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INDIAN LEGAL IMPETUS

ADVANCE PRICING

CYBER CRIME

TAX

FOREWORD

Manoj K. Singh
Founding Partner

It is our immense pleasure to bring the December, 2014 edition of our monthly newsletter "Indian Legal Impetus". The ascription of our readers has provided us the opportunity to enlighten the legal network around the world. This newsletter is a window through which we try to provide a glimpse in to the latest legal diasporas to keep our readers informed around the world.

The cover article of the current edition titled ***'Effect of Arbitration Agreement vis a vis the Jurisdiction of Specialised Tribunals'*** deals with the jurisdictional issues arising in disputes amongst the parties where the parties agreed for ADR. We further enlighten our viewers with the Limitation period applicable to the proceedings for rectification of register of members before the Company Law Board with our Article titled ***'Limitation Period for applying for the Rectification of Register of Members'*** as discussed under the precedents; specifically where the Companies Act is silent for the purpose. We have also endeavored to enlighten our viewers for the changes proposed in the Companies Bill 2014 to be brought in the Companies Act, 2013 and amendments proposed to the Legal Metrology Act.

In the present edition we cover the requirements, responsibilities in regard to the establishment and running of the branch office in India *through* ***'Establishment of Branch Office in India'***; changes brought in by the Companies Act, 2013 in **'Reporting in Financial Statement'** and a quick update on the Advance Pricing Agreement signed recently by the Central Board of Direct Taxes. Our Litigation team has supported this edition with the articles on ***'Garnishee Order'*** and a recent Judgment of Hon'ble Supreme Court of India in the matter of **Ajay Kumar Pal Vs. Union of India And Another** in the article titled ***'Death Sentence: Effect of Delay in Disposal of Mercy Petition'***

We have endeavored to cover the aspects of ***'Cyber War'*** and how it is handled under the local laws of the different countries and control over the internet in our article titled ***'Equivocation Balkanization of the Internet'***

At the end we enlighten our readers with the need of an ideal methodology for arriving at Fair Market Value in Oil & Gas Sector in our article titled ***"Importance of an ideal methodology in order to determine the Fair Market Value in Oil & Gas Sector"***

The ***Newsbytes*** section will provide the latest goings-on and recent developments in the legal world.

We hope this issue also helps us in further achieving our objective of making you understand the laws and recent legal developments in India. We welcome all suggestions and comments for our newsletter and hope that the valuable insights provided by our readers would make "Indian Legal Inputs" 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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Founder - Manoj K. Singh
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EFFECT OF ARBITRATION AGREEMENT VIS A VIS THE JURISDICTION OF SPECIALISED TRIBUNALS

Karan Gandhi

The question of jurisdiction of specialized tribunals over the disputes arising out of the agreement where the parties thereto have agreed for arbitration as their dispute resolution mechanism has been in much debate and interpreted by various courts on various occasions. To understand the arbitration and the intent of the legislature for such enactment, one can refer to the preamble of the Act. The preamble of the Arbitration Act, 1996 reads as follows:

"An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985:

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;"

Arbitration is an alternate dispute resolution mechanism incorporated to have a speedy and out of court fair and efficient settlement of disputes arising in international commercial relations where the parties to the transaction seek an amicable settlement of that dispute by recourse to conciliation.

The preamble itself suggests that Arbitration is a right in personam which binds two parties agreeing to opt for such mechanism for dispute resolution. According to Black's Law Dictionary, Arbitration is a method of dispute resolution involving one or more neutral third parties.

Alternatively, for certain disputes arising between the parties covered and governed by special enactments, there are special courts/tribunals constituted under such enactments where the parties can approach in case of disputes arisen between them. The examples of the same would be Debt Recovery Tribunal constituted under the provisions of The Recovery of Debts Due to banks and Financial institutions Act, 1993, Central Administrative Tribunal and State Administrative Tribunals constituted under the Administrative Tribunals Act, 1985 to deal with the Service matters of the civil servants and employees of public bodies/ authorities, Armed Forces Tribunal constituted under the Armed Forces Tribunal Act, 2007 to decide the disputes of defence personnel etc. It would be pertinent to mention here that such enactments generally have the exclusion jurisdiction set out with a notwithstanding clause mentioned in such acts. Such enactments set out the exclusivity of the disputes governed by such acts to be dela6 with the specialized forums constituted to decide on such disputes.

In the present article we deal with the arbitrability of disputes arisen amongst the banks and the borrowers in the light of the Judgments of the Full Bench of the Hon'ble Delhi High Court in HDFC Bank v. Satpal Singh Bakshi, as to whether the remedy of arbitration stands excluded in cases where specific tribunals are set up to decide the disputes between the same parties, more particularly in view of the exclusion of jurisdiction clauses set out in such acts. Or in other words; which of

the two enactments, i.e. Arbitration Act and The Recovery of Debts Due to Banks and Financial Institutions Act (hereinafter referred to as the 'Debt Recovery Act') is to prevail over the other.

The Full Bench of the Hon'ble Delhi High Court in HDFC Bank v. Satpal Singh Bakshi while inter alia deciding the issue stated above set out a distinction between what is arbitrable and what is not arbitrable in the light of Right in rem and right in personam. Right in rem means a right, often negative, exercisable against the world at large[1]. Whereas, Right in personam; means an interest protected solely against specific individuals[2].

During the course of hearing of the said Judgment, the counsel representing bank inter alia referred to a judgment of Division Bench of Hon'ble Delhi High Court in Kohinoor Creations and Ors. Vs. Syndicate Bank 2005 (2) ARBLR 324 Delhi; wherein it has been inter alia held that in view of the provisions of section 34 of the Debt Recovery Act, the provisions of the Arbitration Act stand excluded. In coming to this conclusion, specific emphasis was laid on sub-section (2) of Section 34 of the RDB Act. Section 34 of the RDB Act reads as under:-

"34. Act to have over-riding effect-

(1) Save as otherwise provided in sub-section(2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made there under shall be in addition to, and not in derogation of the Industrial Finance Corporation Act, 1948, the State Financial Corporation Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank of India Ltd., 1984, the Sick Industrial Companies (Special Provisions) Act, 1985 and the Small Industries Development Bank of India Act, 1989."

The counsel representing bank further contended that Section 17 of the Recovery of Debts Due to banks and Financial institutions Act, 1993 (**the Act**) makes it clear that the Debt Recovery Tribunal (DRT) alone is to decide the applications of the Banks and Financial Institutions for recovery of debts due to them. Also, Section 18 of the Act clearly bars the jurisdiction of any other court, except High Court and Supreme Court, from entertaining matters specified in Section 17. Furthermore, Section 31 of the Act transfers all such cases pending before any Court to the DRT. It is therefore evident from the scheme of the RDB that an exclusive jurisdiction has been given to the DRT. He argued that the law on this point has already been conclusively settled by the Supreme Court in the matter of Allahabad Bank v. Canara Bank, (2000) 4 SCC 406, where the issue was with regard to jurisdiction of DRT and Recovery Officers under the DRT Act vis-a- vis Company Court (when a winding up petition is pending, or a winding up order has been passed). It was held that the adjudication of liability and execution of the certificate in respect of debt payable to banks and financial institutions is within the exclusive jurisdiction of the DRT and the concerned Recovery Officer, and in such a case the jurisdiction of the Company Court under Section 442, 537 and 446 of the Companies Act, 1956 stands ousted. He stated that on the other hand, the Arbitration Act is a substitute for a civil Court within the meaning of Section 9 to adjudicate civil disputes, subject to the additional limitation where it is a right in rem, which is to be adjudicated. Taking sustenance from the judgment of Supreme Court in the matter of Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors., (2011) 5 SCC 532, he pointed out that the Supreme Court while dealing with the issue of "arbitrability" of dispute held that Arbitral Tribunals are "private for a" chosen by the parties in place of Courts or Tribunals which are "public for a" constituted under the laws of the country. All disputes relating to "right in personam" are considered to be amenable to arbitration and all disputes relating to "right in rem" are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. He attempted to apply the ratio of the aforesaid judgment to the given case arguing that when the legislature has expressly made a particular kind of dispute to be decided by a public forum, then the same has been by implication excluded from the purview of arbitrability and therefore cannot be decided by a private forum like arbitration

The Counsel representing the Bank also tried to draw support from Section 34 of the Act which provides a non-obstante clause. Section 34(2) stipulates that the Act is "in addition to and not in derogation" to any law or force. On the contrary, the Arbitration Act does not

1. *Black's Law Dictionary*
2. *Black's Law Dictionary*

have any non- obstante clause except a limited extent insofar as judicial intervention is concerned as provided in Section 5 of the Arbitration Act. He thus submitted that where there are two Acts, the one having a non-obstante clause will prevail over the other and for this reason also, the Act should prevail over Arbitration Act. He also submitted that a finer reading of the provisions of the Act, particularly Section 34 thereof, would reveal that application of Arbitration Act had been expressly as well as impliedly excluded. He also submitted that even if the Arbitration Act is a latter Act, the concept of arbitration was well known to Parliament right from Arbitration Act, 1891 through to the Arbitration Act, 1940. Apart from Section 34, even Section 18 of the Act ousts jurisdiction of all other courts in relation to matters specified in Section 17. Since arbitration is an alternative to the jurisdiction of civil courts and its jurisdiction would be confined and in alternative to cases where civil courts have jurisdiction, therefore, when the jurisdiction of civil courts are ousted, it would impliedly oust the jurisdiction of the arbitral tribunal also. It is Section 18 which is somewhat in pari materia with Section 5 of the Arbitration Act. The Ld. Counsel concluded his submissions by referring to the judgment of the Supreme Court in Nahar Industrial Enterprise Ltd. v. Hong Kong and Shanghai Banking Corporation, (2009) 8 SCC 646 and submitted that the issue at hand stands settled by the aforesaid judgment. In that case, the issue was whether the High Court or Supreme Court has the power to transfer a suit pending in a Civil Court to DRT. The Court enunciated the law as under:

"117. The Act, although, was enacted for a specific purpose but having regard to the exclusion of jurisdiction expressly provided for in Sections 17 and 18 of the Act, it is difficult to hold that a civil court's jurisdiction is completely ousted. Indisputably the banks and the financial institutions for the purpose of enforcement of their claim for a sum below Rs. 10 lakhs would have to file civil suits before the civil courts. It is only for the claims of the banks and the financial institutions above the aforementioned sum that they have to approach the Debt Recovery Tribunal. It is also without any cavil that the banks and the financial institutions, keeping in view the provisions of Sections 17 and 18 of the Act, are necessarily required to file their claim petitions before the Tribunal. The converse is not true. Debtors can file their claims of set off or counter-claims only when a claim application is filed and not otherwise. Even in a given situation the banks and/or the financial institutions can ask the Tribunal to pass an appropriate order for getting the claims of set-off or the counter claims, determined by a civil court. The Tribunal is not a high powered tribunal. It is a one man Tribunal. Unlike some Special Acts, as for example Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 it does not contain a deeming provision that the Tribunal would be deemed to be a civil court."

Upon submission of the counsel of the bank the Full bench of the Hon'ble Delkhi High Court observed as under:

There is no doubt that those matters which are covered by the Act and are to be adjudicated upon by the Debt Recovery Tribunal/ Debt Recovery Appellate Tribunal, jurisdiction of civil courts is barred. Up to this point, we are in agreement with the learned counsel. However, the answer to the question posed before us does not depend upon the aforesaid principle. That principle only ousts the jurisdiction of civil courts. Focus of the issue, however, has to be somewhat different viz. even when a special Tribunal is created to decide the claims of banks and financial institutions of amounts more than `10 Lakhs, can the parties by mutual agreement still agree that instead of the Tribunal constituted under the Act, these disputes shall be decided by the Arbitral Tribunal. If answer to this question is in the negative, then those submissions made by the counsels shall prevail. On the other hand, if we find that it is permissible for the parties, by agreement, to agree for domestic forum of their own choice, namely, Arbitral Tribunal under the Arbitration Act to deal with such claims, then the edifice of the apparent forceful submissions of the Ld. Counsel would collapse like house of cards as all those submissions would be relegated to the pale of insignificance.

No doubt, for determination of disputes the State provides the mechanism in the form of judicial fora, i.e. administration of justice through the means of judicial system established in this country as per the Constitution and the laws. However, it is also recognized that that is not the only means for determination of suit or resolution of conflicts between the parties. Still the parties are given freedom to choose a forum, alternate to and in place of the regular courts or judicial system for the decision of their inter se disputes. There has been a recognition of the concept that notwithstanding the judicial system, parties are free to chose their own forum in the form of arbitration. This was first recognized by enacting Arbitration Act, 1891.

Introduction of Section 89 in the Code of Civil Procedure by amendment to the said Code in the year 2002 takes this concept further by introducing various other forums, known as Alternate Dispute Resolution. Thus, even when the matter is pending in the Court, parties to the dispute are given freedom to resort to Lok Adalat, conciliation, mediation and also the arbitration.

All civil societies demand a proper, effective and independent judicial system to resolve the disputes that may arise. Resolution of disputes by Municipal Courts is, therefore, prevalent in all countries and independence of judiciary is endeavoured in democratic set ups. While courts are State machinery discharging sovereign function of judicial decision making, various alternate methods for resolving the disputes have also been evolved over a period of time. One of the oldest among these is the arbitration. This is a forum for dispute resolution in place of municipal court. Important feature of arbitration is that parties to the dispute voluntarily agree to get the disputes decided by one or more persons, rather than the Court. Though the Indian Arbitration and Conciliation Act, 1996 does not contain a definition of "arbitration", Statement of Objects and Reasons contained therein gives an indication of the general principles on which arbitration is founded. These are:

- The object of arbitration is to ensure a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.
- The parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest.
- Intervention of the courts should be restricted.

Thus, the Courts have not been the only forum for conflict resolutions. As already pointed about above, arbitration in the form of statute was given recognition in the year 1899 though even earlier to that, arbitration in some or other form prevailed in this country. What is important is that arbitration as an alternate to resolution by municipal courts is recognized and in the process, sanctity is attached to the domestic forum which is chosen by the parties themselves. In that sense, party autonomy is recognized as paramount. It is a recognition of the fact that the parties are given freedom to agree how their disputes are resolved. Even the intervention by the Courts is restricted and is minimal.

11. What follows from the above? When arbitration as alternate to the civil courts is recognized, which is the common case of the parties before us, creation of Debt Recovery Tribunal under the RDB Act as a forum for deciding claims of banks and financial institutions would make any difference? We are of the firm view that answer has to be in the negative. What is so special under the RDB Act? It is nothing but creating a tribunal to decide certain specific types of cases which were earlier decided by the civil courts and is popularly known as „tribunalization of justice . It is a matter of record that there are so many such tribunals created. Service matters of the civil servants and employees of public bodies/authorities which were hitherto dealt with by the civil courts and the High Court are now given to the Central Administrative Tribunal and State Administrative Tribunals with the enactment of Administrative Tribunals Act, 1985. Disputes of defence personnel are now dealt with by special tribunals called Armed Forces Tribunal constituted under the Armed Forces Tribunal Act, 2007. With the creation of all these special tribunals, the matters which were up to now dealt with by civil courts or High Courts are to be taken up by these tribunals in the first instance. (We would like to point out that in so far as High Court is concerned, constitutional remedy provided under Article 226 of the Constitution of India remains intact as held in L. Chandrakumar v. Union of India, (1994) 5 SCC 539. However, it is not necessary to dilate on this issue as that does not have any bearing on the present issue).

With the creation of these alternate fora with all trappings of the Court and with the decision of the disputes which were hitherto dealt with by the civil courts, can it be said that parties are now totally precluded and prohibited of exercising their choice of domestic forum in the form of arbitral tribunal. Before we answer this question, we would like to refer to the judgment in the case of Booz Allen and Hamilton Inc. (supra). The Supreme Court in that case dealt with the issue of "arbitrability of disputes" and held that all disputes relating to „right in personam are considered to be amenable to arbitration and disputes relating to „right in rem are those disputes which are not arbitrable and require to be adjudicated by courts and public tribunals, being unsuited for private arbitration. Law in this respect is explained by the Supreme Court with utmost clarity, precision and erudition in the following terms:

The nature and scope of issues arising for consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of 'arbitrability' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon Sub-Section 2(b)(i) of that section.

But where the issue of 'arbitrability' arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

The term 'arbitrability' has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under:

- whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts).
- Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement.
- Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.

Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

The well recognized examples of non-arbitrable disputes are: (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) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right

exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary).

Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable."

What is discernible from the above is that all disputes relating to "right in personam" are arbitrable and choice is given to the parties to choose this alternate forum. On the other hand, those relating to "right in rem" having inherent public interest are not arbitrable and the parties choice to choose forum of arbitration is ousted. Examined in this line, it is obvious that a claim of money by the bank or financial institution against the borrower cannot be treated as "right in rem". Each claim involves adjudication whether, on the facts of that case, money is payable by the borrower to the bank/financial institution and if so to what extent. Each case is the decision on the facts of that case with no general ramifications. A judgment/decision of the Debt Recovery Tribunal deciding a particular claim can never be "right in rem" and is a "right in personam" as it decides the individual case/claim before it with no elements of any public interest.

Merely because there were huge NPAs and lot of monies belonging to the banks and financial institutions was stuck up and the legislature in its wisdom decided to create a special forum to have expeditious disposal of these cases would not mean that decisions rendered by Debt Recovery Tribunal come in the realm of„right in rem . At the same time, we find from the judgment in Booz Allen and Hamilton Inc. (supra) that certain kinds of disputes for which tribunals are created are held to be non- arbitrable. Examples are Rent Control Tribunal under the Rent Control Act and Labour Court/Industrial Tribunal under the Industrial Disputes Act, 1947. Obviously, question that would immediately strike is as to what would be the yardstick to determine some kind of disputes to be decided by the tribunals are non-arbitrable whereas some other disputes become arbitrable. According to us, cases where a particular enactment creates special rights and obligations and gives special powers to the tribunals which are not with the civil courts, those disputes would be non-arbitrable.

It is a matter of common knowledge that Rent Control Act grants statutory protection to the tenants. Wherever provisions of Rent Control Act are applicable, it overrides the contract entered into between the parties. It is the rights created under the Act which prevail and those rights are not enforceable through civil courts but only through the tribunals which is given special jurisdiction not available with the civil courts. Likewise, Industrial Disputes Act, 1947 creates special rights in favour of the workman or employers and gives special powers to the industrial adjudicators/ tribunals to even create rights which powers are not available to civil courts. Obviously such disputes cannot be decided by means of arbitral tribunals which are substitute of civil courts. On the other hand, in so far as tribunal like Debt Recovery Tribunal is concerned, it is simply a replacement of civil court. There are no special rights created in favour of the banks or financial institutions. There are no special powers given to the Debt Recovery Tribunal except that the procedure for deciding the disputes is little different from that of CPC applicable to civil courts. Otherwise, the Debt Recovery Tribunal is supposed to apply the same law as applied by the civil courts in deciding the dispute coming before it and is enforcing contractual rights of the Banks. It is, therefore, only a shift of forum from civil court to the tribunal for speedy disposal. Therefore, applying the principle contained in Booz Allen and Hamilton Inc. (supra), we are of the view that the matters which come within the scope and jurisdiction of Debt Recovery Tribunal are arbitrable.

Once that conclusion is arrived at, obviously the parties are given a choice to chose their own private forum in the form of arbitration.

Another significant fact which has to be highlighted is that the bank entered into agreement with the respondent herein on its own standard form formats. The terms and conditions of the loan were set out and decided by the bank. The respondent signed on dotted lines. In this scenario, when it was the proposal of the bank to have an arbitration clause to which the respondent had agreed, bank cannot now be permitted to say that this arbitration clause is of no consequence. Accepting the contention of bank would mean that the arbitration clause is rendered nugatory. It defeats the very effect of the said arbitration clause which was foisted by the bank itself upon the respondent, though in law, it becomes mutually acceptable between the parties.

Matter can be looked into form another angle as well. Had the bank invoked the arbitration on the basis of aforesaid clause containing arbitration agreement between the parties and referred the matter to the arbitral tribunal, was it permissible for the respondent to take an objection to the maintainability of those arbitration proceedings? Answer would be an emphatic no. When we find that answer is in the negative, the Court cannot permit a situation where such an arbitration agreement becomes one sided agreement, namely, to be invoked by the bank alone at its discretion without giving any corresponding right to the respondent to have the benefit thereof.

CONCLUSION

In the light of the above it may be understood that the disputes whish are in the nature of right in presonam i.e. amongst the parties to the agreement wherein the terms are stipulated and binds those parties, the dispute resolution will be in accordance with the dispute resolution mechanism agreed into amongst the parties thereto. The difference between the right in rem and right in personam is to be understood while adjudicating the exclusivity of the forum to decide certain matters like in arbitration, if the tests specified above are clear, and its is ascertained that the dispute is arbitrable, the same shall be exclusively referred to the arbitral tribunal.

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LIMITATION PERIOD FOR APPLYING FOR THE RECTIFICATION IN THE REGISTER OF MEMBERS

Karan Gandhi & Shivangi Misra[1]

INTRODUCTION

Earlier section 111 & 111A of the Companies Act, 1956 dealt with the provisions of rectification of register of members. Such provisions provided a right to the company, members and a transferee to get themselves registered with the company or to rectify a mistake committed by the Company in entering the name of a person in the register of members of the company and in case there is a refusal on the part of the company to register the legitimate transfer of shares, such person whose bonafide transfer is refused to be registered had a right to apply to the Company Law Board to get the register of members rectified.

In the present article we are dealing with the provisions of Section 111 (2) and 111 (4) in the light of the provisions of the Limitation Act, 1963.

Section 111 : Power to refuse the registration and appeal against registration

Section 111 (1) provides that if a company refuses, whether in pursuance of any power of the company under its articles or otherwise, to register the transfer of, or the transmission by operation of law of the right to, any shares or interest of a member in, or debentures of the company, it shall, within two months from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the company, send notice of the refusal to the transferee and the transferor or to the person giving intimation of such transmission, as the case may be, giving reasons for such refusal.

Further Section 111 (2) of the Companies Act, 1956 provides the right to appeal in a case where the company refuses the bonafide & legitimate transfer to the transferor or transferee, or the person who gave intimation of the transmission by operation of law to the tribunal for the registration of the transfer. Section 111 (2) provides that the transferor or transferee, or the person who gave intimation of the transmission by operation of law, as the case may be, may appeal to the Tribunal (presently; Company Law Board) against any refusal of the company to register the transfer or transmission, or against any failure on its part within the period referred to in sub-section (1), either to register the transfer or transmission or to send notice of its refusal to register the same.

Section 111 (3) provides the limitation under which such person has a right to apply to the Tribunal in an appeal against the refusal or in a case where no communication for refusal is received from the company neither the company has registered the transfer thereby entering the name of the transferee in the register of members of the company. Section 111 (3) provides that such person whose application for registering the transfer has been refused by the company on account of the grounds specified in Sub-Section 1, such person shall file an appeal to the Tribunal as specified in Sub – Section 2, within 2 months of the receipt of the notice of such refusal or, where no notice has been sent by the company, within four months from the date on which the instrument of transfer, or the intimation of transmission, as the case may be, was delivered to the company.

It is pertinent to mention here that the provision as to the appeal reference to the Tribunal for the purposes where the company has refused the registration of the transfer application of a person is clear. The Companies Act, 1956 clearly provides the time period of 2 months and 4 months in the cases illustrated under Sub-Section 3.

Further, Section 111 (4) of the Companies Act, 1956 provides that :-

a. if the name of any person –

   i. is, without sufficient cause, entered in the register of members of a company, or

   ii. after having been entered in the register, is without sufficient cause omitted there from ; or

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b. default is made, or unnecessary delay takes place, in entering in the register the fact of any person having become or ceased to be, a member [including a refusal under sub-section (1), the person aggrieved, or any member of the company, or the company, may apply to the Tribunal for rectification of the register.

The above stated Sub-Section 4 of Section 111 of the Companies Act, 1956 provides a right to the company to apply to the Tribunal for the rectification of the register of members where the name of any person is without sufficient cause entered in the register of the members of the Company. Clearly, there is no limitation or time period specified under Section 111 or elsewhere in the Companies Act, 1956 which provides the limitation period in regard to the rights of the Company to apply to the Tribunal for rectification of the register of members. However, it is known to all that the provisions of the Companies Act, 1956 are now replaced by the Companies Act, 2013 and the major portion of the 2013 Act is operational. The replacement of Section 111 and 111A is Section 59 in the 2013 Act. Section 59 (1) of the 2013 Act provides as under:

59. (1) If the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register, is, without sufficient cause, omitted therefrom, or if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be a member, the person aggrieved, or any member of the company, or the company may appeal in such form as may be prescribed, to the Tribunal, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register.

Even Section 59 (1) of the 2013 Act is silent with respect to the Limitation Period to be applied. It is also seen that the provisions of this section are often intended to be abused by the Company and its management who wishes to oust the particular shareholders with their rightful ownership in the company by applying to the Tribunal for rectification under this Section by way of filing belated applications and interpreting the section in their own benefit.

In this light it is important to know whether the provisions of the Limitation Act, 1963 apply to the Application or Petition preferred by the Company u/s 59 (1) of the Companies Act, 2013 and/or Section 111 (4) of the Companies Act, 1956.

The preamble of the Limitation Act, 1963 provides that it is an Act to consolidate and amend the law for the limitation of suits and other proceedings and for purposes connected therewith.

It is worth noting here that according to the Section 10E (4D) *Every Bench*[2] *shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973, and every proceeding before the Bench shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860), and for the purpose of section 196 of that Code.*

Moreover, Article 137 (under Part II) of the Schedule to the Limitation Act, 1963 provides the limitation period of three years dealing with the "Any other application for which no period of limitation is provided elsewhere in this Division". According to the Kerala State Electricity Board v. T.P. Kumhaliumma - AIR 1977 SC 282 Judgment of the Hon'ble Supreme Court of India, it was held that article 137 of the Limitation Act, 1963 will apply to any petition for rectification of the share register, which prescribes a period of three years of the transfer of shares. The said decision of the Hon'ble Supreme Court has been used for reference to decide the belated applications filed by the Companies and/or its management who with mala fide wish to oust certain members resorting by filing the belated Applications/ Petitions u/s 111 (4) of the Companies Act, 1956. In the matter of **A. Devarajan Vs. N.S. Nemura Consultancy India Pvt. Ltd. and A. Panneerselvam** the Chennai bench of the Hon'ble Company Law Board observed that the in the light of the Kerela State Electricity Board Judgment (Supra) of the Hon'ble Apex Court, the period of limitation as mentioned under Article 137 of the Limitation Act, 1963 shall apply to the proceedings before the Company Law Board initiated u/s 111 (4).

CONCLUSION

In the light of the above, it can be said that the period of limitation is not provided anywhere in the Companies Act with respect to the applications/petitions filed u/s 111 (4) [now replaced with Section 59 (1)] of the

2. *Of the Company Law Board*

Companies Act, 2013 but the period of limitation for such applications/petitions shall be governed by the provisions of Article 137 of the Limitation Act, 1963. Hence the period of limitation for applying for the rectification for register of members by the company under the provisions of Section 59 (1) of the Companies Act, 2013 is three years.

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BRIEF SYNOPSIS ON COMPANIES AMNEDMENT BILL, 2014

Karan Gandhi & Mukesh Arora[1]

INTRODUCTION

2014 has been an exceptional year be it the elections, globalization and liberalization in the policies, new areas opening and widening of FDI sectors, significant governance related policies and perhaps a new approach to governance. To the corporate world, there have been a significant amount of changes to the applicable laws; specifically Companies Act, 2013, Delisting Regulations, Governance issues etc.

Companies Act 2013 is a complete enactment which introduced more transparency, governance, strict compliances, penalties etc. in the corporate India but in the interest of public and upon representations from various bodies, it was observed that there are some difficulties in enforcement of certain provisions. In order to overcome these difficulties, the Companies (Amendment) Bill, 2014 was passed in lower house of parliament on 17.12.2014.

The present article is to summarize the significant changes proposed to be introduced by the Companies (Amendment) Bill, 2014 passed in lower house on 17.12.2014.

In section 2 of the companies act, 2013

Amendment proposed in Section 2(68) and (71) of the Companies Act, 2013 : minimum paid up capital requirement of the Company to be removed in both private and public company.

Relaxation in having a common seal

In relation to the Section 9 of the Companies Act, 2013, Companies (Amendment) Bill, 2014 proposes to omit the words and a common seal which shall mean that it shall not be mandatory for a company to have a common seal.

Consequent change is proposed in the sections which are related to the common seal like Section 12 (3) (b) which provides that a company shall have its name engraved on the common seal is proposed top be substituted with a company shall have its name engraved on the common seal, **if any**.

Further U/s 22 (dealing with Execution of bills of exchange, etc) (2) (a), if any is proposed to be inserted after under its common seal and under subsection (b), the following proviso is proposed to be inserted:

'provided that in case a company does not have a common seal, the authorization under this sub-section shall be made by by two directors or by a director and company secretary, where company appointed a company secretary.'

U/s 46 dealing with the Certificate of Shares, the word under the common seal is proposed to be substituted with under the common seal, if any, of the company or signed by two directors or by a director and a company secretary, wherever the company has appointed a company secretary.

Dispensation of the requirement of induction of the subscribed capital by the subscribers for the commencement of business by a company

The modification proposed u/s 11 (1) (a) provides to omit the words 'and the paid up share capital of the company is not less than 5 lakh rupees in case of a public company and not less than 1 lakh rupees in case of a private company'.

which means that the minimum capital subscription for the private and public companies is proposed to be removed.

Section 76 of Companies Act, 2013 (Acceptance of deposit from public by certain Companies)

Amendment of section 76 by inserting section 76 A is proposed which provides severe punishment for violation of provision of Companies Act, 2013 in relation to acceptance of deposits from general public. This section is inserted in order to protect deposits/funds of innocent investors in the company. It provides the harsh fine and punishment to the company as well as the officer of the company who is in default. Further if

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it is proved that an officer of the company who intentionally contravenes the provision of the Act in order to deceive the company, shareholders, depositors, creditors or tax authorities; he would be liable to the prosecution under section 447.

Under Section 117 of Companies Act, 2013 (Resolution and agreements to be filed)

Amendment of section 117 by inserting provision after section 117 (3)(g) is proposed in order to restrict the inspection or obtaining of copies of resolution under section 399[2] generally name of directors, article of association and memorandum of company are generally available to public therefore some information by the companies are kept secret in order to compete in the market and such strategic decision taken by companies does not fall in the ambit of this section and same has been given affect by way of addition in this section.

Declaration of dividend and unpaid dividend account (Section 123)

Amendment of section by inserting provision after third proviso under section 123(1) is proposed to provide security to the company from the losses incurred in previous year and further to provide financial stability to the Companies.

Amendment of sub-section (6) of section 124 of the said Act states that any dividend is claimed or paid during the said period of seven consecutive years, the share shall not be transferred to education and protection fund.

Under Section 134 of the Companies Act, 2013 (Financial statement of board, reports etc.)

Section 134(3)(ca) inserted which provides that; details in respect of frauds reported by auditors under sub section (12) of section 143 other than those which are reportable to central government. In section 134 sub section (3) after clause (c) additional clause is inserted. Amendment to this particular section has increase the transparency and also burden the duty on auditors to report the fraud.

2. *Inspection, production and evidence of document kept by registrar(section 399 of Companies Act,2013*

Under Section 143 of Companies Act, 2013 (Powers and duties of Auditors and Auditing standards)

Amendment proposed under section 143 (12) shall increase the responsibility on auditor of the company. Amendment of this section has confined a duty upon auditor to inform matter of fraud to board of the company and board is under an obligation to provide same information through board report, it further increase the responsibility of the auditor as they are required to report to central government and public and cannot escape from liability by only disclosing matter in Auditor's report However, the amendment now seeks to restrict this reporting requirement to only material frauds, this would bring great relief to both corporate as well as auditors.

Under Section 177 of the Companies Act, 2013 (Audit Committee)

Amendment of this section proposes insertion of additional provision in section 177(4)(iv) for the purpose of removal of barrier for related party transaction by way of omnibus approval. If business is related to promoter group or related party, directly or indirectly cannot hinder free flow of business and if disclosure are made properly there shall be no interference in governance of business.

Under Section 185 of the companies act, 2013 (Loans to directors)

Amendment of the section proposes the insertion of additional provision after sub section(1) clause(b) which includes clause (c) and (d) and provides the exclusion to certain transaction including that between loan provided by a holding company to its Wholly Onwed Subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly onwed subsidiary company or any guarantee or security provided for any loan from a bank or financial institution by a holding Company for its subsidiary company.

Related party transaction

The proposed amendment to the provision of section 188 of Companies Act, 2013 to alter the approval of shareholders by way of special resolution to the approval of the shareholders accorded by way of ordinary resolution. The same shall result in the increased responsibility and accountability of the

board. the proposed amendment further provides that requirement of passing ordinary resolution under the first proviso (i.e. the contract and arrangement entered into by the companies prescribed under the Rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014) shall not be applicable for transactions entered into between a holding company and its wholly onwed subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

Proposed amendment of **section 212(6) of Companies Act, 2013** clarifies restriction on bail would apply only for offence relating to fraud under section 447 of Companies Act 2013.

Proposed amendment of **section 223(4) (a) of Companies act, 2013** provides that inspector report of the company shall be authenticated whether or not having seal of the company. Such report shall be admissible in any legal proceedings as evidence in relation to any matter contained in report.

Proposed amendment of **section 419(4) of Companies Act, 2013** provides the president shall, for disposal of any relating to rehabilitation, restructuring, revival of companies constitute one or more special benches consisting of three or more members, majority necessarily being of judicial members. Omission of word "winding up" of companies has put restriction on power of special benches, therefore as provided in 419(3) cases related to winding up of the company shall be heard by two members bench instead of three members bench. Amendment of this provision would help in deciding winding up cases promptly as small bench is required to deal with this particular matter.

Proposed amendment of **section 435(1) and section 436(1) (a) of Companies Act, 2013** will reduce the burden on special courts as special courts to try only offences carrying imprisonment of two years or more. Therefore additional provision is inserted in sub clause (1) of section 435 of Companies act, 2013 for the purpose to let magistrate try petty offences resulting in minor violation of Act.

CONCLUSION

Companies (Amendment) Bill, 2014 has brought significant changes and removed various practical difficulties in law in relation to common seal, strength of benches in case of winding up of the company, responsibility of audit committee and related party transaction. whereas, these changes has removed various errors, but has raised many issues in relation to limit on disclosure of information to government by chartered accountant, provision in relation to meeting of the companies etc.

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ESTABLISHMENT OF BRANCH OFFICE IN INDIA

Harsimran Singh

A Branch Office ("BO") is one of the models for a foreign company to enter India and understand the Indian market with a very strict control by the Reserve Bank of India (RBI), as it does allow the foreign companies to test and do business in India; subject to certain conditions.

Establishment of a BO of a foreign entity in India is regulated in terms of Section 6(6) of Foreign Exchange Management Act, 1999 ("FEMA") read with Notification No. FEMA 22/2000-RB dated May 3, 2000 as amended from time to time.

The Reserve Bank of India ("RBI") issued the Master Circular No.7/2014-15 on July 01, 2014 ("Master Circular")[1] thereby consolidating the existing instructions on the subject of "Establishment of Branch/ Liaison/Project Offices in India by Foreign Entities" at one place.

As per section 2(14) of the Companies Act 2013 ("2013 Act") a BO, in relation to a company, means any establishment described as such by the company. One would note that there is a slight deviation in the definition of BO from the one provided under the Companies Act 1956 ("1956 Act") wherein as per section 2(9) a BO in relation to a company was defined as (a) any establishment described as a branch by the company; or (b*) any establishment carrying on either the same or substantially the same activity as that carried on by the head office of the company;* or (c) any establishment engaged in any production, processing or manufacture, but does not include any establishment specified which has been declared by the Central Government not to be a branch office under section 8 of 1956 Act.

In the present article the procedure of registration of BO, nature of business, related regulations, reportings, permissible activities and the closure of BO have been discussed.

Application to RBI

The RBI may consider the application for setting up a BO in prescribed format [application in Form FNC with documents to be filed with Authorized Dealer Bank (AD Bank) for onward transmission to RBI] under two routes, i.e. automatic route or the approval route.[2]

There are certain criterions which are considered by the RBI while entertaining an application for registration of a BO, namely:

(i) Profit making track record of the foreign entity during the immediately preceding five financial years in the home country;

(ii) Net Worth[3] of the foreign entity of not less than USD 100,000 or its equivalent.

The prescribed documentation to be filed for registration of a BO will generally include the following:

1) Request letter detailing the facts of the company, proposed activities in India by the Branch Office. Any other information, which a company wishes to furnish, that would strengthen the application;

2) Duly filled Form FNC (in three copies);

3) Copy of the Certificate of Incorporation / Registration attested by the Notary Public in the country of registration [if the original certificate is in a language other than in English, the same may be translated into English and notarized as above and cross verified/attested by the Indian Embassy/ Consulate in the home country];

1. *http://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=9050*

2. *Automatic Route — Where principal business of the foreign entity falls under sectors where 100 per cent Foreign Direct Investment (FDI) is permissible under the automatic route.*

   Approval Route — Where principal business of the foreign entity falls under the sectors where 100 per cent FDI is not permissible under the automatic route. Applications from entities falling under this category and those from Non - Government Organizations / Non - Profit Organizations / Government Bodies / Departments are considered by the Reserve Bank in consultation with the Ministry of Finance, Government of India.

3. *Total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance Sheet or Account Statement certified by a Certified Public Accountant or any Registered Accounts Practitioner by whatever name.*

4) Memorandum of Association and Articles of Association [if the original certificate is in a language other than in English, the same may be translated into English and notarized as above and cross verified/attested by the Indian Embassy/ Consulate in the home country];

5) Audited Balance sheet of immediate 5 financial years;

6) Certificate issued by Chartered Accountant (CA) / Certified Public Accountant (CPA) summarizing the FY-wise Profit/Loss details of the preceding 5 years;

7) Name, Address, email ID and telephone number of the authorized person in Home Country;

8) Details of Bankers of the Organization the Country of Origin along with the bank account number;

9) Commitment from the Organization to the effect that it will be open to report / opinion sought from its banker by the Government of India / Reserve Bank of India;

10) Expected funding level for operations in India;

11) Details Relating to address of the proposed local office, number of persons likely to be employed, number of Foreigners among such employees and address of the head of the Local office, if decided;

12) Details of Activity carried out in Home Country by the applicant organization in brief about the product and services of company in Brief.

13) Banker's Report from the applicant's banker in the host country / country of registration showing the number of years the applicant has had banking relations with that bank;

14) CA certificate confirming the Net Worth (total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance);

15) Applicants who do not satisfy the eligibility criteria and are subsidiaries of other companies can submit a Letter of Comfort from their parent company as per Annex-2 (as provided in RBI's Master Circular dated July, 01, 2014), subject to the condition that the parent company satisfies the eligibility criteria as prescribed in the Master Circular of RBI;

16) Power of Attorney / Board Resolution authorizing the concerned person to sign the Form FNC (along with Passport copy to validate the signatures).

The AD Bank (through which an applicant liaison with the RBI) may seek further documentation, including the above mentioned documents, in order to fulfill its KYC requirement, namely:

1) Valid addresses proof of parent entity for registered address;

2) Photograph, photo ID and Address Proof of all authorized signatories, key individuals, such as two senior most directors, all partners, all office bearers in case of society / association of persons, all trustees, settlers, protectors, ultimate individual shareholders/beneficiaries holding 10% and above shares/interest etc. of the parent entity as applicable;

3) Individuals related to the account as authorized signatories /POA holders/directors are required to self attest all identity and residence address proofs and their photographs duly signed on the face of the photograph;

4) All entity documents to be duly certified by director/company secretary/trustee as applicable.

The above stated list of documents / information is not exhaustive and may differ depending upon the requirement from the AD Bank. It is to be noted that all foreign documents have to be notarized and self attested. Further, KYC review has to be completed for all the accounts maintained by the applicant organization.

The BOs established with the RBI's approval are allotted a Unique Identification Number (UIN). BOs are also required to obtain Permanent Account Number (PAN) from the Income Tax Authorities on setting up the offices in India.

Every BO after being registered with the RBI ought to get itself registered with the Ministry of Corporate Affairs (MCA), for it to be registered as an establishment

of a foreign company in India.The following documents[4] shall be filled with the Registrar of Companies (RoC):

(i) Form 44;
(ii) Charter, statutes or memorandum and articles of association or other Instrument constituting or defining the constitution of the company(In the manner provided under Rule 16, 17 of the Companies (Central Government's) General Rules and Forms, 1956);
(iii) Director(s) details – individuals;
(iv) Director(s) details - bodies corporate;
(v) Reserve bank of India approval letter;
(vi) Secretary(s) details;
(vii) Power of attorney or board resolution in favor of the authorized representative(s).

Once registered with the MCA, a Corporate Identity Number (CIN) is allotted to the BO by the RoC.

Other business licenses which are applicable and are required to be obtained by a BO include:

(i) Permanent account number (PAN);
(ii) Tax deduction number (TAN);
(iii) Shop & Establishment Registration;
(iv) Service Tax Registration (if the BO provides any services in India);
(v) VAT & CST Registration (if the Branch carries out trading activities in India).

A BO is permitted to acquire immovable property by way of purchase for its own use and to carry out permitted/incidental activities.[5] BOs have general permission to carry out permitted / incidental activities from lease property subject to lease period not exceeding five years.

Permissible Activities

A BO should be engaged in the activity(ies) in which the parent company is engaged. The *Permissible Activities* of a BO of companies incorporated outside India and engaged in manufacturing or trading activities, include:

(i) Export / Import of goods (procurement of goods for export and sale of goods after import are allowed only on wholesale basis);

(ii) Rendering professional or consultancy services;

(iii) Carrying out research work, in areas in which the parent company is engaged;

(iv) Promoting technical or financial collaborations between Indian companies and parent or overseas group company;

(v) Representing the parent company in India and acting as buying / selling agent in India;

(vi) Rendering services in information technology and development of software in India;

(vii) Rendering technical support to the products supplied by parent/group companies; and

(viii)Foreign airline / shipping company.

Retail trading activities of any nature is not allowed for a BO in India. Further, a BO is not allowed to carry out manufacturing or processing activities in India, directly or indirectly. An entity may file a request for undertaking activities in addition to what has been permitted initially by the RBI. Such a request may be submitted through the designated AD Category -I bank to the Chief General Manager-in-Charge, Reserve Bank of India, Foreign Exchange Department, Foreign Investment Division, Central Office, Mumbai, justifying the need with comments of the designated AD Category - I bank.

Notably, profits earned by a BO are freely remittable from India, subject to payment of applicable taxes, on production of the following documents to the satisfaction of the AD Bank through whom the remittance is made and the following is required for the same:

(i) A certified copy of the audited Balance Sheet and Profit and Loss account for the relevant year;

(ii) CA's certificate certifying:

(a) the manner of arriving at the remittable profit,

4. If the above documents are not in English then the translated version of the documents.

5. Except in cases of foreign entities from Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran, Bhutan or China which are not allowed to acquire immovable property in India for a BO without prior RBI approval.

(b) That the entire remittable profit has been earned by undertaking the permitted activities,

(c) That the profit does not include any profit on revaluation of the assets of the branch.

A BO is permitted (with the AD Bank) to open non-interest bearing INR current accounts in India. AD Bank may allow term deposit account for a period not exceeding 6 months in favor of a BO, provided the AD Bank is satisfied that the term deposit is out of temporary surplus funds and the BO furnishes an undertaking that the maturity proceeds of the term deposit will be utilized for its business in India within three months of maturity.[6]

The RBI has also given general permission to foreign companies for establishing BO in Special Economic Zones (SEZs) for undertaking manufacturing and service activities, subject to the following conditions:

(i) such units are functioning in those sectors where 100 per cent FDI is permitted;

(ii) such units comply with part XI of the Companies Act,1956 (Section 592 to 602) which relates to companies incorporated outside India;

(iii) such units function on a stand-alone basis.

Reporting

A BO is required to submit a report containing information, as per format provided in *Annexure* 3 to the Master Circular within five working days of the BO becoming functional (and then on an annual basis) to the Director General of Police (DGP) of the state concerned in which BO has established its office. In case a foreign entity has more than one office, them the report has to be filed with each of the DGP concerned of the state where it has established an office in India.

A BO is also required to file Annual Activity Certificates (AAC), as prescribed in Annexure 4 to Master Circular from CA, at the end of March 31, along with the audited Balance Sheet on or before September 30 of that year. In case the annual accounts of the BO are finalized with reference to a date other than March 31, the AAC along with the audited Balance Sheet may be submitted within six months from the due date of the Balance Sheet to the designated AD Bank, and a copy to the Directorate General of Income Tax (International Taxation), New Delhi along with the audited financial statements including receipt and payment account.

The designated AD Bank scrutinizes the AAC in order to ensure that the activities undertaken by the BO are being carried out in accordance with the terms and conditions of the approval given by the RBI. In the event of any adverse findings being reported by the Auditor or noticed by the designated AD Bank, the same are reported by the designated AD Bank to the Central Office of the RBI, along with the copy of the AAC and their comments thereon.

Transfer of Assets

The AD Banks have been delegated that power relating to transfer of assets of a BO. However, such power is subject to compliance of certain conditions, namely:

(i) Transfer of assets to be allowed by AD banks only when the foreign entity intends to close their BO operations in India.

(ii) Adherence to the operational guidelines by the BO (stipulated in *AP DIR Circular No.23 & 24 of December 30, 2009)* such as (a) has submitted AACs (up to the current financial year) at regular annual intervals with copies endorsed to DGIT (International Taxation) and (b) has obtained PAN from IT Authorities and have got registered with Registrar of Companies under Companies Act 1956, if necessary.

(iii) Submission of certificate from the Statutory Auditor furnishing details of assets to be transferred indicating their date of acquisition, original price, depreciation till date, present book value or written-down value and sale consideration (which should not be more than the book value in each case) to be obtained. The Certificate should also include a confirmation by the Statutory Auditor that the assets were not re-valued after their initial acquisition.

6. Term deposit facility may not be extended to shipping/ airline companies.

(iv) Acquisition of the asset by the BO should be from inward remittances and no intangible assets such as good will, pre-operative expenses should be included. No revenue expenses such as lease hold improvements incurred by a BO can be capitalized and transferred to joint venture/wholly owned subsidiary. AD Bank are required to ensure that the payment of all applicable taxes while permitting transfer of assets.

(v) Credits to the bank accounts of BO on account of such transfer of assets will be treated as permissible credits.

Closure of BO

A foreign entity has to approach the AD Bank for its request regarding closure of its BO. Such request has to be supported by the following documents:

(i) Copy of the RBI's permission / approval from the sectoral regulator(s) for establishing the BO;

(ii) Auditor's certificate

(a) indicating the manner in which the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets;
(b) confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc., of the Office have been either fully met or adequately provided for; and
(c) confirming that no income accruing from sources outside India (including proceeds of exports) has remained un-repatriated to India.

(iii) No-objection / Tax Clearance Certificate from Income-Tax authority for the remittance/s;

(iv) Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending and there is no legal impediment to the remittance;

(v) A report from the RoC regarding compliance with the provisions of the Companies Act, 1956, in case of winding up of the Office in India;

(vi) Any other document/s, specified by the RBI while granting approval.

The AD Bank has to ensure that the BO had filed their respective AACs with the RBI for the previous years, in respect of the existing BO. Closure of such BO has to be reported by the AD Bank to the RBI (the Regional Office concerned for LOs and Central Office for BOs), along with a declaration stating that all the necessary documents submitted by the BO have been scrutinized and found to be in order. If the documents are not found in order or cases are not covered under delegated powers, the AD Bank may forward the application to the RBI, with its observations, for necessary action. All the documents relating to the BO operations may be retained by the AD Bank for verification by the internal auditors of the AD Bank and/or inspecting officers of the RBI.

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AN OVERVIEW ON THE PROPOSED AMENDMENTS TO THE LEGAL METROLOGY ACT, 2009

Rajdutt S. Singh

As per the last report on India's Foreign Trade prepared by Department of Commerce, Government of India in December 2014, it reflects that imports during November, 2014 were valued at US $ 42821.63 million (Rs.264227.44 Crore) representing a growth of 26.79 per cent in Dollar terms and a growth of 24.91 per cent in Rupee terms over the level of imports valued at US $ 33772.92 million (Rs. 211529.90 Crore) in November, 2013.[1]

Further, as per the Ministry of External affairs, Government of India, the Consumer spending in the country is expected to increase about 2.5 times by 2025. It is further expected that the consumer durables market will expand at a compound annual growth rate (CAGR) of 14.8 per cent to US$ 12.5 billion in FY 2015 from US$ 7.3 billion in FY 2012.[2]

Presently, the Legal Metrology Act, 2009 ("Act") and the Rules mentioned therein are the regulatory regimes which regulate trade and commerce in weights, measures, packaging, etc. and other goods which are sold or distributed by weight, measure or number and for matter connected therewith or incidental thereto.

In August, 2014, the Ministry of the Consumer Affairs issued a draft which discusses the proposed amendments to the Act[3] and the Legal Metrology (Packaged Commodities) Rules ("Rules").[4]

The significant amendments that have been proposed to amend the Act and Rules made therein are as under:

Definition of Pre-package Commodity

The definition of the term "Prepackage commodity" which is defined under Section 3(l) in the Act presently includes a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity.

The definition is proposed to be changed to read as "Prepackage commodity mean a product for presentation as such to a consumer, consisting of a product and its packing material, made up before being offered for sale and in which the quantity of the product has a predetermined value, whether the packing material encloses the product completely or only partially, but in any case in such a way that the actual quantity of product cannot be altered without the packing material either being opened or undergoing a perceptible modification".

Hence, it is noted that the proposed amendment is suggested to the existing definition in order to prevent any form of inappropriate alteration to packed commodity by any of the individuals who is involved in the chain of the transaction of manufacture-sell of a commodity.

Industrial consumer

In order to exempt items not meant for retail sale, the term "Industrial consumer" which means
the consumer who buys packaged commodities directly from the manufacturer for use by that
industry has been proposed to include purchase not only from manufacturer but also from importers and wholesale dealers as well. Further, the provision shall clearly mention that such purchase is not meant for further retail sale.

Declarations on pre-packaged commodities

Section 18 of the Act lays down that no person shall manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packaged commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed. Rule 6 of the Legal Metrology (Packaged Commodities) Rules, 2011("Rules") explicitly prescribes the mandatory declarations to be specified in all

1. *http://commerce.nic.in/tradestats/filedisplay.aspx?id=1*
2. *http://indiainbusiness.nic.in/newdesign/index.php?param=economy_landing/415/1*
3. *http://consumeraffairs.nic.in/consumer/writereaddata/AmendmentLM.pdf*
4. *http://consumeraffairs.nic.in/consumer/writereaddata/AmendmentPCR.pdf*

packaged commodities meant for sale, offer for sale distribution, etc.
It is proposed to include sub clause 3 of Section 18 which states that "the Central Government, may provide for different declarations for different type of pre-packaged commodities as required".

Further, the proviso to Rule 9 (3) of the Rules i.e. *"Provided that no such declarations on the inner package is required if the inner package does not contain any declaration on its outer cover"* is proposed to delete in order to give more clarity to the Rule.

Penalties for selling, etc. of non standard packages:

Section 36 (1) of the Act states that "whoever manufactures, packs, imports, sells, distributes, delivers or otherwise transfers, offers, exposes or possesses for sale, or causes to be sold, distributed, delivered or otherwise transferred, offered, exposed for sale any pre-packaged commodity which does not conform to the declarations on the package as provided in this Act, shall be punished with fine which may extend to twenty-five thousand rupees, for the second offence, with fine which may extend to fifty thousand rupees and for the subsequent offence, with fine which shall not be less than fifty thousand rupees but which may extend to one lakh rupees or with imprisonment for a term which may extend to one year or with both."

The last limb (underlined) of the above provision is proposed to amend to read as "with fine which shall not be less than fifty thousand rupees but which may extend upto five lakh rupees" in order to make the it a civil offence.

However, the proposed amendment includes two new Sections i.e. section 36A which states that whosoever fails to comply with the provision of Sub-Section (2) of Section 18 of the Act shall be punished with fine which may extend to ten thousand rupees and for subsequent offence with fine up to fifty thousand rupees. Further Section 36 B states that whoever, sells, distributes, delivers or otherwise transfers any pre-packaged commodity more than the retail sale price shall be punished with fine which shall not be less than five thousand rupees but which may extend to twenty thousand rupees and, for the second or subsequent with fine not less than twenty thousand which may extend to one lakh and for subsequent offence, with imprisonment for a term which may extend to one year and also with fine.

CONCLUSION:

It is observed that since introduction of the Legal Metrology (Packaged Commodities) Rules, 2009, various clarifications have been sought by the manufacturers, importers, wholesalers, retailers etc. from the Legal Metrology authorities from time to time. Undoubtedly, the above proposed amendments would bring more clarity on the provisions of the Act and Rules made therein.

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REPORTING OF THE FINANCIAL STATEMENT

Gopal Bageria & Priya Dhankhar1

INTRODUCTION

The Companies Act 2013 (hereinafter referred to as "2013 Act"), was notified in the official gazette on the 30.08.2013. The 2013 Act passed by the Parliament has received the assent of the President of India on 29th August, 2013. The 2013 Act has been passed to consolidate and amend the law relating to the Companies. Pursuant to this about 60 years old Companies Act 1956 has been replaced with the 2013 Act.

The 2013 Act has been divided into 29 chapters against the 1956 Act which was divided into XIII Parts and various Chapters. For the purpose of this article provision of Chapter IX of the 2013 Act and its corresponding provision in the 1956 Act are relevant. In the present article we have tried to briefly deal with the provisions of Part VI of the Companies Act, 1956 dealing with the accounts of the company and the development thereto under the newly passed 2013 Act and the rules appended thereto.

CHAPTER IX OF THE COMPANIES ACT: ACCOUNTS OF THE COMPANY

Reporting and benefit of the stakeholders has always been an integral part of the provisions of the Companies Act. The Companies Act 2013 also provides for reporting the stakeholders so as to conceive the overall view of the affairs of the company undertaken around the year in the company as well as any of its other offices, including the branch office. It is through such reporting the Company provides information to the stakeholders about the financial position, performance and changes in financial position of an enterprise which is useful to a wide range of users in making economic decisions.

The provisions contained in Section 209 to 220 of the Companies Act 1956 (hereinafter referred to as "1956 Act") were required to be followed for the preparation, laying down, approval and adoption of the Balance Sheet, Profit and Loss Account etc of the company. Since, the 1956 Act has been replaced by the 2013 Act, the relevant provisions, interalia, for the reporting of the accounts of the companies are contained in Section 128 to 137 of 2013 Act along with the Companies (Audit and Auditors) Rules, 2014 which are also required to be complied with.

This article focuses on the financial reporting requirements of the company and for the said purpose the relevant provisions of Section 129 is required to be followed. The said section deals with the reporting through financial statement which was earlier not defined under the provisions of the 1956 Act. However, according to the Section 2 (40) of the 2013 Act, a financial statement means

(i) a balance sheet as at the end of the financial year;
(ii) a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;
(iii) cash flow statement for the financial year;
(iv) a statement of changes in equity, if applicable; and
(v) any explanatory note annexed to, or forming part of, any document referred to in sub-clause (i) to sub-clause (iv)"

The 1956 Act did not use the term financial statement for reporting to the stakeholders rather it used the term Balance Sheet, Profit and Loss Account etc as against the 2013 Act which defines the term "financial statement.

Further, any reference to financial statement shall include any notes annexed to or forming part of such financial statement giving information required to be given and allowed to be given in the form of such notes under this Act as provided in the explanation of Section 129.

Furthermore, Section 129 (3) of the 2013 act requires the company to prepare a consolidated financial statement of all its subsidiaries and lay it before the Annual General Meeting and file with the Registrar copies of the same. In addition to it, the companies shall also attach salient features of the financial statements of all its subsidiaries.

The explanation to this sub-section also clarifies that for the intents and purposes of this sub-section the

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word “subsidiary” shall include joint ventures and associate companies.

All these reporting requirements have not only increased the cost to the company but also duplicated the matters to be reported to the stakeholders.

Rule 6 of the Companies (Audit and Auditors) Rules, 2014 provides that the consolidation of financial statements are applicable to those companies which are required to consolidate its accounts as per the Accounting Standards.

Section 129(1) requires the Financial Statements to be complying with the accounting standards and be prepared as per the format prescribed in the Schedule III as against Schedule VI of the 1956 Act. Further, deviations from the accounting standards must also be disclosed with reasons for such deviation and its impact on profit in the financial statements, as prescribed in S. 129(5).

The 2013 Act has widen the reporting requirements by mandating Companies to lay before the Annual General Meeting and file with the Registrar copies of, inter alia, Cash flow statements, as well. The 1956 act did not provide for mandatory filing of Cash Flow statement and statement of change in equity.

In case of any violation in the compliance of the provisions of this section the Managing Director, Whole time Director in charge of Finance, CFO or any other officer charged with the duty and in the absence of any of the officers mentioned above, all directors shall be punishable with imprisonment for a term up to 1 year or with fine ranging from Rs. 50,000 to Rs. 5,00,000 or with both as stated under section 129(7). Although the 1956 Act also provided for the penalty, the Companies did not abide to the same due to the meager penalty provided. The 1956 act provided for the penalty of Rs 10,000 or with imprisonment of upto 6 months or both.

CONCLUSION

Undoubtedly the immediate compliance of the provisions of Section 129 only would have been burdensome upon the corporate. In this light, Ministry of Corporate Affairs vide its Circular no 8/2014 dated 04.04.2014, has allowed the companies to follow the provision of 1956 act for the preparation, laying down and adoption of the Balance Sheet, Profit and Loss Account etc to be prepared for the financial year ending 31.03.2014. The provision of 2013 Act regarding the preparation, laying down and adoption of the financial Statements is required to be followed by the companies for the financial year commencing on or after 01.04.2014.

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ADVANCE PRICING AGREEMENT

Prashant Kumar

Central Board of Direct Taxes (CBDT) on 19 December 2014[1], signed a bilateral Advance Pricing Agreement (APA) with a Japanese company. This is India's first bilateral APA which has been signed for a period of five years. The APA has been finalized in a period of about one and a half years, which is shorter than time normally taken in finalizing APAs internationally.

Background:

The provisions in regard to the Advance Pricing Agreement were introduced in the Income-tax Act, 1961 (Act) w.e.f. 1 July 2012. The rules in respect of the APA have been notified by the CBDT by way of insertion of Rule 10F to Rule 10T and Rule 44GA in the Income-tax Rules, 1962 (Rules).

APA is an agreement between a taxpayer and at least one tax authority concerning the Transfer Pricing (TP) method functional to a taxpayer's inter-company transactions and will usually cover multiple years. Through the APA, the tax authority accepts not to look for a TP adjustment for enclosed transactions as long as the taxpayer obeys to the terms and conditions as agreed by the APA. Therefore an APA inter alia shall include:

- Details and description of the transactions covered;
- Mutually Agreed TP Policy;
- Determination of arms length price including the TP methodology to be applied;
- Description of any relevant terms and specifics which may depend upon case to case basis;
- Critical assumptions and the terms & conditions, if required, except those contained in the Act and/or Rules;
- Violations of APA which would render APA unworkable.

Kinds of APA

i. Unilateral APA is the one which involves only the taxpayer and the tax authority of the country where such tax payer is located. In case the Taxpayer is involved in the dispute over the transaction covered under APA with the Tax Authorities, it can invoke the provisions of such APA for appropriate relief or initiating a mutual agreement proceeding.

ii. Bilateral APA is the one which involves the tax payer, associated enterprise (AE) of the tax payer in the foreign country and the tax authority of the country where the tax payer is located, and the foreign tax authority.

iii. Multilateral APA is the kind of APA that involves the tax payer, two or more AEs of the tax payer in different foreign countries, tax authority of the country where the tax payer is located, and the tax authorities of AEs

APA and MAP

APA is a price of percentage fixed in advance by the Government/Authorities for a particular type of transactions so that the margin of profit, if within the APA, is not subject to transfer pricing audit.

Mutual Agreement procedure (MAP) is a negotiation between the authorities of two countries over the taxability of transactions by one country which are not in accordance with the tax treaties between those countries.

The tax payer can take the advantage of both at the same time. MAP is useful for the tax payer who has had a litigation history where he can resort to the MAP for the pending issues and for the future transactions can resort to APA.

MAP is based on the tax treaty entered amongst the nations to avoid double taxation and can be invoked at the time of the adverse action against the tax payer. APA since being entered for the prospective years can be used as a dispute resolution/avoidance strategy by the tax payers.

Benefits of APA

- Tax certainty
- Reduction of litigation chances
- Avoidance of risk of Double Taxation
- Removal of an audit threat (minimize rigours of audit),
- Substantial reduction of compliance costs over the term of the APA
- APA shall will improve the investment climate in the country
- For tax authorities, an APA reduces cost of administration and also frees scarce resources

1. Source: CBDT press release dated 19.12.2014

A GLANCE ON PROVISION OF – "GARNISHEE ORDER":

Shivanand Singh

The concept of 'Garnishment' has been introduced in civil procedure code by the amendment Act, 1976 and is a remarkable piece of legislation. This term has been derived from the French word 'garnir' which means to warn or to prepare. In simple words the garnishee is the person who is liable to pay a debt to a debt to judgment debtor or to deliver any movable property to him. Besides Judgment Debtor and decree Holder, Garnishee is a third person in whose hands debt of the judgment debtor is kept.

Garnishee Order is an order passed by an executing court directing or ordering a garnishee not to pay money to judgment debtor since the latter is indebted to the garnisher (decree holder). It is an Order of the court to attach money or Goods belonging to the judgment debtor in the hands of a third person. The third party is known as 'Garnishee' and the court's order is known as Garnishee Order. It is a remedy available to the Decree holder. This Order may be made by the Order of the court to holders of funds, i.e. a third party that no payments have to be made until the court authorizes them. The purpose of the Order is to protect the interest of the Decree holder. This is an Order served upon a garnishee requiring him not to pay or deliver the money or property of the debtor (defendant) to him and/or requiring him to appear in the court and answer to the suit of the plaintiff to the extent of the liability to defendant.

The power of the court enshrined under Rule 46A to issue court notice, is discretionary and the court may refuse to pass such Order if it is Inequitable and the court apprehends that it can cause prejudice to the garnishee, or that the grounds of the application seeking that remedy is not sufficient or if the affidavit is filed by decree holder is frivolous or ambiguous, etc. The discretion, however, must be exercised judicially. Where the court finds that there is bonafide dispute against the claim and the dispute is not false or frivolous, it should not take action under this rule.

The executing Court has been given power to recover any of the amounts of the judgment debtor, which is in the hands of other. The rule of 46 A requires a notice to be issued to a garnishee before a garnishee order is passed against him. If such notice is not issued and an opportunity of hearing is not provided by the court, the order would be null and void. In the eyes of law, there is no existence of such an order and any step taken pursuant to or an in enforcement of such an order would also be void. The object of this rule is to render debt due by the debtor of the judgment debtor available in execution to the decree holder and not to drive him to a suit. It applies to a debt, other than a debt secured by a mortgage or a Charge, which has been attached under rule 46.

Prior to this amendment in 1976, there was no provision relating to garnishee order in the code of civil procedure, 1908. After insertion of this amendment, a direct provision was added to the code of civil Procedure, which empowers the court to issue such an order on the application duly filed. It is the discretionary power of the court to issue a garnishee order and not a mandatory provision.

Garnishee proceedings are the proceedings in rem as well as in personam. It operates on the personam of the garnishee as on the debt. Therefore it is classified as a proceeding quasi in rem. Cheques cannot be attached under Order XXI Rule 46. It is attached under O21 R46. It is attached under OXXI R51 relating to Negotiable Instrument Act. Similarly contingent Debts can also not be attached. The court has to use this power with caution thinking properly and after being ensured that the case is prima facie and that no innocent is harassed, otherwise the very purpose of the legislation of providing the concerned remedy as discussed above shall come to be at a stake.

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DEATH SENTENCE: EFFECT OF DELAY IN DISPOSAL OF MERCY PETITION

Rohit K. Gupta

Hon'ble Apex Court vide its Judgment passed by full bench in **matter 'Ajay Kumar Pal Vs. Union of India And Another[1]'** on 12.12.2014 has allowed the Writ Petition (Criminal) No.128 of 2014 with holding that if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself.

The **issue in question**, which was considered and decided by Hon'ble Supreme Court in present Writ Petition (Criminal) is: *whether delay in execution of death sentence can be a sufficient ground or reason for substituting such sentence by life imprisonment?*

The **facts in brief** which lead the filing of subject Writ Petition are as under:

The petitioner had been awarded death sentence in Sessions Trial No.67 of 2005 by the court of Special Judge, CBI, Ranchi by its judgment and order dated 09.04.2007. The matter reached Jharkhand High Court in Death Reference No.3 of 2007 and also as a result of the appeal preferred by the petitioner. The High Court dismissed the appeal and confirmed the death sentence by its judgment and order dated 28.08.2007. Order dated 28.08.2007 was challenged before Hon'ble Supreme Court vide Criminal Appeal Nos.1295-96 of 2007. Hon'ble Supreme Court concurred with the view taken by the courts below and dismissed the appeals on 16.03.2010. The death sentence imposed upon the petitioner thus stood confirmed on 16.03.2010.

The petitioner, who was in jail all throughout, preferred Mercy Petitions addressed to the President of India as well as to the Governor of Jharkhand on 10.04.2010. The Mercy Petitions were immediately forwarded by the Superintendent, Birsa Munda Central Jail, Ranchi to the appropriate authorities on 10.04.2010 itself along with relevant documents viz. Mercy Petition, Copy of the Order of Additional Judge/Special Judge C.B.I. Ranchi, Copy of the Order of Hon'ble High Court of Jharkhand, Ranchi, Petition filed in the Hon'ble Supreme Court, Hon'ble Supreme Court's Order and Copy of Rule 923(III) of Jail Manual.

The petitioner only on 27.01.2014 i.e. nearly three years and 10 months, received the result of the disposal of his Mercy Petition preferred on 10.04.2010 by the Superintendent, Birsa Munda Central Jail from the Officer on Special Duty, Ministry of Home, Government of Jharkhand that the Mercy Petition was rejected by the President of India which fact was communicated by the Government of India, Ministry of Home Affairs vide its letter dated 08.11.2013.

In these circumstances the petitioner preferred to file this petition relying on the decision of Hon'ble Supreme Court in Shatrughan Chauhan and another v. Union of India and others[2]. The contention of the petitioner was that because of inordinate delay in disposal of his Mercy Petition, the death sentence be commuted to imprisonment for life. It is also submitted that right from the day when the death sentence was awarded i.e. from 09.04.2007, the petitioner has been incarcerated in solitary confinement.

While dealing with maintainability of Writ and issue in question, the Hon'ble Supreme Court has considered earlier verdicts on same subject matter by the Apex Court. In Shatrughan Chauhan matter (supra) while dealing with the issue relating to the maintainability of a petition under Article 32 in similar circumstances, it was observed that the challenge therein was not with regard to the final verdict imposing the death sentence but was based on the supervening circumstances or events that occurred after the confirmation of the death sentence. Relying on some of its earlier Judgments, this Court held such petitions under Article 32 to be maintainable.
It was held that challenge in the instant petition is also not with regard to the verdict wherein the death sentence stands imposed, but the focus is on the

1. *[2014 STPL(Web) 845 SC]*

2. *[2014 (1) SCALE 437]*

subsequent circumstances which are relied upon in support of the case for commutation and accordingly petition was held to maintainable.

While dealing with the submissions regarding delay in disposal of Mercy Petition and the effect of solitary confinement, Hon'ble Apex Court considered the Judgment passed in **T.V. Vatheeswaran v. State of Tamil Nadu**[3], wherein the appellant was awarded death sentence by the first court eight years earlier, was noted by this Court. It was observed:

"20. .... In the United States of America where the right to a speedy trial is a constitutionally guaranteed right, the denial of a speedy trial has been held to entitle an accused person to the dismissal of the indictment or the vacation of the sentence (vide **Strunk v. United States**[4]. Analogy of American Law is not permissible, but interpreting our Constitution sui generis, as we are bound to do, we find no impediment in holding that the dehumanizing factor of prolonged delay in the execution of a sentence of death has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way as to offend the constitutional guarantee that no person shall be deprived of his life or personal liberty except according to procedure established by law. The appropriate relief in such a case is to vacate the sentence of death.

21. .... Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death. We therefore accept the special leave petition, allow the appeal as also the Writ Petition and quash the sentence of death. In the place of the sentence of death, we substitute the sentence of imprisonment for life."

Further, in matter **Sher Singh and others v. State of Punjab**[5], where the death sentence already stood confirmed by dismissal of appeal and review petition therefrom by this Court. Relying on the observations in Vatheeswaran (supra), delay in execution was projected as a ground in a petition under Article 32 of the Constitution of India. Though the Court was broadly in agreement with observations in Vatheeswaran (supra) it did not agree with the statement to the effect "....that delay exceeding two years in the execution of sentence of death should be considered sufficient to entitle the person under sentence to death to invoke Article 21 and demand the questioning of the sentence of death."

The issue was settled by the Constitution Bench decision in **Triveniben v. State of Gujarat**[6], where it was concluded that "No fixed period of delay could be held to make the sentence of death inexecutable ....". The scope and ambit of exercise of jurisdiction in such cases was delineated thus in para 22:

"22. .... the only jurisdiction which could be sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent court convicting and sentencing the condemned prisoner and even while considering the circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be sufficient for coming to a conclusion that execution of the sentence of death will not be just and proper. The nature of the offence, circumstances in which the offence was committed will have to be taken as found by the competent court while finally passing the verdict. It may also be open to the court to examine or consider any circumstances after the final verdict was pronounced if it is considered relevant. The question of improvement in the conduct of the prisoner after the final verdict also cannot be considered for coming to the conclusion whether the sentence could be altered on that ground also."

The contention of the petitioner regarding solitary confinement i.e. since the day he was awarded death sentence, attention was drawn with Section 30(2) of

3. *[(1983) 2 SCC 68]*
4. *[1973] 37 L.Ed. 56]*
5. *[(1983) 2 SCC 344]*
6. *[(1989) 1 SCC 678]*

the Prisons Act, 1894, which postulates segregation of a person 'under sentence of death. In the matter in **Sunil Batra v. Delhi Administration**[7], Krishna Iyer J. observed : "The crucial holding under Section 30(2) is that a person is not 'under sentence of death', even if the sessions court has sentenced him to death subject to confirmation by the High Court. He is not 'under sentence of death' even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, so long as an appeal to the Supreme Court is likely to be or has been moved or is pending. Even if this Court has awarded capital sentence, Section 30 does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, Code and Prison Rules, has not been disposed. Of course, once rejected by the Governor and the President, and on further application there is no stay of execution by the authorities, he is 'under sentence of death', even if he goes on making further mercy petitions. During that interregnum he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be 'under sentence of death' means 'to be under a finally executable death sentence"

In **Shatrughan Chauhan (supra)** after considering law on the point as regards delay in execution of the death sentence and the resultant effect, as also the scope and ambit of exercise of power, it was observed in paras 38, 41 and 42 as under:-

> "38. In view of the above, we hold that undue long delay in execution of sentence of death will entitle the condemned prisoner to approach this Court under Article 32. However, this Court will only examine the circumstances surrounding the delay that has occurred and those that have ensued after sentence was finally confirmed by the judicial process. This Court cannot reopen the conclusion already reached but may consider the question of inordinate delay to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life.
>
> 41. It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the authorities to dispose of the same expeditiously. Though no time limit can be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage, viz., calling for the records, orders and documents filed in the court, preparation of the note for approval of the Minister concerned, and the ultimate decision of the constitutional authorities. This court, in Triveniben (supra), further held that in doing so, if it is established that there was prolonged delay in the execution of death sentence, it is an important and relevant consideration for determining whether the sentence should be allowed to be executed or not.
>
> 42. Accordingly, if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself. To this extent, the jurisprudence has developed in the light of the mandate given in our Constitution as well as various Universal Declarations and directions issued by the United Nations."

Hon'ble Supreme Court accordingly held in its judgment that the death sentence awarded by the trial court on 09.04.2007 attained finality on 16.03.2010 with the dismissal of appeals by this Court. No further proceedings in the form of review petition etc. were taken on behalf of the petitioner. His Mercy Petition preferred on 10.04.2010 i.e. within a month of the decision of this Court was forwarded the same day with all relevant documents so as to enable the concerned functionaries to exercise requisite jurisdiction. Though no time limit can be fixed within which the Mercy Petition ought to be disposed of, in our considered view the period of 3 years and 10 months to deal with such Mercy Petition in the present case comes within the expression "inordinate delay". The delay is not to the account of the petitioner or as a result of any proceedings initiated by him or on his behalf but is certainly to the account of the functionaries and authorities concerned.

While disposing of the present Writ petition, Hon'ble Supreme Court held that the petitioner was kept in solitary confinement since the date trial court awarded

7. [(1978) 4 SCC 494]

the death sentence which is complete transgression of the right under Article 21 of the Constitution causing incalculable harm to the petitioner. A case is definitely made out under Article 32 of the Constitution of India. Accordingly, the Hon'ble Apex Court directed to substitute the sentence of life imprisonment in place of death sentence awarded to the petitioner.

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CYBER WAR

Himanshu Sharma & Pallavi Dhok[1]

INTRODUCTION:

Cyber war in simple term means the use of computer technology to disrupt the activities of a state or organization by disabling financial and organizational systems through stealing or altering classified data to undermine networks, websites and services via the Internet through computer viruses, Denial-of-Service attacks, etc. Cyber war is a virtual conflict initiated as a political attack on the enemy's computer and information system and also known as ***'Cyber Warfare'.***

Cyber war is often confused with the term ***"Cyber Crime".*** There is no doubt indeed that all acts of cyber war are cyber crimes, but not all acts of cyber crime can be termed as cyber war. In order to understand what Cyber War exactly means, let's take an example, when a person from country A conducts a targeted attack against several companies in country B, does it count as cyber war, or cybercrime? The answer depends on "intent". If the attack is politically motivated, an act that may destroy data or even cause physical damage to infrastructure of a specific country, it may be considered an act of cyber war.

For a cyber attack to be called Cyber War there must be a use of force and disruption to physical life and when a person perform these activities with "political aims" then they are popularly known as ***"hacktivists"***

Methods of attacks

There a various methods to attack a computer or network of computers. The method depends upon the attacker's goal, i.e. what he wants to target. Methods of attacks are classified on the basis of the intent. Various methods of attack are as follows:

1. Espionage and National Security Breaches

Espionage is the act of obtaining secrets, sensitive or classified information from rival groups, competitors, government or enemies for military, political or economic advantages by illegal methods of exploitation on internet, software and network of computers. In simple terms it is a method of spying on other nations and their organizations in order to gather data and information about the enemy.

2. Malwares

Malwares are malicious software which refers to viruses, spywares, worms etc. It is software designed to disrupt the system, gather sensitive information or gain access to private computer systems.

3. Denial of Service Attacks (DoS)

Denial of Service Attacks or Distributed Denial of service attacks are the type of activities that makes the network unavailable to its intended users. The main targets of DoS are sites or services hosted on high profile servers like, banks, credit card payment gateways, and even root name servers. DoS attacks makes it difficult for the user to use the machine or network resource and consume up all the resources and it no longer provide its intended service or obstructs the communication media between the intended users and the victim so that they can no longer communicate adequately.

<u>Legal framework to check the Cyber Attack:</u>

With an expansion in the growth of technology and increase in the crimes in the cyber space, there was an urgent need of strict statutory laws to regulate the criminal activities in the cyber world and to protect technological advancement system. In the virtual world known as Cyberspace, the criminal activities are not easy identified and require specific skill with state of the art technology. In addition to specific skill of the law enforcement agencies, an up to date law is also required to deal with the cases related to cyber attack. We now look into the law of different countries related to cyber attack:

<u>INDIA</u>

In India the IT Act 2000, as amended by the IT (Amendment) Act 2008 is known as the Cyber Law. The

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IT (Amendment) Act 2008 has a separate chapter entitled as "Offences". Though there are many shortcomings and it is not a very effective law to monitor cyber war, various cyber crimes have been mentioned as penal offences with punishment in the said chapter. Some of the offences as per the IT (Amendment) Act 2008 are as follows-

1. Hacking[2]

Hacking may refer to computer hacking, including the following types of activity:

- An activity within the computer programmer subculture
- an act to gain access to computer networks, legally or otherwise
- Computer crime

Section 43(a) read with section 66 of the Act[3] **is applicable and Section 379 & 406 of Indian Penal Code, 1860 are also** applicable under the Information Technology (Amendment) Act 2008. Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

2. Spreading Virus or Worms

Viruses or worms are the kind of cyber weapon that can do any amount of damage the creator intends them to do. It can send data to a third party and then delete the data from the computer. It can also ruin/ mess up the system and render it unusable without a re-installation of the operating system. The viruses usually install files on the system and then change the system so that virus program is run every time the system is started. It will then attempt to replicate itself by sending itself to other potential victims.

Under Information Technology (Amendment) Act, 2008, **Section 43(c) & 43(e)** read with **Section 66** is applicable and under **Section 268 of Indian Penal Code, 1860** is also applicable. Spreading of Virus offence is cognizable and bailable.

On **July 23rd, 2013** a new and deadly variant of computer virus called ***'Beebone'***[4] was detected in Indian cyberspace. 'Beebone' belongs to the notorious family of Trojan malwares which get a "privileged access" into a user's computer by faking its identity and deploying smart and corrupt techniques to attack vulnerable computers.

3. Email Spoofing

E-mail spoofing is an e-mail activity in which the address of the sender and other parts of the e-mail appear as though the e-mail originated from a different source. In this an e-mail is sent to another person in such a way that it appears that the e-mail was sent by someone else. It appears to originate from one source but actually has been sent from another source. Spoofing is the act of electronically disguising one computer as another for gaining as the password system.

Under Information Technology (Amendment) Act, 2008, **Section 66-D and Section417, 419 & 465 of Indian Penal Code, 1860** are also applicable. Email spoofing offence is cognizable, bailable, compoundable with permission of the court before which the prosecution of such offence is pending and triable by any magistrate.

UNITED KINGDOM

Cyber crime losses vary depending on the nature of threat and attack. Unlike India, UK has different sets of rules and laws which govern Cyber attacks. Steps have been taken in the UK to help combat with the problem of Cyber War. The UK government has revealed new plans to enhance its National Cyber Security Strategy, announcing a new **British Computer Emergency Response Team (CERT), National Cyber Crime Unit (NCCU)** and a **Cyber Reserves Force**. These teams will help to monitor and report on instances of cyber attacks leading to cyber war.

In addition to 'traditional' criminal legislation against theft and fraud, which can apply to cybercrime, legislation specifically targeted at cyber attacks includes-

1. Computer Misuse Act 1990

The Computer Misuse Act 1990 was established in the aftermath of ***"R v Gold & Schifreen"***[5]. Robert Schifreen

2. http://en.wikipedia.org/wiki/Hacking

3. Act here stands for "Information Technology (Amendment) Act 2008

4. Source: The Economic Times, http://articles.economictimes.indiatimes.com/2013-07-23/news/40749343_1_computer-virus-computer-security-security-features

5. http://en.wikipedia.org/wiki/Hacking

and Stephen Gold, gained unauthorized access to British Telecom's Prestel interactive view data service using conventional home computers and modems in late 1984 and early 1985. The pair was charged under section 1 of the Forgery and Counterfeiting Act 1981 with defrauding BT by manufacturing a "false instrument", namely the internal condition of BT's equipment after it had processed Gold's eavesdropped password. Tried at Southwark Crown Court, they were convicted on specimen charges (five against Schifreen, four against Gold) and fined, respectively, £750 and £600.

2. The Data Protection Act 1998

It includes basic rules of registration for users of data and rights to access that data. It controls how the personal information of an individual or an organization is used by other organization, businesses and government.

The act contains eight "Data Protection Principles"[6]. These specify that personal data must be:

1. Processed fairly and lawfully.
2. Obtained for specified and lawful purposes.
3. Adequate, relevant and not excessive.
4. Accurate and up to date.
5. Not kept any longer than necessary.
6. Processed in accordance with the "data subject's" (the individual's) rights.
7. Securely kept.
8. Not transferred to any other country without adequate protection in situ.

Offences under these acts can result in fines or imprisonment for up to 10 years. There are also sections related to cybercrime in the **Regulatory and Investigatory Powers Act 2000 and the Terrorism Act 2000.**

Law enforcement agencies who deal with cyber attacks include:

- e-crime divisions of local police
- the National Crime Agency
- GCHQ/the intelligence services (depending on the nature of the offence).

6. Cited in http://www.dataprotectionact.org/1.html

THE UNITED STATES

The United States is one of the biggest perpetrators as well as the victim of cyber war. With the US being one of the biggest economies it is one of the targets of being a victim of a cyber attack. The United States federal government has invested heavily in the development of the cyber regime and also for technologies to protect them from being a victim of cyber attack.

In 2011, The White House published an "International Strategy for Cyberspace" that reserved the right to use military force in response to a cyber attack[7]. The strategy of US is based on jus ad bellum, which means a set of criteria needs to be consulted before engaging in war. If the cyber war results into death and significant loss to property then a country has a right to engage into conventional means of war.

The US government created **United States Cyber Command (USCYBERCOM)**, a division of **United States Strategic Command (USSTRATCOM)[8]** to prevent and counter attacks on military network. According to the US government the Law of armed conflict applies to cyber warfare. The United States and many other nations are adopting advanced cyber capabilities to respond to the threats of the emerging cyberspace warfare. The International Committee of the Red Cross (ICRC) has steadfastly argued that many of the same principles that regulate battlefield combat also apply in cyberspace[9].

TALLINN MANUAL ON CYBERWAR

Tallinn manual, originally known as ***"Tallinn Manual on the International Law Applicable to Cyber Warfare"[10]***

7. "International Strategy for Cyberspace" (PDF). The White House. 2011

8. United States Strategic Command, US Cyber Command, Dec. 2011, available at http://www.stratcom.mil/fCyber_Command.

9. See International Committee of the Red Cross, Cyber Warfare, Oct. 10, 2010 available at http://www.icrc.org/eng/war-and-law/conduct-hostilities/information-warfare/overview-information-warfare.htm; See also International Committee of the Red Cross, No Legal Vacuum in Cyber Space, Aug. 16, 2011 available at http://www.icrc.org/eng/resources/documents/interview/2011/cyber-warfare-interview-2011-08-16.htm.

10. Tallinn Manual on the International Law Applicable to Cyber Warfare http://www.knowledgecommons.in/wp-content/uploads/2014/03/Tallinn-Manual-on-the-International-Law-Applicable-to-Cyber-Warfare-Draft-.pdf

The manual is not an official NATO document. It was drawn up by **NATO's Co-Operative Cyber Defence Centre of Excellence.** It was launched in 2008 after hackers from Russia caused damage to infrastructure of Estonia[11]. It is an academic, non- binding study on how international law is applicable to cyber conflicts. The book includes 95 ***"black letter rules"*** detailing how states can carry out and responds to cyber attacks within the boundaries of international law.

It is based on ***jus ad bellum*** and ***international humanitarian law***. The Tallinn manual advises that cyber attacks must not be targeted at hospitals, dams and nuclear power stations. It includes a provision that allows states to respond with conventional weapons to cyber attack by another state that causes death or significant damage to property.

It defines the term **"Hacktivist"** as:

"A private citizen who on his or her own initiative engages in hacking for, inter alia, ideological, political, religious, or patriotic reasons"

CASE STUDY

1. STUXNET

Stuxnet was the computer worm which disrupted Iranian nuclear enrichment in 2010. It came to be known as the first instance of cyber attack to cause physical damage across international boundaries. Unlike a typical worm which is used to steal credit card details and personal and sensitive information, Stuxnet was aimed to cause physical destruction against the industrial systems. It was created to sabotage Iran's nuclear industry.

2. SONY HACK

On November 24th 2014, Sony Pictures faced an unauthorized security breach. The hackers which go by the name of #GOP aka the Guardians of Peace downloaded copies of data from Sony Pictures computers which included personal data of the employees including executive salaries, performance reviews, screenplays, and have leaked some unreleased movies.

11. Source: New Atlanticist. http://www.atlanticcouncil.org/blogs/new-atlanticist/reason-finally-gets-a-voice-the-tallinn-manual-on-cyber-war-and-international-law

The malware used to harm Sony Pictures, known as **"Destover",** acts as a backdoor and is capable of wiping disk drives and any Master Boot Record disk -- in other words, it can sneak into a system, completely take over and give access to the data saved within. It is believed that North Korea is behind this cyber attack as the security was breached right before the release of ***"The Interview",*** an upcoming comedy about two journalists who attempt to **assassinate the Supreme Leader of North Korea**, Kim Jong Un.

As a result of this attack a large amount of confidential Sony Pictures Entertainment data has been stolen by the cyber attackers, including personnel information and business documents and also all the system of Sony Pictures are still shut down.

On December 15, 2014, lawyers filed a **class action complaint** against Sony in federal court in California. The complaint puts companies on notice as to the types of claims that they might face if their systems are hacked, and steps they can take now to protect themselves. Possible legal claims could include: **negligence; violation of medical privacy laws; violations of regulatory rules, if applicable; and failure to comply with post-breach laws.**

3. ATTACK ON ESTONIA

On April 26, 2007 cyber warfare attack began to appear in Estonia. Estonia is an extremely wired country, and its people are addicted to the Internet for all the administrative workings of government, like, economic life, communications, financial transactions, bill paying, etc. The denial of service (DoS) attack swamped websites of Estonian organizations, including Estonian parliament, banks, ministries, newspapers and broadcasters.

On 2 May 2007, a criminal investigation was opened into the attacks under a section of the **Estonian Penal Code** criminalizing ***computer sabotage*** *and* ***interference*** with the working of a computer network, felonies punishable by **imprisonment of up to three years.**

On 24 January 2008, Dmitri Galushkevich, a student living in Tallinn, was found guilty of participating in the attacks[11]. He was fined 17,500 kroons (approximately US$1,640) for attacking the website of the Estonian Reform Party.

12. Postimees, supra note 70.

CONCLUSION

With the massive expansion of the use of technology in the world there is an urgent need to come up with better provisions to protect a country from cyber war. USA tops the chart in being the most attacked countries in the cyber space. Even though US is a super power, it is also most vulnerable to a cyber attack and is not well prepared for a cyber warfare as shown by the recent Sony hacking case. India being a upcoming cyber market is also vulnerable to the cyber attack hence require a better law and trained personnel to deal with the crime related to cyber world.

The problem with cyber attack is that the threat can be found but the individual remains invisible which makes it difficult to stop the attack from further disrupting the systems. A cyber attack can't be stopped completely, but with efficient technology and software the damage can be minimized. Cyber threats are more far dangerous than what we imagine as most of the basic amenities these days are run through internet and any attack on these basic necessities can lead to a complete disaster. It can completely bring a system or a government down resulting into huge financial as well as physical loss in some cases. There is an urgent need to reinforce the security systems and better training and funding for the counterintelligence.

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EQUIVOCATIONAL BALKANIZATION OF THE INTERNET

Himanshu Sharma & Martand Nemana[1]

"Necessity is the mother of invention", an old time tested adage, has proved true every time it was doubted. Not only this, as true as the adage, it has been proved every time an invention is made the unsatisfied human elements have influentially injected evil elements in order to exploit and create a vulnerable situation so as to threaten the trust, belief and motive of users upon the inventors and the invention. Horologists have always ascertained the nature of the evil to manipulate simple phases into a complex plethora of unending ambiguity to balkanize universal accord.

INTRODUCTION:

In the early 1970's when Vinton Grey Cerf processed the first packet data of information to be transferred from one computer to another it was the first step towards the establishment of what we today know as "World Wide Web" or "www." Molded by the ever evolving leaps and bounds the internet is what we see it as of today. Not only has the internet evolved as a backbone and lifeline of global information service and an instant data delivery mechanism but it also has created an entirely virtual e-world for the netizens of the 21st Century. With unmatched levels of speed and luxury internet has evolved a 'must-have' asset for every nation and specially the super powers who believe in concentration of power for establishing absolute monopoly. Soon after the general outset of internet for the common man, many different forces started establishing their internet supremacy and tried taking as much control of it as possible. With the increasing interest and evolutions which fueled the race to evolution of a technological dictator, before one could even realize a war had begun. Silently human desires percolated the minds of all netizens and just like it's every other valuable asset on the earth people started shattering it into small pieces and that when the concept of Balkanization of the internet came into existence.

CONCEPT OF BALKANIZATION AND ITS EFFECTS:

Balkanization as a term was allegedly coined in a New York Times interview with German politician Walther Rathenau, in 1918, which meant "Use of Geopolitical Power to enable division on grounds of religion/region/state, which are hostile and non-co-operative with one another". As a reflection of global balkanization the founders and pioneers of the internet and World Wide Web soon predicted a stage where all the nations shall strive to prove their supremacy and will initiate a war to gain control over the reins of the cyber world, just like it is in the real world. At the given conjecture in light of global incidents it not hard to foresee a breakdown, even in the virtual planet. Internet and law are notoriously riddled with jargon, and this is specifically the main element which makes the cyber-laws much more complex and arduous. The most menacing task is to prescribe the jurisdiction of an occurrence because unlike the real world the internet exists as an open network architecture which is beyond leaps and bounds of geographical impediments.

Over the past decade the internet has witnessed a progressive growth which has completely reconstructed the very essence by redefining the possibilities of the internet; from a mere source of communication between two computers the internet has evolved to what it is today, "the premier backbone of global survival", which is called as an "e-era". This gave birth to "Information Superhighway" which refers to the concept of merging all sources of information into a single retrievable "database". Every home, office, news medium, library, data bank, business, government agency and computer shall be connected to every communication device and an electronic link shall be established. Internet has also revolutionized the global marketplace, products which were earlier bound only to shops, are now being made available to the consumer at every corner of the planet which has not only provided a better and quality experience to the consumer but also has boosted employment as various sectors and steps are involved in completing the chain-link process and also immensely helped the companies move more inventory and hence developed the global markets by bringing it right at the doorstep. These advanced services not only deliver luxury but also create a dangerous scope for malicious elements to misuse the internet.

With the unmatched and untamed powers of the internet every citizen accessing the internet was given complete access to data available on the internet but soon as the malicious elements started to percolate and infect the system with their illegal activities, there started a need for making legislations which shall not only regulate and

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guide the internet but also provide a control to these evil elements. The need of such regulations was strongly felt after the Snowden Revelations of 2013. After the revelations in October 2013 relating to the documents of NSA and several media outlets thousands of classified documents, his leaked documents revealed numerous global surveillance programs; many of them run by the NSA and the Five Eyes with the cooperation of telecommunication companies and European governments. His disclosures have fueled debates over mass surveillance, government secrecy, and the balance between national security and information privacy. Two court rulings since the initial leaks have split on the constitutionality of the NSA's bulk collection of telephone metadata. Soon after the revelations it has also been noted that many countries have started to strength their internet protection networks. This is what has been known as the inception of the proper balkanization of the internet. Though on the general level not much of any of these activates effect the regular general internet consumer but it does raise a serious concern for the government agencies. There have been many significant debates as to the applicability of the boundaries and its justification regarding its effects on the internet, it is important to consider the reverberations both on the government and also on the citizens both at national and international level.

WAYS TO KEEP A CHECK ON BALKANIZATION:

Creating a level playing field for the use of internet seems a distant objective dream as most of the present nations do not belong to the same strata in terms of development. Striking a balance between data sovereignty and uninterrupted access to the individuals is a deciding factor for most of the nations. Bridging the gap between the developed and the developing nations is a challenge both in the economic as well as the technical factors. In some countries where internet serves as a medium for luxury and access on the other hand in some nations it's a tool for development and education. Creating a rift and divide will not only deprive the developing nations from the internet but also shall prevent them accessing their fundamental rights. In 2011 the United Nations declared the "Right to Internet as a Fundamental Right" as it comes under the ambit of *"Right of Freedom of Speech and Expression" and "Right to Development" and "Right to Freedom of Assembly".* The internet is also a major source of information and provides many educational opportunities and serves as resource for various researches and also as a data communication agent. Major strength of the internet being its unrestricted global access, balkanization shall further adhere to weaken and curb the potential of the system, which shall confine and shackle the scope of netizens. In the present world where overcoming the digital divide is a bigger challenge fragmentation shall further deteriorate the scenario.

Though attempts for balkanization started as early as 1941, the U.S. Supreme Court was already employing the word "balkanization" to partially explain why the framers of the American Constitution unified the country in the 18th century and relied on federal power and central authority to regulate interstate commerce.

•Duckworth v. Arkansas, 314 U.S. 390 (1941)

The case registers the first reference to "balkanization" by the Supreme Court: "The practical result [of local restraints that affect the conduct of interstate business] is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry."

•H. P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949)

It evoked the Duckworth decision and allocated the legal reasoning behind balkanization in the semantic field of libertarianism: "… fear that judicial toleration of any state regulations of local phases of commerce will bring about what they call 'Balkanization' of trade in the United States — trade barriers so high between the states that the stream of interstate commerce cannot flow over them. Other people believe in this philosophy because of an instinctive hostility to any governmental regulation of 'free enterprise'; this group prefers a laissez faire economy. To them the spectre of 'Bureaucracy' is more frightening than 'Balkanization'."

•Hughes v. Oklahoma, 441 U.S. 322 (1979)

The Court held that an Oklahoma statute violated the Commerce Clause, and summarized a goal of the Constitution: "…in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

The U.S. Supreme Court expressed its concerns with "balkanization" in almost thirty cases since 1941. In most occasions, balkanization was essentially a matter of

economic policy resulting from the dual sovereignty of American federalism. In its modern connotation, some will cautiously allude to the ultimate importance of unity in the lower levels of the Internet architecture, but the technology literature is much richer than that and refers to "Internet balkanization" as:

- (i) ways of segregating people online according to one's preferences;
- (ii) different levels of infrastructure interconnection to the Internet;
- (iii) fragments resulting from regulatory and cultural forces; and
- (iv) a diplomatic agenda

"Balkanization" not only had come to denote the parcelization of large and viable political units but also had become a synonym for a reversion to the tribal, the backward, the primitive, the barbarian. In its latest hypostasis, particularly in American academe, it has been completely decontextualized and paradigmatically related to a variety of problems. That the Balkans have been described as the "other" of Europe does not need special proof. What has been emphasized about the Balkans is that its inhabitants do not care to conform to the standards of behavior devised as normative by and for the civilized world. As with any generalization, this one is based on reductionism, but the reductionism and stereotyping of the Balkans has been of such degree and intensity that the discourse merits and requires special analysis.

CONCLUSION

Balkanization as a phenomenon is inevitable, with the streaming time and tide the need for balkanization arises but in a much positive and useful manner, rather than creating meaningless boundaries for geopolitical stratification and benefits. On a global perspective making both the ends meet is a crucial need of the hour, where on one hand where some countries still striving at the very basics of food, electricity and resources others are getting supersonically advanced to the level of inducing a need to develop checks and boundaries for avoiding paradigm conflicts with the new emerging technology and services in the making. Fragmentation / Balkanization would only wider the divide and create a bigger rift than solving the need of the greater mass at large. Internet has percolated to so deep and has become so beneficial that not only will it be a building block in the advancements but also will swiftly guide thorough all the subtleties of the ever expanding globe. Legislations should be there to guide and then protect the basics rather than acting as a hindrance to the development.

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COUNTERFEITING AND INFRINGEMENT OF TRADEMARKS: THE THIN LINE OF DIFFERENCE BETWEEN THE LAWS

Vaibhavi Pandey & Deblina Dey[1]

INTRODUCTION

Counterfeiting and Infringement are two phenomenon of the same genus but different species. Where Counterfeiting can be defined as the fraudulent imitation of something such as money, trademark etc, Infringement is the breach or violation, as of a law, regulation, or agreement. It is an encroachment, as of a right or privilege. In other words to counterfeit is to make a copy, usually with the intention to defraud or forge. Counterfeiting is the making of fraudulent copies of something valuable whereas Trademarks are infringed, not by exact marks, but by marks that are likely to confuse.[2]

DIFFERENCE BETWEEN COUNTERFEIT AND INFRINGEMENT

"Counterfeiting differs from trademark infringement in that it is narrower in scope and applies only to marks made to look identical to the actual registered mark."[3] Trademark counterfeiting comes with potentially massive for willful infringement. The basic difference between the two can be summarized as below-

Counterfeiting	Infringement
All counterfeit marks are infringing.	All infringements are not counterfeits.
Counterfeit marks include marks that are "substantially indistinguishable" from a genuine mark, this definition contemplates only minor or trivial differences from the genuine mark.	Infringing marks also include a broader class of marks that are "confusingly similar" to genuine marks. The "confusingly similar" test for infringing marks contemplates wider differences.

POSITION AROUND THE WORLD

The issues of counterfeiting and infringement have been increasing with a great pace since past few years and have attracted serious concerns of the law makers around the world towards themselves. One of the potentially efficient steps taken in this direction is the **Anti-Counterfeiting Trade Agreement** (ACTA) which is aimed to create new global (IP) enforcement standards that go beyond current international law and bring the topic to regional levels as well. Through ACTA, the US aims to hand over increased authority to enforcement agencies to act on their own initiative, to seize any goods that are related to infringement activities (including domain names), criminalize circumvention of digital security technologies, and address piracy on digital networks.[4]

ACTA was negotiated between 11 countries namely US, EU, Switzerland, Canada, Australia, New Zealand, Mexico, Singapore, Morocco, Japan, and South Korea. Eight out of the eleven negotiating countries signed the agreement in October 2011. The number of countries that were part of these negotiations is limited, but the agreement's provisions would have global consequences for digital freedoms. Once six nations ratify the agreement, its implementation will take effect. As of October 2012, it has only been ratified by Japan.[5]

POSITION IN USA

Infringement and Counterfeiting are the basic issues in the United States trademark law. It is predominantly governed by a federal statute, 15 U.S.C. S 1051, also known as the Lanham Act. Unlike the Indian Trademarks Act, the US Trademark Act defines both counterfeiting and infringement. United States Senate Bill S.3804, known as the Combating Online Infringement and Counterfeits Act (COICA) was a bill introduced by Senator Patrick Leahy (D-VT) on September 20, 2010. It proposes amendments to Chapter 113 of Title 18 of the United States Code that would authorize the Attorney General to bring an in rem action against any domain name found "dedicated to infringing activities", as defined within the text of the bill. Upon bringing such an action, and obtaining an order for relief, the registrar of, or registry affiliated with, the infringing domain would be compelled to suspend operation of and lock the domain name.[6]

1. *4th year student, B.A.LL.B. (Hons.), UPES Dehradun*
2. *www.thefreedictionary.com*
3. *David Quam, Chapter 1, Trademark Counterfeiting, p. 1-4.5*
4. *www.eff.org*
5. *www.eff.org*
6. *S. 3804: Combating Online Infringement and Counterfeits Act".*

Apart form this, the states comprising of the United States also have their own independent legislations dealing with unfair competition. In most respects, state trademark and unfair competition law parallels federal trademark law. In some cases, punitive damages, which are permitted under the Lanham Act, can be awarded under state law. The Lanham Act classifies four types of trademark violations:

i) Trademark infringement – Section 32 & 43(a)
ii) Trademark dilution – Section 43(c)
iii) Cybersquatting – Section 43(d)
iv) Civil counterfeiting – Section 34(d)

The different monetary damages available for these various Lanham Act claims are specified in Section 35(a) through (e). The Lanham Act is a civil statute, and no criminal charges can be brought under it. Actions for criminal counterfeiting are provided for by 18 U.S.C s 2320. As per the requirements of the Lanham Act, to claim rights under the Lanham Act-

- The plaintiff must own at the minimum some valid rights over the trademark that may supersede the right of the defendant.
- The trademark must be in continuous use in commerce in connection with the goods and services provided under the trademark.
- The trademark is not abandoned
- The trademark is inherently distinctive or has acquired distinctiveness.
- The trademark is not a generic term.

UNITED KINGDOM

As per the laws of United Kingdom, Infringement and counterfeiting are covered both under the civil law and the criminal law. As a general principle, the offence of counterfeiting is dealt with under the criminal law whereas the offence of infringement is covered under the civil law. Infringement is a legal term for an act that means breaking a law. IP rights are infringed when a product, creation or invention protected by IP laws are exploited, copied or otherwise used without having the proper authorization, permission or allowance from the person who owns those rights or their representative.[7] Counterfeiting can be defined as the manufacture, importation, distribution and sale of products which falsely carry the trade mark of a genuine brand without permission and for gain or loss to another.[8]

Usually under the UK law Criminal IP offences are also known as IP crime or counterfeiting. For example possession of an infringing copy of a work protected by copyright in the course of your business may be a criminal offence under section 107 (1)(c) of the Copyright, Designs and Patents Act 1988. Infringement of trade marks can be criminal offences, as well as being actionable in civil law. A range of criminal provisions are set out in the relevant Acts, and other offences such as those under the Fraud Act 2006 may also be applied. These criminal offences are most often associated with organized crime groups who are dealing for profit in fake branded goods or pirated products. However, these offences can also occur in legitimate business, for example if an employee uses the workplace to produce and/or sell quantities of fake DVDs or branded goods to colleagues or outside the office.[9]

The UK law imposes a penalty of up to £50,000with a sentence of up to 10 years for the potential offenders of counterfeiting and infringement. As well as the legal risks, infringement of IP rights may also prove to be vulnerable to threats from computer viruses and malware. All IP right infringements are actionable in the civil courts by the person who owns the rights. Counterfeiting are the criminal offences of IP rights infringement - also known collectively as IP crime.[10]

POSITION IN INDIA

If we look into the provisions under Indian Trademark Act, 1999, the definition of Infringement is defined under Section 29; however, the Act nowhere refers to the definition of the term counterfeit. Infringing marks also include a broader class of marks that are "confusingly similar" to genuine marks while counterfeit marks include marks that are "substantially indistinguishable" from a genuine mark, this definition contemplates only minor or trivial differences from the genuine mark. The "confusingly similar" test for infringing marks contemplates wider differences. The phenomenon of Counterfeiting of goods can be defined as where the packaging of a trademark has been imitated without the authorization of the actual trademark rights holder, and the imitation of packaging is of such a nature which cannot distinguish the essential feature of the goods itself from the genuine one. Counterfeit goods also include packaging materials, stickers, brochures and instructions even though these are presented separately from the goods themselves.[11]

7. *ipo.gov.uk*
8. *ipo.gov.uk*
9. *ipo.gov.uk*
10. *ipo.gov.uk*
11. *www.legalindia.in*

Further, Infringement and counterfeiting claims require proof of likelihood of consumer confusion, while dilution and counterfeiting claims do not require such proof. The mere existence of counterfeited goods is sufficient for the Plaintiff to initiate actions against the defendant whereas in cases of infringement the onus of proving the likelihood of confusion and deception is on the plaintiff. The situation was made further clear by the Hon'ble Supreme court in the case of *S.M. Dyechem Ltd. Vs Cadbury (India) Ltd [(2000) 5 SCC 573]*. The Court held that "a plaintiff in a suit on basis of infringement has to provide not only that his trademark is infringed by a person who is not a registered proprietor of the mark or a registered user thereof but that the said person is using a mark in the course of his trade, which is identical with or deceptively similar to the trademark of the plaintiff, in such a manner as to render the use of the mark likely to be mistaken as the registered trademark."

CONCLUSION

The basic difference among the two lies in the type of legal remedies available. A trademark owner can seek an ex parte seizure order from a court in the case of counterfeits. For a merely infringing mark, a trademark owner can pursue an injunction, which is granted only after notice to the defendant and a hearing. As per the Indian law, counterfeiting is a cognizable offence prescribed under section 476 of the Indian Penal Code whereas in case of infringement the remedies are of civil nature. From the above discussion we may see that the two concepts infringement and counterfeiting are closely related to each other and both possess a great threat to the IP assets of individuals and entities.

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THE FOREIGN FILING LICENSE REQUIREMENT

Saipriya Balasubramanian

INTRODUCTION

Section 39 of the Indian Patents Act is of prime importance during Patent prosecution, whereby multinational companies with their research & development (R&D) centers in India, are willing to prosecute their Patent applications directly at international level and not in India. There are instances when an applicant for a Patent, an individual or a company intends to file an invention in a foreign country directly or as an international application under PCT without first filing the application in India. The reasons for not filing first in India due to various factors such as less or no demand in the market; subject matter of the invention falling under non-patentable inventions in India and co-ordination with different teams situated globally and so on. Further, a lot of inventions churned out of the R&D centers may have to be first filed in a foreign country.

In such situations, permission to file a patent application outside India has to be obtained from the Indian Patent Office which is commonly referred to as the Foreign Filing License (FFL)

The foreign filing license requirement was introduced in the Indian Patents Act of 1970 in 2002 and later amended in 2005. If the applicant has already filed a patent in India, he may file a Patent in a foreign country after six weeks from the date of filing of Patent application in India.

OBJECTIVE BEHIND FFL REQUIREMENT:

The main objective behind the FFL Requirement can be seen as a measure to keep a check on all inventions being exported to a different jurisdiction especially defense or atomic energy related inventions that would be of nation's interest.

Section 39 of the Indian Patents Act 1970, which is relevant to the FFL requirement, is reproduced as below;

"39. Residents not to apply for patents outside India without prior permission

(1) No person resident in India shall, except under the authority of a written permit sought in the manner prescribed and granted by or on behalf of the Controller, make or cause to be made any application outside India for the grant of a patent for an invention unless—

(a) an application for a patent for the same invention has been made in India, not less than six weeks before the application outside India; and

(b) either no direction has been given under sub-section (1) of section 35 in relation to the application in India, or all such directions have been revoked.

(2) The Controller shall dispose of every such application within such period as may be prescribed: Provided that if the invention is relevant for defense purpose or atomic energy, the Controller shall not grant permit without the prior consent of the Central Government.

(3) This section shall not apply in relation to an invention for which an application for protection has first been filed in a country outside India by a person resident outside India."[1]

DOCUMENTS REQUIRED FOR FILING OF FFL:

1. A brief description of the invention that sufficiently describes the inventive concept known to the applicant at the time of making a request for FFL. Title of the invention along with drawings (if any) has to be provided.
2. Name(s), address (es) and nationality of the inventor(s) who are 'resident in India'.
3. Power of Attorney (POA) from the inventor(s) or the applicant who are resident in India, where a patent agent is appointed to represent them.
4. Name and addresses of assignee, if any
5. The name of the country/countries in which the patent application is expected to be filed after obtaining the Foreign Filing License (FFL) from Indian Patent Office
6. Name of the countries in which the invention would be filed and reason for making such application.

FILING OF PCT APPLICATION, PRIORITY DATE AND SECTION 39

Taking a PCT route for filing a patent application aids the applicant of that application with the same priority to

1. *http://ipindia.nic.in/ipr/patent/eVersion_ActRules/sections/ps39.html*

enter any of the PCT member countries (148 countries) within the prescribed time period of 30 or 31 months from the date of priority. Therefore, filing of a PCT application amounts to filing of a patent application in any of the PCT designated countries only after that application is filed in the patent offices of those respective PCT countries.

From the aforesaid filing of a PCT application with receiving office as India do not tantamount to filing of an application in India. Filing of a patent application in India is duly considered after initial filing (international phase) of the PCT application along with the prescribed forms and fees. This is followed by entering India which is called as 'national phase' entry of the PCT application. Hence, if an application has been first filed in India directly as provisional/complete complete specification, the corresponding date of filing will be considered as priority date of that application and not as international filing date for that application.

If the applicant is not interested in filing patent application in India, he can proceed to file a PCT application at any of the RO in India. In such cases Section 39 of the Indian Patents Act is applicable. The Controller ordinarily disposes of an FFL request within 21 days from the date of filing the FFL request (Rule 71, The Patent Rules 2003[2]).

CONSEQUENCES OF CONTRAVENTION OF SECTION 39

Failure to obtain FFL before filing the application in a foreign country by a resident of India results in the attraction of Section 40 and Section 118 of the Act. Accordingly as per Section 40 of Patents Act, 1970 if applicant makes or causes to be made an application for grant of Patent outside India incontravention of Section 39, the application for Patent under this Act shall be deemed to have been abandoned and the Patent Granted, if any, shall be liable to be revoked under Section 64 of Patents Act, 1970

Further as Per Section 118 of Patents Act, 1970 if any person makes or causes to be made an application for the grant of a Patent in contravention of Section 39, he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

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2. *http://ipindia.nic.in/ipr/patent/eVersion_ActRules/rules/pr71.html*

IMPORTANCE OF AN IDEAL METHODOLOGY IN ORDER TO DETERMINE THE FAIR MARKET VALUE IN OIL & GAS SECTOR

Vaibhav Jain

1. INTRODUCTION

Oil and Gas industry differs from other industries as to how it is valued financially; relying on factors which are subject to changes frequently. To figure the commercial value of an enterprise/company engaged in Oil & Gas sector apart from income, asset and market approach, a careful research of exploration, production as well as the current price of natural resources needs to be undertaken. These companies are valued at an industry specific metric as the investment in Oil and Gas is mainly commodity play. Hence, market prices are correlated to the expected price of the commodity they sell. Different methods of evaluation suit unique situation thus, aligning with the current market data. In this article, we will be discussing in brief about methods available for Fair Market Value ("FMV") determination to set a purchase price and determine the best investment in the ever changing landscape of energy sector.

2. METHODS FOR DETERMINING FAIR MARKET VALUE

There are various methods like comparable sales, rule-of-thumb, income forecast, replacement cost, known to be used by energy experts in order to determine an ideal range of the Fair Market Value for the purchaser or any stakeholder who is either intending to make an investment or contesting a claim in the Tribunal for any damages incurred in its due course. In this article, particularly the Discounted Cash Flow (DCF) method as in addition to all foreseeable business uncertainties and risks including technological (i.e. the possibility that the reserves might be recovered in the amounts or at the rates forecast), economic (like future oil and gas prices, market conditions, future operating costs and the potential need for additional capital expenditures), and political uncertainties (includes oil-import quotas, taxation, environmental considerations, etc) id discussed. The methods for estimating the FMV should consider the time value of money and the rate at which the investment amount is repaid.

i. **Comparable Sales Method:** relies on the use of a recent sales price for the subject or a comparable property. With this technique, prices on real property are based on the previous sale price of that or a similar property. It is not frequently used within the industry/sector as rarely does the owner of a producing property admits that there is another as good as the ones he owns; therefore cannot possible be a comparable sale that has as much proved reserve or as much undeveloped potential as the one being offered for purchase.

ii. **Rule-of Thumb Methods:** There are several rule-of-thumb approaches that has some merits but in this industry, the method do not consider the length of time during which revenues will result from the investment and hence, does not takes into account the time value of money. Living by its flaws, the rule-of-thumb ratios, by ignoring time and other important investment considerations, should not be used except in conjunction with yardsticks that consider the annual rates at which revenues resulting from the investment will be received. The four most familiar rule-of-thumb methods are *price paid per equivalent barrel of reserves, price paid per equivalent per day of production rate, profit-to-investment ratio, and the current income rate for a specified period of time.*

iii. **Replacement Method:** The replacement cost method for determining the FMV has little application in determining the value of producing properties because of the difficulty in estimating the costs for finding replacement reserves. The method is known to lay its genesis from the "real-estate industry". Except in rare occasions, the value for an undeveloped wildcat acreage is seldom based on the volume of oil and gas that may be found.

iv. **Income Forecast Methods:** The methods using income forecasts are often called "cash-flow" methods and are very useful because they enable the investor to compare petroleum investments with other investments options using universal investment criteria. They seek to determine the amount an investor would be willing to pay for the right to receive the future income that the property is expected to yield. The income forecast methods analyze the time pattern of future income; thus they require that a forecast of

expected revenue from the property be made, by time period, for the life of the property. To prepare the future net revenue (FNR) and the discounted future net revenue (DFNR) forecast, frequently called the present worth (PW) calculations, the engineer must estimate the hydrocarbon reserves for the property and must forecast the annual rates at which the reserves will be produced. After the most likely rates of production for the projected reserves have been prepared, economic considerations for the evaluation must be developed. These include consideration for any payment obligations, capital requirements, estimated operating costs and taxes, and costs for well repairs or development during the life of the property.

Out of all the methods discussed above, Income forecast methods are by far known to be the most widely accepted and sophisticated method of projecting or estimating the cash flows from the reserves bearing properties.

3. Issues to be consider while applying the DCF method of valuations in Oil and Gas enterprises

There are various issues that need to be considered while applying the Discounted Cash Flow method for determination of purchase prices in Oil and Gas enterprises. The experts, while determining the factors to be used in the method, should take due care of the susceptibility of the dynamism involved in the sector by being conscious of certain ingredients that forms the basis of such method.

Therefore, in order to inform its audience or the interested groups, an expert should be posed with the following questions for giving an informed choice to the acquirer or the purchaser under different market conditions or scenarios.

a. Sensitivity Analysis

The sector is known to be extensively determined by the government policies and international dynamics with changing crude oil prices, foreign exchange fluctuations, geo-political risks to name a few. Hence, it becomes the duty of the expert to determine whether while applying the DCF model for projecting the future probable cash flows, he has provided "Sensitivity Analysis" which would inform the purchaser/acquirer of how price changes under lower/higher values of the parameters whose small variations can imply significant changes in quantum.

b. Discount Rate

"As it was generally held that investments in oil enterprises were less risky than average investments in the market, the discount rate was reduced[1] ", observed by the Tribunal in Phillips Petroleum who followed this method of valuation. The reference has to be drawn for the discount rate to be used in DCF while discounting the cash flows in the case of Oil and Gas enterprises.

c. Valuation date and use of Hindsight information

Since states (or parties) are tempted to act opportunistically, when business conditions are expected to improve or have already improved, the use of valuation dates at the time of valuation and the use of hindsight information is an important element to prevent opportunistic takings.

i. The selection of valuation dates and to what extent the expert should use the benefits of hindsight information in performing a valuation is of considerable importance in oil and gas cases, given the volatility of crude prices.

ii. Use of "Hindsight information" in case of calculating damages in Energy disputes & arbitrations; in various arbitration awards involving energy disputes (CMS v. Argentina, Sempra v. Argentina, and Enron v. Argentina), the tribunal actually relied on valuation exercises that used hindsight information to determine damages.

Using hindsight information therefore is needed for two reasons, one to assess the actual position that claimant would have been in today in the absence of the damaging measure and second to more accurately evaluate actual damages as evolved in reality, since the date of the taking to the date of award. In volatile environment such as oil and gas, compensation should be based on a fair market valuation of the most recent date.

1. *Phillips Petroleum v. Iran, Statement by Judge Khalilian,*

d. Interest Rate/ Cost of Capital

The cost of capital is nothing but the Weighted Average Cost of Capital (WACC). Using WACC provides the oil and gas investor an interest compensation that, on average, is equal to the cost of sourcing capital in its industry, and thus, on average, this compensation should restore the opportunity cost of money in its business.

4. CONCLUSION

To conclude, it is always a Price vs. Value test that any of the investment analysis should pass, Price being the outcome of using the combination of one and/or all of the yardsticks compared to the Value being the target to be achieved out of the acquisition in question. Hence, a proper FMV determination should consider the time element of the revenue stream and the technological, economic, and political uncertainties coupled with the conventional way by making an adjustment with check lists to account for operator experience, market outlook, equipment condition, and any other concern specific to the transaction being analyzed. It is often observed by many experts in the sector that while calculating the range for the probable price for the acquirer/ purchaser, none of the investment analysis tools are adequate when used alone. Use of yardsticks has shown that investment assumption can be made that will condemn a project when measured by any single method. A single yardstick in itself is fallible and should not be considered as an adequate measure of an investment. If the assumptions are reasonable, it is difficult to destroy all the yardsticks with a single set of assumptions. Furthermore, the results of several yardsticks are highly recommended to eliminate as much uncertainty as possible. Towards an end, nothing is more reliable than the estimates of future oil and gas prices on which they are based.

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NEWSBYTE

YEAR END REVIEW- MAJOR FDI POLICY CHANGES[1]

Government has put in place an investor-friendly policy on FDI, under which FDI, up to 100% is permitted, under the automatic route, in most sectors/activities. FDI policy is reviewed on an ongoing basis, with a view to making it more investor friendly. FDI helps in the economic growth of the country by supplementing the domestic capital, bringing technology transfers, global best practices leading to increased manufacturing and productive capacity. Overall growth in different sectors of economy results in job creation.

FOLLOWING ARE THE MAJOR FDI POLICY CHANGES MADE DURING THE YEAR:

Defence:

The Government vide Press Note 7 /2014 dated 26th August, 2014 has allowed FDI upto 49% on approval route in Defence sector with certain conditions e.g., the applicant company seeking FIPB approval be an Indian company owned and controlled by resident Indian citizens. Above 49% the proposal will be routed to Cabinet Committee on Security on a case to case basis, wherever it is likely to result in access to modern and state-of-art technology in the country. FPI investment has been allowed to be made in the Defence sector upto 24% on automatic route. A number of conditions have been relaxed /removed making the sector more investor friendly.

The proposal is expected to result in technology transfer which would help in increasing the production base and providing an impetus to manufacturing sector and job creation in India. The measure is expected to not only reduce the heavy burden of imports and conserve foreign exchange reserves but also make domestic manufacturing an integral part of GDP growth of the country.

Railways:

The Govt. (vide PN 8/2014 dated 26th August, 2014) has allowed 100% private and FDI investment under automatic route in Rail infrastructure (other than construction, operation and maintenance of (i) Suburban corridor projects through PPP, (ii) High speed train projects, (iii) Dedicated freight lines, (iv) Rolling stock including train sets, and locomotives/coaches manufacturing and maintenance facilities, (v) Railway Electrification, (vi) Signaling systems, (vii) Freight terminals, (viii) Passenger terminals, (ix) Infrastructure in industrial park pertaining to railway line/sidings including electrified railway lines and connectivities to main railway line and (x) Mass Rapid Transport Systems) subject to meeting sectoral laws and with the condition that FDI beyond 49% in sensitive areas from security point of view will be approved by the Cabinet Committee on Security on a case to case basis.

The proposal for amendments will facilitate private investment including FDI inflows into infrastructure projects including elevated rail corridor project in Mumbai, High Speed Train project, port connectivity projects, dedicated freight corridors, logistic parks, station development, locomotive manufacturing units and power plants, through public-private partnerships which would not only bring in the much needed capital but also technology and global best practices.

CONSTRUCTION DEVELOPMENT:

The Government has issued the Press Note No. 10 on 3rd December, 2014 amending the FDI policy regarding Construction Development Sector. Amended policy includes easing of area restriction norms, reduction of minimum capitalization and easy exit from project. Further, in order to give boost to low cost affordable housing, it has been provided that conditions of area restriction and minimum capitalization will not apply to cases committing 30% of the project cost towards affordable housing.

INTRODUCTION OF COMPREHENSIVE ANTI-HIJACKING BILL 2014

The Union Cabinet chaired by the Prime Minister, Shri Narendra Modi, today gave its approval for introduction of the comprehensive Anti-Hijacking Bill 2014. The current law, the Anti-Hijacking Act, 1982, was last amended in 1994.

After the hijacking of Indian Airlines Flight IC-814 in December, 1999, it was felt necessary for providing the award of death penalty to perpetrators of the act of hijacking. The incident of 9/11, where aircrafts were used as weapons, also created the need to further amend the existing Act.

1. *Ministry of Commerce & Industry Press release dated 01.01.2015*

The Anti-Hijacking (Amendment) Bill, 2010 was introduced in the Rajya Sabha in August, 2010. During the process of amendment, a global diplomatic Conference was held at Beijing in August-September, 2010. India is a signatory to the Beijing Protocol signed at the Conference. This Protocol brought out new principal offences combined with ancillary offences, enlarged the scope of 'hijacking', expanded jurisdiction and strengthened extradition and mutual assistance regimes. The Bill provides death punishment for the offence of the highjacking, where such offence results in the death of a hostage or of a security personnel; or with imprisonment for life and the moveable and immoveable property of such persons shall also be liable to be confiscated.

Keeping in view these facts, the Cabinet has given approval for:-

i. Ratification of the Beijing Protocol, 2010;
ii. Repealing of the Anti-Hijacking Act, 1982 as amended in 1994;
iii. Withdrawal of the Anti-Hijacking Amendment Bill, 2010 and
iv. Introduction of a new Anti-Hijacking Bill, 2014.

Source: Cabinet Press releases from Press Information Bureau of 02.12.2014

SIGNING OF FIRST BILATERAL APA BY CBDT

On 19.12.2014, Central Board of Direct Taxes has signed a bilateral Advance Pricing Agreement (APA) with a Japanese Company. This is India's first bilateral APA. The APA is for a period of five years. The APA has been finalized in a period of about one and a half years, which is shorter than time normally taken in finalizing APAs internationally.

The APA scheme has been introduced to bring about certainty and uniformity in transfer pricing matters of multi - national companies and reducing litigation. APAs will improve investment climate in the country. In the context of growing economic ties between Japan and India, especially after Hon'ble Prime Minister's visit to Japan, this APA is expected to generate positive sentiments among Japanese investors in India.

1. FLAT OWNER WITHOUT LEGAL TITLE HAS CONSUMER RIGHTS

In a noteworthy judgment, the South Mumbai Consumer Forum has apprehended that a flat owner legally occupying the flat would be a consumer, even if his title to the flat might be in dispute before a competent court.

In a recent case where Mr.Thurlow owned a flat in a co-operative society. Appuswami was his roommate. In 1976, Appuswami got married and started residing in the same flat with his wife. In course of time the couple had three kids and were born and brought up in the same flat.

After Mr.Thurlow expired Appuswami appealed to court for the title of the flat but unfortunately expired before the title can be granted, but his wife and three kids continued to reside in the same flat. Consequently, the society intervened, opposing Appuswami did not have any right to the flat and it should be handed over to the Society.
Also the society refused to grant permission to renovate and fix the aging flat. On this
the Appuswami family filed a consumer complaint. The complaint claimed that they were recipients of the services availed of by the deceased Thurlow, and would be considered consumers.
Even though the issue of the Title of the Flat was pending, the High Court permitted them to use and occupy till the issue was decided. So they had every right to keep their flat in proper livable condition, and renovation would not cause any harm or prejudice the society's claim.

The society, on the other hand, claimed a consumer complaint was not maintainable as the Appuswami Family had not been recognized as members. The society also argued that no case could be filed before first giving a notice under Section 164 of the Maharashtra Co-operative Societies Act.

The Consumer Forum observed Section 164 was not applicable to consumer complaints. Beside, the Appuswami family had clearly put the society to notice by writing for permission to carry out repairs, and stating the society would be liable if permission was not granted. The Forum observed as maintenance charges had been collected, the consumer complaint was maintainable. The issue of inheritance before the High Court would not debar the filing of a consumer complaint for repairs.

2. CENTRE PLANNING TO AMEND ELECTRICITY ACT, 2003

In order to have a more firm grip over the state electricity regulatory commissions (SERCs), the Narendra Modi Government is planning to make the SERCs invulnerable to the state level political snooping, Enabling SERCs to

compulsorily implement Power tariff revision necessary for persistent power distribution.

As per the changes if any discom fails to provide the Annual Revenue Requirement (ARR) within 30 days after the deadline set by the Power Regulator, the Power Regulator will have legal compulsion to initiate a tariff revision, based on the data at its disposal and issue new tariff order within the next 90 days.

Additionally, Parliament is planning to have two nominees from Center in the SERCs. This will increase the number of members on each state regulatory commission to five, instead of three currently. The tenure of an SERC member will be reduced to 3 years from 5 years at present, with the Forum of Regulators having the authority to ask a non-performing member to go.

3. SECTION 309 QUASHED!

The Bharatiya Janata Party-led government has quashed section 309 of India's colonial-era penal code which said a "suicide survivor could be sentenced to a year in prison, a fine, or both". The home ministry said that the action was taken based on the recommendations from the Law Commission of India, a body which periodically examines legal reform.

In a 2008 report, the body, which first suggested repealing the law back in 1971, said section 309 was inhuman and anachronistic. "Section 309 is also a stumbling block in prevention of suicides and improving the access of medical care to those who have attempted suicide," the report said. The move was welcomed and supported by 18 states and four union territories. World health organization had also welcomed the move and in a report in September 2014 said that countries which decriminalized suicide saw decrease in the number of suicide cases.

WHO also said in one report that about 35.5 deaths per 100,000 people in India were suicides and this is the highest rate in the world. About 134,799 Indians killed themselves in 2013 as per the official report.

4. PAKISTAN'S SUPREME COURT LOOKS UP TO INDIAN SUPREME COURT FOR GUIDANCE.

Judicial lobbies of our neighbor country Pakistan has exposed an igniting fact bringing in Lime light that their highest judicial authority Supreme Court of Pakistan prefers following Supreme Court of India regularly.

One such latest judgment of Supreme Court of Pakistan indicating reference to Supreme Court of India was delivered on December 17 when Supreme Court of Pakistan decided the jurisdiction of High Courts to entertain appeals against interim orders passed by Election Tribunal. A number of petitions had been filed there, challenging the elections of several candidates elected to Parliament in the 2013 general elections.

The case of Javaid Hashmi, ex-party president of Tehreek-e-insaaf, during whose case Supreme Court of Pakistan ruled the exclusion of jurisdiction of all courts in regard to election matters.

Supreme Court of Pakistan took reference from Supreme Court of India in this case and dismissed all the appeals, it ruled: "The legal position that emerges from the combined reading of the case law is that an interlocutory order passed by the Tribunal cannot be questioned in constitutional jurisdiction until the same is patently illegal and the same for reason cannot even be challenged in appeal...."

The Supreme Court of Pakistan has quoted the ruling passed by Indian Supreme Court in EC vs Shivaji (AIR 1988 SC 61) case.

Few other judgments have also come where advocates of Supreme Court of Pakistan had followed the rulings of Supreme Court of India. They are - Hari Vishnu Kamath Vs Ahmad Ishaque (AIR 1955 SC 233), Mohinder Singh Gill vs Chief Election Commissioner (AIR 1978 SC 851), Upadhaya Hargovind Devshker Vs Dhirendrasinh Virbhadrasinh Solanki (AIR 1988 SC 915) and K Venkarachalam Vs A Swamickan (AIR 1999 SC 17230).

All these four judgments ensured sanctity of the democracy and non-interference of judiciary in the matter related to election processes, as are followed by the Indian judiciary.

RBI LIBERALIZED NORMS FOR OVERSEAS DIRECT INVESTMENTS

Reserve Bank of India (RBI) vide RBI/2014-15/371, A.P. (DIR Series) Circular No.54 dated December 29, 2014 has liberalized the below mentioned regulations contained in the Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004. The step has been taken in order to grant more flexibility to the Indian party.

1. Creation of charge on shares of JV / WOS / Step Down Subsidiary (SDS) in favour of domestic/overseas lender
2. Creation of charge on the domestic assets in favour of overseas lenders to the JV / WOS / step down subsidiary
3. Creation of charge on overseas assets in favour of domestic lender

The liberalized regulations of the Notification are detailed as under:

(i) Creation of charge on shares of JV / WOS / step down subsidiary (SDS) in favour of domestic / overseas lender

In terms of the extant FEMA provisions, creation of charge (pledge) on the shares of an JV / WOS of an Indian party in favour of domestic / overseas lender for the purpose of availing facilities (funded or non-funded) by the Indian party and / or the concerned JV / WOS is under the automatic route.

It has been decided that the designated AD bank may permit creation of charge / pledge on the shares of the JV / WOS / SDS (irrespective of the level) of an Indian party in favour of a domestic or overseas lender for securing the funded and / or non-funded facility to be availed of by the Indian party or by its group companies / sister concerns / associate concerns or by any of its JV / WOS / SDS (irrespective
of the level) under the automatic route subject to the following:

a) The Indian party is complying with the provisions under Regulation 6 (and Regulation 7, if applicable) of the Notification ibid for undertaking financial commitment;
b) Compliance to the provisions under Regulation 18 of the Notification ibid;
c) The period of charge, if not specified upfront, may be co-terminus with the period of end use (like loan or other facility) for which charge has been created;
d) The loan / facility availed by the JV / WOS / SDS from the domestic / overseas lender shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever;
e) A certificate from the Statutory Auditors' of the Indian party, to the effect that the loan / facility availed by the JV / WOS / SDS has not been utilized for direct or indirect investments in India, is to be obtained and kept by the designated AD;
f) The invocation of charge resulting into the domestic lender acquiring the shares of the overseas JV / WOS / step down subsidiary shall be governed by the extant FEMA provisions / regulations issued by the Reserve Bank from time to time;
g) The facilities (funded or non-funded) extended by the domestic lender to the Indian party or to its group / sister / associate concern or to any of its overseas JV / WOS / SDS shall also be governed by the prudential norms and other guidelines issued by the Department of Banking Regulation (DBR, the erstwhile DBOD), Reserve Bank of India from time to time; and
h) The matter relating to the setting up / acquiring the multi-layered structure of overseas entities by the Indian party, wherever applicable, is under the examination of the Reserve Bank and the decision taken in this regard shall be conveyed in due course for necessary compliance at AD / Indian party level.

(ii) Creation of charge on the domestic assets in favour of overseas lenders to the JV / WOS / step down subsidiary

As per the extant FEMA provisions, creation of charge on the domestic assets (movable / immovable / financial / other) of an Indian party (or its group / sister / associate concern including the individual promoter / director) in favour of an overseas lender to the JV / WOS / step down subsidiary (SDS) requires prior approval of the Reserve Bank.

It has been decided that the designated AD bank may permit creation of charge (by way of pledge, hypothecation, mortgage, or otherwise) on the domestic assets of an Indian party (or its group companies / sister concerns / associate concerns including the individual promoters / directors) in favour of an overseas lender for securing the funded and / or non-funded facility to be availed of by the JV / WOS / SDS (irrespective of the level) of the Indian party under the automatic route subject to the following:

(a) The Indian party is complying with the provisions under Regulation 6 (and Regulation 7, if applicable) of the Notification ibid for undertaking the financial commitment;

(b) Compliance to the provisions under Regulation 18A(1) of the Notification ibid;

(c) The domestic assets, on which charge is being created, are not securitized;

(d) The period of charge, if not specified upfront, may be co-terminus with the period of end use (like loan or other facility) for which charge has been created;

(e) The loan / funds raised overseas by the JV / WOS / SDS shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever;

(f) A certificate from the Statutory Auditors' of the Indian party, to the effect that the loan / funds raised overseas by the JV / WOS / SDS has not been utilized for direct or indirect investments in India, is to be obtained and kept by the designated AD;

(g) The overseas lender undertakes that, in the event of enforcement of charge, they shall transfer the domestic assets by way of sale to a resident only;

(h) In case of invocation of charge, the resultant remittance of the proceeds exceeding the prescribed limit of the financial commitment of the Indian party (prevailed at the time of creation of charge) shall require prior approval of the Reserve Bank;

   (i) Wherever creation of charge involves pledge of shares of an Indian company, the pledge shall also be governed by the extant FEMA provisions / regulations issued by the Reserve Bank and the consolidated Foreign Direct Investment (FDI) policy issued by the Government of India from time to time; and

   (j) The matter relating to the setting up / acquiring the multi-layered structure of overseas entities by the Indian party, wherever applicable, is under the examination of the Reserve Bank and the decision taken in this regard shall be conveyed in due course for necessary compliance at AD / Indian party level.

(iii) Creation of charge on overseas assets in favour of domestic lender

Creation of charge on the overseas assets of JV / WOS / SDS of an Indian party in favour of a domestic lender to the Indian party or to its group / sister / associate concern or to any of its overseas JV / WOS / SDS requires prior approval of the Reserve Bank.

It has been decided that the designated AD bank may permit creation of charge (by way of hypothecation, mortgage, or otherwise) on the overseas assets (excluding the shares) of the JV / WOS / SDS (irrespective of the level) of an Indian party in favour of a domestic lender for securing the funded and / or non-funded facility to be availed of by the Indian party or by its group companies / sister concerns / associate concerns or by any of its overseas JV / WOS / SDS (irrespective of the level) under the automatic route subject to the following:

a) The Indian party is complying with the provisions under Regulation 6 (and Regulation 7, if applicable) of the Notification ibid for undertaking financial commitment;

b) Compliance to the provisions under Regulation 18A(2) of the Notification ibid;

c) The overseas assets, on which charge is being created, are not securitized;

d) The period of charge, if not specified upfront, may be co-terminus with the period of end use (like loan or other facility) for which charge has been created;

e) The loan / facility availed by the JV / WOS / SDS from the domestic lender shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever;

f) A certificate from the Statutory Auditors' of the Indian party, to the effect that the loan / facility availed by the JV / WOS / SDS has not been utilized for direct or indirect investments in India, is to be obtained and kept by the designated AD;

g) The invocation of charge resulting into the domestic lender acquiring the overseas assets shall require prior approval of the Reserve Bank; and

h) The matter relating to the setting up / acquiring the multi-layered structure of overseas entities by the Indian party, wherever applicable, is under the examination of the Reserve Bank and the decision taken in this regard shall be conveyed in due course for necessary compliance at AD / Indian party level.

It has been further clarified that the necessary amendments to the Notification shall be effective from 3rd December, 2014.

RBI RELAXES ECB NORMS

Reserve Bank of India (RBI) vide RBI/2014-15/377 A.P. (DIR Series) Circular No. 55 dated January 01, 2015 has issued a circular relating to creation of charge over securities for External Commercial Borrowings (ECB).

In the existing guidelines, the choice of security to be provided to the overseas lender or the supplier for securing ECB is left to the borrower.

In order to liberalise and expand the options of securities and to consolidate various provisions related at one place, it has been decided that AD Category-I banks may allow creation of charge on immovable assets, movable assets, financial securities and issue of corporate and / or personal guarantees in favour of overseas lender / security trustee, to secure the ECB to be raised / raised by the borrower, subject to satisfying themselves that:

(i) the underlying ECB is in compliance with the extant ECB guidelines,
(ii) there exists a security clause in the Loan Agreement requiring the ECB borrower to create charge, in favour of overseas lender / security trustee, on immovable assets / movable assets / financial securities / issuance of corporate and / or personal guarantee, and
(iii) No objection certificate, wherever necessary, from the existing lenders in India has been obtained.

Once aforesaid stipulations are met, the AD Category-I bank may permit creation of charge on immovable assets, movable assets, financial securities and issue of corporate and / or personal guarantees, during the currency of the ECB with security co-terminating with underlying ECB, subject to the following:

(a) Creation of Charge on immovable assets:

i. Such security shall be subject to provisions contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000.
ii. The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender / security trustee.
iii. In the event of enforcement / invocation of the charge, the immovable asset / property will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.

(b) Creation of Charge on Movable Assets

In the event of enforcement / invocation of the charge, the claim of the lender, whether the lender takes over the movable asset or otherwise, will be restricted to the outstanding claim against the ECB. Encumbered movable assets may also be taken out of the country.

(c) Creation of Charge over Financial Securities

i. Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower will be permitted. Pledge on other financial securities, viz. bonds and debentures, Government Securities, Government Savings Certificates, deposit receipts of securities and units of the Unit Trust of India or of any mutual funds, standing in the name of ECB borrower/ promoter, will also be permitted.
ii. In addition, security interest over all current and future loan assets and all current assets including cash and cash equivalents, including Rupee accounts of the borrower with AD Category-I banks in India, standing in the name of the borrower/promoter, can be used as security for ECB. The Rupee accounts of the borrower/ promoter can also be in the form of escrow arrangement or debt service reserve account.
iii. In case of invocation of pledge, transfer of financial securities shall be in accordance with the extant FDI/FII policy including provisions relating to sectoral cap and pricing as applicable read with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.

(d) Issue of Corporate or Personal Guarantee

i. A copy of Board Resolution for the issue of corporate guarantee for the company issuing such guarantee, specifying name of the officials authorised to execute such guarantees on behalf of the company or in individual capacity should be obtained.
ii. Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.

iii. Such security shall be subject to provisions contained in the Foreign Exchange Management (Guarantees) Regulations, 2000.

As clarified by RBI in its notification, amendments to the ECB guidelines shall come into force with immediate effect, subject to review from time to time. All other provisions related to raising of ECB remain unchanged.

AMENDMENT IN DESIGN RULES AND FEES

Recently, The Controller General of Patents, Design and Trade Marks (CGPDTM) has issued a Public Notice dated January 01, 2015, where amendment in design rules and fees has been provided. Such amendment is related to official fees for filing a new Design application as well as other proceedings of Design in India. Further, two main categories of Applicant has also been mentioned and applicable fee shall depend on type of applicant.

THE IMPORTANT ASPECT OF AMENDMENT RULES ARE PRODUCED BELOW:

- Applicants have been divided in two main categories namely: "natural person" and "other than natural person(s)" categories. Second category of applicants has been further divided in to two sub-categories 1.) "small entity" 2.) "others except small entity" and fee structure is amended accordingly.
- New form – 24 has been introduced which has to be submitted with all new applications for claiming the status of small entity.
- Addition of new clauses in Design Rules: A new clause has been inserted after rule 2(c) as under '(ca) "person other than a natural person", shall include a "small entity";'
- Another clause has been inserted after rule 2(e) which defines definition of small entities as under '(ea) "small entity" means,

In case of enterprise engaged in the manufacture or production of goods, an enterprises where the investment in plant and machinery does not exceed the limit specified for a medium enterprise under clause (a) of sub-section (1) of the section (7) of the Micro, Small and Medium Enterprises Development Act , 2006 (27 of 2006); and

In case of enterprise engaged in providing or rendering of services, an enterprises where the investment is not more than the limit specified for a medium enterprise under clause (b) of sub-section (1) of the section (7) of the Micro, Small and Medium Enterprises Development Act , 2006 (27 of 2006);

- In rule 5(2) after clause (d), two new clauses have been inserted, as under: "(e) in case an application processed by a natural person is fully or partly transferred to a person other than a natural person, the difference, if any , in the scale of fees between the fees charged from a natural person and the fees chargeable from the person other than natural person in the same matter shall be paid by the new applicant with the request for transfer.
- (f) in case an application processed by a small entity is fully or partly transferred to a person other than a natural person (except a small entity), the difference, if any , in the scale of fees between the fees charged from the small entity and the fees chargeable from the person other than natural person (except a small entity) in the same matter shall be paid by the new applicant with the request made for such transfer."
- In rule 6 after sub-rule (1), the following proviso has been inserted: "Provided that in the case of small entity, every document, for which a fee has been specified, shall be accompanied by Form-24."

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