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Health Check for your Start-up

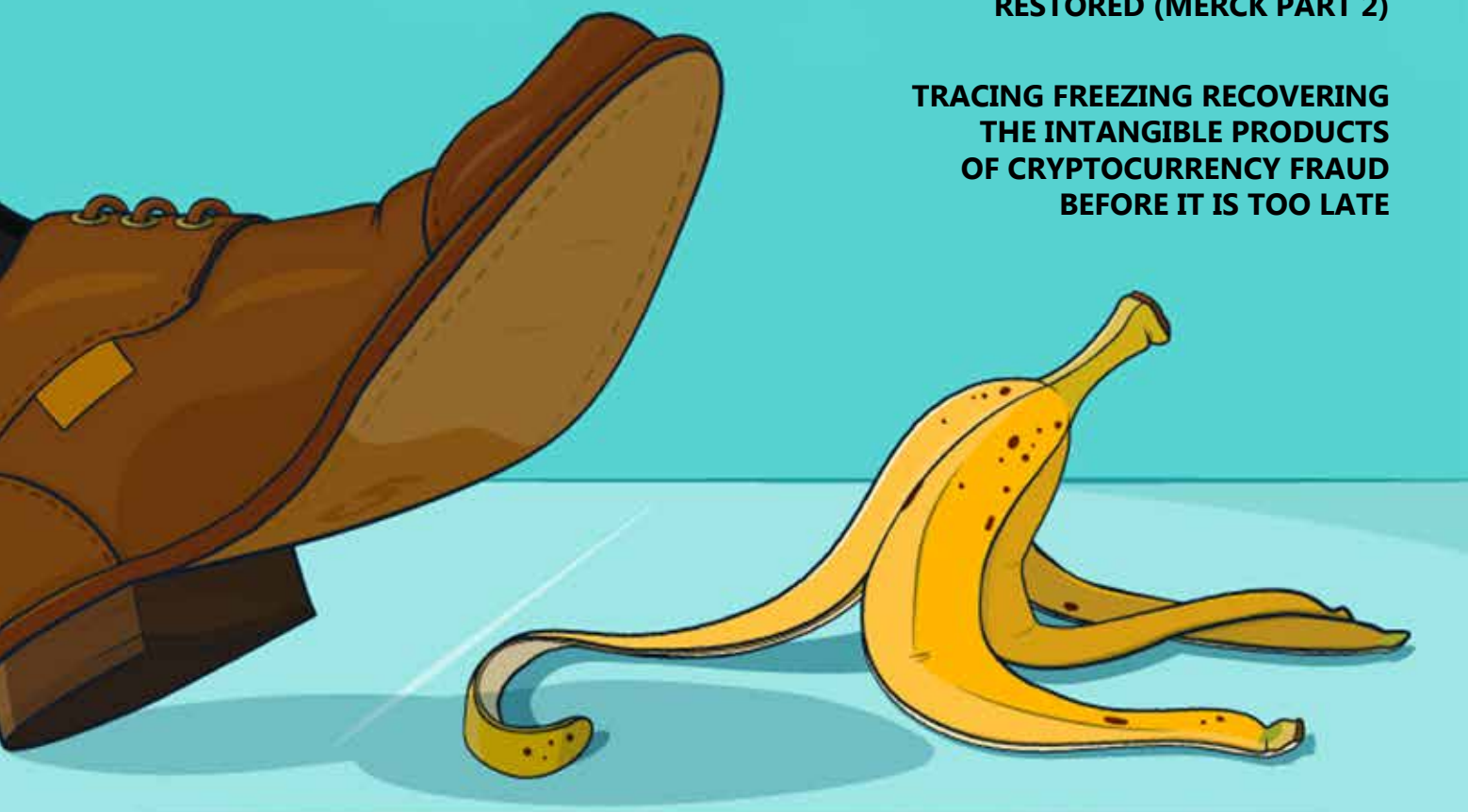
AVOIDING LEGAL PITFALLS AND BOOSTING YOUR INVESTOR READINESS

THE OPERATION OF INTERPOL IN POLITICALLY MOTIVATED BUSINESS CRIME CASES

LAWFUL ACT DURESS CLAIMS ALL BUT GROUNDED?

DEPENDENT CLAIMS FULLY RESTORED (MERCK PART 2)

TRACING FREEZING RECOVERING THE INTANGIBLE PRODUCTS OF CRYPTOCURRENCY FRAUD BEFORE IT IS TOO LATE



The Tata Group has snapped up Air India (AI) four years after the government announced its intention to sell the airline. No doubt that's the biggest story in years, but the story behind the government's divestment in the loss-making public enterprise is equally big, if not more.

When the government first decided to sell AI, it retained some stake without completely exiting the national carrier but failed to get any response from buyers. It did clarify to the Centre, however, that if the government opted to retain a stake and have its nominees on the Board, private players might not be interested in buying a public-sector company. Wiser from this experience, the government decided to completely exit the airline and use the model for other public-sector undertakings (PSUs) on the privatization list (Bharat Petroleum, Shipping Corporation of India). As the government did not want to give away land and real estate along with the company, these assets were hived off into a separate company even before Air India's privatization began. A similar strategy is being deployed for other state-run companies. Also, Air India has been among the biggest beneficiaries of government guarantees, some of them critical for it to borrow from the market to buy aircraft and raise funds later, given its shaky financial condition. The issue led to several rounds of discussions between the finance ministry, department of investment and public asset management, civil aviation ministry and transaction advisor - Ernst & Young. As for the thornier issue of employee benefits post-divestment, the government chose to pay the benefits (pension, medical facilities) till privatization. Reportedly, the airline management has already been asked to start the separation process apart from working out the employees' medical benefits.

So, while the AI sale is a watershed moment in terms of the airline's return to the Tata stable 68 years after its nationalization and the beginning of the MODI government's privatization drive seven years after he first assumed office, it reportedly also leaves ₹45K CRORE in liabilities for the government. What it does however establish is that total exit may be the new way to find buyers for (ailing) PSUs. Whether MODI plans to follow in the footsteps of his predecessor ATAL BIHARI VAJPAYEE who famously privatized as many as 12 PSUs during his tenure as Prime Minister only time will tell...

Aakriti Raizada

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First published in March 2010
Legal Era aims to provide "in the trenches" editorial that gives Common Man, Law Students, Lawyers, Business Leaders and Corporate Managements a detailed outlook of the current legal scenario.

"Legal Era aims at Initiating, Integrating & Innovating ways and means to establish thought-provoking seminars with a vision to proliferate knowledge and optimize business opportunities."

-Aakriti Raizada
Founder & Managing Editor

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'LEGALLY LOVED' BY THE PEOPLE. FOR THE PEOPLE

Legal Era, throughout these years, has established itself as one of the most preferred source for legal practitioners to remain abreast with contemporary legal issues. The wide range of articles covered in the previous editions aptly deal with core legal issues in appropriate detail. I would recommend legalera as a one-stop shop and a must-read for all legal professionals including law students and business professionals.

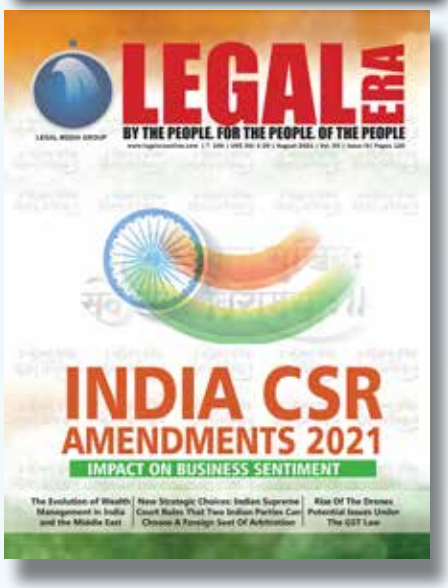
Vikram Sobti
Partner, Chandhiok & Mahajan

Legal Era provides insightful analysis, the latest news and important legal updates. A highly regarded and well respected publication in the legal community

Rishi Hindocha
Senior Associate, Allen&Overy LLP

Legal Era is a great initiative which covers various aspects of the legal profession as well as varied topics. Contributions from some of the best legal minds to the publication make it an interesting and insightful read. Kudos to the Legal Era Team!

Rahul Dwarkadas
Partner and Head of Dispute Resolution, Veritas Legal



I found the latest edition to be a classic blend of key legal updates with articles pertaining to national and international legal domain, all being equally relevant to lawyers as well as the business persons. I also want to thank Legal Era for devoting an entire section as a tribute to Late Dr. N R Madhava Menon

Harshit Khare
Senior Associate, Link Legal

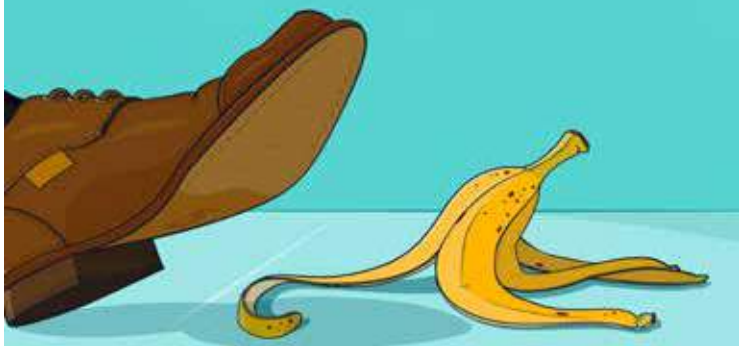
Legal Era is a must-subscribe magazine for all lawyers. The articles are well researched, thought-provoking and are from the best of the best in the legal fraternity. The magazine gives diverse and dynamic perspectives and viewpoints on various legal subjects, which helps keep pace with continuously evolving and complex legal issues. Really thankful to the entire team and good luck in keeping up the spirit and passion and the good work

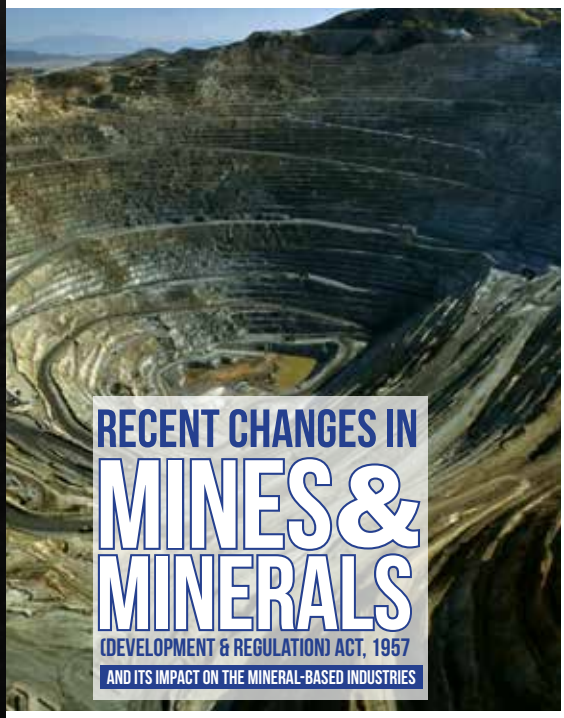
Rajkumar Varier
Vice President (Legal & Regulatory)
Star India Private Limited

CYBER SECURITY for LEGAL SECTOR?

Health Check for your Start-up

Avoiding Legal Pitfalls and Boosting your Investor Readiness





A tale of two Appeals

Victory for aggrieved minority shareholder

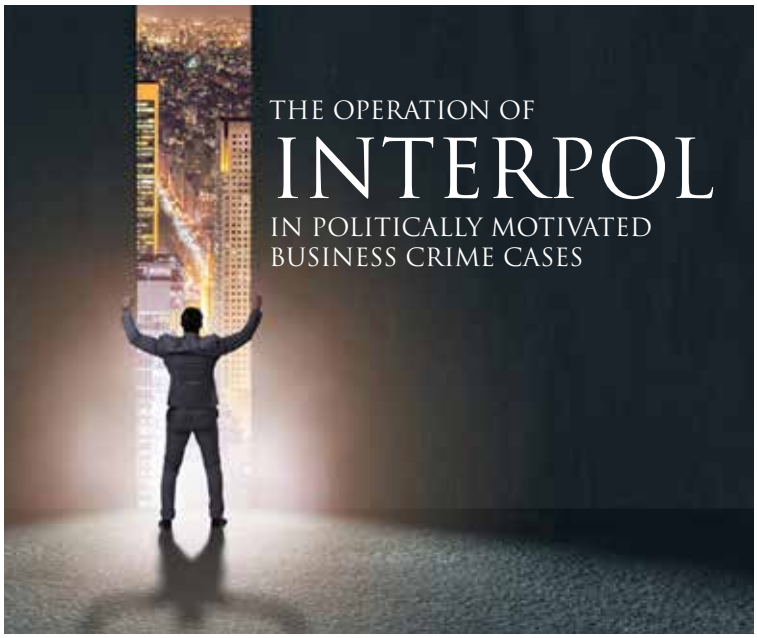
Carey Olsen acted for the successful minority shareholder in two appeals arising from the same facts and underlying claims of unfair prejudice.

"It is imperative for businesses to board the ESG train now! ESG is about sustainably and investing in our collective future"

SUNIL MEHTA

in an exclusive interview with Legal Era

Jurisdictional Issues IN IPR LAWS In The Age Of INTERNET



DEPENDENT CLAIMS FULLY RESTORED

(MERCK PART 2)

CONTENTS

SUPREME COURT: CARETAKER/SERVANT CAN NEVER ACQUIRE INTEREST IN PROPERTY IRRESPECTIVE OF HIS LONG POSSESSION

The Apex Court opined that the Trial Court had committed a manifest error in appreciating the pleadings on record from the plaint filed at the instance of the Respondent.

The Supreme Court of India allowed the owner's appeal by holding that that the caretaker/servant could never acquire interest in the property irrespective of his long possession and that he had to give possession on demand.

A Division Bench of the Supreme Court of India, comprising Justices Ajay Rastogi and Abhay S Oka, dealt with the matter titled Himalaya Vintrade Pvt Ltd v Md. Zahid & Anr.

The facts of the case were that the Appellant – Defendant's right of ownership over the subject property in question became absolute after executing a sale deed. However, the Respondent – Plaintiff filed a suit to declare himself as the lawful occupier as the caretaker/servant of the sole owner of the property. The Appellant – Defendant objected to the suit by filing an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) but the Trial Court dismissed the said application on the ground that the subject matter of dispute could be examined only after the written statement was filed. The order of dismissal by the Trial Court was upheld by the High Court and therefore, the present appeal was filed by the Appellant – Defendant challenging the same.

The Court after considering the material on record, opined that the Trial Court had committed

a manifest error in appreciating the pleadings on record from the plaint filed at the instance of the Respondent – Plaintiff.

The Court held that that the caretaker/servant could never acquire interest in the property irrespective of his long possession and that the caretaker/servant had to give possession forthwith on demand. It was further observed that the plea of adverse possession lacked material particulars and that the plaint did not disclose the cause of action for institution of the suit.

Therefore, the Court allowed the appeal by quashing the order of the High Court as well the original plaint filed by the Respondent – Plaintiff. The Court further directed the Respondent – Plaintiff to handover, vacant and peaceful possession of the subject property in question free from all encumbrances within three months.

HAPPY Diwali

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SUPREME COURT RULES DIVORCED DAUGHTER CAN'T BE TREATED AT PAR WITH WIDOWED OR UNMARRIED DAUGHTER

The Apex Court further felt that the act of filing for divorce immediately after the Government employee's death would suggest that the decree of divorce by mutual consent has been obtained only to get an appointment on compassionate ground.

The Supreme Court has set the norms straight on the appointment of a divorced daughter on compassionate grounds by setting aside a Karnataka High Court judgment.

The Apex Court bench of Justices M.R. Shah and Aniruddha Bose clarified that norms prevailing on the date of consideration of the application should be the basis of consideration of the claim for compassionate appointment.

Karnataka High Court had earlier ruled that a divorced daughter would fall in the same class as an unmarried or widowed daughter for Karnataka Civil Services (Appointment on Compassionate Grounds) Rules, 1996.

In this case, the writ petitioner's mother was employed with the Government of Karnataka as Second Division Assistant at Mandya District Treasury. Following her death, the petitioner filed an application for a job on compassionate appointment.

Her application was rejected by the concerned authorities on the ground that there was no provision provided under Rule 3(2)(ii) of Karnataka Civil Services (Appointment on Compassionate Grounds) Rules 1996 for divorced daughters, prompting the applicant to file a writ petition in the High Court, which directed the state authorities to consider her application.

The High Court interpreted Rule 3 and observed that a divorced daughter would fall in the same class as an unmarried or widowed daughter. It further said that a divorced daughter has to be considered at par with an unmarried or widowed daughter.

In appeal, the Supreme Court summarized the observations made about the grant of appointment on compassionate ground in earlier judgments including the recent one on N.C. Santhosh v State of Karnataka (2020) 7 SCC 617:

(i) that the compassionate appointment is an exception to the general rule;
(ii) that no aspirant has a right to compassionate appointment;
(iii) the appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 1;
(iv) appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy and/or satisfaction of the eligibility criteria as per the policy;
(v) the norms prevailing on the date of the consideration of the application should be the basis for consideration of the claim for compassionate appointment.

Referring to the Karnataka Rules, the court noted that only unmarried daughter and widowed daughter who were dependent upon the deceased female Government servant at the time of her death and living with her can be said to be dependent of a deceased Government servant.

The court further noted that an unmarried daughter and a widowed daughter only can be said to be eligible for appointment on compassionate ground in the case of death of the female Government servant.

"As observed hereinabove and even as held by this Court in the case of N.C. Santhosh (Supra), the norms prevailing on the date of consideration of the application should be the basis of consideration of claim for compassionate appointment. The word 'divorced daughter' has been added subsequently by Amendment, 2021. Therefore, at the relevant time when the deceased employee died and when the original writ petitioner – respondent herein made an application for appointment on compassionate ground the 'divorced daughter' were not eligible for appointment on compassionate ground and the 'divorced daughter' was not within the definition of 'dependent'," the Apex Court observed.

The court also took note of the fact that immediately after the death of the deceased employee, the petitioner had initiated the divorced proceedings under Section 13B of the Hindu Marriage Act, 1955 for the decree of divorce by mutual consent.

The bench further felt that this act would suggest that the decree of divorce by mutual consent has been obtained only for the purpose of getting an appointment on compassionate ground. It also noted that at the time when the deceased employee died on 25.03.2012, the marriage between the respondent and her husband was subsisting.

The Supreme Court ruled that at the time when the deceased employee died she was a married daughter and therefore, also cannot be said to be 'dependent' as defined under Rule 2 of the Rules 1996.

Even if it is assumed that the 'divorced daughter' may fall in the same class of 'unmarried daughter' and 'widowed daughter' in that case also the date on which the deceased employee died she – respondent herein was not the 'divorced daughter' as she obtained the divorce by mutual consent subsequent to the death of the deceased employee, the court observed.

"Therefore, also the respondent shall not be eligible for the appointment on compassionate ground on the death of her mother and deceased employee," the bench said while setting aside the High Court judgment.

DELHI HIGH COURT

GUCCI GETS PERMANENT INJUNCTION AGAINST MISUSE OF ITS LOGO FROM A DELHI COURT

The Court directed that all the infringing goods from the premises of the defendant be handed over to the plaintiff and destroyed while imposing a fine of ₹2 lakh in damages and ₹1.66 lakh on the defendant.

Gucci, the Florence-based global luxury fashion brand, has been awarded an ex-parte injunction against misuse of its logo by a local manufacturer. The Italian fashion brand had moved to a Delhi District Court through its lawyer Shashi P Ojha, contending that the Delhi-based Shipra Overseas, owned by one Intiyaz Sheikh, was manufacturing and selling cheap quality counterfeit products using its iconic logo.

Gucci had sought a permanent injunction from the District Court against the defendant, its agents and stockist from manufacturing, trading, selling, supplying, marketing, offering for sale or dealing in any other way, any goods including socks, tags/labels and its packaging material and/or any other goods and accessories, etc. under the mark "GUCCI".

The Court passed a permanent injunction in Gucci's favor. In addition, it also directed the defendant to pay ₹2 lakh in damages and ₹1.66 lakh as costs.

In the suit, Gucci contended that its field representatives during a market survey in April 2019 found out that the Intiyaz Sheikh-owned Shipra Overseas was manufacturing, stocking and offering large quantities of counterfeit products including socks and packaging material under the plaintiff's well-known "green and red stripes" logo and mark "GUCCI" and presented pictures to support its claim.

Gucci argued in the court that the subject matter of the suit was commercial in nature as defined under Section 2(1)(c) of The Commercial Courts Act, 2015.

Gucci further contended that it had invested heavily in advertising its products bearing its distinctive trademark and logo throughout the world, including India, to promote its brand. The defendant's substandard counterfeit products were thus hurting its business interests.

The defendant failed to appear before the court, prompting District Judge Bharat Parashar to conclude that "It is clear that defendant deliberately chose not to participate in the present proceedings despite having due knowledge of the pendency of the present suit."

The court examined all the evidence produced before it in support of the suit and observed: "I do not find any reason to disbelieve the claim of plaintiff either as regard use of its mark 'GUCCI' and logo since long and also registration of its mark in India. I have also no reason to disbelieve that plaintiff company has acquired very high goodwill, exclusivity, distinctiveness and unique identity with respect to the products manufactured by it carrying the impugned mark and logo."

The District Court directed that all the infringing goods from the premises of the defendant be handed over to the plaintiff and destroyed.

DELHI COURT GRANTS FORD INDIA MD INTERIM PROTECTION FROM ARREST

Ford India dealer had challenged dealership termination by the car marker and accused the company's managing director Anurag Mehrotra of cheating.

A Delhi court has granted interim protection from arrest to Ford India managing director Anurag Mehrotra in an alleged cheating case.

The case was filed by the owner of Libra Cars Pvt Ltd, a car dealership firm in Delhi, who alleged that the car manufacturer terminated its agreement and announced it "duplicitously".

Additional Sessions Judge Raj Rani allowed Mehrotra's plea seeking anticipatory bail.

"Since the investigation in the present case is still pending, it is directed that in the event of arrest, applicant be released on interim bail for a period of 30 days on furnishing of bail bonds in a sum of ₹5 lakh with one surety in the like amount to the satisfaction of IO/SHO…"

The complainant pointed out an agreement clause under which Ford India or its directors could not authorize any other service station/workshop within a 10-km radius of his showroom and alleged that he learnt about the existence of another service center running within the approximate radius mentioned earlier when tried to find out reasons for decreased sales.

The complainant was stated to have reported the matter to the company but the latter sent notices relating to outstanding dues and later terminated the dealership with effect from 21 March 2019, causing wrongful loss of ₹35 crore.

"The applicant has been falsely implicated in the present case by complainant deceitfully and dishonestly alleging inter-alia the commission of the offenses of criminal breach of trust and cheating by the applicant," it was submitted.

Mehrotra's counsel further submitted that the present FIR was registered on the direction of the Chief Metropolitan Magistrate on 4 November 2020 even though in response to the application under 156 (3) CrPC (seeking registration of the FIR), the Economic Offences Wing of the Delhi Police had already filed a status report in which it was stated that no offense was made out.

"The allegations made in the FIR are civil in nature. Since the present complainant did not adhere to the terms and conditions of the agreement of dealership and also not clear their outstanding credit i.e., up to ₹4 crore approximately as clear from the letter dated 18.01.2019 wherein (it is) specifically mentioned about the misconduct or not following the condition of the agreement. Hence, the dealership of the complainant was terminated vide termination letter dated 05.03.2019," Mehrotra's Counsel submitted before the court.

Mehrotra's team of lawyers countered all allegations leveled against their client and submitted that the complainant had paid ₹65 lakh to Ford India even after termination of the agreement establishing the fact that the dealer owed money to the company leading to the termination of the dealership.

"Had there been any clause with regard to the payment of compensation of ₹35 crore in the alleged agreement dated 24.04.2018, the complainant would have never paid ₹65 lakh to the Ford Company post termination," it was argued.

The Court directed Mehrotra to join the investigation as and when required and not intimidate or influence the prosecution witnesses. He was also directed to provide his mobile number to the IO and not change it without bringing it to the IO's notice.

Additional Public Prosecutor Kiran Bala appeared for the State whereas advocates Vijay Kumar Aggarwal, Sarthak Sharma, Hardik Sharma and Barkha represented Mehrotra. Advocate Prashant Diwan represented the complainant – Libra Cars Pvt Ltd.

DELHI HIGH COURT REPRIMANDS STUDENT FOR INITIATING PRIVATE CORRESPONDENCE THROUGH EMAIL WITH A JUDGE

The Delhi High Court reprimanded a student for initiating private correspondence through email addressed to a judge and directed the said student to file an affidavit stating the circumstances in which this e-mail was sent.

A Single Judge Court of Justice Prateek Jalan in the High Court of Delhi, dealt with the matter titled The Institution of Engineers (India) v. Union Of India & Ors.

The petition had been filed by the Petitioner – The Institution of Engineers (India) seeking reliefs regarding their candidature and ineligibility. The Court did not go into the facts of the case and recited instances where emails were sent by one such Student – Applicant to the personal email id of the judge along with another email addressed to the Registrar (Vigilance) of this Court.

The extract of one such email is listed below:

"Respected Sir,

Pl save the lakh of life as we are drowning in the dearth of de morality, perplexed, and also hopelessness. On behalf of thousands of students. Regards, Subrata Pramanik"

The Court observed that this appeared to be an attempt to pressurize or embarrass the Court, which required to be severely deprecated. It

Justice Prateek Jalan

directed the said student to file an affidavit stating the circumstances in which this e-mail was addressed, while making the following observation:

"A pending litigation cannot become the subject matter of private correspondence addressed by a litigant to the judge. Whatever be the contentions of a party, they must be addressed at the hearing or by way of a properly constituted filing in the pending petition, with notice to the other parties."

The Court concluded that it would decide whether any further action was required, including initiation of contempt proceedings against the said student based on the affidavit filed by him.

BOMBAY HIGH COURT

BOMBAY HIGH COURT ISSUES GUIDELINES PROHIBITING PUBLIC DISCLOSURE OF IDENTITIES IN SEXUAL HARASSMENT CASES

The Bombay High Court issued guidelines prohibiting public disclosure in order to protect the identities of the parties in the proceedings of Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013.

A Single Judge Court of Justice G.S. Patel in the High Court of Bombay dealt with the present matter involving issues under the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act) and Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules, 2013, (POSH Rules).

The Court held that it was imperative to protect the identities of the parties from disclosure, even accidental disclosure, in such proceedings but it

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noted that there were no established guidelines so far in such matters. Therefore, the Court decided to create certain guidelines as a minimum requirement for setting out a working protocol for future orders, hearings and case file management.

These guidelines were issued under different subgroups, which are as follows:

1) Orders
2) Filing Protocols
3) Access
4) Hearings
5) Directions To Certified Copy Department
6) Public Access
7) Breach
8) Media Disclosure Forbidden
9) Recording Prohibited
10) Industrial/Labor Court Proceedings

The Court's primary endeavor was to anonymize the identities of the parties. One of the guidelines, was that the names of the parties would not be mentioned in the order sheets and the orders would be read "A v B", "P vs D" etc.

It also directed that the entire record was to be kept sealed and was not to be given to any person without an order of the Court.

It further held that such hearings must be by physical attendance which would only be in Chambers or in-camera and that there would be no online or hybrid facility for hearings.

The Court issued various guidelines restricting the use of names of parties in such matters by issuing prohibition on publishing the names, addresses or other details to any person, including forbiddance on the media.

The Court disposed of this matter by observing that the Courts would strictly adopt and follow these guidelines and any future guidelines and thus, a copy of this order was directed to be sent to the president of that court for his immediate attention and action.

BOMBAY HIGH COURT IMPOSES COSTS ON JUDGMENT DEBTOR TO ARBITRAL AWARD OWED TO SOURAV GANGULY, FOR FURNISHING INCORRECT INFORMATION

The Bombay High Court imposed costs on Respondent – Company who were the judgment debtors to the arbitral award owed to Applicant – Sourav Chandidas Ganguly, for furnishing incorrect information.

The matter titled Sourav Chandidas Ganguly v. Percept Talent Management Ltd & Anr, was placed before a Single Judge Court of Justice A. K. Menon in the High Court of Bombay.

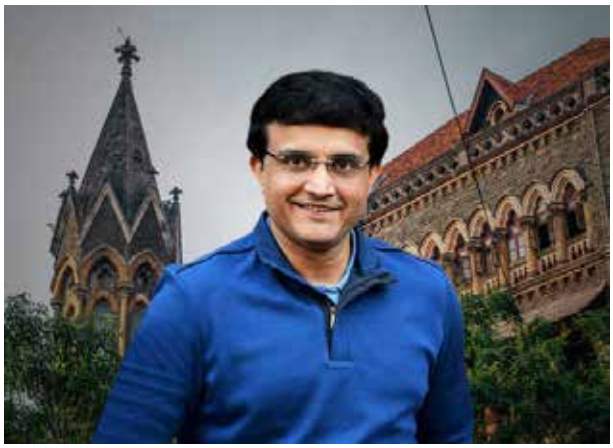
The Court made certain remarks against the Respondent – Company, while hearing this interim application of Applicant – Sourav Chandidas Ganguly pertaining to a petition wherein he sought ₹36 crore payable to him according to a 2018-19 arbitral award by the judgment debtor who was arraigned as Respondent in this matter. The Applicant submitted a certificate issued by the Respondent – Company's Chartered Accountant who had set out names of the directors as available on the portal of the Ministry of Corporate affairs. The said certificate contained one such Director – Harindra Pal Singh and the Court noted that this contradicted the previous statement of the Respondent wherein the Respondent had stated that Harindra Pal Singh was not a director.

Through this revelation of the director list,

the Court observed that this revealed the Respondent's prima facie attempt to mislead this Court and made the following statement:

"In the circumstances, the Applicants have been forced to come to court repeatedly on the basis of incorrect and misappropriate instructions and therefore make improper submissions in Court." The Respondent submitted that they would be submitting the share certificates within three weeks. The Income Tax Department further sought time to obtain instructions for computation of income and balance sheet and profit and loss account.

Thus, the Court made multiple directions regarding affidavits and accounts along with the direction on Respondent to submit share certificates on or before 13 October, 2021.



The Court, considering the conduct of the Respondent, incurred costs for today's hearing to be borne by the Respondent and listed the matter on 13 October, 2021.

MADRAS HIGH COURT

MADRAS HIGH COURT SAYS SCRAP SALES CANNOT FORM PART OF TOTAL TURNOVER

The Court upheld Income Tax Appellate Tribunal's decision by relying on a Supreme Court judgment while dismissing the appeal.

The Madras High Court upheld the order of the Income Tax Appellate Tribunal rejecting the Revenue Authority's appeal by holding that the scrap sales could not form part of total turnover. The matter titled Commissioner of Income Tax v M/s Tweezerman (India) Pvt Ltd was placed before the Division Bench of the High Court of Madras, comprising Justices T.S. Sivagnanam and Sathi Kumar Sukumara Kurup.

The present tax case appeal was filed by the Appellant – Revenue Authorities challenging whether the Income Tax Appellate Tribunal was right in holding that the scrap sales had to be excluded from the total turnover as well as the export turnover while computing the exemption u/s 10B of the Income Tax Act, 1961.

The Court in order to deal with this issue had to compute the total turnover while considering the claim for exemption u/s 10B of the Act.

It was noted that the Respondent – Company was engaged in the manufacture of certain articles which were being exported in which scrap was generated during the manufacturing process, which was sold and these sale proceeds were used to reduce the amount spent on the purchase of raw materials. Therefore, the Appellant – Revenue Authorities contended that the sale of scrap would be included in the

total turnover. The Authorities further drew a distinction with regards to the deduction claim u/s 80HHC of the Act and pointed out that the case on hand was a claim made under Section 10B of the Act which raised the question of what would be the meaning of the word 'turnover'.

In order to deal with this question, the Court considered the judgment of the Supreme Court which is cited as (2014) 46 Taxman 68 (SC), wherein it was held that the term 'turnover' would mean the 'total sales' but the said sales would definitely not include the scrap material which was either to be deducted from the cost of raw material or was to be shown separately under a different head.

The Court, therefore, upheld the decision of the Appellate Tribunal by relying on this judgment of the Supreme Court and dismissed the appeal.

MADRAS HIGH COURT STAYS SOME CLAUSES OF THE NEW IT RULES

The court felt that coercive application of IT Rules against intermediaries violates Article 19(1)(a); oversight mechanism could take from media of its independence.

The Madras High Court has come down heavily on the contentious new Information Technology Rules by expressing deep concerns that its application could take away the independence of media and disintegrate the fourth pillar of democracy.

A bench comprising Chief Justice Sanjib Banerjee and Justice P.D. Audikesavalu stayed two clauses of the IT Rules, 2021, observing that the oversight mechanism prescribed in the rules appears to be aimed "at controlling the media by the government".

"Prima facie there is (a) substance that the oversight mechanism to control the media by the government may rob the media of its independence and the fourth pillar of the democracy may not at all be there," the bench said.

"By way of abundant caution, sub-rules 1 and 3 of Rule 9 of the said Rules of 2021 will remain stayed," the court ruled.

The court also noted in its interim order that if any action is taken citing Rules 3 and 7 of the IT Rules 2021 would be subject to the outcome of the challenge to the constitutional validity of the Rules. Rule 3 speaks about the obligation to exercise due diligence by intermediaries and Rule 7 provides for coercive action against intermediaries for breach of the provisions of the Rules.

These sub-sections of Rule 9 are part of the new Information Technology (Guidelines for intermediaries and Digital Media Ethics Code) Rules, 2021, for self-regulation by the publishers and oversight mechanism by the central government. These rules are related to digital news media having to follow a strict code of conduct while also providing for a three-tier structure for addressing grievances.

A Public Interest Litigation (PIL) was filed before the court by acclaimed Carnatic musician T.M. Krishna and another petition was moved by the Digital News Publishers Association (DNPA) as well as journalist Mukund Padmanabhan.

"If there is any action taken in terms of Rule 3 of the said Rules read with Rule 7 thereof during

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the interregnum, it will abide by the result of the petitions and further orders herein," the court said.

Senior Advocate Rajashekhar Rao representing the petitioners argued against the constitutional validity of Rules 3 and 7 of the IT Rules 2021. He submitted that Rules 3 and 7 of the IT Rules impose additional obligations on an intermediary which had not been incorporated in the parent legislation, i.e. the Information Technology Act, 2000 (IT Act, 2000). In particular, a grievance was raised against the incorporation of sub-clause (x) of Rule 3 (1) (b).

Rule 3 provides for the procedure for observing "due diligence by an intermediary," while Rule 7 states that if an intermediary fails to abide by the IT Rules, it would not be granted the protective exemption under Section 79 of the IT Act, 2000. In such a scenario, Rule 7 states that the intermediary "shall be liable for punishment under any law for the time being in force including the provisions of the Act and the Indian Penal Code", advocate Rao submitted before the bench.

The court observed that that the new Rules confer additional obligations on intermediaries to the extent that criminal proceedings can be initiated against them for non-adherence to the guidelines prescribed by the Centre.

"Though it is submitted by learned Additional Solicitor General that Rule 3 of the present Rules are on similar lines as Rule 3 of the 2011 Rules, there appear to be key changes, particularly the introduction of sub-clause (x) in clause (b) of sub-rule (1) thereof and the additional obligation on the intermediary in, inter alia, clause (c). Any host of a website or platform would be an intermediary and an ordinary person may be denied access to the platform on the ipse dixit of the intermediary or on the intermediary's apprehension that such intermediary may be proceeded against", the Court opined.

The court further noted that by virtue of the newly introduced Section 79 (2) (c) of the IT Rules 2021, this exemption would not apply if the intermediary is found not to have observed that "guidelines as the Central Government may prescribe in this behalf."

The High Court referred to the Supreme Court judgment in Shreya Singhal v Union of India wherein Section 79(3)(b) of the 2000 Act had been read down and further held that unlawful acts beyond what is laid down in Article 19(2) of the Constitution "obviously cannot form any part of Section 79" of the Act.

Accordingly, the bench felt said that there is a substantial basis to the petitioners' assertion that Article 19 (1) (a) of the Constitution may be infringed in how the Rules may be coercively applied to intermediaries.

The court also referred to paragraph 122 of the judgment wherein the Supreme Court had observed, "It would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not."

The matter has been listed for further hearing on 27 October after the bench was informed that the Supreme Court is due to take up transfer petitions in the first week of October.

Senior Advocate MR Raman appeared for DNPA, Digital News Publishers Association and was assisted by Advocate Rahul Balaji. Senior Advocate Rajshekhar Rao appeared for T.M. Krishna, assisted by Vrinda Bhandari, Abhinav Sekhri, Suhrith Parthasarthy and Tanmay Singh.

MADRAS HIGH COURT: NO TDS FOR COMPUTER SOFTWARE PROCURED FROM A NON-RESIDENT

The Court referred to a Supreme Court order to hold that TDS did not apply to a non-resident since his income was not taxable in India.

The Madras High Court has set aside an order of the Income Tax Appellate Tribunal by concluding that the reopening of the assessment was unsustainable since the Assessee would not be liable to deduct Tax at Source (TDS) in respect of the Computer Software, which was procured from a Non-Resident.

The matter titled M/s Financial Software and Systems Private Limited v Commissioner of Income Tax was placed before the Division Bench of the High Court of Madras, comprising Justices T.S. Sivagnanam and Sathi Kumar Sukumara Kurup.

The Appellant – Assessee had filed this petition challenging the order of the Income Tax Appellate Tribunal wherein it upheld the reopening of the assessment of the Assessee u/s 147 of the Income Tax Act, 1961 as valid.

The Court opined that even though the appeal was challenging the validity of the reopening of the assessment, it gave rise to a question of law i.e. whether the Assessee was liable to deduct Tax at Source (TDS) in respect of the Computer Software which was dealt with by them, procured from a Non-Resident and sold in the Indian Market.

A Supreme Court judgment with the citation as (2021) SCC Online SC 159 was relied on by the Court to answer this question of law, wherein it was held that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, was not the payment of royalty for the use of copyright in the computer software, and that the same did not give rise to any income taxable in India, as a result of which the persons referred to in Section 195 of the Income Tax Act, 1962 were not liable to deduct any TDS u/s 195 of the Income Tax Act, 1962.

The Court took this judgment of the Supreme Court into consideration and therefore, chose to decide this case against the Respondent – Authorities and in favor of the Appellant – Assessee. Thus, the reopening of the assessment was held to be unsustainable.

MADRAS HIGH COURT UPHOLDS NOTIFICATION PROHIBITING CRASH GUARDS AND BULL BARS IN MOTOR VEHICLES

The Madras High Court upheld the notification dated 7 December, 2017 issued by the Union Ministry of Road Transport and Highways, prohibiting crash guards and bull bars in motor vehicles.

Multiple petitions were placed before the Division Bench of the High Court of Madras, comprising Chief Justice Sanjib Banerjee and Justice P.D. Audikesavalu challenging the implementation of the notification dated 7 December, 2017 issued by the Union Ministry of Road Transport and Highways.

The notification dated 7 December, 2017 was issued in order to advise all States and Union Territories to ensure that the crash guards in motor vehicles were not permitted as, according to the Union, it was in contravention of Section 52 of the Motor Vehicles Act 1988, which attracted penalty under Sections 190 and 191 of the Act. This matter was about the use of crash guards or bull bars in motor vehicles as several vehicles did not come factory fitted with additional guards in front of the engine, but which were subsequently fitted to protect the impact of any frontal crash on the engine.

The Petitioners – Manufacturers contended that there was no basis to the relevant notification, nor was it evident that any empirical study was conducted to ascertain the perceived ill-effects of crash guards. On the other hand, the Respondent – Authorities had accepted the Union's instructions and enforced the prohibition in such regard in the State.

In order to understand the matter, the Court went through Section 52 of the Motor Vehicles Act, 1988 which prohibited the owner of a motor vehicle from altering the vehicle such that the particulars contained in the certificate of registration are at variance with those originally specified by the manufacturer. However, its second proviso allowed for the alteration of motor vehicles through the authority of the Central Government by prescribing specifications, conditions for approval, retro fitment, etc. The Court noted that the explanation at the end of this section indicated that alteration would imply a change in the structure of the vehicle which resulted in a change in its basic feature.

The Court further noted that crash guards added to the length of the car, provided greater security to the front of a car but altered the basic features of a motor vehicle and thus this was sufficient basis for the issuance of the notification dated 7 December, 2017. The Court therefore, chose not to interfere and observed the following:

"At the end of the day, it appears that public interest may have impelled the Central Government to issue the notice and, on a matter of policy where the Central Government perceives that a thing is necessary in public interest, the court would not willy-nilly intervene unless it finds the policy to be absurd or objectionable to the meanest mind."

The Court, therefore, disposed of these petitions by upholding the notification and ruling that this order would not prevent any representation made by the Petitioners – Manufacturers of crash guards to the Union.

TRIPURA HIGH COURT

TRIPURA HIGH COURT DOES NOT ALLOW PETITIONERS TO ORGANIZE PROTEST RALLY

The Tripura High Court dismissed a writ petition seeking to organize a protest rally by finding that interference with the policy decision was unwarranted.

A Single Judge Court of Justice Arindam Lodh of the High Court of Tripura dealt with this matter titled All India Trinamool Congress & Another v. The State of Tripura & Ors.The Petitioners through this writ petition had sought a direction from this Court to organize a protest rally on 22 September, 2021 protesting against the terrible attacks and inhuman vandalism inflicted on media houses.

A prohibitory order dated 20 September, 2021 was placed by the Respondent – Authorities which prohibited all meetings, processions, public gatherings by any political party in Sadar Police Sub-division with effect from the am (morning) of 21 September, 2021 till midnight of 4 November, 2021. The said order was issued u/s. 144 of the Code of Criminal Procedure, 1973 (CrPC) ordering that any person violating these prohibitory measures would be liable to be prosecuted under the provisions of Section-188 of the Indian Penal Code 1860 (IPC) and as per the provisions of the Disaster Management Act, 2005.

The Petitioners submitted that the government had actuated with malice by issuing a prohibitory order dated 20 September, 2021 as it was aimed only to restrain them from organizing any rally in the city of Agartala. The Petitioners further requested an opportunity to submit representation to the authority concerned for granting permission to organize the protest rally on any future date. Regarding this request, the Court stated that a Court's order was not necessary for such purpose and that they had the liberty to pursue the said cause before the appropriate authority.

The Court perused the prohibitory order dated 20 September, 2021 and found that the government had considered various aspects ranging from the eve of Durga puja, third wave of COVID-19 to the deterioration of the law and order situation if any procession, meetings or public gatherings were permitted.

The judge opined that it was a policy decision and that the Court could not invade the power vested upon the legislatures as well as the executives unless and until a fundamental right was breached. Regarding this, it further observed: "It is entirely upon the government to decide the measures and steps to be taken to maintain law and order in the State and precautionary measures to be adopted on the eve of the threat of the 3rd wave of COVID-19. The Court should not substitute its own judgment for the judgment of the executive in such matters."

The Court agreed that organizing a peaceful rally was a fundamental right as enshrined under Article-19(1)(a)(b) of the Constitution of India. However, it noted that the law imposed reasonable restrictions on it by stating the following:

"In view of this, the State legislature or its executives can impose all reasonable restrictions to achieve certain objects and in the case in hand, the object, the executives intended to achieve is to prevent breach of peace (law and order) in and around the city of Agartala i.e. in the Sadar sub-division and also to take precautionary measures to prevent the deadly corona virus in the crowded city of Agartala".

The Court also perused Section 144 of CrPC and observed that it gave power to issue order in urgent cases of nuisance or apprehended danger.

Thus, the Court found interference with the policy decision as indicated in the prohibitory order as unwarranted and therefore, dismissed the writ petition.

Singapore

PINSENT PINCHES RENEWABLES LAWYER FROM HERBERT SMITH IN SINGAPORE

William Stroll specializes in renewable energy transactions in Southeast Asia.

London-based international law firm Pinsent Masons has hired services of renewable energy partner William Stroll in Singapore.

Stroll was previously associated with Herbert Smith Freehills as a senior energy lawyer.

It is a kind of homecoming for Stroll as he worked with Pinsent Masons in its London office as a corporate solicitor between 2006 and 2011, specializing in corporate finance.

Stroll was with Herbert Smith Freehills in Singapore for three-and-a-half years, focusing on renewable energy transactions in Southeast Asia.

Stroll advises developers, investment funds, independent power producers, and oil and gas majors across a wide range of disciplines.

"Will brings deep market expertise and the relevant skill sets needed to complement our existing energy practice in Asia, and help our clients navigate this changing energy landscape," Melanie Grimmitt, global head of energy at Pinsent Masons, UK, said

According to Grimmitt, Asia is a key market for renewable energy investment as the region's energy consumption is expected to more than double by 2040.

Europe

EXCLUSIVE EUROPEAN ALLIANCE ADVANT LAUNCHED BY THREE LAW FIRMS

Beiten Burkhardt, Nctm and Altana join forces to form the exclusive European alliance.

Three leading European law firms have announced joining forces to launch Advant, an exclusive European alliance, with a pool of 600 professionals and 140 equity partners.

Munich-based Beiten Burkhardt, Nctm in Milan and Paris-based Altana have come under the umbrella of a Swiss Verein.

Under the details announced for the alliance, each of these firms will maintain their independent identities, legal status and brans in their domestic jurisdictions while the Advant brand will become effective when they move beyond their home jurisdictions.

Advant promises to offer seamless service to existing clients in continental Europe and internationally with a specific shared goal of becoming more visible to clients internationally. The three firms had combined revenue of €216 million in 2020 which puts Advant just outside the top 10 European law firms.

Two partners each from the three firms will constitute the leadership structure of a board of six members. There will be leadership groups for practice areas. The presidency will rotate every two years.

M&A partner Jean-Nicolas Soret and Gilles Gaillard will represent Altana in the leadership board, competition partner Philipp Cotta and corporate/M&A co-head Christian von Wistinghausen will represent Beiten while M&A partners Vittorio Noseda and Paolo Montironi, who is also one of Nctm's founding partners, will join the board on behalf of the Italian firm. Cotta will serve as Advant's managing partner and Montironi as senior partner.

"There is a distinctive opportunity in the legal market for an advisor that combines best-of-breed local expertise and relationships with international reach, but very much focused at a European level. This is the gap that Advant fills, offering clients a new perspective and a distinctive advantage as they seek to enter or expand within Europe," Soret said.

Beiten Burkhardt is the oldest and biggest firm in the alliance. Founded in 1990, Beiten would offer services of 260 lawyers, tax consultants and auditors Nctm, founded in 2000, boasts 250 lawyers, whereas the youngest of the lot Altana, founded in 2009, offers services of 85 of its Paris-based lawyers.

Advant will initially cover 11 locations across Europe – Berlin, Brussels, Düsseldorf, Frankfurt, Hamburg, London, Milan, Munich, Moscow, Paris and Rome – while it has international bases in Beijing and Shanghai.

United States

FIRST SMART GLASSES LAUNCHED BY FB IN ASSOCIATION WITH RAY-BAN

In partnership with Ray-Ban, Facebook has launched its first smart glasses, Ray-Ban Stories. Ray-Ban Stories has an integrated 5MP camera and users will be able to record 30-second videos. The communiqué shared by Facebook said that the smart glasses will give an "authentic way to capture photos and video, share adventures and listen to music or take phone calls – so you can stay present with friends, family and the world around you".

Ray-Ban Stories comes in five colors and 20 style combinations – including Wayfarer, Wayfarer Large, Round, and Meteor.

With the integrated 5MP cameras, users can capture spontaneous moments from a unique first-person perspective. There will be hard-wired LED lights to indicate to people nearby when someone is taking photos or videos. With the hands-free video capturing feature, users

can record 30-second videos using Facebook Assistance voice commands or the capture button.

Richer voice will be delivered through the built-in open-ear speakers and richer sound transmission for calls and videos by the three-microphone audio array in the smart glasses. A noise suppression algorithm will enhance the calling experience. The new Facebook View app will allow users to share their point of view, stories, and memories seamlessly with friends and social media followers. "The Facebook View app on iOS and Android makes it easy to import, edit and share content captured on the smart glasses to apps on your phone including Facebook, Instagram, WhatsApp, Messenger, Twitter, TikTok, Snapchat, and more," read the official statement of Facebook.

Content can also be saved to the user's own phone's camera roll and edited and shared from there. Facebook View's new exclusive built-in post-capture enhancements will allow users to create unique content to put a special spin on their posts, the statement from Facebook said.

A portable specially-designed charging case will come with Ray-Ban Stories which allows users charge the device on the go. The price starts at nearly ₹22,000. The smart glass can be purchased

online and also from retail stores in US, Australia, Canada, Ireland, Italy and the UK.

However, experts fear the device can be widely used in surveillance as if you click a photo of someone nearby using the smart glass, a white light from the capture LED hardwired to the camera will notify the person.

The FB statement read, "As with any new device, we have a big responsibility to help people feel comfortable and provide peace of mind, and that goes not only for device owners but the people around them, too. That's why we baked privacy directly into the product design and functionality of the full experience, from the start."

United States

VPN ACCOUNT PASSWORDS FROM 87,000 FORTINET FORTIGATE DEVICES LEAKED

A malicious actor had unauthorizedly disclosed VPN login names and passwords associated with 87,000 FortiGate SSL-VPN devices, network security solutions provider Fortinet confirmed. The company statement reportedly said, "These credentials were obtained from systems that remained unpatched against CVE-2018-13379 at the time of the actor's scan. While they may have since been patched, if the passwords were not reset, they remain vulnerable." Advanced Intel noted that the "breach list contains raw access to top companies" spanning across 74

countries, including India, Taiwan, Italy, France, and Israel" and that "2,959 out of the 22,500 victims are US entities" after the threat actor leaked a list of Fortinet credentials for free on a new Russian-speaking forum called RAMP which launched in July 2021 and on Groove ransomware's data leak site.

A path traversal vulnerability in the FortiOS SSL VPN web portal, CVE-2018-13379, allows unauthenticated attackers to read arbitrary system files, including the session file, which contains usernames and passwords stored in plaintext.

Despite rectifying the bug in May 2019, the security weakness has been repeatedly exploited by multiple adversaries to deploy an array of malicious payloads on unpatched devices, prompting Fortinet to issue a series of advisories in August 2019, July 2020, April 2021, and again in June 2021, urging customers to upgrade affected appliances.

In 2020, CVE-2018-13379 also emerged as one of the topmost exploited flaws, according to a list compiled by intelligence agencies in Australia, the U.K., and the U.S. earlier this year.

United States

END-TO-END ENCRYPTED BACKUPS ANNOUNCED BY WHATSAPP FOR PRIVACY, SECURITY

This will be released as an optional feature and in the coming weeks, WhatsApp will be rolling this out to iOS and Android users.

WhatsApp, which is owned by Facebook, has completed building end-to-end encrypted backups and will soon start rolling out this extra layer of privacy and security protections to users, the company has announced.

With end-to-end encrypted backups, there will be no other messaging service at WhatsApp's scale that will provide this level of security for people's messages.

In a statement the company said, "We are announcing this now to provide the broader technical community with our approach before it's available to our beta testers and eventually everyday users." "In the coming weeks, we will be adding end-to-end encrypted backups as an additional layer of security for those who want it," the company said.

In the event someone chooses to back up their chat history with end-to-end encryption, it will be accessible only to them, and no one will be able to unlock their backup, not even WhatsApp. The company said, "This is a really big privacy advancement, particularly at our scale of more than 2 billion users who send more than 100 billion messages a day." "We believe that this will give our users a meaningful advancement in the safety of their personal messages," it added. This will be released as an optional feature and in the coming weeks, it will be rolled out to iOS and Android users. WhatsApp is reportedly working on other privacy features too.

A recent report said that WhatsApp will soon let users hide their online status from anyone who can't be trusted.

The report said that currently there are no customizable options with 'Last Seen', 'Profile Picture' and 'About' either bing able to be seen by everyone, contacts, or no one at all.

United Kingdom

UK AWARDS CONTRACT TO THREE FIRMS FOR ADVISE ON POST-BREXIT TRADE AGREEMENTS

The six-member CPTPP had earlier agreed to allow the UK to begin the formal negotiation process for entry into the trading bloc.

The top 50 UK law firm TLT and consortium partners McDermott Will & Emery and Canadian law firm Borden Ladner Gervais has been awarded a crucial contract by the UK's Department for International Trade to advise on three post-Brexit trade agreements. The contract is worth £7 million over its lifetime.

The three agreements in question are the Comprehensive and Progressive Agreement for Trans-Pacific (CPTPP), Canada and Mexico.

The contract covers legal advise and support to negotiate the UK's accession to the CPTPP and two bilateral free trade agreements with Canada and Mexico.

The UK government's move to rope in three law firms followed a decision of the six-member nations of the CPTPP, namely Japan, Canada, Singapore, Australia, New Zealand and Mexico, to allow the UK to begin the formal negotiation process for entry into the trading bloc.

TLT, McDermott and Borden Ladner are expected to work in tandem with a network of subcontractor law firms across a total of 11 jurisdictions. They include Australia's Minter Ellison, Mori Hamada & Matsumoto in Japan and Allen Gledhill across Malaysia, Singapore and Vietnam.

According to TLT, the consortium was selected based on the international trade negotiations, international jurisdictions and government advisory work. The firm explained in a statement that it also demonstrated the ability to deliver

Caroline Ramsay

a 'one firm' service across the consortium and wider subcontractor network to provide the 'best value for money' and to promote gender equality across the contract workforce.

TLT has said that it has plans to deploy its innovative IT platform, FutureLaw Solutions, to work with the consortium and its subcontractors. "It is an absolute honor to have been selected to deliver this significant and complex project for the Department for International Trade," Caroline Ramsay, partner at TLT and chair of the firm's international trade group, said.

"We have a proven track record of curating specialist consortia of 'best in class' law firms and lawyers to support the government, and our consortium's collective expertise, combined with TLT's FutureLaw solutions, means we are able to provide a 'global-boutique' trade law service to meet the Department's needs," Caroline Ramsay added.

United States

OGLETREE DEAKINS SETS SHOP IN BELFAST TO BOLSTER IMMIGRATION BUSINESS

The US employment law firm joins hands with Invest Northern Ireland to make Northern Ireland immigration hub.

The US employment law firm Ogletree Deakins has joined hands with the economic development agency Invest Northern Ireland (Invest NI) to launch a legal support office in Belfast.

The firm, rated as one of the biggest and among the best in the immigration business, has plans to increase in a phased manner its team to 78, mainly paralegals, over the next three years.

The Belfast team will work in tandem with its US-based immigration practice group to handle H-1B visas and PERM labor certifications, along with a host of time-sensitive work required for its high-volume business immigration clients.

Invest NI has pledged £312,000 worth of support towards the new jobs, which will be offered to graduates and those with one to three years of paralegal experience. They are expected to generate annual salaries of £1.78 million for the Northern Irish economy.

According to Ogletree Deakins managing director Matt Keen, Northern Ireland's strong pipeline of quality graduates and strong staff retention rates are a key part of the firm's decision to set up shop in Belfast.

Ogletree Deakins' global mobility practice already houses more than 100 immigration attorneys and hundreds of paralegals and other professionals. The firm's revenue from its business immigration and global mobility services has increased by nearly 60 per cent over the past half-decade. The Belfast team in Belfast is expected to provide additional support for the firm's expanding practice.

"Northern Ireland has lots to offer potential investors – skilled and dedicated workforce, great place to live, excellent infrastructure – to name just a few. We are delighted Ogletree Deakins has chosen to locate their new center here, joining a number of other leading firms," Invest NI CEO Kevin Holland said.

United States

HOW PRIVACY PROTECTIONS ARE WEAKENED FOR ITS 2 BILLION WHATSAPP USERS BY FACEBOOK

Users are assured by WhatsApp that no one can see their messages but the company has an extensive monitoring operation and regularly shares personal information with prosecutors.

Mark Zuckerberg cited Facebook's global messaging service, WhatsApp, as a model when unveiling a new "privacy-focused vision" for Facebook in March 2019. "We don't currently have a strong reputation for building privacy protective services," the Facebook CEO acknowledged and wrote that "I believe the future of communication will increasingly shift to private, encrypted services where people can be confident what they say to each other stays secure and their messages and content won't stick around forever. This is the future I hope we will help bring about. We plan to build this the way we've developed WhatsApp."

WhatsApp's signature feature – end-to-end encryption – was the focus of Zuckerberg's vision, which he said the company was planning to apply to Instagram and Facebook Messenger.

End-to-end encryption converts all messages into an unreadable format that is only unlocked when they reach their intended destinations. He said that WhatsApp messages are so secure that nobody else –not even the company – can read a word. Zuckerberg in his testimony to the US Senate in 2018 said, "We don't see any of the content in WhatsApp."

The point is emphasized by WhatsApp consistently in the form of a similar assurance that appears on screen before users send messages "No one outside of this chat, not even WhatsApp, can read or listen to them."

But the assurances are not true for WhatsApp has over 1,000 contract workers filling the floors of office buildings in Austin, Texas, Dublin and Singapore, where they examine millions of pieces of users' content.

While seated at computers in pods organized by work assignments, these hourly workers use special Facebook software to sift through streams of private messages, images and videos that WhatsApp users have reported as improper. These are then screened by the company's artificial intelligence systems. Judgment is passed in typically less than a minute on whatever flashes on their screens by these contractors – claims of everything from fraud or spam to child porn and potential terrorist plotting.

While WhatsApp assures users that their privacy is sacrosanct, it is also policing them which makes for an awkward mission.

ProPublica obtained a 49-slide internal company marketing presentation from December which emphasizes the "fierce" promotion of WhatsApp's "privacy narrative".

WhatsApp's "brand character" is compared to "the Immigrant Mother" and a photo of Malala Yousafzai, who survived a shooting by Taliban and became a Nobel Peace Prize winner, is displayed in a slide titled "Brand tone parameters." The presentation does not mention the company's content moderation efforts. Teams of contractors in Austin and elsewhere review WhatsApp messages to identify and remove "the worst" abusers, WhatsApp's director of communications, Carl Woog, acknowledged.

But he told ProPublica that the company does not consider this as content moderation saying, "We actually don't typically use the term for WhatsApp. WhatsApp is a lifeline for millions of people around the

world. The decisions we make around how we build our app are focused around the privacy of our users, maintaining a high degree of reliability and preventing abuse."

Meanwhile, Facebook says of WhatsApp's corporate siblings, Instagram and Facebook that some 15,000 moderators examine content on Facebook and Instagram, neither of which is encrypted. Quarterly transparency reports are released detailing how many accounts Facebook and Instagram have actioned for various categories of abusive content. There is no such report for WhatsApp.

Deploying an army of content reviewers is just one of the ways that Facebook has compromised the privacy of WhatsApp users. Together, the company's actions have left WhatsApp – the largest messaging app in the world, with two billion users – far less private than its users are likely understand or expect.

A ProPublica investigation, drawing on data, documents and dozens of interviews with current and former employees and contractors, reveals how, since purchasing WhatsApp in 2014, Facebook has quietly undermined its sweeping security assurances in multiple ways.

United States

KIRKLAND & ELLIS EYES UTAH LAW SCHOOLS WITH SALT LAKE CITY LAUNCH

The global giant is in a buoyant mood after it topped Mergermarket's global M&A advisory league table for the first half of 2021.

The Chicago-based global firm Kirkland & Ellis has announced its launch in Salt Lake City. The firm has ambitious plans to attract new legal talent by entering into tie-ups with some of the top law schools of Utah for the purpose.

The global giant is eyeing ties with Utah schools like Brigham Young University's J. Reuben Clark Law School and the University of Utah's S.J. Quinney College of Law.

"With an extraordinary talent pool of highly skilled attorneys, as well as an excellent academic community, including Brigham Young University's J. Reuben Clark Law School and University of Utah's S.J. Quinney College of Law, having an office in Salt Lake City enhances our ability to attract exceptional legal talent and expand our capacity to meet increasing client demand," Jon Ballis, chairman of Kirkland's executive committee, said.

Kirkland is sending some of its prominent lawyers including for the Salt City Launch, including its corporate partner Travis Nelson and litigation partner Brigham Cannon, both alumni of Brigham Young University's J. Reuben Clark Law School. They are relocating from New York and Washington DC respectively. They will be joined by investment funds

KIRKLAND & ELLIS

partner Warren Goodworth, who is relocating from the firm's headquarters in Windy City.

Of late Salt Lake City is being dubbed as the 'Silicon Slopes' due to its growing start-up and venture capital scene. Several prominent law firms like Dentons, Quinn Emanuel and Lewis Brisbois have already set up shops in Salt Lake City with an eye to cash in on the burgeoning commercial activities.

Kirkland is in a buoyant mood after it topped Mergermarket's global M&A advisory league table for the first half of 2021 by deal count in July, notching 420 deals worth approximately $317 billion.

The firm is already planning big with new launches to further expand and consolidate its position in the US and global market. The Utah launch follows the recent launch in the Texas capital Austin, enabling it to set shops in three major Texas cities. It already has offices in Houston and Dallas.

SHARDUL AMARCHAND MANGALDAS & CO. ADVISED BIOCON BIOLOGICS LIMITED OFFER OF 15% STAKE TO SERUM INSTITUTE

Shardul Amarchand Mangaldas & Co. advised Biocon Biologics Limited ("BBL"), a subsidiary of Biocon Limited, pursuant to which BBL will offer approximately 15% stake to Serum Institute Life Sciences Private Limited ("SILS") at a post-money valuation of USD 4.9 billion, for accessing 100 million doses of vaccines per annum for 15 years, primarily from SILS's upcoming vaccine facility in Pune with commercialization rights of the SILS vaccine portfolio (including COVID-19 vaccines) for global markets. The date of signing the deal was 16 September 2021.

The transaction is the first vaccine block strategic deal for supply of COVID-19 vaccines, and one of the largest strategic vaccine deals in the world.

Kiran Mazumdar-Shaw, Executive Chairperson, Biocon Limited & BBL, commented: "This alliance will complement the strengths and resources of the two leading players in vaccines and biologics. Our shared vision of building large scale businesses having global impact makes it a unique and synergistic value creation opportunity."

Adar Poonawalla, CEO, Serum Institute of India, commented: "We look forward to complementing each other's capabilities and capacities in vaccines and biologics, with the objective of addressing inequitable access both in emerging and developed markets for life saving vaccines and biologics."

The transaction team was led by Iqbal Khan, Partner; Ambarish, Partner; Prashant Saran, Senior Consultant; Jamshed Bhumgara, Partner; Aditi Tralshawala, Principal Associate; Devika Menon, Senior Associate; Saloni Kothari, Associate.

The due diligence team was led by Iqbal Khan, Partner; Ambarish, Partner; Aditi Tralshawala, Principal Associate; Tarini Sardesai, Associate; Saloni Kothari, Associate; Soumee Saha, Associate (General Corporate); Shahana Chatterji, Partner; Protiti Roy, Senior Associate; Nidhi Chikkerur, Associate (Regulatory); Mukul Baveja, Partner; Jogeshwar Mishra, Principal Associate (Intellectual Property); Meghna Rajadhyaksha, Partner; Gourav Mohanty, Senior Associate (Litigation); Ashoo Gupta, Partner; Riddhi Shah, Associate (Real Estate). The competition team was led by Aparna Mehra, Partner; Gauri Chhabra, Partner; Rahul Shukla, Senior Associate; Kshitij Sharma, Associate. Akshita Alok, Senior Associate (Bangalore Office) assisted the team with the execution formalities for the transaction in Bangalore.

Allegro Capital Advisors and Bobby Parikh Associates advised BBL on the commercial and tax aspects, respectively. Veritas Legal and Deloitte advised SILS on the legal and tax aspects, respectively.

AZB, TRILEGAL ACT ON HDFC LIFE ACQUISITION OF EXIDE LIFE

In India's biggest insurance deal, HDFC Life acquired Exide Life for ₹6,687 crore.

Two Indian law firms played a key advisory role in India's largest insurance company acquisition deal in which HDFC Life acquired Exide Life Insurance Co.

The deal was valued at ₹6,687 crore (US$915 million).

AZB & Partners, led by Partners Ashwath Rau, Kashish Bhatia and Arvind Ramesh along with Senior Associates Rishikesh Desai and Chitrangda Singh, were the legal advisors to HDFC Life.

The Trilegal team was led by Partners Sridhar Gorthi and Ashwyn Misra along with Counsel Deep Choudhuri and Associates Arunima Singal, Rucha Kolte, Ariba Fahiem, Mayank Jain and Rhea Sampat advised Exide Industries and Exide Life.

The Corporate Governance & Compliance team was led by Rajesh Modani, Principal Consultant; Ashima Chhatwal, Senior Consultant; and Ansif Latheef, Consultant.

CYRIL AMARCHAND MANGALDAS ADVISES CARBORUNDUM UNIVERSAL

Cyril Amarchand Mangaldas advised Carborundum Universal Limited (CUMI) on a strategic majority investment in PLUSS Advanced Technologies Private Limited (PLUSS) through a combination of a primary and secondary acquisition. The total deal size is approx. ₹115 Crores.

The General Corporate Practice of Cyril Amarchand Mangaldas advised CUMI on the Transaction. The Transaction team was led by L. Viswanathan, Partner; and Gautam Gandotra, Partner; with support from Arnav Shah, Principal Associate. The Transaction was signed on August 26, 2021.

INDIAN FIRMS HELP SEAL THE BILLDESK-PAYU DEAL

The PayU acquisition of BillDesk will make the combined entity a top global online payment provider.

Indian law firms have played key roles in the acquisition of the home-grown payment gateway BillDesk by the global major Prosus Ventures (PayU).

The deal worth $4.7 billion will make the combined entity one of the top global and domestic payment gateways with an expected annual turnover of $147 billion.

The deal between BillDesk and PayU is one of the largest acquisitions in India's digital payments landscape and by far the biggest consolidation move in the fast-growing sector.

The deal also means the exit of BillDesk's existing investors General Atlantic, TA Associates, Temasek, Clearstone Ventures, and Visa from the new combined entity.

Law firm Trilegal advised its long-term client Prosus Ventures through its payments and fintech arm PayU. The Trilegal team was led by Yogesh Singh (Partner and Co-head, Corporate Practice Group). He was assisted by Harsh Jain (Corporate Partner) and Nisha Kaur Uberoi (National Head of the Competition Practice).

Other key partners involved in the Trilegal team included Nikhil Narendran and Jyotsna Jayaram (both Technology), Atul Gupta (Employment), Himanshu Sinha (Tax) Gautam Chawla (Competition).

Other attorneys involved in the deal team were Sibani Saxena, Sumi Saikia, Sonam Mathur, Deepthi Rajeev and Komal Dani, (Counsel); Saurabh Arora, Principal Consultant; Ratnavel Pandian, Harshita Parmar, Mathew George, Thomas J. Vallianeth, Parvathy Tharamel and Manasa Sundarraman (Senior Associates); Monik Damania (Senior Consultant); Madhav Tampi, Aishwarya Singh, Namratha Satish, Eshita Jain, Vividha Bawa, Ishan Arora, Rahat Dhawan, Parumita Pal, Pramothesh Mukherjee, Rishi Kauntia, Samriddha Gooptu, Sarthak Pande, Simran Kathuria, Shivangi Chawla, Shreya Ramann, Samvit Ganesh, Anjana Ravi, Utkarsh Srivastava, Divya Padmanabhan, Ishani Sharma and Joseph Moses Parambi (Associates).

Shardul Amarchand Mangaldas (SAM) advised Billdesk and its founders. The SAM team was led by Raghubir Menon, Regional Practice Head – M&A and Private Equity, General Corporate, Natashaa Shroff, Partner, General Corporate, Shiladitya Banerjee, Partner, General Corporate, Tanmayee Chaulkar, Senior Associate and Rohan Singh, Associate.

The SAM Due Diligence Team included Raghubir Menon, Regional Practice Head – M&A and Private Equity, General Corporate, Natashaa Shroff, Partner, General Corporate, Shiladitya Banerjee, Partner, General Corporate, Tanmayee Chaulkar, Senior Associate, Pranav Sethi, Associate, Rounak Agarwal, Associate, Madhurika Durge, Associate and Niharika Sharma, Associate.

While the Tax Team comprised Gouri Puri, Partner and Rahul Yadav, Principal Associate, while the Competition Team included Aparna Mehra, Partner, Rahul Shukla, Senior Associate and Kshitij Sharma, Associate.

The Intellectual Property team was made of Abhay J.V., Partner and Leoni Mahanta, Principal Associate.

AZB & Partners advised the selling shareholders, by a team led by Partners Vaidhyanadhan Iyer and Vipul Jain.

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SUDIPTA ROUTH JOINS BACK LUTHRA

Sudipta Routh has joined back L&L Partners, Mumbai Office with a team of 3 lawyers! He worked with Luthra & Luthra Law Offices from 2010 to 2015 to move onto co-founding Agram Legal Consultants.

Sudipta comes with 25 years of rich experience with a dual qualification from India and England & Wales. An NLS, Bangalore Alumina, Sudipta specializes in structuring funds, joint ventures, acquisitions and formulating entry and investment strategies. He led Mylan's billion-dollar acquisition of Famy Care, Star Dental's (Clove) acquisitions and establishment of India's largest dental chain, Electricite Du France (EDF) solar and wind JVs in India, Tech-Mahindra & Mahindra's joint acquisition of Pininfarina of Italy.

This year, he brought Birkenstock into India and established their countrywide digital and physical franchise operations.

He joins a group of 8 other partners who have joined Luthra back in the last 1 year.

RACHIKA SAHAY QUITS HSA ADVOCATES TO JOIN ARGUS PARTNERS

The HSA Advocates partner will be based in the firm's Delhi office.

Indian law firm Argus Partners has announced the appointment of Rachika Sahay as a partner in its Delhi office.

Sahay has moved over from the HSA Advocates. She will focus on her core specialization in corporate and infrastructure practice.

A 2005 graduate from the National Law Institute University, Bhopal and an LLM from London School of Economics & Political Science, Sahay carries with her rich and diversified experience as a lawyer.

Prior to joining HSA Advocates in 2018, she worked as General Counsel of Ostro Energy. She has previously also worked at Trilegal for over five years.

After quitting Trilegal in 2014, Sahay was associated with the global oil and gas services company Weatherford as its sole legal counsel in India.

"We warmly welcome Rachika to the Argus family. Rachika comes with 16 years of rich experience in the infrastructure space. Her joining will significantly bolster our infrastructure practice as well as the corporate practice," Argus Partners managing partner Krishnava Dutt said.

She has experience in handling corporate transactions including domestic as well as cross-border mergers and acquisitions, private equity investments and joint ventures, besides immense experience in Energy and Infrastructure sectors including power, oil and gas and mining.

HFW HIRES PARTNER IN HONG KONG TO STRENGTHEN DISPUTES TEAM

Karen Cheung joins HFW from independent firm Li & Partners to bolster yacht and private jet teams. Holman Fenwick Willan (HFW) has strengthened its Hong Kong disputes team with a new hire that promises to grow its private client work in the region.

HFW has announced that Karen Cheung is joining the London-based sector-focused global law firm. Cheung has moved over from Hong Kong's independent Li & Partners as a partner. She had in the past spent approximately 10 years with international firms DLA Piper and Ince & Co.

HFW has so far added nine new disputes partners in 2021, including hires in Dubai, Singapore and Sydney.

Cheung, a former barrister, advises ultra-high-net-worth (UNHW) individuals and families in Hong Kong and China on a wide range of disputes, including contentious probate litigation, matrimonial proceedings and land disputes.

Her commercial practise focuses on corporate disputes, including shareholder and joint venture claims for state-owned, multi-national and closely held family enterprises.

"We're very pleased to welcome Karen to HFW. She is an outstanding commercial litigator with a strong following, as well as a busy practice for ultra-high-net-worth individuals and families in Hong Kong and China, which will complement our leading yacht and private jet practices... We look forward to working with Karen to continue to drive our litigation and disputes offering across

Hong Kong, China and the wider Asia region," Noel Campbell, HFW's global head of litigation, said.

Cheung said HFW's strength in international disputes persuaded her to join the firm. "I'm looking forward to joining a firm with such strength in disputes around the world and with such a long history in Hong Kong. HFW is one of the most active firms in the Hong Kong High Court and Hong Kong International Arbitration Centre, and its extensive international network and premier client base provides an excellent platform for me to continue to build my practice as a litigator, arbitrator and mediator."

Cheung is a fellow of both the Chartered Institute of Arbitrators and Hong Kong Institute of Arbitrators, having handled more than 50 international arbitrations – including commercial and shipping arbitration under the Hong Kong International Arbitration Centre, London Maritime Arbitration Association and ICC rules – as well as arbitration-related court proceedings.

ALLEN & OVERY PICK HALF A DOZEN PARTNERS IN SOUTH AFRICA FROM A RIVAL FIRM

The team of six partners join Allen & Overy from Linklaters ally Webber Wentzel in Johannesburg.

UK Magic Circle firm Allen & Overy has picked up a team of six partners from Linklaters' South African ally Webber Wenzel to strengthen its practice in Johannesburg.

The move comes almost five months after its Johannesburg managing director Lionel Shawe had quit the firm in April this year to join the US firm White & Case after an association that lasted for seven long years since the opening of its Johannesburg office in 2014.

Allen & Overy (A&O) has regurgitated its trust in South Africa as a strategic location for wider penetration in the African market.

With the six-partner team joining it, Allen & Overy has bounced back with a big bang to bolster its banking and finance offering in Johannesburg.

The new team specializing in banking and projects matters consists of partners Ryan Nelson, Alexandra Clüver, Alessandra Pardini, Alexandra Felekis, Gillian Niven and Mongezi Dladla.

Nelson re-joins Allen & Overy after a decade. He had previously worked in its London headquarters as a senior associate between 2006 and 2011. Nelson is slated to lead the firm's local banking practice. He is dual-qualified to practise South African and English law. He specializes in general corporate lending, acquisition finance, leveraged finance, real estate finance, fund finance, project finance and restructuring.

Clüver advises clients on the development and financing of projects in the energy, infrastructure and oil and gas sectors in South Africa and the wider Sub-Saharan Africa region for domestic and international clients. She was with Webber Wentzel as a partner for more than a decade, including four years as head of its project finance team. She handles equity and debt funding structures as well as private equity and secondary market activities.

Pardini, on the other hand, was with Webber Wentzel only for a few months. She was previously associated with firms Rudolph Bernstein & Associates and Roodt. She carries extensive experience in advising clients on construction and project development in the mining, energy and infrastructure sectors. Her specific focus lies in engineering, procurement and construction arrangements, operations and maintenance contracts, power purchase agreements and concessions, and public-private partnership arrangements.

Partners Felekis, Niven and Dladla, who all specialize in matters across the mining, energy and infrastructure sectors, covering environmental and regulatory as well as construction and financing expertise, will join Clüver and Pardini in the projects team.

According to Allen & Overy's senior partner Wim Dejonghe, South Africa would play a key part in the firm's broader Africa strategy, while explaining that the new hires will work closely with the firm's other banking and projects groups across its global network on transactions and disputes throughout Africa.

"By focusing on the complete integration of the new teams into the wider network, we will ensure that our South African banking and projects practices enjoy the full benefit of A&O's global platform and vice versa," Johannesburg managing partner Gerhard Rudolph said.

CAM NATIONAL FUNDS HEAD QUITS FIRM TO SHIFT INHOUSE

Shagoofa Rashid Khan joined National Investment and Infrastructure Fund (NIIF) in Mumbai as its group general counsel and head of corporate affairs.

Shagoofa Rashid Khan, the national funds and investments practice head at Cyril Amarchand Mangaldas (CAM) has quit the firm after being associated with it for a little over five years.

She joined National Investment and Infrastructure Fund (NIIF) in Mumbai as its group general counsel and head corporate affairs earlier this month.

A graduate of Osmania University, she did her LLM from the University of Mumbai.

She carries 23 years of experience across structuring funds, managed accounts, fund documentation, private equity, acquisitions/exits/restructuring/joint ventures and strategic initiatives, international taxation and planning, corporate and commercial laws, business advisory, compliance and ethics advisory, audit and finance.

Khan started her legal journey with a stint with Nishith Desai Associates in 2002 as head of real estate funds and international tax policy practices. After spending four years with the firm, she was associated with Kotak Investment Advisors Limited as senior vice president and legal head for nearly eight years. She moved over to Tata Services Limited in the same capacity in 2013. She had a seven-month stint with IDFC Alternatives Limited for seven months before joining CAM in 2016 where she spent over five years.

She is also a qualified chartered accountant and a company secretary.

"It has been an amazing professional journey of 23 years... Am excited to continue my story with NIIF and am looking forward to this new beginning, new learnings, new friendships and new milestones," Khan said in a social media post.

SONALI KHANNA JOINS COCA-COLA INDIA AS VICE PRESIDENT AND OPERATING UNIT COUNSEL

Sonali replaces Anjuli Kelotra who will take on a global assignment in the company.

Coca-Cola has announced the appointment of a new General Counsel in India. Sonali Khanna joins the company as Vice President and General Counsel for Coca-Cola India and South West Asia. She replaces Anjuli Kelotra in the role. Coca-Cola has said that Anjuli will be taking on a global assignment.

Sonali brings with her rich and varied experience of over 24 years, including FMCG, Satellite Communications and Technology companies like Hindustan Coca-Cola

Beverages, GSK Consumer, and Hughes Network Systems.

She is a new addition to Coca-Cola's leadership team for the region to further drive the Company's purpose-driven approach. The new structure is designed to enable the India & South West Asia business to be a growth engine for The Coca-Cola Company, by capitalizing on emerging opportunities while continuing to build on talent development.

Sonali, a product of the prestigious Sri Ram College of Commerce (Delhi University), did her Company Secretary course from ICSI and LL.B from Delhi University.

According to the company, Sonali will be responsible for providing oversight and leadership over all legal matters relating to the Operating Unit (OU), with a focus on strategic legal support, as well as business advise and solutions. She will be actively collaborating with multiple stakeholders, including the Coca-Cola global network of legal professionals, as well as the company's colleagues throughout the Enterprise.

"It is our constant endeavor to strengthen the leadership team for a strong sustainable future growth and address the developing business needs. I am delighted to welcome Sonali on this exciting journey. Sonali brings a wealth of experience in strategic legal support, and her contributions will augment our journey towards Emerging Stronger, together as a system," Sanket Ray, President, India and Southwest Asia said.

Sonali was previously associated with Goodyear India Limited as Head - Legal, Compliance and Company Secretary.

MISHCON DE REYA'S INTERNATIONAL ARBITRATION CHIEF QUITS

Karel Daele is all set to join rival firm Taylor Wessing after serving notice period at Mishcon

Mishcon de Reya's head of international arbitration Karel Daele has resigned from the post after a nine-year-long association with the London-based firm. He is all set to join the rival London firm Taylor Wessing after completing his notice period.

Daele, a partner at Mishcon, is credited for building up the firm's international arbitration practice, particularly in investor-state disputes.

Daele primarily focuses on emerging markets, particularly in African-related arbitrations. He had spent six years at Tanzanian firm Mkono & Co Advocates before joining Mishcon.

Daele has rich and varied experience, having worked at leading arbitration practices at Wilmer Hale, Freshfields Bruckhaus Deringer and leading Belgian independent Stibbe earlier in his career.

Taylor Wessing is expected to thrive on Daele's combination of global insights, arbitral awareness and solid commercial sensibility. It will benefit from his insights into ICC and LCIA arbitrations. At the same time, his civil law

qualification supports the firm's German and Brussels offices, as does his African-related insights for French clients.

"We're seeing an increasing demand for lawyers who have a track-record of success in respect of complex international arbitrations. We continue to invest in our disputes and investigations group because of the increasing client demand, and Karel's appointment significantly strengthens our team so that we can provide the highest quality of representation for our clients," Taylor Wessing UK managing partner Shane Gleghorn said.

A Mishcon spokesperson formally acknowledged Daele's contribution to the firm.

"In the nine years, Karel has been a partner at Mishcon de Reya he has played a key role in developing our international arbitration practice. We thank him for all his hard work and wish him well in his new role," the Mishcon spokesperson said.

DISPUTES LAWYER MOHIT BAKSHI JOINS L&L PARTNERS

Delhi-based Bakshi quits J. Sagar Associates to join Rajiv Luthra's L&L Partners in its New Delhi office.

Delhi-based disputes lawyer Mohit Bakshi has joined L&L Partners, opting to quit J. Sagar Associates after a long stint with the firm.

Bakshi, an LLB (Hons) from Vivekananda Institute of Professional Studies, Guru Gobind Singh Indraprastha University (GGSIPU), New Delhi in 2007, was associated with JSA as a partner in the litigation practice.

He carries with him over 13 years of experience in the areas of civil and corporate commercial litigation. His areas of expertise include corporate and commercial disputes in Courts as well as Arbitration.

Bakshi has extensive experience in advising and handling litigations or arbitrations for Companies involved in manufacturing, processing, trading & import of food products, drugs & pharma, hospitality & leisure, airlines & travel, and fast-moving consumer

goods (FMCG). He has extensive experience of handling matters related to white-collar crimes involving diverse issues.

Bakshi has joined L&L Partners of Rajiv Luthra after the much publicized and bitter legal battle between the firm's founders Luthra and Mohit Saraf leading to Saraf setting up his own firm Saraf & Partners in July.

Bakshi will be based out of L&L Partners New Delhi office.

ASIAN PAINTS GETS NEW GENERAL COUNSEL IN AMI PARIKH

Parikh was previously associated with prestigious firms like AZB & Partners and Cyril Amarchand Mangaldas.

Prominent Mumbai-based lawyer Ami Parikh has joined Asian Paints as its General Counsel. She was heading the Legal & Compliance team at Experian India, which she had joined in 2020.

Ami is seen as a versatile lawyer who was in the past associated with some of the top Indian law firms. She was associated as a partner with AZB & Partners for a couple of years. Before joining AZB & Partners Ami headed the Transactions Support Group at Cyril Amarchand Mangaldas. She was associated with CAM for nearly a decade.

A graduate from Government Law College, Mumbai in 2000. She also had stints with Hariani and Company, DSK Legal and Malvi Ranchoddas & Co.

TWITTER INDIA HIRES TECH AND PRIVACY LAWYER KAPIL CHAUDHARY AS SENIOR LEGAL COUNSEL

As Senior Legal Counsel, India, Chaudhary will oversee legal affairs for Twitter India's business.

Twitter India has enlisted the services of the Delhi-based tech and privacy lawyer Kapil Chaudhary as its Senior Legal Counsel.

In his new role, Chaudhary will be a part of Twitter APAC International Legal Team and will oversee legal affairs for Twitter India's business.

"I'd like to express my gratitude for the warm welcome that I received the last few weeks as I stepped into a new role at Twitter India. As Senior Legal Counsel, India, I am part of Twitter APAC International Legal Team and will oversee legal affairs for Twitter India's business," Chaudhary wrote on his LinkedIn page.

A product of the Air Force School, Chaudhary did graduation with a major in journalism and opted to join the Faculty of Law, Delhi University to do LLB. Chaudhary started his legal career as a senior associate with Fox Mandal in 2000 before joining Watson, Farley & Williams, Singapore. Subsequently, he was associated with Star News as Assistant Vice President Legal.

Prior to joining Twitter India, Chaudhary worked with some of the leading companies in in-house roles across multiple industry domains, including as Counsel IBM, Singapore. He has carved a niche for himself as a tech and privacy lawyer over the years.

NATASHA HARRISON QUITS BOIES SCHILLER AS ITS LONDON DEPUTY CHAIR

Natasha cited travel restrictions to the US as the prime reason behind her decision to step down.

Natasha Harrison, the London-based deputy chair of New York litigation specialists Boies Schiller Flexner, has announced her decision to quit the firm.

She has cited travel restrictions to the US in wake of the COVID-19 pandemic as the reason behind her decision saying running a US firm from overseas over an extended period is impractical.

"I'm sitting in London running a US firm with managing partners who are there, but I can't be there... You need to be present," she has said. She would, however, stay on as one of four managing partners of the firm at least till the end of the current year.

Natasha Harrison was being lined up to be the firm's next leader and had emerged as the heir apparent to the firm's chair and co-founder David Boies following her promotion from co-managing partner to the deputy chair role in December last year after fellow co-managing partner Nicholas Gravante quit for Cadwalder Wickersham & Taft. Boies Schiller had witnessed a tumultuous 2020 with the continuous departure of partners. It is understood that the firm's lawyer headcount came down by 41 per cent from 300 to 177 attorneys last year while its revenue slumped by 38 per cent to $250 million.

Natasha Harrison had joined Boies Schiller in 2013 from Bingham McCutchen to set up and lead its London office as managing partner. She joined the firm's executive committee in October 2017.

CYBER SECURITY for LEGAL SECTOR?

Some awareness, regular updation, following the outlined processes, continuous monitoring of cyber security practices at regular intervals, can be useful to avoid major cyber-threats

Legal sector was taken aback, during May-2020, with the news of the ransomeware cyber attack, on well known law firm that provides legal services to entertainment and media industry in USA. This one example, vividly illustrates the need for cyber-awareness and cyber-security for legal sector. The attack was rumored to involve a hacking group that previously obtained, huge ransom amount using their REvil ransomware. The hacking group stole 756 gigabytes of sensitive data which included emails, contracts, nondisclosure agreements, phone numbers and email addresses. (1 gigabyte equals approximately 60k+ word pages). The worst form of cyber-attacks is ransomware because it blocks access to an organization's computer systems until a ransom is paid. Meanwhile, the hackers can continue to grab data, which they can threaten to release if the ransom demand isn't met.

With widespread mobile applications and usage becoming more common for all the activities including business applications, cyber security's importance can't be overstressed. The lifeline of the legal sector is in data base, which is the base to draft / defend / file / fight or execute the business deals and many times it is critical and sensitive too. The digital transformation plans will always introduce some element of cyber-risks and this will go on. No one can offer 100% sure cyber-security, but awareness and conscious efforts can reduce major bad surprises.

Post May-2018, GDPR / Data privacy legislations covered the law firms as data controllers because they process and store large volumes of confidential client data. This commercially sensitive information makes them an attractive target for malicious cyber-attacks. It can be used to pressure firms into paying large ransoms or to sell on the dark web and example cited above confirms the possibility. The cyber-breaches can have an irreparable impact on law firms with a risk of reputational damage coupled with heavy penalties under GDPR.

The pandemic environment led to forced multifold increase in digital mode usage which increazed cyber-security's importance further. The majority businesses were constrained to adopt digitized mode of working and legal sector could not remain aloof. Legal sector was vulnerable to cyber-threats generally. But with more than 90% of legal activities moving on digital platform, made it more vulnerable. Before the pandemic, law firms had the luxury of taking time to carefully consider the implications of new working practices and also had an option of personal meetings / in-person conferences. These options were closed during pandemic. Further, when the governments announced lockdown in March-2020, law firms were forced to quickly overcome these working obstacles. Ready or not, they were faced with a sudden remote working test run. Due to the scale and speed of this change, many legal firms have unknowingly introduced critical vulnerabilities into their systems. Majority rushed to maintain 'business as usual' during pandemic, while missing to update cybersecurity or protection.

This transformation of working mode from office to work-from-home added to the vulnerability. Unfortunately, hackers are aware of this sudden spike in lax security measures, creating opportunities for them to exploit. Due to pandemic, luckily, we didn't find major breaches in legal sector, but the past may not guarantee future safety, as we have one big cyber-attack as mentioned above.

ATUL JUVLE
General Counsel, Compliance Officer &
Company Secretary- India & South Asia

The new digital working options not only provided advantage of working at each one's pace, but also considerably reduced the cost and time loss in traveling

All this necessitated to be aware of cyber-threats and cyber-security. One doesn't require to be cyber-expert but everyone needs to be cyber-aware.

The vulnerability points normally are data storage, online research activities, data transfer, data accessibility / portability and innocent silly process misses. The vulnerable modes are work-from-home scenario, technological platforms, Intermediaries, storage method, facilities managements. Out of this, the work-from-home needs more attention and training, as vulnerability is more. The mitigation options could be anti-virus locks, encryption, use of VPN, access control etc. along with regular continuous training and monitoring.

The new digital working options not only provided advantage of working at each one's pace, but also considerably reduced the cost and time loss in traveling. The new options adopted during pandemic, proved more flexible with other advantages, and hence appreciated as better options to previous ones. As the lockdown begins to lift across the globe, the activities returning to normal level / mode, law firms need to act swiftly in order to remain cyber resilient. This should involve eliminating security gaps, designing and deploying advanced security solutions, and proactively and genuinely identifying critical vulnerabilities, scaling up training & monitoring activities. It's a known fact that, whatever we do, its not possible to have a 100% bullet-proof strategy but one can at least wear a bullet-proof jacket to be safe from majority risks.

All these transformations, have made it obligatory for each legal professional to know and also to understand cyber-security to prevent a taste of fire. Generally, one is expected to be at least aware of - ***ABCDE***

Always properly log out of online working platform and also to lock the laptop/desktop, when not in work mode. Good number of violations, not from legal sector, but from industries proved that, not logging out from the internet can expose system to third party, for monitoring your activities, stealing or even manipulating the data. Hacking becomes easy when systems are open and no one is working actively on the same.

Be careful when you click, as its your consent to risk or reward. So unless one is sure about the

source of attachment or the site / new link, one should not click. Please do check the url or source, while going through forwarded information. The ransome attack mentioned in the beginning was a result of spam email. Good number of malware or cyber attack are introduced in system, through phishing emails. The phishing emails is one of the biggest cyber threats. One has to be very careful, while handling emails and attachments from unknown senders.

Cyber security aware and updated. Not the expertise, but basic awareness with knowledge of threats can help to reduce risks considerably. Constant communicaiton at regular intervals can be impactful.

Data security / storage / transfer. Conscious efforts to ensure care and concern while storing / transferring / processing the data. Data access should be restricted on the basis of needs as well as authority basis. Confidential / senstive data handling processes have to be followed religiously without any exception.

Extra attention, while using unknown network or public network. Even un-protected home wifi is subject to vulnerability of breach. Extra care is basic need while using the public network. One must check and confirm the security of network at home.

Some awareness, regular updation, following the outlined processes, continuous monitoring of cyber security practices at regular intervals, can be useful to avoid major cyber-threats.

ABOUT THE AUTHOR

Author: **Atul Juvle**

Designation: *General Counsel, Compliance Officer & Company Secretary-India & South Asia*

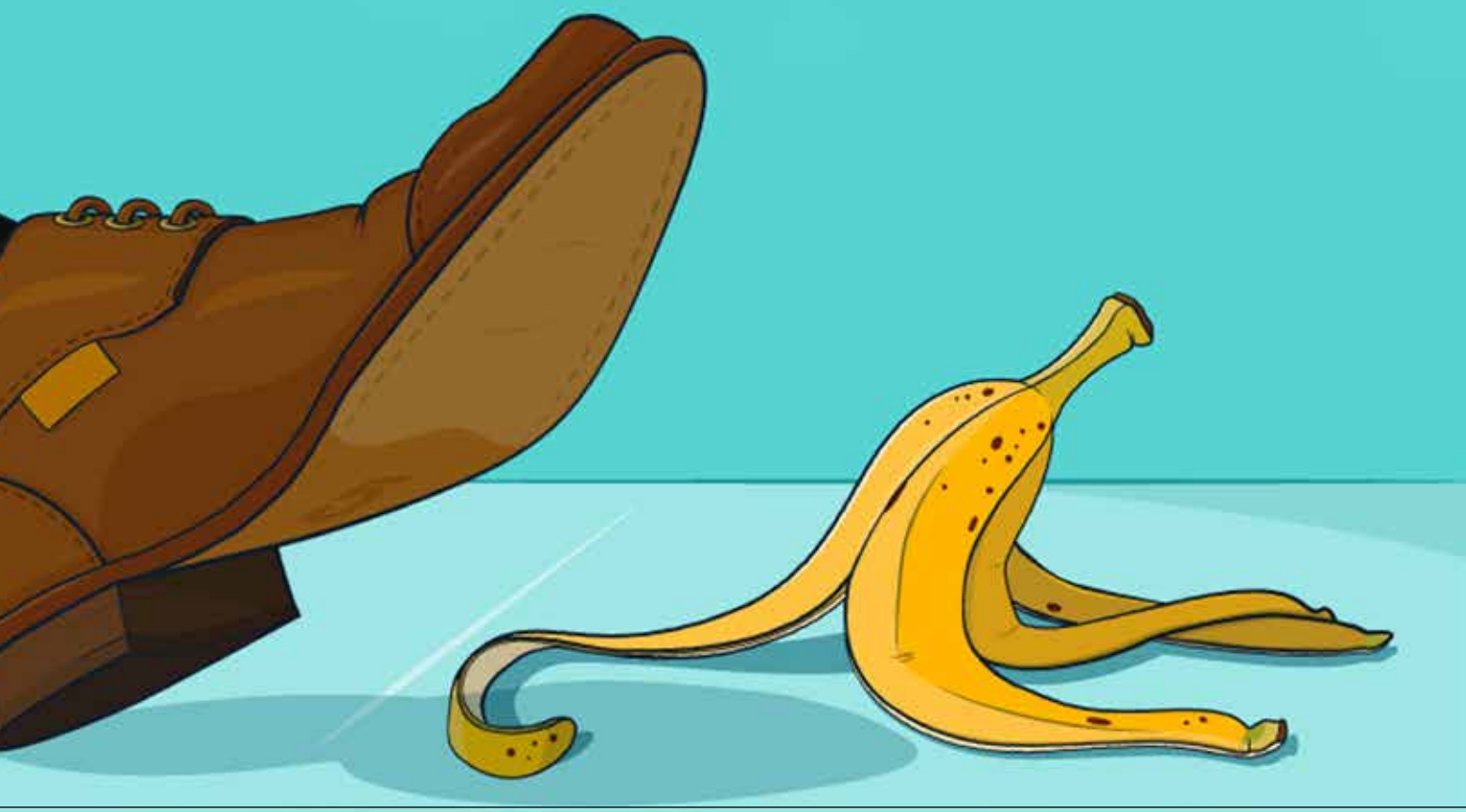
Atul Juvle is currently employed with Schindler India Private Limited as General Counsel, Compliance Officer & Company Secretary India & South Asia. Atul has 30+ years' experience, which includes working with a premier Public Sector Bank (Bank of India), a NBFC & Merchant Banker (Shriyam Securities), the Tata Group - Manufacturing & Export House (TATA International Limited), US MNC - (OTIS Elevator) - Manufacturing & Service Company, HDFC Life Insurance Company, and Godrej Agrovet Limited.

Atul is a Post Graduate in Commerce and a qualified banker and holds a F.C.S. (Sr. Company Secretary), LL.B, & Master's in Financial Management from the Jamnalal Bajaj Institute of Management Studies. His sectoral work exposure includes Legal, Secretarial, & Compliance Assignment.

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

Health Check for your Start-up

Avoiding Legal Pitfalls and Boosting your Investor Readiness



The article provides brief guidelines to crucial aspects that must be taken into consideration while starting a business to avoid legal pitfalls and boost early on investor readiness of the venture

One of the difficulties start-ups naturally face is a lack of essential resources such as professional advise and counseling to critical legal, tax and accounting questions, funding, mentorship, and business strategy consulting, among others. In the worst case, this can lead to an early-stage failure of the venture or in the best case, hamper the growth of the start-up which is vitally ne eded to scale its business early enough in a competitive market. This article tries to provide a brief guideline to some crucial aspects which should be taken into consideration while starting a business to avoid legal pitfalls and to boost early on investor readiness of the venture.

A. Does your start-up have the right setup and foundation?

As a starting point, early-stage businesses need to think about what kind of legal form and license suits their undertaking in terms of effective tax planning, limiting of liability of owners, efficient management and decision-making structures, governance role of shareholders and required sector specific legal forms such as limited liability partnerships mostly applicable to accounting, audit, tax, and legal firms.

Start-up should avoid informal setups and pursue a compliant and proper legally structured foundation based on orderly drafted establishment documents such as articles and memorandum of association, relevant side agreements, board and shareholder resolutions and duly obtained business permits and commercial licenses allowing the venture to operate lawfully in the respective business sector. This does not only prevent that the start-up runs into substantial regulatory penalties predominantly in highly regulated sectors such as financial, telecommunication, digital and technology related services or even be forced to close its operations down due to non-licensed activities but also addresses the risk of IP theft and unfair competition. The ability of a venture to demonstrate sound legal structures, documentation and registrations often decides whether a potential investor shies away from an otherwise promising investment opportunity or is interested in pursuing further an investment.

B. Tax Considerations when starting your business

Often entrepreneurs are occupied with their daily business operations, scaling their business or refining their value offering and R&D leaving less capacity and time to focus on significant administrative aspects such as Tax compliance. Most of the jurisdictions globally require start-ups, with varying regulations for sole establishments or proprietorships, to register for mandatory corporate income tax and VAT/GST registration with the competent tax authorities and to obtain valid tax registrations which need to be mentioned in a visible manner on tax compliant invoices. Reoccurring tax filings and submissions to the revenue authorities, often times on a yearly, quarterly or monthly basis depending on the type of levy, are usually burdensome and can absorb substantial company resources which are already limited from the outset. However, non-compliance with tax obligations can have grave consequences ranging from hurting fiscal penalties to jail terms, in severe cases. A lot of times, businesses tend to oversee the concept of permanent establishment ("PE") in domestic tax legislation triggering corporate income tax upon meeting certain criteria even though the undertaking is not formally incorporated in the respective country. The OECD defines PE as a fixed place of business in which a

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> *It is essential for ventures from their early stage to conform with mandatory regulations and to obtain professional advise to specific areas to prevent risk and challenges later on. Mostly during due diligence procedures, legal loopholes and non-compliance concerns might surface and be detected while ventures looking for investors and raising funds."*

person or business entity carries on business for at least six months. This definition is often adopted by local tax laws. Mandatory and voluntary VAT or valued added tax registrations depend in many tax schemes on certain estimated or forecasted turnover thresholds which need to be observed while evaluating registration. Appointing an experienced tax advisor or accountant for mandatory minimum tax compliance in the very beginning of starting up a venture can be crucial to avoid tax non-compliance pitfalls.

C. Are your IP Rights sufficiently protected?

For many start-ups particularly for those active in the technology sector, their intellectual property such as knowhow, software, innovative processes, etc. is at the core of their business model and value proposition often combined with a cleverly designed logo respectively trademark building the base of their growing brand equity. IP rights can be sold or licensed, providing an important revenue stream, offer customers something new and different and form an essential part of the start-ups' marketing strategy and can be used for example as collateral for loans and debt. While focused on the daily operations and growth of the business, entrepreneurs might miss to protect appropriately their created intellectual property rights or even not be aware of their qualification as IP rights. Most of the IP rights such as patents, copyrights and trademarks can be registered with competent governmental intellectual property offices that will assess registration applications in respective classes. Once IP rights are duly registered, they grant the creator an exclusive right over the use of his/her creation for a certain period of time which can be extended accordingly. Something different applies to trade secrets; they refer to specific, private information that is important to a business because it gives the business a competitive advantage in its marketplace such recipes for certain foods and beverages, new inventions, software, processes, and even different marketing strategies. Trade secrets often cannot be registered and must be protected by non-disclosure agreements, non-competition arrangements or simply by restricting sharing whole or parts of the secrets. Additionally, many startups aiming to pursue franchise (growth) models need to consider that expanding incrementally into new markets necessitates

entrepreneurs to register timely their IP-rights such as trademarks in target markets to safeguard the execution of their growth strategies.

D. Conclusion

Spending on professional service providers, regulatory and compliance requirements and registration fees can be burdensome for start-ups in the beginning and drain crucial resources needed for other areas of the business to boost growth. However, it is essential for ventures from their early stage to conform with mandatory regulations and to obtain professional advise to specific areas to prevent risk and challenges later on. Mostly during due diligence procedures, legal loopholes and non-compliance concerns might surface and be detected while ventures looking for investors and raising funds. Such discovered "red flags" might often lead investors and strategic partners to pull out of transactions and shy away from investments. This can be prevented by prudent management of certain risk factors and key aspects.

E. How can we help your organization?

We help start-ups and ventures to avoid legal pitfalls and boost their Investor readiness significantly during the initial and later stages of growth. We would be delighted to discuss your start-up or investor needs.

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

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"It is imperative for businesses to board the ESG train now! ESG is about sustainability and investing in our collective future."

SUNIL MEHTA

in an exclusive interview with Legal Era

"The Nifty 100 ESG Index has outperformed the Nifty 100 Index over the last 10 years, delivering a return of 13.13 percent (CAGR) as against a return of 11.69 percent (CAGR) by the Nifty 100 Index. So ESG is no longer just theoretical agenda-pushing. It is practical and has shown phenomenal results as well."

LE: Let's start at the beginning. What are the fundamentals of ESG, and how does one relate to it?

ESG or Environmental, Societal, and Governance can be traced back to the early days of socially responsible investing. In the 70s and 80s, if you picked up the financial statements of Indian public-sector companies, you'd find an extensive section on resources deployed on sustainability, societal intervention, local community development and corporate responsibility. So, in its most basic context, ESG awareness and corporate fiduciary has always existed – it is only now taking centerstage and becoming an imperative with clearly defined goals.

As a young trainee article clerk during my chartered accountancy training, I was fascinated to peruse the balance sheets of these PSUs which undertook their societal responsibilities with the seriousness that it truly deserved. They were the hallmarks of corporate social responsibility. They built their factories and hubs in remote areas and contributed

to improvement in the lives of communities around these rural setups.

While ESG is now evolving towards a mandated obligation by all stakeholders, we've always had an inherent value system – an ethos of giving back to communities, perhaps without appropriate metrics and reporting. It is clear that corporates that built strong foundations of trust through transparency, good governance, preservation of environment and societal consciousness benefited from consistent higher market cap multiples than industry peers who lagged in these metrics. They benefited from implicit trust from its stakeholders.

With higher sensitization on ESG given our current ecosystem, investors are also discerning and demanding clear evidence of higher levels of ESG and developing sophisticated models to measure impact. Large global and domestic lenders are moving fast in the same direction. Green financing and ethical lending are fast gaining momentum and entities displaying traits of institutionalizing ESG will attract more quality capital. Investors and lenders performance will also be measured on the same basis.

In essence, ESG is the culmination of these varying but related intersections around climate change, environmental sustainability, social responsibility, and human rights, together with a shared ethos for strong sustainable growth.

LE: Those are some excellent points. When you talk about sustainable investors, could you expand on what's in it for them? Is it just about choosing organizations that are already ESG centric?

Most fund managers are on the lookout for long-term interest for their investors and what they've realized is that companies who have focused on ESG or at least navigated within the vicinity of it have done significantly better. From a purely financial point of view, it makes a lot of sense to invest in these companies.

Investors have recognized that companies who are aware of these necessities of protecting environment and believe in sustainable development are far more resilient to market calamities. Consider the 2008 market crash; companies with brittle governance policies were far more vulnerable. Let's drill down even further; take a look at the global stock market, and you'll notice that the S&P-500 ESG Index – which is designed to measure the performance of securities against a sustainability criterion – has outperformed the S&P-500 index by 459 points from 2011 to 2021.

Now let's bring it closer to home. Data confirms that The Nifty 100 ESG index has outperformed the Nifty 100 Index over the last 10 years, delivering

a return of 13.13 percent (CAGR) as against a return of 11.69 percent (CAGR) by the Nifty 100 index. So, this is no longer just theoretical agenda-pushing. It is practical and has shown phenomenal results.

LE: Even with all these metrics, there's always some confusion. When CSR was first enforced, there was a lot of resistance to it, correct? Will it be the same with ESG?

There is always some opposition to rules and regulations. The 2014 Company's Act was a precursor to CSR and required companies of a specific size to invest in CSR activities. Initially there was skepticism about the new CSR regulations. Over time the corporate sector realized the need and rationale to institutionalize the financial commitment and employee engagement in effective CSR.

Board CSR committees were formed to formulate and extend support to specific causes. The CSR Board committees are playing far more active role towards financially supporting and more encouraging employee engagement towards building sustainable communities. Employee participation becomes critical towards sustained community impact. Eventually, these community initiatives have to be ingrained in the DNA of the organizations as they build a culture of giving and sharing. Measuring outcomes facilitates more meaningful use of corporate resources.

LE: CSR and ESG could almost be the same thing. Are there any distinguishing factors between the two?

ESG is a much broader umbrella under which CSR sits and is much more of a value system. By building a value system within your organization or creating awareness, you are leaving behind an embedded legacy. This legacy is your current responsibility and comes from an innate need to create a more conducive ecosystem for future generations. Will we provide them with a world that is thriving or one that is dying? None of this can even be considered without a set of strong and contemporary governance standards.

Let's consider moral science classes in school. It was about imbibing a certain standard of morals and ethics that are meant to guide you through your life journey. Corporate Boards are responsible for long-term strategic and sustainable organizational growth. By that virtue, they are also the guardians of ESG framework and have a fiduciary responsibility towards this important building block for any organizations.

ESG is more of a sustainable ecosystem that requires institutionalization in order to truly make a difference. It is regulated philanthropy. Philanthropy is about 3 T's - Time, Talent, and Treasure. When you are young, you have time to give back; as you develop, you also have the talent to lead and inspire. Finally, when you've laid the foundational layers, you have the ability to fund your philanthropic goals. This is how I believe ESG will evolve and progress within our entire corporate ecology.

LE: In this regard, how does a company become ESG driven?

Becoming ESG driven or focusing your efforts on ESG is about the mindset. People talk about India becoming a 5 trillion or 6 trillion-dollar economy. In my view, the most important metrics of having arrived at or crossing the $5 Trillion milestone, is dependent on the kind of ecosystem that we envisage building for the future generations. After, over 7 decades of country's independence, we are still grappling with fundamental issues relating to basic hygiene, sanitation, health, water, air and quality education infrastructure amongst other imperatives for life of dignity for all. If we do not heed the clarion call of ESG and Sustainable Development NOW – it will be just too late. It's vital to build commensurate institutional and contemporary regulatory architecture that will support the ESG initiatives.

In this context, given the significance of sustainable development, I believe that the legal fraternity can play a key role in the furtherance of the ESG agenda and help build an ethical edifice of a new India.

Like I mentioned earlier, the world is veering towards becoming investors in sustainable development. You want to back someone whose ethics you relate to and who also happens to do business well. It is imperative for businesses to board the ESG train now! ESG is about sustainably and investing in our collective future.

The newer generations are far more conscious of where they invest their time and resources.

> Corporate Boards are responsible for long-term strategic and sustainable organizational growth. By that virtue, they are also the guardians of the ESG framework.

No one is carried away by brands or logos. They are reversing the pressure and checking the sustainable initiatives led by brands, what type of products they're manufacturing, or causes they're supporting. Everything from the packaging to the product is required to be eco-friendly. Consumer behavior is changing fast and with it, companies will have to adapt accordingly. This pressure will eventually trickle down to other sectors like legal, consulting, or servicing. Their clients will associate only with other ESG compliant firms and companies.

LE: That's an incredibly thought-out analysis of the shift towards ESG. Are there any other thoughts you'd like to leave with our readers?

Yes, I believe India is making giant strides towards adopting ESG or changing the mindset of the country. Think of the Paris Accord on climate change – India dug its' heels in even though the US, under the Trump administration – decided to exit.

It's imperative now that we have the regulations in place to make ESG genuinely successful.

Technology and data will play a critical role in how this framework develops, what we focus on, and how we drive various initiatives forward. It all needs to be carefully planned and balanced to build a better future.

RECENT CHANGES IN MINES & MINERALS (DEVELOPMENT & REGULATION) ACT, 1957

AND ITS IMPACT ON THE MINERAL-BASED INDUSTRIES

The Apex Court held that auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra-vires the constitutional mandate

RAJIV CHOUBEY
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Prologue

The Ministry of Mines, Government of India vide notification dated 28th March 2021 notified the Mines and Minerals (Development and Regulation) Amendment Act, 2021 ('MMDR'). The MMDR Amd Act 2021 is in line with the reforms/changes brought in by the Government of India in the year 2015 wherein MMDR 1957 was amended to bring in certain changes including the Auction regime.

Prior to the MMDR 2015, mineral rights were granted either by (i) Reconnaissance Permit ('RP') (ii) issuing a Prospecting License ('PL') or (iii) Mining Lease ('ML') on first come first serve method. This system of allocation of mineral concession was discretionary and decision making was not transparent. The MMDR Amendment Act 2015 provides that mineral concessions will be granted only on the basis of bidding at an auction, for the prospecting stage or mining stage as the case may be. Mining leases shall be granted for a non-renewable period of 50 years. If the auction regime was immediately applied to the existing mining leases, many of which were captive mines supporting iron-steel, cement, power and other mineral-based industries, the Govt. thought appropriate that (i) all existing leases shall be deemed to have been granted for a period of 50 years and on the expiry of the lease period, the lease shall be put up for auction. (ii) In the case of 'captive' mines, where the mineral is used for captive purpose, in case the 50-year period or current lease expires before 2030, the leases were deemed to be valid and extended till March 31, 2030. (iii) In the case of 'non-captive' mines, the validity of the ML was made till March 31, 2020 (or validity of current lease or 50 years – whichever is later).

Background of Auction Regime

The need for auction regime was felt after the Mining Scam[1] which rocked the industry starting 2010 with the appointment of the Justice MB Shah Commission vide Notification No. SO 2817 (E) dated 22nd November 2010. The coal scam[2] or the Coalgate which made headlines in March 2012, when the Comptroller & Auditor General (CAG) office accused the Government of India of allocating coal blocks in an inefficient manner during the period 2004–2009 resulting in a Central Bureau of Investigation (CBI) probe into whether the allocation of the coal blocks was in fact influenced by corruption. One of the arguments was the allocation of the mines was done in a non-transparent manner.

After the NDA Government came to power in 2014, the Mines and Minerals (Development and Regulation) Act (MMDR Act), 1957 was amended in 2015 with the intention of removing discretion and introducing more transparency in the allocation process of mineral concessions.

Background of MMDR 2021 Amendment

The Amendment of 2021 was after the recommendations of a High Level Committee ('HLC') constituted by the Government of India, which was headed by the Vice Chairman of NITI Aayog on Mines, Minerals and Coal Sectors. The following members were the members of the Committee: (i) Cabinet Secretary (ii) CEO, NITI Aayog (iii) Secretary Finance (iv) Secretary Mines Secretary Coal (v) Secretary Environment, Forest & Climate Change (vi) Secretary Revenue.

The Committee was constituted to recommend legislative, statutory and procedural changes required for accelerating the growth in the Mining Sector and also examine all existing laws, rules and regulations and suggest changes with a view to simplify the process as far as Ease of Doing Business.

Some of the key changes brought in by the MMDR 2021 are as follows:

1 https://en.wikipedia.org/wiki/Mining_scams_in_India
2 https://en.wikipedia.org/wiki/Indian_coal_allocation_scam

Sl. No.	Existing provisions in the MMDR 1957/ 2015	Changes brought by MMDR 2021 (Amended Act) (Impact: Positive / Negative)
1.	Captive Mines were not allowed to sell (i) coal by captive mines and (ii) other mineral except for captive consumption	**Positive** Amended provision in MMDR 2021 – Sec. 8(5) has been added where captive coal. This may facilitate better availability of coal as even captive mines are allowed to sell surplus coal up to 50% of its annual capacity after meeting the requirements of the end use plants. However such permission is not available for coal mines allocated for power projects awarded under a Competitive bidding for tariff including Ultra Mega Power Projects. Similarly under new provisions, viz., sub-section 7A in Sec.8 of the MMDR Act has been added - under the Amended Act, a captive mine can sell mineral (limestone) up to 50% of its annual capacity after meeting the requirements of its attached plant. In that case, an additional amount (equivalent to royalty has to be paid) for the mineral sale. However such sale of coal/ minerals would be subject to payment of additional royalty as specified in Sixth Schedule of the Act (which ranges from additional royalty of 100% to 200%) This will generally improve the availability of the mineral and an enterprise has the option to generate revenue from mining operations.
2	Under Sec.10A of the MMDR Act, in case a Company was having Reconnaissance Permit (RP) or Prospecting License (PL), for all such pending RP/PL, the RP/PL holder could apply for issue of Mining Lease (ML)	**Negative** The provision of Sec. 10A(2)(b) relating to grant of Mining Lease ('ML') has been deleted. This has affected all pending PL to ML cases. The **Saving provisions are deleted and the right to obtain a mining lease will lapse on the date of commencement of MMDR Amd Act 2021.** **This amendment is negative for the industry as now the same ML can only be granted under auction and all efforts made by any enterprise in terms of prospecting operations are lost.**
3	Companies having Letter of Intent ('LOI') had a right to get the Mining Lease (ML) with a period of 2 years, i.e. till 11th January, 2017	**Negative** The provisions of Sec. 10A(2)(c), being a transitory provisions, with respect to LOI have been deleted/ removed. This may affect cases which are subjudice before Courts and where challenges were made after the MMDR Amd. Act 2015.
4	Sec.12A of MMDR Act - Transfer of Captive Mines required additional payment - mines allotted for captive purposes were permitted for transfer with prior permission and payment of Transfer Charges @80% of the royalty paid plus upfront payment of 0.5% of the value to estimated resources.	**Positive** A new proviso to Sec.12A(2) has been added which states that - the transferee of mining lease shall not be required to pay the amount or transfer charges as it stood prior to the commencement of the MMDR Amendment Act, 2021, after such commencement, however, no refund shall be made of the charges already paid. This is a very positive development and will facilitate/ make M&A activity in mineral based industries.

5	No Explanation to words "Without any Authority of Law" with respect to treatment of Illegal Mining. Huge demands equivalent to the mineral value were made by the State Govt. if mining was done in or with Environment /other clearance due Supreme Court judgment in the **Common Cause case**.	**Positive** The Amended Act has clarified that 'Illegal Mining' means – ***"raising, transporting or causing to raise or transport any mineral without any Lawful Authority shall mean raising, transporting any mineral by a person with a PL, ML or Composite License or in contravention of the Rules"***. Post the ***Common Cause vs. Union of India*** WP No.114 of 2014 judgment, State Governments have been raising demands up to 100% of the entire mineral value in case of mining beyond the approved quantity or violation of Environment Clearance ('EC') or any other breach. The amendment has now clarified through the Explanation to Sec.21(4)/(5) of MMDR to define 'Illegal mining' - to replace the words "without any lawful authority" with the words "in contravention of the provisions of this Act and rules made thereunder". Hence only in case of mining without a valid ML will be deemed to be without Lawful Authority and breach under any other Act with respect to a ML would be treated under the respective Acts. The amendment is prospective from on and from the date of commencement of the MMDR Amendment Act 2021 (28th March 2021), however, in my considered view, the rationale can be applied to even past cases, where the breach is limited to a particular Act.
6	Under Sec.4-A of the MMDR Act, 1957 – a Mining Leases (ML) which has not commenced operations or has discontinued the operations for a period of two years, would lapse. However, if an application was made before such lease lapses, and the State Govt. is satisfied that the holder of ML was not able to commence mining operations or the mining operations was discontinued for reasons beyond the control of such lease holder, then on an application before lapsed – make an order that such lease shall not lapse. Even after a ML was lapsed, on a Revival application to be made within 6 months of the ML lapse and if the State Govt. was satisfied that such non-commencement or discontinuance of mining operations was beyond the control of the lease holder, the Govt. would pass an order Reviving the lease. Such Revival was allowed twice during the entire Mine period of lease.	**Negative** The amended proviso now only provides a period of two years for operation to commence or be discontinued for a period of two years and one extension of one year period (when compared to the earlier regime where mines on application made were not allowed to lapse and even after lapsing, the mines could be revived twice during the entire lease period) and hence the maximum extension is for a period of one year. Revival provision has been deleted. Further, the word "Mining Operation" substituted with the "Production and Dispatch". It means that lessee has to start production and dispatch within the said two years plus one year extension otherwise lease will be lapsed. **This is a major shift and it will have wide ranging ramifications on the mining industry.**

7	No provision for transfer of rights, approvals, licenses and permits where a ML expired and was put to auction.	**Positive** Enabling provisions for transfer of all valid rights, approvals, clearances, licenses and the like granted to a lessee in respect of a mine would continue to be valid even after the expiry or termination of the ML and such rights, approval, clearances, licenses shall be transferred to and vested to the successful bidder of ML under auction.
8	No Provisions with respect to Auction by the Central Govt., if State Govt. fails to conduct auction of mines	Auction of Minerals – Proviso to Sec.10B – added wherein, if the State Govt has not completed auction for the purposes of granting Mining Lease ('ML') of any mineral or where after the completion of auction, the ML or Letter of Intent ('LOI') has been terminated or lapsed for any reason whatsoever, the Central Government ('CG') may require the State Govt to conduct and complete the auction/ re-auction, as the case may be within a period fixed in consultation with the State Government ('SG') and where such auction/re-auction process is not completed within such period, the CG may conduct auction for grant of ML for such area.

Analysis of the MMDR Amendment Act 2021

The Government has brought in the amendment to the MMDR Act, 1957 with all good intentions and the same is evident from the rationale reflected in the State of Objects and Reasons of The Mines & Minerals (Development & Regulation) Amendment Bill, 2021, which states as follows *"In order to fully harness the potential of the mineral sector, increase employment and investment in the mining sector including coal, increase the revenue to the States, increase the production and time bound operationalization of mines, maintain continuity in mining operations after change of lessee, increase the pace of exploration and auction of mineral resources and resolve long-pending issues that have slowed the growth of the sector, it is felt necessary to further amend the said Act"*.

Hence, the trust area is to increase the production and time bound operationalization of mines and maintain continuity in mining operations, especially after change of lease. Same is evident from the fact that the MMDR Amd. Act 2021 - under Sec.4A of the Act has brought in the concept of "production and dispatch' in relation to 'mining operations'. Prior to the amendment, it was sufficient to mine the mineral and it was not linked to dispatch. This is a major shift as the word 'mining operations' has been substituted for the words 'production and dispatch'. It only when the mined mineral is dispatched that the operations of the mines would be complete and this will ensure revenue generation and mineral availability.

Sec.4-A deals with circumstances in which Prospecting Licenses ('PL') or Mining Lease ('ML') can be terminated. As has been reflected above, one of the major change in the MMDR Amd. Act, 2021 is a major shift in the way a ML would lapse/ terminated. Under MMDR 1957, in case a Mining Leases (ML) which has not commenced operations or has discontinued the operations for a period of two years, would lapse. However if an application was made before such lease lapses, and the State Govt. is satisfied that the holder of ML was not able to commence mining operations or the mining operations were discontinued for reasons beyond the control of such lease holder, then on an application before lapsed – make an order that such lease shall not lapse. Even after a ML was lapsed, on a Revival application to made within 6 months of the ML lapse and if the State Govt. was satisfied that such non-commencement or discontinuance of mining operations was beyond the control of the lease holder, the Govt. would pass an order

It is long time that the Government looks at the Turnkey model for mines and other similar infra projects as this may not only fetch better revenue from the prospective bidders but at the same time it will improve the overall Ease of Doing Business

Reviving the lease. Such Revival was allowed twice during the entire Mine period of lease. The amended proviso now only provides period of two years for operation commence or discontinued the operations for a period of two years and one more extension of one year period (when compared to the earlier regime where mines on application made were not allowed to lapse and even after lapsing, the mines could be revived twice during the entire lease period) during the entire lease period and hence the maximum extension is for a period of three years. This is a major shift and it will have wide ranging ramifications on the mining industry. This needs to be understood in the context that after a ML is granted, a lease holder needs to arrange for a host of approvals from – Environment Clearance, Consent to Establish and Operate under the Water (Prevention & Control of Pollution) Act, Air (Prevention & Control of Pollution) Act, approval of Mining Plan, needs to arrange Surface rights for the lease holder to enter the land. There are various other minor approvals, which were not even considering. Practically it may be very difficult for a new ML to get all the approvals within a period of two years or three years (max extension) as well as surface rights to enter the land. Further, for any reasons, if the mines are not operational for a continuous period of two years, even in such a scenario the ML will lapse and only a single extension of two plus one year (i.e., three years) can be granted during the entire period of lease. While, I appreciate the intent of the Government to encourage ML holder not to hoard minerals and block them by simply signing the ML and the focus on production and dispatch, some where the practical aspects have been missed and hence the whole intent of purpose of increasing mineral availability may be lost. The solution could have been if the State Government(s), puts only such mineral block as a Turnkey block, where all approvals, surface rights acquired and arranged by the government itself is readily available and the bidder has to just pay the premium and auction and can start mining for day one. It is long time that the Government looks at the Turnkey model for mines and other similar infra projects as this may not only fetch better revenue from the prospective bidders but at the same time it will improve the overall Ease of Doing Business, bringing in more investment, employment generation and revenue for the Government.

The other major shift is termination of the rights under Sec.10-A(2)(b), wherein by the Amd Act. 2021 has added a proviso stating that all pending cases covered under Sec.10(2)(b), the right to obtain a Prospecting license ('PL') followed by a Mining lease ('ML') or a mining lease, as the case may be, shall lapse on the date of commencement of the MMDR Amd Act 2021. This amendment has been brought without providing any time period of notice for all pending cases. There are many cases where a PL holder has invested sufficient time and effort conducting the prospecting operations and was on the verge of executing the ML. Rights of all such enterprise has been adversely affected. In my considered view, all such cases where a LOI was issued and an enterprise has completed all formalities and was just left with execution of ML should have treated differently by providing a transitory provisions for a period of 12 months from the date the amendment was notified. All such cases where the ML could have been executed; the mining could have started, thereby ensuring increase production. It will take quite some time for such PL/ML cases to be allocated after auction as many of these cases have been challenged in various High Courts and are currently sub judice.

Some of these above changes have been slightly negative for the mining industry and the Govt has its own justification and rationale for bringing in the amendments. The Govt at the same has brought in certain positive changes, (i) Captive mines – both coal as well as other minerals have been allowed to sell up to 50% of their production (after first meeting the requirement of their end use plants) on payment of additional royalty. This

will improve the mineral availability and at the same time generate additional revenue for the Government. It would be interesting to analyse the data on this aspect (captive mines selling coal/ mineral to external parties) after a couple of years. (ii) Deletion of provisions related to payment of Transfer Charges for transfer of captive mines. Prior to the 2021 Amendment Act, Transfer Charges @80% of the royalty paid plus upfront payment of 0.5% of the value to estimated resource was required to be paid while seeking approval for transfer of Mining Leases. This will facilitate Mergers & Acquisition (M&A) in the field of mineral based industry. However the implication of Stamp Duty payable to the State Govt(s), for registration of ML would be payable as the same is governed as per the Indian
Stamp Act.

Epilogue

It is not possible to discuss the entire issues which are currently affecting the mineral based industry in this article at the same time the MMDR Amd 2021 has brought in a mix bag. The debate is still on whether 'auction' is the only / best model for allocating natural resources as even the Hon'ble Supreme Court vide its judgment dated 27th Sept. 2012 in the Presential Reference case (Special Reference No. 1 of 201) held that auction is just one of the several price discovery mechanisms. In para 148 of the above judgment – the Apex Court held that, *"In our opinion, auction despite being a more preferable method of alienation/ allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra-vires the constitutional mandate"*. At the same time, auction as a mechanism to allot mining leases is the law and reality. Considering various aspects affecting the industry and also considering the intent of the Govt. to improve the mineral availability to drive the 'Make in India' initiative, as has been stated in the National Mineral Policy 2019, States should auction mineral blocks with preembedded environment and forest clearances.

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

N.B. Views expressed here are personal and not the views of the organization where I am working.

A tale of two Appeals

Victory for aggrieved minority shareholder

Carey Olsen acted for the successful minority shareholder in two appeals arising from the same facts and underlying claims of unfair prejudice.

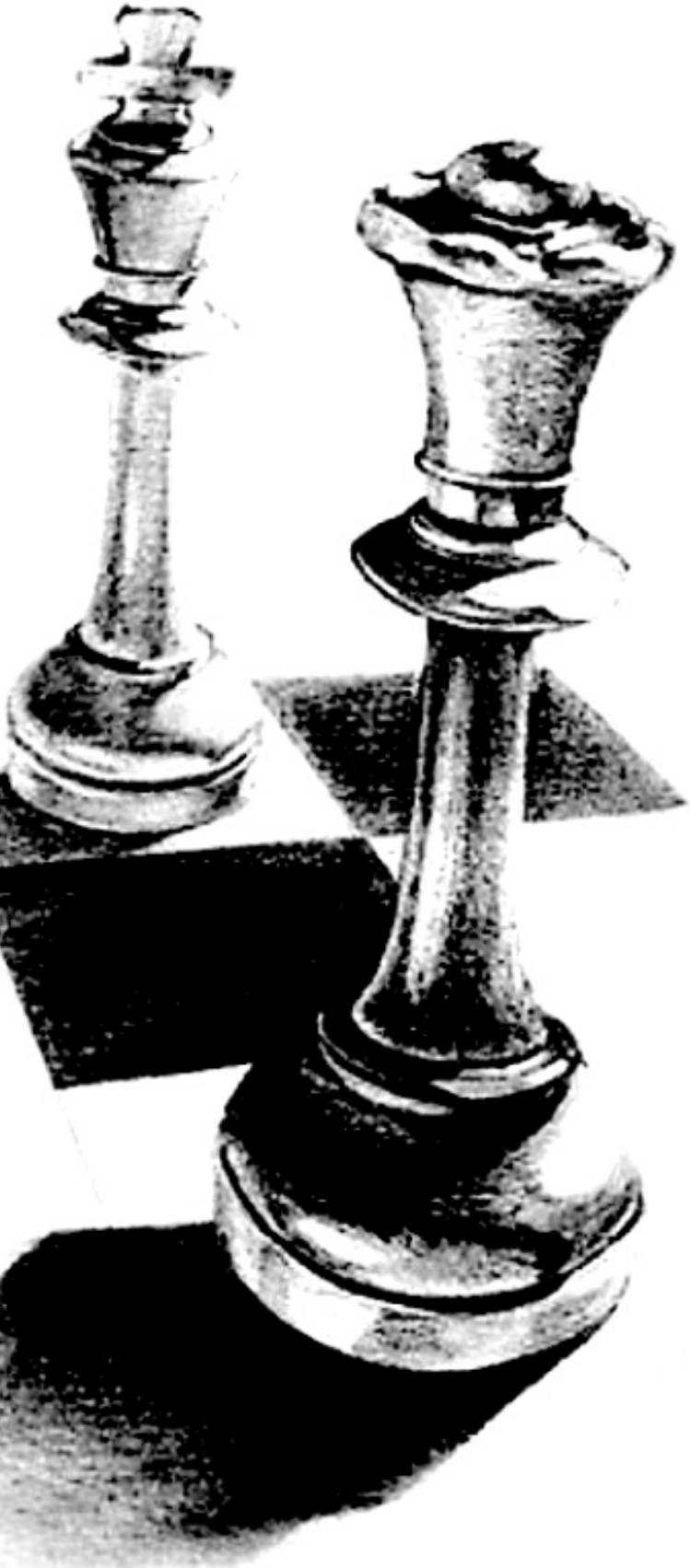
Summary

The Eastern Caribbean Court of Appeal in Siong Beng Seng v Caldicott Worldwide Limited BVIHCMAP 2020/0020 affirmed the well-established but important principle that an appellate court should be slow to interfere with the case management decision of the lower court and found that a minority shareholder is well-entitled to proceed with its unfair prejudice claim against the majority shareholders notwithstanding that its claim against the company in question has been stayed in favor of arbitration.

Further, in Hector Finance Group Limited v Caldicott Worldwide Limited BVIHCVAP 2020/0012 ("Hector Finance"), the Court of Appeal held for the first time that an injunction granted under section 43 of the BVI 2013 (the "Arbitration Act") is not appealable in light of sub-section (10) of section 43 which provides very simply that "[a] decision, order or direction made or issued by the Court under this section is not subject to appeal". These two appeals arise from the same facts and underlying claims. The Carey Olsen team comprising of James Noble, Dhanshuklal Vekaria and Amelia Tan acted for the successful minority shareholder in the appeals.

The Facts

Caldicott Worldwide Limited ("Caldicott") is a minority shareholder of Hector Finance Group Limited (the "Company"). Caldicott brought an unfair prejudice claim in the BVI against the Company and the majority shareholders ("Majority Shareholders") on the basis that they had conducted the business of the Company in a manner that was discriminatory, prejudicial and oppressive towards Caldicott by improperly withholding dividend payments that were declared.



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The Company applied for and was granted a stay of the claim against it on the ground that its articles of association contained an arbitration agreement referring disputes between the Company and its members to arbitration. The claim was allowed to proceed as against the Majority Shareholders.

The Application for Service Out of Jurisdiction – Siong Beng Seng v Caldicott Worldwide Limited BVIHCMAP 2020/0020

The Majority Shareholders applied to set aside the order permitting service of the claim on them outside the jurisdiction on the grounds that Caldicott was guilty of material non-disclosure on the hearing of the ex parte application for permission to serve out, and for an order staying the claim as against the Majority Shareholders in favor of arbitration. The application was dismissed by the Judge and the Majority Shareholders appealed against that order. In dismissing the appeal, the Court of Appeal held that:

a. On an ex parte application for permission to serve out of the jurisdiction, the applicant must make full and frank disclosure of all matters relevant to the decision whether or not to grant the application. The test of materiality is whether the matter might reasonably be taken into account by the Judge in deciding whether or not to grant the application. In this case, the Judge had considered all the relevant circumstances, including the fact that there was an alternative gateway open to Caldicott and Caldicott would have been given permission to serve the Majority Shareholders outside the jurisdiction in any event, hence the matters not disclosed at the ex parte hearing were not material so as to amount to a failure to give full and frank disclosure of all material facts on an ex parte application.

b. The power to grant a stay of proceedings is discretionary and should only be exercised in rare and compelling circumstances. The Judge had found that the unfair prejudice claim could be amended to exclude the claim against the Company and that it was appropriate for the claim against the Majority Shareholders to proceed ahead of or in tandem with the arbitration proceedings. The presence of the Company was not essential to determine the

real issues in dispute between the parties, which was that the Majority Shareholders, as the persons who controlled the Company, conducted the affairs of the Company in a manner that was unfairly prejudicial to Caldicott by causing the Company to withhold dividends. Further, the Judge found that there was no sufficient risk of inconsistent judgments and there was no sufficiently close overlap between the liability of the Company and the liability of the Majority Shareholders to warrant a stay.

c. In the course of the appeal, notwithstanding the jurisdictional challenge, the Majority Shareholders issued a Request for Information in respect of Caldicott's Statement of Claim and subsequently made an application for the same. Such conduct was consistent with a waiver of the challenge to the jurisdiction of the court and the Majority Shareholders, by their conduct, had submitted themselves to the jurisdiction of the BVI court.

The Injunction Applications – Hector Finance Group Limited v Caldicott Worldwide Limited BVIHCVAP 2020/0012

Upon service of its claim against the Company, Caldicott also applied for an ex parte freezing injunction against the Company and for disclosure. The BVI judge granted the injunction (the "Injunction").

The Company then filed an application to discharge the Injunction and Caldicott filed an application to continue the same. As the claim against the Company was subsequently stayed in favor of arbitration, Caldicott later filed a second continuation application asking the court to continue the Injunction until further order of the court pursuant to the court's jurisdiction under section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act ("Supreme Court Act"), or alternatively, to grant a fresh injunction pursuant to the court's jurisdiction under section 43 of the Arbitration Act. After the hearing of the discharge application and the continuation application, the Judge dismissed the discharge application and made an order continuing the Injunction and/or in the alternative granted a fresh injunction. The Company appealed against the Judge's decision with the construction and effect of the order in issue.

If the Injunction was continued under the Supreme Court Act, there is a right of appeal to the Court of Appeal and the Court of Appeal has jurisdiction to hear the appeal

The Court of Appeal's Decision on the Injunction

The central issue before the Court of Appeal was whether the Judge had continued the Injunction under the Supreme Court Act or had granted a fresh injunction under the Arbitration Act. The Court of Appeal held that it was important to decide which of the two bases applied in this case because the difference had an important impact on the ability of the Court of Appeal to hear the appeal. If the Injunction was continued under the Supreme Court Act, there is a right of appeal to the Court of Appeal and the Court of Appeal has jurisdiction to hear the appeal. This is true of all injunctions unless the right of appeal has been excluded by statute.

Section 43 of the Arbitration Act is an example of where the right of appeal has been excluded by the legislature. Section 43 gives the court the power to grant interim measures relating to arbitration proceedings which have been or are to be commenced in or outside the BVI. Section 43(10) expressly provides that "A decision, order or direction made or issued by the Court under this section is not subject to appeal." Therefore if a fresh injunction was granted under the Arbitration Act, there is no appeal from that

decision and the Court of Appeal would not have jurisdiction to hear the appeal.

Upon an analysis of the Judge's order, the Court of Appeal concluded that the injunction ordered by the Judge granting a freezing injunction against the Company was granted under section 43 of the Arbitration Act of the BVI, and was not the continuation of the existing Injunction. As such, the Court of Appeal did not have jurisdiction to entertain an appeal from the Judge's decision. The Court of Appeal therefore dismissed the appeal in its entirety.

Concluding Remarks

The Court of Appeal's decision is a timely reminder that unfair prejudice claims are usually a dispute as between the shareholders of a company. The company is either not a party to the proceedings, or is a nominal defendant for purposes of disclosure or making sure the orders are binding on the company. A stay of a claim against a company in favor of arbitration would not, in most cases, consequently warrant a stay of the claim against the defendant shareholder.

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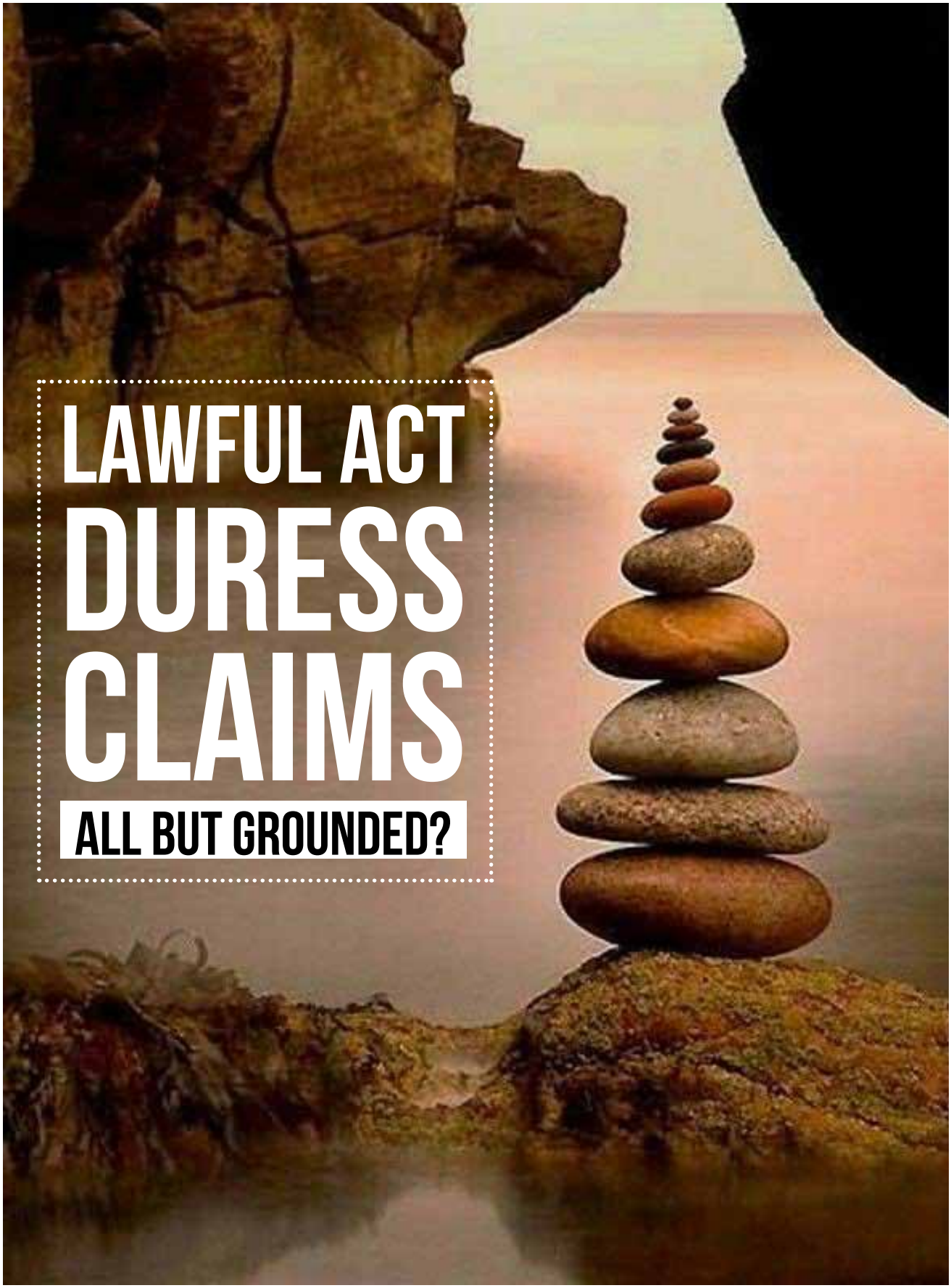

LAWFUL ACT DURESS CLAIMS

ALL BUT GROUNDED?

Following the recent UK Supreme Court judgment in Pakistan International Airlines Corporation v Times Travel (UK) Ltd, arguments founded on lawful act duress will be difficult to get off the ground.

The principle of unlawful act economic duress is well established in English law. A threat of violence or a threat to breach a contract, for example, to coerce a party to agree to a contract variation on unfavorable terms, is likely to be the basis for unlawful act economic duress. Providing that the party which is on the receiving end of the duress acts reasonably promptly, the contract may be voidable.

But what about a situation where a party uses a threat of a lawful act to apply pressure? Would this also constitute economic duress?

These questions have been addressed by the UK Supreme Court in its recent judgment in Pakistan International Airlines Corporation v Times Travel (UK) Ltd. In summary, whilst the existence of lawful act duress is acknowledged, the Supreme Court has confined its application to extremely limited circumstances. In practice, following this judgment, the threshold to establish lawful act duress is high.

Background

The facts of the case before the Supreme Court are straightforward. In around 2006, Pakistan International Airlines Corporation (PIAC) appointed Times Travel (UK) Ltd (TT) as a sales agent for tickets on its flights. PIAC was, at that time, the only airline offering direct flights between London and Pakistan. TT was a small family-owned company that specialized in flights from the UK to Pakistan. Its business was built on what was termed in the Supreme Court's judgment as "almost exclusive reliance on PIAC".

In 2012, when a dispute arose between TT and PIAC in relation to commission allegedly payable to TT on past sales, PIAC informed TT that, in order to continue its relationship with PIAC, TT would need to waive its claim for unpaid commission. PIAC served notice to terminate the old agreement and the new contract, which TT signed in 2012, included a clause that TT would waive its claims to historic commission. PIAC's position was that it was not under any obligation to enter into a new contract with TT.

In 2014, TT commenced proceedings against PIAC claiming that the new agreement (and therefore the waiver) were voidable on grounds of economic duress. TT argued that it had been pressurized by PIAC to waive its claim for historic unpaid commission under the threat that, if it did not do so, PIAC would not enter into a new contract with TT. TT argued that it should not be bound by its waiver on the basis that it had, at the time the waiver was given, no realistic commercial alternative other than to agree.

The questions before the Supreme Court were:

1. What needs to be shown where a party seeks to set aside a contract on the ground that it was entered into under duress?
2. Must the conduct said to amount to duress have been unlawful?
3. If not, what are the criteria for establishing whether or not duress existed?

Key aspects of the decision

At first instance, the High Court found in favor of TT but this was overturned by the Court of Appeal on the basis that lawful act duress, whilst recognized as a doctrine, could not encompass a situation where the defendant uses lawful pressure to accomplish an objective to which it believes, in

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good faith, it is so entitled. The Supreme Court upheld the Court of Appeal's decision, albeit on a different rationale.

The Supreme Court recognized that the doctrine of lawful act duress arose out of the equitable principle of undue influence. It unanimously agreed that lawful act duress exists where pressure is exerted (or a lawful threat is made) that is illegitimate which causes the claimant to enter into the contract in circumstances where the claimant had no reasonable alternative but to give in to threat or pressure.

The majority of the Supreme Court Judges considered that PIAC's behavior could not be regarded as unconscionable behavior and that the courts should approach any extension of the doctrine of lawful act duress "with caution". In fact, only two circumstances were identified as examples of where lawful act duress had been applied:

1. Where the defendant used knowledge of criminal activity by the claimant; and

2. Where the defendant used illegitimate means to maneuver the claimant into a position of weakness in order to force it to waive its claim.

Whilst it is not the case that these are the only circumstances where lawful act duress may apply, the Supreme Court made it clear that a restrictive approach should be taken such that claims succeed only in exceptional cases. In particular, Lord Hodge's judgment underlines the already established principle that English Courts will not generally interfere in contracts or look behind the bargains agreed between the parties. It also reinforces what English lawyers already know: parties looking to argue the existence of implied terms generally face an uphill struggle.

Lord Burrows gave a lengthy judgment addressing the question of when a threat of pressure would be considered illegitimate. Lord Burrows reasoned that lawful act duress should apply in circumstances where a party acted in bad faith (such that the party does not genuinely believe it is entitled to what it is demanding). This was rejected by the majority on the basis that distinguishing instances of bad faith from situations where a party merely seeks to rely upon their own commercial advantage would be fraught with difficulty. The majority of the

Supreme Court considered that the fundamental principle of contractual certainty would be eroded if lawful act duress was to apply in more than exceptional cases.

Conclusion

The Supreme Court judgment will no doubt be disappointing news to parties who find themselves on the wrong side of commercial relationships where unequal bargaining positions are at play. It is clear that claims founded on lawful act duress will now be difficult to win, given the judgment's recognition that "Discreditable behavior can be a feature of commercial activity".

On the other hand, the Supreme Court has commendably upheld well-established principles of certainty of contract and reconfirmed the English Courts' unwillingness to redraw the bargains agreed between parties. It will reassure parties looking to assert their commercial advantage that they will not find their contracts torn up by the courts further down the line in response to allegations of lawful act duress.

The majority of the Supreme Court considered that the fundamental principle of contractual certainty would be eroded if lawful act duress was to apply in more than exceptional cases".

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Tracing freezing

recovering the intangible products of cryptocurrency fraud

BEFORE IT IS TOO LATE

While it may seem that the law is playing catch up with technology, there are in fact existing remedies available for the tracing, freezing and recovery of stolen cryptocurrencies...

It is hard to believe that a mere decade ago most of the world still transacted using notes and coins as the main form of currency. Fast forward to today, many have grown comfortable with pointing to numbers on the screen as proof of their wealth, and exchanging goods and services for virtual currencies.

Cryptocurrency is the latest player in this evolution of money. Tesla CEO and Silicon Valley billionaire has publicly touted cryptocurrency as a *"far better way to transfer value than pieces of paper"*[1], and cryptocurrencies like Bitcoin and Ethereum have increasingly been adopted by investors and traders as a form of value transfer. The relatively light-touch regulation on the cryptocurrency industry and the prevalence of its use has however led to an inevitable rise in cryptocurrency related fraud and scams. In the United States alone, more than 80,000 crimes involving cryptocurrencies were reported in 2020[2]. Closer home in Singapore, there were more than 500 reports of crypto-related cheating, fraud or other crimes between 2018 and 2020, amounting to over S$29 million in losses for investors[3].

In light of these worrying trends, it is clear that laws and regulations must evolve alongside technology to guard against the increasingly sophisticated nature of cryptocurrency fraud. It has become necessary to have legal solutions to trace, freeze and recover stolen crypto-assets, even after they have been mixed and dissipated across thousands of crypto-wallets worldwide. We discuss below some of the available legal mechanisms in major financial centers such as the United Kingdom (UK), Hong Kong (HK) and Singapore.

1 *https://www.cnbc.com/2019/02/20/elon-musk-paper-money-is-going-away-cryptocurrency-tech-has-merit.html*
2 *https://www.forbes.com/sites/simonconstable/2021/06/29/us-saw-more-than-80000-cryptocurrency-frauds-in-2020-report/?sh=328095286f0b*
3 *https://www.channelnewsasia.com/cnainsider/get-rich-quick-avoid-cryptocurrency-scams-losses-investment-risk-2079181*

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Is cryptocurrency considered as property?

This is a threshold question to determine whether the legal principles invoked to trace and recover traditional "property" may likewise apply to cryptocurrencies. Across all three jurisdictions, it is encouraging that there is support for the proposition that cryptocurrency could be recognized as property in the context of asset recovery.

- Following a slew of cases where specific relief was granted to preserve cryptocurrencies, the UK Jurisdiction Taskforce published a paper in November 2019 which stated that cryptoassets are *"to be treated in principle as property"*[4].

- The Singapore Court of Appeal, in considering whether it was appropriate to create a trust over cryptocurrencies, opined that there may be *"much to commend the view that cryptocurrencies should be capable of assimilation into the general concepts of property"*[5].

- In 2019, a Mareva injunction was granted by the HK Court of First Instance to freeze assets including Bitcoins. The willingness to grant such remedy suggests that cryptocurrencies are regarded as having some proprietary character.

Tracing mechanisms

The two most common tools to track down the proceeds of fraud are (1) a Norwich Pharmacal disclosure order, and (2) a Bankers Trust disclosure order.

- A Norwich Pharmacal disclosure order compels an individual or entity to provide information to enable a plaintiff to ascertain the identity of a potential defendant before commencement of proceedings. Such orders are commonly made against banks, to compel disclosure of customer information including KYC documents, transaction statements, and payment instructions.

- A Bankers Trust disclosure order may be sought to compel financial entities to disclose information regarding the proceeds of stolen

4 https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf (see para 15(d)).
5 Quoine Pte Ltd v B2C2 Ltd [2020] SGCA(I) 2, at [144].

funds, allowing victims to follow its current whereabouts.

These tracing tools are especially useful in the context of cryptocurrency fraud. Although blockchain has greatly facilitated the transparency and accessibility of crypto-assets, tracing efforts are often hampered by the use of pseudonymization to obscure the account holders' identities.

Orders have been successfully obtained against cryptocurrency exchanges to obtain information on customer identities and the movement of crypto-assets between accounts. Orders have also been obtained against Internet service providers to obtain information regarding the fraudster's IP addresses.

With stricter regulation of crypto-exchanges (for example, in Singapore, where crypto-exchanges must be licensed and collect customer information as part of due diligence), disclosure orders may make it easier for victims to trace down perpetrators through legal mechanisms. A case in point – AI company Fetch.ai had recently succeeded in obtaining disclosure orders from the UK High Court against crypto-exchange Binance, to locate more than US$2.6 million[6] lost through fraudulent cryptocurrency transactions executed at an undervalue[6]. Binance has confirmed that they "are helping Fetch.ai in the recovery of assets", and that "it routinely freezes accounts that are identified as having suspicious activity in line with [their] security policies"[7].

Freezing mechanisms

Once the stolen crypto-assets are located, a freezing order or Mareva injunction may be obtained to ensure that the monies can no longer be "tumbled" into mixed funds and be dissipated worldwide.

This remedy is relatively less contentious. The UK and HK courts have previously granted freezing orders in respect of cryptocurrencies. This is likely to be the position in Singapore as well given the implicit recognition that cryptocurrency should be regarded as property in Singapore.

5 Fetch.ai Limited & Anor v. Persons Unknown & Ors [2021] EWHC 2254 (Comm).
6 https://www.businesstimes.com.sg/banking-finance/london-court-orders-binance-to-trace-cryptocurrency-hackers

Recovery mechanisms

The recovery of crypto-assets could be somewhat more challenging.

Conventionally, once default judgment is obtained against a fraudster, victims may apply for a garnishee order against the party holding the funds (e.g. banks) to gain access to the fraudster's assets. However, unlike banks which have physical headquarters in multiple jurisdictions, the location of crypto-exchanges are often shrouded in secrecy.

This could give rise to complications in determining where the garnishee order should be sought.

Moreover, not all cryptocurrencies are held on exchange-hosted wallets. If the stolen funds are traced to a cold, offline wallet, there may be difficulties in compelling individuals to disclose their private keys (to which they retain total and exclusive control of the cryptocurrency) in order that the victims may access the funds.

Conclusion

While it may seem that the law is playing catch up with technology, there are in fact existing remedies available for the tracing, freezing and recovery of stolen cryptocurrencies. The challenge now would be to successfully adapt and use these tools for this new asset class.

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TREADING CROSS-BORDER WATERS, GALVANIZING ASIAN MARKETS

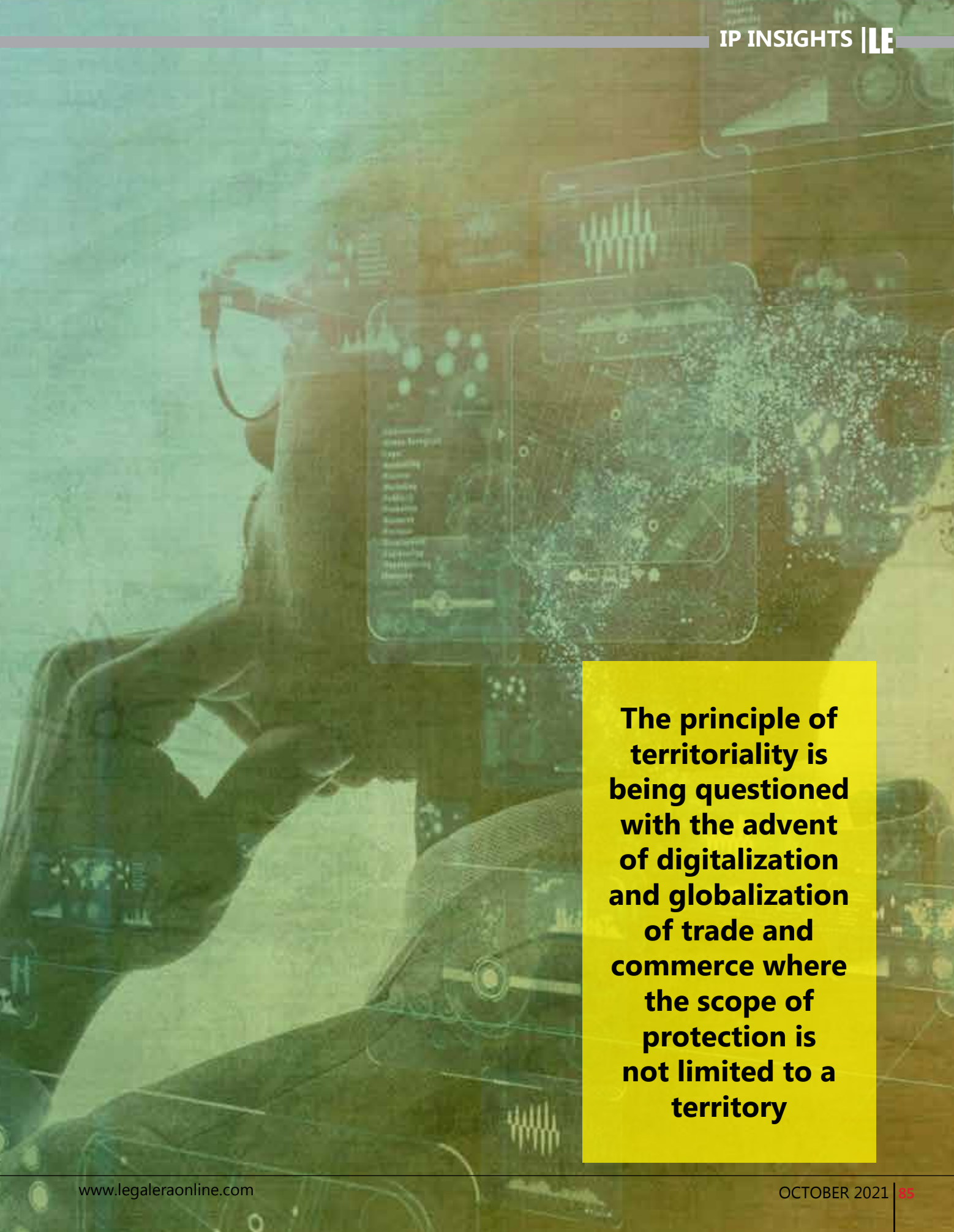
Jurisdictional Issues IN IPR LAWS In The Age Of INTERNET

IP is international in scope but very territorial in nature

Every country has its own patent, trademark and design law, and a person or company requiring to protect their intellectual property (IP) in a particular country must make an application for patent/trademark or design in that country, in accordance with the requirements of that country. Similarly, local laws can apply to patents, trademark, industrial designs copyright, and other forms of intellectual property in each jurisdiction. Though IP is international in scope, it is very territorial in nature. Organizations like World Intellectual Property Office (WIPO), have created a certain level of harmonization of laws practices and procedures set out in conventions, treaties allow for applications and registrations to be made on an international and regional basis. For example, The Patent Cooperation Treaty (PCT) streamlines the process of filing patents in multiple countries. By filing one patent application, applicants can concurrently seek protection in up to 152 countries all over the world. The Madrid Protocol also makes it easier to file for trademark registration in multiple countries; an applicant can concurrently seek protection in up to 100 countries. Similarly, the Hague System for the International Registration of Industrial Designs provides a practical business solution for registering up to 100 designs in over 66 territories through filing one single international application.

Concept of territoriality is inseparable from jurisdiction

The ever-escalating importance of intellectual property in international and domestic commerce is remarkable. Most obvious is the impact of electronic commerce and the growth of the internet as a selling medium, a forum that transcends national boundaries and bears no physical location. The digitalization and globalization of trade and commerce has enabled inventions, designs, brands or copyright works to easily cross physical and cyberspace



The principle of territoriality is being questioned with the advent of digitalization and globalization of trade and commerce where the scope of protection is not limited to a territory

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The process of globalization has not only paved the way for evolution of international norms for protection of intellectual property but has also changed the face of the law protecting it

borders. However, the concept of territoriality is inseparable from jurisdiction. Commercialization and infringement of intellectual property in the true sense have become multi territorial. These are giving rise to issues of jurisdiction and applicable law in cases where the intellectual property rights' (IPR) protection is not limited to a territory. The notion of territoriality as applied in the classical framework of conflict analysis is ambiguous. The principle of territoriality is being questioned with the advent of digitalization and globalization of trade and commerce where the scope of protection is not limited to a territory. Protecting intellectual property in the global markets poses serious challenges as infringement in case of Intellectual property are frequently connected to more than one country, either because the infringer or the right holder is located abroad or because the infringement has been committed in a different country.

Jurisdictional challenges in today's digital age

Globalization and commercialization of intellectual property activities has created multiple challenges. The process of globalization has not only paved the way for evolution of international norms for protection of intellectual property but has also changed the face of the law protecting it. The world has witnessed that the International convention on the Trade Related Aspects of Intellectual Property Rights (TRIPs) has brought certain fundamental changes in the world of intellectual property. The trend of progressive harmonization of Intellectual Property laws will lead to greater simplification and expediency in the acquisition and protection of intellectual property. This is likely to affect the very foundation of the framework of the substantive and procedural laws. The jurisdictional challenges in today's age of fast communication, have invited various viewpoints from academicians, the judiciary and legislators for their resolution including significant changes in the existing legal framework. Internet being one of the most significant changes in the field of information technology requires more than mere adjustment in the law governing it. Therefore, the principle of Law that intellectual property and the rules governing intellectual property rights are territorial by nature becomes more complex. In order to file a complaint, it is essential to determine which courts have jurisdiction over the case. Jurisdictional rules provide for the nexus between the state, activity and the person involved in any litigation.

Jurisdiction overview of IP matters and recent developments in India

At a high level as per the law In India, a suit for infringement of trademark, copyright or patents can be filed in a court not lower than a district court. The exceptions to this are the High Courts of Delhi, Calcutta, Madras, Bombay, Shimla, and Jammu and Kashmir, which are courts having original side jurisdiction. Appeals from orders of the district court are heard by the corresponding High court having appropriate territorial jurisdiction. Similarly, an appeal against an order passed by a single judge of a high court having original side jurisdiction will therefore lie with a division bench of the same high court comprising two judges. The decisions in such appeals can be challenged up to the Supreme Court of India subject to grant of special leave by the apex court.

High courts also exercise writ jurisdiction, invoked for the violation of fundamental rights and other legal rights of citizens and non-citizens alike. Writs are issued by courts against public bodies and writ jurisdiction can be directly invoked against decisions of various IP registries such as the Patent Office, Trademarks Registry etc., when there is a violation of principles of natural justice or other principles enshrined in the Constitution.

Moreover, to increase the efficiency and speed of trial in IP disputes, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 categorized IP disputes as commercial disputes and modified procedural law to expedite and manage their timeline. The Act directed the creation of commercial divisions within high courts and currently, the Delhi and Bombay High Courts have set up commercial divisions to manage IP suits.

Creation of Intellectual Property Division (IPD)

In a recent press release dated July 7, 2021, we were all informed that Delhi High Court creates Intellectual Property Division (IPD) to deal with intellectual property rights (IPR) matters. The creation of the Intellectual Property Division (IPD) in the High Court of Delhi is a significant step which is in line with global practices in this regard. Such IP Divisions or IP Courts, which exclusively deal with IPR matters, already exist in UK, Japan, Malaysia, Thailand, China etc., The creation of IPD with comprehensive Rules governing IPR matters is a momentous step taken towards efficient disposal of such matters.

This was triggered by the fact that The Tribunals Reforms (Rationalization and Conditions of Service) Ordinance, 2021 was promulgated by the President of India and was notified on April 04, 2021. The ordinance dissolves certain existing appellate bodies and transfers their functions (such as adjudication of appeals) to other existing judicial bodies.

The Intellectual Property Appellate Board (IPAB) which was dealing with appeals from the IP offices as also matters such as revocation of Trademarks, Patents, etc. under the various Intellectual Property related statutes is now dissolved. The power to deal with all the pending matters before IPAB as also fresh matters under these statutes, have now been vested in the High Court's pursuant to the new Ordinance.

The Chief Justice of the High Court of Delhi, Justice D.N. Patel had constituted a committee of Justice Pratibha M. Singh and Justice Sanjeev Narula, in order to have a streamlined and comprehensive review of the manner in which a large quantum of IPR cases ought to be dealt with. The Committee submitted its report to the Chief Justice both in respect of IPR and non-IPR subject statutes.

Based on the recommendations of the Committee, the Chief Justice has been pleased to direct the creation of the Intellectual Property Division (IPD) in the Court to deal with all matters related to Intellectual Property Rights. The IPD so created, besides dealing with original proceedings, would also deal with the Writ Petitions (Civil), CMM, RFA, FAO relating to Intellectual Property Rights disputes (except those which are required to be dealt with by the Division Bench).

Press release said that IPD Benches shall be notified by the Chief Justice from time to time. Exclusive IPD Benches are also likely to be created for dealing with such matters. Office-Order is also going to be issued specifying nomenclature to be given to such Petitions and about payment of court-fee for such matters.

The Delhi High Court has created an Intellectual Property Division (IPD) to deal with all matters related to intellectual property rights (IPR). As per information in the press release, approx. 3,000

cases are now to be transferred from IPAB to the High Court of Delhi. In addition, the Delhi High Court has already seized various categories of IPR matters, namely suits relating to Infringement of Trade Marks, Copyrights, Patents, Writ Petitions, Revision petitions arising from IPR suits before the Commercial Courts, appeals from orders/ judgments the Commercial Courts concerning IPR suits, etc

Specific sections that govern the applicable jurisdiction

Analysis of specific sections under IP Laws that govern the applicable jurisdiction:

- Section 62 of the Copyright Act, 1957,
- Section 134 of the Trademark Act, 1999 and
- Section 20 of Code of Civil Procedure, 1908

Section 62 that deals with Jurisdiction of court over matters arising under Copyright Act says that -

(1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.

(2) For the purpose of sub-section (1), a "district court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.

Section 134 under Trademark Act states that a suit for infringement, etc., is to be instituted before District Court.–

(1) No suit–
   (a) for the infringement of a registered trademark; or
   (b) relating to any right in a registered trademark; or
   (c) for passing off arising out of the use by the defendant of any trademark which is identical with or deceptively similar to the plaintiff's trademark, whether registered or unregistered, shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

(2) For the purpose of clauses (a) and (b) of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain. Explanation. —For the purposes of sub-section (2), "person" includes the registered proprietor and the registered user.

For both Copyright and Trademark:

Section 20 under CPC is applicable which says that: Other suits to be instituted where defendants reside or cause of action arises. – Subject to the limitations aforesaid, every suit shall be instituted

in a Court within the local limits of whose jurisdiction—

(a) The defendant, or each of the defendants where there are more than one, at the time of the commencement of the Suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case, either leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation: A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Under the Code of Civil Procedure, an Indian court would have jurisdiction over a matter if the alleged infringement took place or the cause of action arose within its territorial jurisdiction, or if the defendant or any of the defendants actually and voluntarily resides, carries on business, or personally works for gain, within its territorial jurisdiction. The location of the plaintiff is not a consideration. In Sholay Media Entertainment Ltd v. Yogesh Patel, the Division Bench of the Delhi High Court held that even an infinitesimal fraction of a cause of action will confer jurisdiction.

Further it's important to note that both Section 62 and Section 134 are 'inclusive' in nature. They are categorical in nature. The inclusive nature of these sections can be inferred from the word 'include'.
To better understand the intent and effect of section 62 and section 134, it's important to understand what recourse plaintiff would have in absence of these sections and what recourses they have now with these sections.

In absence of Section 62 and Section 134, having resort to section 20, plaintiff may be able to file the suit of infringement against the defendant only at the district court (in case of copyright) or at a court that is not inferior to the district court (in case of trademark) within local limits of which cause of action wholly or in part arises, or where the defendant resides, carries on business or personally works for gain. But when we read Section 62 and Section 134 with Section 20, plaintiff can also file suit for infringement at a place where he resides or carries on business or personally works for gain. Plaintiff is not barred to file suits at courts having jurisdictions where cause of action has arisen wholly or in part or at court having jurisdiction where defendant resides or carries on business or personally works for gain even if plaintiff is not residing or carrying on business or personally working for gain in any of those jurisdictions.

Ordinarily, the doctrines of lex specialis and lex posterior would apply, and the provision under CPC would be restricted. However, considering the language used in the IP Acts, the Supreme Court has held that the jurisdiction under CPC is not ousted; rather the IP Acts merely provide an additional forum where suits may be filed. The purpose behind this additional route is to expose an infringer with inconvenience rather than compelling the sufferer to chase after the former.

Therefore, Section 62 and Section 134 are not in derogation of Section 20, instead they just provide an additional forum for the suing to the plaintiff. Such interpretation of Section 62 and Section 134 has been confirmed by the division bench of the Hon'ble Madras High Court in the 2015 matter of M/S. MICRO LABS LIMITED, v/s M/S. ERIS LIFE SCIENCES PVT. LTD.

The Bombay High Court further in the case of Ultratech Cement Ltd. held that even if one of the Plaintiffs had a place of residence or business within the jurisdiction of the court, the court would have jurisdiction to entertain the suit. The Court further held that the mere existence of a subsidiary or sub-ordinate place of business, even if no cause of action arises at such place, would amount to the plaintiff "carrying on business" within the jurisdiction of the court, thus allowing him to file a suit for infringement and passing-off the trademark. The Court expanded the scope of its jurisdiction under Section 134(2) of the Trademark Act to allow the filing of an infringement suit even if one of the plaintiffs has a place of business within the jurisdiction of the district court. This is in line with the objective of Section 134 of the Trademark Act which aims to provide convenience to a plaintiff to file in a place where the plaintiff actually or voluntarily resides or carries on business or personally works for gain. This special provision in the Trademark Act is a deviation from the principle under Section 20 of the CPC which requires that a corporation would be deemed to be "carrying on business" at its principal office in India, or in respect of a sub-ordinate office, if such cause of action takes place at the place of the sub-ordinate office.

Where there are multiple plaintiffs filing a suit for infringement of a Trademark, even if one plaintiff has a place of residence or business, the court would have jurisdiction to adjudicate the matter.

Often, foreign trademark owners grant a trademark license to the Indian subsidiary for use of the trademark in India. In such cases, typically, the licensee is also impleaded as one of the plaintiffs when such trademark is infringed or otherwise violated. In such cases, now this judgment clarifies that the place of business of such licensee, could confer jurisdiction on the court.

Guided by the motive of aiding convenience, the IP Acts provide for an additional forum where a registered right-holder could sue for infringement. However, the motive was never to enable a plaintiff to indulge in forum shopping, and the legislature did not attend to require either party to travel to distant places. Therefore, in Sanjay Dalia, the Supreme Court interpreted Section 62 of the CR Act and Section 134 of the TM Act in a manner that allowed the availment of the additional route to plaintiffs while restricting harassment of defendants through filing of suits at far-flung places. It was noted that generally, a plaintiff under the IP Acts ought to file a suit at the place of ordinary residence or where the principal office is situated. However, if a right-holder is residing or carrying on business at a place where the cause of action has also arisen, the suit must be filed at that place itself – the IP Acts thus do not allow the right-holder to travel to a far-off place where it carries on business for the purposes of instituting proceedings. For example, if a company has its registered office at A and branch offices at B and C, with the cause of action arising at B, the appropriate forum for filing a suit under the IP Acts would be the court exercising jurisdiction over B. This position has been adopted and further clarified in Ultra Home, where specific scenarios contemplating the plaintiff as a corporation were set out.

Section 62 of the CR Act and Section 134 of the TM Act provide a forum additional to those under Section 20 CPC where a plaintiff may institute proceedings. However, the jurisdiction under IP Acts may only be utilized in respect of a registered copyright/trademark; In a case involving infringement of a copyright/trademark, jurisdiction may be invoked either under the IP Acts or under CPC. Both are individually enough for determining the appropriate forum of dispute. In cases of passing off, only the jurisdiction under CPC may be availed.

Jurisdiction may also depend upon the relevant territory of the court, and the pecuniary value and subject matter of the dispute. Each of these determinants are independently considered for a court to assume jurisdiction.

However, in cases where the validity of the registration of an intellectual property right is disputed, Indian courts will have jurisdiction only if the registration is granted in India. It would therefore not be possible to question the validity of a registration of an intellectual property right

granted in a foreign jurisdiction before an Indian court.

However, it would be possible for a foreign entity to challenge the validity or registration of an intellectual property right granted in India. Further, even if rectification proceedings instituted by a defendant in a foreign court are pending, these will not preclude an Indian court from granting interlocutory relief in favor of the claimant in trademark matters.

Concept of Internet Jurisdiction

The concept of internet jurisdiction has also evolved to quite an extent in India. It is interesting to note that the Indian Courts have been liberal in their approach to interpret the complexity of internet transactions. The Indian Courts have interpreted the concept of Internet Jurisdiction in nexus with the scope of jurisdiction as provided for in Section 19 and 20 of CPC, 1908 as well as considering judicial pronouncements from all over the world. In the absence of any law on the issue, judicial pronouncements will only set the footing in the issue.

Since content, products and services on a website or mobile application are available throughout territories wherever the reach of the internet extends, there are two pertinent questions that need answering:

- In respect of an entity having an online presence, where exactly can a plaintiff or a defendant be said to "carry on business"?
- In respect of infringing goods/services offered or sold over the internet, where exactly does the "cause of action" arise?

Answers to these can assist us in addressing the conundrum of jurisdiction around internet-based intellectual property disputes and pinpoint the appropriate forum for institution of a suit.

The question on where exactly a plaintiff or a defendant can be said to "Carrying on Business" was addressed in Dhodha House v. S.K. Maingi (hereinafter referred as Dhodha House Case)

In the Dodha House case, it was observed that the presence of any man was not necessary for the purpose of "carrying on business", and the Supreme Court set out three fundamental conditions that had to be satisfied for establishing that an entity carries on business within a court's jurisdiction:

- Presence of an agent who carries on business exclusively for and in the name of the principal;
- Agency in the strict sense of the term; and
- An "essential part" of the business must take place in that place.

However, later in World Wrestling Entertainment Inc. v. Reshma Collection matter (hereinafter "WWE"), the Division Bench clarified that in case of web-based business models, the first two conditions set out in Dodha House will not apply, since they specifically relate to agents. What warrants consideration is whether in transactions over the internet, the third condition stipulating performance of the essential part of the business is satisfied, and if yes, where?

It was noted that the display of goods on a website amounts to an invitation to offer against which an offer is made by a customer at the place where he or she is located. If accepted, the money is paid from the customer's location, and the goods are delivered to the same location. Owing to the nature of the internet, the offer and acceptance are instantaneous. Keeping these factors in mind, it was held that the availability of transactions through a website at a particular place is virtually the same as a seller having a shop at that place in the physical world, and therefore, such seller would be regarded as carrying on business at that place.

The principle expounded in WWE has been upheld and applied in subsequent cases. In Millennium & Copthorne matter, it was clarified that service providers would also attract jurisdiction at places where customers can make a mere reservation (even through third-party websites), whether the reservation concludes into a transaction or not. For example, if there is a hotel located at A, and through a tourism website, customers at B and C can book a room at the hotel, the hotel would be carrying on business at B and C, and would attract jurisdiction on this ground at both of those places in addition to A.

On the second question on Cause of Action. The determination of the cause of action, and thereby, jurisdiction under Section 20 CPC in an online context has been examined extensively Banyan Tree Holding (P) Ltd. v. A. Murali Krishna Reddy (hereinafter "Banyan Tree Case"); A case

where interestingly, neither the plaintiff nor the defendant was located within the territorial limits of the court. Here, the Division Bench of the Delhi High Court decided that mere accessibility or interactivity of a website in a particular place would not confer jurisdiction to courts in that place. Rather, the plaintiff must establish that the defendant "purposefully availed" itself of the jurisdiction at the place of suing. After noting common law developments in UK and USA, the following elements were held necessary to show that the cause of action partly arose in a place through the use of internet:

1. Specific targeting of customers in that place;
2. Conclusion of commercial transactions with such customers; and
3. Injury to plaintiff's business, goodwill or reputation in that place.

Thus, a rigorous standard to determine cause of action and jurisdiction in cases of online transactions was set up. Over the years, however, adjudication has diluted this standard. In Sholay Media and Entertainment (P) Ltd. v. Yogesh Patel, the Court considering that mere display of a trade mark at an exhibition confers jurisdiction observed that an act of advertising counterfeit products or soliciting customers therefor in a place would constitute a part of the cause of action, and courts in such place would accordingly have jurisdiction.

Similar views have been held in Burger King Corpn. v. Techchand Shewakramani and in Exxon Mobil Corpn. v. Exoncorp (P) Ltd. (hereinafter "Exxon Mobil"). According to these decisions, the cause of action arises in each and every place where infringement/passing off occurs. Since, in addition to actual sales, advertisements and promotions too constitute infringement according to the IP Acts, the cause of action partly arises in all places where such advertisements and promotions are made. The courts exercising jurisdiction in all those places would thus be appropriate fora for institution of proceedings.

So, to conclude in the context of disputes over the internet, the scope of "carrying on business" has been elucidated in WWE while the scope of "cause of action" has been expounded in Banyan Tree. The ratios of these decisions have been applied and clarified in the subsequent decisions of Millennium & Copthorne and Exxon Mobil to hold that jurisdiction is conferred even in places where a website advertises infringing goods and services or facilitates the mere making of bookings or reservations.

These decisions have greatly expanded the ambit of jurisdiction in cases of online intellectual property violations, so far so that they were recently applied in HT Media v. Brainlink International towards the exercise of extra-territorial jurisdiction to injunct the infringing activities of a defendant located in New York.

Clearly, Section 20 CPC has a wider scope than jurisdiction under the IP Acts, and in context of intellectual property violations over the internet, right-holders would be able to invoke jurisdiction on the basis of "cause of action" under CPC with greater ease than on the ground of "carrying on business".

Thus, it is easy to conclude by saying India has given the concept of personal jurisdiction a wide berth and a multi-dimensional interpretation and one can hope to have a "one size fits all" criteria in the foreseeable future, as Courts get better acclaimed with the use of and the advancement of technology in all fields – legal & commercial.

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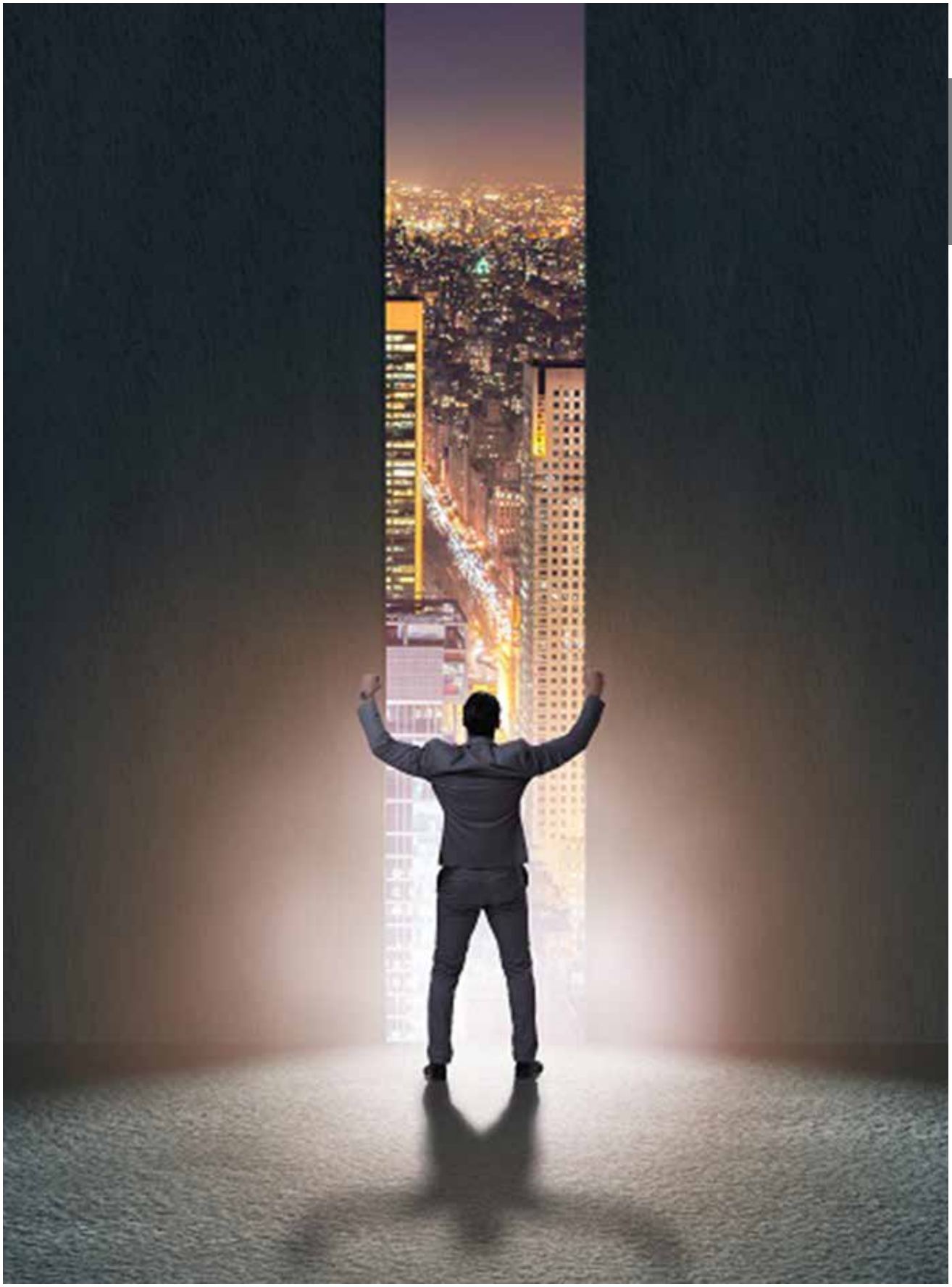
Anubhav Kapoor is counted among the Top 100 General Counsel in India. As Director of Legal Affairs at Ford India, ANUBHAV is responsible for legal, IP, regulatory compliance and corporate governance practices and policies of the entities of Ford in India. He is based out of Pune. Anubhav has 27 years of experience as in-house counsel across industries including IT, automotive, aerospace, pharmaceuticals, food, banking & insurance software and engineering. His areas of expertise include M&A, arbitration & litigation management, structuring of large business contracts, IPR and global compliances to name a few. Passionate about innovation, he has helped large corporates devise their IP creation and monetization strategies. He has also handled contracts and litigations involving complex IP issues.



THE OPERATION OF INTERPOL IN POLITICALLY MOTIVATED BUSINESS CRIME CASES

How INTERPOL helps fight crime

INTERPOL was initially conceived during the first International Criminal Police Congress of 1914, which brought officials from 24 countries together to discuss cooperation in law enforcement. The plan was to build an organization which allowed national police to share and access information internationally, including about individuals accused of serious crimes. As INTERPOL now has 194 countries as its members, it has reach into virtually every country in the world. This capacity has a growing importance as globalization continues and police forces increasingly need to be able to make interventions beyond their own country's borders.

In terms of the prosecution of crime and the punishment of offenders, among INTERPOL's most significant tools are 'red notices' and 'diffusions'. A red notice is a request, issued by INTERPOL, to law enforcement bodies worldwide to locate and provisionally arrest a person pending extradition or surrender. India is currently pursuing hundreds of suspected or convicted criminals by means of INTERPOL red notices. A diffusion is similar to a red notice, but can be issued more speedily, without the same formalities. Unlike red notices, diffusions are circulated by the National Crime Bureaus of individual countries directly to other INTERPOL member states, without first being scrutinized by INTERPOL.

Red notices and diffusions help countries to identify and apprehend potential fugitives. A visit to the red notice page of Interpol's website quickly gives an impression of the range of offenses alleged. The difficulty is that INTERPOL's system is susceptible to abuse. For a number of years, members of INTERPOL and civil society organizations have raised concerns about the functioning, transparency and funding of the organization. These problems affect even the most senior levels of INTERPOL's leadership. Although Russia is notorious for its abuse of INTERPOL's systems, the Russian candidate was prevented from becoming president of the organization in October 2018 only as a result of last-minute lobbying by the UK and others amongst the 'Five Eyes' group of intelligence sharing nations.

Problems with red notice and diffusion systems

INTERPOL's website reveals that there are 7,700 public red notices in circulation. However, this is just the tip of the iceberg, because not all red notices are public. According to its own figures, INTERPOL issued over 11,000 new red notices in 2020 alone. In total, there are an estimated 65,000 red notices in existence. INTERPOL is required to review each request for a red notice before publication, in order to ensure that it complies with the organization's rules. However, with a staff of only two or three dozen dedicated to the task, INTERPOL does not have the resources to carry out a meaningful review and often appears to accept a request for a red notice at face value.

In addition to the requests for new red notices, it is understood that around 50,000 diffusion requests are made a year. Even though diffusions, like red notices, must comply with INTERPOL's Rules, they are not vetted at all before they are circulated. This means they enter into circulation without any independent oversight whatsoever.

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This lack of proper scrutiny of both red notices and diffusions leaves the system susceptible to abuse. Although Article 3 of INTERPOL's Constitution states that, "it is strictly forbidden for the Organization to undertake any intervention or activities of a political character", some countries flagrantly attempt to use the red notice system to persecute political opponents. Turkey attempted to issue 60,000 red notices against political opponents after the failed 2016 coup. Increasingly, INTERPOL Red Notices and Diffusions are also being abused in another way: in order to apply pressure in disputes arising out of a commercial context.

Interpol and commercial disputes

Where a business comes into conflict with local political interests and politicians wield influence over prosecutors, a criminal investigation may be opened. Alternatively, a commercial rival may pull political strings in order to get ahead of a competitor, and that may result in allegations of financial crime. The prospect of being pursued by these criminal law means, with the collusion of politicians, has become one of the perils of doing business in some high-risk jurisdictions. Where an investigation has been opened, a red notice or diffusion will often soon follow, as a means of forcing international businesspeople to come to the negotiating table and to make a deal. Businesses affected include oil companies, financial service providers, real estate developers, but also the whole spectrum of other businesses.

One of the most well-known examples of this is William Browder, the founder of Hermitage Capital Management Ltd. The Russian State used red notices as part of an overall strategy to strip Hermitage of its assets and intimidate its founder. Russia now increasingly uses diffusions for the same purpose, because they are not scrutinized, but it is by no means unique in abusing INTERPOL's systems in this way. Red notices and diffusions are used in similar ways by many countries in which the rule of law is weak. For example, red notices have a reputation of being used effectively as a means of private debt collection by certain Middle Eastern countries.

Not every country will treat a red notice as a valid arrest warrant. However, even if this consequence does not automatically follow, the practical effect

of a red notice or diffusion is far-reaching. An individual cannot travel freely, without the risk of arrest and extradition to the requesting country. The existence of the INTERPOL alert will also cause reputational damage and may well lead to the closure of bank accounts and the withdrawal of finance facilities. Due diligence service providers will access information published by INTERPOL or reported in the press. This information will then feature in risk and compliance reports. As well as the toll this takes on an individual, these occurrences are likely to have significant deleterious effects on any business.

> *"Increasingly, INTERPOL Red Notices and Diffusions are also being abused in another way: in order to apply pressure in disputes arising out of a commercial context."*

Ways to address the problems

Various member countries and organizations are now looking at what can be done to improve INTERPOL's capacity to resist this kind of abuse. Within INTERPOL, there is a body known as Commission for the Control of Interpol's Files (CCF). The role of this part of the organization is to ensure that all data processed by INTERPOL complies with its rules. A recent welcome development is the appointment to the CCF of Teresa McHenry, who brings valuable experience from her senior role as head of the Human Rights and Special Prosecutions section of the US Department of Justice. In the UK, in June this year, the House of Commons Foreign Affairs Committee published a report that made recommendations for the reform of INTERPOL. Such change takes time. In the meantime, there are steps an individual businessperson may take, in his or her own defense.

Those who are victims of fraudulent red notices or diffusions may write to the CCF to make representations. This can be done pre-emptively, before the red notice is actually published, or once publication has occurred. Skilled representations will dramatically increase the likelihood that a notice or diffusion will be removed and an individual will be able to return to business as usual.

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DEPENDENT CLAIMS FULLY RESTORED

(MERCK PART 2)

While the FC Merck case was highly welcomed, it was doubtful whether the shadow of the SKB Shutters Ruling lingered on patent practices, given the introduction of Type 1 and Type 2 claims by the FC

Dependent claims are commonplace in patents where such claims, which are narrower in nature, include all the features of one or more independent claim(s) with additional or limiting features. Generally, these dependent claims would act as "fall-back" claims if the independent, wider claim is invalidated. However, the need for dependent claims was severely diluted by the 2015 decision of ***SKB Shutters Manufacturing Sdn Bhd v Seng Kong Shutters Industries Sdn Bhd & Anor***[1] whereby the Federal Court (**"FC"**) ruled that the validity of a dependent claim will automatically fall upon the substantive finding of invalidity of its independent claim (**"the SKB Shutters Ruling"**).

Four years later, the FC cured this precarious position by overruling the SKB Shutters Ruling in the case of ***Merck Sharp & Dohme Corp & Anor v Hovid Berhad***[2] (**"the FC Merck case"**). As a brief background, Merck's patent was one for "pharmaceutical compositions for use in inhibiting bone resorption" (**"the 194 Patent"**) which consisted of independent claim 1 and dependent claims 2 to 22. In 2014, Merck commenced an infringement action against Hovid Berhad (**"Hovid"**) while Hovid sought to invalidate the 194 Patent. The High Court (**"HC"**) held that independent claim 1 was invalid due to obviousness. Being bound by the SKB Shutters Ruling due to stare decisis, the HC subsequently invalidated dependent claims 2 to 22 without considering their validity separately.

On appeal to FC, the FC held that the validity of the dependent claims must be assessed independently, notwithstanding the fall of the independent claim which they depended upon. In particular, the FC introduced the novel concepts of Type 1 and Type 2 patent claims. Consequently, the FC ordered a remittal of the case to the HC to determine whether each of the dependent claims (claims 2 to 22) possessed independent validity ("the Remitted Case").

THE CONCEPT OF TYPE 1 AND TYPE 2 PATENT CLAIMS

The FC relied on the following diagram to explain the concept of Type 1 and Type 2 patent claims:

The FC explained that:

a) Type 1 claims are defined as consisting of one or more independent claims which are supersets of their dependent claims. The dependent claims herein would thus be subsets of the independent claim, focusing on specific features and having a narrower scope than its independent claim.[3]

b) Type 2 claims are defined as consisting of dependent claims which include additional features over and above the independent claims making them more specific.[4]

According to the FC, the interdependency of claims hinges on whether the claims are Type 1 or Type 2 claims. The FC seemed to sugg est that:

a) If the claims are Type 1 claims and the basis of challenge relates to prior art (namely obviousness or lack of novelty), then, when the independent claim is invalidated, the claims dependent on the said independent claim may also be declared to be invalid.[5]

1 *[2015] 6 MLJ 293*
2 *[2019] 12 MLJ 66*
3 *See paragraph 87 of Merck Sharp & Dohme Corp & Anor v Hovid Berhad [2019] 12 MLJ 66.*
4 *See paragraph 88 of Merck Sharp & Dohme Corp & Anor v Hovid Berhad [2019] 12 MLJ 66.*

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b) However, if the claims are Type 2 claims and the basis of challenge relates to prior art, when the independent claim is invalidated, the dependent claims have to be addressed separately to determine their validity. This is because they may have additional features that have not been disclosed by prior art or prior publications.[6]

THE REMITTED CASE

In the course of the Remitted Case, Hovid mounted its challenge by arguing that the said dependent claims were Type 1 claims and since the independent claim 1 had been invalidated, the said dependent claims should likewise be automatically invalidated.

While Merck conceded that the said dependent claims were Type 1 claims, it argued that for an automatic invalidation of a Type 1 claim to occur, the prior arts relied upon to invalidate the independent claim must have disclosed the entire range of the features of the independent claim.[7]

In the course of its arguments in the HC, there was also reliance on the acknowledgment by the FC that Type 1 claims could remain open for independent assessment when it cited the Scottish case of ***Verathon Medical (Canada) ulv v. Aircraft Medical Limited.***[8] In that case, despite dependent claim 17 of the patent being a Type 1 claim in form, the court acknowledged that claim 17 would have been independently valid if the Prior Art did not already disclose a device with a wireless connection to a monitor for viewing'.[9] Flowing therefrom, Merck argued that the 'automatic invalidation' would not apply to the facts of its dispute as none of the prior arts relied upon by Hovid in its invalidation of independent claim 1 disclosed the entire range of the dosages and periodicities of claim 1. On this basis alone, the said dependent claims must be assessed independently, despite being Type 1 claims.

More importantly, Merck contended that if the Court accepted Hovid's interpretation of the

5 *See paragraph 182 of Merck Sharp & Dohme Corp & Anor v Hovid Berhad [2019] 12 MLJ 66.*
6 *See paragraph 183 of Merck Sharp & Dohme Corp & Anor v Hovid Berhad [2019] 12 MLJ 66.*
7 *Reliance was placed by Merck on the following paragraph 105 of the FC Merck case: "Since the dependent claim is a subset of the independent claim, and all its features are present in the independent claim, it stands to reason that, should the prior art have the same features of the independent claim, when the independent claim is found to be invalid, the dependent claim falls."*
8 *[2011] CSOH 19*
9 *See paragraph 173 of Verathon Medical (Canada) ulv v. Aircraft Medical Limited [2011] CSOH 19.*

concept of Type 1 claims, there was the danger in returning to the SKB Shutters heydays which would have been inconsistent with the spirit and intent of the FC Merck case, having earlier departed from the SKB Shutters Ruling.

In its oral decision on 6 April 2021, the learned HC Judge agreed with Merck's interpretation of the concept of Type 1 claims. The Judge found that since none of the prior arts cited by Hovid disclosed all the essential features of independent claim 1 of the 194 Patent, the HC was obliged to independently assess the validity of the said dependent claims.

In its oral decision on 6 April 2021, the learned HC Judge agreed with Merck's interpretation of the concept of Type 1 claims

CELEBRATING THE PROPER INTERPRETATION OF TYPE 1 AND TYPE 2 CLAIMS

While the FC Merck case was highly welcomed, it was doubtful whether the shadow of the SKB Shutters Ruling lingered on patent practices, given the introduction of Type 1 and Type 2 claims by the FC. Questions arose as to whether dependent claims would be automatically invalidated upon the invalidation of their independent claim, merely because such claims fell within the realm of Type 1 claims. Fortunately, the HC clarified the concepts of Type 1 and Type 2 claims in the Remitted Case, which restores patentees' confidence in dependent claims.

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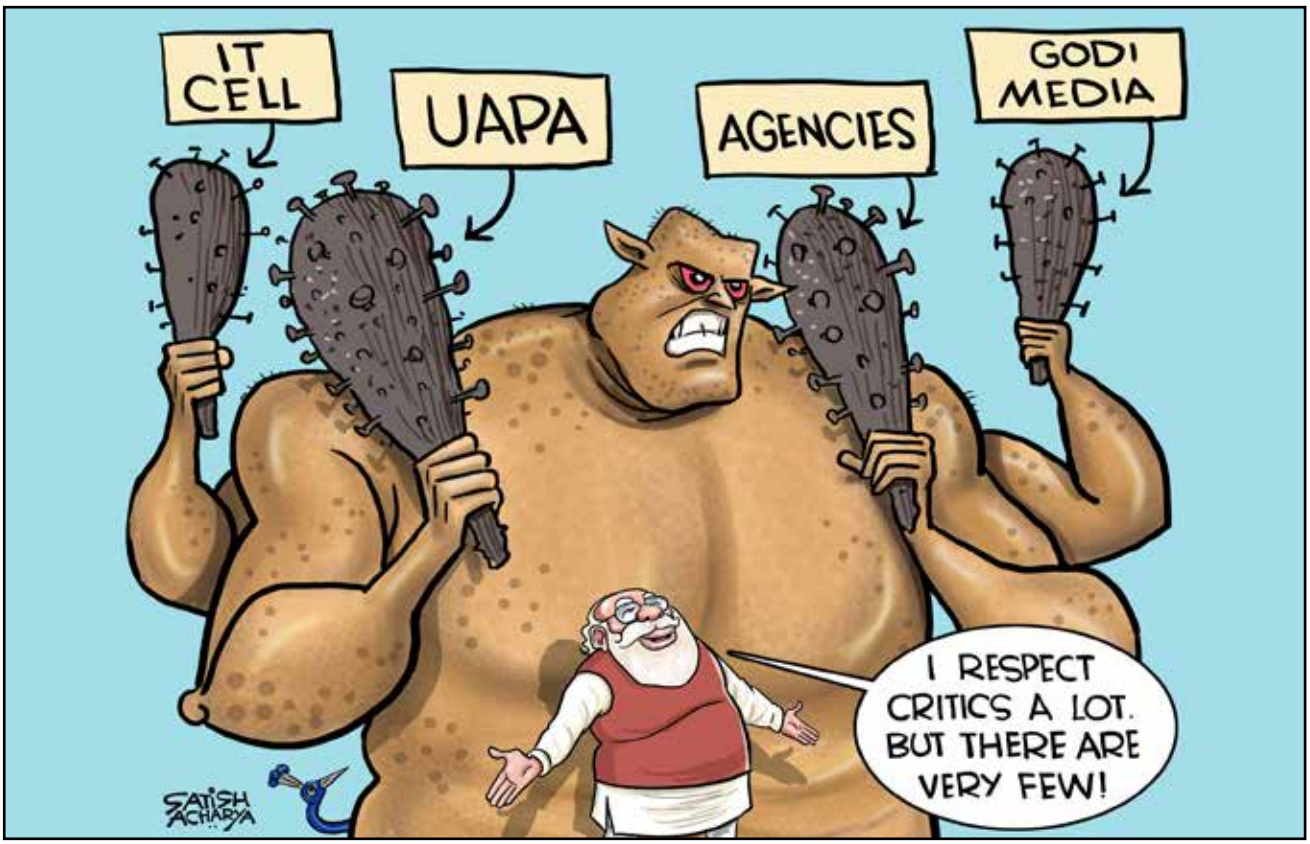
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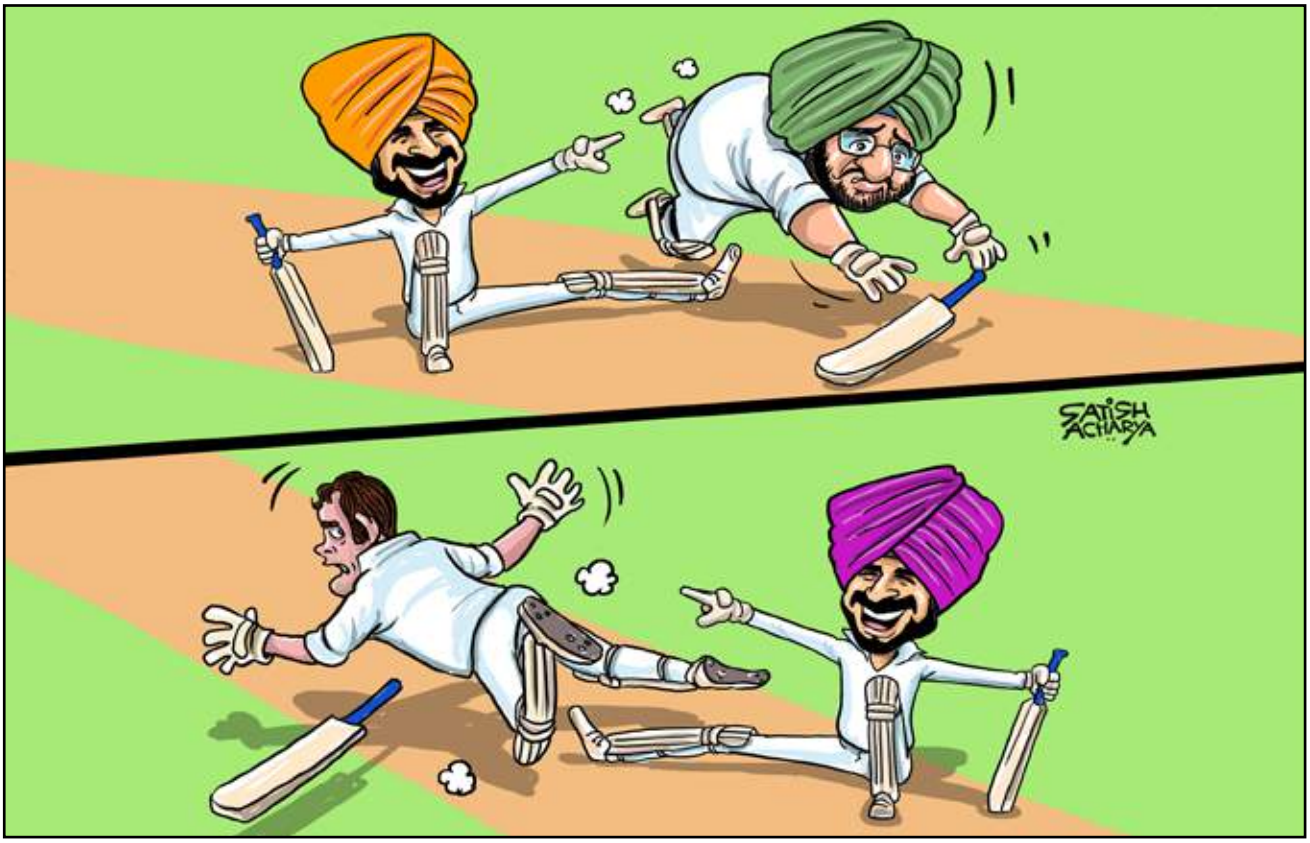
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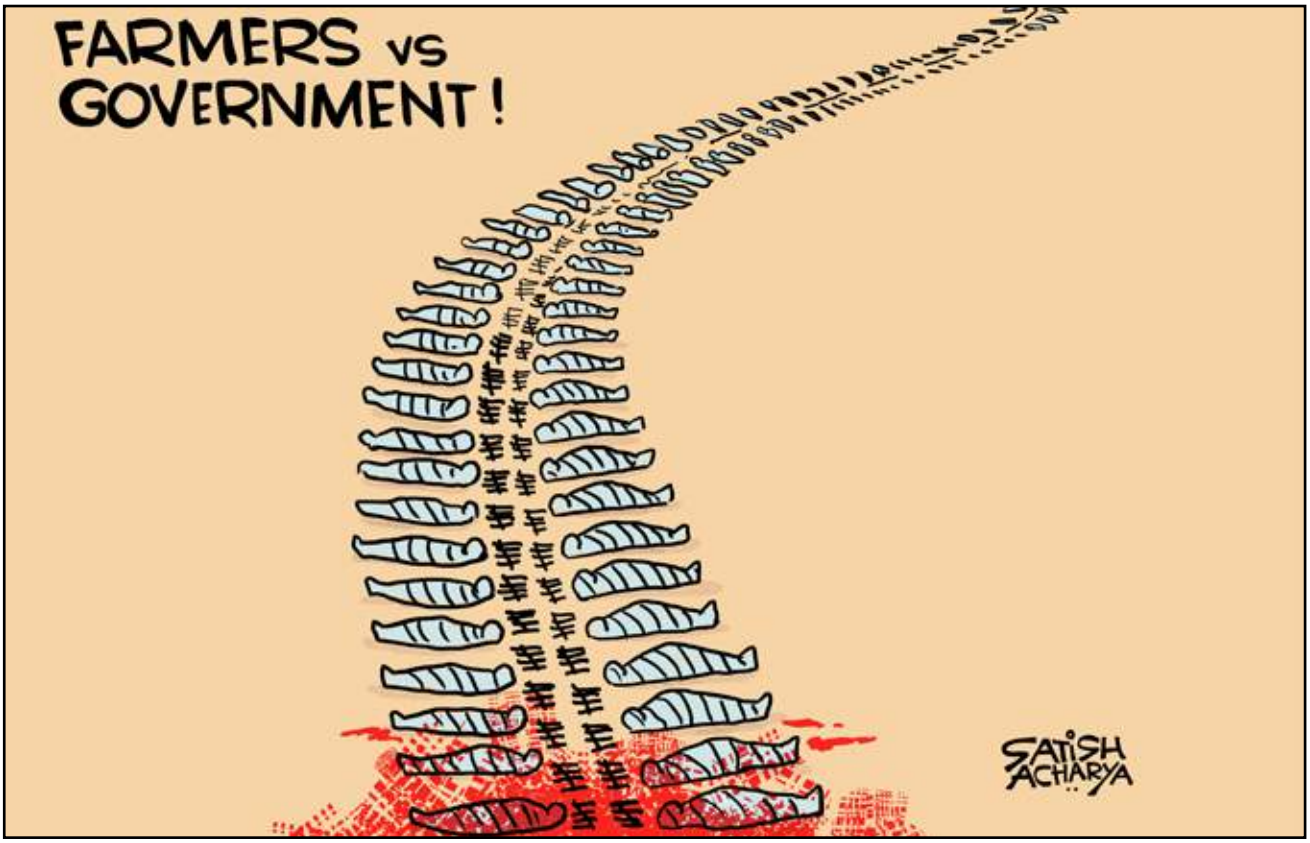
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