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INDIAN LEGAL IMPETUS®

EDITORIAL

Manoj K. Singh
Founding Partner

Dear friends

We are happy to bring to you this November 2017 issue of Indian Legal Impetus and sincerely hope that the contents hereof cater to intellectual appetite of you all.

To begin with, various legal aspects those are crucial to maintain the quality standard of drugs in the third largest in the world (volume wise) pharmaceutical industry in the world vis-à-vis applicable laws and role of relevant authorities is discussed. Along with this write up on quality standard of drugs, this issue provides an overview of Commodities (Control of Unethical Practices in Marketing of Drugs) Order as well.

On corporate laws front this issue incorporates legislative analysis of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 thereby analyzing and discussing overhauling done to the 1992 SEBI Regulations on insider trading.

A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honor. This notion has been discussed at length by various courts of the country and an article on court's perspective qua family settlements/arrangements have been included in this edition.

Further, we talk about a territorial aspect of the shipping industry, i.e. free *pratique* concerning permission granted to a ship to have dealings with a port, after quarantine or on showing a clean bill of health. This issue also includes write ups on varied topics namely *dies non juridicum* or *dies-non* (in legal parlance, signifies a day which cannot be counted for legal business or purpose).

There are quite a few write-ups relating to arbitration. Firstly, there is an article on whether to choose a foreign seat of arbitration or not. Followed by interpretation of fraud/misrepresentation under the umbrella of public policy as a ground to challenge arbitral award. Thereafter, we analyze whether the tiered dispute resolution clauses are mandatory or directory in view of various precedents. There is also an article cum case study wherein observations in light of *GMR Energy v. Doosan Power Systems India Private Limited & Ors.* subjecting a non-signatory party to a foreign seated arbitration proceeding have been analyzed.

Trust you enjoy reading this issue as well. Please feel free to send your valuable inputs / comments at newsletter@singhassociates.in

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LEGAL ASPECTS TO MAINTAIN THE QUALITY STANDARD OF DRUGS

Rajdutt S Singh

The Indian Pharmaceutical Industry is presently the third largest in the world (volume wise). In terms of value, the size of the industry is approximately Rs. 200,000 Crores (USD 30 billion), out of which more than half is value from exports to different countries across the globe. [1] The Drugs and Cosmetics Act, 1940 ("***D&C Act***") and Drugs and Cosmetics Rules, 1945 ("***D&C Rules***") regulate the import, manufacture, distribution and sale of drugs in India. All drugs, whether imported or manufactured in India are required to comply with the standards as specified in the Second Schedule of the D&C Act ("***Schedule***"). The Schedule provides details of the class of drugs and the standards to be complied with by such class of drugs. For instance, as per the Schedule, drugs included in Indian Pharmacopoeia ("***IP***") are required to comply with the standards of identity, purity and strength specified in the edition of the IP (and such other standards as may be prescribed).

Similarly, in case of drugs which are not included in the Indian Pharmacopoeia, but which are included in the official Pharmacopoeia of any other country, standards of identity, purity and strength specified for drugs in the edition of such official Pharmacopoeia of another country (and such other standards as may be prescribed) are required to be complied with. In addition, import [2] and manufacture [3] of drugs (which are not of standard quality, misbranded, adulterated or spurious) are prohibited under the D&C Act.

In order to provide stringent penalties for manufacture of spurious and adulterated drugs, the D&C Act was amended in 2008, and various offences have been made cognizable and non-bailable under the revamped D&C Act. Additionally, the amount of penalty has also been increased from INR 10,000 to INR 10 lakh or three times the value of the drugs confiscated, whichever is more.

1 *http://www.indiaenvironmentportal.org.in/files/file/National%20Drug%20Survey%202014-16.pdf*
2 *Chapter III of the D&C Act.*
3 *Chapter IV of the D&C Act.*

However, after introduction of the aforesaid amendments in the D&C Act, the Central Drugs Standard Control Organisation ("***CDSCO***") formulated guidelines [4] as per which the CDSCO categorized drugs (which are not of standard quality) into three categories viz. Category A (Spurious and Adulterated Drugs), Category B (Grossly sub-standard Drugs) and Category C (Minor Defects).

The Guidelines which, inter alia, provide directives to the State Drugs Authorities, states: *"Care should be taken that while violations with criminal intent or gross negligence leading to serious defects are dealt with heavy hand, the violations involving minor variations in quality by licensed manufacturers are resolved through administrative measures".* Accordingly, the Guidelines, *inter alia,* state that in the case of reports of not of standard quality due to minor defects [5] arising out of variations from the prescribed standards or contraventions of other provisions of chapter IV of the D&C Act, administrative measures including suspension/cancellation or compounding of offences may be resorted to.

Further, the Ministry of Health and Family Affairs devised a reward scheme for whistleblowers in the fight against the menace of spurious or fake drugs, cosmetics and medical devices. [6] This reward scheme provides rewards to the informers who provide specific information to the designated authorities, leading to seizures of spurious, adulterated, misbranded and not of standard quality drugs, cosmetics and medical

4 *Guidelines for taking action on samples of drugs declared spurious or not of standard quality in the light of enhanced penalties under the Drugs and Cosmetics (Amendment) Act, 2008.*
5 *As per the Guidelines, examples of minor defects are: Broken or chipped tablets, presence of spot/discolouration/uneven coating, cracking of emulsions, clear liquid preparations showing sedimentation, change in colour of the formulation, slight variation in net content, formulations failing in weight variation, formulations failing to respond to the colour test, isolated cases of presence of foreign matter, labelling error including nomenclature mistake - Rx, NRx, XRx, Red Line, Schedule H. Caution, Colour etc.*
6 *http://www.cdsco.nic.in/ Whistle%20Blowe%20(3).pdf*

devices. As per this reward scheme, reward is to be given only when there is a confirmation of seizure of spurious, adulterated and misbranded drugs, cosmetics and medical devices by the designated officers of the CDSCO. There is a provision that a reward of a maximum of up to 20 per cent of the total cost of consignments seized, is to be payable to the informer which should not exceed INR 25 lakh in each case.

In order to spread a real-time awareness of drugs which are not of standard quality, the CDSCO publishes a monthly drug safety alert on its website. This monthly alert includes a list of drugs which are declared as 'not of Standard Quality, spurious, adulterated or misbranded along with the details of Batch No. and manufacturing site. The list also gives the details of testing laboratories which perform the quality test of drugs along with the reason for failure in testing for each affected drug. In addition, where any person has been convicted for contravening any of the provisions of the D&C Act or Rules made thereunder (including without limitation manufacturing of drugs not of standard quality), the stock of the drug in respect of which the contravention has been made, is liable to confiscation. At the same time, the regulatory regime also provides compounding of certain offences [7] under the D&C Act.

In November 2012, the CDSCO introduced guidelines for recall and rapid alert system for drugs. [8] These guidelines are applicable to all defective quality product reports and to all reported incidents of safety and efficacy received for all drugs including vaccines & biological. The said guidelines provide recall classification and recall procedure and all the manufacturers, importers, stockists, distributors and retailers are required to follow these guidelines for recalling of defective drugs.

DRUGS REGULATORS' RECENT INITIATIVES

The central drugs regulator, CDSCO, issued draft Standard Operating Procedures ("***SOPs***") for handling of not of standard quality drug samples. As per the draft SOPs, whenever the analysis result of any sample is not within the range of specified limits, it is referred to be Not of Standard Quality (NSQ) / out of specification (OOS). [9] Further, as per recent media reports, the Drug Controller General of India ("***DCGI***") is preparing a plan to ensure that drug testing laboratories meet the prescribed good laboratories practice (GLP) norms. [10] It is also noted that the Maharashtra Food and Drugs Administration cancelled 58 manufacturing licenses and suspended 145 licenses based on various inspections carried out on manufacturing units in Maharashtra. [11]

CONCLUSION

In the recent times, Indian Drugs Regulators have become more vigilant to ensure that drugs manufacturers maintain standard of quality of drugs. At the same time, Drugs Regulators are also mindful of the fact that drug manufacturers whose drugs qualify as a drug not of standard quality due to minor defects, should not be subject to stringent penalty. India has emerged as one of the most preferred locations exporting drugs and various Indian pharma companies have US Food and Drug Administration (USFDA), MHRA (UK), TGA (Australia), MCC (South Africa), Health Canada etc. approved plants, for generic drugs manufacture. Ironically, USFDA had raised concerns about the quality and efficacy of medicines being sold in India. In the backdrop of the stringent penal provisions, drug manufactures are required to carry out necessary checks and balances as per the provisions of the D&C Act and Rules for maintaining required standard of quality of drugs and they should be encouraged to initiate legal and regulatory audits on regular intervals.

7 *Section 32-B of the D&C Act.*

8 *http://www.cdsco.nic.in/writereaddata/Guidlines%20on%20Recall.pdf*

9 *http://pharmabiz.com/ArticleDetails.aspx?aid=102585&sid=1*

10 *http://www.livemint.com/Industry/wd3INVcJwMx4X16M8gY3mJ/DCGI-plans-surprise-tests-in-labs-to-check-drug-quality.html*

11 *http://pharmabiz.com/ArticleDetails.aspx?aid=103920&sid=1*

FREE *PRATIQUE* – STANDARDIZING AND HARMONIZING FOR RELEVANCE AND CONVENIENCE

Avneet Jha

Pratique in general parlance is the permission granted to a ship to have dealings with a port, after quarantine or on showing a clean bill of health. In the shipping industry, it is a certificate from the port-health-authorities that the ship is without infectious diseases or plague on board and therefore, should be permitted to enter port and to allow people to board or disembark. Such permission is usually under the authority of medical/ health officers situated around the port of entry in apprehension of ships from other territories carrying contagious diseases on board among crew members or passengers. However, if the ship is carrying any serious infectious illness on board or has arrived from a place where such illness is known to be widespread, then the ship may have quarantine restrictions imposed upon her and may not get the clean bill of health for entry to the port for carrying out intended operations.

In olden days, before being allowed to trade, ships would be quarantined or had to wait for long periods at waiting docks or berths before being inspected by port authorities for being granted free *pratique* for carrying out trade. In the shipping industry, the cargo ships, upon arrival at the port where they intend to carry out operations, tender a notice of readiness. The notice of readiness is a notice under the contract between parties that the ship is ready in all respect for operation as envisaged in the contract. Such delays, on account of the boarding of port authorities, had severe impact on the lay-time of such vessels, which in essence meant that the ship took much longer due to delays that were beyond their control and such delays had direct impact on their business as time in trade is of great importance and delays have adverse consequences.

Therefore, in order to overcome such shortcomings for the convenience of parties in trade, the system of obtaining such *free pratique* has since evolved for present day businesses. Now the shipmaster may at certain ports even give notice of readiness whether in free *pratique* or not. (*The same is also applicable to certain ports in India and to certain ship owners free pratique may not be necessary for tendering a notice of readiness*). This means the concept of *free pratique* has become a territorial concept and has no universal application. Despite the ports authorities and territories taking steps to make the concept of *free pratique* less hazardous to business undertakings, the same advantage is not available at all trade ports and need for homogeneity is not met. Therefore, the contracts must necessarily provide for minute deviations in order to determine and agree upon the method of calculation of lay-time and avoid conflict between the parties. It is necessary for the parties to draw up contracts with clear intentions for discharge at different ports. This need also stems from the fact that such requirements are not mandated in law (including in ports in India) and the obligations of parties merely take shape from commercial agreements, tailored with an intention to harmonize and standardise shipping related activities. However, such standard contracts fail to provide for specific deviations and therefore parties are forced to compromise or enter dispute resolution processes, which, needless to say, are lengthy and onerous.

In the shipping industry, steps to bind parties to location specific terms is not an easy proposition as the trade system is based on immediacy (with stakes being high), and involvement of multiple parties at various locations worldwide. Any time lost in drawing up shipping contracts between two parties would necessarily entail lengthy negotiations which in turn would lead to heavy losses due to time loss. Such issues may also discourage parties from exploring new territories impacting the growth of the shipping industry.(*and the same holds true for India, where ports are looking to make trade at Indian ports attractive to big consumers worldwide*). However, if a contract clearly delineates the port specific requirements this may help to standardise and harmonise shipping related activities leading to fewer conflicts between parties, resulting in flourishing, hassle free industry trade.

Despite the growth in the shipping industry, there are only a handful of associations that are formed with the intention of harmonising contracts. The law makers worldwide must also take steps to make proper laws to fill the lacunae in the shipping laws and governance of ports, for trade and industry to flourish and for growth in international trade. If shipping industry in India or other ports around the world where location specific terms including not just *free pratique* but other terms of shipping, are diverse, it would be prudent to have ready contracts that are location specific which would give impetus to the organic growth that the shipping industry is seeking in recent times.

Therefore, just as *free pratique* has seen flexibility in application in recent times, the charter parties must provide for flexibility in requirements thereof (which would burden port authorities with compromise) or provide for location and ship owner specific contracts, better filling systemic gaps for ease of business and trade.

FOREIGN SEAT OF ARBITRATION: TO CHOOSE OR NOT TO CHOOSE

Priya Dhankhar

The Arbitration and Conciliation Act, 1996 ("***Act***") provides that an arbitration between an Indian and a foreign party (i.e. an international commercial arbitration) can be governed by foreign law and can have a foreign seat. However, whether two Indian parties can agree to a foreign seat for arbitration or not is not expressly addressed by the Act. Therefore, it is important to refer to recent judicial trends to clarify this position.

The Hon'ble Bombay High Court has in the matter of *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.* (Arbitration Application 197/2014), wherein the arbitration clause provided that "Arbitration in India or Singapore and English law to apply", held that two Indian parties cannot be allowed to derogate from Indian law as that would be against public policy and thus the arbitration has to be conducted in India.

However, the Hon'ble Madhya Pradesh High Court in *Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd.* (First Appeal No. 310/2015), reached an opposite conclusion from that of the Hon'ble Bombay High Court, by holding that the Indian parties are free to choose a foreign seat (in this case being London). This judgment of the Hon'ble Madhya Pradesh High Court has also been upheld by the Hon'ble Supreme Court of India.

The Hon'ble Madhya Pradesh High Court while arriving at its decision, heavily relied on the judgment of the Hon'ble Supreme Court of India in the case of *Atlas Exports Industries v. Kotak & Company*, (1997) 7 SCC 61, wherein the Hon'ble Supreme Court of India considered the applicability of Sections 23 and 28 of the Contract Act and held that merely because the arbitration is situated in a foreign country would not by itself be enough to nullify the arbitration agreement that the parties entered into on their own volition.

Even further clarifying the predicament surrounding foreign seat of arbitration, recently, the Hon'ble Delhi High Court has in the matter titled as *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors,* vide its judgment dated 14 November 2017 ruled that there is no prohibition in two Indian parties opting for a foreign seat of arbitration, and such an arrangement would attract Part II of the Act. A brief of the Hon'ble Delhi High Court's judgment is provided herein below:

FACTS OF THE MATTER

GMR Chattisgarh Energy Limited and Doosan Power Systems India Private Limited entered into three EPC agreements all dated 22 January 2010. Thereafter, GMR Chattisgarh Energy Limited, GMR Infrastructure Ltd**.**, and Doosan Power Systems India Private Limited also executed a corporate guarantee on 17 December 2013. Thereafter, two Memoranda of Understanding were executed between Doosan Power Systems India Private Limited and GMR Energy Limited on 1 July 2015 and 30 October 2015. Thereafter, disputes arose between the parties and Doosan Power Systems India Private Limited invoked arbitration proceedings in the Singapore International Arbitration Centre ("***SIAC***") seeking enforcement of certain liabilities. Therefore, GMR Energy Limited filed a civil suit before the Hon'ble Delhi High Court to *inter alia*, restrain Doosan Power Systems India Private Limited from instituting or continuing or proceeding with the arbitration proceedings in SIAC.

In the said matter, the Hon'ble Delhi High Court on 4 July 2017 passed an ad interim *ex parte* order directing that no arbitrator be appointed on behalf of GMR Energy Limited until the next date of hearing. GMR Energy Limited also filed an urgent interim application under Order 39, Rule 1 and 2 of the Code of Civil Procedure, 1908. Whereas Doosan Power Systems India Private Limited filed two applications to vacate the operation of the Order dated 4 July 2017 and to refer the parties to arbitration under Section 45 of the Act.

ARGUMENTS OF THE PARTIES:

The primary contentions on behalf of Doosan Power Systems India Private Limited was that the Hon'ble

Supreme Court had already in the case of *Sasan Power* and *Atlas Exports*, held that two Indian parties can choose a foreign seat of arbitration, and such an arrangement would not be in contravention with Section 28 of the Indian Contract Act, 1872.

On the contrary, the contentions of behalf of GMR Energy Limited was that since the relationship between the parties is domestic in nature and all parties being Indian, hence Part I of the Act would apply (in view of the recent amendment to Section 2 (1) (f) (iii) of the Act). Further, it was also argued that as the arbitration is between two Indian parties, it cannot be termed as international commercial arbitration and Indian substantive law (i.e. Part I of the Act) cannot be derogated from as the same would be hit by Section 28 of the Contract Act.

Additionally, in regards to the application under Section 45 of the Act, it was argued by GMR Energy Limited that Part II of the Act would not apply merely because the place of arbitration is out of India. Once the arbitration is between two Indian parties, it ceases to be an "international commercial arbitration", and therefore automatically ceases to be "considered as commercial under the law enforced in India" which is the principle condition for defining "a foreign award" under Section 44 of the Act.

JUDGMENT:

The Hon'ble Delhi High Court affirmed the finding of the Supreme Court of India in the Atlas Exports matter and held that there is no prohibition for two Indian parties to opt for a foreign seat of arbitration. Further, the Hon'ble Delhi High Court also held that the decision in Aadhar Merchantile is per incuriam as it had not considered the judgment of the Hon'ble Supreme Court of India in the Atlas Exports.

FAMILY SETTLEMENTS – FROM COURT'S PERSPECTIVE

Harsimran Singh

Through a family settlement or arrangement, members of a family descending from a common ancestor or a common relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles as a final acceptance of claims settlement so as to gain peace of mind and bring about complete harmony and goodwill in the family.

Family arrangements can be arrived at orally, and the terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what has been agreed upon so that there are no hazy notions about the agreements in future. It is only when the parties list out the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as then it would be a document of title declaring for future - what rights in what properties the parties possess.

The family arrangements are governed by principles and sentiments peculiar to them and are enforceable, if honestly made. In this connection, Kerr in his valuable treatise "Kerr on Fraud" at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus:

> The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend.

The object of a family arrangement is to protect the family from a long-drawn litigation or perpetual conflicts which mar the unity and solidarity of the family and create hatred and bad blood between various family members. Today when we are striving to build up an egalitarian society to maintain and uphold the unity and homogeneity of the family, which is the first step towards the unification of the society and, subsequently, of the entire country, is the prime need of the hour. A family arrangement by which the property is equitably divided between various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of few is undoubtedly a stepping stone in the administration of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a *spes successionis,* so that likely future disputes are sealed forever and the family, instead of fighting claims inter se and wasting time, money and energy on fruitless and futile litigation, is able to devote its attention to more constructive work in the larger interest of the society. The Courts have, therefore, leaned in favor of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect, the Rule of estoppel is pressed into service and is applied to shut out the plea of the person, who being a party to the family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. England too, has similar law on this point. In Halsbury's Laws of England, Vol. 17, Third Edition, at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made:

> *A family arrangement is an agreement*

between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The Court, when deciding the rights of parties under family arrangements or claims that upset such arrangements, considers what, in the broadest view of the matter, is most favorable for the interest of families, and takes into regard, considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements. The central idea in the approach made by the Courts is that, if by consent of parties a matter has been settled, it should not be allowed to be re-opened by the parties to the agreement on frivolous or untenable grounds.

In *Khunni Lal v. Gobind Krishna Narain (1911) 38 Ind App 87*[12] the statement of law regarding the essentials of a valid settlement was fully approved of by their Lordships of the Privy Council. In this connection, the High Court made the following observations which were adopted by the Privy Council:

THE LEARNED JUDGES SAID:

The true character of the transaction appears to us to have been a settlement of disputes between several members of the family, each one relinquishing all claims in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement. Their Lordships have no hesitation in adopting that view.

It is well settled that a family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognizing the right of the others, as they had previously asserted to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement It is assumed that the title claimed by the person receiving the property under the arrangement, had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary.[13]

This does not mean that some title must exist, as a fact, in the persons entering into a family arrangement. It simply means that it is to be assumed that the parties to the arrangement had an antecedent title of some sort and that the agreement clinches and defines what that title is. Similar assumption can be made in the present case even where the property was purchased with the mother's money. How the parties got some antecedent title in the property is not for us to determine. If a plaintiff alleges that the property belonged to the family and the other party does not allege that it could not have belonged to the family as it was purchased with the moneys of the mother but claimed that it was his self-acquired property; it can be assumed that the parties recognized the existence of such antecedent title to the parties to the property as was recognized by them under the family arrangement. It is not so much an actually existing right as a claim to such a right that matters. This indicates that by family arrangement no title passes from one in whom it resides to the person receiving it and as no title passes, no conveyance is necessary.

In relation to the contention that a settlement agreement requires registration, reliance is placed on

12 *This decision was fully endorsed by a later decision of the Privy Council in Mt. Hiran Bibi v. Mt. Sohan Bibi, MANU/PR/0086/1914 : AIR 1914 PC 44.*

13 *Sahu Madho Das and Ors. Vs. Mukand Ram and Anr. (AIR1955SC 481)*

what was said further in Madho Das's case, AIR1955SC481, which reads:

"*But, in our opinion, the principle can be carried further.... we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges, that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present.*

The legal position in such a case would be this - the arrangement or compromise would set out and define that the title claimed by A to all the properties in dispute was his absolute title as claimed and asserted by him and that it had always resided in him. Next, it would effect a transfer by A to B, C and D (the other members to the arrangement) of properties X, Y and Z; and thereafter B, C and D would hold their respective titles under the title derived from A. But in that event, the formalities of law about the passing of title by transfer would have to be observed, and now either registration or twelve years adverse possession would be necessary."

In other words, to put the essentials of a family settlement and their binding effects in a concretized form, the matter may be distilled into the following propositions:[14]

1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

3) The family arrangements may even be oral in which case no registration is necessary;

4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement has already been made either for the purpose of the record or for information of the Court for making necessary mutation/s. In such a case, the memorandum itself does not create or extinguish any rights in Immovable properties and therefore does not fall within the mischief of Section 17(2) (sic) Section 17(1)(b) of the Registration Act and is, therefore, not compulsorily registrable;

5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest or even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favor of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed, and the family arrangement will be upheld, and the Courts will find no difficulty in giving assent to the same;

6) If bona fide disputes, present or possible, which may not involve legal claims, are settled by a bona fide family arrangement which is fair and equitable, the family arrangement is final and binding on the parties to the settlement.

In *Maturi Pullaiah v. Maturi Narasimham AIR1966SC1836,* it was held that even if there was no conflict of legal claims, but the settlement was a bona fide one it could be sustained by the Court. Similarly, it was also held that even the disputes based upon ignorance of the parties as to their rights were sufficient to sustain the family arrangement. In this connection the Hon'ble Supreme Court observed as follows:

> *It will be seen from the said passage that a family arrangement resolves family disputes, and that even disputes based upon ignorance of parties as to their rights may afford a sufficient ground to sustain it.*

14 *Kale and Ors. Vs. Deputy Director of Consolidation and Ors. (AIR1976SC 807)*

> *Briefly stated, though conflict of legal claims in praesenti or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular case, Courts will more readily give assent to such an arrangement than to avoid it.*

In *Krishna Biharilal v. Gulabchand AIR1971SC1041,* it was pointed out that the word 'family' had a very wide connotation and could not be confined only to a group of persons who were recognized by law as having a right of succession or claiming to have a share. The Court observed:

To consider a settlement as a family arrangement, it is not necessary that the parties to the compromise should all belong to one family. As observed by this Court in *Ram Charan Das v. Girjanandini Devi [1965]3SCR841,* the word "family" in the context of a family arrangement is not to be understood in a narrow sense of being a group of persons who are recognized in law as having a right of succession or having a claim to a share in the property in dispute. If the dispute which is settled, is one between near relations then the settlement of such a dispute can be considered as a family arrangement. The Courts lean strongly in favor of family arrangements to bring about harmony in a family and do justice to its various members and avoid anticipated future disputes which may affect all.

REGARDING REGISTRATION OF FAMILY SETTLEMENT ARRANGEMENTS:

Sub-section (1) of section 17 of the Registration Act, specifies what are the documents that are to be registered. An instrument of gift of immovable property, an instrument which purports to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in immovable property, the value of which exceeds Rs. 100/-, any instrument which acknowledges the receipt or payment of consideration on account of the creation, declaration, assignment, limitation or extinction of any right title or interest, leases of immovable property from year to year or for a term exceeding one year and instruments transferring or assigning any decree or order of court or any award where such decree or order or award operates to create, declare, assign, limit or extinguish any right, title or interest in immovable property, the value of which exceeds Rs. 100/-.

The Hon'ble Supreme Court, in Shanmugam Pillai's case [1973]1SCR570, after an exhaustive consideration of the authorities on the subject, observed:

> Equitable principles such as estoppel, election, family settlement, etc. are not mere technical Rules of evidence. They have an important purpose to serve in the administration of Justice. The ultimate aim of the law is to secure justice. In the recent times in Order to render justice between the parties, Courts have been liberally relying on those principles. We would hesitate to narrow down their scope.
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> x x x
>
> The Hon'ble Supreme Court, in Subbu Chetty's Family Charities case AIR 1961 SC 797, observed that if a person having full knowledge of his right as a possible reversioner enters into a transaction which settles his claim as well as the claim of the opponents at the relevant time, he cannot be permitted to go back on that agreement when reversion actually falls open.

In these circumstances there can be no doubt that even if the family settlement was not registered, it would operate as a complete estoppel against the party challenging it. All the courts have found that relinquishment being a part of a family settlement, its validity cannot be questioned on the ground of want of registration in the light of the decisions of the Hon'ble Supreme Court.

"*… registration is necessary for a document recording a family arrangement regarding properties to which the parties had no prior title. These observations apply to a*

case where one of the parties claimed the entire property and such claim was admitted by the others and the others obtained property from that recognized owner by way of gift or by way of conveyance. In the context of the document stating these facts, this Court held the real position to be that the persons obtaining the property from the sole owner derived title to the property from the recognized sole owner and such a document would have to satisfy the various formalities of law about the passing of title by transfer."[15]

Registration is necessary only if the terms of the family arrangement are reduced to writing but here too, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere Memorandum prepared after the family arrangement has already been made, either for the purpose of recording or for information of the Court for making necessary mutation. In such a case, the Memorandum itself does not create or extinguish any right in the immovable properties and, therefore, neither does it fall within the mischief of Section 17(2) of the Registration Act nor is it compulsorily registrable. Again, even if a Family Arrangement, which required registration was not registered, it would operate as a complete estoppel against the parties, which had taken advantage thereof.

15 *Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Ors. (AIR1966SC 292)*

LEGISLATIVE ANALYSIS OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROHIBITION OF INSIDER TRADING) REGULATIONS, 2015

Aishwarya Bedeker

INTRODUCTION

Insider Trading can be defined as an act of directly or indirectly trading in securities of a public listed company, based on certain confidential information that the public is not privy to, by any individual who may or may not be a part of the management of the company. Such information must have the potential to influence the market conditions of the securities and bring about a price fluctuation. The rationale behind this overhaul is to prevent a person with access to this kind of critical information, from unfairly benefitting from such knowledge, and consequently impaling the interests of the masses who are not fortuitous enough to enjoy the same kind of access. [16]

The menace of insider trading is a growing concern to legal jurisprudences across the world; accordingly, a host of laws and regulations have been adopted to tackle this emergent issue. In India, Section 24[17] of the SEBI Act penalizes insider trading as a crime punishable with imprisonment upto 10 years. The Indian position on insider trading was previously embodied in the SEBI Regulations, 1992. One of the major flaws in these regulations was their failure to identify the dynamic character of insider trading. Several amendments were made to the Regulations, largely in 2002, in order to plug some of the gaping loopholes in the legislation.

SEBI recognized the need for a complete revamp of the Regulations to provide a more healthy and pragmatic set of laws to curb the vice of insider trading and encourage fair market practices; all this while ensuring information symmetry in the securities markets. A special high level committee[18] was appointed to formulate the new regulations and these regulations known as the SEBI (Prohibition of Insider Trading Regulations) 2015 were published in the official gazette. The new regulations seek to rectify the inadequacies in the existing regime by streamlining the regulatory approach, as a way of building investor confidence in India's capital markets.

SCOPE

This article aims to analyze the provisions of the SEBI Prohibition of Insider Trading Regulations, 2015. The objective is to highlight the improvements the 2015 regulations provide over the 1992 regulations, as effected by SEBI.

IMPROVEMENTS MADE TO THE 1992 REGULATIONS:

Section 195 of the Companies Act prohibits insider trading in India. As per this Act directors and people in senior managerial positions are precluded from engaging in the activity of insider trading. It is reasoned that people in such positions owe a fiduciary duty towards the shareholders to safeguard their interests. Indulging in the vice of insider trading is a breach of the shareholder's trust and an affront to fair market practices. In order to curb this nuisance of insider trading, SEBI released its Regulations in 1992. These regulations operated in tandem with S.195 Companies Act. Both these acts carried provisions for barring the upper management and senior employees of a company from engaging in the act of insider trading. While, the ambit of the SEBI Regulations was considerably wider, it was nonetheless restrictive in its terminology, especially in comparison to today's provisions. Prior to this notification we followed the regressive and lethargic SEBI Regulations of 1992. The

16 *Insider Trading Regulations - A Primer, Desai*

17 *Section 24 of the SEBI Act[1] criminalizes insider trading, punishable with imprisonment of up to ten years, or with fine of up to INR 25 crores, or both. Further under Section 15G of the SEBI Act, SEBI can impose a penalty of twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher, for insider trading.*

18 *Justice N.K. Sodhi Committee, Report of the High Level Committee to Review the SEBI (Prohibition on Insider Trading) Regulations, 1992*

advent of the new regulations has brought about some striking changes. This section highlights those differences and verifies the robustness of these improvements. The new SEBI regulations cover the following:

EXPANDING ON UPSI AND GENERALLY AVAILABLE INFORMATION

The committee chose to define Unpublished Price Sensitive Information (UPSI) in an exclusionary fashion; meaning information not generally available to the public and if made available would substantially affect the securities of the company. While the provision does provide certain instances[19] of UPSI; in no manner is this an exhaustive list or at all indicative of compulsory UPSI. The Committee, in its report, actively deliberated upon how the determination or test for UPSI must always be a mixed question of law and fact. As the definition of UPSI depends heavily upon the concept of 'generally available information', the same has been clearly defined by the regulations. It precludes from its ambit, information that has been selectively or discriminatorily disclosed to the public. Although the definition itself is fairly simplistic, it is accompanied by a detailed explanation on what amounts to generally available information. However, the legislation provides no clarification with respect to the forum or platform to be used to conform to the standards mandated by the given provision. It leaves questions unanswered as to the mode of publication, whether any third-party publication like publications through the media outlets constitutes valid publication and the specificity of information to be provided. The provision leaves it open to the court's interpretation to decide what constitutes as UPSI according to the facts and circumstances of each case brought before it.[20]

CHANGE IN TERMINOLOGY OF 'TRADING'

Another marked departure evident in the current laws, is the alteration of one of the charging provisions; which now reads 'trading in securities when in possession of UPSI' instead of 'dealing' in securities or the then standing judicial interpretation of 'on the basis of UPSI'. The provision simultaneously replaces the anti-fraud theory of insider trading with the fault theory thereby allowing the mere possession of UPSI to create a presumption of insider trading. The definition of trading has been expanded and provided more leg room in comparison to its original operation. The latest definition brings within its purview charges like dealing, buying, subscribing, selling or agreeing to deal, buy, subscribe or sell any securities. Not only does this definition bring dealing within its ambit, it also envisages a situation where one may agree to engage in the aforementioned activities and therefore, accordingly imposes a prohibition on the same. The enlarged scope of this section aims to bring home a host of different charges under one umbrella.

DEFINITION OF INSIDER

A streamlined definition of insider, as has been postulated by the committee, encompasses 'connected person' or any receiver of UPSI within in its jurisdiction. The artificial distinction between deemed connected person and connected person has been removed and, as it stands every connected person will be held to be an insider. Furthermore, any outsider in possession of UPSI will be found to be an insider according to these regulations. Connected persons are any persons that have some sort of association with the company by way of which they may have access to UPSI. Immediate relatives of 'connected person' are also presumed to be connected persons unless and until proved otherwise. With the implementation of the new regulations, a person runs the risk of being labeled a connected person even if the company does not employ him in any formal capacity. Thus, external consultants, advisors and the like will also fall within this definition. The relevant test is whether the person is associated with a company in any capacity including by reason of frequent communication with its officers or being in any contractual, fiduciary or employment relationship. As opposed to the existing rules, which required the presence of a formal capacity, the reach of the provision governing 'connected person' now stands considerably widened.

(I) INSIDER INCLUDES PUBLIC SERVANTS

Expanding the boundary of connected person to include public servants and immediate relatives is a much-anticipated move with foreign jurisdictions like USA having been quick on the draw in incorporating a

19 *Certain specific instances of UPSI such as financial results, dividends, changes in capital structure, Mergers and Acquisitions and changes in key management personnel are mentioned in this list.*

20 *V. NIRANJAN, India Corp Law, Overhauling Insider Trading Regulations*
http://indiacorplaw.blogspot.in/2013/12/overhauling-insider-trading-regulations.html

similar clause in its laws[21]. Further, the clarity in terms of the concept of immediate relatives being those who typically rely upon the insider's advice to make monetary decisions or are financially dependent on the insider makes the provision all the more robust. However, this presumption is rebuttable in case such persons can sufficiently establish that they had no access to the UPSI in question. The onus of disproving lies on them. The Regulations have adopted a novel approach in binding public servants, like a judge hearing a merger petition; and barring them from engaging in insider trading. A public servant involved in policy making that can alter the operations of a company will also lie within the jurisdiction of 'connected person.' While the inclusion of public servants within the scope of the insider trading regime is necessary and overdue, much will depend upon how forcefully the legal regime is implemented against them.

DEFENSES

The Regulations have been given effect with an omnibus charging clause governing insider trading, in contra to which certain specific defenses have been delineated. This style strikes a precocious balance between the duties and responsibilities assigned to the insider and the obligations entrusted to the regulators. It is the job of the regulator to demonstrate that the insider enjoyed possession of UPSI while carrying out trades in the concerned securities of the company. Once this preliminary possession has been established the burden shifts to the insider to negate this allegation in its entirety by demonstrating lack of access to the UPSI itself or by making out a case entitling him to one or more of the defenses. The defenses were incorporated in lieu of the anti-fraud theory as has been later discussed in this paper.

IDENTITY OF EXECUTOR OF TRADE

The committee report brought to light, the core rationale behind enacting a prohibitive insider trading legislation. The aim of these regulations is to impose a bar on violative insider trading meaning trading by insider/s, when in possession of UPSI such that they enjoy an undue advantage over other market players. It envisages a market structure with a level playing field where all players have equal access to material information. Thus, the Regulation concerns itself with the identity of the person affecting the trades rather than the title bearer or owner of the securities being traded. When the person who made the trade and the person whose securities were traded are two different people, the key issue to be considered while determining guilt, would be whether the person carrying out the trades was in possession of any UPSI.

INNOCENT RECIPIENT OF UPSI

The proposed regulations provided for an additional defense of 'innocent recipient' of UPSI. However, the same has been omitted from the 2015 Regulations. This defense was deliberately excluded from the 2015 regulations, as it would be extremely difficult on the part of the insider, to establish his innocence. Not only would he have to prove that he had received such information inadvertently, but he would also have to demonstrate that despite making all efforts to verify and cross check the information and carrying out due diligence as contemplated from a reasonable man, he was given no reason to question the sanctity of the information and even entertain the thought of it being UPSI. The insider would have to show the trade was performed in a bona fide fashion and that he did not comprehend the character of the UPSI in order to be exempted from liability under the charging provision.

CONCLUSION

While, the concept of providing potential investors with UPSI as part of due diligence is sound in terms of its reasoning, it is but fraught with practical difficulties. Investors need to be expressly told that the information being shared with them is UPSI and they need to be informed of the restriction viz a viz trading period when in receipt of such information, they should also be made aware of the cleansing strategy to be adopted in case the transaction is not executed. These regulations will only succeed in their operation if the market players are conscious and well informed as to the nature of UPSI and insider trading norms. Caution must be exercised to ensure that only those potential investors who understand and agree to the confidentiality obligations and trading restrictions are to be provided with UPSI. The scope of misuse with respect to the regulation mandating code of conduct is high and additional rules or guidelines should be issued by SEBI in that regard; else the objective of the regulations to bring about informational symmetry in the market will be negated. Several countries are slowly moving towards making public authorities

21 The Stop Trading on Congressional Knowledge Act (STOCK) seeks to apply insider trading rules to members of Congress and their staff.

accountable for misusing certain confidential information in public policy. The committee makes a brave thrust in this direction by requiring public officials, whose actions would impact the price of listed securities, from trading prior to making such policy or judicial pronouncements public. The Committee has undertaken a novel approach of affording notes and explanations to each provision encapsulating the legislative intent. These notes and explanation are an essential part of the regulations and can be used as tools of interpretation to reduce ambiguity. The overhaul of the regulations governing insider trading is timely and offers much needed clarity and certainty in this field of law. However, the effectiveness of the substantive law depends entirely on its implementation by the appellate authorities as well as the regulators.

INTERPRETING *FRAUD/MISREPRESENTATION* UNDER THE UMBRELLA OF PUBLIC POLICY AS A GROUND TO CHALLENGE ARBITRAL AWARD

Surbhi Darad

To safeguard the interest of the parties thereby making a genuine case, the award needs to be challenged in the light of section 34 of the Arbitration and Conciliation Act, 1996. The Section providing grounds for challenging the Arbitral award have been amended and narrowed down via 2015 amendment to the Arbitration and Conciliation Act, 1996. It has attempted to pre-define the meaning of word "*Public policy of India*" to mean that the award is affected by fraud or corruption or was in violation of Section 75 and 81 of the Act; being in contravention to the Fundamental policy of Indian law; or in conflict with most basic notions of morality or justice. The idea behind this amendment was to restrict court's intervention by reviewing the merit of the Dispute. Subsequent to the development, the incidence of setting aside of the awards has increased manifold in view of the broadend definition of *Public Policy*.

Section 34, *inter alia,* prescribing the grounds of challenge against an award, is *pari material* to the provisions of Section 48, bestowing a right on a person who has suffered a foreign award to object its execution in the manner prearranged in section 34.[22]

After the 2015 amendment, it is an understood fact that the legality of the Foreign Award can be decided u/s 34 of the Arbitration and Conciliation Act by the Indian Courts. Also arbitral proceedings including any Award, if passed in violation of public policy of India, is not sustainable and cannot be enforced

Declaration of the award being in conflict with Public Policy of India is required to be read as meaning grounds *ejusdem generis* with the grounds of fraud or corruption or the award being based on materials exchanged in conciliation which ultimately failed. [23]

The expression "fraud", its meaning and once proved to have been committed by a party against its adversary, then its effect on the judicial proceedings, was succinctly explained by the Supreme Court in **Ram Chandra Singh v. Savitri Devi and Ors**., *MANU/SC/0802/2003 : (2003) 8 SCC* 319 in the following words:

Fraud and justice never dwell together as Fraud vitiates every solemn act. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists of leading a man into damage by willfully or recklessly causing him to believe and act on falsehood.

The expression "public policy of India" in the context of arbitration cases, its meaning, scope and ambit has been discussed at length in various judgments. In the light of all previous decisions referred above on the subject, R.F. Nariman, J. speaking for the Bench in the case of **Associate Builders v. Delhi Development Authority,** *MANU/SC/1076/2014 : (2015) 3 SCC 49,* held that violation of the provisions of Foreign Exchange Act, disregarding orders of superior Courts in India and their binding effect, if disregarded, would be violative of the Fundamental Policy of Indian Laws. It was, however, held that juristic principle of "judicial approach" demands that a decision be fair, reasonable and objective. In other words, a decision which is wholly arbitrary and whimsical would not be termed as fair, reasonable or an objective determination of the questions involved in the case.

Highlighting similar situations, the Supreme Court in its recent judgment in **Venture Global Engineering Llc vs. Tech Mahindra Ltd and Anr Etc.** *(01.11.2017 - SC Order) MANU/SCOR/45344/2017,* decided the validity of the *award* containing directions which are in conflict

22 *Goldrest exports Vs. Swissgen N.V 2005 (2) Arb LR 306: 2005 (2) Bom CR 590*

23 *NHAI Vs. Oriental Structure Engineers Pvt. Ltd, AIR 2015 Del 79*

with the FEMA Act and Regulations made thereunder. It was concluded that the award directing VENTURE to transfer its shares in the JVC to SATYAM at book value is in violation of the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000. The book value of the shares of JVC is less than that of their fair value. It was pointed out that even according to the trial court SATYAM argued that the book value of the shares is the price of shares as recorded in the books of accounts of the Company is in violation of Foreign Exchange Management Act and violation of public policy.

Once the fraud, misrepresentation or suppression of fact, if found to have been done by a party in any judicial proceedings, is later discovered or disclosed then it would relate back to the date of its actual commission and would necessarily result in vitiating such judicial proceedings. Also, Award of an arbitral Tribunal can be set aside only on the grounds specified in Section 34 of the Arbitration and Conciliation Act, 1996 and not on any other grounds.

MULTI TIER ARBITRATION CLAUSES: DIRECTORY OR MANDATORY?

Manish Gopal Singh Lakhawat

After the recent amendments in the Arbitration and Conciliation Act, 1996, inter alia, regarding fixation of time period within which a dispute must be adjudicated upon, more and more parties are flocking towards Arbitration. Arbitration clauses form a part of a majority of commercial contractual transactions. Often, these clauses provide for a pre-arbitration step called the process of amicable resolution to trigger arbitration which are known as Multi-tier dispute resolution clauses.

Multi-tier dispute resolution clauses are also known as escalation clauses or filter clauses. They provide a forum for alternative resolution of disputes at each stage which otherwise finally escalate to arbitration. The inclusion of such clauses in commercial transactions is based on the necessity to look for amicable modes of dispute resolution. These clauses generally contain preconditions of mediation and/or conciliation and/or negotiation before referring the disputes to arbitration. The inclusion of such clauses in today's commercial transactions are largely governed by recognition of the understanding that a number of disputes get settled and scripting a multi-tier arbitration clause ensures that parties will at least look for alternative modes before moving towards the process of arbitration. However, the contour of application of law becomes more complex when these multitier dispute resolution clauses are not fulfilled, and the defaulting party has proceeded with invocation of arbitration. The judicial view is divided on the enforceability of these clauses in such circumstances.

The Rajasthan High Court in the case of *M/s Simpark Infrastructure Pvt. Ltd. Vs Jaipur Municipal Corporation; MANU/RH/1010/2012,* states that where agreed procedure of dispute resolution has been made a condition precedent for invoking the arbitration clause, the same is required to be followed. The Court relied upon the judgment of Hon'ble Supreme Court in *SBP & Co. vs Patel Engineering Co*. and held that the agreed arbitral procedure is required to be followed and further, a defaulting party cannot be allowed to take advantage of its own wrong. A perusal of Sec. 11(6) of the Act of 1996 also reveals that a party is required to act upon the agreed arbitral procedure for dispute resolution which it had earlier signed consciously, and therefore, later it is not open to the party to ignore the same and invoke exercise of power under Sec. 11(6) of the Act.

Whereas the Delhi High Court in the case of *Ravindra Kumar Verma vs M/s BPTP ltd. & Anr. MANU/DE/3028/2014,* holds that the existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings for referring the matter to arbitration and which is necessary for preserving the rights as envisaged by Section 77 of the Act. However, since in many contracts there is an effective need for conciliation etc in terms of the agreed procedure provided by the contract, the best course of action to be adopted is that existence of conciliation or mutual discussion procedure or similar other procedure, should not be held as a bar for dismissing of a petition which is filed under Sections 11 or 8 of the Act or for any legal proceeding required to be filed for preserving the rights of the parties. However, before formally starting effective arbitration proceedings, parties should be directed to take up the agreed procedure for conciliation as provided in the agreed clause for mutual discussion/conciliation in a time bound reasonable period, which if they fail at, the parties can thereafter be held entitled to proceed with the arbitration proceedings to determine their claims/rights etc.

In view of the above dividing judgments, it can be concluded that where the parties have agreed upon an arbitral procedure of dispute resolution, which has been made a condition precedent for invoking the arbitration clause, then the same is required to be followed before filing an application under Sec, 11 of the Act of 1996. Sub-Section (6) of Sec. 11 of the Act of 1996 cannot be invoked directly on expiry of thirty days' notice under sub-sec. (4) of Sec. 11 of the Act of 1996, by the Applicant for appointment of the Arbitral Tribunal ignoring the agreed arbitral procedure. However, a possible counter argument can be developed that when a party is sure of the stand taken

by the other party because of the facts and circumstances then agreed arbitral procedure need not be followed as the same would be futile and would be a mere empty formality.

PRINCIPLE OF *DIES NON:* SUSPENSION OF SERVICE

Pankhuri Agarwal

The Latin phrase *dies non juridicum* often abbreviated as *dies-non* means "a day when Courts do not sit or carry on business". The expression *dies-non*, in legal parlance, signifies a day which cannot be counted for legal business or purpose.

The same concept of "*dies-non*" is widely used and applied in service law to denote the period of unauthorized absence of employees from their service. Such period is neither considered as part of service nor a break in service. The essential element for a period of service to qualify as *dies non,* is that the employee's absence is without prior permission or; the employee, though on duty, leaves without proper permission; or the employee is in office but refuses to perform his duties. Therefore, a wilful and unauthorized absence from work may be counted as *dies non*. Though it does not constitute a break in service, such a day or a period which the employer treats to be qualified as *dies non,* would not qualify as part of the employee's service for monetary benefits or increments. Such a course of action may be resorted to without prejudice to such disciplinary action the competent authority may contemplate.

While applying the notion of *dies non,* the doctrine of "no work, no pay" is invoked. This doctrine is based on the principle that, a person is expected to carry out the work assigned to him in the course of his employment. The employee is entitled to receive remuneration only if the pre-assigned work is duly performed by expending his skill, energy and effort. Such remuneration is a compensation for the contribution of the employee. The rule of *no work, no pay* is not to be considered as a punishment as there is a *quid pro quo* between the employer and the employee. Both the parties are equally responsible to perform their sets of obligations in order to fulfil the employment contract. The employee must undertake to carry out his work in lieu of the remuneration which is to be paid by the employer. The concept of *dies non*, however, would not be applicable in respect of the period during which an employee remains suspended from service. When an employee is on suspension, his absence from work is neither wilful nor unauthorized. In reality, it is a case where the employer restrains the employee from performing his duties.

An employer can suspend an employee pending an inquiry into his misconduct and the pertinent question that arises in such suspension relates to payment of remuneration during the period of such suspension. If there is no express term relating to the payment during such suspension or if there is no statutory provision in any enactment or rule, the employee is entitled to his full remuneration for the period of his interim suspension. However, if there is a term in this respect in the contract of employment or if there is a provision in the statute or the rules framed there under providing for the scale of payment during the suspension, the payment will be made in accordance therewith.[24]

In the case of *Depot Manager, A.P. State Road Transport Corporation, Hanumakonda* v *V. Venkateswarulu and Anr.* [25] it was held that it is open to the competent authority to withhold payment of full salary for the suspension period on justifiable grounds. The employee concerned has to be given a show cause notice in respect of the proposed action and his reply needs to be taken into consideration before passing the final order.

The Apex Court in the case of *Ex-Hav. Satbir Singh vs. The Chief of the Army Staff, New Delhi and Anr.,*[26] while determining whether the intervening period between suspension and reinstatement of service should be counted for the purpose of terminal benefits, held that, even though the employee did not work during the intervening period, he was liable for the terminal benefits as his discharge/ termination was bad. The period was therefore, not to be counted as *dies non*.

The competent authority has to take into consideration the circumstances of each case while deciding whether

24 *OP Malhotra, The Law of Industrial Disputes 1185(6th ed., Vol. 2, Lexis Nexis, New Delhi, 2004)*
25 *1994 Supp. (2) SCC 191*
26 *(2013)1SCC390*

an employee who is suspended, is entitled to his pay and allowances or not and to what extent, if any, and whether the period is to be treated as on duty or on leave. It is only if such employee is acquitted of all blame and is treated by the competent authority as being on duty during the period of suspension that such employee is entitled to full pay and allowances for the said period.[27]

If the employee owing to his own misconduct and wilful default, renders no work and the employer is in no way responsible for keeping him away from his duties then, any remuneration will be against the principle of 'no work, no pay' and unjust to those who have to work and earn their pay. Thus, such period must be considered as *dies non*.

27 *Management of Reserve Bank of India, New Delhi v Bhopal Singh Panchal AIR 1994 SC 552*

SUBJECTING A NON-SIGNATORY PARTY TO A FOREIGN SEATED ARBITRATION PROCEEDING: SOME OBSERVATIONS IN THE LIGHT OF GMR ENERGY V. DOOSAN POWER SYSTEMS INDIA PRIVATE LIMITED AND ORS.

Anmol Jassal

INTRODUCTION AND FACTS

The High Court of Delhi, on 14 November 2017, passed a comprehensive judgment in the matter of *GMR Energy* v. *Doosan Power Systems India Private Limited and Ors*.[28] ('Doosan India'), which can lay down an important precedent in subjecting a party, which is a non-signatory to the arbitration agreement, to arbitration proceedings in a foreign seated arbitration.

In the instant case, GMR Energy filed a suit for permanent injunction restraining Doosan India from continuing with arbitration proceedings before the Singapore International Arbitration Centre (SIAC). Although, GMR Energy was not a party to the agreements containing the arbitration clause, it was made a party to arbitration proceedings instituted by Doosan India, on the basis of common family governance, transfer of shareholding and for being the *alter ego* and the guarantor of GMR Chhattisgarh Energy Limited ('GCEL') and GMR Infrastructure Limited ('GIL'), the actual entities with which Doosan India had entered into the contracts containing the arbitration clauses.

POWERS OF ARBITRAL TRIBUNAL TO PIERCE THE CORPORATE VEIL

One of the principal questions which came up before the High Court of Delhi while deciding the matter was, whether the arbitral tribunal has the jurisdiction to pierce the corporate veil and apply the principle of *alter ego*. On this issue, the counsel on behalf of Doosan India, placed reliance upon *Chloro Controls India Pvt. Ltd*. vs. *Severn Trent Water Purification Inc. & Ors.*[29], wherein the Supreme Court recognized the legal basis of binding a non-signatory to an arbitration agreement, , *inter alia*, on grounds such as, implied consent, third party beneficiary, guarantors, assignment, other transfer mechanism control, apparent authority, piercing of veil, agent vendor relations, agent principal relations etc. The counsel on behalf of Doosan India also placed reliance upon the judgement delivered in the case of *Ms/ Sai Soft Securities* v. *Manju Ahluwalia*[30] and *State of UP and Ors.* V. *Renusagar Power Co.*[31] to contend that Fraud is not the only ground on which Corporate veil can be pierced. In the *Renusagar case*, the Supreme Court reiterated the increasing reach of the jurisprudence concerning lifting of corporate veil, on grounds other than Fraud also, in the following words,

> *"It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding".*

It was finally held by the Hon'ble High Court that considering the following facts

- GCEL was a joint venture of GMR Group,

- the group companies did not observe separate corporate formalities and comingled corporate funds,

- by the MOUs entered into between Doosan India, GMR Energy and GCIL, GMR Energy undertook to discharge liability and made part payments in discharge of GCEL's liability also,

- when the MOUs were entered into, GMR Energy had acquired GCEL,

28 CS (Comm) 447/2017
29 2013 (1) SCC 641
30 FAO(OS) No. 65/2016
31 1988 4 SCC 59

from the notice of arbitration Doosan India has made out a case for proceeding against GMR Energy to subject GMR Energy to arbitration with GCEL and GIL.

The court further went on to decide the issue whether the arbitral tribunal has the jurisdiction to pierce the corporate veil or not. It was contended by the counsel on behalf of GMR Energy that the concept of piercing the corporate veil lies within the domain of courts only and not arbitral tribunals, as decided by the Supreme Court in *Balwant Rai Saluja* & *Anr*. vs. *Air India Ltd.*[32]

The counsel on behalf of Doosan India, by relying upon the decision in *A. Ayyasamy* vs. *A Paramasivam*[33] wherein the Court laid down the criteria of non arbitrability of disputes, contended that the issue of *alter ego* does not fall in the category of non-arbitrable disputes hence can be determined by the Arbitral Tribunal. In *A.Ayyasamy*, the Supreme Court laid down that though the Arbitration Act does not specify this, but the courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The Court laid the categories of non-arbitrable disputes being: (i) patent, trademarks and copyright; (ii) antitrust/competition laws; (iii) insolvency/winding up; (iv) bribery/ corruption (v) fraud; and (vi) criminal matters.

It was held by the Hon'ble High Court that in the present case arbitration was initiated without the intervention of the Court and only after initiation of the arbitration, GMR Energy filed the present suit invoking the jurisdiction of this Court seeking an injunction against arbitration to proceed against it on the basis of issue of *alter ego*. The issue of *alter ego,* not falling within the categories of non-arbitrable disputes as specified in *A.Ayyasamy* and the nature of parties to the agreement being distinct from the formal validity of the arbitration agreement, even if considering that Doosan India had filed an application under Section 45 before this Court, which is without prejudice to its right. Thus, the issue of alter ego based on the facts as noted in the present case and not on fraud can be decided by the Court as well as the Arbitral Tribunal.

CONCLUSION

It can thus be seen that in the instant case, the Delhi High Court, has refused to restrain an entity from being subjected to a foreign seated arbitration, even where it was not a party to the principal agreements containing the arbitration clauses by the application of the principles of *alter ego* and also held that in such cases, Part II of the Arbitration Act would be applicable, as contrary to Part I. The judgment is noteworthy from the viewpoint that all the parties being Indian parties, the Delhi High Court also refused to pay heed to the contention that such an arbitration cannot be an International Commercial Arbitration and went ahead to hold that since the arbitration is to be governed by SIAC Rules, Singapore was not only the venue of Arbitration but also the seat of arbitration.

32 2014 (9) SCC 407
33 2016 (10) SCC 386

STATEMENT OF COMMERCIAL WORKING OF PATENTS IN INDIA SECTION 146 OF THE PATENTS ACT, 1970

INTRODUCTION:

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

GOVERNING STATUTE:

- The statement of commercial working of a patent is required under Section 146 of the Act and the same shall be submitted on Form 27 provided in Schedule II of Patents Rules, 2003.
- As prescribed in Rule 131, working statements shall be filed for every calendar year within 3 months after the end of the calendar year, i.e., Form 27 for each patent shall be filed at the IPO before 31st March every year.

DETAILS TO BE FURNISHED IN THE STATEMENT:

The patented invention: {} Worked {} Not worked

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

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

- Filing of annual statement of commercial working of patent by way of Form 27 is a mandatory requirement under the Act. The information so submitted is open for public inspection and the same is in fact published or made freely available by the IPO.
- The working or non-working of a patent is useful information for anyone desirous of approaching the Patentee for a license over the patent. Further, the said information may also be instrumental in commercial valuation of the patent.
- Non-filing of working statement (Form 27) as required under Section 146 or furnishing false information on Form 27 may lead to penalty as stipulated in Section 122 of the Act:
  a) If a patentee refuses or fails to furnish information required under Section 146, he shall be punished with a fine, which may extend up to INR 1000000 (USD 15600).
  b) Furnishing of false information under Section 146, or an information which the patentee either knows or has a reason to believe to be false or does not believe to be true, shall be punishable with imprisonment upto 6 months, or with said fine, or with both.

PROCEDURE FOR SUBMISSION OF WORKING STATEMENT:

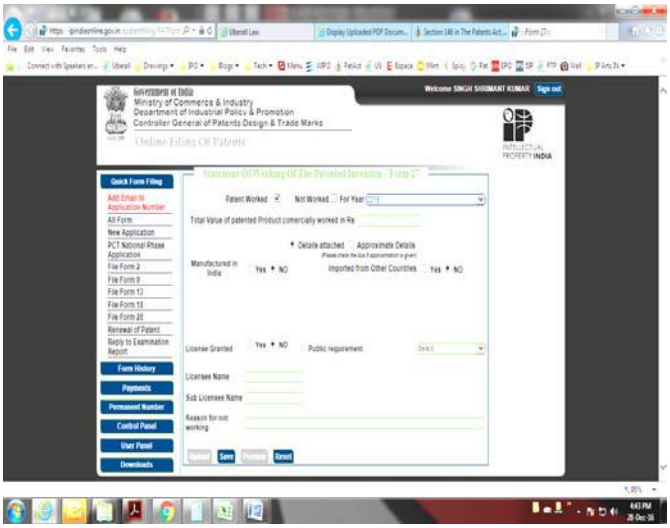
- In addition to the information regarding commercial working of a patent as prescribed on Form 27, the Indian Patent Agent would require a power of attorney (PoA) executed in original by the Patentee/Licensee authorizing

the Indian Agent to prepare and file Form 27 at the IPO on behalf of the Patentee/Licensee.

- On receipt of working statement instructions from its clients, details such as patent number, application number, Patentee/Licensee name, and status of the patent shall be cross checked from the official website of the IPO.
- Upon verifying details and receiving clarifications/corrections from the clients, the Indian Agents prepare and file Form 27 for respective patents on the official e-Filing Portal. Further, the clients are duly served with a filing report along with official confirmation of the IPO evidencing submission of Form 27.

LATEST UPDATE WITH RESPECT TO SUBMISSION OF FORM 27:

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



SALIENT POINTS:

- Filing of Form 27 statement of commercial working of patent is mandatory;
- The same is required to be filed through e-Filing;
- Along with details of commercial working of patents, a PoA in favour of the Indian Patent Agent is also required;
- Last date to submit working statements – Form 27 for year 2017 is March 31, 2018.

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

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Season's Greetings
Thank You For Your
Invaluable Support. We All Join
In Sending You A World Of
Best Wishes For Joy,
Good Health And Prosperity.
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