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ACQUISITION FINANCING AND INDIA'S CURIOUS CASE

PARENT COMPANY LIABILITY:SUPREME COURT CLARIFIES APPROACH TO JURISDICTIONAL CHALLENGES

CONCEPT OF DATA EXCLUSIVITY AND INDIA'S GROWTH AS GENERIC DRUG MANUFACTURER

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-Aakriti Raizada
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SEBI Proposals:
A STEP IN THE RIGHT DIRECTION

Earlier this month, the Securities and Exchange Board of India proposed moving from the concept of "promoter group" to that of "person in control" and decreasing the minimum lock-in period for promoters and other shareholders subsequent to an IPO. The SEBI also recommended rearranging disclosure conditions of group companies. The markets' regulator has given the public till June 10 for comments on its proposals.

The SEBI reasoned that ownership and controlling rights are no longer completely vested in promoters and that there has been a considerable increase in private equity and institutional investors. It added that investor focus on quality of Board and management has also increased. "The changes in nature of ownership could lead to situations where persons with no controlling rights and minority shareholding continue to be classified as promoters. By virtue of being called promoters, such persons may have influence over the listed entity disproportionate to their economic interest, which may not be in the interests of all stakeholders," the SEBI said in its consultation paper. The markets' regulator has proposed three years for a smooth transition from promoter to person in control.

The SEBI also advised reducing the lock-in period from the current three years to one year from the date of allotment in the IPO for minimum promoters' contribution of 20 percent if the aim is sale or financing other than capital expenditure for a project. "Promoters holding in excess of minimum promoters' contribution shall be locked in for a period of six months as opposed to the existing requirement of one year from the date of allotment in the IPO," the SEBI said.

The SEBI further proposed disclosing only names and registered office addresses of all group companies in the Draft Red Herring Prospectus.

According to capital market analysts, the SEBI proposals, if implemented, will only serve to empower the regulator in addition to rationalizing and simplifying the role and responsibility of promoters and most importantly, aligning the Indian IPO framework with international practices.

And while we stay at home, study/work online, and spend quality family time, we are sure this May edition of Legal Era with its array of exciting reads in addition to the usual features will keep you constructively engaged. Here's wishing you all positivity and growth through consuming cutting-edge knowledge and staying indoors.

Aakriti Raizada

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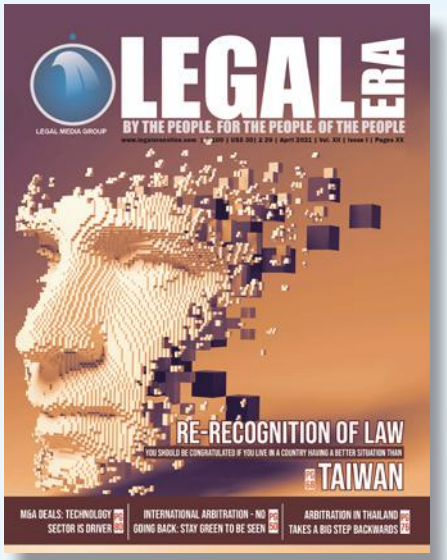

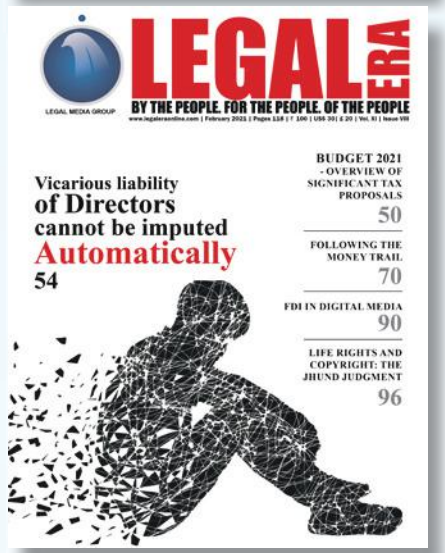

Ideals can be reached when kinds of hindrances keeping us away therefrom are surpassed. Legal Era Magazine pursues ideal principles of by, for and of the people by industriously looking for potential enlightenments ubiquitously but variantly existing at any piece of land all over the world. Moving forward with Legal Era Magazine with like efforts, an ideal global village may become imaginably nearer.

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"Legal Era is a high quality and informative magazine for which I was delighted to offer my contribution. Their professionalism and expertise is evident in the presentation and content of their publication as they provide relevant and up-to-date developments in the legal world."

Dhiraphol Suwanprateep
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I think, Legal Era is distinctly different simply by virtue of its substance and freshness in terms of topics. It is one of the few magazines which are focused on the dynamism of industries and legal developments around the same. Legal Era is selective about contribution thereby ensuring quality of what they publish. They are also future looking, thus helping in insights.

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Vice President – Legal, InMobi

I enjoyed reading the latest edition of Legal Era magazine providing a wide range of insightful articles and contributions from diverse jurisdictions and industries.

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Reading Legal Era Magazine is a fantastic way of keeping oneself updated with the latest developments in the legal field. Its articles are scholarly and well written. Legal Era's conferences are not only great learning forums, but also present an excellent networking opportunity for the legal fraternity.

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Senior Vice President – General Counsel, ITC Ltd.

QUICK GLANCE

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SUPREME COURT: INDIAN PARTIES HAVE LIBERTY TO SELECT FOREIGN SEAT OF ARBITRATION

Justices Hrishikesh Roy, BR Gavai, and Rohinton Nariman

The Supreme Court (SC) in the case titled PASL Wind Solutions Private Ltd (Appellant) v. GE Power Conversion India Private Limited (Respondent) ruled that two Indian parties are entitled to choose a foreign seat of arbitration. An arbitral award arising from such arbitration would be a foreign award.

The SC three-judge bench comprising Justices Rohinton Nariman, BR Gavai, and Hrishikesh Roy received an appeal from PASL Wind Solutions wherein it challenged a judgment of the Gujarat High Court (HC).

The Top Court emphasized the significance of party autonomy to arbitration and said that party autonomy has been held to be the brooding and guiding spirit of arbitration.

It further stated that nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals.

Issue before the SC

Whether or not two companies incorporated in India can choose a forum for arbitration outside India?

Brief Facts of the Case

The factual matrix of the case is that the appellant and the respondent, both Indian incorporated companies, had chosen Zurich as the seat of arbitration. A dispute arose between both the parties and the respondent filed a preliminary application challenging the jurisdiction of the arbitrator.

The respondent contended that both the parties being from India could not choose a foreign seat of arbitration. This contention of the respondent was opposed by the appellant and it asserted that there was no bar in law from choosing a foreign seat of arbitration.

The said contention of the appellant was rejected by the sole arbitrator. Subsequently, hearings were held in Mumbai which was agreed by the parties as to the venue of arbitration. The arbitrator passed an award against the appellant.

In the final award, the appellant was directed to pay the amounts, however, it failed to oblige the same. The respondent initiated enforcement proceedings under Section(s) 47 and 49 of the Arbitration & Conciliation Act (Arbitration Act) before the High Court, within whose jurisdiction the assets of the appellant were located.

Observations of the SC

- The seat of Arbitral Proceedings

The SC put reliance on the decision of the case MankastuImpex (P) Ltd. v. Airvisual Ltd., (2020) 5 SCC 399, where disputes were to be resolved by arbitration "administered in Hong Kong", wherein the Court concluded, that the arbitration agreement entered into between the parties provides Hong Kong as the place of arbitration. The agreement between the parties that the dispute "shall be referred to and finally resolved by arbitration administered in Hong Kong" clearly suggests that the parties have agreed that the arbitration is seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have the power of judicial review over the arbitration award."

The Apex Court said that Clause 6 of the settlement agreement extracted above

would show that arbitration is to be resolved "in Zurich" by the Rules of Conciliation and Arbitration of the ICC.

- **Part I and II of the Arbitration Act are mutually exclusive**
  The Top Court observed that the Arbitration Act is in four parts. Part I deals with arbitrations where the seat is in India and has no application to a foreign-seated arbitration. Part II does not apply to arbitral proceedings once commenced in a country outside India. The Court held that the two parts have been held to be mutually exclusive.

  The Court rejected the argument that proviso to Section 2(2) of the Arbitration Act is a bridge that connects the two parts. It added that the reason for the insertion of the proviso to Section 2(2) was after the judgment in Bhatia International v. Bulk Trading S.A that has been expressly overruled by a five-Judge Bench in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 [BALCO].

  It added that the said proviso made it clear that where, in an arbitration which takes place outside India, assets of one of the parties are situated in India and interim orders are required qua such assets, including preservation thereof, the courts in India may pass such orders.

- **International Commercial Arbitration**
  The SC said that the expression "international commercial arbitration" clearly implies to a place of the arbitration being outside India, an arbitral award made in such place is enforced and recognized under the provisions of Part II of the Arbitration Act.

  The context of this expression is, therefore, different from the context of the definition of "international commercial arbitration" contained in Section 2(1)(f), which is in the context of such arbitration taking place in India, which only applies "unless the context otherwise requires", the Court said.

  The four sub-clauses contained in section 2(1)(f) would make it clear that the definition of the expression "international commercial arbitration" contained therein is party-centric in the sense that at least one of the parties to the arbitration agreement should, inter alia, be a person who is national of or habitually resident in any country other than India.

- **Ingredients of a Foreign Award**
  Under Section 44 of the Arbitration Act, a foreign award is defined as meaning an arbitral award on differences between persons arising out of legal relationships considered as commercial under the law in force in India, in pursuance of an agreement in writing for arbitration to which the New York Convention applies, and in one of such territories as the Central Government, by notification, declares to be territories to which the said Convention applies.

  It has four major ingredients which are discussed as under-

(i) The dispute must be considered to be a commercial dispute under the law in force in India,
(ii) It must be made in pursuance of an agreement in writing for arbitration,
(iii) It must dispute that arise between "persons" (without regard to their nationality, residence, or domicile), and
(iv) The arbitration must be conducted in a country that is a signatory to the New York Convention.

Section 10 of Commercial Courts Act

The Top Court observed that when a foreign award is sought to be enforced under Part II of the Arbitration Act, the explanation to Section 47 makes it clear that the applicant must approach the HC first.

It added that 'International commercial arbitration', when used in the proviso to Section 2(2) of the Arbitration Act, does not refer to the definition contained in Section 2(1)(f) but would have reference to arbitrations that take place outside India, awards made in such arbitrations being enforceable under Part II of the Arbitration Act.

Section 10(1) applies to international commercial arbitrations, and applications or appeals arising therefrom, under both Parts I and II of the Arbitration Act, the judgment noted.

The SC clarified that Section 10(1) applies to international commercial arbitrations, and

applications or appeals arising therefrom, under both Parts I and II of the Arbitration Act. When applications or appeals arising out of such arbitrations under Part I, where the place of arbitration is in India, undoubtedly, the definition of "international commercial arbitration" in Section 2(1)(f) will govern.

However, when applied to Part II, "international commercial arbitration" has reference to a place of arbitration that is international in the sense of the arbitration taking place outside India.

The decision of the Court

After hearing both the parties at length and analyzing the relevant provisions in detail, the Top Court concluded that there is no clash at all between Section 10 of the Commercial Courts Act and the explanation to Section 47 of the Arbitration Act.

It added that an arbitration resulting in a foreign award, as defined under Section 44 of the Arbitration Act, will be enforceable only in the HC under Section 10(1) of the Commercial Courts Act, and not in a District Court under Section 10(2) or Section 10(3).

It further clarified that an arbitral award arising from such arbitration would be a foreign award. It added that remedy is available under Section 9 of the Arbitration Act for such foreign seated arbitrations between two Indian parties.

While disposing of the appeal, the SC bench held, "We uphold the impugned judgment of the Gujarat High Court, except for the finding on the Section 9 application of the respondent being held to be non-maintainable."

SUPREME COURT: DEDUCTIONS FOR PROFITS AND GAINS FROM INDUSTRIAL UNDERTAKINGS CANNOT BE CONFINED TO 'BUSINESS INCOME'

Justices L. Nageswara Rao and Vineet Saran

The Supreme Court (SC) on 28 April 2021, in the case titled Commissioner of Income Tax [Appellant(s)] v. M/s. Reliance Energy Ltd. (Formerly BSES Ltd.) [Respondent (s)] ruled that the Deductions for profits and gains from industrial undertakings under Section 80-IA of the Income Tax Act, 1961, (IT Act) must not be confined to 'Business Income' only.

The SC division bench comprising Justices L. Nageswara Rao and Vineet Saran highlighted the essential ingredients of Section 80-IA (1) of the IT Act:

- The 'gross total income' of an assessee should include profits and gains;
- Those profits and gains are derived by an undertaking or an enterprise from a business referred to in sub-section (4);
- The assessee is entitled to deduction of an amount equal to 100% of the profits and gains derived from such business for 10 consecutive assessment years;
- In computing the 'total income' of the Assessee, such deduction shall be allowed.

The factual background of the case is that the Assessee - M/s. Reliance Energy Ltd. has been engaged in the business of generation of power and also deals with the purchase and distribution of power.

The Assessee-Company generated power from its power unit located at Dahanu. In respect of deduction under Section 80-IA of the Act, the Assessee was asked to explain as to why the deduction should not be restricted to business income, as had been the stand of the Revenue for

the assessment year 2000-01.

The Assessee had revised its claim under Section 80-IA of the IT Act to ₹546,26,01,224/-, having admitted that there was an error in the calculation of income-tax depreciation.

The Assessing Officer (AO) rejected the contention of the Assessee that Section 80AB of the Act is not applicable. The AO restricted the eligible deduction under Section 80-IA of the IT Act to the extent of 'business income' only.

The Commissioner of Income-Tax (Appeal) [CIT(A)] has partly allowed the Appeal filed by the Assessee and reversed the order of the Assessing Officer on the issue of the extent of deduction under Section 80-IA of the Act.

The Income Tax Appellate Tribunal (ITAT) upheld the decision of the Appellate Authority on the issue of deduction under Section 80-IA. The High Court refused to interfere with the Tribunal's order as far as the issue on deduction under Section 80-IA is concerned.

It was held that Section 80AB of the Act makes it clear that for the AO elaborated on this point by stating that 'income from business' alone had to be considered for allowing any deduction computed on 'income from business' and using the same analogy, deduction computed on 'income from other sources' should be allowable against 'income from other sources' only.

As the deduction under Section 80-IA of the Act pertains to profits and gains from a business undertaking, the deduction is allowable only against 'income from business'.

On behalf of the Assessee, it was argued that Section 80AB of the Act is with reference to computation of deduction on the basis of net income.

It was contended that there is no indication in sub-section (5) of Section 80-IA that the deduction under sub-section (1) is restricted to 'business income' only. On the other hand, according to him, sub- section (5) deals with the determination of the quantum of deduction by treating eligible business as the only source of income of the Assessee.

The controversy in this case, pertains to the deduction under Section 80-IA of the Act being allowed to the extent of 'business income' only. The claim of the Assessee that deduction under Section 80-IA should be allowed to the extent of 'gross total income' was rejected by the AO.

The Top Court held that the scope of sub-section (5) of Section 80-IA of the Act is limited to the determination of quantum of deduction under sub-section (1) of Section 80-IA of the Act by treating 'eligible business' as the 'only source of income'.

It added that "Sub-section (5) cannot be pressed into service for reading a limitation of the deduction under sub-section (1) only to 'business income'."

SUPREME COURT REFRAINS FROM RECALLING ITS JUDGMENT DIRECTING RBI TO DISCLOSE LOAN DEFAULTERS' LIST

The Supreme Court (SC) on 28 April 2021, in the case titled Reserve Bank of India [Applicant(s)] v. Jayantilal N. Mistry &Anr. [Respondent(s)] dismissed a joint plea by the Central Government and 10 other banks seeking a recall of the 2015 judgment. The Court directed the Reserve Bank of India (RBI) to disclose financial information regarding banks.

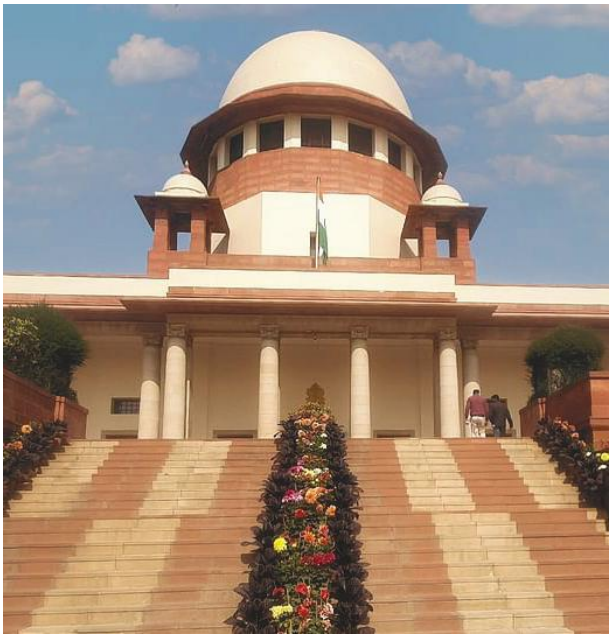
The SC bench comprising Justices L Nageswara Rao and Vineet Saran while rejecting the application ruled that the applications for recall were not maintainable and were an attempt to seek reconsideration of the 2015 judgment.

In the instant matter, applications were filed by the Union Government, State Bank of India, Punjab National Bank, HDFC Bank, Bank of India, Canara Bank, Bank of Baroda, Uco Bank, Indian Bank, Kotak Mahindra and AU Small Finance Bank before the Top Court to recall its 2015 judgment.

In its 2015 verdict (Reserve Bank of India v. Jayantilal N. Mistry (2016) 3 SCC 525), the SC held that RBI was not in any fiduciary relationship with any bank. RBI has no legal duty to maximize the benefit of any public sector or private sector bank, and thus there is no relationship of 'trust' between them. RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy, and the banking sector.

Subsequently, RBI came out with disclosure policies in 2016 and 2019 that sought to dilute the impact of the court verdict. But after the SC initiated contempt proceedings against RBI, the regulator rolled back the 2019 policy.

After six months, the HDFC Bank and SBI filed applications for recall of the 2015 judgment and a different bench issued an interim order, wherein it directed that "Inspection Reports/Risk Assessment Reports/Annual Financial Inspection Reports of the Banks including State Bank of India shall not be released by the Reserve Bank of India until further orders."



After the aforesaid order was passed more banks queued up for seeking the same relief and the banks urged that it is a violation of natural justice, as the banks were not heard when the 2015 judgment was passed.

The Central Government contended that disclosure of such information could hurt the economic interest of the country and not just the entities involved and therefore, it was imperative to recall the judgment and reconsider the issues afresh.

The contentions were opposed by stated that a review petition would require consideration of the matter on merits in case there is an error apparent on the face of the record. Whereas, recall applications are entertained only in case the judgment is passed without jurisdiction, or without an opportunity hearing being given to the affected party.

In Delhi Administration v. Gurdip Singh Uban & Ors., this Court made it clear that applications filed for clarification, modification or recall are often

only a camouflage for review petitions. It was held that such applications should not be entertained, except in extraordinary circumstances.

The Apex Court to maintain financial transparency in the banking system revived its 2015 judgment wherein the Court has made it mandatory for the Reserve Bank of India (RBI) to disclose financial information regarding private and public banks under the Right to Information (RTI) Act.

The SC bench noted that the banks did not make any attempt to present their version when the main case was heard and held that close scrutiny of the applications for recall makes it clear that in substance, the applicants are seeking a review of the judgment in Jayantilal N Mistry (2015 judgment) and dismissed the same on the grounds of being meritless.

The Apex Court noted that the dispute relates to information to be provided by RBI under the Act. Though the information pertained to the banks, it was the decision of RBI which was in challenge and decided by this court. No effort was made by any of the applicants in the miscellaneous applications to get them impleaded when the transferred cases were being heard by this Court.

The SC dismissed the application and concluded that "We are of the considered opinion that these applications are not maintainable. We make it clear that we are not dealing with any of the submissions made on the correctness of the judgment of this Court in Jayantilal N. Mistry (supra)."

SUPREME COURT: HIGH COURTS ARE BARRED TO EXERCISE INHERENT POWERS UNDERMINING SECTIONS 14 & 17 OF IBC

Justices UU Lalit and KM Joseph

The Supreme Court (SC) ruled in Sandeep Khaitan, Resolution Professional (Appellants) v. JSVM Plywood Industries (Respondents) that the High Courts (HCs) should not use its' inherent powers provisioned under Section 482 of the Code of Criminal Procedure (CrPC) to undermine the statutory provisions provided under Sections 14 and 17 of the Insolvency and Bankruptcy Code, 2016 (IBC).

The SC bench comprising of Justices UU Lalit and KM Joseph held that "The High Court appears to have, in passing the impugned order, which is an interim order for that matter, overlooked the salutary limits on its power under Section 482."

The factual matrix of the case is that an application under Section 7 of the IBC was admitted against one National Plywood Industries Limited (NPIL). The appellant was appointed as the Interim Resolution Professional (IRP) and a moratorium was also passed under Section 14 of the IBC.

Section 7 deals with 'initiation of corporate insolvency resolution process by the financial creditor'; Section 14 deals with 'Moratorium' which means 'temporary prohibition of an activity' and Section 17 of the IBC deals with 'management of affairs of corporate debtor by interim resolution professional'.

The appellant alleged that the former Managing Director of the Corporate Debtor in conspiracy with the respondent engaged in an illegal transaction of ₹32.50 lakh without authority from the appellant and the said act was in violation of Section 14 of the IBC.

A cyber-complaint and an FIR were lodged against the respondent by the appellant. The appellant

also filed an application under Section 19 read with Section 23 (2) of the IBC wherein it was alleged that there was non-corporation by the previous management of the Corporate Debtor.

Subsequently, a lien was created by the ICICI Bank upon the bank account of the respondent based on the allegedly illegal transaction. The respondent challenged the FIR through a criminal petition under Section 482 of CrPC before the HC.

The respondent also filed an application before the Court seeking permission to operate their bank accounts over which lien had been created and those accounts which had been frozen based on the FIR. The HC allowed an interlocutory application filed by Respondent No. 1 allowing it to operate the bank account maintained with the ICICI Bank.

The HC further directed in its order to unfreeze the bank account of its creditors over which the lien has been created and the accounts were frozen pursuant to the lodging of an FIR by the appellant, that was made subject to certain conditions.

An appeal was filed before the Top Court against the order of the HC. The Apex Court clarified in the instant matter that the power of the HCs under Section 482 of the Cr.PC is available for countenance the breach of a statutory provision.

It added that the expression mentioned in Section 482 of the Cr.PC i.e. 'to secure the ends of justice' does not refer to overlook the undermining of a statutory dictate, specifically regarding the provisions of Section 14, and Section 17 of the IBC. The Court further held that the impact of the moratorium under IBC includes the prohibition of transferring, encumbering, alienating, or disposing of by the Corporate Debtor of any of its assets.

It further stated that "The contours of the jurisdiction under 482 of the Cr.PC are far too well settled to require articulation or reiteration."

The Court added that "The provisions of the IBC contemplate resolution of the insolvency if possible, in the first instance and should it not be possible, the winding up of the Corporate Debtor. The role of the insolvency professional is neatly carved out. From the date of admission of application and the appointment of Interim Resolution Professional, the management of the affairs of the Corporate Debtor is to vest in the Interim Resolution Professional."

The SC concluded that the HC has exercised its inherent powers beyond its limit and said that "the orders passed by the National Company Law Tribunal (NCLT) of allowing the application u/s 7 and ordering of moratorium u/s 14 and its other orders and also the order of the HC that resulted to unfreeze the accounts of respondent no. 1 without reimbursement of the debt of ₹32.50 lakh, all these orders cannot be sustained."

The SC bench modified the orders of the HC and it permitted the respondent to operate its account after clearing the dues of ₹ 32.50 lakh. It further directed that the assets of the Corporate Debtor shall be managed strictly in terms of the provisions of the IBC.

The SC directed in its order that "The judgment will not stand in the way of Respondent No.1 pursuing its claim with regard to its entitlement to a sum of ₹32.50 lakhs and any other sum from the Corporate Debtor or any other person in the appropriate forum and in accordance with law."

MADRAS HIGH COURT

AN EXEMPTION NOTIFICATION HAS TO BE INTERPRETED STRICTO SENSU: MADRAS HIGH COURT (MADURAI BENCH)

The Madurai Bench of the Madras High Court has ruled that it is a fundamental legal principle that an exemption notification has to be interpreted stricto sensu. No external aids can be brought in to interpret an exemption notification. If the assessees, who claim benefit of exemption notification, fail to fulfill any one of the conditions contained therein, the benefit cannot be extended. Courts have to read the exemption notification as such without substituting the words or phrases.

As to the facts of the case, the assessees imported Latex Gloves in bulk and filed bills of entry for clearance of those goods, which after clearance were packed in pouches, after undergoing a process of sterilization and were sold in the retail market with the brand name.

The assessee filed applications for refund of Special Additional Duty of Customs (SAD) paid by them by relying on a Notification dated 14 September 2007. The original Authority had sanctioned refund in respect of 77 bills of entry and in respect of the remaining 69 bills of entry, they were not sanctioned.

The contention of the Revenue was that in terms of Section 2(f)(iii) of the Central Excise Act, 1944, packing, re-packing, labeling, re-labeling, printing of MRP on packages or any treatment of goods to render them marketable would amount to manufacture. Therefore, the Department proposed that the assessee had not fulfilled the conditions specified in the Notification No. 102/2007, wherein there is a specific condition that the imported goods shall be sold as such and without being subjected to any further process amounts to manufacture.

According to the assessee, the process of sterilization would not amount to manufacture as the use and character of the imported gloves remain the same even after packing and no new

product has been created on account of the said process of sterilization and repacking. Further, in terms of the notification, if the importer can establish that the goods sold were the same as imported, the benefit of exemption would apply and there is no specification in the notification that the goods are required to be sold as such.

The Revenue submitted that exemption is given only if the importer fulfills the conditions specified in the Notification and one such condition being the imported goods sold as "imported goods" without being subjected to any further process, which amounts to manufacture. Repacking, re-labeling etc., shall amount to manufacture and the imported goods no more remain the imported goods as required under the Clauses 2(d), 2(e)(ii) of the Notification No.102/2007.

The division bench of Justices T.S. Sivagnanam and S. Ananthi held that, "On a reading of Notification No.102/2007, we find that nowhere there is indication that it is a supersession of an earlier Notification. Therefore, the question would be whether the Tribunal could have come to the conclusion that Notification No.102/2007 was in supersession of the earlier notification, which uses

only the expression "subsequently sold" will stand fulfilled in the case of the assessees."

The court further held that the Tribunal found fault with the Adjudicating Authority in not granting relief in respect of the imports after 11.07.2014 and while granting the relief to the assessees proceeded on the basis that the earlier Notification No.56/1998 required the imported goods to be sold "as such" and it had a more stringent condition and there is no such requirement in the Notification No.102/2007.

According to the Court, this finding prima facie appeared to be not sustainable as the issue whether the Notification No. 102/2007 was in supersession of Notification No.56/1998 was required to be considered and decided.

The Court said, "Those orders passed by the Assistant Commissioner of Customs were based upon the order in original No.1/2016, dated 19.04.2016, which is to be set aside and the matter to be remanded back to the file of the Commissioner of Customs for fresh decision.

In such circumstances, we are of the considered view that the writ petitioners should not be left without any remedy and since we are remanding the matter back to the file of the Commissioner of Customs for reconsideration, after setting aside the order passed by the Tribunal, we deem it appropriate that the orders passed by the Assistant Commissioner of Customs rejecting the refund applications are required to be set aside and the refund applications should stand restored to the file of the Assistant Commissioner of Customs to be taken up for fresh consideration after the Commissioner of Customs completes de novo adjudication based on the order of remand in this appeal."

The Court set aside the order passed by the Tribunal and remanded the matter to the Commissioner of Customs, Tuticorin, to consider the issue afresh, after affording opportunity to the assessees.

MADRAS HIGH COURT: COURTS SHALL NOT PROVIDE AN OPPORTUNITY TO ASSESSEE TO ESCAPE LIABILITY MERELY ON THE GROUND OF JURISDICTIONAL ERROR

Justice S.M. Subramaniam

The Madras High Court (HC) in the case titled M/s Sri Sathya Jewelry (Petitioner) v. The Principal Commissioner of Customs (Respondent) ordered the petitioners to approach the Customs, Excises, Appellate Tribunal (CESTAT) and said that the Courts must not provide an unnecessary opportunity to the assessee to escape from liability merely on jurisdictional error.

The HC single-judge Justice S.M. Subramaniam noted that a large number of writ petitions are filed without exhausting the statutory appeal remedies and the HC is also routinely entertaining such writ petitions.

In the instant matter, the primary ground of contention was that the show cause notice (SCN) was issued by an incompetent authority, not having jurisdiction under the provisions of the Customs Act, 1962, and therefore, the entire proceedings are liable to be set aside.

It was contended that the SCN was issued by the improper authority and it was highlighted that the language employed in the Statute is "The Proper Officer" and it means that such authority is

empowered to issue show cause notice, and neither the higher authority nor any other authority has jurisdiction to issue any further orders regarding review or otherwise.

It was further contended that the original authority in certain cases is Appraisers or Assistant Commissioners or Deputy Commissioners of Customs. However, the reassessment has been undertaken by the Customs and the show cause notices were issued by the Directorate of Revenue Intelligence in some cases, and in other cases, Special Investigation Intelligence Branch for Customs.

Hence, it was stated that the Directorate of Revenue Intelligence is not the proper authority as contemplated under Section 28(4) of the Customs Act. Keeping such writ petitions pending for a long time would cause prejudice to the interest of the assessee also.

The HC said that the statutory provisions regarding the appeal are to be decided at the first instance, enabling the litigants to avail the remedy by following the procedures as contemplated under law. Such writ petitions filed may be on the ground of jurisdiction or otherwise.

It added that the Courts are expected to ensure that all such legal grounds available to the parties are adjudicated before the proper Forum and only after exhausting the statutory remedies, writ petitions are to be entertained.

The HC stated that "In the absence of exhausting such remedies, High Court is losing the benefit of deciding the matter on merits as the High Court cannot conduct a trial or examine the original records in the writ proceedings under Article 226 of the Constitution of India."

According to the Court, "Powers of the High Court under Article 226 of the Constitution of India cannot be extended nor widened so as to allow lay hands on the facts and circumstances by conducting the trial, nor certain facts and circumstances with reference to documents and evidences can be assumed or presumed or inference can be drawn, which is not preferable."

It further held, "Jurisdictional error should not result in exoneration of liability. Jurisdictional error, if any committed, is technical, and thus, rectifiable. In such circumstances, the Courts are expected to quash the order passed by an incompetent authority and remand the matter back for fresh adjudication. Contrarily, if an assessee is exonerated from liability, undoubtedly, the purpose and object of the Customs Act, 1962 is defeated."

Justice Subramaniam further said that the Court shall not provide an unnecessary opportunity to the assessee to escape from the liability merely on the ground of jurisdictional error, which is rectifiable.

It held that the petitioners are at liberty to approach the appellate authority and file an appeal by following the procedures contemplated and by complying with the conditions to prefer the appeal, within 60 days from the date of receipt of a copy of this order.

It further said that in the event of filing of appeal(s) by the writ petitioners within 60 days, all such appeals are directed to be entertained without reference to the period of limitation, and the matters are to be adjudicated on merits and by law and by allowing all the parties, and the appeals are to be disposed of as expeditiously as possible.

KARNATAKA HIGH COURT

KARNATAKA HIGH COURT DENIES BAIL TO MIDDLEMAN FOR CHEATING POLITICIANS, BUSINESSMEN AND A FORMER HIGH COURT JUDGE

Justice K Natarajan

The Karnataka High Court (HC) in the case titled Yuvaraj (Petitioner) v. State of Karnataka (Respondent) denied bail to Yuvaraj, who has been accused in multiple cases of allegedly cheating politicians, businessmen, and an Ex-High Court judge.

The single-judge of the HC Justice K Natarajan noted that an Ex-Karnataka High Court judge's made an attempt to secure the post of Governor by paying a bribe to a middleman. The HC stated that the said act of the former Judge lowered the prestige of Judges and the image of the Governor's post.

The factual matrix of the case is that the petitioner had approached the HC for seeking bail in different crimes registered against him by the Cyber Crime Police, High Grounds Police, and Jnanabharathi Police for the offenses punishable under Sections 406, 418, 419, 420, 504 and 506 of the Indian Penal Code, 1860 (IPC) and under Section 66 of the Information Technology Act, 2000 (IT Act).

In December 2020, the petitioner was arrested by Bengaluru police for allegedly cheating several people of crores of rupees by promising them high positions in the government.

It was also alleged that a former HC Judge had paid the accused a bribe of ₹ 8.5 crore through RTGS and cash. Later, the petitioner was arrested by the police and the ex-judge filed a police complaint alleging that she was cheated.

The Court, after going through the details of each case registered against the accused, went on to note that Yuvaraj appeared to be a middleman having contacts with ministers but is suppressing the names of persons to whom he has paid money for securing posts.

The HC said that "Looking to the entire facts and circumstance of the case, I am of the view that if this petitioner is granted bail, he will tamper with the prosecution witnesses, and committing similar offenses is not ruled out. He is a very influential person and he may threaten the prosecution witnesses and cause hurdle to the investigation by the Police."

It added that "If he is granted bail, there will be a wrong message sent to the Society that a person having money can buy post in the Government. Hence, he does not deserve for grant of any bail."

The HC stated that it is also most unfortunate that a former Judge of the High Court has paid a bribe to the petitioner for securing the Post of Governor which act of the complainant not only lowered the prestige of a Judge but also affect the image of Governor's post.

The Court rejected the bail and concluded, "The petitioner is notorious and having so much influence with the political parties and cheating the persons under the guise of providing posts in government organizations and that too to the level of assuring for providing post of Governor. Such being the case, I am of the view that the petitioner is not entitled to bail in all the petitions."

DELHI HIGH COURT

DELHI HIGH COURT: INSURANCE POLICIES MUST ALSO COVER MENTAL ILLNESS; NO DISCRIMINATION BETWEEN PHYSICAL & MENTAL ILLNESS

Justice Pratibha M. Singh

The Delhi High Court (HC) in the case of Shikha Nischal (Petitioner) v. National Insurance Company Limited & Anr. (Respondents) held that all insurance companies are liable to give effect to Section 21(4) of the Mental Health Act, 2017 (MHA, 2017). It added that there cannot be any discrimination between mental and physical illness.

The HC single-judge Justice Pratibha M. Singh held that "The MHA, 2017 and the provisions are absolutely relevant for a person who was suffering from Schizoaffective Disorder. The Petitioner was entitled to reimbursement of her claim as per the provisions of the MHA, 2017."

The factual matrix of the case is that the petition raised an important issue relating to insurance coverage for mental illnesses and the provision of non-discrimination qua such illnesses as enshrined in Sections 21(1)(a) and 21(4) of the Mental Healthcare Act, 2017.

The Petitioner regularly obtained health insurance policies from Respondent No. 1 - M/s National Insurance Company Limited since 2016. The last policy was purchased by her on 29 May 2020, named as 'National Mediclaim Policy'. The said Healthcare Policy is valid for one year 28 May 2021. The sum insured was ₹3,95,000/-.

In June 2020, the Petitioner developed a certain illness for which she obtained treatment from Sukoon Hospital, Gurugram. She was admitted to the hospital and was discharged after a month of treatment. The total expenses incurred by her was ₹5,54,636/- for the said period of hospitalization. She was diagnosed with Schizoaffective Disorder - a mental illness.

She then applied for reimbursement of the expenses incurred in her treatment, amounting to ₹5,54,636/-, from NICL in terms of Clause 1.1 of the Healthcare Policy. As per the Petitioner, she is entitled to reimbursement in terms of Clause 1.1 of the Healthcare Policy which provides for insurance policy coverage for medical expenses incurred for hospitalization.

Her claim was rejected by National Insurance Company Limited (NICL) on the ground that the Healthcare Policy did not cover psychiatric disorders. The claim was subsequently also rejected by Insurance Ombudsman.

A petition was filed before the HC wherein the petitioner contended that she is clearly covered under Section 21(4) of the MHA, 2017 which provides specifically that insurance companies would not make any distinction between mental illnesses and physical illnesses.

Issue before the HC

Can mental illness be treated differently from physical illness for medical insurance purposes?

It was further contended that NICL could not have rejected the claim of the Petitioner on the ground that the condition of the Petitioner was a mental illness.

It was further urged that IRDAI had issued guidelines on 29 July 2016 Guidelines on Product Filing in Health Insurance Business regarding how the medical claim policies were to be issued by the insurance companies.

It approved the NICL's policy and by the 2016

Guidelines, the new product covering mental illness was launched within six months. The petitioner had renewed her Healthcare Policy and it covered mental illnesses.

Analysis and Conclusion of the HC

The HC after a detailed analysis of various legal provisions concluded that protections to be extended to persons with mental illnesses to ensure that they are treated equally with persons who have physical illnesses. It is clear from a reading of Section 21(4) of the MHA, 2017 that there cannot be any discrimination in providing medical insurance between mental and physical illnesses or conditions.

The Court added that it is the IRDAI's function to ensure that laws that are enacted for the benefit of policyholders are fully given effect to by the insurance companies. It said that a perusal of the provisions of MHA, 2017 clearly shows that insurance companies had to make provision for mediclaim insurance for treatment of mental illnesses on the same basis as treatment available for physical illnesses.

In its detailed judgment, the HC stated that mental illnesses cannot be treated differently from physical illnesses. Insurance policies also cannot discriminate between these two types of illnesses. While physical illnesses are manifested in the human body in some form, mental illnesses do not always have visible physical manifestations. However, mental illnesses can also be debilitating and destructive.

The Court added, "Availability of insurance for mental disabilities or conditions is, therefore, not only important but is an essential need. It is in recognition of the importance of a healthy mental state for a human being that both the Convention and the provisions of the MHA, 2017 discussed above, have been introduced."

Decision of the HC

Justice Singh held, "The Insurance Ombudsman's order failed to consider the fact that the MHA, 2017 recognized the rights of the Petitioner and the conclusion of the Insurance Ombudsman that the provisions of the MHA, 2017 are not relevant, is completely contrary to law and is untenable."

PHONEPE V. BHARATPE: DELHI HIGH COURT REFUSES TO GRANT INTERIM RELIEF HOLDING NO INFRINGEMENT OF PHONEPE TRADEMARK

The Delhi High Court (HC) in the case titled PhonePe (Plaintiff) v. Ezy Services & Ors. (Defendants) refused to grant an interim injunction order against 'BharatPe' held that the said mark is not in violating the trademark held by "PhonePe".

The single-judge of the HC Justice C Hari Shankar held that the terms 'Phone' and 'Bharat' are not identical and the plaintiff cannot exclusively claim over the suffix 'Pe'.

The factual matrix of the case is that the plaintiff approached the HC and submitted that the term "Pe" was an 'invented word' and it was an essential, dominant and distinguishing feature of its registered trademarks in the name of 'PhonePe'.

The plaintiff contended that the use of suffix 'Pe' by the defendant that is offering identical services is amounting to infringement of its registered trademark and it also amounts to passing off.

The defendant argued that the plaintiff was not the registered proprietor or permitted user of

the words, "Pe", "Pay" or the Devnagari "पे". It was further contended that the registration was over the entire word "PhonePe" and the same cannot be dissected.

Analyzing legal position of infringement under Trademarks Act

The HC analyzed the provisions of the Trademarks Act and also placed reliance on various judgments. The Court highlighted the legal position of the 'violation of trademarks' -

1. "Exclusivity can be claimed, and infringement/ passing off alleged, only in respect of the entire mark, not in respect of a part thereof. The registration of the whole mark cannot confer any exclusive rights, on the holder thereof, to any part of such registered mark.

2. It is open, however, for the plaintiff to assert infringement on the ground that a part of the mark has been copied by the defendant, provided the part so copied is the dominant part or the essential feature of the plaintiff's trademark.

3. No exclusivity can be claimed, over a descriptive mark, or a descriptive part of the mark, even by misspelling it.

4. There is one exception, where the descriptive mark or descriptive part has attained distinctiveness, i.e. it has acquired a secondary meaning, indelibly linking the mark, in the mind of the consumer, to the goods or services provided by the proprietor thereof.

5. Acquisition of secondary meaning is essentially a matter of trial and evidence. Evidence of extensive use is insufficient."

Based on the aforesaid analysis, the Court rejected the claim of the plaintiff and stated that both are the composite marks and the plaintiff cannot claim exclusivity solely over the "Pe" suffix as no infringement can be claimed on the basis of part of a registered trademark.

In the case of Big Tree Entertainment and Bharat Biotech International, the Court held that the issue of whether a descriptive mark had attained distinctiveness, or had acquired a secondary meaning, was a matter of evidence, which could be asserted only during trial.

Conclusion of the HC

- "PhonePe" and "BharatPe" are both composite marks.

- These marks cannot be dissected into "Phone" and "Pe" in the case of the plaintiff and "Bharat" and "Pe" in the case of the defendants.

- The plaintiff cannot claim exclusivity solely over the "Pe" suffix, as no infringement can be claimed on the basis of part of a registered trademark.

- "Pe", as used by the plaintiff, admittedly connotes the expression, and meaning, "pay".

- The plaintiff and the defendants provide service by which online payments can be made, the expression "pay" is clearly descriptive of the services provided by the plaintiff and the defendants.

- By misspelling "Pay" as "Pe", the legal position cannot change. The plaintiff would, therefore, be entitled to claim exclusivity over the suffix "Pe", as it would have been, had the suffix in its trademark been "Pay".

- The plaintiff has been in business only since 2016, using the "PhonePe" mark. The defendants have also claimed extensive use of their "BharatPe" mark. This, too, inhibits the Court from arriving at any prima facie conclusion that the "Pe" suffix had acquired secondary meaning, invariably associated with the plaintiff.

The HC held that no case for grant of interim injunction against the defendant, therefore, exists and it dismissed the application of the plaintiff.

The Court directed the defendants to maintain accounts of the amounts earned as a result of the use of the impugned "BharatPe" mark and to file six-monthly audited statements, before the Court.

KERALA HIGH COURT

ICAI DECISION VIOLATES CA'S 'RIGHT TO PRACTICE' GUARANTEED UNDER ARTICLE 19(1)(G) OF THE CONSTITUTION

Justice N Nagaresh

The Kerala High Court (HC) on 26 April 2021, in the case titled Joshi John (Petitioner) v. ICAI and Ors. (Respondents) ruled against the Institute of Chartered Accountants of India (ICAI) and held that the professional body not allowing Chartered Accountants (CAs) to register a new firm without settling a dispute with the earlier partnership firm violates the constitutional right to practice a profession.

The single-judge of HC Justice N Nagaresh passed the aforesaid judgment after considering a petition filed by Joshi John. The HC noted, "The Chartered Accountants Act does not empower the Council to adjudicate inter se dispute between members of the Institute or disputes between partner-members of a Firm, unless those disputes fall within the ambit of Chapter V of the Act, 1949."

It added that "Though the decision of the Council to evolve a mechanism of Alternate Dispute Resolution (ADR) to resolve inter se disputes between their members/Firms is laudable, availability of such ADR mechanism cannot be a reason not to record the current status of a Chartered Accountant in a Firm, in the registers maintained under Regulation 190."

The petitioner stated that he was a working partner of a three-member partnership at will and that the other two members were not taking an active role in running the partnership.

He further mentioned in the petition that a dispute arose with the other partners, the petitioner filed an application to ICAI online to dissolve the partnership but the professional body insisted on OTP confirmation by other partners.

The petitioner further alleged that he filed another application to register a new partnership was also not allowed citing the reason that he was in charge of the other partnership. His attempt to register his firm as a sole proprietorship was also denied for the same reason.

Issue before the HC

Whether the ICAI can force a CA to continue in a partnership of CAs even after the dissolution of the Partnership Firm or retirement of the CA, by retaining such an unwilling partner in the Partnership Firm?

While dealing with the aforesaid issue, the HC noted that Section 2(b) of the Chartered Accountants Act, 1949 (Act) "Chartered Accountant" means a person who is a member of the Institute incorporated under Section 3 of the Act. A member of the Institute shall be entitled to practice as a Chartered Accountant only if he obtains a Certificate of Practice from the Council of the Institute.

It further noted that it is clear from the Scheme and provisions of the Act, 1949 that the Act is not intended to register the partnerships of Chartered Accountants or regulate inter se relations or disputes between partners.

It added that Regulation 190 is intended only to regulate the Trade name or Firm name of Chartered Accountants. Regulation 190(1) mandates approval of Firm name and Regulation 190(7) mandates communication to the Council, of changes in the particulars of a Firm. The Registration and regulation of a partnership Firm of Chartered Accountants, like any other partnerships therefore are to be governed by the Indian Partnership Act, 1932.

The Court said that "Section 43 of the Indian Partnership Act, 1932 provides that when a partnership is 'at will', the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. The firm is dissolved as from the date mentioned in the notice and if no date is so mentioned, as from the date of communication of the notice."

The Court concluded that the decision of the 1st respondent-Institute not to recognize and record the retirement of the petitioner from M/s. R. Kumar and Associates will therefore cause unnecessary and unwarranted hindrance to the professional advancement of the petitioner.

It will offend the fundamental right of the petitioner to practice a profession freely, guaranteed to him under Article 19(1)(g) of the Constitution of India. The petitioner is therefore entitled to reliefs, in this writ petition.

While allowing the writ petition, the HC directed that "The 1st respondent shall recognize the retirement of the petitioner from the Firm 'M/s. R. Kumar and Associates'. The 1st respondent shall remove the name of the petitioner from the list of partners of 'M/s. R. Kumar and Associates' maintained under Regulation 190 of the Chartered Accountants Regulations, 1988. The 1st respondent may permit the respondents 2 and 3 to re-constitute the firm, if they so desire and are eligible."

THE INCOME TAX APPELLATE TRIBUNAL (ITAT)

ITAT: SALARY RECEIVED FROM SERVICES RENDERED ABROAD AREN'T TAXABLE IN INDIA

The Income Tax Appellate Tribunal (ITAT), Hyderabad bench, on 22 April 2021, in the case titled Sri Vamsee Krishna Kundurthi (Appellant/ Assessee) v. Income Tax Officer (Respondent/ Revenue) held that if the services are rendered outside India such income would not be taxable in India under the provisions of the Income Tax Act, 1961 (IT Act).

The ITAT coram Judicial Member P Madhavi Devi held that the salary and the foreign allowance were received in India for the services rendered abroad and by virtue of the Double Taxation Avoidance Agreement (DTAA) and the IT Act, there is no bar in law for receiving the money in India.

The factual background of the case is that the assessee, an individual, and an employee of IBM India was outside the country during the relevant assessment year in connection with his foreign assignments.

The assessee received salary and foreign allowance during the relevant period and claimed for deduction in respect of the same while filing his income tax returns.

The Assessing Officer (AO) asked him to produce all the required documents since he had claimed double taxation relief under Section 90 of the IT Act and admitted NIL total income but claimed TDS of ₹8,61,345/- in his return.

The assessee failed to produce the Tax Residency Certificate of Austria for claiming the Double Taxation relief under Section 90 as it is statute U/s 90(4) of the IT Act w.e.f. from A.Y. 2013-14 and all other supporting documents.

Hence, the AO denied the tax benefit by further observing that the assessee has neither produced any bank account outside India to prove any credits received outside India nor any mode of receiving the receipts outside India.

The assessee filed an appeal before the ITAT and contended that the same issue had arisen in the case of similar employees of IBM Ltd. before the Tribunal and the Tribunal has granted relief to the assessee in support there several orders of the decisions of the Coordinate Bench of the Tribunal are placed before the Tribunal.

Reliance was also placed by the assessee on the case of ITO v. Sunil Chitranjan Muncif (2013 58 SOT 356 - ITAT, Ahmedabad), wherein it was held that there was no dispute about the fact that the assessee is an NRI and the salary income received by him in India for employment exercised in the UK has been offered by him for taxation in the UK in pursuance of Article 16 of DTAA with the UK. Hence, the salary received by the assessee was not taxable in India in pursuance of DTAA between India and the UK.

The ITAT directed the AO to allow an exemption to the assessee, and held that a similar view was taken in the case of employees of IMB India Ltd. Respectfully following the same; the appeal of the assessee is allowed.

United States

US SUPPORTS INDIA AND SA PROPOSAL FOR IP WAIVER OF COVID VACCINES

US government has supported India and South Africa's joint proposal at WTO over lifting the patent protection of COVID-19 drugs which can help the poor parts of the world get more doses. This move assumes that the inoculation drive will speed up especially in the poor countries amid pandemic.

The decision also got the support of France's Emmanuel Macron and has been getting praises from countries and health advocates. Nevertheless, the decision also saw the pharmaceutical industry not supporting it with countries such as Germany stating that this won't help to curb the outbreak anytime soon and will hurt innovation.

This is a global health crisis, and the extraordinary circumstances of the COVID-19 pandemic call for extraordinary measures," the United States Trade Representative (USTR) said. USTR in its statement said that it strongly believes in the IP protection but for the service of ending this pandemic, USTR said it supports the waiver of those protections for COVID-19 vaccines and that it will "actively participate in text-based negotiations. "Those negotiations to affect the IP waiver would take time given the consensus-based nature of the institution and the complexity of the issues involved", said USTR in the statement.

This proposal was floated jointly by India and South Africa last year seeking waiver of the IP rights for prevention, containment, or treatment of COVID-19 which was supported by more than 100 countries with EU, Japan, US, Australia continue opposing it. Such a proposal sought the removal of trade barriers for better accessibility of vaccines and medical products.

Such a decision will be taken by the members of WTO having the complex trade rules among nations. The decision needs to be taken unanimously, and if successful, the developers will need to share the know-how of the vaccine for manufacturing. Such type of unanimous decision has never been taken before except the temporary waiver that was passed at WTO for importing cheap generic drugs for HIV, tuberculosis, and malaria.

"A waiver is the simple but the wrong answer to what is a complex problem," said the International Federation of Pharmaceutical Manufacturers and Associations. "Waiving patents of COVID-19 vaccines will not increase production nor provide practical solutions needed to battle this global health crisis."

Italy

RECORD LABELS SUE VIMEO OVER FAILURE TO PREVENT UNLICENSED MUSIC TO STREAM ON ITS PLATFORM

Record Labels have sued Vimeo in the latest legal case alleging that Vimeo has failed to prevent unlicensed music from appearing on its platform. This case tests the obligation of safe harbor dwelling website and platform in case of streaming contents which led to copyright infringement.

Vimeo is a video streaming service focusing on B2B operations providing a platform to various artists to put their videos. This case was led by music rights holders coordinated by global labels body the IFPI, Italian national body Fimi, and anti-piracy organization FPM.

France Moore, CEO of IFPI claimed, "Vimeo has fallen short of its obligation as an online content sharing service to take effective steps to prevent unlicensed music from being made available on its site. Significant amounts of unlicensed music are being uploaded and reuploaded to its service. Record labels invest heavily in discovering, nurturing, and promoting artists. The making available of unlicensed sound recordings harms their ability to secure a return on their investment which is crucial to their ability to invest in new artists".

The case was filed at the time when Vimeo recently raised $300m funding to be valued at $5bn. Vimeo also revealed through its publication of financial results with revenue of $89.4m in the first quarter of 2021. Such action might not be good news for Vimeo.

Vimeo has been previously sued by the record industry over its takedown system which was instigated by the EMI record company prior to its acquisition by Universal which was fought in the US court. Either in the US or Europe, the obligation towards the safe harbor dwelling platforms has been interpreted more strictly.

Vimeo does have a system through which the copyright owner can request to put down those videos that infringe their copyright. But whether those systems are rigorous enough that it could ensure the safe harbor protection for Vimeo is something which the case will delve upon.

United States

REYNEN COURT REVAMPS ITS CLOUD-BASED LEGALTECH PLATFORM

Reynen Court, a California-based legaltech company, has unveiled a new version of its app store platform that allows law firms and corporate in-house legal departments easy access and manage third-party software applications without putting pressure on their own IT infrastructure.

The company, which is backed by several law firms including Clifford Chance, Latham & Watkins and Orrick, said the new platform makes it easier for firms and legal departments to source, test and adopt cloud-based legal technology.

Reynen Court's new full-service platform adds to its existing self-managed platform, where users provide their own infrastructure to host the platform and manage all third-party applications in-house.

"For law firms and law departments that seek to access a portfolio of modern cloud-based solutions without having to trust their confidential data to a large and growing number of disparate vendors, our full-service model will give them a powerful alternative to the self-managed platform," Venky Srinivasan, chief evangelist at Reynen Court, said.

According to Bill Koch, chief knowledge officer at Womble Bond Dickinson in the US, they see no end to the onslaught of new technologies. "Reynen Court will allow us to cut through the noise so that we may rapidly adopt technologies that improve our efficiency and facilitate purposeful interactions with our clients," Bill Koch was quoted as saying.

Womble Bond Dickinson is among the law firms that have signed up to Reynen Court's new full-service platform.

Reynen Court, which was founded in February 2018, had raised $7.4 million last year to expand and consolidate. While it raised $3 million in January 2000, it secured $4.5 million in October to accelerate its growth. At the time of the October fundraising, the platform's 'solutions store' provided access to around 200 third-party legaltech applications. The number of its clients has since increased.

Europe

HATSTONE HEADS TO DUBLIN TO ESTABLISH ITS EU BASE

Multinational law firm Hatstone is all set to establish its base in Dublin as its EU base in the Irish Republic through a deal with the partners of Tully Rinckey (Ireland).

Tully Rinckey's Irish partners, led by Grainne Loughnane, with her colleagues, Setanta Landers and Julie O'Sullivan, their associates and staff, are joining Hatstone. The agreement ends their association with the Tully Rinckey international network of law firms. Grainne as the Managing Partner will head Hatstone's Dublin office.

Dublin has become the most popular destination for UK law firms and financial services businesses for relocating to the Irish Republic in the wake of Brexit.

Grainne said that the need for a post-Brexit base in the EU and the Investment Limited Partnerships (Amendment) Act, 2020, designed to make the Republic more attractive to private funds, lured the Hatstone to Dublin.

"As a result of our strong relationship and shared values, Hatstone is a natural fit for us," she added.

Hatstone partner Bella Ward explained that the firm's clients had been asking it to establish a base in Dublin as they sought to invest in the Irish Republic or through Dublin they wanted a presence in the EU.

The firm's newly-joined Irish partners have experience in advising investors, companies and financial institutions. They have a particular focus on property, including inward investment in social housing.

Hatstone, which has offices in the British Virgin Islands, London, Jersey, Panama and South Africa, specializes in finance, and corporate and commercial law.

"We're seeing a lot of interest in this sector from investors seeking to diversify away from more mature markets for these assets in the UK and Europe," Grainne said, adding that although this was a new area for the firm, the recent law reforms and policy changes have left it well supported.

United States

APPLE GETS BREATHER IN PATENT INFRINGEMENT CASE

US District Court Judge Rodney Gilstrap has tossed the $506 million damages awarded to Optis in the case last year and orders fresh trial.

The US District Court has tossed aside the $506 million damages awarded to Optis Wireless by a Texas court in a patent infringement case last year.

Judge Rodney Gilstrap said the jury should have been allowed to consider whether the royalty demand was consistent with a requirement that standard-essential patents be licensed on "fair, reasonable and non-discriminatory," (FRAND) terms.

Federal Judge Rodney Gilstrap ruled that Apple should be allowed to argue whether the royalty demands were fair.

Apple had lost a lawsuit over LTE patents filed by Optis Wireless last summer, resulting in damages of $506 million.

The lawsuit centered around some Optis Wireless patents relating to the use of LTE cellular technology in the iPhone, Apple Watch, and iPad.

Optis had claimed that Apple infringed on its LTE patents and also refused to sign a licensing agreement. Among other points, Apple said looking inside its hardware proved that it did not infringe the said patents. In the end, the jury voted that Apple had failed to prove that the Optis claims were invalid.

Apple had taken a stand that such lawsuits by companies who accumulate patents simply to harass the industry only serve to stifle innovation and harm consumers.

While Apple got the breather it had asked for and has now won a new trial, it is not yet completely out of the woods since Judge Gilstrap did not throw out the liability finding. Only Apple can expect a fair trial and argue its case afresh.

CAM OPENS NEW OFFICE IN GUJARAT GIFT CITY

Cyril Amarchand Mangaldas (CAM) is all set to start a new office in Gujarat International Finance Tec-City (GIFT City). The office has been approved by International Financial Services Centre Authority (IFSC) in Gandhinagar, Gujarat.

CAM aims to assist companies in the GIFT City in navigating through legal and regulatory framework.

The office in the GIFT City will be led by the Managing Partner, Cyril Shroff along with L. Viswanathan, Partner and Chair – Finance, Projects & Insolvency, and Partner & Head of Ahmedabad Practice, Paridhi Adani.

With this, CAM will have six offices in India. In February this year, CAM opened a Representative Office in Singapore.

On the GIFT City office opening, Mr. Cyril Shroff, Managing Partner, Cyril Amarchand Mangaldas said, "We are seeing great potential for the companies setting up their offices at the GIFT City. We are quite excited to be part of this big change. Given our experience in Financial and IT/ITes sectors, we will be able to assist companies in setting up their operations in the GIFT City and cater to their future legal and regulatory requirements."

In a Press Release, Mr. L. Viswanathan, Partner & Chair – Finance, Projects & Insolvency, Cyril Amarchand Mangaldas said, "I am very excited

on the opening of our office in the GIFT City. With ease of doing business and tax incentives offered for companies, it opens up a new marketplace for financial services with global ambition and scale."

Ms. Paridhi Adani, Partner & Head of Ahmedabad Practice added, "We are delighted with our new office in the GIFT City. The decision to have our presence in the GIFT City was a logical step in our growth strategy."

Gujarat International Finance Tec-City (GIFT City) is a business district near Gandhinagar in Gujarat. It is India's first operational greenfield smart city and international financial services centre, promoted by the Government of Gujarat as a greenfield project.

CANADIAN LAW FIRM BLG ACQUIRES AUM LAW

Borden Ladner Gervais LLP (BLG) – a Canadian Law firm has acquired AUM Law Professional Corporation (AUM Law), a Canadian law firm that offers legal and regulatory compliance advise to the asset management industry.

According to a Press Release by BLG, the transaction combines BLG's deep expertise and long-standing counsel in the investment management industry with AUM Law's fixed-fee regulatory compliance offerings, providing clients with an efficient, innovative approach to help them manage a wide array of legal and regulatory compliance obligations.

In the Press Release, John Murphy, National Managing Partner and CEO, BLG said, "Our clients rely on us to stay ahead of change and help them navigate the complex business landscape. This acquisition, which is the first of note in our sector in several years, is evidence of our commitment to embrace innovation to transform the practice of law and bring new services to our clients as quickly as possible.

BLG's investment in AUM Law will allow the firm to expand and automate its regulatory compliance services to clients across Canada as part of the BLG Beyond portfolio of alternative legal services.

With over 60 years of experience through lawyers located in all offices across Canada, BLG's Investment Management Group holds the number one place in Chambers Canada's legal rankings and is the largest practice group focusing exclusively on the investment management industry in Canada.

AUM Law was established in 2009 to coincide with the introduction and roll-out by the Canadian Securities Administrators of the new cross-Canada registration regime. AUM Law has developed a systematic, predictable approach to regulatory compliance and general counsel requirements, as well as one-off fixed fee services and modules.

In the Press Release, Kevin Cohen, President, AUM Law was quoted as saying, "Since inception, we have developed strong client relationships while developing our model to proactively support our clients with managing risk and compliance in a rapidly changing environment.

This is an opportunity to expand our platform across Canada and bring our alternative legal services model to new clients as part of BLG, attract the finest talent to our team, and leverage BLG's investment in technology to further enhance the client experience. It's an exciting moment for our firm, our people and our clients."

SEASPINE HOLDINGS CORPORATION PUBLIC OFFERING WORTH US$101 MILLION ACTED ON BY DLA PIPER

DLA Piper represented SeaSpine Holdings Corporation (SeaSpine) in its recent public offering of 5,175,000 shares of its common stock at a price of $19.50 per share, including the exercise of the underwriters' option to purchase 675,000 shares of common stock (less underwriting discounts and commissions).

SeaSpine is a global medical technology company focused on the design, development and commercialization of surgical solutions for the treatment of patients suffering from spinal disorders. SeaSpine has a comprehensive portfolio of orthobiologics and spinal implants solutions to meet the varying combinations of products that neurosurgeons and orthopedic spine surgeons need to perform fusion procedures on the lumbar, thoracic and cervical spine.

The team from DLA Piper was led by Partner – Michael Kagnoff and also comprised of Patrick O'Malley (Partner) and Zamzama Azizi (associate). Michael Kagnoff stated in a Press Release, "We were thrilled to assist SeaSpine with this public offering, which demonstrated the strength of our life sciences capital markets capabilities and ability to facilitate complex transactions and bring value to our clients."

JSA ADVISE BOOK RUNNING LEAD MANAGERS IN THE QIP OF DILIP BUILDCON LIMITED

J. Sagar Associates (JSA) advised Axis Capital Limited and IIFL Securities Limited (collectively, the BRLMs) in relation to the qualified institutions placement (QIP) of Dilip Buildcon Limited (Dilip Buildcon).

Dilip Buildcon had filed a placement document on April 26, 2021, for issue of 9,445,203 equity shares to qualified institutional buyers aggregating to ₹5,100.41 million.

This QIP was a transaction amidst, the rapidly increasing COVID-19 cases in India and the volatile stock market.

Dilip Buildcon is a large infrastructure development company with capabilities in roads, special bridges, tunnels, mining excavation, mining development and operations, dams, canals, metro rail viaduct, airports, railways and industrial, commercial and residential buildings, with a presence in 19 states in India. As of

December 31, 2020, Dilip Buildcon had completed the construction of 130 projects across 15 states in India, out of which 122 were road projects with an aggregate length of approximately 16,895.71 Lane kms.

JSA team comprised Lead Partner - Arka Mookerjee, Partners - Siddhartha Desai and Pracheta Bhattacharya, Senior Associate - Krupa Brahmbhatt and Associate – Aniran Ghoshal.

TIGER GLOBAL ACQUISITION OF EQUITY STAKE IN COINSWITCH KUBER ACTED ON BY AZB & PARTNERS

Coinswitch Kuber – an Indian crypto platform operated by Chain Labs Pte. Ltd. has raised $25 million (approx. ₹ 1.86 billion) in a Series B equity funding round from Internet Fund VI Pte Ltd., a fund managed by Tiger Global Management (Tiger Global).

Coinswitch was founded by Ashish Singhal, Govind Soni and Vimal Sagar Tiwari as a global aggregator of cryptocurrency exchanges. CoinSwitch Kuber was launched in June 2020 – an India exclusive crypto platform aimed at simplifying crypto investments for Indian retail investors.

Tiger Global Management, LLC is an American investment firm. It mainly focuses on internet, software, consumer, and financial technology industries. This is Tiger Global's first investment in an Indian cryptocurrency company.

AZB & Partners advised the Tiger Global in the funding round. The team comprised of Partners – Ashwath Rau and Srinath Dasari.

WARBURG PINCUS ACQUIRES MAJORITY STAKE IN PARKSONS PACKAGING UNDER THE GUIDANCE OF AZB & PARTNERS

Green Fin Investments B.V. – an affiliate of Warburg Pincus LLC (Warburg Pincus) has acquired significant majority stake in Parksons Packaging Limited (Parksons Packaging).

As part of the transaction, existing private equity investors, Kedaara Capital AIF 1 and Olza Holdings Limited and IIFL, have fully exited their investment in Parksons and the Kejriwal family ("Founder Family") has sold a partial stake. Ramesh Kejriwal, Siddharth Kejriwal and Chaitanya Kejriwal will continue to retain their current positions of Chairman, Managing Director and Joint Managing Director, respectively, and will drive the business going forward.

Parksons was founded in 1996 and is India's largest independent folding carton manufacturer with a highly diversified product portfolio. Parksons serves over 300 customers across several industries including FMCG, Pharmaceuticals, Retail and Electricals in domestic as well as international markets.

Warburg Pincus LLC is a leading global growth investor. The firm has more than $60 billion in private equity assets under management. The firm's active

portfolio of more than 200 companies is highly diversified by stage, sector, and geography. Warburg Pincus is an experienced partner to management teams seeking to build durable companies with sustainable value. Founded in 1966, Warburg Pincus has raised 19 private equity funds, which have invested more than $90 billion in over 930 companies in more than 40 countries.

AZB & Partners advised Warburg Pincus in the transaction. The team involved consisted of Partners – Anil Kasturi, Akhilesh Rai, Niladri Maulik and Anisha Shridhar and Senior Associates – Sugandha Bhatia and Toshit Shandilya.

CARLES ESTEVA MOSSO FROM EUROPEAN COMMISSION TO JOIN LATHAM & WATKINS AS PARTNER IN THE ANTITRUST & COMPETITION PRACTICE

Latham & Watkins has announced that Carles Esteva Mosso – who has worked with the European Commission's Directorate General for Competition (DG COMP) for 25 years in a variety of positions – will join the Brussels office as a Partner in the Antitrust & Competition Practice. He will join Latham & Watkins in June.

At the European Commission's DG COMP, Esteva Mosso has served as the Deputy Director-General for Mergers between 2014-2019 and Deputy Director-General for State Aid between 2019-2021. He has also held a number of other leadership posts relating to merger enforcement and competition policy.

Esteva Mosso in his illustrious career with the European Commission has overseen a variety of high profile antitrust, merger control, State aid, cartel and enforcement matters. He is one of the leading figures in the global antitrust community, and has been actively involved in some of Europe's most significant merger control and State aid matters, policy decisions, and legislative proposals over the past two decades.

Mosso has worked in co-operation with senior government representatives of the EU Member States on matters of national importance and with prominent enforcement agencies across the world, including the UK Competition and Markets Authority, the Spanish CNMC, the French Autorité de Concurrence, the German Bundeskartellamt, the Antitrust Division of the US Department of Justice, the US Federal Trade Commission, and the Chinese SAMR, among others.

With the addition of EstevaMosso, Latham & Watkins has added yet another feather to its cap as the high profile practitioner brings with him significant enforcement agency experience adding to the firm's market-leading global Antitrust & Competition Practice. His addition follows the recent arrival of Ian Conner – former Director of the Bureau of Competition at the US Federal Trade Commission (FTC) who joined the firm in March 2021.

EstevaMosso graduated in both Law and Economics at the Universidad de Barcelona and in Political Science at the UniversitatAutonoma de Barcelona, before completing a Masters Degree in EU Law at the Institutd'ÉtudesEuropéennes of the UniversitéLibre in Brussels. After joining the Barcelona Bar, he worked in private practice for several years before joining the European Commission in 1994.

He has held a number of prominent positions at the Commission over the years, including as a Member of cabinet of former Commissioner for Competition Policy Mario Monti; Head of Unit for Merger Policy, Mergers in Telecoms and IT, and Private Enforcement; Director for Competition Policy and Strategy; and Deputy Director-General in charge of Mergers. Most recently, he served under the leadership of Executive Vice President and Competition Commissioner Margrethe Vestager as Deputy Director-General for State Aid.

FORMER FAA CHIEF COUNSEL ARJUN GARG JOINS HOGAN LOVELLS AS PARTNER IN WASHINGTON D.C.

Former Chief Counsel and Acting Deputy Administrator of the Federal Aviation Administration (FAA), Arjun Garg has joined the Hogan Lovells in the firm's Transportation Regulatory Practice as a Partner in Washington D.C.

The firm's Transportation Regulatory practice work is involved in advising leading transportation companies and government agencies to solve the industry's most complex regulatory, transactional and business issues. The team combines top-tier aviation, automotive, railroad, mobility, logistics and supply chain transportation regulatory practices in each of the world's major markets.

Arjun Garg has also served as the Chief Counsel of the Federal Transit Administration and as a U.S. Department of Justice trial attorney in the Federal Programs Branch of the Civil Division.

Arjun helps clients across all facets of aviation navigate regulatory and policy issues affecting their business and solve their most complex problems.

At the FAA, Arjun led the agency's legal strategy on the grounding, review, and safe return to service of the 737 MAX, and steered the agency through related congressional oversight, investigations, litigation, whistleblower complaints, and policy reforms.

Arjun is an established leader in the aviation

industry whose clients benefit from his versatility. With experience as a regulator, litigator, and counselor, Arjun combines technical skill as a lawyer with the strategic perspective of an executive and the relationships of a senior government official. Drawing on this background, he helps clients across all facets of aviation navigate regulatory and policy issues affecting their business and solve their most complex problems.

Arjun has been practicing civil litigation for a decade and has expertise in administrative law, class action, and commercial matters as a trial attorney at the U.S. Department of Justice, as an associate at an international law firm, and a law clerk to the Hon. Thomas F. Hogan of the U.S. District Court for the District of Columbia.

KUNAL MEHRA QUITS DUA ASSOCIATES TO JOIN L&L PARTNERS AS A PARTNER

Dua Associates Partner Kunal Mehra has quit the firm to join L&L Partners in New Delhi as a Partner.

At Dua Associates, Kunal was an M&A and Competition Partner. He has over 15 years of experience as a seasoned M&A lawyer including 5 years of rich experience as a competition/antitrust lawyer with an extensive experience in the areas of mergers and de-mergers including cross border mergers, acquisitions, private equity transactions, general corporate advisory, drafting and negotiating transaction documents including share purchase agreements, shareholders agreements, joint venture agreements, business transfer agreements, etc.

Kunal has also advised clients on foreign direct investment structures and entry level strategies as well as several legal and regulatory issues.

Kunal actively advises on competition related matters including merger control filings with the Competition Commission of India (CCI), abuse of dominance cases, cartel investigations and also undertakes competition compliance programs for leading corporates.

He acted as the Indian antitrust counsel to The Dow Chemical Company in relation to its USD 130 billion combination with DuPont. The deal was awarded the Matter of the Year globally at the prestigious Global Competition Review Awards 2018. Further, in an abuse of dominance matter against South Asia LPG Co. Pvt. Ltd. (SALPG), Kunal succeeded in securing the highest percentage fine imposed by the CCI in any abuse of dominance matter.

Kunal is an avid writer and has published several articles in leading corporate law journals and business newspapers.

Previously Kunal has worked with AZB & Partners and Amarchand & Mangaldas & Suresh A. Shroff & Co (now Shardul Amarchand Mangaldas) including a secondment to Apollo Global Management in New York.

Kunal holds a Master of Laws in International Business Laws from Queen Mary, University of London where he secured a Merit Class including a Distinction in his dissertation "Analysis of the Power of the Competition Regulators to Unscramble the Eggs." He holds a Bachelor of Laws and a Bachelor of Socio-Legal Sciences from ILS Law College, Pune.

He is also the recipient of Legal Era 40 Under 40 Rising Star Award.

DANAHER'S DR. VIVEK MITTAL JOINS DR. REDDY'S LABORATORIES AS GLOBAL GENERAL COUNSEL

Dr. Vivek Mittal has joined Dr. Reddy's Laboratories as their Global General Counsel from Danaher Corporation where he was working as their Regional Counsel - METAI Region (Diagnostics Platform).

He has more than 21 years of experience working in-house in the legal departments of various companies across sectors such as diagnostics, pharmaceuticals, retail, NBFC and manufacturing.

In his last assignment at Danaher, Dr. Vivek Mittal was responsible for providing "leadership, guidance, direction and assistance in connection with various legal, regulatory, compliance and business matters" for Danaher's diagnostics business.

Before joining Danaher Corporation in September 2017, he was associated with Lupin Limited heading their legal function which has operations globally and managed across 20 geographical locations. He spearheaded the company's legal affairs and related process framework process globally. His activities included M&A, strategic alliances, in-licensing and partnerships, contracts, litigation, risk mitigation and

intellectual property rights management. He is also credited with having successfully reorganized and bolstered the legal services group by setting up and centralizing legal affairs for the company.

Dr. Vivek holds a Doctorate in Philosophy (Ph.D. 2011), is a law graduate (LL.B.) and post graduation in commerce (M. Com). He is also a member of the Institute of Company Secretaries of India (ICSI).

He has been listed under Elite BW Legal World Top 100 General Counsel of India 2020 by BW Legal Group.

ANUBHAV KAPOOR JOINS FORD INDIA AS ITS DIRECTOR OF LEGAL AFFAIRS

Anubhav Kapoor – the erstwhile Group Vice President – Legal and Group Company Secretary of Cummins India has joined Ford India Private Limited as its Director of Legal Affairs and is based out of Pune. As Chief of Legal, Anubhav is responsible for legal, regulatory compliance and corporate governance practices and policies for the entities of Ford in India.

As the Chief of Legal, at Cummins in India, Anubhav was responsible for legal, IP, regulatory compliance and corporate governance practices and policies for all the entities and JV of Cummins in India. Before that, he was working with Microland Limited as its General Counsel and Company Secreatry.

Anubhav has also helped large corporates like Tata Technologies, Domino's Pizza India, Polaris to name a few devise their IP creation and monetization strategies. He has also handled contracts and litigations involving complex IP issues. He has also been involved with IP issues during M&A, spin-out, and joint venture deals during his long career.

Anubhav has 27 years of experience as in-house counsel which spans across various industries including IT, automotive, aerospace, pharmaceuticals, food, banking and insurance software's and engineering. Anubhav has handled multifarious areas such as M&A, arbitration & litigation management, structuring large business contracts, IPR, global compliances to list a few. Also, being a corporate secretary, he has also dealt with high visibility boards and handled complex matters including those related to corporate governance, insider trading, private & public offerings.

Anubhav was listed in Intellectual Asset Management (IAM) Strategy 300 (http://www.iam-media.com/Strategy300/) among the World's Leading IP Strategist and awarded as Star General Counsel 2017 of the year by Legal Era.

He was listed as "World Leading General Counsel" in 2018 by Legal Era and as "Top 100 General Counsel in India" by Business World in 2021 and more recently by Business World Magazine BW Legal Group as part

of Elite BW Legal World Top 100 General Counsel of India in Feb 2021.

Anubhav is passionate about innovation. He has helped large corporates like Tata Technologies, Cummins, Domino's Pizza India, Polaris to name a few; devise their IP creation and monetization strategies. Anubhav has also handled contracts and litigations involving complex IP issues. He has also been involved with IP issues during M&A, spin-out and joint venture deals during his long career. He has spoken on several national and international forums on topics related to management of IP. He is also a serving member of CII Committee(s) on Legal Services and Regulatory Affairs.

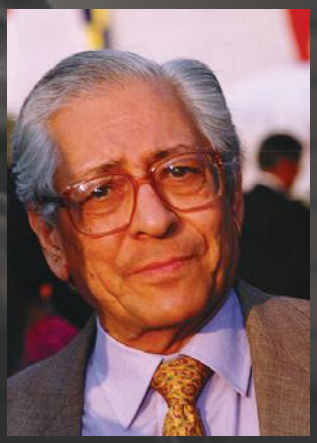
During his tenure at Tata Technologies, Anubhav has also served as Head of Global Corporate Sustainability at where he worked extensively in programs related to education of girls in engineering, promotion of diversity at workplaces and encouraging innovation and design thinking among engineers. His much successful "Ready Engineer" program targeted towards promotion of Science, Technology, Engineering and Maths (STEM) has been awarded National Education Excellence Award 2017 by ASSOCHAM for significant contribution done by the industry in education sector in India.

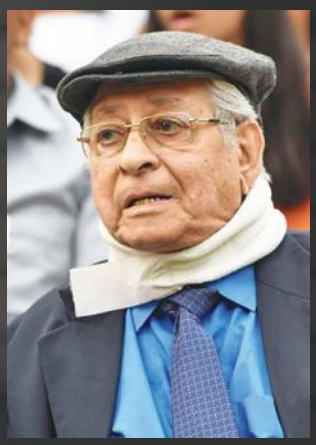
Anubhav was also bestowed with an honorary Paul Harris Fellowship by Rotary International because of his contributions to e-learning and digital education in India and invited to speak at the Rotary International Convention at Canada in 2018.

SOLI SORABJEE's WALK INTO ETERNITY

LEGEND

LEGACY





Legends never die, their legacies remain there forever. Soli Sorabjee's contributions and legacies will be gratefully remembered forever

India might be facing an acute shortage of judges, but there is no dearth of lawyers in the country. There never was. Thousands of youngsters join the Bar each year with dreams in their eyes.

India was still a young Republic. The meticulously crafted Constitution of India had been adopted just three years back when a 23-year-old young law graduate from Bombay's Government Law College, who responded to the call of Soli Jamshed Sorabjee or just Soli, joined the legal profession in 1953, with dreams in his eyes. Dreams of scores of youngsters joining the legal profession wither away, but here was Soli, determined to live his dream. He was here to stay and leave an indelible imprint as one of the doyens of the Indian legal system.

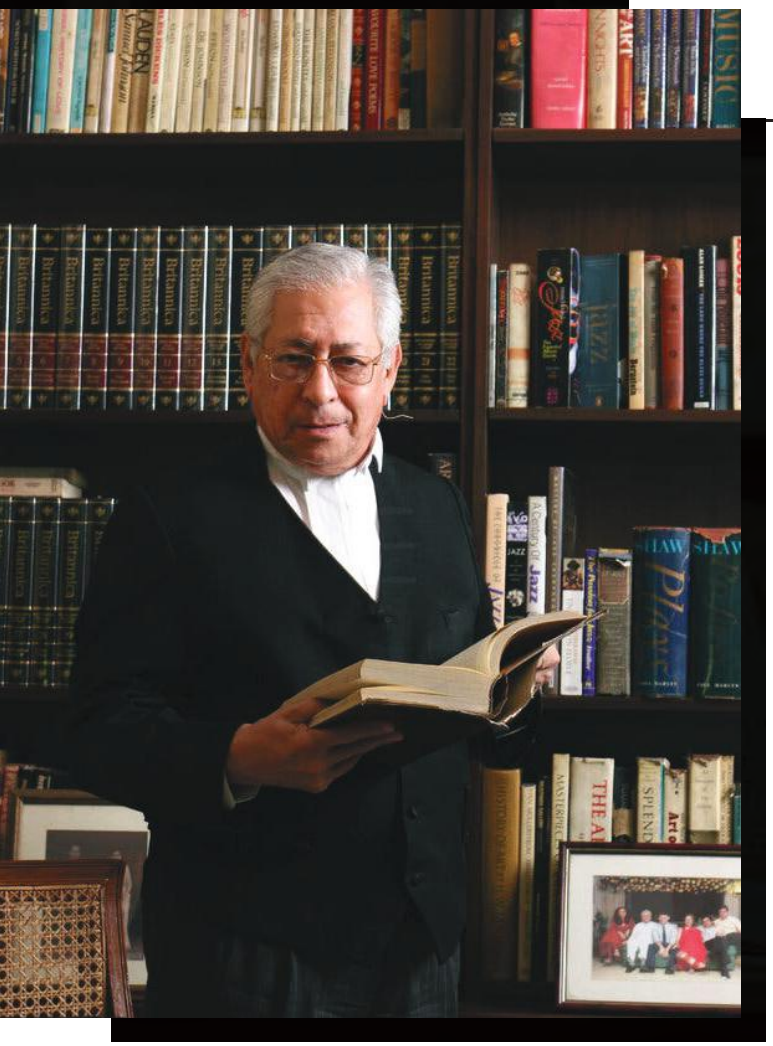
People are born, they live and then they die -- it's a cycle that one must go through, but only those become immortals who know the art of living like Soli. He lived the life as few did, and when he breathed his last on 30 April 2021, the entire nation plunged into gloom for, not many leave a defining legacy during his 68 years career, making him a living legend.

Born into a relatively wealthy Bombay-based Parsi family on 9 March 1930, Soli's businessman father Jehangir Sorabjee died when Soli was merely 20. His mother Khorshed, a homemaker took care of him and ensured that her son does whatever he wanted to do. He graduated from St. Xavier's College and then enrolled for a law degree.

He started his law practice at the Bombay High Court as a junior in the chambers of Sir Jamshedji Kanga, an eminent lawyer of his time. It was here that he met another junior of Sir Kanga, Nani Palkhivala. It was the beginning of a lifelong friendship and an association of two brilliant legal brains that was to define the Indian judicial system with their interpretations of the Constitutional laws and forceful arguments.

Soli is believed to have imbibed a liking for brief and crisp pre-hearing briefings from Palkhivala. Later in life, when he was on his own, this remained a signature style of Soli Sorabjee. Many of his juniors would burn the midnight oil to study the case and brief him. They would find him uninterested in great details. He would just grasp the basics and argue in the court in his own style. He had an uncanny ability to read the mood of the judges and would change the track of his argument based on his judgment of judges' moods.

"He (Palkhivala) was senior to me in age and the profession but I would often joke that I was senior to him in terms of marriage," Soli had said in one of his television interviews.



Sorabjee's contributions are limitless

He was still young and definitely not raw when in 1971 the Supreme Court designated him as a Senior Lawyer, a prefix that every Indian lawyer dies for.

Sorabjee's first brush with fame came when he joined hands with Palkhivala in the famous Keshvananda Bharati vs State of Kerala case in which the verdict was pronounced in 1973. It is seen as a defining moment of the Indian judiciary as in which the Supreme Court laid down the doctrine of the inviolability of the basic structure of the Constitution.

The Apex Court decided that it had the right to test laws passed by Parliament upon the touchstone of whether they altered the basic structure of the Constitution. It is widely accepted that the Top Court's verdict saved democracy in India by preserving the concept of the supremacy of the Constitution and putting to rest the British concept of parliamentary supremacy.

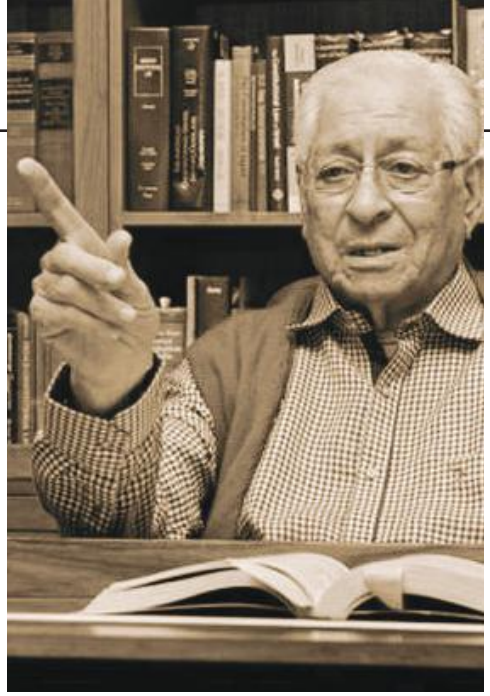
Sorabjee and Palkhivala went down in the annals of the Indian judicial system for their significant contribution to the interpretation of constitutional law. By now Sorabjee was recognized as the champion of free speech and civil liberties.

"Soli steadfastly believed in Voltaire's famous dictum that he would disagree violently with anyone but defend to death that person's right to disagree with him," his junior and neighbor at South Delhi's famous lawyers' colony Neeti Bagh, Dr Abhishek Manu Singhvi, said in a tribute.

Sorabjee's fearless character became visible during the dark years of Emergency as he took up cases of those detained under the draconian MISA (Maintenance of Internal Security Act) as he was opposed to the suspension of civil liberties and fundamental rights during that phase.

Sorabjee never bothered about his fees and would work pro bono if he felt something wrong was being done that was against the spirit of the Indian Constitution. Expectedly, he ended up rubbing the powers that be, the then Indian premier Indira Gandhi, the wrong way. Many including his family feared that he would be arrested and jailed, but that never happened.

Sorabjee's contributions are limitless, be it the court in Maneka Gandhi passport case in 1979 holding that a person's fundamental right entails that he or she cannot be denied a passport without ascribing a reason, or Ahmedabad based-St. Xavier's College's petition against the State of Gujarat in which the court upheld the rights of minority bodies to set up and run their educational institutions.



The Apex Court's verdict in the 1989 in the SR Bommai case was to become a guiding light for Indian democracy as he fought the then Karnataka chief minister Bommai's dismissal by the state Governor Buta Singh at the behest of the Rajiv Gandhi government at the Centre.

Sorabjee's forceful arguments changed the course of Article 356 under which there is provision for the central government to dismiss an elected government in a state. In its judgment that was passed in 1994, the Supreme Court stated that the power of the President to dismiss a state government is not absolute, and is open to judicial review. It led to some kind of curtailment on whimsical dismissals of governments in states ruled by opposition parties. In the later years, courts ordered the reinstatement of many dismissed governments and the verdict laid down the rule that the majority of a government cannot be tested only on the floor of the Assembly and not in the Governor's house.

Sorabjee served as the Attorney General of India twice -- between 9 December 1989 and 2 December 1990 and then again between 7 April 1998 and 4 June 2004. While serving as the Attorney General, he was nominated as a recipient of Padma Vibhushan, the second-highest civilian award of the country.

Soli Sorabjee's love for music and literature is legendary. He was known as the moving spirit behind jazz music in India. He was introduced to jazz accidentally when he was all of 18. He had asked for a record of the HungarianDances by Brahms and the salesman of Bombay's famous Rhythm House store gave him something else instead.

"I found it nothing like Brahms at all," he said in an interview with a TV channel. It sounded so different and fell in love with it when he played the record the third time on his gramophone. It happened to be Tiger Rag by the Benny Goodman Trio. Sorabjee later became the architect of the annual Jazz Yatra, a week-long music festival. The lawns of New Delhi's India International Centre (IIC), of which he was a life trustee, is bound to miss him and the sounds of jazz.

His birthday parties at the IIC was something everyone looked forward to. He had grand plans of celebrating his 90th birthday at IIC in 2020 which he had to cancel due to the outbreak of COVID-19. And COVID-19 it was that took away his life. He ended up contracting the deadly virus, was hospitalized at a famous South Delhi private hospital, but could never recover from it. He breathed his last on 30 April 2020.

Sorabjee is survived by his wife Zena, daughter Zia Mody – famous lawyer, and sons Jehangir, Hormazd and Jamshed and seven grandchildren. He lived in Delhi along with his wife and Hormazd.

As the saying goes, legends never die, their legacies remain there forever. Soli Sorabjee's contributions and legacies will be gratefully remembered forever.

SPECIAL EDITION

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PRIVATE EQUITY INVESTMENTS IN A PRIVATE COMPANY REGISTERED IN THAILAND

JIRAPONG SRIWAT
Partner

NISHIMURA & ASAHI

Private equity investments aim at reviving or expanding a potential business, and selling it when the time is right. To limit its liabilities and avoid being subject to Thailand's foreign investment restrictions, private equity firms typically form a Special Purpose Vehicle ("SPV") in Thailand to be its investment entity in a Thai portfolio company.

To achieve the business outcome, the SPV may acquire majority shares in the portfolio company as well as the board seat and the right to nominate key managing members in the portfolio company, so as to gain control over the management of the portfolio company. Once the expected rate of investment return reaches or exceeds a defined minimum amount, the SPV will divest its investment by exiting the portfolio company in order to realize its returns, either through reselling the shares to another firm or proceeding with the listing process in order to cash-out via an IPO. The investment horizon of the private equity is typically three to seven years.

In this article, we will discuss the investment horizon of the private equity investment in a private company registered in Thailand from the perspective of Thai law and Thai market practice, from setting up the investment structure to exiting the investment.

SETTING-UP ENTITIES IN THE INVESTMENT STRUCTURE

Most of the private equity transactions in Thai market are cross-border whereby the funds, which are formed outside Thailand, invest in portfolio companies in Thailand through the SPV, which are incorporated under Thai laws. This investment structure is driven mainly by Thailand's foreign investment restrictions, especially those prescribed in the Foreign Business Act of Thailand (the "FBA"), which restrict foreigners from engaging in certain business activities such as domestic transportation, retail, wholesale and provision of certain services, and the Land Code, which prohibits a foreigner from owning land in Thailand.

To avoid these foreign investment restrictions under the FBA and the Land Code, the SPVs are typically set up as a "Thai" company and offshore investments shall not result in the shareholding of the portfolio companies exceeding the

following requirement: (i) at least 51% of their total shares being held by Thai shareholders; and (ii) the number of their foreign shareholders being not more than half of their total number of shareholders.

FINANCING

The SPV typically provides financing to the portfolio company in the form of equity, debt or hybrid of debt and equity. Concerns from the Thai law perspective are discussed below:

2.1 *Equity Financing*

To determine the percentage of shares in the portfolio company that the SPV should acquire and/or subscribe for, private equity firm should take into account not only the foreign shareholding restrictions as discussed above, but also the shareholding threshold that will enable it to have an appropriate control over the management of the portfolio company.

In general, ordinary matters proposed to the shareholders' meeting could be resolved by a simple majority vote of the shareholders. However, for significant matters, the Civil and Commercial Code of Thailand (the "CCC") requires a special resolution of the shareholders' meeting which shall be passed by at least 75% of the total voting rights of the shareholders attending the meeting and having the right to vote. For example, a resolution for an amendment to the company's memorandum or articles of association, and a capital increase or decrease.

In light of this, in order for the SPV to have near-absolute control over the portfolio company, the SPV should hold at least 75% of the total shares in the portfolio company so as to prevent the minority shareholders from having a statutory veto right over the matters requiring ordinary and special resolutions. On the other hand, in the case where the aim is to be a minority shareholder, the SPV should, among others, hold more than 25% of the total shares in the portfolio company (e.g. 25% plus 1 share) so as to prevent the majority shareholders from having an absolute control over the matters requiring special resolution which are important to protect their investment (e.g. increase of capital).

> ***In this article, we will discuss the investment horizon of the private equity investment in a private company registered in Thailand from the perspective of Thai law and Thai market practice, from setting up the investment structure to exiting the investment.***

2.2 *Debt Financing*

The private equity firm needs to be mindful of the formality requirement of a loan agreement. That is, a loan of more than Baht 2,000 needs to be made in writing and signed by the borrower; otherwise, it will not be enforceable by action. In addition, a lender which is not a financial institution shall be prohibited from imposing a loan interest of exceeding 15% per annum; otherwise, the loan interest will be void and the lender will be subject to an imprisonment not exceeding 2 years and/or a fine not exceeding Baht 200,000.

It is typical for the loan or credit facilities agreement to stipulate that repayment of debt is mandatory once the portfolio company earns profits, and early redemption is triggered by the event of default.

2.3 *Hybrid Financing*

For hybrid financing, the underlying agreement typically provides for a term that debt is exchangeable into equity. As such, the legal requirements for the debt financing as

discussed in Paragraph 2.2 will apply to the hybrid financing as well.

In this regard, it is worth noting that it is not legally possible for a private company in Thailand to issue a convertible bond, as it cannot have authorized but unissued shares. In order to achieve the same economic result, a private company may opt to employ different legal forms and issue a synthetic convertible bond to the private equity firm.

PARTICIPATION IN THE MANAGEMENT OF THE PORTFOLIO COMPANY

In the case where private equity firm wishes to increase the portfolio company's operation efficiencies and thereby earnings and financial status, it may need to acquire as many board seats in the portfolio company as possible. In addition, the private equity firm or the SPV may also strive to be appointed to the steering committee, and nominate the key managing members, such as CFO or COO of the portfolio company.

EXIT FROM THE PORTFOLIO COMPANY

Exiting is an essential step of private equity investment. It requires determination of the exit strategies and identification of timing for divestment. The most common exit strategies are trade sales and IPO.

4.1.1 Trade Sale

Private equity firm's ability to sell its stake in a portfolio company largely depends on the share transfer restriction under the portfolio company's articles of association as well as any existing shareholders' agreement which may provide for the right of first refusal, drag-along and tag-along provisions, among others.

4.1.2 IPO

Exiting from the portfolio company by taking it public through an IPO may generate the highest returns for the private equity investors and firm, depending on stock market condition. However, major disadvantages of exiting via an IPO are the high transaction costs as well as the lengthy and time-consuming process. In addition, given the lock-up period under the Stock Exchange of Thailand's listing rules, the private equity firm may not be able to make a clean exit right after the IPO.

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ACQUISITION FINANCING AND INDIA'S CURIOUS CASE

In M&A transactions, financing an acquisition is a key consideration for acquirers. Acquisition finance is the raising of debt capital in order to acquire all or some of the shares or assets of a target company. Acquisition financing through bank debt is common in jurisdictions outside India. However, in India, debt-financing acquisitions of capital instruments are restricted, resulting in a significant impact on how M&A transactions are funded in India.

Debt sourced from both domestic banks and foreign lenders is restricted from being used for acquiring capital instruments in India under the Reserve Bank of India's (RBI's) regulations for domestic banks and the External Commercial Borrowings (ECB) Regulations for foreign lenders, with very limited exceptions, including disinvestments and the infrastructure sector. We understand the reasoning to be the illiquidity of capital instruments and their potentially speculative nature.

Furthermore, even where borrowing for acquiring capital instruments is permissible, through borrowings from the non-banking sector or by raising debt instruments like bonds and debentures, it is difficult to secure this borrowing via the target's assets, as is typical in other jurisdictions. We should, however, note and clarify at the outset that lending for the acquisition of businesses and assets of the target rather than shares, and control over the target, is permissible even to banks.

India has not yet fully unlocked its potential in the M&A space due to restrictions on acquisition financing by banks.

As a result, debt financing of acquisitions of capital instruments and control over targets (likely the simplest form of acquisition) in India has entailed a structured process, without the involvement of banks. Structures include the issuance of non-convertible debentures (NCDs) by the Indian acquirer, which can be issued to Foreign Portfolio Investors, Indian financial institutions and debt funds, including mutual funds. Special purpose vehicles can raise debt abroad and invest through the FDI route, though this becomes equity or hybrid equity in the Indian acquirer.

Acquisitions are also commonly funded by non-banking financial companies (NBFCs). Overseas bonds have also been issued to fund acquisitions. However,

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the formal banking sector and foreign lenders remain restricted from financing the acquisition of shares.

Interestingly, and as noted above, similar restrictions do not exist on banks financing acquisitions conducted through business transfers or asset transfers, which, in many situations, lead to outcomes and risks largely similar to acquiring capital instruments.

Restrictions on debt financing of acquisitions by banks are absent in developed jurisdictions. We understand there are no equivalent restrictions in the US, the UK and Singapore. In fact, bank financing of acquisitions is quite prevalent in these jurisdictions. Furthermore, target companies are permitted to secure borrowings at their own level to fund an acquisition of their shares.

In these jurisdictions, we understand that 'whitewash' procedures are often necessary to enable this, entailing board or shareholders' resolutions stating that the target company will not face solvency issues for a stipulated period after the acquisition while securing the acquisition. This is to ensure that the target company is not financially drained just to finance its acquisition.

Similar to these jurisdictions, Indian private companies (which are usually closely held corporations) can provide collateral or guarantees in respect of loans raised by acquirers, provided there is no pre-existing common interest of directors.

However, under the Companies Act, 2013, public companies (i.e. companies whose share capital and control is widely dispersed or can be widely dispersed) cannot provide 'financial assistance' towards the purchase of their own shares. 'Financial assistance' here is understood quite widely, including assistance in the form of loans, guarantees and the provision of security.

There is no possibility of whitewash procedures, effectively rendering unviable several legitimate transactions that do not affect the financial state or capitalization of the target. This concern is amplified in practice for two reasons – first, the securing of debts using the target's assets is all the more necessary in cases of acquisitions of large public companies of high value; and second, the definition of a 'public company' in India includes its subsidiaries that are private companies. Consequently, several private companies in India are also prohibited from offering collateral or guarantees, being subsidiaries of public companies.

> It is increasingly apparent that the Indian government's restrictions are not in line with global practices. As a nation attempting to posture itself as a viable investment destination, it is necessary for India to re-examine these restrictions.

Owing to these restrictions, India has not fully unlocked its potential in the M&A space. We must also look at the regulatory regime in China, as a closer comparison. In M&A transactions in China, we understand that domestic banks (including branches of foreign banks) are the predominant source of debt finance. We understand that under Chinese law, while debt raised from foreign lenders has end-use restrictions similar to India, debt-financing by domestic banks, including branches of foreign banks, is permitted in a regulated manner.

Accordingly, for the purchase of equity shares, we understand that companies in China can raise up to 60 per cent of the total purchase consideration through debt finance. Further, we understand that banks are required to stipulate maximum ceilings for loans to a single entity, to borrower groups, and specific industry sectors.

Thus, it is increasingly apparent that the Indian Government's restrictions are not in line with global practices. As a nation attempting to posture itself as a viable investment destination, it is necessary for India to re-examine these restrictions.

Accordingly, we believe that debt financing of acquisitions of capital instruments must be permitted in India, via both domestic banks and foreign lenders. Simultaneously, one needs to be mindful of India's sensitive foreign exchange considerations. For debt raised under the ECB route, minimum tenures can be stipulated, which allays the RBI's concerns of maintaining foreign exchange balances and avoiding the excess pressures of quick redemption.

Finally, following the position in more developed jurisdictions, the government needs to implement guidelines that allow target public companies to guarantee or collateralize loans taken for the purposes of acquisitions, provided appropriate whitewashing resolutions are rendered and the interests of the target are not prejudiced.

We believe these dispensations will permit the closer alignment of M&A in India with long-standing global practices and benefit India as an investment destination, while also providing a fillip to M&A activity within the domestic Indian market.

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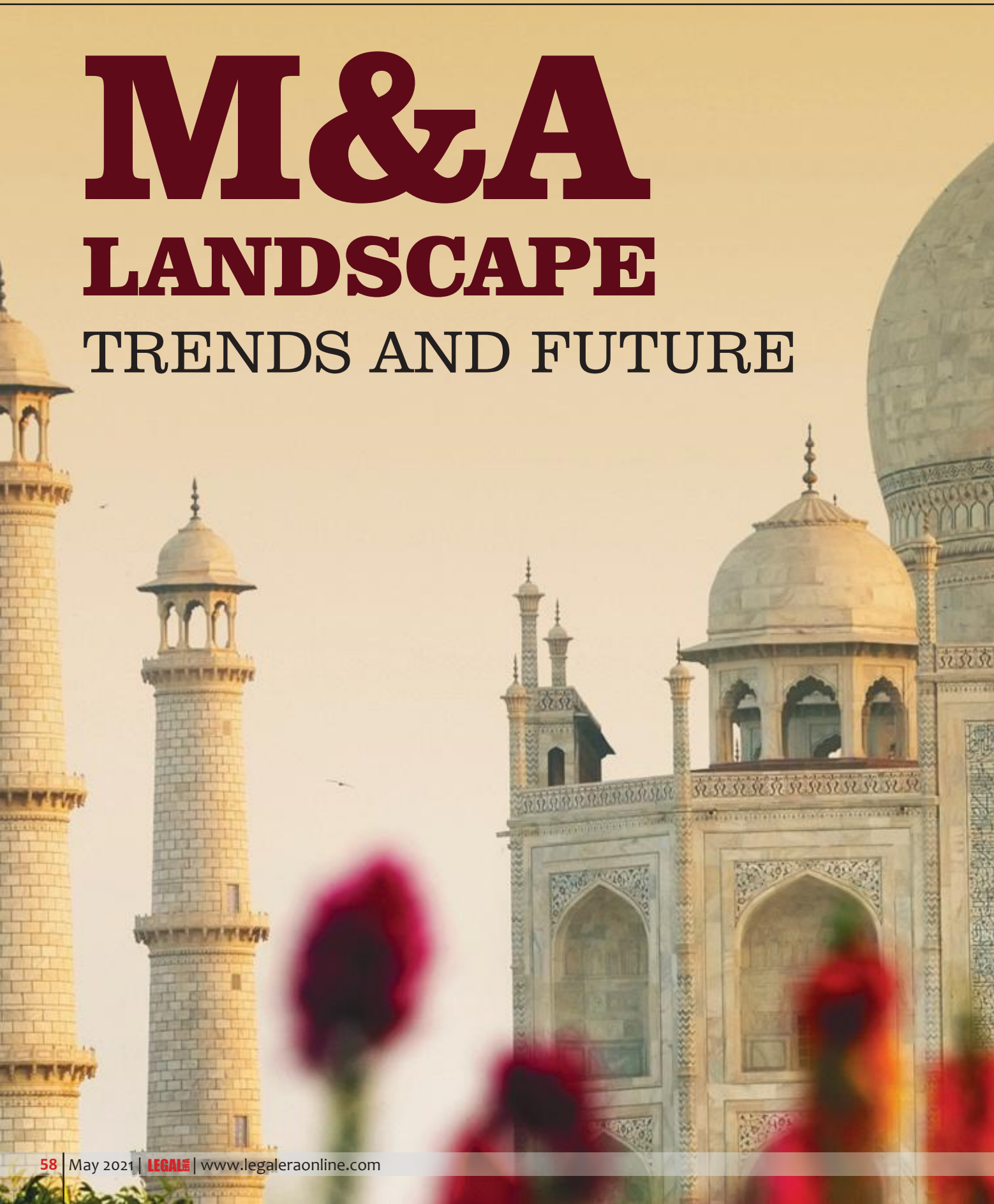
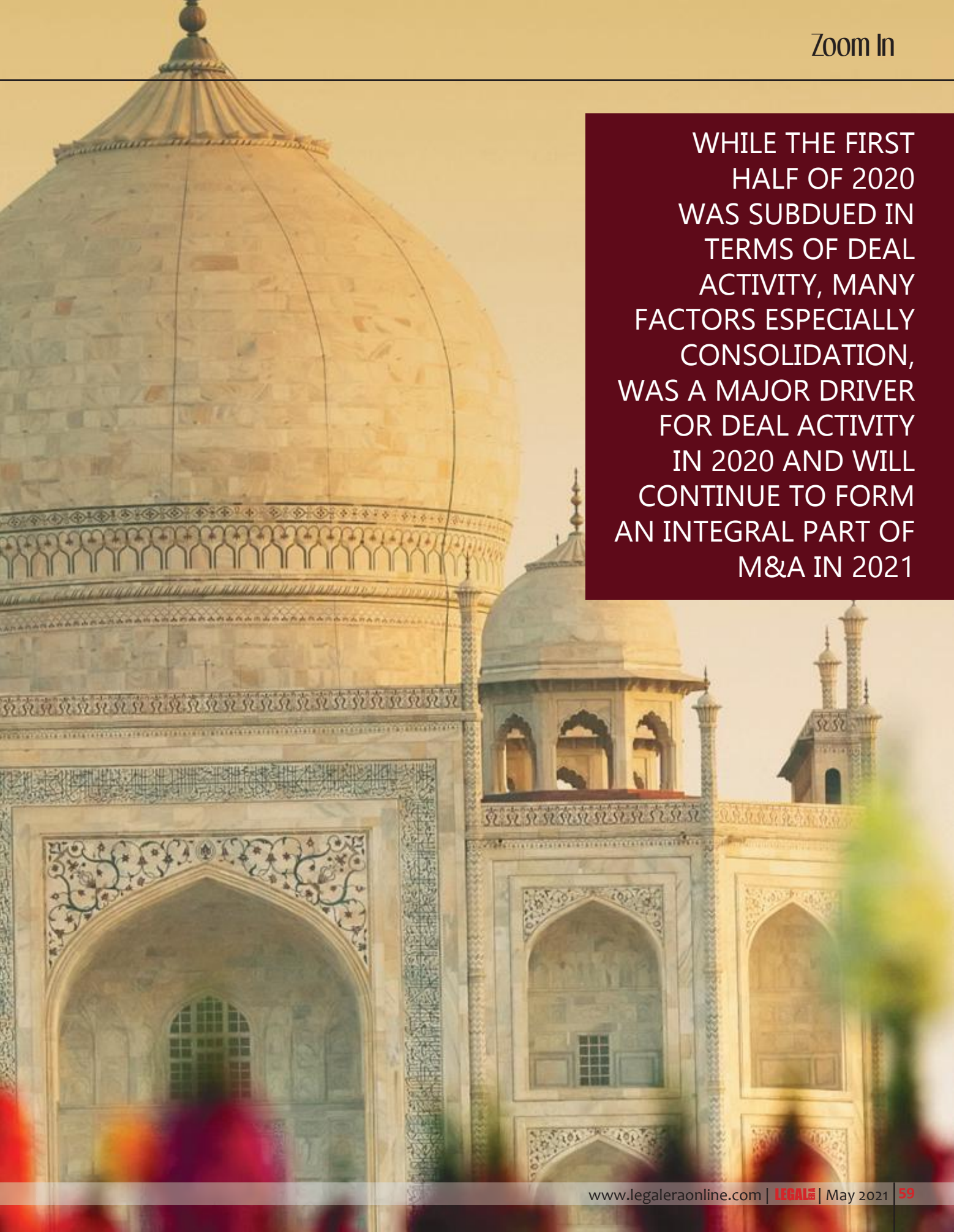
He has worked on marquee transactions across various sectors, representing investors, entrepreneurs, acquirers and sellers and advised companies on operational matters in areas of regulatory complexity and on a number of strategy-oriented matters, such as confidential board and shareholder level disputes, white-collar crimes, pre-litigation strategy and other matters.

Arjun is also regular in conducting various knowledge sessions, speaking engagements and training sessions in the fields of private equity and venture capital and on corporate law for various clients and organizations.

M&A LANDSCAPE

TRENDS AND FUTURE





WHILE THE FIRST HALF OF 2020 WAS SUBDUED IN TERMS OF DEAL ACTIVITY, MANY FACTORS ESPECIALLY CONSOLIDATION, WAS A MAJOR DRIVER FOR DEAL ACTIVITY IN 2020 AND WILL CONTINUE TO FORM AN INTEGRAL PART OF M&A IN 2021

RABINDRA JHUNJHUNWALA
PARTNER

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PRINCIPAL ASSOCIATE

2020 was a year of uncertainty due to the far-reaching and extended effects of the COVID-19 pandemic. The pandemic had a considerable impact on global M&A as corporations, financial institutions and funds sought to adapt and respond to changes in their respective markets. Yet, despite a halt in M&A activity early in the year, as businesses began assessing the impact of the pandemic and actioned recovery plans, there was significant resurgence in transactions during the second half of the year.

Despite concerns around macroeconomics, corporate governance, changing regulatory norms, geopolitics and global tensions, deal values in 2020 nearly retained momentum with the previous year. At an aggregate level, deal values amounted to little over USD 80 billion across around 1,268 transactions, which is a 7% increase in terms of value as compared to 2019. However, 25% of this deal value could be attributed to sizeable inbound investments in Jio platforms. Strategic deals (mergers and acquisitions) accounted for over 50% of the total deal value this year, while private equity (PE) activity kept pace with last year, recording investments worth USD 38.2 billion.

Excluding big-ticket deals in the telecom sector, the first half of 2020 witnessed a slowdown with investors putting their plans on hold and shifting focus towards cash conservation. Within the PE community, several funds adopted a more cautious approach during the initial months of the year – either to focus on their existing portfolios or with the expectation of revised valuations. Simultaneously, a number of organizations were looking to hive-off non-core assets or distressed segments in an effort to enhance or retain profitability, creating a number of M&A opportunities.

The next few years are expected to be challenging for the Indian economy. However, corporate India has previously demonstrated agility and adaptability in the face of crises. Government reforms and demographic advantage further reaffirm India's potential as a key investment destination.

We have seen significant changes in M&A across locations and sectors, as well as in the way M&A

and due diligence is now being conducted. In this article, we list out key trends that will dominate in 2021, and highlight certain considerations to be aware of.

KEY M&A TRENDS IN INDIA

Consolidations

The lockdown in India severely affected almost every sector, especially all consumer facing sectors such as retail. The retail sector struggled to stay above water, creating several opportunities for consolidation and expansion in the sector. Reliance Retail Ventures acquired the retail, wholesale, logistics and warehousing businesses of Future Group for USD 3.3 billion. The acquisition was the largest domestic deal recorded in 2020 .

A number of large mergers were also recorded in the banking sector, which was already witnessing a wave of consolidation in previous years. Aimed at improving capital efficiency and financial inclusiveness, the merger of 10 public-sector banks into 4 larger banks accounted for around a quarter of the consolidation activity in 2020. Domestic consolidation spurred a lion's share of the M&A activity in India, accounting for nearly 50% of the total deal value in 2020 .

The start-up ecosystem particularly saw a lot of consolidation, most notably in the EdTech and online grocery space. BYJU's (a decacorn and largest player in the EdTech sector) has been steadily acquiring smaller and more niche players such as: (i) WhiteHat Jr, a platform which teaches kids coding; and (ii) Doubtnut, a two-year-old education learning app in order to supplement and expand its existing bouquet of services and for access to customers from smaller cities and towns across India. The Tata Group recently announced that it would be acquiring a 68% stake in the 'essentials' online grocery delivery startup Bigbasket for an estimate amount of ₹9,500 crores. Prior to its acquisition by the Tata Group, Bigbasket itself increased its market presence by acquiring the milk delivery platform Daily Ninja. The pandemic has presented larger cash rich startups with an unprecedented opportunity to acquire their smaller rivals and consolidate their position in their respective sectors.

Given the volatility, uncertainty and complexity of the current times, we expect this trend to continue well into 2021 and 2022.

Special purpose acquisition companies (SPACs)

Despite the pandemic, SPACs have managed to raise over USD 80 billion in about 237 listings last year in the US alone. The SPACs ability to significantly reduce the amount of time it takes a company to go public (2-6 months on average) than through a traditional IPO process, which can take 12 to 18 months has piqued investors' interest across the globe.

Unfortunately, India's stringent rules on shell companies mean that no SPACs can be listed on the exchanges here. However, for Indian investors, SPACs are a window to participate in an attractive IPO on the Nasdaq; and for Indian tech startups, SPACs offer a sort of "short cut" to the big US market listing . However, recent media reports have indicated that SEBI, India's market regulator, has asked its Primary Market Advisory Committee (PMAC) to examine the feasibility of SPACs in India and submit a report on the regulations required to successfully introduce the SPAC route here.

The recently concluded USD 8 billion deal between India's ReNew Power and Nasdaq listed SPAC RMG Acquisition Corporation II, is among the largest ever listings involving an Indian company in the US via this route. If media reports are to be believed, this deal may very well be the tip of the iceberg as many unicorns in India are apparently considering going the SPAC route to list themselves.

Deals driven by geopolitical changes

On 17 April 2020, the Indian Government amended its FDI Policy under which, all investments by entities incorporated in a "country which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country", will now require prior approval of the Indian Government. The countries which share a land border with India are Afghanistan, Bangladesh, Bhutan, China (includes Hong Kong and Taiwan), Myanmar, Nepal, and Pakistan.

> Despite concerns around macroeconomics, corporate governance, changing regulatory norms, geopolitics and global tensions, deal values in 2020 nearly retained momentum with the previous year. At an aggregate level, deal values amounted to little over USD 80 billion across around 1,268 transactions, which is a 7% increase in terms of value as compared to 2019.

While the intention of the Indian government behind the introduction of the amendment was to "curb the opportunistic takeovers/acquisitions of Indian companies due to the current pandemic", the primary trigger seems to have been the rising geopolitical tensions between India and China at the Indo-China border. The introduction of the Press Note appears to be more of a retaliatory measure to put economic pressure on China to resolve the issues at the Indo-China border.

The FDI ban has had a significant impact on Chinese investments in India, especially in the burgeoning start-up ecosystem in India. Many follow on investments by existing Chinese investors have been stuck as a result of the ban and these have placed tremendous strain on cash strapped companies which are already reeling from the negative impact of the COVID pandemic. In addition to the FDI ban, the Indian government has also banned a plethora of Chinese apps from download and use in India citing national security concerns and is also working on a policy to stop Indian telecommunication players from purchasing network equipment from Chinese manufacturers such as Huawei.

While there has been no significant impact on FDI coming in from other countries, the ban has led to a peculiar situation wherein entities which have a remote and insignificant connection to China (for example: PE funds or non-Chinese companies routing investments through Hong Kong) are also getting caught in the approval web.

We only expect increasing scrutiny from the Indian government on all Chinese related matters and investments till such time the geopolitical issues between the two countries are resolved.

Distressed deals

While the introduction of the insolvency and bankruptcy code back in 2016 gave a major fillip to distressed deal making in India, the pandemic is expected to give another major boost to distressed deals and consolidation. A number of companies across sectors, including manufacturing, infrastructure, financial services and real estate, already faced significant challenges like under utilization of capacities, inventory pile up and mounting debt in the pre-COVID era. The situation has only been aggravated by the pandemic, which has caused labor disruptions, capital inadequacy and demand contraction, among several other issues. This is expected to cause a spike in the non-performing assets (NPAs), creating very lucrative opportunities for either the PE community or larger players in the sector to buy good-quality assets at attractive valuations. We expect significant interest from both domestic as well as global parties in distressed assets to drive M&A activity in 2021.

Conclusion

While the first half of 2020 was subdued in terms of deal activity, the above factors and especially consolidation, was a major driver for deal activity in 2020 and they will continue to form an integral part of M&A in 2021, possibly driving the emergence of new and larger Indian corporations in years to come. Even PE funds are upbeat about India's recovery and growth story and are anticipating a bumper year in 2021.

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MERGERS & ACQUISITIONS Landscape

LOOKING BACK TO LOOK AHEAD

The Genesis of Growth

Post the 1991 reforms, as India emerged as an attractive investment destination and as global interest in Indian companies and assets grew, there was inevitably a steady rise in M&A activity in India. The flow of such transactions in India, picked up pace towards the end of the last millennium and the beginning of the new. The sectors leading this activity were the chemicals, drugs and fertilizers sector, information technology, telecom and financial services and the services sector[1]. An era of globalization spurred by technology resulted in accelerated M&A activity in various other domains as well, and India continued to be at the center of global interest as a result of having one of the highest economic growth rates in the world, a large, young talent pool and an aspirational growing middle class.

Surging Ahead

Between 2015-2019, India saw more than 3,600 M&A deals with an aggregate value of over USD 310 billion[2]. About 70% of the growth in M&A activity in 2018 was led by distressed deals, enabled through the corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016[3] (**"IBC"**). Some of the largest deals during that period include Walmart's USD 16 billion investment in Flipkart and Rosneft-led Russian consortium's acquisition of Essar Oil for USD 13 billion.

In 2019, in spite of the global economic turbulence, the strained US-China trade relationship and geopolitical instability of the past years impacting a few quarters of M&A activity in India like in other jurisdictions, according to the United Nations Trade and Development (UNCTAD), India attracted foreign direct investment of USD 51 billion in 2019, marking a 20% increase from 2018. This can be attributed to corporate India's resilience and remaining remarkably steadfast to growth strategies. Some of the top deals of 2019 were ArcelorMittal and Japan's Nippon Steel's acquisition of Essar Steel India for USD 7.21 billion which was a successfully competed IBC acquisition and the largest deal of 2019 and RA Hospitality Holdings (Cayman) increasing its stake to 30% in Oravel Stays

[1] *Mergers & Acquisitions in India: A sectoral analysis Priya Bhalla Moti Lal Nehru College (E), University of Delhi, India, International Journal of Business and Economic Development Vol. 2 Number 2, July 2014*
[2] *"India M & A report 2019" published by Bain & Company and the Confederation of Indian Industry*
[3] *"India M & A report 2019" published by Bain & Company and the Confederation of Indian Industry*

While the pandemic has been an incredibly difficult time for all sectors, it has kick-started a reforms cycle in India...

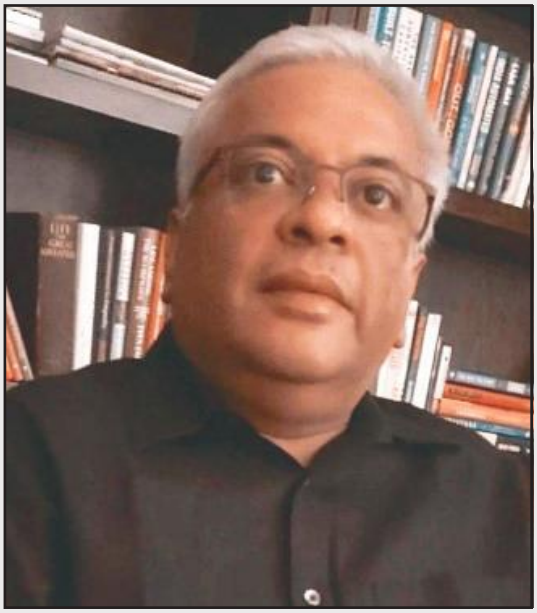
Private Limited (OYORooms.com) for USD 2 Billion. The manufacturing sector led the deal values with a 29% share. The year also recorded some high-value deals in the energy space with the sector recording 18 transactions and a 16% share in total M&A deal values. On the other hand, the information technology sector led deal volumes with an 18% share, followed by start-ups and pharma, which together accounted for 28% of total deal volumes.[4]

2020: Prolonged Pause, Recovery & Reforms

The year 2020 began with the dismal performance of the capital markets and to compound the economic woes, the world was caught in the maelstrom of COVID-19 which brought growth to a grinding halt with significant adverse impact across the global M&A market. According to Refinitiv, India Inc's M&A deals in 2020 fell to a three-year low of USD 38.1 billion in the first half of 2020, a 14.1% decline compared to the first half of 2019.[5] However, there was a quick rebound in the latter half of 2020, wherein India ranked fifth for total transactions' value in the post-global financial crisis period with deal values amounting to a little over USD 80 billion across around 1,268 transactions, which is a 7% increase in terms of value as compared to 2019.[6] It should be noted that investment by global giants such as Facebook, KKR, General Atlantic and Google in Reliance's Jio Platforms form a large part of the total deal values in 2020. This was also a year for consolidation, as domestic consolidation accounted for 50% of the total deal value in the year 2020[7].

While the IT and healthcare sectors witnessed a spurt in M&A activity, others like aviation and construction, are still in the throes of a major slowdown due to the

[4] *Grant Thornton: Annual Deal Tracker 2020*
[5] *https://www.businesstoday.in/current/corporate/ma-activity-in-india-touch-3-year-low-of-381-billion-in-h1-refinitiv/story/408592.html*
[6] *PWC: Deals in India Annual Review and outlook for 2021*
[7] *PWC: Deals in India Annual Review and outlook for 2021*



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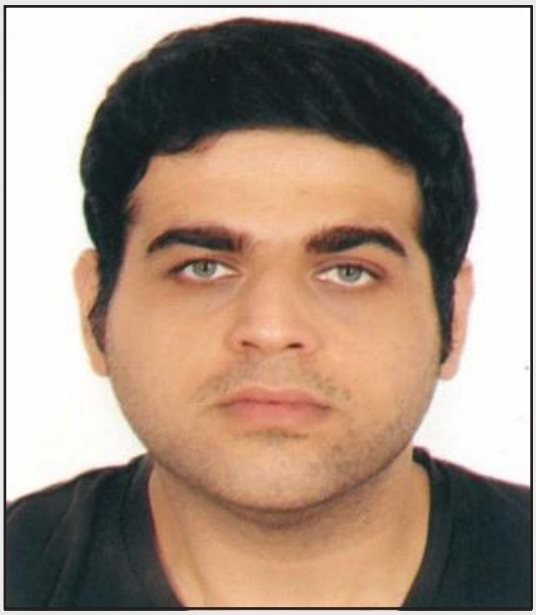

PRATEEK BEDI
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DUA ASSOCIATES
Advocates & Solicitors

COVID pandemic. However, certain industries like auto and hospitality which were struggling, are expected to see stronger growth in 2021-22 and there is cautious optimism on the deals front.

It is no secret that many business groups with varied interests and robust financials will look at rejigging their businesses at this point and therefore be on the lookout for reasonably priced deals to possibly expand and/or diversify in order to fortify or make operations more sustainable. On the other hand, there may be many enterprises with an established presence in certain verticals or geographies which could look at potentially entering into new territories and business segments. Stressed sectors/industries will have to evaluate their group structures and make an assessment of the restructuring requirements, while others may also consider consolidation to ensure business continuity. Such a consolidation could either be horizontal or vertical combination thereby unlocking potential and facilitating exit with higher returns while achieving better economies of scale.

A key trend which is likely to play out, is that private equity fund houses which are flush with liquidity will carry out in the days ahead, acquisitions of companies who may announce their inability to service their payments to financial institutions/other lenders on account of the pandemic impacting their business operations badly.

All the aforesaid will certainly lead to enhanced M&A activity even if the transactions may not commence or close immediately.

To tide over the COVID pandemic crisis, the Government has undertaken several key policy measures and reform interventions to increase investor confidence. There have been several initiatives undertaken by the Government of India like fast tracking investment clearance through an empowered group of secretaries, a proposed new public sector enterprise policy, electronics manufacturing clusters scheme, a new tariff policy in the power sector, private participation in coal sector and various reforms in the Companies Act, 2013 to promote ease of doing business. That said, the recent amendments proposed in the Finance Bill 2021 particularly the proposal to not regard goodwill as part of the intangible assets block effective April 1, 2020, consequently denying depreciation may adversely impact buyers and act as a blow to internal group restructuring and strategic M&A deals. M&A transactions already

consummated with the tax benefit on goodwill factored in, the deal IRRs considered by corporate India would undergo a significant change. Similarly, for M&A negotiations presently underway, buyers will need to factor in the impact of these changes in finalizing the acquisition price and may have to undertake valuation exercise afresh.

While undeniably the pandemic has been an incredibly difficult time for all sectors, it has kickstarted a reforms cycle in India which may boost economic activity in the near future and may after all be a silver lining.

2021 and Beyond: The Road Ahead

COVID pandemic has brought about a rethink of strategies and realignment of priorities by companies to ensure business sustainability, continuity and financial stability. Technology has played a key role in helping businesses stay afloat in these times and is expected to be key to driving M&A activity in India. The real estate sector which had seen a major downturn even prior to the COVID pandemic will likely bounce back with the Government making efforts to boost growth in this sector, given its high employment generation potential. There is also considerable interest in the ed-tech, fintech, defense, pharma and healthcare sectors as they provide innovative solutions to India's infrastructure problems in these sectors.

A key trend which is likely to play out, is that private equity fund houses which are flush with liquidity will carry out in the days ahead, acquisitions of companies who may announce their inability to service their payments to financial institutions/other lenders on account of the pandemic impacting their business operations badly.

Consolidation is expected to continue to fuel major deals in 2021 and beyond and the outlook is reassuringly bright on the back of a slew of reforms and an improved regulatory framework aimed at pump-priming the economy. The optimism on the continued momentum in M&A activity moving forward, partly stems from the Indian Prime Minister's policy of "Atmanirbhar Bharat" which translates into 'self-reliant India' aimed at making India "a bigger and more important part of the global economy". It is also led by companies being confronted with the urgency to make strategic investments to help better navigate the complexities of an uncertain world.

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MALAYSIA'S CENTRAL BANK, BANK NEGARA MALAYSIA, HAS PROJECTED THE GROWTH FOR MALAYSIA IN 2021 TO FALL BETWEEN THE RANGE OF 6.5% AND 7.5%.

M&A LANDSCAPE

TRENDS & FUTURE

THE LANDSCAPE IN MALAYSIA

YON SEE TING
Managing Partner

SANJEVE PRAKASAM
Senior Associate

CHRISTOPHER
& LEE ONG

When the World Health Organization (WHO) declared COVID-19 a pandemic in March 2020, countries rushed to close their borders and enforced lockdowns in a bid to contain and prevent the spread of COVID-19. Economic activities ground to a near halt and the world economy took a nose-dive. Malaysia was no different and commenced its "movement control order" in March 2020 which restricted all movements and economic activities save for essential activities such as purchasing daily necessities and seeking healthcare services.

Compounding this health and economic crisis was the political turbulence which arose after Tun Mahathir resigned as Prime Minister. This resulted in the collapse of the less than 2-year-old Pakatan Harapan coalition government which had come into power after toppling Prime Minister Najib, who was during this period, prosecuted and convicted of 1MDB-related corruption charges although it is still subject to appeal.

The Perikatan Nasional coalition government came into power in February 2020 amid allegations that the lockdown restrictions were introduced to prevent Parliament from sitting and voting on a no-confidence motion to remove this Muhyiddin-led coalition. Following an increase in COVID-19 daily cases, the King assented on 12 January, 2021 to the Government's request for a state of emergency which would not last beyond 1 August, 2021. This would confer emergency powers on the Prime Minister including ordering the government to take over private healthcare facilities to relieve the strain on public hospitals. It would also prevent Parliament from sitting during this period.

Many businesses and individuals struggled during this period and the government like many other governments around the world, introduced multiple economic stimulus packages in 2020, aimed at stimulating economic growth and stabilizing the economy. Despite the Malaysian government's efforts, the Malaysian economy contracted by 5.6% in the whole of 2020.

M&A Transactions in Malaysia

Merger and acquisition ("M&A") activity in Malaysia was also adversely impacted by the pandemic, falling in line with reduced M&A activity in South East Asia. Public data of announced deals in 2020

valued at more than US$5 million per deal showed the lowest deal value and deal count based on available data going as far back as 2013.

The value of takeover deals in Malaysia in 2020 was nonetheless substantially bolstered by the ongoing takeover of one of the largest palm oil plantation owners in the world, FGV Holdings ("FGV"), by the Government agency, Federal Land Development Authority ("Felda"). The takeover offer was announced on 8 December, 2020 and the transaction is valued at US$2.72 billion. This takeover is in fact to aid a debt-laden Felda as FGV had been expecting Felda to terminate their land lease agreement which would give rise to compensation of approximately RM4 billion payable to FGV.

To shore up their cash position impacted by the pandemic, companies took to divesting their non-core assets and consolidating their portfolios. Sime Darby sold off its 30% stake in Tesco Stores (Malaysia) Sdn Bhd for RM300 million resulting in its exit from a non-core hypermarket business at a reasonable valuation. This divestment constituted part of South East Asia's biggest deal in 2020, namely Thailand's Charoen Pokphand Group's acquisition of Tesco's Asian operations in Thailand and Malaysia for US$10.58 billion.

Similarly, Khazanah Nasional Berhad ("Khazanah"), one of Malaysia's sovereign wealth fund, was busy re-balancing its portfolio of investments. There were announcements in October 2020 of a proposed merger between UEM Sunrise Bhd and Eco World Development Group Bhd which would create a property giant with the second-largest land bank in Malaysia. If the merger succeeded, Khazanah's stake will be diluted in the enlarged UEM Sunrise, via UEM Group, from 66% to 43%. Like all property developers in Malaysia, both UEM Sunrise and Eco World Development had faced challenging times following the property down cycle which had started since 2014 and which worsened because of the pandemic, as affordability and tighter mortgage financing conditions have capped property sales. Both these property developer companies subsequently called off the merger talks in January 2021.

Despite this setback, Khazanah announced in February 2021, its acceptance of the Dagang NeXchange Berhad (DNeX)-led consortium's bid to acquire Khazanah's wholly-owned 200mm semiconductor wafer foundry and loss-making company, SilTerra Malaysia Sdn Bhd. Although the deal value was not disclosed, Bloomberg reported that the deal could be worth about US$150 million (RM610.5 million).

Not surprisingly, the aviation sector, which was crippled by the global travel restrictions arising from the pandemic, swirled with rumors of talks of a merger between the national carrier, Malaysia Airlines Berhad and the regional low-cost carrier AirAsia Group Berhad. These eventually dissipated and recently, the parent company of Malaysia Airlines Berhad, Malaysia Aviation Group, received formal approval from a UK court to proceed with its restructuring plan. This includes an arrangement between its leasing unit and most of its aircraft lessors, as well as a capital injection of US$891 million from Khazanah. This deal is expected to reduce Malaysia Airlines Berhad's liability of over US$3.7 billion and fund the business through the restructuring period until 2025. Thus, if M&A is not possible, a company would have to look towards restructuring instead.

AirAsia, however, managed to dispose of 32.67% of the 49% stake it held in AirAsia (India) Ltd to Tata Group for US$37.66 million.

M&A Trends in Malaysia

While Christopher & Lee Ong saw some clients deferring their M&A divestment transactions as valuations were impacted by the lower revenue numbers, our M&A teams remained busy during 2020 as many other clients especially, funds, which had ample "dry powder" and cheap money, saw opportunities amidst lower valuations. Christopher & Lee Ong worked on M&A transactions in the "hot sectors" including technology, logistics for e-commerce, healthcare, pharmaceutical, manufacturing and service sectors.

Our M&A lawyers discovered it was possible to conduct entire M&A transactions from start to end while completely working from home (WFH)! Legal due diligence has been conducted through virtual data rooms for some time now. Negotiations can be conducted in different time zones via Zoom or MS Teams platform. Signatures on share purchase agreements signed in counterparts can be affixed digitally. Even our Malaysian government's revenue

> To shore up their cash position impacted by the pandemic, companies took to divesting their non-core assets and consolidating their portfolios.

body, the Stamp Office, has an electronic platform for the submission of share transfer forms for adjudication of stamp duties payable on a share transfer and payment for stamp duties paid electronically. Filings of change in shareholding can also be lodged online with the Companies Commission of Malaysia.

Christopher & Lee Ong also worked with our regional M&A colleagues from Rajah & Tann Asia on South East Asian centric transactions. These larger transactions typically involve another rising trend, namely W&I (warranties and indemnities) insurance to cover transactions where sellers invite bids for their shares for the best price with minimal exposure to the sellers who would agree to provide only minimal warranties and indemnities. Partly due to this, the timeframe needed from the time of opening of the data room by the sellers to the signing of the share purchase agreement has also been reduced.

Future of M&As in 2021

Although Malaysia (as in many other countries) saw a resurgence of COVID-19 cases from the fourth quarter (Q4) of 2020 resulting in a re-introduction of lockdowns and a slowdown in the economic recovery, news of vaccine rollouts has improved business sentiments. Malaysia's central bank, Bank Negara Malaysia, has projected the growth for Malaysia in 2021 to fall between the range of 6.5% and 7.5%.

While Malaysia is expected to receive its supply of vaccines as are sufficient for the population to achieve herd immunity only in the first quarter (Q1) of 2022, we predict M&As to gain momentum going into the second half of 2021 as the economic recovery of China and the Western world is expected this year with their more advanced vaccine rollout plans and central banks around the world continue with their low interest rate environment, which would in turn fund more acquisitions.

These are, however, uncertain times. As we know, no one foretold what had happened in 2020.

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CONCEPT OF DATA EXCLUSIVITY AND INDIA'S GROWTH AS GENERIC DRUG MANUFACTURER

DTAB's decision to maintain the current data exclusivity equilibrium and instead concentrate on evaluating drug protection through bio-equivalence tests is a positive move

The term "data exclusivity" refers to the protection of data (information) submitted to regulatory authorities or governmental agencies from third-party access. The data, in general, provides information for obtaining marketing clearances for application materials. For instance, a clinical trial report that discloses research trials conducted on people for the assessment of medical or behavioral intervention and is submitted to the government may be in support of a drug application. The information is normally needed to demonstrate the drug's safety and efficacy.

The basis of data exclusivity can be traced back to the principles of unfair competition, which were established by the Paris Convention, which is governed by WIPO under Article 10 bis and includes effective defense against unfair competition. Furthermore, when the WTO was established, the principle of data protection was introduced through Article 39 of the TRIPS agreement, which elaborated on the protection of "undisclosed information" and "data submitted to governments or governmental agencies" as part of members' obligations to create protection.

The second condition in Article 39 of the TRIPS Agreement is data exclusivity, which refers to the confidentiality of data sent to regulators, states, or public agencies.

Currently, the Indian regulatory system allows for a four-year cycle of data exclusivity after the first approval of a "new drug" or its inclusion in the Indian Pharmacopoeia (an official book of standards for drugs produced and/or sold in India). Section 122E of the Indian Drugs and

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Cosmetics Act, 1940, grants data exclusivity for a total of four years from the date of approval for a new drug. A "new drug" is not necessarily a proprietary drug, but rather one that has never been widely used in the world. A new drug is a medication that has not been accepted or licensed in India, or a drug that has recently been licensed and authorized for marketing, or a combination of drugs that have been individually approved but sold together, or vaccines and r-DNA related drugs.

If a generic version application is submitted during this "protected time," the generic manufacturer/applicant must include new clinical evidence on the generic drug's "safety" and "efficacy". As a result, there is no patent connection in India, and filing or processing applications by regulatory authorities during the duration of a patent on drug composition is not prohibited under Indian law.

The process of bringing a new medication to market begins in a testing lab and ends with 4 phases of clinical trials to prove the drug's effectiveness and safety to domestic regulators. It can be a very expensive process. The generics Regulators are able to approve generic drug applications based on pre-submitted clinical trial data rather than needing to conduct separate clinical trials, allowing players to put rival products in the market at a fraction of the cost. As a result, the contours of data exclusivity have important policy consequences.

Around 2016, the Central Government proposed amending Rule 122E of the Drugs & Cosmetics Act, 1945 to extend the data exclusivity period from four to 10 years, but the Indian Pharmaceutical Alliance, a group of Indian generic drug manufacturers, vehemently opposed the move claiming that such an extension would severely limit the availability of low-cost, affordable generic medicines in India. Following that, there had been no further discussion on the topic.

Furthermore, while the Indian patent laws and other legal frameworks support generic drug producers, the government has only amended national laws to the extent that it is necessary to comply with multilateral or bilateral treaties. For example, India's product patent regime for drugs was only implemented in 2005 to

comply with the commitment India made when it joined the WTO/TRIPS in 1995. The TRIPS-related changes to patent laws were limited to the minimum requirements and did not include TRIPS + standards.

In conclusion, there are no provisions for patent term extensions on any grounds, and the court's infringement exceptions are construed liberally when it comes to drug patents.

Bolar provisions, for example, have been construed rather liberally by the courts from time to time to allow the selling, export and import of patented drugs within the duration of the patent if the seller, exporter and buyer agree that the purchased material will only be used for data creation. Though no clear case laws authorize "stockpiling", it appears that the courts can accept "stockpiling" because patent term extensions are prohibited. Even if a drug does not qualify for patent protection, data exclusivity is available as long as it counts as a "new drug" under Rule 122E.

A longer data exclusivity duration will necessitate longer clinical trials and higher costs for generic manufacturers to develop generic versions. As a result, generic manufacturers will find it more difficult to launch generic versions.

Data exclusivity is a different and distinct type of protection from what is offered by the Indian patent system. A patent may be awarded for an invention that is a new product or new method, requiring an innovative phase, and capable of industrial use, according to the Patent Act of 1970. Even if a new version of an existing drug is not patentable, it qualifies as a "new drug" under Section 122E of the Drugs and Cosmetics Rules of 1945. As a result, any other company requesting marketing approval for such a new medication within the four-year timeframe will be expected to include independent clinical evidence. Consequently, data exclusivity and patent rights are mutually exclusive with distinct safeguards.

For example, while a new drug's patent protection will be for 20 years, data exclusivity for clinical research data is for four years. And if a new drug is determined to be non-patentable, data exclusivity rights will be valid for the standard four years.

India's existing data exclusivity duration of four years, which is shorter than international norms and the stance of developed countries, can be credited with the growth and success of the Indian generic pharmaceutical industry, as well as the alleviation of some of the world's access to medicine issues.

Following the expiration of the four-year term, subsequent manufacturers may obtain permission from state licensing authorities (rather than the Central Drugs Standard Control Organisation [CDSCO], as was necessary during the data exclusivity period) to manufacture the formulation while relying on existing data submitted by the original manufacturer. This allows subsequent manufacturers to carry rival drugs to the market at a lower cost and quicker, which is one of the main drivers of the generics drugs industry's growth in India and a key contributor to expanding global healthcare access.

The Hatch-Waxman Act in the United States has shown that access to clinical testing data will lead to innovation among generic manufacturers, who can use the data to develop cheaper and safer drugs. The availability of many brands promote healthy market competition and avoid monopolization, which benefits the customer.

The crux of this debate is determining how long data exclusivity should last to strike a

balance between incentivizing creativity and allowing generic manufacturers to offer cheaper alternatives. To this end, India's existing data exclusivity duration of four years, which is shorter than international norms and the stance of developed countries, can be credited with the growth and success of the Indian generic pharmaceutical industry, as well as the alleviation of some of the world's access to medicine issues.

The other, more complex view of data exclusivity is based on the need to demonstrate the effectiveness and protection of generic drugs through separate and effective clinical trials, which include bioavailability and bioequivalence studies. This requirement is currently met under Indian rules, which mandate generic drug manufacturers to demonstrate bioavailability and bioequivalence of their products to existing drugs to obtain regulatory approval. However, some clauses allow certain assessments to be waived in the public interest.

The issue here is that waivers of the bioavailability and bioequivalence criteria can often negatively affect because the effectiveness and reaction of the drugs in the local community may not be fully understood. Bioequivalence trials, in any case, are normally conducted on a limited number of subjects and at a fraction of the expense of a full-fledged clinical trial.

In 2012, a Parliamentary Standing Committee report highlighted the troubling pattern of CDSCO automatically approving products without conducting bioavailability or bioequivalence tests. Following that, in 2013, the Ranjit Roy Chaudhury Report proposed that bioequivalence trials be made mandatory before market approval is given for any generic medication, except for highly soluble molecules, as is the case in the United States.

These guidelines, however, were quietly dropped because the Drugs Consultative Committee (DCC) believed that mandatory bioequivalence testing could not be made mandatory by way of a regulation that would apply uniformly because Indian generic manufacturers lacked the infrastructure to carry out the plan. The DCC agreed that bioavailability/bioequivalence tests should be needed only when there are concerns about patient safety and variable bioavailability.

Although gaining access to low-cost generic drugs remains a priority, this cannot be

accomplished at the expense of generic drug quality or protection. A shortage of resources cannot be a sufficient excuse to waive generic drug bioequivalence checks. Also, regardless of data exclusivity, there is a case to be made for rethinking the position on mandatory bioavailability/bioequivalence testing for generic drugs in the post-data exclusivity era.

The proposal to increase the exclusivity duration for clinical trial data from 4 to 10 years was discussed by the Drug Technical Advisory Board (DTAB), a committee that advises the government on all technical matters. While this proposal was not approved, the DTAB proposed that regulatory authorities ensure that adequate testing has been conducted and that the product's protection has been identified through bio-equivalence studies.

It is important to note that data exclusivity not only balances the conflicting desires of medication innovators and generic producers but also protects medicine customers. Any policy initiative in India on this front must always aim to effectively counterbalance these competing interests so that the balance does not tip too heavily in benefit of one over the other. To this end, the DTAB's decision to maintain the current data exclusivity equilibrium and instead concentrate on evaluating drug protection through bio-equivalence tests is a positive move.

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Remedy worse than the DISEASE

NCLAT's stand in the Tata-Mistry controversy was a curious mix of over-reach and under-reach

In a landmark judgment passed by the Hon'ble Supreme Court on 26 March 2021, one of the most high-profile board room battles between the Tata Sons Group (Tata Group) and Cyrus Mistry Group (Mistry Group) was decided with the Apex Court ruling in favor of the Tata Group.[1]

The said case arose out of a batch of 15 civil appeals, 14 of which were preferred by the Tata Group, assailing the order dated 18 December 2019 passed by the National Company Law Appellate Tribunal (NCLAT). The Mistry Group, too, preferred a cross-appeal, seeking more reliefs than what had been granted by the NCLAT which, inter-alia, included a direction to provide them proportionate representation on the Board of Directors of Tata Sons Limited.

The Supreme Court, while hearing the appeals, gave its findings on a host of issues thereby highlighting several facets of company law jurisprudence. The questions for consideration before the Court, inter-alia, included:

i. Whether the affairs of the Tata Group were being conducted in a manner prejudicial and oppressive to the minority shareholders.

ii. Whether the reinstatement of Cyrus Mistry as Executive Chairman of Tata Sons Limited was valid; and

iii. Whether the NCLAT could mute the powers of the Company and/or the Directors by nullifying the effect of the Articles of Association of a Company, without an expression challenge made to set aside the same.

Among various issues, one key issue which emerges on the face of the judgment and the issues so raised therein is that of the scope of power of the tribunal (NCLT/NCLAT), which has been established under and derives its powers from, specific statute(s). This article focuses on the aforementioned key issue by endeavoring to delve into the confines of adjudicatory powers of tribunals and the need to distinguish the fine line between judicial purview and commercial wisdom.

ADVENT OF TRIBUNALS

The advent of tribunalization in India can be traced back to the 42nd Amendment to the Constitution of India whereby Part XIVA was added which included Articles 323A and 323B, providing for the constitution of tribunals dealing with administrative matters and other issues, respectively. The rationale of setting up tribunals was essentially to create specialized adjudicating authorities which could effectively discharge judicial functions in a speedy and specialized manner, within the parameters that would not violate the integrity of the judicial system.[2]

For consolidating the matters pertaining to the companies, the Government constituted a high-level committee on the law relating to insolvency of companies under the Chairmanship of Justice V. Balakrishna Eradi.[3] This resulted in the creation of NCLT and NCLAT which were vested with all the powers and jurisdiction of the Company Law Board, the Board for Industrial and Financial Reconstruction, the Appellate Authority for Industrial & Financial Reconstruction and the

[1] *Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd. and Ors. (2021 SCC OnLine SC 272).*
[2] *Statement of Object and Reasons, The Constitution (42nd Amendment) Act, 1976.*
[3] *The Justice Eradi Committee On Law Relating To Insolvency Of Companies was constituted on 22-10-1999 which recommended the formation of the NCLT and NCLAT.*

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entire jurisdiction of the High Court(s) relating to Company Law matters.

Accordingly, the Companies Act was modified in 2002. Thereafter, with the promulgation of the Insolvency and Bankruptcy Code, 2016 (Code), NCLT and NCLAT were vested with the adjudicatory powers and jurisdiction for all matters under the Code.

ANALYZING THE SCOPE OF INHERENT POWER OF THE NCLT/NCLAT

The powers of NCLT and NCLAT have been provided under various provisions of the Companies Act, 2013 as well as the Code. Rule 11 of the NCLT Rules, 2016 and the NCLAT Rules, 2016 specifically provide 'inherent powers' to the tribunals to pass such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of process of the tribunal. These inherent powers pronounce equity as an integral part of these tribunals.[4]

These inherent powers, though written in letter of law, cannot be deemed to be absolute in nature, wherein, the tribunals could act dehors the mandate of the law. For example, it is a well-settled proposition that the tribunals cannot traverse the four walls of a statute that it itself is a creature of.

The approach of the NCLAT in the instant case appears to be that of acting in a manner that is not optimum to its corresponding powers and duties. While on one hand, the NCLAT went far beyond its mandate to pass an order which was not even pleaded by either of the parties, i.e., reinstatement of Cyrus Mistry as the Executive Chairman; on the other hand, it failed to adjudicate the issues which were specifically raised before it. This is a rare case of over-reach and under-reach, within the same order.

THE OVER-REACH

The declaration of appointment of Natarajan Chandrasekaran as 'Executive Chairman' as illegal, and the reinstatement of Cyrus Mistry for the 'rest of the tenure' was ultra-vires to the pleadings made before the NCLAT. This apparent oversight was corrected by the Apex Court, which observed as under:

[4] *Union of India v. R. Gandhi, (2010) 3 CTC 517*

> "157. The judgment of the NCLAT was passed on 18.12.2019, by which time, a period of nearly 7 years had passed from the date of CPM's appointment as Executive Chairman. Therefore, we fail to understand: (i) as to how NCLAT could have granted a relief not apparently sought for (though wished for); and (ii) what NCLAT meant by reinstatement "for the rest of the tenure". That the question of reinstatement will not arise after the tenure of office had run its course, is a settled position. "

The position of the 'Executive Chairman', as observed by the Apex Court is not a legal or statutory position recognized under the law. It is a designation resulting out of the creation of the company and its board of directors. For NCLAT to decide on such a matter would imply that the NCLAT took sufficient liberty, to trespass and enter into the board room and take board-like decisions. Not only did the NCLAT go to the extent of reinstating Cyrus Mistry on the Board of Tata Sons, but also on the Board of Tata Group companies. The said companies were not even parties to the proceedings, without there being any complaint against those companies under Section 241 of the Companies Act and without there being any prayer against them.

The NCLAT clearly acted in excess of its jurisdiction by rendering the aforementioned finding. Had it not been for the Supreme Court, then findings like these might have resulted in ramifications that could seriously compromise the independence of the board. This, in turn, could severely dampen and jeopardize the spirit and vision of corporate governance in the country.

THE UNDER-REACH:

Paradoxically, the NCLAT, as observed by the Supreme Court, was lackadaisical in its approach to adjudicate upon all such issues that had been categorically raised before it. The Apex Court observed that none of the findings of the NCLT, except the one relating to the removal of Cyrus Mistry was specifically and individually overturned by NCLAT.

The NCLT dealt with each and every allegation in an elaborate manner, which can be broadly categorized under the following heads:

- Transactions with Siva and Sterling Group of Companies

The NCLAT acted in excess of its jurisdiction. Had it not been for the Supreme Court, then findings like these might have resulted in ramifications that could seriously compromise the independence of the board. This, in turn, could severely dampen and jeopardize the spirit and vision of corporate governance.

- Diversion of funds by Air Asia Pvt. Ltd. through global terrorists
- Transactions with Mehli Mistry
- Nano Car project and losses suffered by Tata Motors
- Acquisition of Corus
- The oppressive nature of Articles 104B, 121, 121A and 75
- Removal of Cyrus Mistry
- Interference by Nominee Directors
- The affirmative voting rights of the Directors
- The Conversion of Tata Sons into a private company
- Wellspun Acquisition by Tata Power

The findings recorded by NCLAT, on the contrary, revolved primarily around the removal of Cyrus Mistry, the affirmative voting rights, interference by nominee Directors and the conversion of Tata Sons into a private company only. This hasty approach of the NCLAT even left the Hon'ble Apex Court curious to the extent of them recording as under:

> "45. While NCLT dealt with every one of the allegations contained in the main company petition and recorded its findings, NCLAT,

curiously, focused attention only on (i) the removal of CPM (ii) the affirmative voting rights of the Directors nominated by the 2 Trusts in the decision making process and (iii) the amended certificate of incorporation issued by the RoC, deleting the word "Public" and making it a private company once again.

47. As pointed out at the beginning of chapter 7, NCLT dealt with every one of the allegations of oppression and mismanagement and recorded reasoned findings. But NCLAT, despite being a final court of facts, did not deal with the allegations one by one nor did the NCLAT render any opinion on the correctness or otherwise of the findings recorded by NCLT. Instead, the NCLAT summarized in one paragraph, namely paragraph 183, its conclusion on some of the allegations, without any kind of reasoning."

It is a well-settled principle that the findings of the NCLT, not specifically modified or set aside by NCLAT should be taken to have reached finality unless the parties aggrieved by such non-interference by NCLAT would approach the Supreme Court. The fact that the Mistry Group further approached the Supreme Court against certain findings/non-findings of the NCLAT can be construed as a failure on part of the NCLAT for not having taken due cognizance of such reliefs prayed by the parties.

This is effectively an act of under-reach wherein the NCLAT, being the final court of fact, failed to adjudicate upon the issues specifically prayed therein by either of the parties. The tribunal failing to exercise the jurisdiction so vested upon it under the law is as much an error in law as it is in exceeding the jurisdiction vested in it under the same law.

CONCLUSION

The Supreme Court summarized the position of the NCLAT in the instant case to be that of eliminating the discipline in pleadings and procedure, instead of eliminating delays.

As suggested by the Apex Court, the purpose of an order, as passed by the company law tribunal, is to bring to an end the matters complained of, by providing a solution. Such a complaint may either be that of "oppressive conduct" or "unfairly prejudicial conduct" or mere "prejudicial conduct".

The Supreme Court rightfully observed that the object cannot be to provide a remedy worse than the disease. In other words, the aim of the courts must be to put an end to the matters complained of and not to put an end to the company itself, forsaking the interests of other stakeholders. The courts must always keep in mind the purpose for which remedies are made available under various provisions, before granting relief or issuing directions. It is on the touchstone of the objective behind these provisions that the correctness of the reliefs granted by the tribunal should be tested.

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PARENT COMPANY LIABILITY

The UK Supreme Court has reinforced the jurisdictional gateway through which claimants may bring claims in negligence against the parent company of an overseas subsidiary. In the case of Okpabi & Others v Royal Dutch Shell Plc & Another [2021] UKSC 3, the Supreme Court considered the appellant's claims as to whether they could establish jurisdiction under one or more of the four jurisdictional gateways set out by it in the previous case of Lungowe v Vedanta Resources [2019] UKSC 20 ("Vedanta").

BACKGROUND

The claim comprised of two sets High Court proceedings, encompassing some 40,000 individuals from the Ogale Kingdom and 2,235 individuals from the Bille Kingdom, both communities in Rivers State in Nigeria. The claimants alleged widespread environmental damage, including serious water and ground contamination, caused by spills from oil pipelines and infrastructure operated near their communities. They alleged that due to the failure

SUPREME COURT CLARIFIES APPROACH TO JURISDICTIONAL CHALLENGES

Is there a tangible benefit, in terms of brand, reputation and attracting talent and investment, to be derived from embracing Environmental, Social and Governance metrics as key differentiators for your business, as opposed to being a compliance issue?

to remediate the contamination, the natural water sources in their communities could not safely be used for drinking, fishing, agricultural, washing or recreational purposes.

The claimants alleged that the oil spills were caused by the negligence of the pipeline operator, The Shell Petroleum Development Company of Nigeria Ltd ("SPDC"), a Nigerian registered company, as part of a joint venture. SPDC is a subsidiary of Royal Dutch Shell Plc ("RDS"), a UK domiciled company and the parent company of the multinational Shell group of companies.

The claimants obtained permission to serve the claim out of the jurisdiction on SPDC as a necessary or proper party to the claims against RDS, the "anchor" defendant. RDS applied to contest jurisdiction and set aside the order for service.

At first instance, the judge hearing the applications decided that it was not reasonably arguable that there was any duty of care on RDS towards the claimants. The orders for service out of the jurisdiction were set aside and the claims against RDS struck out. SPDC appealed.

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As to whether a parent company owes a duty of care under English law, the Supreme Court said that there was nothing special about the parent-subsidiary relationship - the issue had to be decided under general principles of tort law.

The Court of Appeal considered that the judge had erred in certain respects in his approach to considering the evidence, but having reconsidered the evidence itself, nonetheless dismissed the claimants' appeal by a 2:1 majority (Lord Justice Sales dissenting). The majority held that there was no arguable case that RDS owed the claimants a common law duty of care to protect them against foreseeable harm caused by the operations of SPDC.

THE SUPREME COURT

Appealing again, the claimants contended that the Court of Appeal had materially erred in law in its analysis of:

(1) the principles of parent company liability in its consideration of the factors and circumstances which may give rise to a duty of care; and/or
(2) the procedure for determining what constitutes an arguable case at an interlocutory stage, and by its approach to both contested factual issues and to the relevance and significance of likely future disclosure; and/or
(3) the overall analytical framework for determining whether a duty of care exists in cases of this type and in its reliance on the threefold test in Caparo Industries plc v Dickman [1990] 2 AC 605.

HOW SHOULD A JURISDICTIONAL CHALLENGE BE DECIDED?

The Supreme Court focused on the second limb, as it appeared to it clear that the Court of Appeal had erred in the procedure it had followed for deciding whether there was a triable issue. The Court of Appeal had been drawn into conducting a mini-trial and that had led it to adopt an inappropriate approach to contested factual issues and to the (voluminous) documentary evidence, leading to it making determinations that that were not appropriate on an interlocutory application. The claimants' appeal was therefore allowed.

In reaching this decision, the Supreme Court emphasized the importance of proportionality when determining jurisdictional issues. It reaffirmed the guidance in the case of Three Rivers District Council v Bank of England No 3 (2003) 2 AC 1, as to the scope of the inquiry where the court was assessing, at the interlocutory stage, whether the claim had no real prospect of succeeding at trial. For those purposes, the court should

assume the facts are as set out in the particulars of claim unless exceptionally they are shown to be 'demonstrably untrue or unsupportable'.

The claimants had re-focused their legal argument before the Supreme Court in line with its prior decision in Vedanta. They alleged that RDS owed a duty of care to them through Vedanta routes (1) to (4), namely by:

(1) RDS taking over the management or joint management of the relevant activity of SPDC;
(2) RDS providing defective advise and/or promulgating defective group-wide safety/ environmental policies, implemented as of course by SPDC;
(3) RDS promulgating group-wide safety/ environmental policies and taking active steps to ensure their implementation by SPDC, and/or
(4) RDS holding out that it exercises a particular degree of supervision and control of SPDC.

WHEN MIGHT A DUTY OF CARE ARISE?

As to whether a parent company owes a duty of care under English law, the Supreme Court said that there was nothing special about the parent-subsidiary relationship - the issue had to be decided under general principles of tort law. The question was, to what extent had the parent taken over, controlled, supervised, advised or intervened in, the management of the relevant subsidiary? In that regard, the case set out in the pleadings established that there was a triable issue on Vedanta grounds 1 and 3, and accordingly the appeal was allowed.

COMMENT

The judgment clarifies that challenges to jurisdiction should not involve a document heavy analysis of the evidence put before it by the court, but rather an assessment as to whether the facts set out in the particulars of claim show a real prospect of success. Those facts should be accepted at face value, unless demonstrably false or unsupportable.

The Vedanta and Okpabi decisions, while procedural in nature, do pose a conundrum for multinational corporations. Do they continue to take an active role in supervising compliance with standards applicable to the subsidiary/group or

do they leave it to the subsidiaries to address this and risk prosecution under the 'failure to prevent' offenses. Taking into account these decisions and the forthcoming European Human Rights, Environment and Governance due diligence legislation due to be enacted in 2021, some factors to consider going forward will be:

1. ***Business Functions*** - Structuring group activities under vertical business or function lines accountable to the parent, might erode the boundaries between separate legal entities, making it easier to bring claims against the parent;
2. ***ESG Due Diligence*** - Identifying and assessing actual or potential adverse human rights and environmental impacts that a business may cause or contribute to (including legacy issues) through its operations, relationships, products or services, taking appropriate preventative and remedial action e.g. timely replacement of infrastructure, tracking the effectiveness of such measures and communicating this to all stakeholders, will be a prerequisite for selling into the European Union;
3. ***Compliance*** - Promoting and enforcing group-wide environmental, health and safety, and regulatory compliance policies may be necessary, but could open up the parent to claims alongside the subsidiary, thus making it vital that risk assessments are followed up by effective risk mitigation policies and action on the ground;

4. ***Ear to the Ground*** - Instilling a robust 'speak up' system and an effective and responsive complaints process to ensure warning signs are not missed;
5. ***Crisis Management*** - Ensuring the management of subsidiaries have the ability to respond swiftly to crises with an effective crisis management plan;
6. ***Delegation*** - Training and empowering legal and compliance functions to address these issues in their jurisdictions, to avoid creating a puppet structure;
7. ***Embrace Change*** – Is there a tangible benefit, in terms of brand, reputation and attracting talent and investment, to be derived from embracing Environmental, Social and Governance metrics as key differentiators for your business, as opposed to them being a compliance issue?

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Phillip has over 20 years' experience of complex, high value commercial litigation and arbitration, often with a cross-border element, and regularly advises on commercial, technology, financial services and civil fraud disputes, as well as enforcement and asset recovery.

Phillip has acted on a number of board and shareholder, banking and IT disputes and represents a range of private sector clients. He has a particular interest in contentious and transactional work involving India, having acted on several English law disputes involving Indian parties.

He is recommended for both banking and commercial disputes in The Legal 500.

Disclaimer – The views expressed in this article are the personal views of the author and are purely informative in nature.

BREAK THE BARRIER

Ever since the Biden administration announced support for a patent waiver - as late as 5 May, there has been quite a flutter on this side of the camp. What is this all about? Let's explore.

As we all know, India being a member of the WTO, amended its patent and other IP laws in order to conform to TRIPS requirements. This overhauled the process-only patent regime for drugs and introduced product plus process patents with a life of 20 years.

As a consequence, drugs and vaccines that are crucial for managing the COVID-19 pandemic are caught in the patent stranglehold, limiting their availability and accessibility to a handful few - either the patentees or their chosen licensees. Third

parties out of the fray, coupled with an explosion in the number of COVID positive cases has led to an acute shortage of medicines, forcing us to rely on imports, and re-examine whether patents and medicines should be filtered through the public interest angle for now. The obvious and only solution to end the disaster quickly is to expand the manufacturing base and make available all the drugs and vaccines in large numbers so that every citizen is armed and ready to combat this deadly virus.

RAJESHWARI HARIHARAN
Founder

RAJESHWARI & ASSOCIATES
trademark & patent attorneys

Pharmacy of the world must come to the aid of grieving and pained India to ramp up COVID vaccination

It is in this context that in around October 2020, India and South Africa had proposed to the WTO that the implementation or enforcement of IP rights be suspended/waived for the period of the pandemic. Because the TRIPS mechanism is consensual, India and South Africa need the consent of 164 countries before a resolution can be passed by the TRIPS Council. The debate is on.

While the US appears to support the waiver, there is dissent from the developed world including from Europe, Japan, etc.

What are the patent barriers?

We have following vaccines for now:

1. **Covaxin** – which has been jointly developed by Bharat Biotech with the aid of the Indian Council of Medical Research (ICMR) and the National Institute of Virology. It is based on an inactivated virus, which uses common technology platforms. As per public domain resources, the patent is pending.

2. **Covishield** – which is sub-licensed to Serum Institute of India (SII) by AstraZeneca; it has been developed by Oxford University who granted an exclusive license to Astra. There are two granted patents and two pending applications.

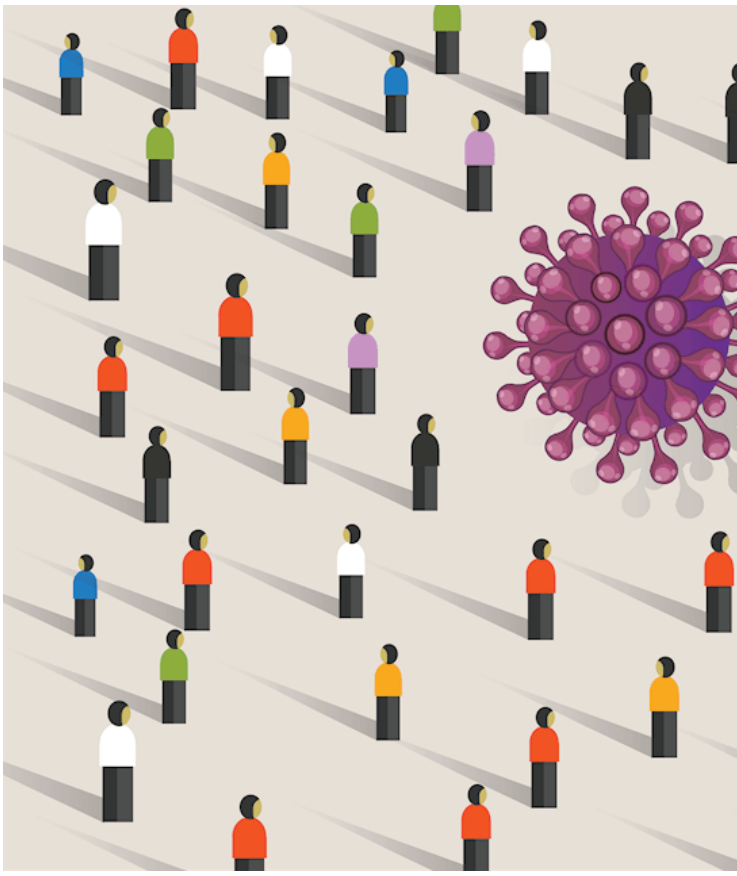
3. **Sputnik V** – developed by Gamaleya Research Institute of Epidemiology and Microbiology in Russia. It is an adenovirus-based vaccine. No patents/applications could be located - it may follow a licensing model.

4. **Covavax** - developed by Novavax, a US-based company, is a protein-based COVID-vaccine. It is learnt that SII has acquired the license rights to this vaccine for supply in India; there are pending applications protecting this vaccine's composition.

5. **J&J vaccine** - this is also an adenovirus-based vaccine developed by Johnson & Johnson. It is based on technology similar to Sputnik V or that of Astra. Biological E is believed to have the license to produce the product. The IP landscape around this is not fully open to the public.

6. **Pfizer-Moderna** - this is an mRNA-based vaccine - not yet approved in India. There are pending applications protecting this vaccine's composition and the technology platform.

As of now, only Covaxin and Covishield are approved for use in India. The rest are at various stages of being approved. Thus, except for Covishield, there is no immediate patent barrier for manufacturing

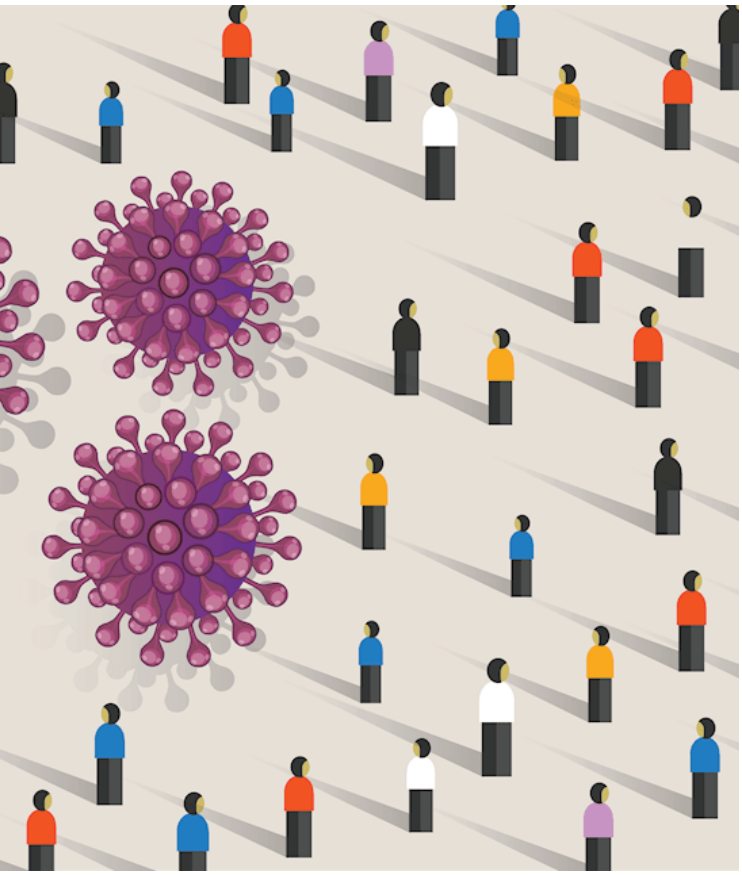


these vaccines. As for Sputnik V, royalty-free licenses are being granted. Moderna had earlier declared that they would not be pressing their rights in the vaccine. If they abide by that commitment, it would ease the IP burden.

Despite having a long history of developing and providing vaccine to the entire country through various means, our reaction to the COVID-19 pandemic has been incomprehensively relaxed. India has currently vaccinated less than 11 per cent of its population (10.13 per cent as of 15 May 2020), which is among the lowest in the world.

Though vaccine approvals came as early as 21 January, chaotic planning coupled with an overdose of vaccine diplomacy has deprived us of a golden opportunity of achieving herd immunity quickly.

Let's be clear: when it comes to the manufacture of vaccines, unlike synthetic drugs, the regulatory approval path is quite arduous and even if an abbreviated path is followed, it would take at



least six to eight months for any approval to come through optimistically. Apart from this, the raw materials for a vaccine such as adjuvants, cell culture media, cell lines, etc. are important from various countries including the United States. Though some of the export bans have been lifted, the issue of access to technology in the form of cell lines, etc. still remains a challenge.

Therefore, though the attractive proposition of IP waiver is in the works, and even if a deal is struck by tomorrow, we have a lot of homework to do before we unlock the secret to the vaccine recipe and the citizens can avail its benefit with a generic vaccine. But, yes, the IP waiver would encourage generic companies to make investments without the fear of being sued and dragged into prolonged litigations, and perhaps, before the anticipated third wave, one may have just enough vaccines.

The IP waiver would also enable hundreds of entities in India to manufacture small synthetic molecules which are often in short supply.

> Right to life and liberty, right to good health, right to medicines should not remain platitudes that adorn statute books. What good are sections and rules, if not implemented at the right time for the right causes?

Remdesivir, favipiravir, apixaban, molnupiravir, baricitinib, hydroxychloroquine, iopinavir, and interferon beta-1a are drugs used for the treatment of COVID-19 at various stages and found to be in short supply. These are produced by a handful of licensees and clearly, there is no solution other than to urgently ramp up the production of these drugs and make them available on large scale through reliable sources.

Compulsory license

When faced with a mammoth problem of the kind that we have, a compulsory license comes across as an immediate answer. Is that the only option?

The Patents Act, 1970 offers several solutions, some of which can be implemented immediately.

a) Section 47 read with Section 100: Use of patented inventions by the Government – either through self-manufactured or through imports; as per these provisions, the Government may import the patented drug/vaccine and/or authorize any number of companies to manufacture the drugs/vaccines for use of the Government, i.e. through Government or its authorized channels. The Patentee would be given a certain compensation, but there is no need for the Government to engage in long debates before such steps are taken. In other words, Government can engage in contract

manufacturing of the drugs/vaccines through third parties right away.

b) Section 92, 92A: The Government under these provisions is empowered in cases of 'national emergency' or 'extreme urgency' or 'public health crisis' to issue a notification that it is satisfied that such circumstances of urgency exist, necessitating the issuance of compulsory license and then invite applications from interested parties for the manufacture of the drugs in question.

There is no limit to the number of drugs that can be covered under such notification. All the terms, including royalty and the terms of the license, would be settled by the Controller of Patents. Of course, it can be challenged at different levels in the High Court by way of writ and other means. This option can also be exercised, provided the steps of this provision are followed.

Russia for instance has already issued a compulsory license using provisions similar to Section 100 for remdesivir to a company called Pharmasyntez. Gilead has retaliated with a lawsuit filed against the Russian Government.

c) Voluntary licenses: Government should intervene and proactively encourage innovators to grant voluntary licenses to as many companies for a limited-term so that technology is available and production can be ramped up. This, of course, coupled with an assurance of fast track regulatory approval be it of vaccine or drug.

Thus, India should use all the flexibilities within the current Patents Act and throw open the manufacture of the important drugs and vaccines used for Covid treatment to as many manufacturers as would be ready and willing to take up this not-so-daunting task. Given that, the Delhi High Court in the case of Rakesh Malhotra v Union of India as well the Supreme Court In Re: Distribution of Essential supplies & services during the pandemic case, has directed the Government to consider the use of such tools, there is hardly any justification for any further inaction or pussy-footing on this issue.

The argument of big pharma companies that they would be 'disincentivized' from further research, that it would give away confidential information, that some countries demanding access are so far behind that it is impossible to play catch up, are common oft-repeated narratives, all without merit.

Covishield and Covaxin are both outcomes of public-funded research; hence the public has a right to the fruits of the research. To say that our scientists are "far behind" technologically is a story of the past. In today's world, the globe is one. Technology pervades and reaches everywhere, perhaps technical know-how may be limited; but even that limitation is not impossible to overcome.

The right to life and liberty, right to good health, right to medicines should not remain platitudes that adorn statute books. What good are sections and rules, if not implemented at the right time for the right causes.

The 'pharmacy of the world' must live up to its reputation – by harnessing and unleashing the potential of its pharma companies to come to the aid of a grieving and pained India.

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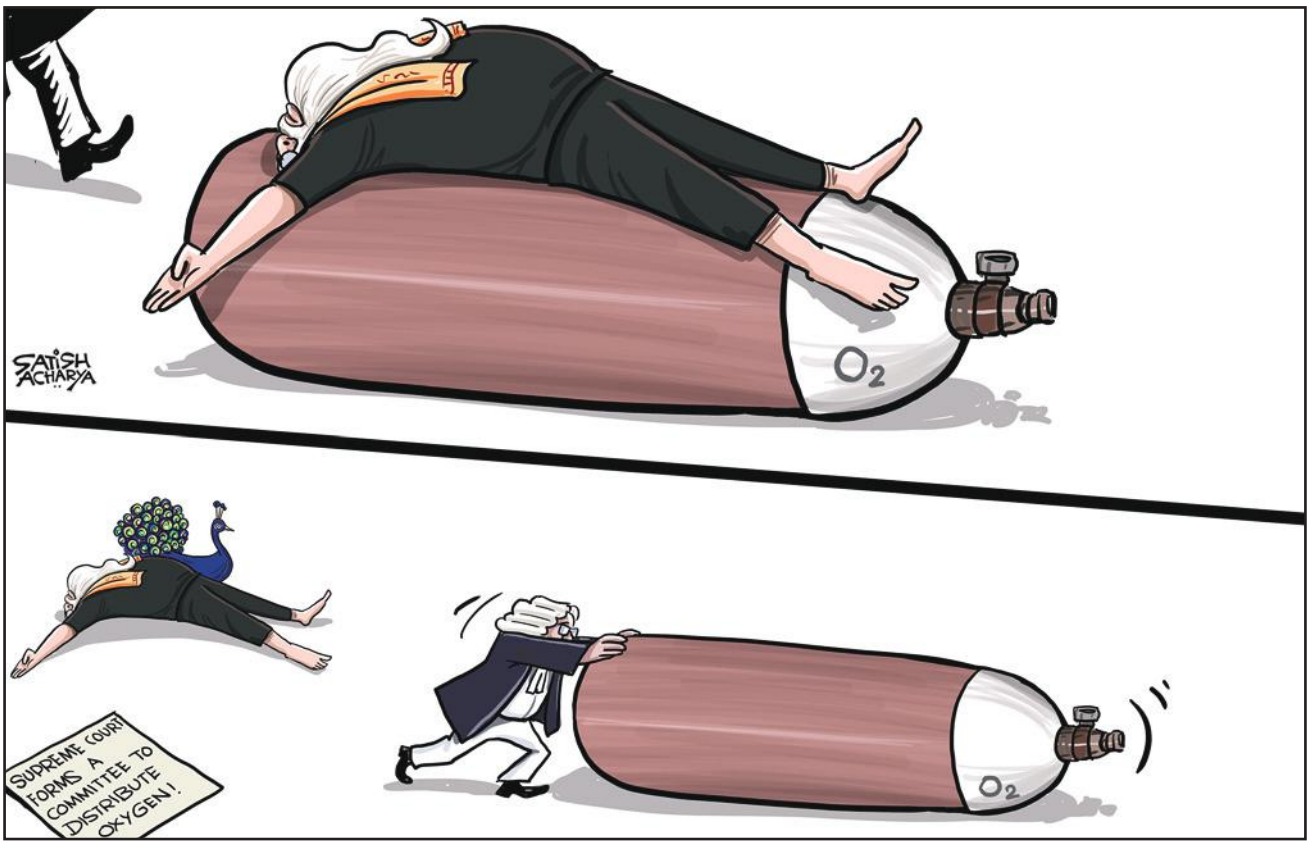
Rajeshwari specializes in Intellectual property law, especially, IP litigation. She has in many of the cases that have defined the scope of intellectual property rights. She has argued several patent and trade secret litigation at the Supreme Court of India and various High Courts across India. She has authored several articles and is a regular speaker at various conferences and seminars throughout India and internationally. She has the distinction of having won India's first compulsory license for her client. Her knowledge of patent law with command in trial advocacy, and an aptitude for science and technology are the hallmarks of her skills.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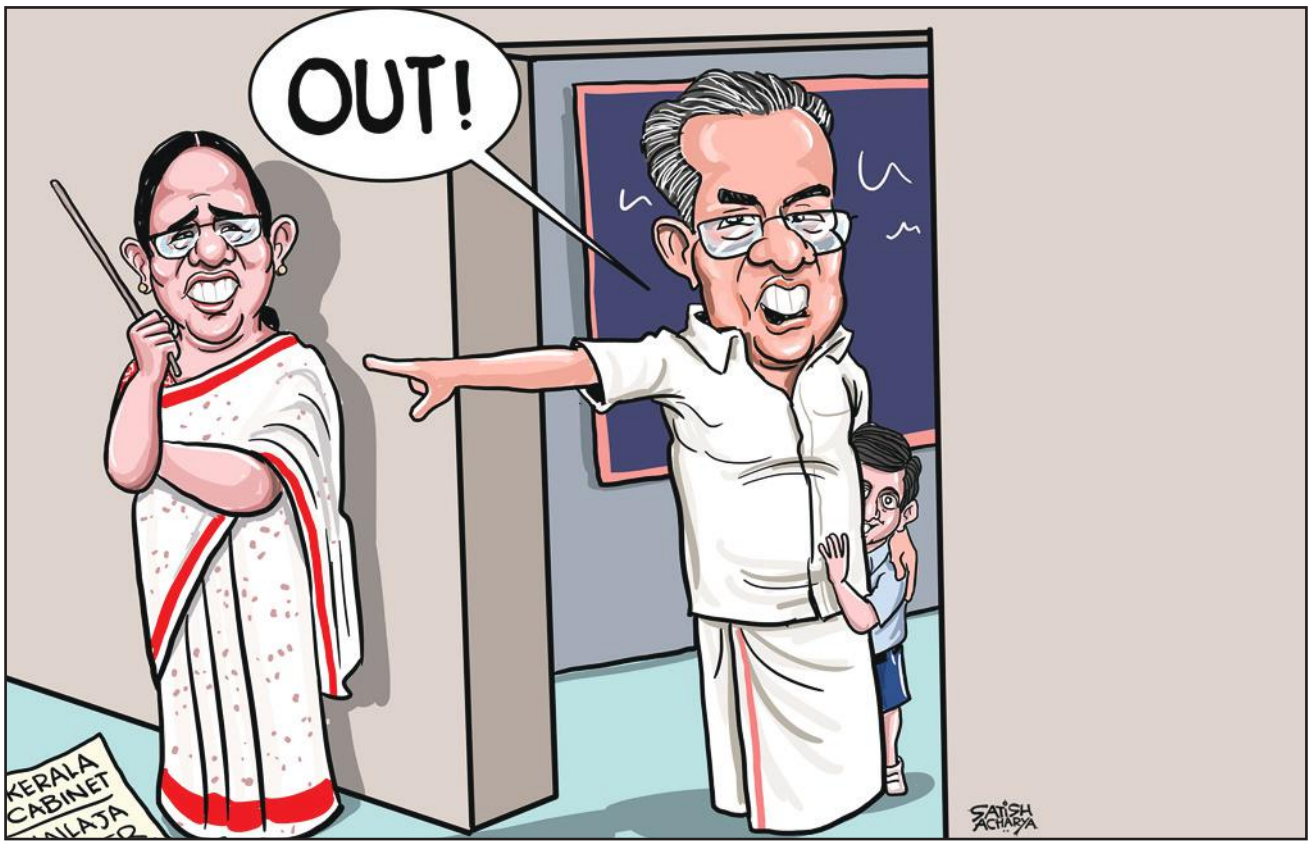
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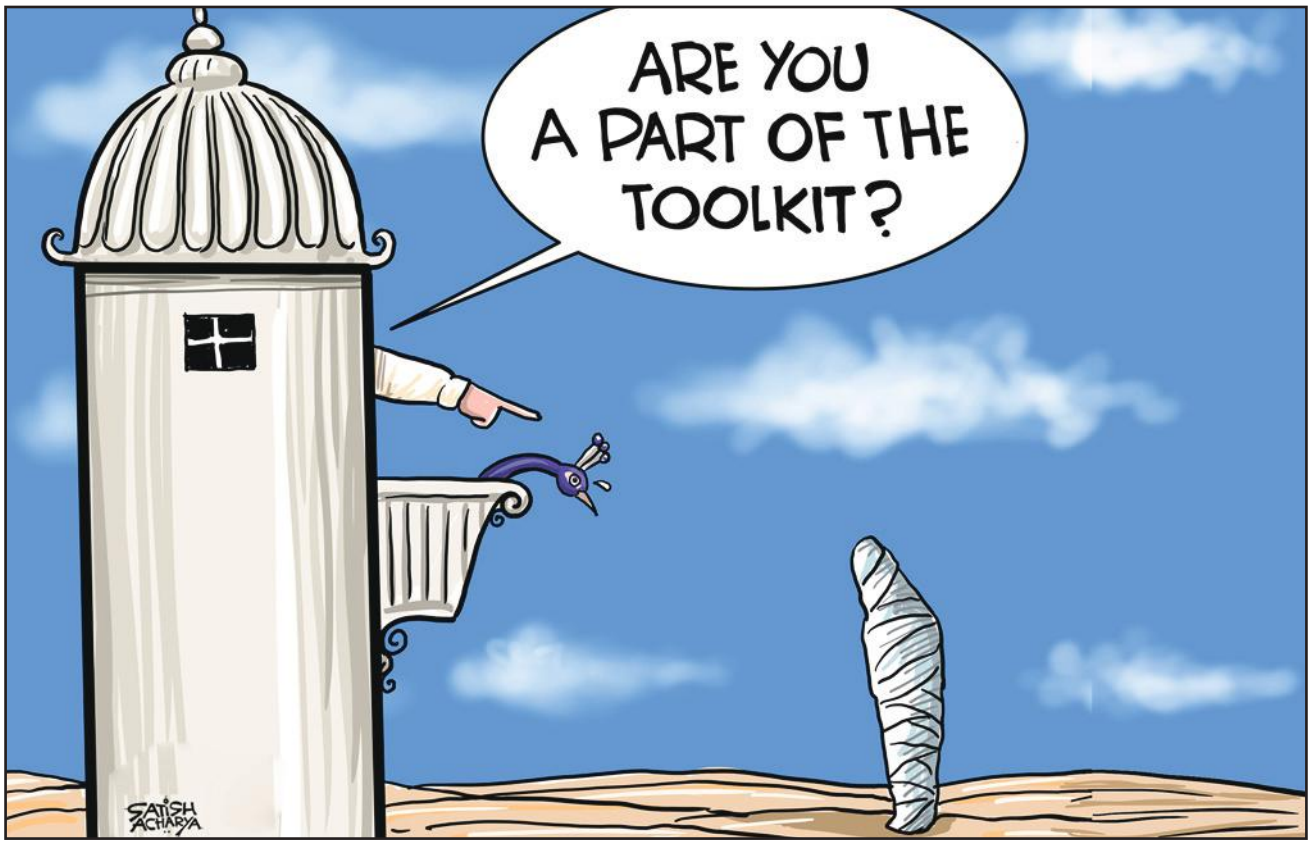
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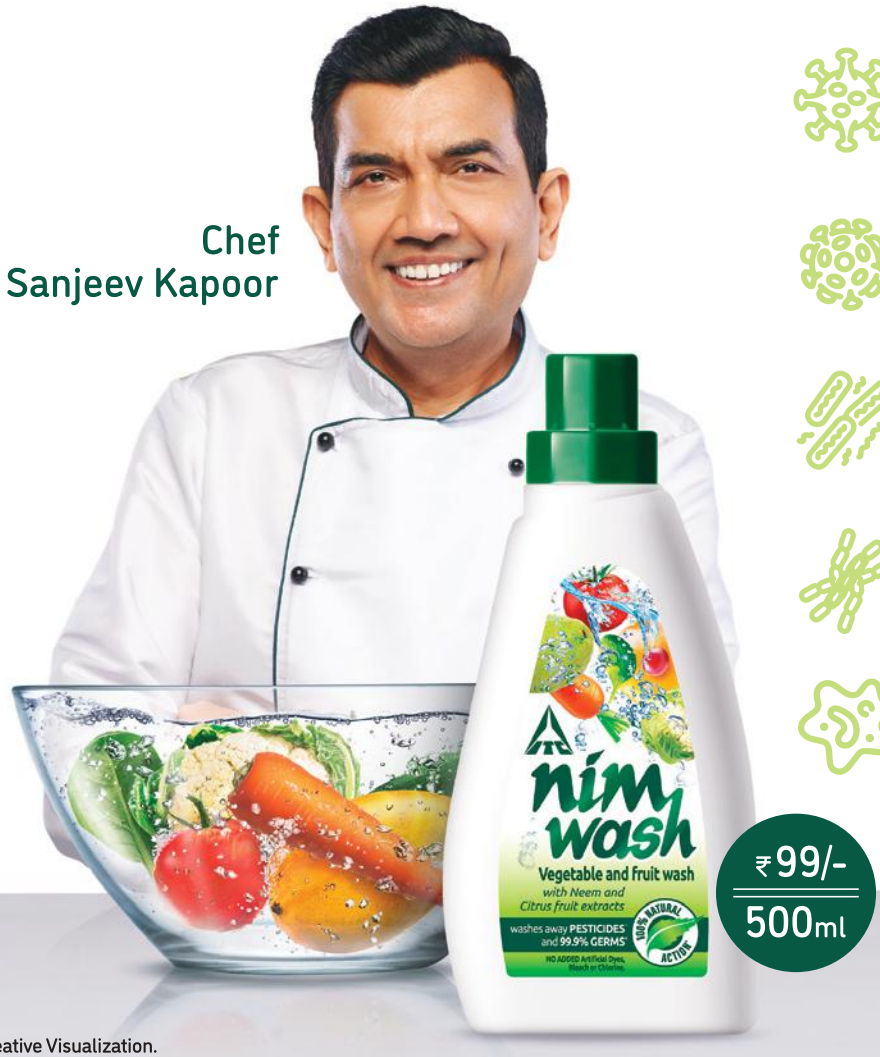

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