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EDITORIAL

Manoj K. Singh
Founding Partner

Singh & Associates, Founder-Manoj K. Singh, Advocates and Solicitors is thankful to all readers of our Newsletter **"Indian Legal Impetus"** who have always bestowed overwhelming support to us as a result of which we have been successful enough to bring **October 2016 edition** covering the latest legal developments in India.

Legal arena has always been dynamic and ever evolving, with judgment, legislations and new technologies being introduced time and again. While keeping the same in mind the latest edition of our monthly newsletter Indian Legal Impetus includes articles on topics from diverse fields of Law.

The cover article of this edition is "ADDITION OF INTERNET BROADCASTING RIGHTS" which discusses how the emergence of Internet has led to whole new set of problems for the statutory licensing for broadcasting of literary, musical works and sound recording and while introducing technological protection measures, the law ensures that fair use survives in the digital era by providing special fair use provisions.

The second article "Principles governing waiver of deposit contemplated under section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993" brings forth the true objective behind the law that is no frivolous appeal should be filed and no person should be denuded from his right to appeal because of his/her financial hardship.

The articles from Patents field are on the topics "Divide and Patent: provisions of filing divisional applications in India" discussing the concept of "Unity of invention" or "one patent for one invention" and emergence of Divisional Patent Applications, "PATENT SPECIFICATION - where the rubber meets the road" explaining the requirements and contents of complete specification draft and how well it should be drafted in accordance with the invention, "Provisions governing the deposit of biological material under Indian Patents Act" discusses the legality and requirement for disclosing information regarding biological material used in inventions and how it becomes a part of complete disclosure of invention, and "Choosing the Right Patents Renewal Firm" explains the importance of choosing the right partners for handling the Patent Maintenance and discusses how making a perfect IP portfolio is very important for the overall success and protection and so is the proper and timely renewal or maintenance of IP.

Moving on further we present an article on "Companies (Mediation and Conciliation) Rules, 2016" with the recent developments and impact of said rules on companies. Also article on the topic "External Commercial Borrowings (ECB) by Startups" explains the Guidelines for Startups to access loans under the External Commercial Borrowing (ECB) framework.

The article "Nullifying the effect of arbitration agreement" discusses a recent decision of the Supreme Court dated 04 October 2016 in the case of A. Ayyasamy Vs. Respondent: A. Paramasivam and Ors. answered whether allegation of fraud simpliciter would also preclude arbitrability under a contract.

Lastly in the Newsbyte Section, we bring an update on "Real Estate (Regulation and Development) (General) Rules, 2016".

We hope this issue also helps us in further achieving our objective of making our readers understand and interpret the recent legal developments in India and find the provided information useful. We welcome all suggestions and comments for our newsletter, and hope that the valuable insights provided by our readers would make "Indian Legal Impetus" a valuable reference point and possession for all. You may send your suggestions, opinions, queries or comments to *newsletter@singhassociates.in*.

Thank You!.

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ADDITION OF INTERNET BROADCASTING RIGHTS

Himanshu Sharma & Martand Nemana

INTRODUCTION

Copyright, a legal doctrine with a long tradition, involves legal protection for works that have been published, for which there is clear authorship, and the economic value of which does not recede over short periods of time. The changing times have raised alarming concerns in the legal arena to stay abreast with the developments and device out reforms with a vision of sustainable future. Although the rights in a copyrighted work under the Indian Copyright Act, 1957 are exclusive in nature and cannot be used by any other person for commercial use without the permission of the owner. On the other hand the owner need to use or lack of use of the copyrighted work, cannot be in such a way that it will lead to create a monopoly.

A copyrighted work which has been published or performed in public and which is withheld from public can be allowed to be compulsory licensed to an interested party after going through the process provided under the Copyright Act, 1957. The statutory licensing can be provided in different works and for different purpose such as for the benefit of disables, for cover versions, for broadcasting. The broadcasting of literary, musical and sound recording in the age of internet has sources which were earlier not thought of and same has created a void among the literature and practicality of the Act. The internet as a medium of communication has progressed a long way in last decade or so and hence the use of internet from being a medium of communication to source of entertainment has also led to create a void in the practicality of provision related to the statutory licensing for broadcasting.

STATUTORY LICENSING FOR BROADCASTING

Entertainment as a major industry has turned out into a multi-million-dollar industry; which operates on an "***end-user***" based model where there is a very strict adherence to the time period where the original creator of the content has to encase and embark upon the complete potential of the content in order to generate revenue.

Suspense and curiosity play a major role in garnering the fan following and creating a public base and this where the broadcasting media takes advantage of the situation. Right from the intimation of the content till the official launch where it is made available to the public, either in full or in pieces, the same is broadcasted on conventional methods of promotion such as the Newsprint, Radio and Television. However, with the technology boom, internet broadcasting and live streaming which have been garnering much attention and public interest, the void of regulations and reforms to exercise control over the internet rights has been an alarming concern which has raised out many questions over the legal validity of the entire architecture.

The emergence of Internet has led to whole new set of problems for the statutory licensing for broadcasting of literary and musical works and sound recording. The emergence of internet as a source of broadcasting and entertainment has influenced the actions of DIPP under the Ministry of Commerce and Industry, Govt. of India, to issue an Office Memorandum, dated 05th September, 2016, in response to the representations received on behalf of the stakeholders, seeking justification regarding the legal status of the internet broadcast, and whether it could be brought under the purview of Section 31D of the Copyrights Act, 1957 in India.

The said Office Memorandum has elaborated the provisions and provided its version of interpretation of the said Section 31D with regards to the fate of the internet broadcasting and its related rights, ***which still are subject to approval from the competent authority***.

THE VOID: ENTAILING REFORMS.

The Copyright works withheld from the public can be broadcasted by applying for statutory licensing under section 31D of Copyright Act, 1957 but the provision lacks the practicality in reference to the current set of broadcasters. The contemporary period of broadcasting has sources which were earlier not thought of and same has created a void among the literature and practicality of the Act. The internet as a medium of

communication has progressed a long way in last decade or so and hence the use of internet from being a medium of communication to source of entertainment has also led to create a void in the practicality of provision related to the broadcasting.

Section 31D of the Copyright Act deals with Statutory Licensing and subjects any 'Broadcasting Organisation' to the provisions of the same. Section 31D states ***"Any broadcasting organization desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section."*** Further to which clause 3 of Section 31D states ***"The rates of royalty for radio broadcasting shall be different from television broadcasting and the Copyright Board shall fix separate rates for radio broadcasting and television broadcasting."***

Clause 3 of Section 31D ***only expressly*** refers to television and radio as the broadcasting organisations and mentions the royalties to be imposed for television and radio to be different. Taking into account only 'radio' and 'television' further caused the ambiguity with respect to the term ***'Any Broadcasting Organisation'.*** The question as to the scope of 'Any Broadcasting Organisation' was whether the same was limited to 'Television' and 'Radio' or 'Internet Broadcasting' could be included under the ambit of the same? As per the memorandum issued by DIPP, the term ***"Internet Broadcasting"*** is included in ***"Communication to the public"*** as defined in section 2(ff) of the Copyright Act. DIPP finally quoted that, "any broadcasting organisation desirous of communicating to the public, may not be restrictively interpreted to be covering only radio and TV broadcasting as definition of "broadcast" read with "communication to the public", appears to be including all kind of broadcast including internet broadcasting. Thus, the provisions of Section 31D are not restricted to radio and television broadcasting organisations only but also cover internet broadcasting organisations."

Section 31D of the Indian Copyright Act, 1957 enables the broadcasters to obtain statutory licenses to facilitate access of the created work by the broadcasting organizations. It also has been laid down succinctly that while broadcasting any audio or sound recordings, complete mention of the artist and due credit and recognition should be given during the broadcast. It also has been mentioned that no alteration shall be allowed without prior permission would be allowed during the broadcasting. It should be taken into consideration that the tracks or sound recordings can be shortened as per the requirements or required time frame but no new addition or alteration shall be allowed. It also has been laid down that the broadcasting organization shall maintain records of the broadcast, books of account and render to the owner such records and books of account.

The importance of developing the framework is to lay down guidelines to create a benchmark to assess the liability of the broadcaster through medium of internet and the copyright vested in the work used for the same. Section 31D of the Indian Copyright Act, 1957 has subtly discussed the process of operation when a statutory licensing in a work is applied by a broadcasting organization.

CONCLUSION:

The volume of the usage on the internet has clearly surpassed the total reach of conventional methods combined together, calling for immediate legal reforms to efficiently manage and control their activities. While introducing technological protection measures, the law ensures that fair use survives in the digital era by providing special fair use provisions. The proposed changes have resulted in the Copyright Act being more suitable to contemporary situation and will help in facilitating the access to works to the modern mediums along with the old mediums.

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PRINCIPLES GOVERNING WAIVER OF DEPOSIT CONTEMPLATED UNDER SECTION 21 OF THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993

Rahul Pandey and Nitu Mittal [1]

As per the mandate of Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "**the DRT Act**") that an appeal *filed by the person from whom the amount is due* shall not be entertained unless *seventy-five per cent of the amount of debt* so due from him has been deposited with the tribunal. The proviso to Section 21 gives power to the Appellate Tribunal to waive the deposit contemplated in the Section. The relevant extract of Section 21 of the DRT Act and Rule 8 of the Debt Recovery Appellate Tribunal (Procedure) Rules, 1994 (hereinafter referred to as "**the DRAT Rules**") may be enumerated as below:

SECTION 21 OF THE DRT ACT:

21. Deposit of amount of debt due, on filing appeal.— Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal under section 19:

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

RULE 8 OF THE DRAT RULES"

Deposit of amount of debt due. –Where an appeal is preferred by a person referred to in section 21 of the Act, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal under section 19 of the Act, provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under section 21 of the Act.

In the case of ***Satinder Kapur and Ors. v. IFCI Ltd. and Ors.,*** W.P. (C) 5138 of 2011, the Hon'ble Delhi High Court considered the scope and ambit of the power to waive deposit as contemplated under Section 21 of the DRT Act. In this case, a decree had been passed by DRT in favour of IFCI Ltd., IDBI Ltd. and Kotak Mahindra Bank Ltd. upon failure of debtors/ guarantors in making repayment of the debt. An appeal was filed along with a miscellaneous application u/s 21 of the DRT Act for waiver of deposit. The same was contested by Kotak Mahindra Bank Ltd. DRAT disposed off the application by directing deposit of 25% of the decretal amount pertaining to the share of Kotak Mahindra Bank Ltd. The same was on the ground that no document had been placed on record to show that the debtors were not in a position to pay their debts. The Hon'ble High Court held that the powers contemplated by Section 21 of DRT Act had to be exercised on well known judicial principles. It has duly held that:

"Para 15. Apart from considering the usual prima-facie case, balance of convenience and irreparable loss and injury, the Appellate Tribunal has to consider: "Whether it would be a case of undue hardship if the letter of the law has to be complied with by the Appellant before it."

Para 16. Suffice would it be to state that No. person should be denuded the right of appeal if there is financial hardship and this is the reason why the legislature has enacted the proviso to Section 21 of The Recovery of Debts due to Banks and Financial Institutions Act, 1993. Otherwise, the section would be susceptible to a constitutional challenge of being unreasonable.

In a subsequent case of ***Vinay Rai v. IFCI Ltd. and Ors.***, WP (C) No. 15954/2006, it was held that it was not a case wherein there can be total waiver of the pre-deposit, but, at the same time, it was also not equitable to direct the petitioner to give a deposit of Rs.750 crores in order to enable him to argue his appeal. The petitioner

1. *Legal Intern, Symbiosis Law School, Noida*

was directed to deposit only 10% as against 75% of the amount of the Recovery Certificate.

Therefore, the DRAT has to consider the judicial principles of prima-facie case, balance of convenience, irreparable loss and injury and whether it would be a case of undue hardship if the literal wordings of the provision has to be complied with by the Appellant. The true objective behind the law is that no frivolous appeal should be filed and no person should be denuded from his right to appeal because of his/her financial hardship.

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DIVIDE AND PATENT: PROVISIONS OF FILING DIVISIONAL APPLICATIONS IN INDIA.

Shrimant Singh

The concept of "Unity of invention" or "one patent for one invention" found its place in the Indian patent statutes way back in 1911. Specifically, Section 5(1)(b) of the Patents and Designs Act, 1911, empowered a Controller of Patents to refuse an application for patent or required the applicant to delete the distinct inventions if a patent application comprised of more than one inventions. However, the said Act of 1911 had no provision for filing a subsequent/further application out of the disclosure or teachings of the main application for patent.

Consequently, the Patents and Designs (Amendment) Act, 1930, under amended Section 5(1)(f) prescribed that "*when a specification comprises more than one invention, the application shall, if the Controller or the applicant so requires, be restricted to one invention and the other inventions may be made the subject-matter of fresh applications; and any such fresh application shall be proceeded with as a substantive application*". Hence, a remedy of filing of a "divisional application" was first introduced in the Indian Patents statute by the said amendment under the 1930 Act.

Coming to the present statue, the Patents Act, 1970, the "Unity of invention" in an application is ensured by Sub-Section (5) of Section 10 of the Act which, prescribes that *the claims of a complete specification shall relate to a single invention, or to a group of inventions linked so as to form a single inventive concept*.

Further, Section 16 of the Patents Act, 1970, provided the provisions and requisites for filing of a divisional application out-of the first filed application (or parent application):

> *16. Power of Controller to make orders respecting division of application. –*
>
> *(1) A person who has made an application for a patent under this Act may, at any time before the grant of the patent, if he so desires, or with a view to remedy the objection raised by the Controller on the ground that the claims of the complete specification relate to more than one invention, file a further application in respect of an invention disclosed in the provisional or complete specification already filed in respect of the first mentioned application.*

The pertinent points to note in the said enabling provision are:

i) A divisional application can be filed <u>at any time before the grant of the patent</u>; and

ii) An applicant may file a divisional application <u>voluntarily</u> ("if he so desires"), or <u>to remedy the Controller's objection</u> on the ground that the claims of the parent application relate to more than one invention;

Sub-Section (2) of Section 16 prescribes that the complete specification of the divisional application(s) shall <u>not</u> include any new subject matter over the original application or disclosure:

> *16(2). The further application under sub-section (1) shall be accompanied by a complete specification, but such complete specification shall not include any matter not in substance disclosed in the complete specification filed in pursuance of the first mentioned application.*

And, Sub-Section (3) of Section 16 ensures that the subject matter claimed in the divisional application shall be distinct from that claimed in the original specification:

> *16(3). The Controller may require such amendment of the complete specification filed in pursuance of either the original or the further application as may be necessary to ensure that neither of the said complete specifications includes a claim for any matter claimed in the other.*

Lastly, by way of Explanation, Section 16 provides that the divisional application shall be deemed to have been filed on the date of filing of the parent application (ante-dating of the divisional application):

> *Explanation.-For the purposes of this Act, the further application and the complete specification*

accompanying it shall be deemed to have been filed on the date on which the first mentioned application had been filed, and the further application shall be proceeded with as a substantive application and be examined when the request for examination is filed within the prescribed period.

Upon reading the said statutory provisions, one can safely construe that the principal purpose of divisional application is to protect the applicant's rights (by filing a further application) in case there is more than one invention disclosed or taught in the complete specification. Further, the requisites or criteria of the said enabling provision, i.e., Section 16, seem to be quite simple and direct. However, the same is much intricate than it seems.

On close reading, the Section 16, Sub Section (1) can be dissected to read as:

A person who has made an application for a patent under this Act may, at any time before the grant of the patent,

(a) if he so desires, or

(b) with a view to remedy the objection raised by the Controller on the ground that the claims of the complete specification relate to more than one invention,

file a further application in respect of an invention disclosed in the provisional or complete specification already filed in respect of the first mentioned application.

Accordingly, it can be construed that an applicant may file a divisional application voluntarily, if he desires, and looking at phrase "or" after (a) above, it appears that the condition of parent application relating to more than one application is applicable only to the remedy in option (b). On the said interpretation/ construction of the Section 16(1), several divisional applications were filed at the Patent Office even with same set of claims as of the parent application, and without claiming an invention distinct from that claimed in the parent application/patent.

More particularly, the applicants started misusing the '*if he so desires*' provision of the section under instances such as: where an applicant failed to attend to the objection(s) raised in the examination report within the prescribed period or failed to convince the Controller adequately for grant of a patent, the applicant started filing a divisional application with the same set of claims as in the parent application so as to secure a second chance at patenting the claimed invention.

The above understanding however was overturned and negated by the Intellectual Property Appellate Board (IPAB) in its decisions in appeal instances of: *Bayer Animal Health GmbH v Union of India (OA/18/2009/ PT/DEL)* and *LG Electronics Inc v Controller of Patents & Designs (OA/6/2010/PT/KOL)*. In both said cases the applicants opted to file a divisional application with claims relating to the same invention, i.e., the parent applications did not relate to plurality of invention. The IPAB held that:

> "The basis of divisional application is the existence of a plurality of invention. This is a *sine qua non* for seeking a division of an application."

Accordingly, the IPAB has mandated the condition of plurality of inventions for filing a divisional application by volition or to remedy an objection by the Controller. Particularly, in LG Electronics case, the IPAB stated that the usage of word 'or' was conjunctive with its aim, i.e., even if the applicant wished to divide the patent application *suo moto*, it would have to be primarily based on the fact that the application contains a plurality of inventions not linked by single inventive concept.

Therefore, while proceeding with a divisional application in India, an applicant shall keep in mind that the divisional application shall be filed before the grant of patent over the parent application, parent application shall disclose or teach more than one invention in substance, specification of divisional application shall not disclose a subject matter not covered in the parent application, claims of the divisional application shall be duly supported by the parent specification, the claims of the parent and divisional application shall be distinct, i.e., the divisional application shall not claim a subject matter already claimed in parent application/patent.

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PATENT SPECIFICATION - WHERE THE RUBBER MEETS THE ROAD

Aayush Sharma

SECTION 10(4) OF THE PATENTS ACT, 1970

" … every complete specification shall- fully and particularly describe the invention and its operation or use and the method in which it is to be performed; disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection…"

In order to obtain a patent, an applicant must fully and particularly describe the invention therein claimed in a complete specification. The disclosure of the invention in a complete specification must be such that a person skilled in the art may be able to perform the invention. This is possible only when an applicant discloses the invention fully and particularly including the best method of performing the invention. The Specification is a techno-legal document containing full scientific details of the invention and claims to the patent rights. The Specification, thus, forms a crucial part of the Patent Application. It is mandatory on the part of an applicant to disclose fully and particularly various features constituting the invention.

The Specification may be filed either as a provisional or as a complete specification. The specification (provisional or complete) is to be submitted in Form-2 along with the Application in Form-1 and other documents, in duplicate, along with the prescribed fee as given in the First Schedule of the Patents Act, 1970.

The requirement for an adequate disclosure of the invention in the specification ensures that the public receives knowledge, know-how and research in return for the exclusionary or monopolistic rights that will be granted to the inventor/applicant in an application for patent.

The relevance or say importance of the specification can be seen in the landmark judgement of the Supreme Court in the case of *Biswanath Prasad Radhey Shyam v. Hindustan Metal Industrie*[1]*s*, where the court had made reference to *Arnold v. Bradbury2*, to arrive at the principle that the proper way to construe a specification is not to read the claims first and then see what the full description of the invention is, accordingly the description of the invention needs to be read first, in order for the reader's mind may be prepared for what it is, that the invention is to be claimed and also for the patentee that he cannot claim more that he desires to patent. From the above discussed case, it is well understood that the specification is the important aspect of an invention. When the meaning of a term in a claim is not clear, the description will be relied upon to understand the term in context of what is described in the specification. A complete specification in whole is important for an invention.

Essential components of a complete specification are description, claims, drawings, abstract and sequence listings, if any. All these essentials combine to form a complete specification. The goal behind the full disclosure of the invention in the specification part is that a person skilled in the art may be able to perform the invention or more preferably an ordinary person can able to understand the invention upto maximum extent.

FUNCTION OF THE SPECIFICATION:

The patent specification is designed to convey the full disclosure, particularly including the best method of performing the invention.

Contents of Specification: *Section 10 of the Patents Act, 1970*, clearly defines the various contents of specification:

1. Title of the patent invention
2. Background of the invention
3. Summary of the invention/ Object of the nvention
4. Explanation if any of the patent drawings
5. Description of the invention
6. Patent Claims
7. Patent Abstract of the disclosure

1 http://www.bananaip.com/ip-news-center/case-note-inventive-step-case/

8. Sequence listing, if any

TITLE OF THE INVENTION:

The title should give a fair indication of the art or industry to which the invention relates. It should be brief, free from fancy expressions, free from ambiguity and as precise and definite as possible but it need not go into the details of the invention itself and should be normally within 15 words. It should verbally agree with the title stated in application. The followings are not allowable in the title: Inventor's name; the word 'Patent'; words in other languages; the abbreviation "etc"; fancy words ,e.g. "Washwell Soap", "Universal Rest Easy Patent Chair". The following titles do not appear to be objectionable: Improved folding chair; railway rail chair; improvements in pneumatic tyres; motorcar differential gear; filaments for electric lamps; etc.

FIELD OF THE INVENTION

The description should preferably begin with a general statement of the invention so as to indicate briefly the subject matter to which the invention relates, e.g. "This invention relates to ……".Thereafter, the advantages of the invention may be mentioned to bring out clearly the areas of application and preferable use of the invention. The applicant may substantiate industrial applicability of the invention in this part.

PATENT ABSTRACT

a) Every complete specification shall be accompanied by an abstract to provide technical information on the invention. The abstract shall commence with the title of the invention.

b) The abstract shall be so drafted that it constitutes an efficient instrument for the purposes of searching in the particular technical field, in particular by making it possible to assess whether there is a need to consult the specification itself.

c) The abstract shall contain a concise summary of the matter contained in the specification. The summary shall indicate clearly the technical field to which the invention belongs, technical problem to which the invention relates and the solution to the problem through the invention and principal use or uses of the invention. Where necessary, the abstract shall contain the chemical formula, which characterizes the invention.

d) The abstract may not contain more than one hundred and fifty words. If the specification contains any drawing, the applicant shall indicate on the abstract the figure, or exceptionally, the figures of the drawings which may accompany the abstract when published. Each main feature mentioned in the abstract and illustrated by a drawing shall be followed by the reference sign used in that drawing.

e) The Controller may amend the abstract for providing better information to third parties.

SUMMARY OF THE INVENTION:

The nature of the invention and technology domain is written in the summary of the invention. It also includes main points of the detailed description of the process, machine, manufacture or composition of matter. The advantages of the invention are discussed in the summary too. The summary represents the general idea of the invention in a summarized form. The problems which existed previously and were identified in the background of the invention are pointed out in the summary with their solutions.

PATENT DRAWINGS:

A number of figures with numeral labelling are described and specified in patent drawings. These descriptions and specifications point out the patent claims of the invention. The invention is described visually with the help of patent drawings. Drawings are made using structures – chemical or mechanical and charts and graphs depending upon the technology. While submitting the drawing sheet, at the right and left top corners of the sheet shall include name of an applicant and total number of drawing. Whereas, every drawing sheet ends with a signature either of an applicant or the agent authorizes by the applicant at the right bottom corner.

PATENT CLAIMS:

The most important part of the patent applications are patent claims. The subject matter of the invention

which distinguishes the invention from what is old is written in the claims. Patentability of an invention is judged by the patent claims as it defines the scope of the invention. The major function of the patent claim or independent patent claims is to clearly define the scope of protection granted. The patent claims must be supported by the invention disclosed in the descriptive part of the patent drafting. The patent claims should be drafted from a new page and each patent claim should be written in a new sentence. A reference numeral is followed to mention the patent claim and to illustrate the patent drawings. However, the patent claims of a patent specification must relate to the same invention.

BACKGROUND OF THE PATENT INVENTION:

Background of the invention contains references related to specific documents which are related to the invention. The improvements needed by the invention should be discussed in the background of the invention. Prior patent applications are identified and written in the background section of the patent document. Key features of the current invention and prior art are compared and discussed.

DETAILED DESCRIPTION OF THE PATENT INVENTION

i) The description of an invention is required to be furnished in sufficient detail so that a complete picture of the invention can be obtained easily. Further, the nature of improvements or modifications effected with respect to the prior art should be clearly and sufficiently described. The details of invention described here should be sufficient for a person skilled in the art to perform the invention by developing necessary technical know-how by himself. It can include examples / drawings or both for clearly describing and ascertaining the nature of invention. Sufficient number of examples must be included in the description especially related to the chemical inventions.

ii) Reference to the drawings should be specific and preferably in the following form: "This invention is illustrated in the accompanying drawings, throughout which like reference letters indicate corresponding parts in the various figures".

iii) The specification in respect of a Patent of Addition should contain at the beginning of the description, a definite statement indicating an improvement in or modification of, the original invention, and the serial number of the application for patent in respect of the original invention should be quoted. The specifications should also contain a short statement of the invention as disclosed in the earlier specification.

iv) Terms in other languages, if any, used in the description should be accompanied by their English equivalents. The use of vague slang words and colloquialisms is objectionable and should be avoided.

v) If the invention is using biological material, such a material shall be deposited for the completion of the application when such material is not available to the public and cannot be described adequately as per the provisions of the act. The deposition shall be made with the International Depository Authority under the Budapest Treaty, on or before the date of filing/priority. The International Depository Authority in India is Microbial Type Culture Collection and Gene Bank (MTCC) –Chandigarh.

vi) Reference of such material shall be made in the specification within three months from the date of filing giving all the available characteristics of the material required for it to be correctly identified or indicated including the name, address of the depository institution and the date and number of the deposit of the material at the institution.

vii) Further, the source and geographical origin of the biological material specified in the specification also should be disclosed therein.

viii) Sequence listing may also be numbered in the specification if necessary in the case of Biotechnology Inventions.

ix) Sequence listing should be given in electronic form.

x) Access to the material is available in the depository institution only after the date of the application of patent in India or after the date of the priority, if a priority is claimed.

REQUIREMENTS FOR COMPLETE SPECIFICATION:

Rule 9 of the Patents Rules, 2003, clearly highlights the requirements while drafting the complete specification. All documents and copies of the documents, except affidavits and drawings, filed with patent office, shall -

(a) be typewritten or printed in Hindi or English (unless otherwise directed or allowed by the Controller) in large and legible characters not less than 0.28 centimetre high with deep indelible ink with lines widely spaced not less than one and half spaced only upon one side of the paper;

(b) be on such paper which is flexible, strong, white, smooth, non-shiny, and durable of size A4 of approximately 29.7 centimetre by 21 centimetre with a margin of at least 4 centimetre on the top and left hand part and 3 centimetre on the bottom and right hand part thereof;

(c) be numbered in consecutive Arabic numerals in the centre of the bottom of the sheet; and

(d) contain the numbering to every fifth line of each page of the description and each page of the claims at right half of the left margin.

In case of submission of sequence listing, sub rule 3 of rule 9, in case, the application for patent discloses sequence listing of nucleotides or amino acid sequences, the sequence listing of nucleotides or amino acid sequences shall be filed in computer readable text format along with the application, and no print form of the sequence listing of nucleotides or amino acid sequences is required to be given.

CONCLUSION

It is true to said that the Patent specification is the face of an invention. It helps in understanding the main aspects of the invention and what an invention tries to say. The complete specification should be the applicant's most complete attempt at describing and defining the invention. The complete specification should generally be a self-contained document with respect to the invention. At most care is to taken when drafting the complete specification and in the manner as defined relevant section and rule of the Patents Act, 1970.

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PROVISIONS GOVERNING THE DEPOSIT OF BIOLOGICAL MATERIAL UNDER INDIAN PATENTS ACT

Saipriya Balasubramanian

INTRODUCTION:

Patent documents are techno-legal documents containing full scientific details of the invention and more specifically claims identifying the scope of the invention sought for protection. A patent application must disclose detailed information with regards to the invention so that a person of ordinary skill in the field related to the invention is able to perform the invention. Patent Applications relating to biological material under the (Indian) Patents Act, 1970, are subject to the provisions set out in Section 10(4) (ii) of the Patents Act, 1970, and Rule 13(8) of the Patents Rules, 2003. Further references with regard to deposit of biological material are mentioned in Form 1 (The second Schedule of The Patent Rules, 2003) and Section 6 of the National Biodiversity Act, 2002.

PUBLIC AVAILABILITY OF BIOLOGICAL MATERIAL:

For applications relating to biological material, the Act strictly requires that the description of such biological material shall be included in the complete specification including all available characteristics of the material so that the biological material is correctly and particularly identified and/or indicated in the specification. Therefore, when a biological material is identified in a specification and such a material is not available to the public and the same cannot be fully and particularly described as required under Section 10(4)(a) and (b) of the Patents Act, such material shall be deposited with the International Depository Authority under the Budapest Treaty, on or before the date of filing as per Section 10(4)(ii) of the Act..

BUDAPEST TREATY:

Budapest Treaty[1] is an international convention governing the recognition of microbial deposits in officially approved culture collections which was signed in Budapest in the year 1973 and later on amended in 1980. Because of the difficulties and on occasion of virtual impossibility of reproducing a microorganism from description in the patent specification, it is essential to deposit a strain in a culture collection centre for testing and examination by others. It obviates the need of describing a microorganism in the patent application and further samples of strains can be obtained from the depository for further working on the patent.

As of 2016, 80 countries are party to the Budapest Treaty and there are total of 45 notified International depositories for deposition of microbial cultures.
India acceded and ratified the Budapest Treaty on 17 December 2001. In India, Microbial Type Culture Collection and Gene Bank (MTCC) at the Institute of Microbial Technology (IMTECH), Chandigarh and Microbial Culture Collection (MCC), Pune India., are the two recognized international depositories of microorganisms.

NOTIFICATION BY IPO REGARDING DEPOSIT OF BIOLOGICAL MATERIAL[2]:

In respect of biological material which is not available to the public, access to the material is available in the depository institution only after the date of the application of patent in India. The Controller General of Patents, Designs and Trademarks has issued a notification regarding the aforesaid, on July 2nd, 2014 which states as follows:

"According to the provisions of the Act, the deposition of such material in an International Depository Authority (IDA) under the Budapest Treaty shall not be later than the date of filing of patent application in India. However, the reference of deposition of biological material in the patent application shall be made within three months from the date of filing of such application as per Rule 13(8) of the Patents Rules, 2003.

1 http://nopr.niscair.res.in/bitstream/123456789/3613/1/JIPR%2010(1)%2044-51.pdf

2 http://www.ipindia.nic.in/writereaddata/Portal/News/159_1_115-public-notice-02july2014.pdf

In view of the above, it is hereby informed that applicants should ensure that the deposition of the biological material to the IDA is made prior to the date of filing of patent application in India and the reference of such deposition in the specification is made within three months from the date of filing of such application, if the same is not already made.

In case of non-compliance of the above-mentioned provisions, the concerned applications are liable to be refused under the Act."

Section 10(4)(d)(ii):

According to Section 10(4)(d)(ii)**,** "*if the applicant mentions a biological material in the specification which may not be described in such a way as to satisfy clauses (a) and (b), and if such material is not available to the public, the application shall be completed by depositing the material to an international depository authority under the Budapest Treaty and by fulfilling the following conditions, namely:-*

(A) the deposit of the material shall be made not later than the date of filing the patent application in India and a reference thereof shall be made in the specification within the prescribed period;]

(B) all the available characteristics of the material required for it to be correctly identified or indicated are included in the specification including the name, address of the depository institution and the date and number of the deposit of the material at the institution;

(C) access to the material is available in the depository institution only after the date of the application of patent in India or if a priority is claimed after the date of the priority;

(D) disclose the source and geographical origin of the biological material in the specification, when used in an invention."

RELEVANCE OF SECTION 3(J) TO CREATE A WINDOW FOR PATENTING MICROORGANISMS:

Section 3(j) of Patent Act 1970, prescribes:

3. What are not inventions.- The following are not invention within the meaning of this Act,-

(j) "*Plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals are not inventions.*"

Earlier to the 2002 amendment of the Patents Act, 1970, [*with effect from 20-May-2003*] the inventions on microorganisms were not patentable. TRIPS under the Article 27.3(b) stipulated that '***parties may exclude from patentability plants and animals other than microorganisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes' [emphasis laid]***. Thus, India to be a TRIPS compliant member country had to amend the provision to allow patentability over microorganisms.

DEPOSITABLE SUBJECT MATTER:

Though Budapest Treaty do not define what is meant by "microorganism", the range of materials that are able to be deposited at IDAs under the Budapest Treaty includes cells such as bacteria, fungi, eukaryotic cell lines such as plant spores, genetic vectors (such as plasmids or bacteriophage vectors or viruses) containing a gene or DNA fragments; organisms used for expression of a gene (making the protein from the DNA).

When an Applicant deposits any of the aforesaid biological material with IDA, an accession number is provided to the applicant that indicates to that particular deposit. As per Rule 13(8) of the Indian Patent Rules, 2003, the Indian patent office requires the applicant to provide a reference to the deposit within three months of filing of the patent application[3].

Further, it is compulsory to provide all the available characteristics of the material required for it to be correctly identified. The essential data required includes the name, address of the depository institution and the date and number of the deposit of the material at the institution.

Apart from depositing the biological material, the applicant is also required to clearly mention the source of geographical origin of the biological material used

3 http://www.ipindia.nic.in/manual-patents.htm

in the specification. If the source of origin of biological material is from India then the applicant has to submit the permission from the National Biodiversity Authority of India before the grant of a patent over the application.

While the timeline required for mentioning or providing information regarding deposit of biological material at Indian Patent Office is the same for PCT-National phase, Convention and/ first filing ordinary application, i.e., 3 months from the date of filing in India, however in case the PCT International application and/priority application does not mention the information on biological deposit the same shall be included in the complete specification in India along with a request for amending the specification to include the aforesaid as additional information.

CONCLUSION:

Depositing the biological samples is mandatory for enabling completion of specification, hence to complete an application, as per the Indian Patent Act. Further, a deposit could be required so that the invention can be practiced by any person by making using of the said deposit available from IDA instead of working from the scratch to obtain it from nature. The deposition satisfies issues of enablement and sufficiency of disclosure as prescribed under section 10(4) (a) and (b) in addition to representing best method of performing the invention.

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CHOOSING THE RIGHT PATENTS RENEWAL FIRM

Monika Shailesh

Intellectual Property (IP) portfolio is one of the most critical possessions of a business. A good IP portfolio is the one of the most significant attribute for the success of a business. While on one hand, the IP portfolio provides a technical edge over the competitors through acquired monopoly, on the other hand it prevents a business from getting hurt from Patent trolls. Making a perfect IP portfolio is very important for the overall success and protection and so is the proper and timely renewal or maintenance of IP. Just like building IP portfolio, IP management also requires a lot of time, efforts and money. In today's globalization where the portfolios are extended to various countries around the world and are managed by different patent offices, planned renewals or annuities become the need of the hour. Different patent offices have altered renewal process and rules to handle those situations and to provide a good analysis of which patents to continue and which should not be retained. A high degree of expertise in IP portfolio management is required, and this is where the role of an IP renewal service provider comes into picture of IP portfolio management. A competent renewal service provider can be very handy to reduce the administrative and budgetary loads on the business. It also brings with it added benefits like peace of mind and a track-record-proven process. However with so many firms providing similar services for annuities which one to partner with is one question that needs a bit attention from the business perspective.

Let us examine a few critical aspects for the strategy to select the partner firm.

1. The world of IP is highly dynamic in nature. New amendments in IP law and continuous upgrade in technology and further innovations requires not only a good experience but also a constant up gradation of knowledge and process know how. A good renewals firm can certainly be identified based on its capacity to acclimatize to the ever changing IP world and the level of experience it brings on the table. A renewal service provider should have reliable processes at its core and should always attempt to bring in improvements in the overall system by utilizing new technologies and management software's to enhance the inclusive efficiency.

2. IP is regional in nature, different jurisdictions enforce different legislation. Since patent is not universal in nature a good IP renewals team should keep refreshing and acquiring knowledge of national and international patents laws. Protecting IP in one legislation does not guarantee that it will by default get protection in other regions also; therefore, it is advisable to choose an IP partner firm based on its global foot prints. Many countries still need a local counsel to file for the renewal, so the firm providing service can be shortlisted based on the network of counsels it has in important jurisdictions.

3. Missed renewal can cause loss of patent and directly impacts the asset proposition of the business. It should be the prime concern of the business that renewals of patents shall be fail safe. One should always confirm if the partner renewal firm has international quality standards like ISO 9001. Customer base of the renewal service provider firm/company is another means to gauge about the firm's value and quality. A firm involved in IP portfolio maintenance must have 'customer first' approach at its core values and the service delivery second to none. On time renewals if missed leads to lot of concerns for business like what would be the impact on business what be the quantum of loss; that will cover the cost and so on, therefore choosing the right firm is of high importance

4. IP is a data intensive commodity, not only in terms of volume but also in terms of Confidentiality. The patent portfolio of a business shall be managed in a way that all the patents are identified according to the criticality to the business and therefore it is always highly confidential and needs a very precise and safe data management. When a renewal partner firm works for many more customers' data management, it becomes even more critical in terms of volume and quality of data base. A good data base helps in quick queries and hence helps in proper planning of renewals and the analysis of

patent portfolio. The IT infrastructure of a firm defines the ability of the firm to minimize errors and minimizing the risk of patent loss due to failure of renewal payments. A good team having experience of large data processing also helps in analyzing the trends in near future and assists the customer to identify the more realistic strategy for IP portfolio management.

5. A good renewal provider not only helps in maintaining the IP portfolio but it should also have the ability to align itself with the goals and mission of the customer's business by providing an efficient analysis of the IP portfolio. The renewal service provider firm should assist the business in generating intelligence out of the IP portfolio by providing efficient tools and process that could provide an inclusive insight to the data at critical junctions and market scenario. Partner firm shall also provide services to the customer for their IP portfolio management like:

    a. formulating strategy on which technology to focus for patents,

    b. what are the regions where patents needs to strengthen,

    c. market trends,

    d. technologies under focus of competitors,

    e. Do the business has sufficient patents, are there unused or low value patents that can be abandoned etc.

    This is how a renewal firm can help a business in aligning its patent portfolio to the core of business and its strategy so that it can influence the board room directly.

6. An IP portfolio of a Business may have a large number of patents and not all patents generate monetary benefits. Some patents have the ability to create real benefits for the Business/company; others have the potential to protect the Business/company from unnecessary litigations. A huge amount is being spent by the company not only in creating the IP portfolio but also in maintaining the same. However with time and the ever changing market scenario and constant innovations, some patents may become unusable, non-productive and may also not have any capacity to create intelligence for the business. A good renewal firm also assists the client company in identifying patents that have zero or very low real importance to the business and may help the company to decide in abandoning or discontinuing with investments in maintaining such patents. In this way the business can save a lot of time money and efforts while managing its IP portfolio.

CONCLUSION:

It can be established that IP renewals is undoubtedly one of the critical aspects of IP portfolio management. It can have severe impact on the performance of a business, its finances, and the valuation of the business. Therefore choosing the right renewal partner must be given a due thought and consideration. To conclude, the below listed points would be helpful in deciding on an IP portfolio management partner:

a. Experience has no replacement.

b. Look for global foot prints and network.

c. Credibility and customer base.

d. Information Technology infrastructure and database management system.

e. Flexibility

f. Tools for providing and insight to IP portfolio.

g. Ability to align the IP portfolio with the core business values and strategy.

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COMPANIES (MEDIATION AND CONCILIATION) RULES, 2016

Arpita Karmakar

The Ministry of Corporate Affairs (MCA), vide notification dated September 9, 2016, has introduced Mediation and Conciliation Rules, 2016 (hereinafter referred to as 'Rules'), under Companies Act, 2013 (hereinafter referred to as 'the Act'). The Section 442 of the Act, effective from 01.04.2014, authorizes the Central Government to set up panel of experts to be called as Mediation and Conciliation Panel. Incorporating of such voluntary dispute resolution under companies' law has been induced by the Government for the first time wherein the corporate can now take the route of formal mechanism of mediation and conciliation via government empanelled mediators and conciliators.

The introduction of these Rules would further reduce the burden of the National Company Law Tribunal and the National Company Appellate Tribunal, by offering the parties under dispute to opt of additional forum to settle their disputes.

The important provisions under the new rules have been briefed below:

ORGANIZATIONAL STRUCTURE OF THE PANEL MEDIATORS OR CONCILIATORS:

a) Regional Director has the authority to constitute the panel of experts willing and eligible to be appointed as mediators or conciliators in the respective regions and such appointed panel is placed on the website of the Ministry of Corporate Affairs or on any other website as may be notified by the Central Government.

b) The Regional Director invites applications from persons interested and qualified, under Rule 4 of the Rules, for getting empanelled as mediator or conciliator. Such applications will be invited by the Regional Director every year during the month of February and update the Panel which shall be effective from 1st of April of every year.

c) A person who intends to get empanelled as mediator or conciliator and possesses the requisite qualifications shall apply to the Regional Director in Form MDC-1.

QUALIFICATIONS AND DISQUALIFICATIONS FOR EMPANELMENT:

	Qualifications for empanelment A person shall not be qualified for being empanelled as mediator or conciliator unless he:-	**Disqualifications for empanelment** A person shall be disqualified for being empanelled as mediator or conciliator, if he:-
a.	has been a Judge of the Supreme Court of India ; or	is an undischarged insolvent or has applied to be adjudicated as an insolvent and his application is pending ;
b.	has been a Judge of a High Court ; or	has been convicted for an offence which, in the opinion of the Central Government, involves moral turpitude;

c.	has been a District and Sessions Judge ; or	has been removed or dismissed from the service of the Government or the Corporation owned or controlled by the Government ;
d.	has been a Member or Registrar of a Tribunal constituted at the National level under any law for the time being in force ; or	has been punished in any disciplinary proceeding, by the appropriate disciplinary authority ; or
e.	has been an officer in the Indian Corporate Law Service or Indian Legal Service with fifteen years experience ; or	has, in the opinion of the Central Government, such financial or other interest in the subject matter of dispute or is related to any of the parties, as is likely to affect prejudicially the discharge by him of his functions as a mediator or conciliator.
f.	is a qualified legal practitioner for not less than ten years ; or	-
g.	is or has been a professional for at least fifteen years of continuous practice as Chartered Accountant or Cost Accountant or Company Secretary ; or	
h.	has been a Member or President of any State Consumer Forum ; or	
i.	is an expert in mediation or conciliation who has successfully undergone training in mediation or conciliation.	

APPLICATION FOR APPOINTMENT OF MEDIATOR OR CONCILIATOR AND HIS APPOINTMENT:

Parties concern may agree on the name of the sole mediator or conciliator for mediation or conciliation between them. In any other case, the Central Government or the Tribunal or the Appellate Tribunal may ask each party to nominate the mediator or conciliator or the Central Government or the Tribunal or the Appellate Tribunal may appoint the mediator or conciliator, as may be deemed necessary for mediation or conciliation between the parties.

DUTY OF MEDIATOR OR CONCILIATOR TO DISCLOSE CERTAIN FACTS:

It shall be the duty of a mediator or conciliator to disclose to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, and also to the parties under dispute, about any circumstances which may give rise to a reasonable doubt as to his independence or impartiality in carrying out his functions.

PROCEDURE FOR DISPOSAL OF MATTERS:

For the purposes of mediation and conciliation, the Rule lays down the following procedure to be followed by the mediator or conciliator, namely:

i) He will fix, in consultation with the parties, the dates and the time of each mediation or conciliation session, where all parties have to be present;

ii) He would hold the mediation or conciliation at the place decided by the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, or such other place where the parties and the mediator or conciliator jointly agree;

iii) He may conduct joint or separate meetings with the parties;

iv) Each party shall, ten days before a session, provide to the mediator or conciliator a brief memorandum setting forth the issues, which need to be resolved, and his position in respect of those issues and all information reasonably required for the mediator or conciliator to understand the issue and a copy of such memorandum shall also be given to the opposite party or parties. The memorandum may be provided for the reduced period of ten days at the discretion of the mediator or conciliator;

v) Each party shall furnish to the mediator or conciliator such other information as may be required by him in connection with the issues to be resolved.

vi) Where there is more than one mediator or conciliator, the mediator or conciliators may first concur with the party that agreed to nominate him and thereafter interact with the other mediator or conciliator, with a view to resolve the dispute.

MEDIATOR OR CONCILIATOR NOT BOUND BY THE INDIAN EVIDENCE ACT, 1872 OR THE CODE OF CIVIL PROCEDURE, 1908:

The mediator or conciliator will not be bound by the Indian Evidence Act, 1872 or the Code of Civil Procedure, 1908 while disposing the matter of dispute, but will be guided by the following:

a) The principles of fairness and natural justice;

b) Have regard to the rights and obligations of the parties;

c) Usages of trade, if any, and

d) The circumstances of the dispute.

REPRESENTATION OF PARTIES AND CONSEQUENCES OF NON-ATTENDANCE OF PARTIES AT SESSIONS OR MEETINGS ON DUE DATES:

a) The parties shall ordinarily be present personally or through an authorized attorney at the sessions or meetings notified by the mediator or conciliator;

b) The parties may be represented by an authorized person or counsel with the permission of the mediator or conciliator in such sessions or meetings and the mediator or conciliator or the Central Government or the Tribunal or the Appellate Tribunal as the case may be, shall be entitled to direct or ensure the presence of any party to appear in person;

c) The party not residing in India may, with the permission of the mediator or conciliator, be represented by his or her authorized representative at the sessions or meetings;

d) On failure of parties to attend a session or a meeting fixed by the mediator or conciliator deliberately or wilfully for two consecutive times, the mediation or conciliation shall be deemed to have failed and mediator or conciliator shall report the matter to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

ROLE OF MEDIATOR OR CONCILIATOR:

The mediator or conciliator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute, emphasizing that it is the responsibility of the parties to take decision which affect them and he shall not impose any

terms of settlement on the parties. On consent of both the parties, the mediator or conciliator may impose such terms and conditions on the parties for early settlement of the dispute as he may deem fit.

TIME LIMIT FOR COMPLETION OF MEDIATION OR CONCILIATION:

a) The process for any mediation or conciliation under these rules shall be completed within a period of three months from the date of appointment of expert or experts from the Panel.

b) On the expiry of three months from the date of appointment of expert from the Panel, the mediation or conciliation process shall stand terminated.

c) In case of mediation or conciliation in relation to any proceeding before Tribunal or Appellate Tribunal which could not be completed within three months, the Tribunal or as the case may be, the Appellate Tribunal, may on the application of mediator or conciliator or any of the party to the proceedings, extend the period for mediation or conciliation by such period not exceeding three months.

COMMUNICATION BETWEEN MEDIATOR OR CONCILIATOR AND THE CENTRAL GOVERNMENT OR THE TRIBUNAL OR THE APPELLATE TRIBUNAL:

a. In order to preserve the confidence of parties in the Central Government or the Tribunal or the Appellate Tribunal as the case may be and the neutrality of the mediator or conciliator, there shall be *no communication* between the mediator or conciliator and the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, in the subject matter;

b. If any communication between the mediator or conciliator and the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, is necessary, it shall be in writing and copies of the same shall be given to the parties or the authorized representative;

c. Such communication between the mediator or conciliator and the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, shall be limited to communication by the mediator or conciliator:

i. About the failure of the party to attend;

ii. About the consent of the parties ;

iii. About his assessment that the case is not suited for settlement through the mediation or conciliation;

iv. About settlement of dispute between the parties.

SETTLEMENT AGREEMENT:

a) Where an agreement is reached between the parties in regard to all the issues or some of the issues in the proceeding, the same shall be reduced to writing and signed by the parties and if any counsel has represented the parties, the conciliator or mediator may also obtain the signature of such counsel on the settlement agreement;

b) The agreement of the parties so signed shall be submitted to the mediator or conciliator who shall, with a covering letter signed by him, forward the same to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be;

c) Where no agreement is reached at between the parties, before the time limit specified in the Rules itself, or where the mediator or conciliator is of the view that no settlement is possible, he shall report the same to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, in writing.

d) The Central Government or the Tribunal or the Appellate Tribunal as the case may be, shall fix a date of hearing normally within fourteen days from the date of receipt of the report of the

mediator or conciliator and on such date of hearing, if the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, is satisfied that the parties have settled their dispute, it shall pass an order in accordance with terms thereof.

e) If the settlement disposes of only certain issues arising in the proceeding, on the basis of which any aforementioned order is passed, the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, shall proceed further to decide the remaining issues.

ETHICS TO BE FOLLOWED BY MEDIATOR OR CONCILIATOR:

The Rule lay down the following ethics to be followed by the mediator or conciliator-

a) Follow and observe the rules strictly and with due diligence;

b) Not carry on any activity or conduct which shall reasonably be considered as conduct unbecoming of a mediator or conciliation;

c) Uphold the integrity and fairness of the mediation or conciliation process;

d0 Ensure that the parties involved in the mediation or conciliation are fairly informed and have an adequate understanding of the procedural aspects of the process;

e) Satisfy himself or herself that he or she is qualified to undertake and complete the assignment in a professional manner;

f) Disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias;

g) Avoid, while communicating with the parties, any impropriety or appearance of impropriety;

h) Be faithful to the relationship of trust and confidentiality imposed in the office of mediator or conciliator;

i) Conduct all proceedings related to the resolutions of a dispute, in accordance with the relevant applicable law;

j) Recognize that the mediation or conciliation is based on principles of self-determination by the parties and that the mediation or conciliation process relies upon the ability of parties to reach a voluntary, undisclosed agreement; and

k) Maintain the reasonable expectations of the parties as to confidentiality and refrain from promises or guarantees of results.

If any party finds conduct of mediator or conciliator violative of ethics laid down in this rule, the party may immediately bring it to the notice of the Regional Director.

MATTERS NOT TO BE REFERRED TO THE MEDIATION OR CONCILIATION:

The following matters shall not be referred to mediation or conciliation:

a) The matters relating to proceedings in respect of inspection or investigation under Chapter XIV of the Act; or the matters which relate to defaults or offences for which applications for compounding have been made by one or more parties.

b) Cases involving serious and specific allegations of fraud, fabrication of documents forgery, impersonation, coercion etc.

c) Cases involving prosecution for criminal and non-compoundable offences.

d) Cases which involve public interest or interest of numerous persons who are not parties before the Central Government or the Tribunal or the Appellate Tribunal as the case may be.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS:

The parties shall not initiate, during the mediation or conciliation under these Rules, any arbitral or judicial proceedings in respect of a matter that is the subject-matter of the mediation or conciliation, except that a party may initiate arbitral or Judicial proceedings, where, in his, opinion, such proceedings are necessary for protecting his rights.

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EXTERNAL COMMERCIAL BORROWINGS (ECB) BY STARTUPS

Kumar Deep

INTRODUCTION

The Reserve Bank of India (RBI) vide Notification[1] dated October 27, 2016 had issued Guidelines for Startups to access loans under the External Commercial Borrowing (ECB) framework. This Guideline has been introduced by the RBI with aspire to attract foreign funds by the Startups which can be used by such Startups to leverage their financial health and growth. This Guideline would allow Startups to access foreign currency loan from foreign lenders.

It is worth noting here that the RBI vide A.P. (DIR Series) Circular No. 32 dated November 30, 2015[2] had announced the revised ECB Framework for other sectors in India. As per said revised Framework ECBs have been segregated broadly into following three tracks:

Track I	Medium term foreign currency denominated ECB with Minimum Average Maturity (MAM) of 3/5 years.
Track II	Long term foreign currency denominated ECB with MAM of 10 years.
Track II	Indian Rupee denominated ECB with MAM of 3/5 years.

All the parameters and terms and conditions under the revised ECB framework have been in line with the above categories of tracks.

MEANING OF EXTERNAL COMMERCIAL BORROWINGS (ECB)

ECB is an instrument used by the companies to facilitate the access to foreign money. In India, ECBs are being regulated by Department of Economic Affairs, Ministry of Finance, Government of India along with RBI. As per ECB Guidelines issued by the RBI, only permitted resident entities are eligible to raise borrowings as ECB from recognized non-resident entities. Such borrowings to be covered under the regime of ECB framework can be in any of the following forms:

i. Bank loans;

ii. Securitized instruments (e.g. floating rate notes and fixed rate bonds, non-convertible, optionally convertible or partially convertible preference shares / debentures);

iii. Buyers' credit;

iv. Suppliers' credit;

v. Foreign Currency Convertible Bonds (FCCBs);

vi. Financial Lease; and

vii. Foreign Currency Exchangeable Bonds (FCEBs)

It may be noted that except FCEBs (permitted only under the approval route) all other forms of ECB can be availed of both under the automatic and approval routes.

It is to be noted that ECBs can be used for the specified purpose only as permitted by the RBI and such can not be used for investment in stock market or speculation in real estate.

DEFINITION OF START-UPS

As per Notification[3] of the Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion ("DIPP"), number G.S.R. 180(E), dated the 17th February, 2016, published in the Gazette of India, Extraordinary, part II, section 3, sub-section (i), dated the 18th February, 2016, 'startup' shall mean a company in which the public are not substantially interested and which fulfills the following conditions:

a) incorporated or registered in India not prior to five years;

1 https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10667&Mode=0

2 https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10153&Mode=0

3 http://dipp.nic.in/English/Investor/startupindia/Definition_Startup_GazetteNotification.pdf

b) its turnover for any of the financial years has not exceeded Rs. 25 crore; and

c) it is working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property;

Therefore for the purpose of Government schemes, Startup means an entity, incorporated or registered in India not prior to five years, with annual turnover not exceeding INR 25 crore in any preceding financial year, working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property. Provided that such entity is not formed by splitting up, or reconstruction, of a business already in existence. Provided further that a Startup shall be eligible for the tax and other benefits only after it has obtained certification from the Inter-Ministerial Board, setup for such purpose.

HIGHLIGHTS OF THE ECB FRAMEWORK FOR STARTUPS

As per the ECB Framework for Startups, the RBI has permitted Start-ups to borrow up to 3 million USD or equivalent per financial year either in rupees or any convertible foreign currency or a combination of both for a minimum average maturity period of three years. The key highlights of the said framework are enumerated as under:

ELIGIBILITY:

On the date of raising ECB, an entity should be recognized as a Startup in terms of the criteria provided in the Notification dated 17th February, 2016.

MATURITY:

The minimum average maturity period for the ECB raised by Startups shall be 3 years.

RECOGNISED LENDER:

Under the ECB framework for Statrups, lender / investor (foreign entity) shall be a resident of a country who is either a member of Financial Action Task Force (FATF) or a member of a FATF-Style Regional Bodies; and shall not be from a country identified in the public statement of the FATF as:

i) A jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or

ii) A jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

However, it has been provided that overseas branches or subsidiaries of Indian banks and overseas wholly owned subsidiary / joint venture of an Indian company will not be considered as recognized lenders under this framework.

FORMS OF BORROWING:

The framework provides that borrowing can be in the form of loans or non-convertible, optionally convertible or partially convertible preference shares only.

CURRENCY:

As per framework the borrowing should be denominated in any freely convertible currency or in Indian Rupees (INR) or a combination thereof. In case of borrowing in INR, the non-resident lender, should mobilize INR through swaps/outright sale undertaken through an AD Category-I bank in India.

RESTRICTION ON AMOUNT OF BORROWING:

The amount of borrowing per Startup will be limited to USD 3 million or equivalent per financial year either in INR or any convertible foreign currency or a combination of both.

ALL-IN-COST:

The all-in-cost requirements shall be mutually agreed between the borrower and the lender.

END-USES:

Under the framework, ECB proceeds can be utilised for any expenditure in connection with the business of the borrower.

CONVERSION INTO EQUITY:

Conversion ECB into equity is freely permitted, subject to Regulations applicable for foreign investment in Startups.

SECURITY:

Subject to compliance with the foreign direct investment / foreign portfolio investment and/ or any other norms applicable for foreign lenders / entities to hold securities, the borrower can provide any security in the nature of movable, immovable, intangible assets (including patents, intellectual property rights), financial securities, etc.

CORPORATE AND PERSONAL GUARANTEE:

Under the framework, issuance of corporate or personal guarantee is allowed. Further, any Guarantee issued by non-resident(s) is allowed only if such parties qualify as recognized lender under this framework as mentioned hereinabove. However, issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by Indian banks, all India Financial Institutions and NBFCs relating to ECB is not permitted under the framework.

HEDGING:

The framework provides that, in case of INR denominated ECB, the overseas lender can hedge its INR exposure through permitted derivative products with AD Category – I banks in India. Further, the lender is also permitted to access the domestic market through branches/ subsidiaries of Indian banks abroad or branches of foreign bank with Indian presence on a back to back basis.

CONVERSION RATE:

The framework provides that in case of borrowing in INR, the foreign currency - INR conversion will be at the market rate as on the date of agreement.

OTHER PROVISIONS:

Other provisions relating to parking of ECB proceeds, reporting arrangements, powers delegated to AD banks, borrowing by entities under investigation, conversion of ECB into equity will be in accordance with the provisions provided under the revised ECB framework announced by the RBI vide Circular dated November 30, 2015. Further, the provisions relating to leverage ratio and ECB liability: Equity ratio will not be applicable to such ECB by Startups.

It may be noted that Startups raising ECB in foreign currency, whether having natural hedge or not, are exposed to currency risk due to exchange rate movements and hence are advised to ensure that they have an appropriate risk management policy to manage potential risk arising out of ECBs.

CONCLUSION

Before the announcement of the said circular by the RBI to allow ECB by Startups, only large Indian corporates were permitted to raise money through ECB. Thus, by allowing the Startups to get funds through ECB route is very imperative decision taken by the RBI. This move is warm welcoming step as the startups are in much need of funds for their growth.
The Government is strived to promote startups India campaign through various measures and schemes. In order to promote Startups, the Government had introduced various incentives viz. income tax holiday, capital gains tax exemptions on investments in start-ups, easier regulations to raise funds from the security market. The ECB Framework for Startups is another progressive move that will definitely benefit large number of Startups. The reason behind that the ECBs are considered to be cheaper than domestic borrowings as the interest rate for ECBs is far lower.

The RBI has kept the conditions and restrictions of the said Guidelines to the minimum so that the Startups will get more benefits from this framework. Is has been observed that large number of Startups are facing problem of unavailability of funds for their survive and growth. Therefore, this action of RBI at this stage is vital and significantly essential for the Startups.

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NULLIFYING THE EFFECT OF ARBITRATION AGREEMENT

Avneet Jha

In a recent decision of the Supreme Court dated 04 October 2016 in the case of A. Ayyasamy Vs. Respondent: A. Paramasivam and Ors. answered whether allegation of fraud simpliciter would also preclude arbitrability under a contract.

In deciding the above question the Supreme Court laid down that allegations of criminal wrongdoing or of statutory violation would not detract from the jurisdiction of the arbitral tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement, and held that allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration Clause or the validity of the arbitration Clause itself.

In the said judgment the Supreme Court held that in each such case where an objection on the ground of fraud and criminal wrongdoing is raised, it is for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. The burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish the dispute is not arbitrable under the law for the time being in force.

In coming to its conclusion the Supreme Court discussed the dicta laid down by the Supreme Court in the case of N. Radhakrishnan.

Dicta in N Radhakrishnan's case was that Since the case relates to allegations of fraud and serious malpractices on the part of the Respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the Arbitrator. This arose out of a partnership dispute. A suit was instituted before the civil court for declaratory and injunctive reliefs. In the said case, an application under Section 8 of the Arbitration Act was rejected by the Trial Court and the order of rejection was affirmed in revision by the High Court. In the said case, the submission of the Appellant that the dispute between the partners ought to have been referred to arbitration was met with the objection that the Appellant having raised issues relating to misappropriation of funds and malpractices, these were matters which ought to be resolved by a civil court. The judgment of the High Court was affirmed by a Bench of two judges of the Supreme Court.

The Supreme Court held that the position that emerged both before and after the decision in N. Radhakrishnan is that successive decisions of present Court have given effect to the binding precept incorporated in Section 8 of the Arbitration Act. Once there is an arbitration agreement between the parties, a judicial authority before whom an action is brought covering the subject matter of the arbitration agreement is under a positive obligation to refer parties to arbitration by enforcing the terms of the contract. It is necessary to emphasise that as a matter of first principle, this Court has not held that a mere allegation of fraud will exclude arbitrability.

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NEWSBYTE

REAL ESTATE (REGULATION AND DEVELOPMENT) (GENERAL) RULES, 2016

The Central Government has recently notified the Real Estate (Regulation and Development) (General) Rules, 2016 ("Rules"), to be applicable to the five Union Territories i.e. Andaman & Nicobar Islands, Dadra & Nagar Haveli, Daman & Diu, Lakshadweep and Chandigarh.

With these Rules, the Real Estate (Regulation & Development) Act, 2016 ("Act") takes a big leap ahead.

In a nutshell, the Act was brought into effect to protect rights and interests of consumers and promotion of uniformity and standardization of business practices and transactions in the real estate sector. The Act endeavors to strike a balance between the interests of real estate buyers and that of developers by imposing responsibilities on both parties. Further, the Act attempts to institute symmetry of information between the real estate developer and buyers, transparency of contractual obligations, establish bare minimum standards of responsibility and a fast-track dispute resolution mechanism. Without a doubt, the Act is a major step in protecting the interests of real estate buyers like protecting them from various kinds of frauds being played upon by the builders apart from being advantageous to genuine real estate builders and developers.

KEY FEATURES OF THE RULES

i bring clarity in builder-buyer agreements, i.e. doing away with onerous terms which mostly favored the builders/developers, along with making it compulsory for builders/developers to complete construction of projects in timely manner and deliver possession thereof without applying any hidden charges etc.;

ii) builders/developers to refund or pay compensation to the buyers/allottees with interest (rate of State Bank of India's highest marginal cost of lending rate) plus two per cent within 45 days of the payments becoming due;

iii) builder/developer, within 3 months of applying for registration of a project with the Real Estate Regulatory Authority shall deposit in a separate bank account, 70% of the amount collected and unused for ensuring completion of ongoing projects. This will keep a check on diversion of funds raised for one project to another / unrelated avenues hampering the completion of the project for which the funds were actually received;

iv) builders/developers to publish all kinds of vital information in respect of the ongoing projects such as status of the project with photographs floor-wise, status of construction of internal infrastructure and common areas with photos, etc.;

v) compounding of punishment with imprisonment for violation of the orders of Real Estate Appellate Tribunal against payment of 10% of project cost in case of developers and 10% of the cost of property purchased in case of allottees and agents;

vi) adjudicating officers, Real Estate Authorities and Appellate Tribunals will be responsible to dispose of the complaints within 60 days from the date of institution thereof. Additionally, authorities will publish the information relating to profile and track record of promoters, details of litigations, advertisement and prospectus issued about the project, details of apartments, plots and garages, registered agents and consultants, development plan, financial details of the promoters, status of approvals and projects etc. on their websites;

As on November 4 2016, all the Union Territories and a few states have duly notified and adopted the Rules. This is in wake of the fact that as per the provisions of the Act, Real Estate Regulatory Authorities are required to be put in place by April 30, 2017 before full Act is brought into effect from May 1 2017.

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