HSA ADVOCATES
HEMANT SAHAI ASSOCIATES

India Update

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Quarterly newsletter analyzing the legal, regulatory and policy developments in India

TABLE OF CONTENTS

Investment and deal activity analysis
Analysis of PE/VC deal activity and sectoral distribution of the investments in India in 1H21

Securities and Exchange Board of India – Key updates
- SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations 2021
- New Norms for large IPOs
- Draft consultation paper proposing changes to the 'Promoter' concept under ICDR Regulations
- Revision in delisting for public M&A in India
- Companies to separate the roles of Chairperson and Managing Director
- Guidelines on valuation of securities with multiple put options

Reserve Bank of India – Key updates
- ECB Policy – Relaxation in the period of parking of unutilized ECB proceeds in term deposits
- Key monetary policy announcements
- Extension of the 'Interest Equalization Scheme for Pre and Post Shipment Rupee Export Credit' for another 3 months
- Contribution to AIF set up in offshore jurisdiction including IFSCs
- Change in bonds auction methodology

E-commerce rules – Proposed amendments and implications
Key aspects of the Proposed Amendments by Consumer Affairs Ministry in the Consumer Protection (E-commerce) Rules, 2020

Relaxations made to the definition of listed companies
Definition of 'Listed Company' has been tweaked to improve the Ease of Doing Business rankings

Companies (CSR Policy) Amendment Rules 2021
Multiple clarifications on what companies could consider as part of their CSR expenditure in wake of urgent emerging health care requirements

PASL Wind Solutions Pvt Ltd v. GE Power Conversion India Pvt Ltd
Supreme Court upheld the right of two Indian parties to choose a foreign seat of arbitration and additionally held that an application for interim reliefs is maintainable in such cases

Additional due diligence requirements for SSMI under IT Intermediary Guidelines
Significant Social Media Intermediaries are now required to observe specific additional due diligence

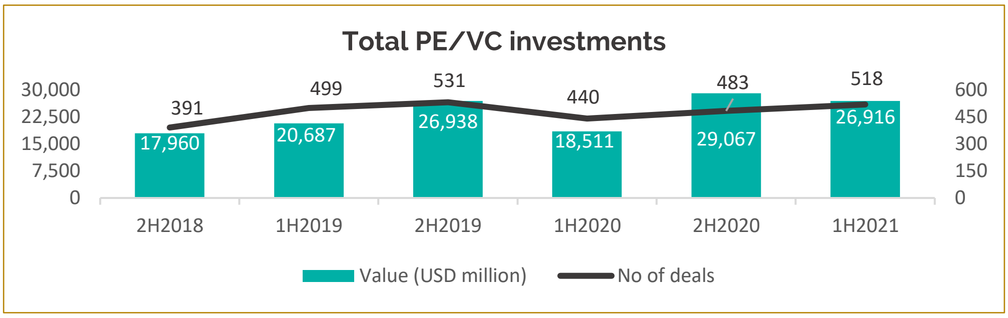
Pre-packaged insolvency resolution process
Pre-packaged insolvency resolution process for Corporate Debtors classified as MSMEs under the MSMED Act, 2006

Interdigital Technology Corp v. Xiaomi Corp & Ors
Any court in one sovereign jurisdiction cannot injunct the legal proceedings in any court in another sovereign jurisdiction

INVESTMENT AND DEAL ACTIVITY ANALYSIS

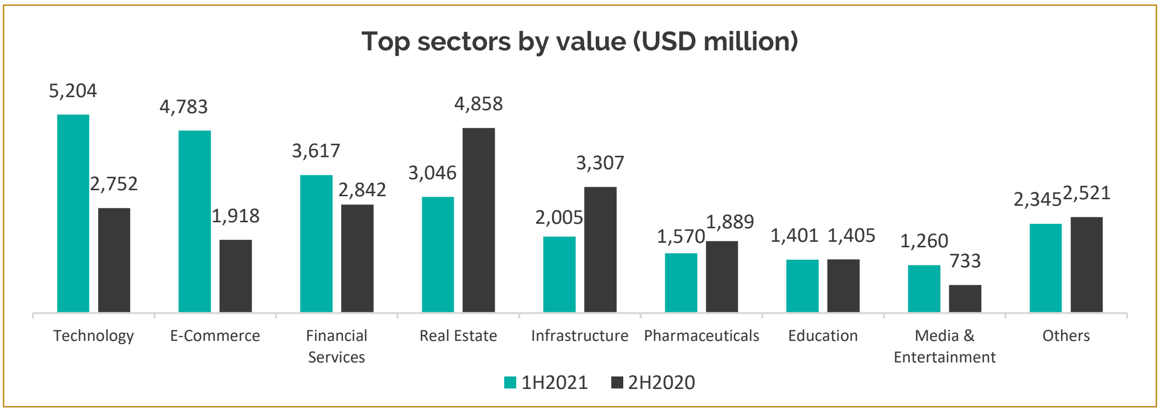
On a half yearly basis, PE/VC investments in H1 of 2021 recorded a 45% increase year on year. In terms of number of deals, this period recorded an increase of 18% with 518 deals as against 440 deals in H1 of 2020 and 483 deals in H2 of 2020. This increase is indeed impressive, more so given the lower base effect as H1 of 2020 was significantly affected by the uncertainties that came along with the onset of the Covid-19 pandemic and the strict nationwide lockdown that ensued shortly thereafter.

Pure play PE/VC investment (excluding real estate and infrastructure sectors) recorded its highest ever value of USD 21.9 billion in H1 of 2021, which is 32% higher compared to H1 of 2020 (USD 16.5 billion) and 5% higher than H2 of 2020 (USD 20.9 billion). This period saw 64 large deals aggregating to USD 19.1 billion (compared to 30 large deals aggregating to USD 13.6 billion in H1 of 2020). The largest deals included Blackstone along with ADIA, UC Investments and GIC acquiring a majority stake (~75%) in Mphasis for around USD 2.8 billion and a group of investors including QIA, GIC, Goldman Sachs, Naspers and others investing ~USD 800 million in Swiggy.



Source: IVC Association and Ernst & Young Monthly PE/VC Roundup, June 2021

From a sector perspective, technology was at the top (USD 5.2 billion across 67 deals), with e-commerce at second place (USD 4.8 billion invested across 83 deals) followed by financial services sector (USD 3.6 billion across 90 deals). Media and entertainment sector is noteworthy for recording an all-time high number of USD 1.3 billion across 25 deals.



Source: IVC Association and Ernst & Young Monthly PE/VC Roundup, June 2021

This period also saw significant exits via strategic sale with transactions worth USD 12.7 billion recorded across 29 deals. Next in line were exits via secondary sale (sale to other PE funds) at USD 4.5 billion (31 deals) that recorded the highest ever half-yearly value and four times the value recorded in entire 2020. Open market exits recorded 38 deals worth USD 2.9 billion. PE-backed IPOs too recorded highest ever half-yearly value of exits in H1 of 2021 and second highest in terms of number of IPOs (USD 1.6 billion in sale proceeds across13 IPOs). From a sector perspective, technology sector recorded the highest value of exits in this period (USD 11.8 billion across 11 deals), which is more than the exits recorded by the sector in the preceding eight years combined. This is primarily on account of Hitachi's buyout of the stake held by CPPIB and Partners Group in GlobalLogic for USD 8.6 billion. Financial services was the next big sector with 22 exits worth USD 2.5 billion.

Indian PE/VC investment activity grew at a record setting pace throughout this period and the deal pipeline indicates that this pace is only going to intensify as 2021 progresses. Technology, e-commerce, financial services, pharmaceuticals, education and media and entertainment sectors are likely to witness enhanced deal activity. PE/VC exit activity is also on track to notch up a record setting year. With ~USD 22.5 billion of exits in the first six months and several large deals in pipeline, 2021 is expected to materially eclipse 2018's high of USD 27 billion. Large, multi-billion dollar exits to strategic buyers is expected to remain the main driver, while exits via secondary deals, open market sale of listed positions as well as IPOs are also expected to remain strong. A positive response by the equity markets to the Zomato IPO and the soon to follow IPOs by other VC funded new age unicorns are expected to catalyze even more investment and exit activity in the Indian start-up ecosystem.

SECURITIES AND EXCHANGE BOARD OF INDIA – KEY UPDATES

SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) (AMENDMENT) REGULATIONS 2021

SEBI vide Gazette notification dated May 05, 2021, notified the SEBI (Substantial Acquisitions of Shares and Takeover) (Amendment) Regulations, 2021 (**Amendment**) which amends the SEBI (Substantial Acquisitions of Shares and Takeover) Regulations, 2011 (**Regulations**).

The primary aim of the Regulation is to monitor and control acquisition of shares and voting rights in publicly listed companies of India. During the course of the time, the Regulation has gone through multiple amendments to keep up with the dynamic trading platforms and investor behavior patterns. The current Amendment aims to amend the Regulations to insert certain provisions relating to the Innovators Growth Platform and the trigger point for making open offer by an acquirer.

Amendment

The Amendment has amended the nomenclature wherein the Institutional Trading Platforms (**ITP**) has been substituted with Innovators Growth Platform (**IGP**). Further, the trigger for making a public offer under Regulations 3 and 6 of the Regulations, in the listed entities on IGP has been enhanced to 49% from the erstwhile 25%, pursuant to the Amendment.

Pursuant to the Amendment, the requirement to disclose further acquisition of shares to the board of that company, beyond the threshold of 5% has been revised to 10%. Regulation 29 (2) of the Regulations requires disclosure of change in shareholding or voting rights of the acquirer if such change exceeds 5% of total shareholding /voting rights from the erstwhile 2%, pursuant to the Amendment.

Furthermore, Regulation 26 (6) of the Regulations, which deals with the analysis by the committee of independent directors, the Amendment seeks to introduce disclosure of voting pattern of the meeting in which the open offer proposal was discussed as a part of the detailed public statement issued along with the open offer by the acquirer.

Conclusion

The Amendment is seen as another modification by SEBI to revive the market lows, as the trade and market experience a decline in value creation by different firms using such platforms. Setting the bar lower for shareholders and voting rights was intended to stamp on fair market play and encourage more transparency on the acquisition of shares, voting rights, and standing on the shareholder's board. However, intending to give liberty to the acquirers and motivate them to indulge in trading in companies, SEBI has relaxed the regulations to some extent. It would mean that the acquirer can buy such shares without triggering the need for making an open offer until 49%, unlike other listed entities whereupon acquiring 25% shares, the acquirer shall have to make an open offer to the public mandatorily. Any acquirer will now be able to exercise a little more room to avoid the procedural formality of public disclosures and infuse capital in cash straped companies.

NEW NORMS FOR LARGE IPOS

SEBI has eased the listing norms for certain companies by reducing the threshold for minimum public shareholding. These changes were brought in considering the decline of Initial Public Offerings (**IPOs**) and constraints faced by companies with post-issue Market Capital (**MCap**).

Key takeaways

- **Reduced MPO requirements:** The prevailing norms mandated that for companies with a post-issue capital above INR 4000 crore, the minimum public offer size was 10% of shares. However, this caused several practical problems, especially for Very Large Companies (**VLCs**), as the requirement of offering at least 10% stake to the public made compliance troublesome. The new norms have brought in changes to reduce the burden on VLCs and the requirement of Minimum Public Offer (**MPO**), for post-issue capital has been reduced from the existing 10% to INR 1,000 crore plus 5% of the incremental amount when MCap is beyond INR 10,000 Crore.
- **Revised MPS tenure:** The other amendment brought in is with respect to the Minimum Public Shareholding (**MPS**) tenure. In view of this proposal, it has been observed that Large and Very Large issuers may find themselves in a position of having to issue 10% public shareholding during the listing and being jeopardized under Rule 19(2)(b) of the Securities Contracts (Regulations) Rules, 1957, (**SCRR**), which mandates such companies to have at least 25% of their MCap in MPS within a period of 3 years from the date of listing. There arises a need for such companies to have a requisite interval to first raise 10% of public shareholding and then subsequently comply with the 25% MPS requirement. Under the new norms, companies with MCap inside the bracket of INR 10,000 to 100,000 crore are directed to achieve 10% of their public shareholding within 18 months and 25% MPS within 3 years from the date of listing. Similarly, for companies having a market capitalization of more than INR 100,000 crore, 10% public shareholding is to be achieved within 2 years and 25% MPS within 5 years from the date of listing.

These amendments, effective from June 18, 2021, have been hailed as a progressive change in recognizing the expanding scale of companies in India. The newly updated norms will prove significantly beneficial in allowing companies with substantial market capitalizations to successfully conduct IPOs and fulfill MPO requirements without the burden of making a huge offer for newly listed companies.

DRAFT CONSULTATION PAPER PROPOSING CHANGES TO THE 'PROMOTER' CONCEPT UNDER ICDR REGULATIONS

As per suggestions of Primary Markets Advisory Committee (**PMAC**) and as part of its continuing efforts to review policy framework and adopt best international practices aimed at providing better information to investors for decision making, SEBI has proposed to revamp the concept of 'promoter' in the context of Indian securities market through a public consultation paper to make it relevant in present market conditions and support ease of doing business.

Traditionally, SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (**ICDR Regulations**) prescribe and govern promoter participation and ownership in an Indian company, including other operational norms for minimum promoters' contribution, lock-in period, date of allotment in IPO, in order to determine and evaluate disclosure from control perspective. SEBI has now proposed to liberalize the ICDR Regulations norms through a Draft Consultation Paper and sought public comments on easing the lock-in period for promoters, rationalizing the definition of 'promoter group' and move to the concept of 'person in control' for promoters and other shareholders after an IPO.

The salient features of the proposal are discussed here:

- **Trimmed lock-in periods for minimum promoter's contribution and other shareholders for public issuance on the Main Board exchange**
  - In case of offer for sale or financing (excluding capital expenditure for a project), the draft proposes to reduce the lock-in period for minimum promoters' contribution to 1 year from the date of allotment in IPO instead of the existing requirement of 2 years.
  - Shares held by promoter(s) will be exempt from lock-in requirements after 6 months from the date of allotment in IPO, only for the purpose of achieving compliance with minimum public shareholding norms.
  - Promoters' holding exceeding minimum threshold requirement will be locked in for a period of 6 months (instead of existing requirement of 1 year) from the date of allotment in the IPO – as a result, the entire pre-issue capital held by persons excluding promoters will also be locked-in for a reduced period of 6 months from the date of allotment in the IPO.
- **Streamline disclosure norms of Group Companies**
  - To minimize the compliance burden, only name and registered office address of all Group Companies can be disclosed in the Offer Document.
  - All other disclosure requirements – such as financials of top 5 listed/unlisted Group Companies, litigation, nature of activities, equity capital, reserves, sales, profit after tax, earnings per share and diluted earnings per share, net asset value etc. – presently done in the Draft Red Herring Prospectus are proposed to be replaced with disclosures to be made on websites of listed companies.
- **Shifting from concept of 'promoter' to 'person in control'**
  - ICDR Regulations define 'promoter' as a person named in the offer document, or in the annual return of the issuer, or a person who has control over the issuer (directly or indirectly), or in whose advice, directions or instructions the Board of Directors of the issuer is accustomed to act. The draft proposes to revisit the existing concept of 'promoter' and replace this with 'person in control' or 'controlling shareholders', to better reflect present market realities. This will require consequential amendments under various regulations like SEBI Regulations ICDR Regulations, LODR Regulations, Takeover Regulations and SEBI (Prohibition of Insider Trading) Regulations, owing to implications on the related laws administered by other regulators.

Conclusion

In order to ensure smooth transition and avoid any disruptions, the implementation of these proposed changes is expected to be concluded over a 3-year period. Accordingly, SEBI has invited comments to review the regulatory framework for promoter, promoter group and group companies under SEBI ICDR Regulations on or before June 10, 2021.

SEBI clearly recognizes that prospective listed companies with matured businesses have pre-existing institutional investors such as private equity firms, AIFs, etc. Therefore, the switch to a 'person in control' or 'controlling shareholder' concept makes imminent sense and is aligned with international best practices. Such a transition will help bring about standardization and consistency to the concept of 'control'. Importantly, shifting the goal post from promoter group to control based ownership prevalent under the internationally accepted concept including adopted in certain other SEBI regulations would add standardization and consistency to the consolidation and reporting principle through the concept of control.

REVISION IN DELISTING NORMS FOR PUBLIC M&A IN INDIA

On June 10, 2021, SEBI introduced the SEBI (Delisting of Equity Shares) Regulations, 2021 to turn the process more investor friendly as well as safeguard shareholders' interest. The delisting regulations paves the way for a streamlined, timebound and transparent process, while addressing certain lacunae in the erstwhile regulations. The proposed regulatory framework is expected to make M&A transactions for listed companies more rational.

Key changes proposed

- **Disclosure by the acquirer:** Acquirer will be required to disclose an intention to delist the company by making an initial public announcement.
- **Eligibility for delisting:**
  - The company should have been listed for 3 years
  - No outstanding securities that are convertible into equity shares required to be delisted
  - The acquirer should not have sold shares of the company six months prior to making the initial public announcement
- **Floor price and indicative price:** The new norms specify that the indicative price must be higher than the floor price. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 have set a minimum price for delisting which is disclosed as the 'floor price'. Now, the acquirer has the option to disclose an 'indicative price' (higher than floor price) which can also be increased until the bidding commences.
- **Reverse book-building process and determination of discovered price:** Discovered price is the price at which shares accepted through eligible bids takes the shareholding of the acquirer to at least 90% of the

company's share capital. Delisting fails if the 90% threshold is not met.

- **Financial arrangements for a delisting offer:** Prior to commencing the delisting offer process, the acquirer must ensure that their financial arrangements will be able to fulfil the payment obligations. It is mandatory for the acquirer to set up an escrow account and deposit the total consideration amount in phased manner.
- **Exit Period for residual shareholders:** After a successful delisting, for one year (exit period) the acquirer is obliged to acquire shares voluntarily tendered by the residual shareholders at the final delisting price.
- **Delisting under the following special provisions:**
  - Delisting of shares on Innovators Growth Platform
  - A subsidiary company getting delisted through scheme of arrangement wherein the listed holding entity and the subsidiary company are in the same line of business
  - Delisting by operation of law

The fresh norms emphasize on incremental improvements by plugging the gaps in the erstwhile regulations. The hassle-free framework is a stimulant for taking privates and therefore public M&A in India. The enhanced disclosures will instill confidence among the shareholders and ease the earlier complex procedure of voluntary delisting.

Reforms with checks and balances in valuation reports and fairness opinions could achieve an outcome for potential investors as well as public shareholders and timebound procedure will also help the companies to take an exit from the stock exchanges and explore their business opportunities by going private.

COMPANIES TO SEPARATE THE ROLES OF CHAIRPERSON AND MANAGING DIRECTOR

Securities and Exchange Board of India (**SEBI**) has asked Indian companies to work towards separating the roles of chairperson and managing director (**MD**).

The deadline is a year away, but the market regulator is hinting that it will no longer extend it. Listed entities were initially required to separate the roles of chairperson and MD/CEO from April 01, 2020 onwards. However, based on industry representations, an additional time period of two years was allowed for compliance. The regulation will now be applicable to the top 500 listed entities by market capitalization, with effect from April 01, 2022. As at the end of December 2020, only 53 % of the top 500 listed entities had complied with this provision. He said the rule is not to weaken the position of promoters but to improve corporate governance.

GUIDELINES ON VALUATION OF SECURITIES WITH MULTIPLE PUT OPTIONS

On July 9, 2021, SEBI announced a new set of regulations on valuation of securities with multiple put options, held by mutual funds. The circular will come into effect from October 1, 2021. The key aspects of this circular are as follows:

- In respect of valuation of securities with multiple put options present *ab initio* wherein put option is factored into valuation of the security by the valuation agency, the following will be decided based on the recommendation of Mutual Fund Advisory Committee:

  If the put option is not exercised by a Mutual Fund, while exercising the put option would have been in favour of the scheme

  - A justification for not exercising the put option shall be provided by the Mutual Fund to the Valuation Agencies, Board of AMC, and Trustees on or before the last date of the notice period.
  - The Valuation Agencies shall not consider the remaining put options for the purpose of valuation of the security
- The put option shall be considered as 'in favour of the scheme' if the yield of the valuation price, ignoring the put option under evaluation, is more than the contractual yield/coupon rate by 30 basis points.
- This circular is issued in exercise of powers conferred under Section 11 (1) of the Securities and Exchange Board of India Act, 1992 read with the provisions of Regulation 77 of SEBI (Mutual Funds) Regulations, 1996, to protect the interest of investors in securities and to promote the development of the securities market.

RESERVE BANK OF INDIA – KEY UPDATES

ECB POLICY – RELAXATION IN THE PERIOD OF PARKING OF UNUTILISED ECB PROCEEDS IN TERM DEPOSITS

The Reserve Bank of India (**RBI**) has stated that unutilized External Commercial Borrowing (**ECB**) proceeds drawn down before March 1, 2020, can be parked in Term Deposits with banks in India prospectively up to March 1, 2022, in a relief to borrowers who could not utilize the proceeds due to lockdown.

Under the extant ECB framework, borrowers are allowed to place ECB proceeds in Term Deposits with banks in India for a maximum period of 12 months. However, in view of the difficulty faced by borrowers in utilizing already drawn down ECBs due to Covid-19 pandemic induced lockdown and restrictions, RBI took this decision to relax the stipulation as a one-time measure.

Accordingly, unutilized ECB proceeds drawn down on or before March 1, 2020, can be parked in Term Deposits with AD category-I banks in India prospectively up to March 1, 2022. The central bank will be issuing guidelines in this regard separately.

KEY MONETARY POLICY ANNOUNCEMENTS

With the aim of boosting digital economy in the county, some major changes have been proposed in the Monetary Policy by the RBI on April 07, 2021. The key changes as per the policy are:

- The maximum end of day outstanding balance for payments banks is proposed to be increased to INR 2 lakh from INR 1 lakh. This is done with a view to incentivize the migration of Pre Payment Instruments (**PPI**) to full-KYC
- Money transfer facilities like NEFT and RTGS have been proposed to be extended to non-banking payment system operators which was earlier limited only to banks with exceptions to CCIL and development institutions
- It further proposed to make interoperability mandatory for full-KYC PPIs and all payment acceptance infrastructure such as wallets and pre-paid cards
- Cash withdrawal is now proposed to be permitted for full-KYC PPIs issued by non-banks, which was earlier restricted to full-KYC PPIs issued by banks only

These transformative changes are welcoming steps towards bringing level-playing field for non-banking entities and boosting digital economy of the country.

EXTENSION OF THE 'INTEREST EQUALIZATION SCHEME FOR PRE AND POST SHIPMENT RUPEE EXPORT CREDIT' FOR ANOTHER 3 MONTHS

The RBI vide a notification dated April 12, has provided an extension of the Interest Equalization Scheme for Pre and Post Shipment Rupee Export Credit (**Scheme**). The Scheme which was ending on March 31, 2021 has been extended for a period of three months with effect from April 01, 2021 and ending on June 30, 2021. The scope and coverage of the scheme shall remain the same during this extended period and the extant operational instructions issued by the RBI under the Scheme shall continue to remain in force till June 30, 2021.

This Scheme was first introduced in 2015 to provide rebate of interest on pre and post shipment export credit like packing credit to eligible exporters. The eligible exporters under the Scheme can claim the benefit from the banks on the basis of a certification by an external auditor in this regard. The banks can then claim a reimbursement of the same from the RBI.

CONTRIBUTION TO AIF SET UP IN OFFSHORE JURISDICTION INCLUDING IFSCS

In another attempt to relax the provisions of Overseas Direct Investment (**ODI**), RBI recently permitted Indian Party (**IP**) to make offshore investment in an AIF by treating it under automatic route to simplify the offshore remittance process involved to comply with sponsor commitment for such funds.

RBI, under the ODI route by Residents in JVs/WOS abroad, permits IP incorporated as a company in India or a registered partnership firm or other approved entity making investment in a JV or WOS abroad, and includes any other entity in India as may be notified by the RBI, subject to certain conditions.

Importantly, RBI guidelines for offshore investments made by IP did not prescribe certainty for investment route for investments in approved offshore AIFs, including that for International Financial Services Centres (**IFSC**), which had to primarily comply with local AIF regulations. AIF regime in IFSC obligates the entity to be established through a minimum sponsor commitment of 2.5% of the corpus or USD 750,000 for Category 1 and 2 AIFs, whichever is lower, and % of the corpus or USD 1.5 million, whichever is lower for Category 3 AIFs.

CHANGE IN BONDS AUCTION METHODOLOGY

Reserve Bank of India (**RBI**) typically uses multiple price methods in government security auctions. But on July 2, 2021 RBI notified a shift in its method of auctioning government bonds to decrease volatility and further spike in yields. Under the new mechanism, bonds maturing between 2-14 years will now be auctioned under the uniform price auction except the 30 - 40 year bonds which will continue to be auctioned via the multiple price-based method. At this auction, more than INR 10,000 crore in bonds maturing in 2026 were devolved on underwriters. This uniform price auction is applicable on bonds of following tenure - 2 year bonds; 3 year bonds; 5 year bonds; 10 year bonds; 14 year bonds and Floating rate bonds

To decrease the volatility in bids, an auction cut-off rate is fixed based on bids placed. Once the cut off rate is established, securities are allotted to all participants at the same rate. This is unlike the multiple price auction, where bidders pay at the respective rate, they had bid.

This change in the methodology is not a very common phenomenon. Earlier in February 2021, RBI had modified the auction method for a series of difficult-to-sell bonds, introducing uniform price auction applicable to all bidders.

Apart from the change in auction methodology, RBI has also written to primary dealers to come up with a framework to set acceptable bids at auctions, as underwriters are having to step into rescue more bond sales.

E-COMMERCE RULES - PROPOSED AMENDMENTS AND IMPLICATIONS

The Consumer Affairs Ministry has proposed significant amendments (**Proposed Amendments**) to the Consumer Protection (E-Commerce) Rules, 2020 (**Rules**). Key aspects of the Proposed Amendments are as follows:

- **Definition of e-commerce entity:** The proposed change casts a wider net to cover two additional categories of persons within the purview of 'e-commerce entity':
  - A person engaged by an e-commerce entity for fulfilment of orders would now be counted as an e-commerce entity as well
  - Any 'related party' of an e-commerce entity as per the Companies Act, 2013 (**Act**), would also be an e-commerce entity

  While these changes seem intended to bring third party logistics entities within applicable regulatory fold, this could be a large envelope that will potentially cover related party entities of wide swathe of business houses who might own/operate/manage an e-commerce facility but also have other diverse business interests.
- **Bar on flash sales:** The proposed definition of 'flash sale' has the expected references to reduced prices and high discounts as well as such sales being organized by fraudulently intercepting ordinary course of business using technology. This will enable only certain seller(s) managed by the e-commerce entity to undertake flash sales and can potentially hurt inventory-based e-commerce entities, some of whom may have a genuine need to clear inventory and improve cashflows. The most worrisome parts are the absence of metrics for what would constitute 'fraudulent interception' and 'ordinary course of business'.
- **Prohibition on mis-selling and misrepresentation:** Mis-selling has been introduced as a prohibited activity, premised upon deliberate misrepresentation of information to a user. However, when defining misrepresentation, one criterion states 'causing, however innocently, a consumer to purchase such goods or services, to make a mistake as to the substance of the thing which is the subject of the purchase'. The use of 'however innocently' creates an absolute burden of compliance that is naturally difficult to achieve. Furthermore, its usage also appears contradictory to the notion of 'deliberate misrepresentation'.
- **Fall back liability:** Introduced particularly for marketplace model entities, the definition proposes to make the entity liable to a user who faces loss due to commissions, omissions and negligent conduct towards such user by a seller registered on the platform.
- **Registration of e-commerce entities:** The nodal body for this would be the Department for Promotion of Industry and Internal Trade. If this does come into effect, further details for the process would be expected from the regulator. At present, the complete procedures remain unknown.
- **Clamp down on misleading users:** An e-commerce entity has been barred from allowing display or promotion of misleading advertisements, whether in the course of business on its platform or otherwise. While this is good for the users, it has wide ramifications for a marketplace entity and also creates fall back liability for a seller who might have placed a misleading advertisement. To what extent a marketplace entity would have the ability to evaluate such advertisements or obtain back-to-back protection from a seller is a matter to ponder. Another example is for the e-commerce entity to not mislead users by manipulating their search result/index. Once again, it is difficult to test for what could be construed as manipulation and whether such search result/index indeed misled a user (because search results would have to appear in some sequence or the other).
- **Deeper compliance and grievance redressal:** E-commerce entities have been mandated to increase points of redress, with the Proposed Amendments mandating the appointment of a Chief Compliance Officer and a Resident Grievance Officer. In addition, there is also the obligation to appoint a nodal contact person (other than the Chief Compliance Officer) for 24x7 coordination with law enforcement. It can be debated whether the space where this law is intended to operate requires a 24x7 coordination with law enforcement agencies or if this might be a compliance and cost burden on an e-commerce entity. Furthermore, there are additional provisions pertaining to increased information disclosures about products and their sourcing, as well as restrictions against consumer information being shared.
- **Abuse of dominant position:** No e-commerce entity that holds a dominant position in any market shall be allowed to abuse the same. This is a reiteration of a positive protection for consumers and smaller players. However, what would constitute market remains unclear (as it could cover product market, product category market, retail market and similar variables).
- **Disclosure of cross-sell data:** The Proposed Amendments mandate disclosures on cross-sell data by the e-commerce entity to users. While this is a good to have, it may not be of particular benefit to users or their purchasing needs.
- **Additional obligations for marketplace entities:**
  - Obligation to ensure that none of its related parties or associated enterprises are enlisted by it for sale to consumers directly. While the restriction of B2C sale is understandable, there is inconsistency in defining 'related party'. The term 'associated enterprise' in the Proposed Amendments has a wider import than the Act's definition of 'associate company'. One possible reason may be that the Proposed Amendments intend to snap certain business models that could be considered circumvention of the spirit, if not the letter, of the existing law.
  - Ensure that its related parties/associated enterprises do nothing that the entity itself would not be permitted to do. One such example is related parties and associated enterprises of the marketplace entity are not supposed to listed as sellers on the marketplace platform.
  - Ensure that any information the marketplace entity collects through its platform is not used for unfair advantage of its related parties and associated enterprises. There are questions that this raises. For instance, can it be presumed that the information is supposed to be only of users, since the parent law is for consumer protection, and could information of other third-party sellers be used? Would data/information that a user or a third-party seller has consented to sharing with the marketplace entity be off limits for data analytics? What would constitute 'unfair advantage'?

There is food for thought aplenty in the Proposed Amendments, not just for large marketplace entities but smaller players as well as inventory model operators. In addition, logistics entities as well as end-consumers will also notice that there are aspects that unintentionally have the potential of causing confusion. As various stakeholders continue to evaluate the Proposed Amendments, it is clear that they need to be put under a microscope for some fine tuning.

RELAXATIONS MADE TO THE DEFINITION OF LISTED COMPANIES UNDER COMPANIES (AMENDMENT) ACT, 2021

The Central Government has introduced multiple measures aimed at improving the ease of doing business in India. In line with this intention, a significant set of amendments were made to the Companies Act, 2013 (**Companies Act**) through the Companies (Amendment) Act, 2021 (**Amendment Act 2020**).

One such amendments aim to tweak the definition of a listed company. As result, a proviso has now been added under Section 2 (52) of the Companies Act which deals with definition of listed companies. As per the proviso, the Central Government may, in consultation with the Securities and Exchange Board of India (**SEBI**), exclude from the definition of listed companies, certain classes of companies which have listed or intend to list a prescribed class of securities on any recognized stock exchange. This amendment was also suggested by the Company Law Committee in November 2019.

Amendment Act 2020 and its Implications

Earlier, as per Section 2(52) of the Companies Act, the definition of a listed company referred to any company which has its securities listed on a recognized stock exchange. The definition for securities is provided under the Securities Contract Regulation Act, 1956 (**SCRA 1956**). As per Section 2(h) of SCRA 1956, a security includes shares, scrips, stocks, bonds, debentures, debenture stock or any other marketable security.

As a result of the inclusive definition under the SCRA 1956 and Companies Act, private limited companies which had their debt securities listed on a stock exchange were compelled to follow the compliances applicable to the listed companies (viz., adhere to norms such as filing of returns, maintenance of records, appointment of auditors, appointment of independent director and women director, constitution of board committees, etc.), which are subject to more stringent requirements as compared to unlisted companies.

However, with effect from 1 April 2021, as per Section 2(52) the Companies Act read with the newly inserted Rule 2A of the Companies (Specification and Definition Details) Rules, 2014, following classes of companies will now be excluded from the definition of listed companies:

- Public companies which have not listed their equity shares on a recognized stock exchange but have listed non-convertible debt securities issued on private placement basis in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008, and/or non-convertible redeemable preference shares issued on private placement basis in terms of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013
- Private companies which have listed their non-convertible debt securities on private placement basis on a recognized stock exchange in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008
- Public companies which have not listed their equity shares on a recognized stock exchange but whose equity shares are listed on a stock exchange in a foreign jurisdiction as specified in sub-section (3) of section 23 of the Companies Act

As a result of the Amendment Act 2020 and w.e.f. April 1, 2021 the above mentioned companies will now benefit from a major compliance relief such as filing of returns, maintenance of records, appointment of auditors, appointment of independent director and women director, constitution of board committees etc. amongst other stringent requirements.

Another critical implication of the Amendment Act 2020 is amendment under Section 23(3) of Companies Act. The amendment now empowers the Central Government to allow certain class of public companies to list classes of securities on a permissible foreign jurisdiction without any simultaneous listing in India. While the amendment is not yet effective, it will provide relief to listed foreign companies from compliance requirements applicable to listed companies under the Companies Act 2013.

The move to include relaxations in the definition of listed companies will, to a large extent, make it easier for smaller companies to approach debt markets, in turn boosting the listing of debt securities. The move also lays out the road for domestic companies to tap foreign equity markets in a comparatively hassle free manner. The impetus to growth is very welcome at this stage of the economy where an attempt at recovery is being made in the post-covid era.

[1] https://www.mca.gov.in/Ministry/pdf/AmendmentAct_29092020.pdf

COMPANIES (CSR POLICY) AMENDMENT RULES 2021

The Companies Amendment Acts of 2019 and 2020 resulted in some major changes in the CSR provision under Section 135 of the Companies Act. The Ministry of Corporate Affairs (**MCA**) on January 22, 2021 notified the Companies (Corporate Social Responsibility Policy) Amendment Rules 2021 (**New Rules**) giving effect to the changes introduced in CSR by the Companies Amendment Acts of 2019 and 2020.

CSR has been evolving in India ever since CSR spending was statutorily mandated in 2014 and now, in the wake of urgent emerging health care requirements, MCA has issued multiple clarifications on what companies could consider as part of their CSR expenditure.

Few noteworthy changes brought to the CSR Regime vide the New Rules and subsequent notifications of the MCA are as below:

- Any company engaged in research and development of new vaccines, pharmaceuticals, and medical devices in the ordinary course of business may undertake research and development of new vaccines, medicines, and medical devices relevant to Covid-19 as CSR during the FYs 2020-21, 2021-22, and 2022-23, subject to the following conditions:
  - Such R&D activities must be carried out in collaboration with any of the institutes or organizations mentioned in Item (ix) of Schedule VII of the Companies Act (e.g. Indian Council of Medical Research, Council of Scientific and Industrial Research, Department of Biotechnology and the Department of Science and Technology)
  - Details of such activity must be disclosed separately in the annual report on CSR included in the board's report
- Contributions made by companies towards following activities are now allowed to be considered as eligible CSR expenditure:
  - Contributions to the PM CARES Fund
  - Contributions to incubators or R&D projects in the field of science, technology, engineering and medicine, funded by the central or state government, a public sector undertaking or any agency of the central or state government
  - Contributions to public-funded universities engaged in conducting research in science, technology, engineering and medicine to promote sustainable development goals, in collaboration (additional) with Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy and the Department of Pharmaceuticals
- Companies could use CSR funds for creating health infrastructure for Covid-19 care, establishment of medical oxygen and storage plants, manufacturing and supply of oxygen concentrators, ventilators, cylinders and other medical equipment for countering Covid-19
- **Amendment to Rule 7:** As companies are now allowed to set off CSR expenditure above the required 2% expenditure in any financial year against the required expenditure for up to three financial year, if a company spends an amount in excess to their CSR requirements

The provisions of the New Rules appear to be more structured and paint a promising picture for India's CSR regime. These changes have reduced the excessive discretion in the hands of a company, have enhanced clarity, and introduced uniformity by laying down the procedures to be followed in certain respects by introducing new statutory requirements. While the companies are battling the gruesome blows of Covid and at the same time are in recalibration mode by trying to shift their operational guidelines as per the framework of the new CSR Rules, which has introduced significant changes to monitoring and evaluation of CSR activities, and utilization of CSR expenditure and also mete out serious punishment for non-compliance. The aforesaid are merely highlights of the wide array of transitional challenges which companies have to deal with while, simultaneously juggling with the impact of Covid on businesses.

PASL WIND SOLUTIONS PVT LTD V. GE POWER CONVERSION INDIA PVT LTD

Civil Appeal No. 1647 of 2021 (Arising out of SLP (C) No.3936 of 2021)

The Supreme Court's decision in this matter is laudable as it settles the debate on empowering two Indian parties to freely choose a foreign seat of arbitration. This landmark judgement has in essence strengthened the legal position by reinforcing the principle of party autonomy. SC's judgement also clearly outlines the applicability of Section 2(2) of the Act to Section 9 application so that the parties are not rendered remediless. SC also reiterated the law that Sections 23 or 28 of Indian Contract Act do not close the door for two Indian parties from referring their disputes to a forum outside India and the same is not opposed to public policy.

Background facts

- The Appellant had issued three Purchase Orders (**PO**) to the Respondent for supply of six converters used in wind turbines. Owing to disputes regarding the expiry of the warranty of the said converters, the parties entered into a Settlement Agreement containing a dispute resolution clause (Clause 6). Arbitration clause specified that the disputes between them shall be resolved by arbitration in Zurich in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (**ICC**). Disputes arose between the parties pursuant to the settlement agreement, whereby the Appellant issued a request for arbitration to ICC.
- In the arbitration proceedings, the Respondent filed a preliminary application objecting on the ground that as both the parties are Indians, the choice of foreign seat is invalid. The Appellant opposed the said application and asserted that there was no bar in law. The Respondent's objection was dismissed by the Arbitrator and this decision was accepted by both the parties. The Arbitrator decided that the venue will be Mumbai although the seat is in Zurich and consequently, an Award was advanced in favor of the Respondent.
- The Respondent then commenced enforcement proceedings under Sections 47 and 49 of Arbitration and Conciliation Act, 1996 (**Act**) before Gujarat High Court (**HC**) seeking enforcement of the Award as a foreign award in India and interim relief under Section 9 of the Act. At this stage, the Appellant blew hot and cold by arguing that choice of foreign seat by Indian parties is baseless. However, HC confirmed that two Indian parties can choose a foreign seat of arbitration although they cannot avail interim relief in Indian Courts.

Issues at hand?

- Whether two companies incorporated in India can choose a forum for arbitration outside India?
- Whether an Award made at such forum outside India, to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) applies, can be said to be a 'foreign award' under Part II of the Act and be enforceable as such?

Decision of the Court

- SC referred to *Mankastu Impex (P) Ltd. v. Airvisual Ltd*[2] and confirmed that Zurich was the judicial seat mutually agreed by the parties as explicitly set out in Settlement Agreement. SC dismissed challenge of the Appellant that by applying closest connection test, seat of arbitration will be Mumbai and reasoned that test will be applied only if it is ambiguous that a seat has been chosen either by parties or by tribunal.
- SC solidified the statement of law laid down in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc* (**BALCO**)[3] that Part I and Part II of the Act are fundamentally distinct and there can never be an overlap between them. SC held, using this as frame of reference, that the argument of the Appellant on Section 2(2) of the Act bridging the gap between the two parts of the Act, to be ill-conceived.
- SC juxtaposed Section 2(1)(f) defining 'International Commercial Arbitration" under the provisions of Part I with Section 44 dealing with 'International Commercial Arbitration" under Part II of the Arbitration Act and clarified that the former essentially revolves around one of the parties to the arbitration agreement who must be a foreign national or habitually resident outside India while the latter focuses exclusively on place/seat of Arbitration outside India. After careful perusal of Section 44 of the Act which incorporates the elements necessary for an award to be identified as a foreign award, SC advanced that the facts of this case fall within the blanket of this section.
- SC placed reliance on *Atlas Export Industries v. Kotak & Co* (**Atlas Export**)[4] and held that a foreign award cannot be tossed out merely because it was made between two Indian parties, under pari materia provisions of the Foreign Awards Act.
- To answer the contentions raised by the Appellant with respect to Sections 23 and 28 of the Indian Contract Act, SC enunciated the principles furnished in Atlas Export, that when a dispute arises where both the parties are Indian, and if the contract has the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India, the same is not opposed to public policy. Thus, SC confirmed that Sections 23 or 28, do not close the door for two Indian parties from referring their disputes to a forum outside India.
- Furthermore, SC upheld that two Indian parties can choose a foreign seat outside India for the purpose of resolving their disputes. SC also strongly emphasized that its observations *in TDM Infrastructure (P) Ltd v. UE Development India (P) Ltd* (**TDM**)[5] were only for purpose of determining jurisdiction of the Court as envisaged under Section 11 of the 1996 Act and thus, cannot be relied on while deciding whether Part I or Part II of the Act will prevail.
- SC confirmed that an arbitration resulting in foreign awards will be enforceable only in a High Court under Section 10(1) of the Commercial Courts Act, and not in a district court under Section 10(2) or Section 10(3). SC immaculately applied Section 2(2) of the Act to grant the interim relief under Section 9 application in case of foreign award. Therefore, SC endorsed the judgement of HC except for its perspective on the unsustainability of Section 9 application. In the light of the above, the SC answered the issues in affirmative.

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[2] (2020) 5 SCC 399
[3] (2012) 9 SCC 552
[4] (1999) 7 SCC 61
[5] (2008) 14 SCC 271

ADDITIONAL DUE DILIGENCE REQUIREMENTS FOR SSMI UNDER IT INTERMEDIARY GUIDELINES

Government of India (**GoI**) notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 on February 25, 2021. The said new rules superseded the Information Technology (Intermediaries Guidelines) Rules, 2011 and took effect on February 25, 2021the date of their publication in the Official Gazette.

However, Rule 4(1) of the said new rules, which applied to Significant Social Media Intermediaries (**SSMIs**) and required them to observe specific additional due diligence, gave them three months to comply with the said specific requirements. The period of three months was to run from the date the GoI notified the threshold of minimum registered users for a Social Media Intermediary (**SMI**) to be classified as a SSMI. On February 25, 2021, GoI issued another notification which provided the said threshold to be 5 million registered users.

The aforementioned period of three months expired on May 24, 2021, and now, the SSMIs are required to comply with the additional due diligence requirements as stipulated in Rule 4(1). Hereinbelow are the key additional requirements which an SSMI is required to comply with w.e.f. May 25, 2021:

- **Appointment of Chief Compliance Officer (CCO)** who shall be responsible for ensuring compliance with the IT Act and the rules made under the said Act and be liable under any proceedings relating to any third-party information, data or communication link hosted or made available by the SSMI.

  The CCO should be a KMP or senior executive of the SSMI and resident in India.
- **Appointment of nodal contact person**, who may be contacted by the law enforcement agencies for 24x7 coordination and to ensure compliance with their orders. Such person should also be resident in India.
- **Appointment of resident grievance officer** to whom a victim or user may make complaint for violation and who shall also be responsible for disposing of the complaint within fifteen days. The said resident grievance officer is also responsible for receiving the orders issued by the Appropriate Government.
- **Publication of monthly compliance reports**.

It is pertinent to mention that the SSMIs were provided grace period of three months only for the above compliances. SSMIs were already required to comply with certain additional compliances under the new rules. E.g. SSMIs engaged in providing messaging services are required to enable identification of first originator of a message or information. Also, an SSMI engaged in providing any service relating to transmission of information which earns it financial benefit or which is its exclusive intellectual property, is required to make a disclaimer to the effect that the said information is being advertised, sponsored or marketed or is subject to its exclusive ownership as intellectual property.

PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS

The President of India has promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 (**The Ordinance**) on April 04, 2021, to allow pre-packaged insolvency resolution process for Corporate Debtors classified as micro, small or medium enterprises (**MSME**) under the Micro, Small and Medium Enterprises Development Act, 2006.

In the aftermath of the Covid-19 pandemic, the Central Government via the Insolvency and Bankruptcy Code (amendment) Ordinance, 2020 introduced Section 10A into the Insolvency and Bankruptcy Code, 2016 (**IBC**), which suspended the operation of Section 7, 9 and 10 of the IBC for initiation of fresh insolvency proceedings against the defaults incurred on and after March 24, 2020, for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf.

The Ordinance alters the IBC by introducing the Ordinance as a part of Chapter IIIA of Part II of the Code. Further Section 4 of the Code has been amended to enable the Central Government to notify a pre-packaged procedure for defaults not more than INR 1 Crore.

A pre-packaged settlement entails a corporation working out a restructuring agreement with its creditors before applying for bankruptcy protection. This helps to reduce the overall time and expense of the process and also ensures a quicker, cost-effective and value maximizing outcome for all the stakeholders. An application for initiating a pre-packaged insolvency resolution process may be made in respect of a Corporate Debtor, subject to the following conditions, that:

- It has not undergone pre-packaged insolvency resolution process or completed corporate insolvency resolution process, as the case may be, during the period of three years preceding the initiation date
- It is not undergoing a corporate insolvency resolution process
- No order requiring it to be liquidated is passed under section 33
- It is eligible to submit a resolution plan under section 29A
- The financial creditors of the Corporate Debtor, not being its related parties, representing such number and such manner as may be specified, have proposed the name of the insolvency professional to be appointed as the resolution professional for conducting the pre-packaged insolvency resolution process of the Corporate Debtor, and the financial creditors of the Corporate Debtor, not being its related parties, representing not less than 66%

The majority of the directors or partners of the Corporate Debtor, as the case may be, have made a declaration, in a form that may be specified, as to the limitation period along with a declaration of no intent to commit fraud.

INTERDIGITAL TECHNOLOGY CORP V. XIAOMI CORP & ORS

I.A. 8772/2020 in CS(COMM) 295/2020

The High Court gave a very positive decision in this matter wherein it held that any court in one sovereign jurisdiction cannot injunct the legal proceedings in any court in another sovereign jurisdiction, as this is completely against the basic principles of natural justice. Furthermore, imposing cost on the defendant was vital for setting a precedent that the act committed by them - secretly filing of an anti-suit injunction before the Wuhan court without informing either the HC or the Plaintiff - is unpardonable and smacks of disregarding the majesty of the HC.

Background facts

- Interdigital Technology Corporation (**Plaintiff**) had licensed its 3G and 4G Standard Essential Patents (**SEPs**) to third parties and invited Xiaomi for getting such license, but the Plaintiff rejected the rate proposed by Xiaomi as the proposed rate was not in confirmation to FRAND (fair, reasonable and non-discriminatory) parameters.
- Later it was found by the Plaintiff that Xiaomi was in the infringement of SEPs, as it was using the said SEPs without a valid and executed license agreement. As a result, Plaintiff moved the High Court against the above-mentioned infringement of its SEPs by Xiaomi.
- Meanwhile, Xiaomi had already filed an 'anti-suit injunction' in the Wuhan Intermediary People's Court, China (**Wuhan Court**). The Wuhan Court had, vide its order dated September 23, 2020, restrained the Plaintiff from filing lawsuits before any courts in either China or any other countries and/or regions requesting to adjudicate the royalty rate of the royalty disputes in terms of the 3G and 4G SEPs against Xiaomi. It also directed the Plaintiff to immediately withdraw or suspend their application for any temporary injunction before HC against Xiaomi Communications Co Ltd, Xiaomi Home Commercial Co Ltd, and Beijing Xiaomi Mobile Software Co Ltd.

Issues at hand?

- Whether an injunction against Defendant Nos. 1 to 8 can be granted for restraining them from enforcing an anti-suit injunction order (dated September 23, 2020, passed by the Wuhan Court) against the Plaintiff?
- Whether the costs equivalent to the costs likely to be imposed on the Plaintiff by the Wuhan Court can be imposed on the Defendants?

Decision of the Court

- After taking into consideration the case of *IPCom GmbH & Co KG v. Lenovo Technology (United Kingdom) Ltd*[6], HC with regards to the primary issue held that a sovereign court in one jurisdiction (former court) cannot injunct proceedings in a sovereign court in another jurisdiction (latter Court), especially in the realm of infringement of intellectual property rights, which are maintainable only before such latter court and none other.
- Any such injunction as mentioned above would be equal to an assault on the rights of the litigant before the latter Court. Moreover, in the absence of any cogent and convincing material to indicate that the continuation of the proceedings before the latter Court would be oppressive or vexatious to the proceedings pending before the former, such injunction would be completely unjustified in law.
- The Court also applied troika test (prima facie case, balance of convenience and irreparable loss) and held that the grant of anti-enforcement injunction, as sought by the Plaintiffs, would be eminently justified on the basis of the above-mentioned test. Hence the ad interim injunction granted by the Court on October 09, 2020 was made absolute i. e the Defendant was restrained from enforcing against the Plaintiff the order dated September 23, 2020, passed by the Wuhan Court.
- On the issue of imposing cost on the Defendants, the Court held that the Defendants had resorted to malice and unfair practice in securing the order from the Wuhan Court by keeping both the Plaintiffs as well as Court in dark. The Court stated that if the Wuhan Court directs payment of the fine towards enforcement of its anti-suit injunction order, the brunt has to be borne by the Defendants based on the findings of this Court in the present case.
- The Court took into consideration that once it has been decided that the enforcement of the anti-suit injunction order of the Wuhan Court deserved to be injuncted, then it merely acts as a sequitur that the Plaintiffs cannot be fastened with the fine imposed by said order of the Wuhan Court.

[6] (2019) EWHC 3030 (Pat)

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