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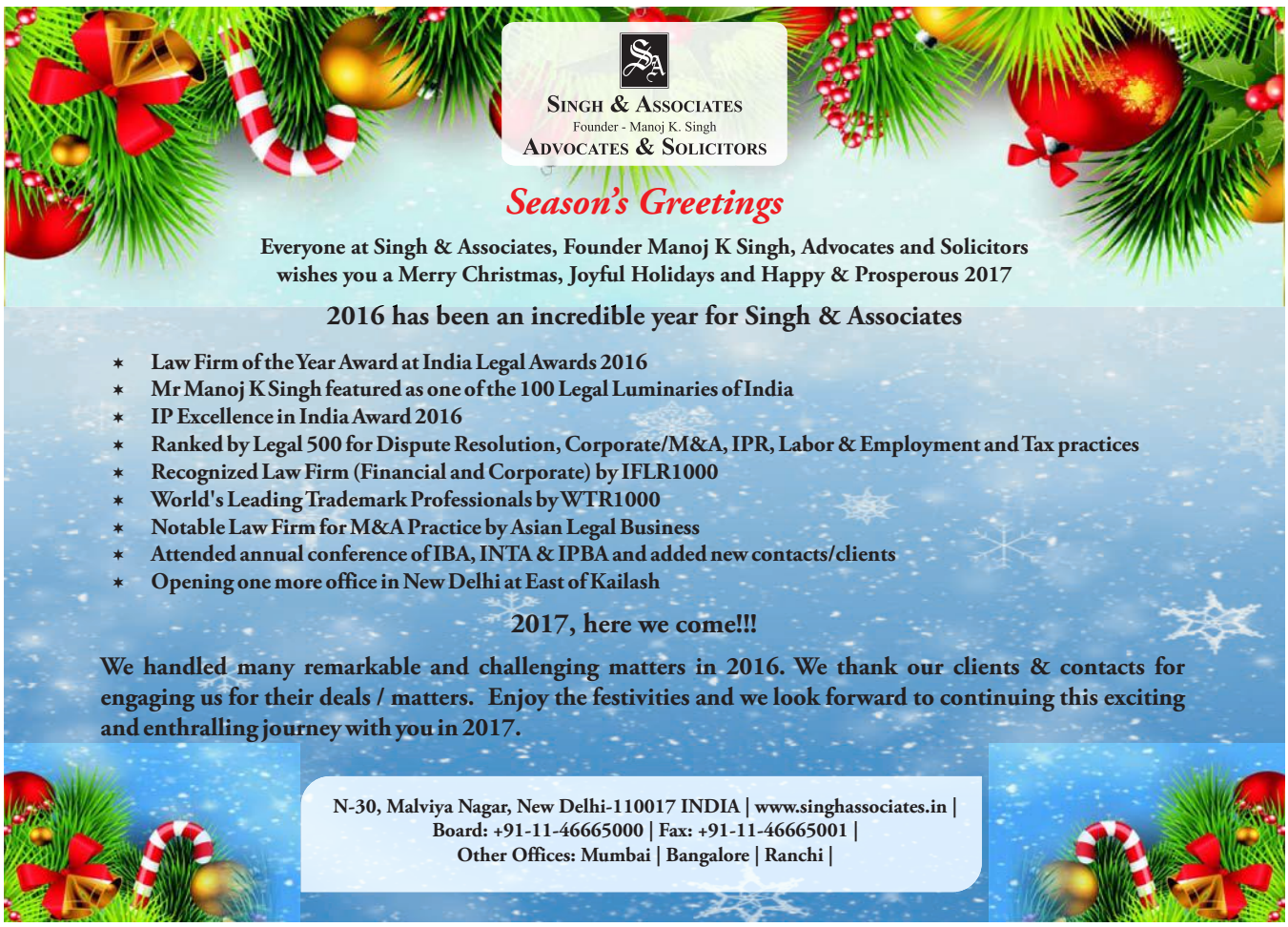
November 2016. Vol. IX, Issue XI

INDIAN LEGAL IMPETUS®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Founder - Manoj K. Singh
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Season's Greetings
Everyone at Singh & Associates, Founder Manoj K Singh, Advocates and Solicitors
wishes you a Merry Christmas, Joyful Holidays and Happy & Prosperous 2017
2016 has been an incredible year for Singh & Associates
Law Firm of the Year Award at India Legal Awards 2016
Mr Manoj K Singh featured as one of the 100 Legal Luminaries of India
IP Excellence in India Award 2016
Ranked by Legal 500 for Dispute Resolution, Corporate/M&A, IPR, Labor & Employment and Tax practices
Recognized Law Firm (Financial and Corporate) by IFLR1000
World's Leading Trademark Professionals by WTR1000
Notable Law Firm for M&A Practice by Asian Legal Business
Attended annual conference of IBA, INTA & IPBA and added new contacts/clients
Opening one more office in New Delhi at East of Kailash
2017, here we come!!!
We handled many remarkable and challenging matters in 2016. We thank our clients & contacts for engaging us for their deals / matters. Enjoy the festivities and we look forward to continuing this exciting and enthralling journey with you in 2017.
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EDITORIAL

Manoj K. Singh
Founding Partner

It gives me immense pleasure to present the November 2016 edition of our monthly Newsletter **Indian Legal Impetus**. As the name suggests this Newsletter is our sincere effort to bring forth the latest developments and accomplishments in the Legal world and their applicability and effect on various fields. The entire Singh and Associates team would like to extend our sincere and earnest gratitude to all the readers who have continuously uplifted our morale and motivated us by the awe-inspiring response to every edition of **Indian Legal Impetus**. It gives me great joy to announce another milestone that SINGH & ASSOCIATES have achieved as the ***Law Firm of the Year*** awarded by India Legal Awards 2016. We would also like to thank our supporters for their votes that helped us achieve ***IP Excellence in India 2016*** on the occasion for **The Best Practices in Patents 2016, Mumbai** in a survey conducted by **de Science infoware.**

Britain's efforts to move out of the European Union seems to be in a soup again with the Hon'ble High Court of U.K with the unanimous decision held that Britain's departure from the European union cannot be given by the executive acting all alone under the prerogative powers of the crown but must pass the litmus test in parliament. A detailed report and examination of various aspects are covered in the cover article of the edition **Parliament is supreme and Sovereign- May it be Brexit**. Moving further, this edition includes an article on **Revised National IPR Policy India- From Industry and Public development Perspective** which provides an insight on the new IPR policy in India. Moving ahead the next article **Concise Overview of the Prohibition of Benami transaction Act, 1988** tries to throw light on the latest amendments through a very crisp synopsis of Benami Transaction Act, 1988. The next article **Emerging Issues In The Arbitration Regime – India & Singapore** discusses the issues in the arbitration regime with some mitigation efforts going around the world to have expedited arbitral proceedings. The idea of denationalization "Lex Mercatoria" in the context of law of choice in the arbitration is presented and various aspects of conflict of law is explained through the article **Choice of Law: Problems In International Commercial Arbitration**.

The corporate section of this edition includes an article **Optimism of Banks & FIs: The New Debt Recovery Act**. This article deals in the latest efforts that government of India is making in to make the debt recovery easier and effective. Be it the Enforcement of security Interest and Recovery of Debts Laws and Misc. provisions (Amendments) bill, 2016 or the insolvency and bankruptcy code 2016. The next article titled **Working Statement: Time of the Year** brings in the importance of submissions of information relating to the commercial working of patents in India. The article explains various statutory requirements and legal aspects of filing working statements.

Going forward, the entire world was astonished by the Indian Government's decision due to which current high denomination notes of rupee 1000 and 500 ceased to be legal tender. We present an insight into the legality of the demonetization under the article **Legality of Demonetization of Rs.500 and Rs.1000 Notes**. The next article on **Limitations on the Choice of Means and Methods of Warfare** discusses the International Humanitarian law, also known as 'Laws of War' alongwith a detailed analysis of different means of warfare. The last but not the least is the article on **DCR Under National Solar Mission-WTO, Appellate Body Report** providing an analysis of the findings by the WTO, Appellate Body with respect to the DCR policies adopted by India.

Please also read our newsbytes section for the latest developments and happenings in the field of law, summarized in the last section. We, sincerely hope that our readers find the articles provided herein useful and informative. Any comments, suggestions, opinions or comments from our readers would be highly welcome. Please send us your valuable insights and reviews on newsletter@singhassociates.in.

Thank You.

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INDIAN LEGAL IMPETUS®

Volume IX, Issue XI

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Published by
Singh & Associates
Founder: Manoj K. Singh
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PARLIAMENT IS SUPREME AND SOVEREIGN - MAY IT BE "BREXIT"

Vishal Gera

"Divorces are messy things, for Individuals, States and Union"

The Hon'ble High Court of U.K. by a unanimous decision of three Hon'ble Judges has put a hurdle in the Britain's exit route from the European Union. In **R (Miller) V. Secretary of State for Exiting the European Union** (case no. CQ/3809/2016 and CO/3281/2016, decided on 3rd of Nov.' 2016), three judges bench (Lord Thomas LCJ, Lord Etherton MR and Sales LJ) held unanimously that the Article 50 notification which will bring about **Britain's** departure from the **European Union** cannot be given by the executive acting all alone under the prerogative powers of the crown but must pass the litmus test in the Parliament.

The Hon'ble Judges after penning down the detailed lengthy judgment finally concluded that Secretary of State does not have power under the Crown's prerogative to give notice to Article 50 of the TEU for the United Kingdom to withdraw from the European Union(reference to Para 111). Thus, Britain's divorce from European Union has to pass the test in Parliament. The way for the will of the people as majority voted for exiting from European Union has to go through the Parliament.

BACKGROUND

1. On 1 January 1973 the United Kingdom joined what were then the European Communities, including the European Economic Community. Parliament passed the European Communities Act 1972 (1972 Act) to allow that to happen since it was a condition of membership that Community law should be given effect in the domestic law of the United Kingdom and primary legislation was required to achieve this [reference to Para 1 and Para's 36–54]. The European Communities have now become the European Union.

2. Pursuant to the European Union Referendum Act 2015 a referendum was held on 23 June 2016 on the question of whether the United Kingdom as a member should leave or remain in the European Union. The majority answer given was that the UK should leave [reference to Para 2].

3. The process for withdrawal is governed by **Article 50 of the Treaty on European Union**, which states that once a Member State gives notice to withdraw there is a two-year period in which to negotiate a withdrawal agreement. If no agreement is reached in this time then, subject only to agreement on an extension of time with the European Council acting unanimously, the EU Treaties shall cease to apply to that State. The Government accepts that a notice under Article 50 cannot be withdrawn once it has been given. It also accepts that Article 50 does not allow a conditional notice to be given: a notice cannot be qualified by stating that Parliament is required to approve any withdrawal agreement made in the court of Article 50 negotiations [reference to Para 9-17].
4. The most fundamental rule of the UK's constitution is that Parliament is sovereign and can make and unmake any law it chooses. As an aspect of the sovereignty of Parliament it has been established for hundreds of years that the Crown – i.e. the Government of the day – cannot by exercise of prerogative powers override legislation enacted by Parliament. This principle is of critical importance and sets the context for the general rule on which the Government seeks to rely – that normally the conduct of international relations and the making and unmaking of treaties are taken to be matters falling within the scope of the Crown's prerogative powers. That general rule exists precisely because the exercise of such prerogative powers has no effect on domestic law, including as laid down by Parliament in legislation [reference to Para 18-36].
5. The High Court was very clear that the inevitable effect of triggering Article 50 would be to change the law of the land. Rights previously enjoyed would no longer be enjoyed (more particularly Para's 63-66).

6. For the Court, the government's argument that the claimants had to identify an abrogation of the prerogative in the 1972 Act (the operation of which is contingent on the government entering into agreements on the international plane: reference to Para 77 and 93) The statutory interpretation especially of a constitutional statute "must proceed having regard to background constitutional principles which inform the inferences to be drawn as to what Parliament intended by legislating the way it did"; the statute has to be read "in the light of constitutional principle" (reference to Para 82). In particular, "the major constitutional importance" of the 1972 Act belied the argument that "Parliament nonetheless intended that its legal effects could be removed by the Crown through the use of its prerogative powers" (reference to Para. 88). That the executive has a broad foreign affairs prerogative is so only because this prerogative cannot be used to modify domestic law (reference to Para 89, 91). The "clear and necessary implication" of the provisions of the 1972 Act, read in their constitutional context, was to exclude the possibility that the legislation could be turned into an empty shell by the executive acting alone.

7. On other side, at Para's. 105-108, the Court clearly held that the legislation providing for a referendum was part of advisory effect only and Parliament must have appreciated that the referendum was intended only to be advisory and it did not stop Parliament or enable the executive in any way. The referendum was purely and simply "a political event" (reference to Para. 108) with no legal implications.

However, it would be interesting to see the strategy of Mrs. May as she has a rocky path forward to give effect to the will of People and also to shield British Pound from further dropping. As per the news available the government would be appealing against the aforesaid verdict of Hon'ble High Court to the Hon'ble Supreme Court, which would be heard in early December.

***

REVISED NATIONAL IPR POLICY INDIA- FROM INDUSTRY AND PUBLIC DEVELOPMENT PERSPECTIVE

Monika Shailesh

May 2016 marked a new era in the history of IPR policy and regulation in India. The Union Cabinet on May-12-2016 approved the much anticipated "National Intellectual Property Rights (IPR) Policy" to lay the future roadmap for intellectual property in India. It is said to be a "first of its kind" policy for India, covering all forms of intellectual property together in a single framework. The ideologies laid down in the policy incentivize IP owners by granting them monopoly rights. The Policy is in compliance with WTO's (World Trade Organization) agreement on TRIPS (Trade Related aspects of IPRs), goals to sustain entrepreneurship and boost the scheme "Make in India".

The National IPR Policy is a vision document that aims to create and exploit synergies between all forms of intellectual property (IP), concerned statutes and agencies. It sets in place an institutional mechanism for implementation, monitoring and review. It aims to incorporate and adapt global best practices to the Indian scenario. This policy shall weave in the strengths of the Government, research and development organizations, educational institutions, corporate entities including MSMEs, start-ups and other stakeholders in the creation of an innovation-conducive environment, which stimulates creativity and innovation across sectors, as also facilitates a stable, transparent and service-oriented IPR administration in the country.[1]

Vision Statement:
An India where creativity and innovation are stimulated by Intellectual Property for the benefit of all; an India where intellectual property promotes advancement in science and technology, arts and culture, traditional knowledge and biodiversity resources; an India where knowledge is the main driver of development, and knowledge owned is transformed into knowledge shared.[2]

Mission Statement
Stimulate a dynamic, vibrant and balanced intellectual property rights system in India to:

i. Foster creativity and innovation and thereby, promote entrepreneurship and enhance socio-economic and cultural development

ii. Focus on enhancing access to healthcare, food security and environmental protection, among other sectors of vital social, economic and technological importance.

The new policy is set to administer the subsequent Acts: Patents, Trade Marks, Design, Copyright, Protection of Plant Varieties and Farmers' Rights, Semiconductor Integrated Circuits Layout Design and Biological Diversity. It is expected, therefore, that it will impact sectors as diverse as pharmaceuticals, software, electronics and communications, seeds, environmental goods, renewable energy, agricultural and health biotechnology, and information and communications. Developed countries like USA have been forcing India to tighten its IPR policy regime to gain added advantage for their MNC's. Experts believe that the revised IPR policy shows that India has not surrendered to the mounting international pressure over the formulation of new IPR policy but India should have made the policy a bit more radical to safeguard India's Generic Industry. The new policy is completely silent on the generic medicines in the pharma industry. New IPR policy is established over the Doha Declaration for the policy framework and is in compliance with the TRIPS agreement and public health. The Doha Declaration is a 2001 WTO text which recognizes that IP and patent regimes have to be weighed against the context of burning health issues like HIV/AIDS, tuberculosis, malaria and other epidemics that primarily affect the developing nations. Developed nations like USA and European countries have been trying to extract more and more out of the developing countries on the basis of TRIPS agreement. The new IPR policy however has made it clear that India for sure is not going to deliver anything more than the intents of the TRIPS agreement and it is assumed to be good step towards the

1 *http://pib.nic.in/newsite/PrintRelease.aspx?relid=145338 (Last visited on 20/12/2016)*

2 *http://pib.nic.in/newsite/PrintRelease.aspx?relid=145338 (Last visited on 20/12/2016*

indigenous and generic Indian Industry. The basis of this can be seen in the light that India has not opened any debate on Section 3(d) of patents act that states inventions that are mere discoveries of a new form of a known substance and do not result in any increase in the efficiency are not patentable. This has given a great reprise to the Indian generic pharma industry, otherwise in case patents are granted to International firms like Tykerb which applied patent for the cancer drug it would have made the cancer drug so expensive and out of reach of many patients. However the new policy seems to be a failure where it is required to create a favorable environment for the creativity and innovation. The developed countries are least interested in developing medicines for diseases like malaria that haunt the third world or the developing countries while the new IPR policy completely fails to encourage the innovations in the area of biomedicine for Indian companies.Indian applicants have rather leading in the trademark applications and not patents. The number of new drug applications filed by Indian companies with USFDA, for instance, has never crossed the single digit figure. So many experts do criticize that the new policy framework will not do any significant job in enhancing this situation.

OBJECTIVES OF NEW POLICY FRAMEWORK[3]

i. IPR Awareness: Outreach and Promotion - To create public awareness about the economic, social and cultural benefits of IPRs among all sections of society.

ii. To stimulate the generation of IPRs

iii. Legal and Legislative Framework - To have strong and effective IPR laws, which balance the interests of rights owners with larger public interest.

iv. Administration and Management - To modernize and strengthen service oriented IPR administration.
Commercialization of IPR - Get value for IPRs through commercialization.

v. Enforcement and Adjudication - To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements.

vi Human Capital Development - To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPRs.

CONCLUSION

In totality the new IPR policy appears to be fair and balanced, particularly the way the new IPR policy has safeguarded the interest of the generic biomedicine sector of India. The policy makers are to be applauded for not yielding to the ever mounting international pressure and lobbying by the big MNC's. The recommended trail for IPR in India appears to be clear, explicit, and see-through. The policy comprehensibly has not taken any extreme stance on any aspect of the IP. The policy expresses of encouraging IP as a financial asset and economic tool. However, the policy seems to be failing to provide safety from improper valuation of the IPR asset. It is encouraging to note that now there will be high level body would monitor the progress and implementation of the new policy to see through a clear indication on the performance and target deliverables. The new policy do encourages the "THINK TANK" by providing statutory incentives, like tax benefits linked to IP creation, reduction in fee for patents that will lead to public development, reduction of time taken to grant patent or express service to patents that intent to start manufacturing in India, under "MAKE IN INDIA" scheme etc. The IPR policy favors the government considering financial support for a limited period on sale and export of products based on IPRs generated from public-funded research. As per the WTO norms, a compulsory licensing (CL) can be invoked by a government allowing a company to produce a patented product without the consent of the patent owner in public interest. Under the Indian Patents Act, a compulsory licensing (CL) can be issued for a drug if the medicine is deemed unaffordable, among other conditions, and the government grants permission to qualified generic drug makers to manufacture it. Compulsory licensing is the approach towards bending the aim of patents for public interest. New policy also aims to create an effective loan guarantee scheme to encourage start-ups. Overall the new IPR Policy regime can be classified as a balanced scheme where the interest of both the industry as well as the public development domain has been considered.

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3 *http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_08.08.2016.pdf (Last visited on 20/12/2016)*

CONCISE OVERVIEW OF THE PROHIBITION OF BENAMI TRANSACTIONS ACT, 1988

Dikshant Bhansali

INTRODUCTION

The word "Benami" means anonymous or nameless and the term "Benami Transaction" is used to describe a transaction where one person pays for property but the property is transferred to or held by somebody else. The person who pays for the property is the real beneficiary, either at present or at some point in the future, but is not recorded as the legal owner of the property. This enables the payer to achieve undesirable purposes such as utilizing black money, evading the payment of tax and avoiding making payments to creditors.

The Benami Transactions (Prohibition) Act, 1988 ('Primary Act') was enacted in the year 1988 to prohibit all benami transactions. The Act defined a 'benami transaction' as "any transaction in which property is transferred to one person for a consideration paid or provided by another person".

The Hon'ble Supreme Court in *Bhim Singh v. Kan Singh* AIR 1980 SC 727, explained Benami Transaction as "Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami. In that case the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner."

However, the Primary Act was not comprehensive enough and lacked to make a big impact. The Rules of the Primary Act were not framed and benami transactions continued in India. The Primary Act had several loopholes, including the absence of an appellate mechanism and lack of provisions for vesting of the confiscated property with the Central government.

The Benami Transactions (Prohibition) Amendment Act, 2016 ('Amendment Act') seeks to amend the Primary Act and is aimed at catching those with black money in the domestic economy hidden through benami properties.

The reason for bringing an Amendment Act instead of a new Act is that the Primary Act has penal provisions and penal provisions cannot be applied retrospectively. So if a new Act was passed in 2016, all those who acquired benami properties before 2016 would be given immunity.

PURPOSE & SCOPE OF THE AMENDMENT ACT

The Amendment Act seeks to:

- amend the definition of benami transactions,
- establish adjudicating authorities and an appellate tribunal, and
- specify revised penalties for benami transactions.

The term 'Benami Transaction' covers a transaction or arrangement

a) where a property is transferred to, or is held by, a person for a consideration provided, or paid by, another person; and

b) the property is held for the immediate or future benefit, direct or indirect, of the person providing the consideration.

The Amendment Act increases the scope of transactions which qualify as benami and includes property transactions where:

i. transaction is made in a fictitious name, or

ii. owner is not aware of or denies knowledge of the ownership of the property, or

iii. person providing the consideration for

the property is not traceable or is fictitious.

The Amendment Act specifies the following cases which are exempted from the scope of the definition of a benami transaction. When a property is held by:

i. a member of a HUF, and is being held for his or another family member's benefit, and has been provided for or paid from known sources of income of that family;

ii. a person in a fiduciary capacity (such as a trustee, executor, partner, director of a company, depository or participant);

iii. a person in the name of his spouse or child, and the property has been paid from the person's known sources of income; and

iv. a person in the name of his brother or sister or lineal ascendant or descendant (where their respective names appear as joint-owners in any document), and the property has been paid from the person's known sources of income.

BENAMI PROPERTY:

Property of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property.

INITIATION OF PROCEEDINGS AGAINST ALLEGED BENAMI PROPERTY BENEFICIARIES:

The Act establishes four authorities who will be able to conduct inquiries regarding benami transactions:

i. Initiating Officer (i.e. Assistant Commissioner of Income-Tax or a Deputy Commissioner of Income-Tax);

ii. Approving Authority (i.e. Additional Commissioner of Income-Tax or a Joint Commissioner of Income-Tax);

iii. Administrator (Income Tax officer); and

iv. Adjudicating Authority.

PROCESS:

i. Issue of Show Cause Notice by Initiating Officer where he has reason to believe that any person is a benamidar in respect of a property.

ii. Provisional attachment of property if necessary.

iii. Revoke provisional attachment if satisfied the property is not benami.

iv. Continuing provisional attachment or ordering provisional attachment where not satisfied that property is not benami and refer a statement of case to Adjudicating Authority.

v. Adjudicating Authority to hear affected persons and pass order holding that property is benami or not. The authority will decide within a year if the property is benami.

vi. Where adjudication order holds property as benami, hear affected persons and pass confiscation order. all rights and title in such property shall vest absolutely in the Central Government free of all encumbrances

vii. Administrator to take possession of benami property and manage it.

Authority	**Function**
Initiating Officer	Notice and Attachment of the Property
Approving authority	Notice to furnish evidence
Administrator	Possession and Management of Properties confiscated
Adjudicating Authority	Confiscation and vesting of Property
Appellate Tribunal	Hear appeals against the orders of Adjudicating Aut hority

- Appeals against orders of the Appellate Tribunal will be to the respective High Court with jurisdiction.
- The Act mandates Central Government to designate one or more Session Court as Special Court for trial of offence punishable under it.

OFFENCES AND PENALTIES

Where any person enters unto a benami transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, the following shall be guilty of the offence of benami transaction:

- Beneficial owner,
- Benamidar
- Any other person who abets or induces any person to enter into benami transaction

The offences are non-cognizable and non-bailable.

OFFENCE	FINE	IMPRISONMENT
For guilty of offence of a benami transaction	Up to 25% of the FMV	Minimum 1 upto 7 years
For providing false information	Up to 10% of the FMV	Minimum 6 months upto 5 years

Fair Market Value is a price that the property would ordinarily fetch on sale in open market. In cases where the price is not ascertainable, another procedure will be prescribed.

CONCLUSION

The Amendment Act seeks to clearly define the benami transactions, establish adjudicating authorities and an Appellate Tribunal to deal with benami transactions, and specifies the penalty for entering into benami transactions.

The Act is necessary to reduce generation and utilization of unaccounted black money. Real estate is considered as one of the major avenues for investment of unaccounted money in India.

All real estate transactions shall now be in the name of the actual owner who is paying the consideration from his known sources. The practice of including the correct name in property transactions will bring transparency in the sector. With increased transparency, title risks would be minimised and buyer confidence in property transactions will get a boost. A fresh breath of professionalism will be ushered in.

Moreover, this will also increase the tax revenue for the Government by curbing unaccounted money into the system. In the long term it will make India a more attractive investment destination, aligning transactions with ethical standards and will increase international institutional investors and financial institutions participation in this sector. Along with other regulatory changes such as implementation of Goods and Services Act (GST), Real Estate Regulation Act (RERA), this amendment is a step in right direction to improve the overall confidence in the real estate sector.

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EMERGING ISSUES IN THE ARBITRATION REGIME – INDIA & SINGAPORE

Mahip Singh Sikarwar

INTRODUCTION

With the introduction of the recent amendment of 2015 to the arbitration laws in India, the regime of Arbitrability has taken a sharp turn and has made the future prospects look bright for Arbitration in India. It is an attempt to make India a preferred seat of arbitration for Indians as well as foreign parties. In a quest to compete with the current arbitration seat attractions like Singapore and London, this change in the Indian arbitration laws is being looked upon with a lot of hope by the MNC's planning to invest in India.

India has not been the only country to bring about some steep amends in the arbitration regime to assist the "ease of doing business". In order to maintain its top position as the most preferred seat of arbitration, Singapore has also amended its Rules of Arbitration (SIAC Rules) to such extents so as to bring out some sheer changes in its laws. In the following paragraphs we will read about the changes made in both arbitration regimes of India and Singapore and issues related with them.

INDIAN ARBITRATION REGIME – AMENDMENT AND ISSUES

The government of India has been trying to make the arbitration regime of the country more flexible. It has taken a lot of measures to make it happen but was not able to realize a attractive business environment to its satisfaction. In 2001 it tried to amend the arbitration laws of the country but failed. Then again it tried in 2010, but even that attempt was aborted. Finally on October 23, 2015 an ordinance was promulgated by the President incorporating the essence of major rulings passed in the two decades, inclusive of the recommendations of the 246th Law Commission Report.

Subsequently the Arbitration and Conciliation Bill 2015, was passed in the Lok Sabha on December 17, 2015 and Rajya Sabha with minor additions to the amendments introduced by the ordinance. Eventually the Presidents signed it on December 31st, 2015 and the Arbitration and Conciliation (Amendment) Act, 2015 came into effect, from October 23, 2015.

Even with the recent amendment which did bring some stark change in the arbitration laws of India, a lot of issues have been still left unanswered. The issues of Indian parties having foreign seats and arbitration in case of oppression and mismanagement within a company are matters which are still suffering from conflict of opinions of various high courts.

EFFECT OF THE 2015 AMENDMENT ACT ON ICA

It is undeniable that this current amendment in the Arbitration Act has cemented a relatively easier path for International Commercial Arbitration to take place with seat in India and shows bright prospects of India becoming an arbitration hub for future arbitrations but there are still some issues which have been left out from the amendment and which would impact the future applicability and efficiency of these amendments and their objective.

Section 44(b) of the Arbitration and Conciliation Act 1996, after the Amendment, requires that the foreign award not only be made in a reciprocating territory, but also that the reciprocating territory be notified by the Central Government in Official Gazette. With only about 50 (fifty) countries having been notified as reciprocating territory, the scope of enforcing foreign arbitral awards is significantly reduced. The Government should either notify most countries in the Official Gazette, or do away with the requirement of Section 44(b) that provides for notifying reciprocating territories in the Official Gazette.[1]

In order to provide statutory recognition to the "emergency arbitrator" as provided under some institutional rules, the Law Commission Report had recommended the addition of "emergency arbitrator" to the definition of "arbitral tribunal" under Section 2(d) of the Arbitration Act. The concept of "emergency arbitrator" has been recognized by most international arbitration rules and has gained popularity for its

1 *http://barandbench.com/when-good-intentions-are-not-good-enough-the-arbitration-ordinance-in-india/*

effectiveness. The recommendations made by the Law Commission Report in this regard have not been accepted and this is a significant omission that is likely to impact arbitrations in India.

EMERGING ISSUES IN THE ARBITRATION

APPLICABILITY OF THE AMENDMENT ACT IS IN DISPUTE

Madras High Court in a case[2] has ruled that the language used in the Section 26 of the Amendment Act only refers to arbitral proceedings and not court proceedings due to deletion of the language "in relation to." Section 26 of the Amendment Act is not applicable to the stage post arbitral proceedings.

However, the Calcutta High Court in has given a contrary view, and held that the Amendment Act will not apply and Section 34 petitions in case of arbitration proceedings commenced prior to October 23, 2015, would act as automatic stay.[3]

TWO INDIAN PARTIES HAVING A FOREIGN SEAT IS STILL QUESTIONABLE

Even though this issue has been addressed by a number of High Courts in the past, there is still no clarity on ability of two Indian parties to choose a foreign seat of arbitration. In a case[4] the Bombay High Court expressed a view that two Indian parties choosing a foreign seat and a foreign law governing the arbitration agreement could be considered to be opposed to public policy of the country whereas in the case of *Sasan Power Ltd v. North America Coal Corporation India Pvt. Ltd.*[5], the Madhya Pradesh High Court opined that two Indian parties may conduct arbitration in a foreign seat under English law.

However, one must be wary of the ruling in *TDM Infrastructure*,[6] wherein the court ruled that two Indian parties could not derogate from Indian law by agreeing to conduct arbitration with a foreign seat and a foreign law.

ARBITRABILITY IN CASES OF OPPRESSION AND MISMANAGEMENT

A landmark judgment on this issue was delivered by the Bombay High Court in *Rakesh Malhotra v. Rajinder Kumar Malhotra,*[7] wherein the court held that disputes regarding oppression and mismanagement cannot be arbitrated, and must be adjudicated upon by the judicial authority itself. However, in case the judicial authority finds that the petition is *mala fide* or vexatious and is an attempt to avoid an arbitration clause, the dispute must be referred to arbitration. Arguably, this could have an unintended impact on the *prima facie* standard in section 8, as amended and introduced by the Amendment Act.

CHANGES BROUGHT ABOUT BY SIAC RULES 2016 IN THE ARBITRATION REGIME IN SINGAPORE

MULTIPLE CONTRACTS, JOINDER, AND CONSOLIDATION

The new multi-contract and multi-party provisions in the SIAC Rules 2016 are three-pronged. They contain mechanisms for regulating (i) disputes arising out of multiple contracts; (ii) joinder of additional parties; and (iii) consolidation of several arbitral proceedings.

Rule 6 allows, amongst others, filing of a single Notice of Arbitration in relation to disputes arising out of multiple contracts. The Registrar is to treat such a Notice of Arbitration as a request to consolidate disputes under the relevant arbitration agreements.

Rule 7 allows joinder of additional parties prior to the tribunal constitution and empowers the SIAC Court to decide the joinder applications. The SIAC Court retains the power to revoke any arbitral appointment made prior to its decision on a joinder.

Rule 8 introduces consolidation to the SIAC arbitration, its mechanisms being largely in line with institutional best practices worldwide. The SIAC Court is empowered to decide consolidation applications prior to the tribunal constitution. The SIAC Court is likely to grant consolidation request if (i) all parties agree to

2 *New Tripur Area Development Corporation Limited v. M/s. Hindustan Construction Co. Ltd. & Ors*

3 Electrosteel Castings Limited v. Reacon Engineers (India) Private Ltd.

4 Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.Judgment in Arbitration Petition No. 1710/2015 dated January 14, 2016

5 *Judgment in First Appeal No. 310/2015 dated September 11, 2015.*

6 TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271

7 *Rakesh Malhotra v. Rajinder Kumar Malhotra, (2015) 2 CompLJ 288 (Bom).*

consolidation; or (ii) the claims are made under the same arbitration agreement; or (iii) the claims are made under compatible arbitration agreements, and if the disputes arise out of the same legal relationship or out of the same transaction or series of transactions.[8]

EARLY DISMISSAL OF CLAIMS AND DEFENCES

The provision which deserves a special mention is the one regarding early dismissal of claims and defenses. Rule 29 of the SIAC Rules provides a party with the right to file an objection to dismiss a claim on the basis that the claim is "*manifestly without legal merit*" or "*manifestly outside the tribunal's jurisdiction*". If an early dismissal application is filed, the tribunal is first to decide whether the application may proceed.

With this new provision, the architecture of the SIAC Rules 2016 is such that it now offers a three-step objection process. First, Rule 28.1 grants the SIAC Registrar and the SIAC Court the screening power to determine *prima facie* whether the arbitration shall proceed. Second, under Rule 28, a party may file jurisdictional objections within 14 days after the matter that "manifestly" falls outside the tribunal's jurisdiction has arisen (or no later than in its statement of defence). And finally, the objecting party may have a shot at the same objection through the early dismissal mechanism.[9]

The problem with the three-step objection process is that it is effectively a "no risk" proposition for the respondent. The respondent may make a screening objection and, if it fails, go on to file a preliminary jurisdictional objection and if that fails, an early dismissal application on the same grounds. That is because presumably, none of these three mechanisms would result in a decision that would have *res judicata* effect.

SEAT DELOCALIZATION

One of the most significant changes brought about by these amendments to the SIAC Rules is delocalizing the Singapore seat and taking it to a global level. According to Rule 21 of the SIAC Rules 2016, Singapore is no longer the default seat of arbitration. The SIAC Rules Drafting Committee has introduced this amendment in an attempt to elevate Singapore above the earlier "local" default preference for Singapore as a seat. This change ensures a more global reach for SIAC, and brings Singapore in line with a number of other "delocalized" arbitral institutions, such as the ICC and the SCC. A minor speed bump in this regard is that because the SIAC Rules 2016 have lost the default seat provision, parties may find themselves locked in a dispute before the tribunal as to where the seat should be unless they specify the seat in their arbitration clauses.[10]

CONCLUSION

Henceforth, the changes in the arbitration regimes throughout the well known centers of Arbitration and India are a ray of hope for parties stuck in delayed arbitration procedures and gives a brighter prospect of having expedited arbitral proceedings all over the world with minimal costs of procedure. Be it the Singapore International Arbitration Centre or the LCIA each institutional arbitration centre is competing to become the first preference of parties entering into arbitration agreement. With the recent amendment of 2015 to the Arbitration Act 1940, it seems India might be entering the race soon enough to be the preference of parties entering into arbitration agreement.

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8 *Rule 21 of the SIAC Rules 2016*
9 *Ibid.*
10 *Id.*

CHOICE OF LAW: PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION

Amarendra Pratap Singh

I. INTRODUCTION

A. DETERMINATION OF THE APPLICABLE LAW BY THE PARTIES

When an arbitrator has to decide which law to apply for the solution of the dispute, he may find a contractual clause providing an express choice of law[1]: "The validity, construction and performance of this contract shall be governed by and in accordance with the law of…" or similar provisions. The parties may provide for the application of some national law or for some non-national set of rules.

(I) IF THE PARTIES CHOOSE A NATIONAL LAW

In such situation, the arbitrator has to decide: should he test the autonomy of the parties in choosing the applicable law under a conflict of laws system or should he recognize that freedom without relying on any conflict of laws rule? The party autonomy is widely recognized both in common law and civil law. However, not every country gives parties unlimited freedom to choose the applicable law. Since every right, power or duty of a person has its root in the law of the nation, even the party autonomy principle as well as arbitration as a whole, must rely on and derive its existence from a national law system. The arbitrator must analyze the party autonomy under the conflict of laws of the *lex fori* and he can also disregard the choice of the parties if they did not select the national law with which the contract has its closest connection. In so doing they can find an agreement that they probably could not have reached if they had applied the national law of either party. Those factors make the choice of the parties "appropriate" – meaning that for those reasons the contract has sufficient connections with that law such as to admit that choice.

1 *Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration.*

(II) IF THE PARTIES CHOOSE A NON-NATIONAL SET OF RULES

Non-national standard has been defined in different ways: international law, international customs or usages[2], transnational law. In spite of all these different labels probably the same phenomenon reoccurs: a set of rules developed to regulate international trade in the merchants' community. The question is whether an arbitrator should respect the choice of the parties. Furthermore, not being a highly developed system, *lex mercatoria* does not cover all the matters which might be the object of a dispute.

B. Determination of the Applicable Law by the Arbitrator When the Parties Do Not Make a Choice

It so happens that an agreement is sound but when parties reach the stage of selecting the applicable law they face a difficult situation. They come from different countries and therefore they are not acquainted with and do not confide in the respective national laws. Why is the determination of the applicable law by the arbitrator a problem in an international commercial arbitration?

(i) Application of the Conflict of Laws System of the Country Which Would Have Had Jurisdiction in the Absence of an Arbitration Clause

The conflict of laws system controlling arbitration is that of the country which would have had jurisdiction to settle the dispute between the parties if they had not included the arbitration clause in the contract. That country has been in reality dispossessed of its jurisdictional authority by the arbitration clause and therefore it may reaffirm its control over arbitration in this way. The theory has been criticized mainly on two grounds. An arbitrator, under Anzilloti's theory, has the difficult burden to determine which national court would have had jurisdiction if parties had not submitted

2 *Article 28(4) of the UNCITRAL Model Law on International Commercial Arbitration; Article VII, European Convention on International Commercial Arbitration.*

to arbitration. Second, this solution is not acceptable because it is circular. An arbitrator has to select a conflict of laws rule to know which country would have had jurisdiction; hence the issue of the applicable private international law system arises again.[3]

(ii) Application of the Conflict of Laws System Where the Arbitral Tribunal Has Its Seat

Under this theory, the will of parties is respected: they can freely choose the seat of arbitration and therefore indirectly select the applicable conflict of laws rule. An arbitration clause, as any other contract between private parties, cannot be suspended in the air, but must draw its authority from a national law provision.

(iii) Application of the Conflict of Laws System: Three Trends

It has often been suggested that the conflict of laws rules of the arbitrator should apply. The first question is: what test should be followed: the nationality, the domicile or the residence of the arbitrator? The argument in favor of this theory is that an arbitrator has the best knowledge of his personal law. It is very easy to object that in an ICA the two parties come from different countries and therefore an arbitrator choosing the law of either party leaves the other one unsatisfied. The third and last example is the attempt to apply the private international law system of the state where the arbitral award will be enforced.

(iv) Cumulative Application of the Conflict of Laws Systems Connected with the Dispute

An arbitrator, instead of applying one of the conflict of laws systems mentioned in the previous sections, looks at all the systems that have any contact with the dispute.[4] From this analysis, might ascertain that these systems lead to the same solution: they all select the same national law as applicable to the contract.

(v) Application of a Substantive National Law without Having Recourse to any Conflict of Laws System

The substantive conflicting laws may contain different provisions, hence leading to dissimilar solutions of the dispute: this is a so-called true conflict of laws situation. In this context a national court would usually apply its private international law rule. When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection.[5]

II. INTERNATIONAL CONVENTIONS' PROVISIONS AND ARBITRAL INSTITUTIONS' RULES ON THE APPLICABLE LAW

(i) New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

Its purpose is to render compulsory among contracting parties the enforcement of arbitral awards. Therefore the specific subject of the Convention does not interfere with the issue at hand: the applicable law in an international commercial arbitration. The provision is dealing exclusively with the arbitration agreement and not with the whole contract. It is undisputed today that the two issues, the validity of the arbitration agreement and the validity of the contract, are separate and therefore the law applicable to the former is not necessarily the same one applicable to the latter. Consequently a national court could refuse enforcement of the award if the arbitration clause was invalid under either law of article V (l) a, but it could not if any other substantive provision of the contract was invalid under that law.

(ii) European Convention on International Commercial Arbitration, April 21, 1961

In contrast with the New York Convention, article VII[6] of the European Convention specifically deals with the issue of the applicable law in an international commercial arbitration.

(iii) Rules of Arbitral Institutions on the Applicable Law

3 *Videocon Industries Pvt. Ltd. v. UOI* (2011) 6 SCC 161.

4 *C v. D,* 2007 EWHC 1541 (Comm).

5 *Article 187, Swiss P.I.L. Act.*

6 *Art. VII of the Convention reads: The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade wages.*

The International Chamber of Commerce, the UNCITRAL, the UNECAFE and the UNECE Arbitration Rules, contain specific provisions dealing with the law applicable in an international commercial arbitration. All three provisions follow the pattern of the 1961 European Convention: recognition of the principle of party autonomy, the rule of conflicts which the arbitrator deems applicable and the relevant trade usages.

III. CONCLUSION: THE RATIONALE UNDERGIRDING THE DEBATE OF CHOICE OF LAW

Some authors support *lex mercatoria*, "denationalization" of arbitration and the idea that arbitration should not be necessarily bound by any national conflict of laws rule. Another part of the doctrine, as authoritative as this, argues against *lex mercatoria* and any attempt to detach arbitration from any national law system. It is important to stress that international commerce needs a "denationalization" of arbitration and that international merchants look at an arbitration as disconnected from any national law system. One has to demonstrate how this new legal order, in which international arbitration plays such an important role, can subsist theoretically.

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OPTIMISM OF BANKS & FIS : THE NEW DEBT RECOVERY ACT

Bornali Roy

PREFACE

To make debt recovery more effective, the Minister of Finance, Mr. Arun Jaitley, has moved the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016[1] in Lok Sabha, on May 11, 2016. It was sought to amend four laws: (i) Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), (ii) Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI), (iii) Indian Stamp Act, 1899 and (iv) Depositories Act, 1996. It also confers more powers to the Reserve Bank of India (RBI) to regulate asset reconstruction companies (ARCs).

After having approved Insolvency and Bankruptcy Code, 2016, earlier this year, the government had been putting stress on the bringing up an infrastructure to deal with escalating bad debt at banks. The government moved the amendments in the Lok Sabha, just before the House concluded the budget session. The Bill was passed in the Lok Sabha on August 01, 2016 and in the Rajya Sabha on August 09, 2016. Finally, the Bill received the assent of the President on August 12, 2016. The Minister of Finance had issued a notification (S.O. 2831 (E)) dated September 01, 2016[2], through which the Act came into force on September 01, 2016.

AMENDMENTS TO THE SARFAESI ACT, 2002 (HEREINAFTER "PRINCIPAL ACT")

The SARFAESI Act permits a secured creditor to take possession over collaterals, against which a loan had been provided, upon default in repayment in the loan. This process is to be undertaken with the assistance of the District Magistrate, and does not involve the intervention of courts or tribunals. The Act provides a time limit for concluding this procedure. The new Act *(Section 12 amending Section 14 of the principal Act)* has provided that this process will have to be completed within 30 days by the District Magistrate.[3] The Joint Committee had further modified it to allow for the time limit to be extended to 60 days, if District Magistrate is unable to pass an order within 30 days, due to some circumstances.[4]

The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act further empowers the District Magistrate to assist banks in taking over the management of a company, in case the company defaults in the repayment of loans. This will be done in case the banks convert their outstanding debt into equity shares, and resultantly hold a stake of 51% or more in the company *(Section 13 amending Section 15 of the Principal Act)*.[5]

1 *Bill No. 144 of 2016 as per <http://www.thehindu.com/multimedia/archive/02976/SARFAESI_2976440a.pdf>, as visited on 12/11/2016.*

2 *The Central Government appointed the 1st day of September, 2016 as the date on which the following provisions of the said Act would come into force, namely Section 2 and 3 (both inclusive), Section 4 (except clause xiii), Section 5 and 6 (both inclusive), Section 8 to 16 (both inclusive), Section 22 to 31 (both inclusive) and Section 33 to 44 (both inclusive).*

3 *Section 12 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – "In the principal Act, in section 14, in sub-section (1),— (i) in the second proviso, after the words "secured assets", the words "within a period of thirty days from the date of application" shall be inserted; (ii) after the second proviso, the following proviso shall be inserted, namely:— "Provided further that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days."*

4 *Vatsal Khullar, 'PRS Legislative Research', <http://www.prsindia.org/uploads/media/Enforcement%20of%20Security/Joint%20Committee%20Report%20Comparison.pdf>, as visited on 12/11/2016.*

5 *Section 13 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – "In the principal Act, in section 15, in sub-section (4), the following proviso shall be inserted, namely:— "Provided that if any secured creditor jointly with other secured creditors or any asset reconstruction company or financial institution or any other assignee has converted part of its debt into shares of a borrower company and thereby acquired controlling interest in the borrower company, such secured creditors shall not be liable to restore the management of the business to such borrower.""*

While, under the SARFAESI Act, a central registry is created to maintain records of transactions related to secured assets, the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act required creating a central database to integrate records of property registered under various registration systems with this central registry. This has included integration of registrations made under Companies Act, 2013, Registration Act, 1908, Motor Vehicles Act, 1988, Merchant Shipping Act, 1958, Patents Act, 1970, Designs Act, 2000 or other such records under any other law for the time being in force *(Section 16 inserting new Section 20A in the Principal Act)*.[6] The new Act further provides that secured creditors would be unable to take possession over the collateral unless it is registered with the central registry *(Section 18 inserting new Chapter IVA thereby inserting Section 26D in the Principal Act)*.[7] Further, these creditors, after registration of security interest, will have priority over others in repayment of dues *(Section 18 inserting new Chapter IVA thereby inserting Section 26E in the Principal Act)*.[8] The move will provide a better picture of assets to the existing and potential creditors.

The SARFAESI Act authorizes the Reserve Bank of India (RBI) to scrutinize the statements and inspect any information of Asset Reconstruction Companies related to their business. The new Act further gives power to the RBI to conduct audit and inspection of these companies. The RBI has further been bestowed with executive powers as it may penalize a company if the company fails to comply with any directions issued by it *(Section 21 inserting new Section 30A in the Principal Act)*.[9]

The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act provides that stamp duty will not be charged on transactions undertaken for transfer of financial assets in favor of asset reconstruction companies *(Section 6 amending Section 5 in the Principal Act)*.[10] Financial assets include loans and collaterals.

6 *Section 16 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – "In the principal Act, after section 20, the following sections shall be inserted, namely:— "20A. (1) The Central Government may, for the purpose of providing a Central database, in consultation with State Governments or other authorities operating registration system for recording rights over any property or creation, modification or satisfaction of any security interest on such property, integrate the registration records of such registration systems with the records of Central Registry established under section 20, in such manner as may be prescribed. Explanation.—For the purpose of this sub-section, the registration records includes records of registration under the Companies Act, 2013, the Registration Act, 1908, the Merchant Shipping Act, 1958, the Motor Vehicles Act, 1988, the Patents Act, 1970, the Designs Act, 2000 or other such records under any other law for the time being in force. (2) The Central Government shall after integration of records of various registration systems referred to in sub-section (1) with the Central Registry, by notification, declare the date of integration of registration systems and the date from which such integrated records shall be available; and with effect from such date, security interests over properties which are registered under any registration system referred to in sub-section (1) shall be deemed to be registered with the Central Registry for the purposes of this Act.""*

7 *Section 18 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – Insertion of new Chapter IV A – "…Section 26D - Right of enforcement of securities - Notwithstanding anything contained in any other law for the time being in force, from the date of commencement of the provisions of this Chapter, no secured creditor shall be entitled to exercise the rights of enforcement of securities under Chapter III unless the security interest created in its favour by the borrower has been registered with the Central Registry."*

8 *Section 18 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – Insertion of new Chapter IV A – "…Section 26E – Priority to secured creditors - Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority."*

9 *Section 21 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – Insertion of new sections 30A (Power of adjudication authority to impose penalty), 30B, 30C and 30D.*

10 *Section 6 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 - In the principal Act, in section 5,— "(i) after sub-section (1), the following sub-section shall be inserted, namely:— "(1A) Any document executed by any bank or financial institution under sub-section (1) in favour of the asset reconstruction company acquiring financial assets for the purposes of asset reconstruction or securitization shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899: Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitization."*

AMENDMENTS TO THE RDDBFI ACT, 1993 (HEREINAFTER "PRINCIPAL ACT")

The RDDBFI Act established the Debt Recovery Tribunals and Debt Recovery Appellate Tribunals. The new Act increased the retirement age of Presiding Officers of Debt Recovery Tribunals from 62 years to 65 years *(Section 28 amending Section 6 of Principal Act)*.[11] Further, it increased the retirement age of Chairpersons of Appellate Tribunals from 65 years to 67 years *(Section 30 amending Section 11 of Principal Act)*.[12] It has also made Presiding Officers and Chairpersons eligible for reappointment to their positions.

The RDDBFI Act provides that banks and financial institutions will be required to file cases in tribunals having jurisdiction over the defendant's area of residence or business. The new Act has enlarged the territorial jurisdiction. It allows banks to file cases in tribunals having jurisdiction over the area of bank branch where the debt is pending. *(Section 32 amending Section 19 of Principal Act)*[13]

The new Act further provides that certain procedures like presentation of claims by parties and summons issued by tribunals under the RDDBFI Act will be undertaken in electronic form *(Section 33 inserting new Section 19A in the Principal Act)*.[14]

The new Act also provides details of procedures that the tribunals will follow in case of debt recovery proceedings *(Section 37 inserting new Section 22A in the Principal Act)*.[15] This includes the requirement of applicants to specify the assets of the borrower, which have been collateralized. It further prescribes time limits for the completion of some of these procedures.

SIGNIFICANCE AND CONCLUSION

Alongside the new bankruptcy law which was passed earlier in the beginning of this year, amendments that are concretized by the way of this Act will help to create an infrastructure which would effectively deal with non-performing assets in the banking system. The Act will help the financial institutions and banks to effectively recover their bad loans. The Act aims to encourage more Asset Reconstruction Companies to set up their business and would also help to revamp Debt Recovery tribunals. As the current laws are asymmetrical and favourable to the defaulters, the Act will help to strengthen the banking system more legally. The Act has empowered RBI with more powers.

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As per Joint Committee Report, this benefit will not be provided if asset is acquired for any purpose other than reconstruction or securitization.

11 *Section 28 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – "In the principal Act, for section 6, the following section shall be substituted, namely:— "6. The Presiding Officer of a Tribunal shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for reappointment: Provided that no person shall hold office as the Presiding Officer of a Tribunal after he has attained the age of sixty-five years.""*

12 *Section 30 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – "In the Principal Act, for section 11, the following section shall be substituted, namely:— "11. The Chairperson of an Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for reappointment: Provided that no person shall hold office as the Chairperson of a Appellate Tribunal after he has attained the age of seventy years.""*

13 *Section 32 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – ""In the principal Act, in section 19,— (i) in sub-section (1), clause (a) shall be renumbered as clause (aa) and before clause (aa) so renumbered, the following clause shall be inserted, namely:— "(a) the branch or any other office of the bank or financial institution is maintaining an account in which debt claimed is outstanding, for the time being; or";…"*

14 *Section 33 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – " After Section 19 of the Principal Act, the following sections shall be inserted, namely:— Section 19A - Filing of recovery applications, documents and written statements in electronic form –*

… (b) any summons, notice or communication or intimation as may be required to be served or delivered under this Act, may be served or delivered by transmission of pleadings and documents by electronic form and authenticated in such manner as may be prescribed."

15 *Section 37 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – "In the principal Act, after section 22, the following section shall be inserted, namely:— "22A. The Central government may, for the purpose of this Act, by rules, lay down uniform procedure consistent with the provisions of this Act for conducting the proceedings before the Tribunals and Appellate Tribunals.""*

'WORKING STATEMENT' TIME OF THE YEAR!!

Shrimant Singh

The Cause: Under the (Indian) Patents Act, 1970, the right holders (patentee/licensees) of the patented inventions are required to submit "working statements" annually in respect of each of their patents in India. This enables the Government to ensure whether an invention is actually worked in India and/or the public requirements with respect to the same are met or not.

One may regard the requirement of 'working statements' as amongst the duties placed upon the right-holders in exchange of the monopoly granted by the Government over their patented inventions in India. Simply put, the right-holder under this requirement declares that the patented invention has been commercially worked in India for the benefit of the public, or, that the invention is not yet worked while also giving out reasons for such non-working of the same.

THE ENABLEMENT: SECTION 146 OF THE (INDIAN) PATENTS ACT, 1970, PRESCRIBES THAT:

> ***146.*** *Power of Controller to call for information from patentees. -*
>
> (1) The Controller may, at any time during the continuance of the patent, by notice in writing, require a patentee or a licensee, exclusive or otherwise, to furnish to him within two months from the date of such notice or within such further time as the Controller may allow, such information or such periodical statements as to the extent to which the patented invention has been commercially worked in India as may be specified in the notice.
>
> (2) Without prejudice to the provisions of sub-section (1), every patentee and every licensee (whether exclusive or otherwise) shall furnish in such manner and form and at such intervals (not being less than six months) as may be prescribed statements as to the extent to which the patented invention has been worked on a commercial scale in India.

Further, Rule 131(2) of the Patents Rules, 2003, states that the statements required under Section 146(2) shall be furnished in respect of every calendar year within three months of the end of every year.

In other words, (1) the Controller may ask the right-holders to submit statements [with details] regarding commercial working of a patent in India and the same shall be furnished within 2 months of such askance by the Controller; further, (2) the said statements referred in (1) shall anyways be furnished by the right holder for every calendar year in respect of each of its patents before 31st March of the subsequent year. To exemplify, a statement regarding commercial working of a patent for the year 2016 shall be furnished at the Patent Office by 31st March 2017.

The prescribed mode [Form 27]: Statements under Section 146(2) providing details of commercial working of a patent in India shall be furnished on Form 27 as prescribed under Rule 131(1) of the Patents Rules, 2003.

DETAILS REQUIRED TO BE FURNISHED IN FORM 27 ARE:

1. Whether the patented invention has been worked or not worked in India:
   a. if not worked, the reasons for not working and the steps being taken for the working of the invention.
   b. if worked, the quantum and value (in rupees) of the patented product;
      i) manufactured in India;
      ii) imported from other countries along with the details of each country;
2. The licenses and sub-licenses granted during the year;
3. Whether the public requirement has been met, at a reasonable price either partly, adequately or to the fullest extent.

The enforcement: Interestingly, prior to the 2005 amendments in the Patents Act, 1970, the penalty for not filing a working statement was INR 20,000 (USD 300 approx), however, it appears that the Parliament

considered that the said penalty was not enough for the right-holders to take the provisions for working statements seriously enough. Accordingly in 2005, by way of an amendment in the Patents Act, the penalty was increased, rather drastically, by 50 times to INR 10,00,000 (USD 14,700 approx.). The relevant Section 122 of the Patents Act, 1970, after the 2005 amendment read as:

***122**. Refusal or failure to supply information: (1) If any person refuses or fails to furnish— (b) to the Controller any information or statement which he is required to furnish by or under section 146, he shall be punishable with fine which may extend to [ten lakh rupees]*[1].

Further, as per Section 122(2), in case a right-holder submits false information on Form 27 or information which he knows or has a reason to believe to be false or does not believe to be true, he shall be punishable with imprisonment up to six months or with fine as in Rule 122(1) or both.

Even after the said astronomical rise in penalty, it seemed that the 'desired' compliance of Section 146 (2) requirement by the right-holders was not achieved at the Patent Office. Accordingly, in 2009, the Office of Controller General of Patents, Designs and Trademarks (CGPDTM) issued a notification in this regard, directing all patentees and licensees to furnish details regarding the commercial working of patented invention in India in compliance with Section 146 of the Act and Rule 131 of the Patents Rules. The said official notice also emphasized on punitive provisions under Section 122 which can be invoked upon non-submission of prescribed information or submission of false information on Form 27. Again in 2014, a similar notification was issued by the Office of Controller General, appealing to the patentees and licensees to comply with Section 146 of the Patents Act, 1970.

The exceptionally high penalty and repeated public notices by the Patent Office reinforced the intention of the Parliament under Section 146 of the Act and emphasized that right holders shall strictly comply with the requirement of submitting statements regarding commercial working of their patented inventions in India.

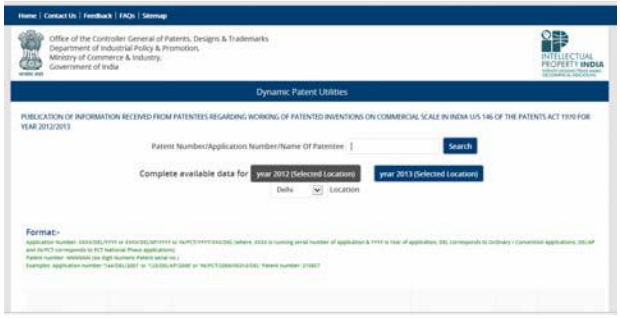
1 *Amendment in Patents Act with effect from 1-1-2005*

<u>The resultant</u>: Under Section 146(3), it is provided that:

***146 (3)**.The Controller may publish the information received by him under sub-section (1) or sub-section (2) of section 146.*

In pursuance to the said provision, the working statements on Form 27 so furnished in respective patents were made available to the public by the Patent Office. Furthering the said cause, the recently updated website of the Patent Office now has a dynamic utility whereby year-wise data of a certain patent number, application number or the patentee can be searched. While the said dynamic utility has its shortcomings in the compilation and display of the information / working statements, however, the Patent Office's step of making the said information easily available to the public is appreciable.

[snapshot of IPO's dynamic utility to search for information submitted re commercial working of patents



SO FAR, WE HAVE DISCUSSED-

- ***the cause*** as to why the working statements are required,
- ***the enablement*** of said requirement under Indian laws,
- ***the prescribed mode [Form 27]*** and timeline for complying with the said requirement,
- ***the enforcement*** provisions for said requirement, and
- ***the resultant*** of working statements made available to the public.

It is equally important to know how the said working statements can be used by the public or any interested party. Accordingly, we now delve into **the use**, i.e., how a person may probably use such information or "working statements" as available to them in respect of the patented inventions.

The said publically available data of the commercial working of patents, i.e.:

i) amount in rupees for working of a patent in India (manufactured or imported);
ii) reasons for not working, where applicable, and also providing steps undertaken by the patentee/licensee towards working the invention;

can be of great importance while approaching a patentee for a license or assignment over the said patented invention or deciding upon the applications for compulsory license on patents by the Patent Office or IPAB.

It is pertinent to note that while granting the first compulsory license[2], the Patent Office and later the IPAB – Intellectual Property Appellate Board heavy relied on the information provided in the statements of commercial working submitted by the patentee - Bayer. In the said case, Natco a generic drug manufacturer was granted a compulsory licensee to a patent owned by Bayer covering its Nexavar drug. While granting the compulsory license, the IPAB relied substantially on the information submitted under working statements by Bayer corresponding to the Nexavar drug patent. Further, the Bombay High Court in the Writ Petition No.1323 of 2013 and Supreme Court while hearing a SLP by Bayer in 2014 upheld the decision of IPAB granting of the compulsory license over Nexavar.

Further, the statement of commercial working of patent is relied upon in litigation while assessing whether the patent was actually worked commercially in India or not. If we consider another instance where the patentee files a case of infringement of patent and seeks injunction and damages or an account of profit under Section 108 of the Patents Act, the information so submitted as statements of commercial working of a patent [Form 27] in India by the patentee can be used in support (or against) such claim of damages before the Court.

CONCLUSION:

Submission of information relating to commercial working of patents in India is innate to the duties placed on the patentee under the Indian Patents Act. The due compliance of said provisions enables the Government, and in turn benefits the patentee as well, in ensuring that the patent is commercially worked in India so that the advantages of the invention can reach to the public at large. Further, as can be seen above, the true information of a commercially worked patent can assist the patentee in substantiating its prayer before the Court for injunction and/or damages in a suit for infringement.

Accordingly, coming back to the title of this article, as the due date of 31st March 2017 is nearing; a right-holder over patent(s) in India should start compiling true and accurate data with respect to the commercial working of each of its patent(s) in India. The commercial working statement on Form 27 shall be submitted timely with the Indian Patents Office on or before March 31st 2017.

In case you have any queries or require any assistance in this regard, please feel free to contact us at: ipr@singhassociates.in.

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2 *Bayer Vs. Natco Pharma*

LEGALITY OF DEMONETIZATION OF RS.500 AND RS.1000 BANK NOTES

Vijay Kumar Singh

The Government of India has taken a policy decision that the Bank notes in the denomination of Rs. 500 and Rs. 1000 shall cease to be a legal tender 8th November, 2016 onwards. Simultaneously, bank notes of Rs. 2000 were also introduced, possibly to carry a larger value of money with fewer notes.

The *Reserve Bank of India Act, 1934* [hereinafter referred to as "RBI Act"] has been enacted inter-alia to regulate the issue of bank notes and keeping of reserves with a view to secure monetary stability in the country and generally to operate the currency and credit system of the country to its advantage.

The RBI is the sole note issuing authority and has the obligation to exchange those notes when demanded except when, and to the extent, it is relieved of the obligation by the Central Government.

Section 26(1) of the RBI Act provides that every bank note shall be a legal tender in payment or on account of the amount mentioned therein and shall be guaranteed by the Central Government. Section 26(2) of the RBI Act lays down that by notification in the Gazette of India, any series of bank notes of any denomination shall cease to be legal tender from a date and in a manner as specified in the said notification. Section 24 (1) of RBI Act provides that bank notes shall be of denomination values of different amount not exceeding Rs. 10000.

The Central Government had withdrawn the legal character of bank notes of certain denomination values at least on two earlier occasions. In the year 1978, the High Denomination of Bank Notes (Demonetization) Act, 1978 (hereinafter referred to as **Demonetization Act**) was enacted by the Parliament to avoid the menace of unaccounted money which had resulted not only in affecting the economy of the country but had also deprived the Public Exchequer of its revenue to a great extent.

The constitutional validity of the Demonetization Act was challenged before the Supreme Court of India. A Constitutional Bench comprising of 5 (five) Judges in *Jayantilal Ratanchand Shah vs. Reserve Bank of India & Others* [1]upheld the constitutional validity of the Demonetization Act.

The Preamble of the Demonetization Act makes it clear that where the availability of high denomination bank notes facilitate illicit transfer of money for financial transactions and which are harmful to the national economy or which serve illegal purposes, the Reserve Bank of India can demonetize high denomination bank notes in public interest. Thus, when the Constitutional Bench of the 5 Judges of the Supreme Court has upheld the constitutional validity of the Demonetization Act, this policy decision of the government can only be considered by another Constitutional Bench comprising of more than 5 Judges.

The present legal tender of Rs. 1000 and Rs. 500 was withdrawn on 8th November 2016 without bringing any specific legislation as was done earlier. This action of the government was challenged before the Supreme Court as well as various High Courts. The question that the legal tender character of bank notes can be withdrawn without bringing legislation is a debatable issue which can only be settled by judicial pronouncements.

The scope of testing the decision to demonetize the current legal tender of bank notes is very limited. The Supreme Court doesn't interfere in the policy making of the Government with respect to financial matters. Since it has come in public domain that the reasons for demonetization is to curb the illicit financial transactions which is affecting the economy including terrorist and naxal activities and to stop money laundering which is primarily done in high denomination notes. The growing menace of use of high denomination bank notes in betting, hawala transactions, corruption, black money, drug money will be significantly curtailed including circulation of fake currency notes.
The reasons given by the Government are certainly reasonable and cogent one. Section 26(2) of the RBI Act

1 *https://indiankanoon.org/doc/1199635*

definitely gives such power. If the legal tender character of Rs. 500 and Rs. 1000 bank notes can be withdrawn without legislation, why did the government enact law on earlier occasion? The legality will certainly be examined by the Supreme Court/High Courts in the pending matters. Therefore, to avoid any legal lacuna, it would appropriate for the government to bring legislation and justify its actions.

The Government of India has been promoting electronic transactions which are cashless to achieve the goal of transparency in trade/dealing and include majority of the population within the tax net. Due to large scale prevalence of cash transactions, the revenue collection of the government is significantly reduced. The World Bank in July, 2010, estimated the size of the shadow economy to be about 23% of the GDP in the year 2007. The shadow economy deprives the government of its legitimate revenues which the government could have used for welfare and development activities. It is expected that the decision of withdrawing legal tender character of Rs. 500 and Rs. 1000 bank notes will bring a significant change in all aspects in the country.

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LIMITATION ON THE CHOICE OF MEANS AND METHODS OF WARFARE

Tanuka De

THE PRESENT WEAPON SYSTEM OF THE WORLD

Considering the hostiles across the border and the anticipation and on-going talks of a warlike situation gathering over the issues in Kashmir, it is pertinent that the laws of war and use of weapons be re-visited once more because

"At his best, man is the noblest of all animals; separated from law and justice he is the worst."- Aristotle

HOW DO WE USE OUR WEAPONS?

International Humanitarian law, also known as 'Laws of War' serves to regulate and minimize the effects of an armed conflict. The law of weaponry dwells on the basic concept that the rights of belligerents to adopt means of injuring the enemy are not unlimited.[1] This principle is traced by the authors of the ICRC Commentary on Additional Protocol 1 back to the writings of Grotius[2]. It is reflected in the Hague Regulations of 1907[3] and in Article 35 of Additional Protocol 1 to the Geneva Conventions. It is undoubtedly a principle of customary international law and thus binding on all states irrespective of the fact whether they have ratified certain treaties or not.

The two basic principles of the law of armed conflict concerning the use of weapons are that weapons should neither cause unnecessary suffering to combatants nor be used in a manner that will indiscriminately affect both combatants and non-combatants[4]. These rules are now codified in Articles 35, 36and 51(4) of the Additional Protocol 1.

1 *Bill Boothby, "The Law of Weaponry – Is it adequate?" in International Law and Armed Conflict: Exploring the fault lines-Essays in Honor of Yoram Dinstein*

2 *Grotius, De jure belli ac pacis, 1625*

3 *Article 22*

4 *Fenrick, "The Conventional Weapons Convention: A modest but useful Treaty", international Review of Red Cross, No. 279 (November-December 1990), 498, 499.*

THE PRESENT WEAPONS SYSTEM CONDITION OF THE WORLD:

In using any particular weapons system, a distinction should be made between legitimate military targets and civilians and objects. The modern rules on specific weapons are contained in different treaties some dating to 1868.

The real problem is that not all states are bound by the same treaties. Some have accepted a given treaty but with national reservations or interpretations. Let us now look at the various provisions as they stand today:

- **Explosive Projectiles:** The use of projectiles below the weight of 400 gm. which are either exploding or contain an inflammable substance are prohibited – St. Petersburg Convention, 1868.

- **Explosive Bullets:** The uses of bullets which expand or flatten easily in the human body are prohibited.

- **Poisoned Weapons, gases and Bacteriological methods of Warfare:** The use of poison or poisoned weapons is prohibited under the Hague Convention of 1907. The Geneva Protocol of 1925 prohibited the use of asphyxiating, poisonous or other gases and bacteriological methods of warfare.

- **Booby traps, Mines and Incendiary Weapons:** The 1980 UN Convention dealt with these and non-detectable fragmentation weapons. This convention is divided into 3 Sections or Protocols:

PROTOCOL 1 Deals with **Non-detectable fragments**.

PROTOCOL 2 Deals with **Booby Traps and Mines.**

PROTOCOL 3 Deals with **Incendiary weapons.**

SCENARIO IN INDIA:

India ratified all 3 protocols of the Convention in March 1984: some provisions on weapons were adopted a

time ago. Others are very new and some still in the process of definition and ratification. As recently as September 1995, the Vienna Conference added a further protocol to those of 1980. This dealt with **Laser weapons.** It prohibits the use of laser weapons whose sole purpose is to blind the opponent. Proposals to Anti-Personnel mines were also addressed and efforts in this direction will continue in the future.

The Indian military ranks third in position in terms of number of troops after the U.S. and China. The paramilitary unit of the Republic of India is the world's largest paramilitary force at over one million strong. Eager to portray itself as a potential superpower, India began an intense phase of upgrading its armed forces in the late 1990s. India focuses on developing indigenous military equipment rather than relying on other countries for supplies. Most of the Indian naval ships and submarines, military armored vehicles, missiles, and ammunition are indigenously designed and manufactured.

The law of war is dynamic. It has and will continue to and try and limit the excesses of war. Much of the law is ignored particularly with respect to mines; it is the innocent civilians who pay the price.

INDIA'S NO FIRST USE POLICY:

India has recently declared a nuclear 'no-first-use policy and is in the process of developing a nuclear doctrine based upon a certain principle known as "credible minimum deterrence". In August 1999, the Indian Government came up with a draft of this particular doctrine which asserts that nuclear weapons are should exclusively and only be used in case of deterrence and also said that India will pursue a policy of "retaliation only". This means that India will use its nuclear weapons only in dire consequences only where the safekeeping of the nation depends upon the usage of these weapons only. The document also states the following statement: "India will not be the first to initiate a nuclear strike first, but will respond with punitive retaliation should deterrence fail" and that the decisions to authorize the use of nuclear weapons would be made by the Prime Minister or his 'designated successors' only. According to certain reports, despite the extreme tension during the India Pakistan War of 2001-2002, India remained committed to its no-first-use policy. India is not a signatory to either the Nuclear Non-Proliferation Treaty (NPT) or the Comprehensive Test Ban Treaty (CTBT), but did accede to the Partial Test Ban Treaty in October 1963.

NEW AGE WEAPONS – DRONES:

An **unmanned aerial vehicle** (**UAV**), commonly known as a **drone** and referred to as a **Remotely Piloted Aircraft** (**RPA**) by the International Civil Aviation Organization (ICAO), is an aircraft without a human pilot aboard. Its flight is controlled either autonomously by onboard computers or by the remote control of a pilot on the ground or in another vehicle. The typical launch and recovery method of an unmanned aircraft is by the function of an automatic system or an external operator on the ground.

Under international humanitarian law drones are not expressly prohibited, nor are they considered to be inherently indiscriminate or perfidious. In this respect, they are no different from weapons launched from manned aircraft such as helicopters or other combat aircraft. It is important to emphasize, however, that while drones are not unlawful in themselves; their use is subject to international law.[5]

STATE OF AFFAIRS WITH RESPECT TO INTERNATIONAL HUMANITARIAN LAW CASE STUDIES:

There are people with contradicting mind sets around the world; members of the armed forces have often suggested that the weapons that have been discussed as inherently dangerous should be used without any restrictions for the sake of security with which they can defend themselves.

The words of these men fighting battles, ensuring our safety cannot be completely done away with and this is why there is still so much ambiguity remaining in the case of law of weapons. Jurists and other men yet do not know whether to completely ban such weapons for the sake of civilians and for the benefit of our future generations or to think about the state of the combatants-their mortality and allow the usage of such weapons. Such contradictions have come up in various international law cases also.

5 http://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm (26.06.2014 ; 9:32 pm)

We can take the instance of *The Nuclear Weapons Case*[6], where in the dissenting opinion given by Justice Higgins, she says that there has to be respect for human rights in International armed conflict and the "unnecessary suffering principle" should also be kept in mind. The weapons, which over the years have been banned by one treaty or the other, should be heeded to and the provisions must be obliged with.

Contrary to the above decision, the Japanese Court in the *Shimoda v. The State*[7] case says, "The use of a certain weapon, great as its inhuman result may be, need not be prohibited by international law if it has a great military effort.

Therefore we see how dual opinions about the usage of weapons have arisen in the world. However, the table stipulated on the subsequent page will give us a clear concept and understanding about the finality of the position of the law of weaponry as it exists today.

WEAPONS SPECIFICALLY BANNED IN TREATIES:

WEAPONS	TREATY
Explosive projectiles weighing less than 400 grams	Declaration of Saint Petersburg (1868)
Chemical weapons	Geneva Protocol (1925) Convention on the Prohibition of Chemical Weapons (1993)
Biological weapons	Geneva Protocol (1925) Convention on the Prohibition of Biological Weapons (1972)
Weapons that injure by fragments which, in the human body, escape detection by X -rays	Protocol I (1980) to the Convention on Certain Conventional Weapons
Blinding laser weapons	Protocol IV (1995) to the Convention on Certain Conventional Weapons
Anti -personnel mines	Convention on the Prohibition of Anti - Personnel Mines (Ottawa Treaty) (1997)
Explosive remnants of war	Protocol V (2003) to the Convention on Certain Conventional Weapons
Cluster munitions	Convention on Cluster Munitions (2008)

6 *Nucleur Weapons Case, ICJ Reports, (1996), p. 583-585 (Higgins J. dissenting.)*

7 *Shimmoda v. The State, 32 ILR 626 at 634.*

DCR UNDER NATIONAL SOLAR MISSION - WTO, APPELLATE BODY REPORT

Rajdutt S Singh

The Government of India launched the Jawaharlal Nehru National Solar Mission ("***JNNSM***") in January, 2010. The JNNSM had set the target of deploying 1,00,000 MW (scaled up on July 1, 2015 from 20,000 MW) of grid connected solar power by 2022 and aims at reducing the cost of solar power generation in the country through *inter alia* (i) long term policy; (ii) large scale deployment goals; (iii) aggressive R&D; and (iv) domestic production of critical raw materials, components and products. JNNSM had stipulated the target under 3 phases (first phase up to 2012-13, second phase from 2013-2017 and third phase from 2017-2022) for various solar application segments including utility grid solar power.

JNNSM was implemented to promote domestic manufacturing. In view of this, Domestic Content Requirement ("***DCR***") is imposed by Indian Government on Solar Power Developers ("***SPDs***"). SPDs are required to procure their project components *inter alia* solar cells and solar modules from domestic manufacturers.

As per media reports available in public domain, National Solar Energy Federation of India ("***NSEFI***") sent a letter on 24 March 2014 to Ministry of New and Renewal Energy ("***MNRE***") and Solar Energy Corporation of India, stating that the DCR has made projects economically unviable. NSEFI accused Indian manufacturers of using DCR to raise solar cell prices by a whopping *USD 0.06-0.08 per watt*, within a few days of the announcement of award and that such price rise is completely unethical[1].

The NSEFI letter indicated that domestic manufactures have used the domestic content requirements to extract higher prices on solar cells and modules, and further alleged,

"the most distressing and worrying feature is a supposed cartelization by some of the larger domestic cell manufacturers. Taking advantage of the procurement compulsions imposed by the…conditions of domestic content, bidding having been completed and strict time limits having been imposed, the manufacturers have increased cell prices by a whopping 6-8 cents/Wp within few days of award announcement. This has made the module manufacturers increase the price per Wp by close to 15-16% than the initial quotes before bidding. This has made DCR projects economically unviable"[2]

In or around April 2014, The United States registered a complaint before the World Trade Organization ("***WTO***") against the DCR measures imposed by Indian Government on SPDs selling electricity to governmental agencies under JNNSM. The United States *inter alia* contended that *"India's domestic content requirements accord less favorable treatment to imported solar cells and modules than to domestic solar cells and modules. Imported products are prevented from competing for a role in the program under the same conditions as domestically-produced cells and modules".*

It was also contended by the United States that JNNSM Programme measures, including individually executed contracts for solar power projects, are inconsistent with India's National Treatment Obligations under Article III:4 of the *General Agreement on Tariffs and Trade 1994* (**GATT 1994**) and Article 2.1 of the *Agreement on Trade-Related Investment Measures* (**TRIMs Agreement**).

On the other hand, India contended that the DCR is not inconsistent with Article III:4 of the GATT 1994 or Article 2.1 of the TRIMs Agreement. India further contended that imported solar cells are treated at par with similar products of Indian origin.

Succinctly, National Treatment Obligation of Article III:4 of the GATT 1994 requires that imported products cannot be discriminated against ("accorded treatment no less than favorable) vis-à-vis like local products in matters of all laws, regulations and requirements "affecting their internal sale, offering for sale, purchase,

1 *http://www.pv-tech.org/news/nsefi_indian_domestic_content_developers_debating_ppa_signing*

2 *http://natgrp.org/2014/03/26/nsefi-letter-to-seci-and-mnre-regarding-issues-with-dcr-category-projects-under-jnnsm-phase-ii-batch-i/*

transportation, distribution or use". Article 2.1 of the TRIMs bars all WTO member states from undertaking any trade related investment measure that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

A Panel was established on 23 May 2014 ("***Panel***") to consider the aforesaid complaint made by the United States against India regarding DCR measures imposed by India on SPDs. The Panel vide its report (*circulated to the members of the WTO on 24 February 2016*) found *inter alia* that the DCR measures are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

In or around April 2016, India appealed before the Appellate Body against the report of the Panel. The Appellate Body vide its report dated 16 September 2016 upheld the findings of the Penal that the DCR measures are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994 and recommended to the Dispute Settlement Body that *India to bring its measures, to be inconsistent with the TRIMs Agreement and the GATT 1994, into conformity with its obligations under such Agreements.*

CONCLUSION:

Due to the aforesaid findings of the Appellate Body of WTO, (as per which DCR measures imposed by the Indian Government are not in line with India's obligations under the WTO regulations), Indian Government has to revisit DCR related policies. Further, in absence of DCR requirement, Solar Power Developers will have access to continuous and affordable supply of imported solar cells and modules. Non imposition of DCR, would also address increasing cartel like situations (as indicated by NSEFI) amongst certain big domestic cells manufacturers.

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NEWSBYTES

SON HAS NO LEGAL CLAIM ON PARENTS' HOUSE, CAN STAY ONLY TILL THEY ALLOW: DELHI HC

The Delhi High Court this month in a recent judgment has held that a son married or unmarried has no legal right to reside in the house of his parents but can stay with them only at their mercy. Justice Pratibha Rani has put her foot down on the proposition that the son can stay with his parents as long as they enjoy cordial relations with him and not because they have to bear his burden. The High court gave this judgment as it was dismissing an appeal made by a husband and wife who had challenged a trial court's order that had gone in the favour of the parents who had filed a law suit seeking the court's orders for their son and daughter-in-law to vacate the house in their possession. The concerned parents had filed complaints at the police station stating that their son and daughter-in-law had made their "life hell". They had also issued public notices in 2007 and 2012 about debarring the son and his wife from their self-acquired property. They filed a suit seeking a decree of mandatory injunction directing them to vacate the floors in their possession. The children, in any case, denied the affirmations and fought that they were the co-proprietors of the property as they had contributed towards its purchase and construction. The court, however, decreed in favour of the parents, which was challenged by the children in the high court. The court expelled the case and held that the applicants had neglected to demonstrate their co-possession in the suit property and the guardians had sufficiently demonstrated that the property had a place with them through documentary evidence.

The judgment read as, *"Where the house is self-acquired house of the parents, son whether married or unmarried, has no legal right to live in that house and he can live in that house only at the mercy of his parents up to the time the parents allow."*

ESI CORPORATION RAISES WAGE THRESHOLD TO RS 21,000

The Ministry of Labor & Employment on 22 December 2016 vide its Notification being G.S.R. 1166(E) and in exercise of the powers conferred by section 95 of the Employees' State Insurance Act, 1948, after consultation with the Employees' State Insurance Corporation (ESIC), notified the Employees' State Insurance (Central) Third Amendment Rules, 2016 ('Amendment Rules') amending the Employees' State Insurance (Central) Rules, 1950 ('Rules').

By way of said Amendment Rules the Ministry raised wage threshold to INR 21,000 from current INR 15000 as provided in Rule 50 of the said Rules. The amended Rule 50 will now read as under:

50. Wage limit for coverage of an employee under the Act. — The wage limit for coverage of an employee under sub-clause (b) of clause (9) of Section 2 of the Act shall be twenty-one thousand rupees a month: Provided that an employee whose wages (excluding remuneration for overtime work) exceed twenty-one thousand rupees a month at any time after and not before the beginning of the contribution period, shall continue to be an employee until the end of that period. Provided further that the wage limit for coverage of an employee who is a person with disability under the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995 (1 of 1996), and under the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999) respectively, shall be twenty-five thousand rupees per month.

The Amendment Rules shall come into force from 1st day of January, 2017.

The increase in wage cap has come after six years as the last increase was from INR 10000 to INR 15000 in 2010. Due to this increase in cap, industrial workers drawing a salary of up to INR 21,000 will now be eligible for health care at clinics and hospitals run by the ESIC.

The Principal Rules were published in the Gazette of India vide notification number S.R.O. 212 dated the 22nd June, 1950 and lastly amended vide notification

number G.S.R. 959(E), dated the 6th October, 2016. As per Notification dated October 6, the Amendment Rules also insert a new Rule in the Rules, which is reproduced below:

"51B. In areas where the Act is implemented for the first time, the rates of employer's and employee's contribution for the initial twenty-four months from such date of implementation, shall be as under:-

(a) Employer's contribution - A sum (rounded to the next higher rupee) equal to three per cent of the wages payable to an employee; and

(b) Employee's contribution – A sum (rounded to next higher rupee) equal to one per cent of the wages payable to an employee

Provided that on completion of twenty-four months from the date of implementation of the Act, the rate of contribution as provided under rule 51[1] shall be applicable."

In simple words, lower rate of contributions (3% instead of 4.75% for employers and 1% instead of 1.75% for employees) will apply in areas where the Act is implemented for the first time.

The increase in wage cap will augment the burden on employers as they have to pay 4.75% of an employee's salary as ESI contribution every month (Rule 51 of the Rules). A benevolent amendment indeed for the employees; however the far reaching effect & impact thereof will be seen in times to come.

EVERY COURT OF SESSION NOT EMPOWERED TO GRANT ANTICIPATORY BAIL: PATNA HC

Patna High Court in the full bench judgment of District Bar Association versus State of Bihar, has thought on the contrast between a Sessions Judge and Court of Session, a Sessions judge and an Additional/Assistant Sessions Judge. The bench which comprised of Hon'ble Chief Justice of Patna High Court IA Ansari, Justice Navaniti Prasad Singh and Justice Chakradhari Sharan Singh, remarked while dealing with a public interest litigation by the district Bar Association which had challenged a circular issued by High Court wherein it had directed that the applications, seeking pre-arrest/ anticipatory bail, shall be filed before the Sessions Judge, who, shall, in turn, distribute such applications amongst the senior Additional Sessions Judges.

Now As per the Bar Association, enumerating Code of Criminal Procedure under Section 438 stated that each Court of Session has been engaged to issue headings for pre-arrest/anticipatory bail and, hence, the circular is illegal. . The bench observed that a Court of Session should, conventionally, mean the Sessions Judge's Court, as well as the Courts of Additional and Assistant Sessions Judges. Alluding to Section 9 of the Code of Criminal Procedure, the court likewise watched that an Additional Sessions Judge or Assistant Sessions Judge can't be regarded as a Sessions Judge, for while a Sessions Judge presides over the Court of Session constituted for a sessions division, an Additional Sessions Judge or Assistant Sessions Judge merely exercises jurisdiction in such a Court of Session. The Code has always intended that the power can be exercised only by a Sessions Judge, the Code has used the expression '*Sessions Judge*' and not '*Court of Session*', the Bench observed. Thus, regarding the fundamental issue of lawfulness of the circular issued, the court observed that the plan of the Code, demonstrates that generally, it is just the high court and the Sessions Judge, who can exercise controls under Sections 438 and 439 in light of the fact that the general control of administration, in a given sessions division, rests in the Sessions Judge.

As the Sessions Judge does exclude Additional/ Assistant Sessions Judge, the court upheld the circular issued by dismissing the contention that each Court of Session has been enabled to issue directions for pre-arrest/anticipatory bail.

WELL-EDUCATED WOMAN, CAPABLE OF EARNING INCOME, CAN'T SEEK MONETARY RELIEF UNDER DV ACT: RAJASTHAN HC

The DV application of Geeta Singh,filed under Section 12 of the Protection of Women from Domestic Violence Act, 2005 claiming interim monetary relief by the court for her girl Geetanjali was dismissed by the Rajasthan High Court in Geeta Singh versus State of Rajasthan and Anr.

The reliefs which was majorly looked for is that respondent might be directed to pay 700 pounds for every month as living expenses as she was seeking

after higher studies at Cardiff University, England. Geetanjali's father fought he had borne all the school and school instruction costs for his daughter and even dealt with education and all different costs for her higher studies at Nottingham, England.

The question incorporated was whether the unmarried daughter, who has effectively finished her post graduation from a college in India like Delhi University and who likewise sought after her further education at Nottingham, England, in 2009, is an aggrieved individual inside the connotation of the Act, and if yes, whether she can assert between time financial help as her everyday costs for seeking after her further studies abroad without the assent of her father only by the reason that in the blink of an eye she doesn't have her own particular source of income and her other educational costs were being acquired by her mother in the wake of taking loan from a bank.

The sub-section (1) of Section 20 of the Act is as follows:-

While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to—

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

To be an aggrieved person for the purpose of the Act, following conditions are required to be fulfilled:

(i) the *woman must have a domestic relationship with the respo*ndent;

(ii) she must be subjected to some kind of domestic violence by the respondent.

The issue in the instant case was whether refusal by the father to incur or bear the living expenses of his daughter could be commission of economic abuse. Justice Prashant Kumar Agarwal, speaking for the bench, held that:

"Expenses incurred or to be incurred by daughter of a person for her reasonable studies can be said to be a requirement out of necessity but living expenses incurred or to be incurred by a daughter for pursuing her further higher studies from a foreign University and more particularly in view of the fact that she has already obtained a post graduate degree from a reputed university in India and has already taken further studies from a foreign university and is capable of earning her own income by joining a job and who has joined her further studies without the consent of his father rather against his wishes cannot be said to be a requirement out of necessity and even if father has refused to bear such expenses, it cannot be said that the daughter has been subjected to economic abuse within the meaning of the Act. Although, the Act has been enacted to provide more effective protection of the rights of women but that does not mean that a woman can claim any expenses as monetary relief from the respondent."

The court held that since the daughter does not come under the purview of an "*aggrieved*", she was not entitled to maintenance and thus, the appeal was dismissed.

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