure', the inventor is required to deposit the sample of living organism involved in the invention with an authorized depository authority

33. Article 27.2 of TRIPS

34. Article 27.3(a) of TRIPS

35. Article 27.3(b) of TRIPS

36. <https://indiankanoon.org/docfragment/918903/?formInput=dimminaco>



which has been developed for biological inventions. In India, Microbial Type Culture Collection (MTCC) was recognized by WIPO as International Depository Authority (IDA) on 4th October 2002. The deposit of microorganisms under the Budapest Treaty is recognized to fulfill the requirement of patent procedure in 80 member countries.

It is seen from the above, that there exists a systematic evolution in patenting of biotechnological inventions especially patenting of life forms / living-organisms. The TRIPS agreement was criticized for two major reasons, firstly *its anti-poor nature* that threatens the right of poor countries to manufacture or to import cheap generic version of the patented drugs; secondly, the mandatory requirement of TRIPS that forces all members to accept indirectly combination of new biotech patents covering genes, cell lines, organisms and living organisms persuaded into accepting these 'Patents on life'³⁷.

CONCLUSION:

Patenting of life forms/living organisms possess several issues with regards to religious and ethical values. Though India became TRIPS compliant since the amendment of Indian Patents Act 1970 in 2005, it had allowed several flexibilities such as compulsory licensing owing to the indigenous conditions prevalent in the Indian IP scenario. To conclude, human rights approach to intellectual property takes an implicit balance between the rights of inventors and creators, and the interests of the wider society. The aforesaid is evident in the field of biotechnology as there is a successful shift towards greater IP Protection in biotech inventions, including protection of living organisms.

37. Mae-Wan Ho, *J. Intellect. Property Rights*, 2002, 7, 151-165



THE DU PHOTOCOPY CASE

Martand Nemana

INTRODUCTION

The order of 09th December, 2016 of the two judge bench of **Justice Nandrajog** and **Justice Khanna** is in furtherance to the order of September, 2016 on the more famously known "*DUPhotocopy Case*". The present order has tried to clear the mist over the interpretation of various words which bear great importance and significance in terms of copyright laws.

The essence of the judgment was to draw the line to demarcate between the rigidity of protection and flexibility of fair use under the copyright laws, and also to establish sustainable harmony between the both. The present order also speaks in detail about the acts under the purview of Section 51 and the permissible acts under Section 52 of the Indian Copyrights Act, 1957.

The order also has tried to envisage the interpretations of the word "*reproduce*" which has not been defined under the Indian Copyrights Act, 1957. Implications have also been given on the words like "*duplicating equipment*", "*photograph*" and "*reprography*" which render crucial presence during the entire course of events of the case and also in the order.

The earlier Judgment in this case by Single Judge Bench of Justice Endlaw had provided a formative platform for the Copyright Law which focused the spotlight on one of the more blind areas of the act, thus triggering the need for reformative measures.

Though the final judgment reserved, in the order of December 9th 2016, the Division Bench decided the appeal interpreting Section 52(1) (i) of the Copyright Act. The inference laid out in the order was that in permitting photocopying of copyrighted works for preparation of course packs without any formative cap, the sole purpose of the permission educational instructions. The highlights of the order, as penned by **Justice Nandrajog** and **Justice Khanna**, are as follows:

MARKET FOR THE PUBLISHERS: AFFECTED OR EFFECTED?

The order begins with a very elaborative analysis of the books constituting the course pack. The exhaustive list provided also speaks about the cost of the books along with the amount of copying done from the book. While the Appellant tried to emphasize on the fact that making copies of the books and excerpting materials was hampering the market of the book, the learned court was of the opinion that, not only are the books immensely expensive but it would not be possible for an ordinary student to be able to have afforded the purchase of all the books mentioned in the list. Further Court also opined that, had it not been for the course packs the students would have resorted to the library, which still is the case in many instances, and hence it was ruled out that the affective preparation of course packs and its sale/use by the students solely for educational purposes could have any effective impact on the market for the original publishers of the books.

Interestingly, the Division Bench though accepting the observations made by the Single Judge, went on to provide with its own logic of interpretation for the word, "*publication*", i.e. as to the question being whether the making of the course pack would amount to "*publication*", relying upon the judgment of *Martin Luther King JR. Inc. v. CBS Inc.* (1999), the US Court of Appeals in the Eleventh Circuit observed that a "*general publication occurs only if copies of a work are issued to the members of the general public*"; the Division bench appreciated the fact that the students for whom the course pack is being made are not to be classified as general public and that they were the limited target audience who really are in need of the materials for education and hence, the said act would not amount to publication.

Further, explanation was also given on the difference between "*in the course of preparation for instruction*" and "*in the course of instruction*" and that if the preparation of course pack was solely for the purpose of education then there could be no applicable limit to the amount of content which can be copied and that,



education when seen in the ambit of “*in the course of instruction*” would not only mean classroom instructions or institutional access, but would be seen in general and that term should have a wider gamut of interpretation to allow students to easily access the educational materials.

FAIRNESS AND INTERPRETATION OF WORDS

The Division Bench while observing the aspect of fairness went on to interpret that during the course of instruction and educational purposes there cannot be any variations based on the qualitative and quantitative aspect and the same has been mentioned in the order,

“In the context of teaching and use of copyrighted material, the fairness in the use can be determined on the touchstone of ‘extent justified by the purpose’. In other words, the utilization of the copyrighted work would be a fair use to the extent justified for purpose of education. It would have no concern with the extent of the material used, both quantitative and qualitative. The reason being, ‘to utilize’ means to make or render useful. To put it differently, so much of the copyrighted work can be fairly used which is necessary to effectuate the purpose of the use i.e. make the learner understand what is intended to be understood... Thus, we reject the arguments by learned counsel for the appellants that the four factors on which fair use is determined in jurisdictions abroad RFA (OS) No.81/2016 Page 36 of 58 would guide fair use of copyrighted material during course of instruction. The qualitative and quantitative test which is one of the four tests would not apply to clause (i)... Further, while the Court in B.D. Bhandari’s case (supra) did hold that a fair dealing standard was to be read into all clauses of Section 52 of the Copyright Act, 1957, as held hereinabove, a fair dealing standard has only been provided in clause (a) of sub-Section (1) and not in the other clauses of sub-Section (1) of Section 52, and therefore, cannot be read into the other clauses.”

The court holds that “there has to be fairness in every action... and especially when a person’s result of labour is being utilized by somebody else, fair use must be read into the statute.” Now, the phrase “fair use” is generally understood to signify a very precise test in

copyright law. Courts across the world consider four specific factors whilst testing if a particular use can be called “fair use” or not – the purpose of the use, the amount and substantiality of the portion used, the nature of the work and the effect of the use on the potential market.

Notably also, the interpretation of words seemed to have eased the whole scenario which allowed for better understanding. The Bench defined words like reproductions, teacher, photocopying, to shed the ambiguity. It was seen that the reproduction and publication were mostly seen to be used interchangeably which was then the same but carried different amount of emphasis of its own in the relevant area of use.

Further, the Division Bench also laid down its accordance with Section 52 of the Indian Copyright Act, 1957 and cited the provisions to be in agreement with the guidelines of fair-use as mentioned by them in the judgment.

Section 52(1) (a), (h) and (i) of the Copyright Act, 1957 read as under:-

52. Certain acts not to be infringement of copyright- (1) The following acts shall not constitute an infringement of copyright, namely:-

(a) a fair dealing with any work, not being a computer programme, for the purposes of-

(i) private or personal use, including research;

(ii) criticism or review, whether of that work or of any other work;

(iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public.

The **Indian Copyright Act, 1957** provides an exception to infringement of copyrights in the context of educational use. As per **Section 52** the following acts will not be counted as infringement of Copyright as laid down in Article (h) of the Section; which reads:

(h) the reproduction of a literary, dramatic, musical or artistic work-



- by a teacher or a pupil in the course of instruction; or
- as part of the questions to be answered in an examination; or
- in answers to such questions" does not amount to an infringement of copyright.

(i) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a [sound recordings] if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution [or the communication to such an audience of a cinematograph film or sound recording].

CONCLUSION

The Court also appreciated the need for clarity and reforms in the Indian Scenario and said "*We declare that the law in India would not warrant an approach to answer the question by looking at whether the course pack has become a textbook, but by considering whether the inclusion of the copyrighted work in the course pack was justified by the purpose of the course pack i.e. for instructional use by the teacher to the class and this would warrant an analysis of the course pack with reference to the objective of the course, the course content and the list of suggested readings given by the teacher to the students. This would require expert evidence*"

Though two issues have been left for trial and further date has been given on the 04th January, 2017, until then the Defendant has been asked to maintain records of the photocopies in order to avoid further conflicts till the final judgment is given.



IMPORTANT NOTICE FOR STATEMENT OF COMMERCIAL WORKING OF PATENTS IN INDIA

INTRODUCTION:

Statement of commercial working is a disclosure provided by the patentee or the licensee to the Indian Patent Office (IPO) stating whether the patent is commercially worked in India to meet the reasonable requirements of the public at large or not.

GOVERNING STATUTE:

The statement of commercial working of a patent is required under Section 146 the Patents Act, 1970 and the same shall be submitted on Form 27 provided in Schedule II of Patents Rules, 2003.

As prescribed in Rule 131, working statements shall be filed for every calendar year within 3 months after the end of the calendar year, i.e., Form 27 for each patent shall be filed at the IPO before 31st March every year.

DETAILS TO BE FURNISHED IN THE STATEMENT:

The patented invention: {} Worked {} Not worked

- a If not worked: reasons for not working and steps being taken for working of the invention.
- b If worked: quantum and value (in INR) of the patented product:
 - i Manufactured in India
 - ii Imported from other countries (give country wise details)
- c Licenses and sub-licenses granted during the year;
- d Whether public requirement has been met partly / adequately / to the fullest extent at a reasonable price.

LEGAL CONSEQUENCE OF THE FILING AND NON-FILING OF WORKING STATEMENTS

Filing of annual statement of commercial working of patent by way of Form 27 is a mandatory requirement under the Act. The information so submitted is open

for public inspection and the same is in fact published or made freely available by the IPO.

The working or non-working of a patent is useful information for anyone desirous of approaching the Patentee for a license over the patent. Further, the said information may also be instrumental in commercial valuation of the patent.

Non-filing of working statement (Form 27) as required under Section 146 or furnishing false information on Form 27 may lead to penalty as stipulated in Section 122 of the Act:

- a If a patentee refuses or fails to furnish information required under Section 146, he shall be punished with a fine, which may extend up to INR 1000000 (USD 14700).
- b Furnishing of false information under Section 146, or an information which the patentee either knows or has a reason to believe to be false or does not believe to be true, shall be punishable with imprisonment upto 6 months, or with said fine, or with both.

PROCEDURE FOR SUBMISSION OF WORKING STATEMENT:

In addition to the information regarding commercial working of a patent as prescribed on Form 27, the Indian Patent Agent would require a power of attorney (PoA) executed in original by the Patentee/Licensee authorizing the Indian Agent to prepare and file Form 27 at the IPO on behalf of the Patentee/Licensee.

On receipt of working statement instructions from its clients, details such as patent number, application number, Patentee/Licensee name, and status of the patent shall be cross checked from the official website of the IPO.

Upon verifying details and receiving clarifications/ corrections from the clients, the Indian Agents prepare and file Form 27 for respective patents on the official



e-Filing Portal. Further, the clients are duly served with a filing report along with official confirmation of the IPO evidencing submission of Form 27.

LATEST UPDATE WITH RESPECT TO SUBMISSION OF FORM 27:

In 2016, by way of Patents (Amendment) Rules, e-Filing of all forms have been made mandatory at the IPO. Consequently, Form 27 is required to be filed at the e-Filing portal of the IPO. In this regard, after a meeting with the stakeholders in December 2016, the IPO has revised the online Form 27 as available on its e-Filing portal. A snapshot of the same is provided below for ready reference:

SALIENT POINTS:

- Filing of Form 27 statement of commercial working of patent is mandatory;
- The same is required to be filed through e-Filing;
- Along with details of commercial working of patents, a PoA in favour of the Indian Patent Agent is also required;
- Last date to submit working statements – Form 27 at the IPO is March 31, 2017.

In case any further information or assistance is required in this regard, please write to us at ipr@singhassociates.in.



NEWSBYTES -

RESPONSE TO OFFICE ACTION(S) IN RESPECT OF INDIAN PATENT APPLICATIONS

We hereby bring to notice of all the applicant(s) in respect of Indian Patent Applications, that in accordance with The Patent Rules, 2003 as amended by Patent (Amendment) Rules, 2016 the time to put the application in order for grant under Section 21 has been reduced from 12 months to 6 months with effect from 16 May 2016.

"The time for putting an application in order for grant under Section 21 of Patents Act, 1970 in cases where the first statement of objections has been issued by the Office on or after 16 May 2016, shall be 6 months from the date on which the said first statement of objections is issued to the applicant to comply with all the requirements imposed under the Act and Rules made there under in accordance with Rule 24B(5) of the Patents (Amendment) Rules, 2016".

In view of the above all the objections/requirements as mentioned in Office Action(s) shall be complied within **6 months** from the date of issue of First Examination Report (FER).

Further an extension of time for three months beyond the said six months duration can be requested from Controller of Patents to comply with objections by filing Form-4 with prescribed official fee before the expiration of six months timeline.

Relevant rule in this regard is mentioned below for ready reference as amended with Patent (Amendment) Rules, 2016.

Rule 24B(5) of Patents Rules, 2003: Examination of application

*(5) The time for putting an application in order for grant under Section 21 shall be **six months** from the date on which the first statement of objections is issued to the applicant to comply with the requirements.*

(6) The time for putting an application in order for grant under section 21 as prescribed under sub-rule (5) may be further extended for a period of three months on a request in Form-4 for extension of time along with prescribed fee, made to the Controller before the expiry of the period specified under sub-rule (5).

It is pertinent to mention that the time for putting the applications in order for grant under Section 21 of the Act in cases where the first statement of objections has been issued by the Office before 16 May 2016, shall remain 12 months from the date on which the said first statement of objections is issued to comply with all the requirements imposed under the Act and Rules made there under in accordance with the earlier provisions.

INDIA AND BRITAIN SIGN MOUS ON INTELLECTUAL PROPERTY RIGHTS

On Monday, 07th December, 2016, INDIA and Britain signed memoranda of understanding (MoUs) on intellectual property rights (IPR). This MoU will help both the countries in establishing a wide network of IPR.

It envisages establishing a mechanism for furthering cooperation between the intellectual property offices of India and Britain in the field of intellectual property and related information technology services. It further includes exchange of best practices, experience and knowledge of intellectual property awareness among the public, businesses, industry, research and development organisations and educational institutions, as well as on processes for disposal of applications for patents, trademarks, industrial designs and geographical indications.



LABOR LAWS COMMUNIQUE - EASE OF COMPLIANCE TO MAINTAIN REGISTERS UNDER VARIOUS LABOUR LAWS RULES, 2016

The Ministry of Labour and Employment vide its Notification dated 4th November, 2016 being G.S.R. 1048(E) paved way for ease of record keeping under various labor laws by way of proposing Ease of Compliance to Maintain Registers under various Labour Laws Rules, 2016 (the 'Proposed Rules'). The Ministry has invited comments / inputs of all persons likely to be affected thereby; and notice is hereby given that the said draft rules will be taken into consideration after the expiry of a period of three months from the date on which the copies of the Official Gazette in which this notification is published are made available to the public.

An employer is required to comply with the requirements of the various labour related laws for the purpose of maintaining registers for all such laws. The Ministry after due consideration came to the opinion that it has become essential to frame separate rules for combining the registers to sub-serve the purposes, more specifically electronically, of the said labour related laws and the rules made thereunder, wherein provisions have been made for maintenance of such registers;

The purpose behind the combined registers is to facilitate ease of compliance, maintenance and inspection, and will also make the information provided thereunder easily accessible to the public through electronic means thereby increasing transparency. The proposed Rules will benefit making references of registers provided under different labour related laws simple, which will serve public purpose in a better way.

Currently, the relevant provisions under various laws requiring employer to maintain registers include:

- (i) section 62 of the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996;
- (ii) section 35 of the Contract Labour (Regulation and Abolition) Act, 1970;
- (iii) section 13 of the Equal Remuneration Act, 1976;

- (iv) section 35 of the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979;
- (v) section 58 read with section 59 of the Mines Act, 1952 and after complying with the requirements of sub-section (4) of said section 59;
- (vi) section 29 and section 30 of the Minimum Wages Act, 1948;
- (vii) section 26 of the Payment of Wages Act, 1936;
- (viii) section 12 of the Sales Promotion Employees (Conditions of Service) Act, 1976;
- (ix) section 20 of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955; and
- (x) section 23 of the General Clauses Act, 1897 read with Chapter III of the Information Technology Act, 2000.

Rule 2 (Maintenance of registers under certain labour related laws) of the Proposed Rules provides that notwithstanding anything contained in any rules made under the above stated statutes, the combined registers in the Forms specified in the Schedule to the Proposed Rules shall be maintained either electronically or otherwise and used for the purposes, of the aforesaid statutes and the rules made thereunder, as specified therein. Further, if the combined register is required for inspection by the concerned Inspector appointed under any of the enlisted above, the concerned persons shall make available the combined registers or provide the necessary particulars for the purposes of accessing the information, as the case may be. Moreover, where any combined register is maintained in electronic form, then, layout and presentation of the register may be adjusted without changing the integrity, serial number and contents of the columns of the register, but not otherwise.

Schedule 1 to the Proposed Rules renders format of the combined register to be followed for maintaining records by the employer:



FORMAT OF EMPLOYEE REGISTER

[Part-A: For all Establishment]

Name of the Establishment _____									
LN _____									
Sl.No	Employee Code	Name	Surname	Father's Name	Date of Birth*	Nationality	Education Level	Date of Joining	Designation
1	2	3	4	5	6	7	8	9	10
Category	Type of Employment	Mobile	UAN	PAN	ESIC IP LWF	AADHAR	Present Address	Permanent Address	
11	12	13	14	15	16	17	18	19	20
Service Book No	Date of Exit	Reason for Exit	Mark of Identification	Photo	Specimen Signature	Remarks			
21	22	23	24	25	26	27			

Note: In case the age is between 14 to 18 years, mention the nature of work, daily hours of work and intervals of rest in the Remarks Column.

Objections or suggestions, if any, may be addressed to the Secretary, Ministry of Labour and Employment, Shram Shakti Bhawan, Rafi Marg, New Delhi – 110001 before expiry of the period specified above, and such objections or suggestions will be considered by the Central Government.

THE PAYMENT OF WAGES (AMENDMENT) ORDINANCE, 2016

Apropos recent government's move to build cashless economy / market in the wake of demonetization, it has done away with the requirement of obtaining employee's permission for payment of wages through electronic transfer is sure to relieve employers from the hassles of making wage payments in cash. For bringing about this change The Payment of Wages (Amendment) Ordinance, 2016 ('Ordinance') was introduced in Lok Sabha in December, 2016. The Ordinance proposes to make amendment to the Payment of Wages Act, 1936 (the 'Act'), i.e. to section 6.

Section 6 before Ordinance (Wages to be paid in current coin or currency notes)	Section 6 proposed in Ordinance (Wages to be paid in current coin or currency notes or by cheque or by crediting in bank account)
<p><i>All wages shall be paid in current coin or currency notes or in both:</i></p> <p><i>Provided that the employer may, after obtaining the written authorisation of the employed person, pay him the wages either by cheque or by crediting the wages in his bank account.</i></p>	<p><i>All wages shall be paid in current coin or currency notes or by cheque or by crediting the wages in the bank account of the employee.</i></p> <p><i>Provided that the appropriate government may, by notification in the Official Gazette, specify the industrial or other establishment, the employer of which shall pay to every person employed such industrial or other establishment, the wages only by cheque or by crediting the wages in his bank account.</i></p>

The Act mandates that payment of wages can be carried out by issuing coins or currency notes or both, the employer can also pay wages to his employees by issuing a cheque or by crediting the amount accrued to the bank account of the employee. However, the latter could be effected only after obtaining a written permission from the employee. This Ordinance removes the requirement of obtaining a written permission from the employee. Additionally, the relevant government may specify the industrial or other establishments where an employer should pay wages by cheques or through wire transfers.



PAVING WAY FOR FOREIGN LAW FIRMS VIA SEZS !

The Ministry of Commerce and Industry (Department of Commerce) vide its notification dated January 3, 2017 being G.S.R. 12(E) (the 'Notification'), issued in exercise of the powers conferred by section 55 of the Special Economic Zones Act, 2005 (the 'Act'), notified the Special Economic Zones (Amendment) Rules, 2017 (the 'Amendment Rules') thereby amending the Special Economic Zones Rules, 2006 (the 'Rules').

The Amendment Rules brought about a minor looking amendment to Rule 76 of the Rules which in fact has a far-reaching affect. Below tabular comparison clarifies pre- & post- Amendment Rules change in Rule 76:

Rule 76 (Pre-Amendment Rules)	Rule 76 (Post-Amendment Rules)
<p>76. The "services" for the purposes of clause (z) of section 2 shall be the following, namely.—</p> <p>Trading, warehousing, research and development services, computer software services, including information enabled services such as back-office operations, call centers, content development or animation, data processing, engineering and design, graphic information system services, human resources services, insurance claim processing, legal data bases, medical transcription, payroll, remote maintenance, revenue accounting, support centers and web-site services, off-shore banking services, professional services (excluding legal services and accounting) rental/leasing services without operators, other business services, courier services, audio-visual services, construction and related services, distribution services (excluding retail services), educational services, environmental services, financial services, hospital services, other human health services, tourism and travel related services, recreational, cultural and sporting services, entertainment services, transport services, services auxiliary to all modes of transport, pipelines transport.</p>	<p>76. The "services" for the purposes of clause (z) of section 2 shall be the following, namely.—</p> <p>Trading, warehousing, research and development services, computer software services, including information enabled services such as back-office operations, call centers, content development or animation, data processing, engineering and design, graphic information system services, human resources services, insurance claim processing, legal data bases, medical transcription, payroll, remote maintenance, revenue accounting, support centers and web-site services, off-shore banking services, professional services, rental/leasing services without operators, other business services, courier services, audio-visual services, construction and related services, distribution services (excluding retail services), educational services, environmental services, financial services, hospital services, other human health services, tourism and travel related services, recreational, cultural and sporting services, entertainment services, transport services, services auxiliary to all modes of transport, pipelines transport.</p>

Notably, the Amendment Rules delete the phrase "**(excluding legal services and accounting)**" earlier placed after 'professional services' in Rule 76 of the Rules. Rule 76 provides for list of services **for the purposes of clause (z) of section 2³⁸ of the Act, i.e. definition of the term 'services'. In other words, legal services and accounting which were earlier not included in the ambit of professional services which are permissible to be carried out in the special economic zones (SEZs) have now been included by virtue of above stated deletion. Simply put, legal services would now be permitted to be carried out through Unit³⁹ established in SEZs.**



The basis for foreign entities / firms to set up Unit in SEZs is derived from definition of the term 'person' given in section 2(v)⁴⁰ of the Act which includes entities incorporated outside India as well. Consequently, now a foreign law firm (falling in the definition of term 'person') may now approach Development Commissioner to submit its proposal for setting up Unit in SEZs in accordance with procedure laid down in section 15 of the Act.

Interestingly, the Amendment Rules have been issued during the time when *Draft Bar Council of India Rules for Registration and Regulation of Foreign Lawyers in India, 2016* are being contemplated upon in light of suggestions received from Indian National Bar Association and Society of Indian Law Firms amongst others.

Views and comments from industry pioneers, law firms and stakeholders within and outside the country have already started pouring in on this intriguing piece of amended legislation. SILF has already put forward certain issues for consideration of its members questioning the scope, legality and applicability of the Notification and its impact (<http://silf.org.in/Announcements/41/announcement.htm>).

38. Section 2(z) of the Act -- "services" means such tradable services which,-- (i) are covered under the General Agreement on Trade in Services annexed as IB to the Agreement establishing the World Trade Organization concluded at Marrakesh on the 15th day of April, 1994; (ii) may be prescribed by the Central Government for the purposes of this Act; and (iii) earn foreign exchange;

39. Section 2(zc) of the Act -- "Unit" means a Unit set up by an entrepreneur in a Special Economic Zone and includes an existing Unit, an Offshore Banking Unit and a Unit in an International Financial Services Centre, whether established before or established after the commencement of this Act;

40. Section 2(v) of the Act -- "person" includes an individual, whether resident in India or outside India, a Hindu undivided family, co-operative society, a company, whether incorporated in India or outside India, a firm, proprietary concern, or an association of persons or body of individuals, whether incorporated or not, local authority and any agency, office or branch owned or controlled by such individual, Hindu undivided family, co-operative, association, body, authority or company;



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