

NLS Business Law Review

Volume 6 | 2020

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

www.nlsblr.com

Subscription: INR 650

© NLS Business Law Review 2020

The mode of citation for this issue of NLS Business Law Review 2020 is as follows:

2020 NLS Bus. L. Rev.

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Published by:

NLS Business Law Reivew

National Law School of India University

Nagarbhavi, Bangalore – 560072

Website: www.nlsblr.in Email: nlsblr@nls.ac.in

Distributed exclusively by:

Eastern Book Company

34, Lalbagh, Lucknow - 226 001

U.P., India

Website: www.ebc.co.in Email: sales@ebc-india.com

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INDIRECT ACQUISITIONS UNDER THE TAKEOVER CODE: THE FAIRNESS-EFFICIENCY SPECTRUM AND LESSONS FOR REGULATION

*Gautham Srinivas, Pranav Agarwal and Sai Saket Rachakonda**

The Indian regime of takeover regulation is characterised by a strong emphasis on the protection of minority shareholders, which has the potential to deter merger and acquisition activity. This is particularly true of ‘indirect acquisitions’, or acquisitions of entities upstream that result in a change in the person(s) ultimately controlling a downstream entity. Indian law mandates that a takeover bid be made for all such indirect acquisitions, regardless of whether such acquisition was of any consequence to the primary transaction that resulted in it. This article presents a critical view of this position in view of the limitations it places within the Indian securities market, as well as the impact it has on foreign merger and acquisition transactions. It examines Indian law in light of the approaches taken by various overseas jurisdictions, relying on the conceptual framework of a ‘fairness-efficiency spectrum’ to classify the relative weightage a jurisdiction gives to the concerns of minority shareholder protection (fairness) and the promotion of merger and acquisition activity (efficiency). Drawing on these practices, it offers suggestions on recalibrating India’s approach to indirect acquisitions, in order to achieve greater balance between the concerns at play.

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* The views of the author(s) in this article are personal and do not constitute legal/professional advice of Khaitan & Co. For any further queries or follow up please contact us at ergo@khaitanco.com.

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INTRODUCTION

Early 2017 saw two global industrial gas behemoths, Linde AG (“Linde”) and Praxair, Inc. (“Praxair”) announce the signing of a definitive business combination agreement to merge their businesses.¹ This would result in their consolidation under a common holding company, creating the world’s single largest supplier of industrial gases.² While the merger was going through regulatory scrutiny in the jurisdictions where it left a footprint, a unique challenge cropped up in India. The Securities and Exchange Board of India (“SEBI”), India’s securities market regulator, determined that pursuant to the consolidation, a change of control in the listed Indian entity, Linde India Limited (“Linde India”) (held by Linde through several layers of intermediary entities) had occurred, requiring that an offer be made to Linde India’s shareholders to acquire its outstanding shares.³ The merging entities sought to demonstrate how the requirement of making such an ‘open offer’ was not applicable to them, but this reading was rejected on a technicality.⁴ The BOC Group Limited (a subsidiary of Linde), Praxair, and other ‘persons acting in concert’⁵ would eventually have to cross the regulatory hurdle of making

¹ Praxair, Inc, ‘Praxair News Release’ (SEC, 1 June 2017) <<http://www.sec.gov/Archives/edgar/data/884905/000119312517191218/d506854dex991.htm>> accessed 13 April 2020.

² Oliver Sachgau and David McLaughlin, ‘Linde, Praxair Win US Antitrust Nod to Create Gas Giant’ Bloomberg (22 October 2018) <www.bloomberg.com/news/articles/2018-10-22/linde-praxair-win-u-s-antitrust-nod-to-create-gas-giant> accessed 11 April 2020.

³ Linde AG, ‘Informal Guidance SEBI/CFD/DCR/OW/P/2017/15182/1’ (SEBI, 3 July 2017) <www.sebi.gov.in/sebi_data/commndocs/oct-2017/Lindeinformal_p.pdf> accessed 9 April 2020.

⁴ *Ibid.* SEBI denied granting the exemption available to acquisitions that result from schemes of arrangement on the technicality that it was not sanctioned by a court or competent authority, even though there was no such requirement in the United States or Germany, jurisdictions where the primary transaction took place. Further, refer to Tarunya Krishnan, Tanushree Bhuvalka and Aman Dwivedi, ‘Foreign Mergers: Exemption from Open Offer Under the Takeover Code’ (MONDAQ, 14 November 2017) <www.mondaq.com/india/CorporateCommercial-Law/646098/Foreign-Mergers-Exemption-From-Open-Offer-Under-The-Takeover-Code> accessed 30 March 2020.

⁵ ‘Persons acting in concert’ are those that co-operate to acquire shares, voting rights or control over a company, pursuant to a common objective to do so. In examining whether a takeover bid has been triggered, the voting rights or control held by such persons are considered alongside those of the principal acquirer. Further, refer to the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011, reg 2(1)(q).

a takeover bid, for a seemingly insignificant entity in a merger of global proportions.⁶

This was only one of the many instances where large corporations undergoing merger and acquisition activity were forced to make offers for the outstanding shares of relatively inconsequential downstream Indian entities. Much like Linde dwarfed Linde India in size, Indian companies held by foreign entities tend to represent a small portion of these upstream entities. This has, therefore, given rise to the question of whether or not offers of such nature for seemingly inconsequential entities are even warranted. This proposition was considered by the Takeover Regulations Advisory Committee (“**Achuthan Committee**”), which gave shape to the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“**Takeover Code**”). A survey of listed Indian companies with foreign parent companies carried out by the Achuthan Committee showed that the mean of the market capitalisation, net worth and net sales of Indian companies in the survey, in comparison to their foreign parents, were a paltry 5.4%, 1.8% and 2.1%, respectively. Of the 35 companies that the Achuthan Committee studied, only three companies had a market capitalisation that exceeded 20% of their foreign parents; none exceeded even 15% of their parents’ net worth or net sales.⁷ This presents a curious difficulty for Indian securities market regulation – the ultimate owners of Indian listed companies often change in transactions where acquiring control over such a company was, at best, a minor consideration. In response, as we shall explore over the course of this article, the relative importance of such an Indian leg to global transactions, or the intent underlying them, comes to assume minimal importance in Indian takeover regulation. A decade since this approach was adopted, some practical questions remain.

Takeovers, simply put, are transactions where one or more persons attempt to acquire control over a company, ordinarily through the purchase of its shares.⁸ Statutes concerned with takeover regulation, performed in India through the Takeover Code, regulate such takeovers - as we shall explore in Part I of this article, at least in theory, they ensure the orderly conduct of

⁶ Linde India Limited, ‘Post-Offer Advertisement in accordance with regulation 18(12) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, as amended, for the attention of the shareholders of Linde India Limited’, (SEBI, 14 October 2019) <www.sebi.gov.in/filings/takeovers/oct-2018/linde-india-limited_40818.html> accessed 13 April 2020.

⁷ C Achuthan Committee, *Report of the Takeover Regulations Advisory Committee under the Chairmanship of Mr C Achuthan* (SEBI 2010), annexure 7. Admittedly, the study is a decade old, and it shall be interesting to see if circumstances have changed since.

⁸ Paul Davies, ‘The Transaction Scope of Takeover Law in Comparative Perspective’ (2016) ECGI Working Paper Series in Law 313/2016 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2749266> accessed 1 April 2020.

takeovers while protecting minority shareholders through such a change in control. Central to Indian takeover regulation is the ‘mandatory takeover bid’ – a requirement that any person that comes to control a company must make a general offer to acquire its outstanding shares, at the best possible price – one which is equal to or higher than the price paid for the shares that gave the person such control.⁹

It is not necessary that control over a ‘target’ is acquired directly through the purchase of shares or other rights therein. One may also do so by acquiring an intermediary (what this article calls the ‘primary acquisition’) which already holds control over one’s target, allowing one to control the target through the intermediary (the ‘indirect acquisition’). Consider a company, A, which holds a 60% stake and a controlling interest in company B. Were you to acquire A, you would also be able to exercise the rights that company holds through its 60% stake in B, thereby effectively holding control over B. Such ‘indirect’ acquisitions also come under the purview of the Takeover Code, even though there is no change to the listed company’s own shareholding. Under the provisions of the Takeover Code, *all* such acquisitions trigger mandatory takeover bid requirements, regardless of the intention underlying the primary acquisition.¹⁰ While indirect acquisitions have served as potential triggers for mandatory takeover bids since 1997,¹¹ the Takeover Code is noted by some as having cemented the law on the matter, laying a detailed and transparent framework for how such acquisitions are treated.¹² With this change in the law, many mandatory takeover bids now occur pursuant to indirect acquisitions – in the three previous fiscal years, 8.33% of all public announcements for such mandatory takeover bids have been pursuant to indirect acquisitions.¹³ Despite this, however, there is little academic litera-

⁹ *Ibid* 9.

¹⁰ Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011, reg 5 read with regs 3 and 4.

¹¹ The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997 (“Takeover Code 1997”) make several references to indirect acquisitions. Prominent among these is the explanation to regulation 12 of the Takeover Code 1997, which cover acquisitions of control over a company. As the explanation stated, “... acquisition shall include direct or indirect acquisition of control of target company by virtue of acquisition of companies, whether listed or unlisted and whether in India or abroad”.

¹² Cyril S Shroff, ‘New Takeover Regime Provides Clarity for Indirect Acquisitions in India and Overhauls Old Regime’ (*International Institute for the Study of Cross-border Investment and M&A*, 18 October 2011) <xbma.org/indian-update-new-takeover-regime-provides-clarity-for-indirect-acquisitions-in-india-and-overhauls-old-regime/#ftn4> accessed 23 March 2020.

¹³ This data has been obtained from documents we studied that were publicly available on the website of SEBI, for each public announcement made for a takeover bid in the period. There were a total of 180 such announcements in this period, of which 15 involved indirect acquisitions.

ture analysing India's approach to takeover regulation, despite their potential to greatly hinder merger and acquisition activity.

This article takes a critical view of the regulation of indirect acquisitions in India, attempting to suggest alternative models for how the same may be achieved. Part I of this article sets forth the main rationales offered for takeover regulation, which it terms 'efficiency' and 'fairness' considerations, arguing that moving too far in the favour of fairness can potentially have a negative impact on efficiency. Carrying on from this understanding, Part II of this article reviews approaches that jurisdictions across the globe have taken to indirect acquisitions along a rudimentary 'fairness-efficiency' spectrum and highlights how the approaches they opt for, promote, or derogate, against either consideration. Part III describes India's approach to indirect acquisitions in some detail, drawing out its trajectory along the fairness-efficiency spectrum over time. Acknowledging that Indian law today lies at one far extreme of this spectrum, Part IV presents a case for reform based on the principle of comity, along with our suggestions on the way forward.

I. THE OBJECTIVES OF TAKEOVER REGULATION

Two rationales are often given for takeover regulation, which we term 'efficiency' justifications and 'fairness' justifications. The former argues that takeovers, as an integral aspect of the 'market for corporate control', promote efficiency in markets by pushing managements to ensure the highest price for a company's shares, lest they be taken over by another entity. The latter suggests that takeover regulations serve as a means of ensuring that minority shareholders are treated fairly, allowing them the option to exit from the company in the case of a change in its management, at terms that are comparable to those shareholders that transferred control to the new management.

As we shall see, however, particularly with mandatory takeover bid requirements, these considerations potentially work against one another. While such requirements do give minority shareholders greater rights where there is a change in control, these rights come at the expense of efficiency, by increasing the cost of a change in control. Designing takeover legislation, therefore, is a balancing act – one of ensuring that shareholders are given the maximum possible protection, while the impact of regulation on merger and acquisition activity is kept at a minimum.

A. Efficiency

Markets are famously believed to have a disciplining effect on producers, as customers flock towards attractive products, while avoiding unattractive ones. Likewise, many believe that securities markets discipline managements, as investors buy into companies that are managed well, keeping their share prices high, while staying away from badly managed companies. This, as Henry Manne first argued in 1965, creates a ‘market for corporate control’,¹⁴ pushing company managements to compete with one another to ensure that the company’s share prices are high.

Takeovers are an important tool for the functioning of these markets for corporate control. Takeover bidders often seek targets that have low share prices due to mismanagement. The fear of being taken over creates an incentive for managements to work as efficiently as possible so that the company’s share price is too high for a takeover to be profitable. Should existing managements fail in this endeavour, takeovers allow a path for new managements to replace them and potentially improve the company’s performance.¹⁵ Takeover regulations can play a crucial role in this regard, by ensuring the orderly conduct of takeovers, without undue interference from entrenched managements.¹⁶ It is thus that the G20 and OECD recommend ensuring the efficient functioning of markets for corporate control to enhance corporate governance, for which they consider essential the existence of clearly articulated rules and procedures governing takeovers.¹⁷

The model of takeover regulation opted for by India,¹⁸ however, is best suited for jurisdictions where share ownership is highly dispersed, making

¹⁴ Henry G Manne, ‘Mergers and the Market for Corporate Control’ (1965) 73 *The Journal of Political Economy* 110.

¹⁵ *Ibid.* Further, refer to Jonathan R Macey, ‘Market for Corporate Control’ (*The Library of Economics and Liberty*) <<https://www.econlib.org/library/Enc/MarketforCorporateControl.html>> accessed 27 March 2020.

¹⁶ Francis Okanigbuan, ‘Corporate Takeovers and Shareholder Protection: UK Takeover Regulation in Perspective’ (2013) 2 *Manchester Student Law Review* 267, 273–274.

¹⁷ Organisation for Economic Co-operation and Development, ‘G20/OECD Principles of Corporate Governance’ (*OECD Publishing*, 2005) <<https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1585308830&id=id&acname=guest&checksum=F607D3BAC54560F55F4644E286534C65>> accessed 27 March 2020.

¹⁸ Explored in greater detail, particularly in the context of indirect acquisitions, in Chapter III of this article. While sixteen countries’ takeover laws were studied for its formulation, India’s takeover laws are widely understood to be modelled, at least in part, on the United Kingdom’s City Code on Takeovers and Mergers. Further, refer to John Amour, Jack B Jacobs and Curtis J Milhaupt, ‘The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework’ (2011) 52 *Harvard International Law Journal* 219, 277.

it relatively easy for an outsider to take over a company.¹⁹ For a variety of historical, structural, and cultural reasons,²⁰ India has a notably stagnant market for corporate control, with a large majority of its companies being controlled by family business groups.²¹ This presents a problem for the governance of listed Indian companies. With shareholdings largely concentrated in the hands of founders and their families, managements have little accountability to public shareholders.²²

In such a setting, takeover regulations have had little impact on spurring a market for corporate control. Despite mandatory takeover bid requirements forming part of Indian law since 1990,²³ hostile takeover attempts have been few and far between.²⁴ Even though the report of the Justice P.N. Bhagwati Committee (“**Bhagwati Committee**”), which led to the promulgation of the Takeover Code 1997 (which preceded the Takeover Code), saw them as a

¹⁹ This is often termed the ‘Anglo-American’ model, due to highly dispersed shareholdings being typical in the companies of the United Kingdom and the United States. In such jurisdictions, holding ~30% of the shares of most companies is believed sufficient to gain control over them.

²⁰ For an examination of some of these factors, refer to Abhinav Chandrachud, ‘The Emerging Market for Corporate Control in India: Assessing (and Devising) Shark Repellents for India’s Regulatory Environment’ (2011) 10 Washington University Global Studies Law Review 187.

²¹ For an analysis of corporate ownership trends in Indian companies between the years 2001-2011, for instance, refer to N Balasubramanian and RV Anand, ‘Ownership Trends in Corporate India 2001-2011: Evidence and Implications’ (2013) Indian Institute of Management Bangalore 419/2013 <https://www.iimb.ac.in/sites/default/files/2018-07/WP_No._419_0.pdf> accessed 26 March 2020.

²² As the preface to the report of the Kotak Committee notes, many Indian companies are run by promoters (an Indian legal concept, referring to persons who control a company, and in most cases are its founders) as personal fiefdoms: “In the ‘*Raja*’ (monarch) model, promoter interest i.e., self-interest precedes interests of ‘*Praja*’ (subject) i.e., other stakeholders. Given the sizeable number of promoter-led companies that are present in the Indian market, the challenges India Inc. faces are inherently unique. There are instances of promoters carrying out actions that are favourable to them but detrimental to the interests of minority shareholders” (translations inserted). Refer to Kotak Committee, *Report of the Committee on Corporate Governance* (SEBI 2017) <https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html> accessed 27 March 2020.

²³ At the time, clause 40 of the erstwhile listing agreement that companies would enter with stock exchanges governed takeovers, mandating that a takeover offer be made to shareholders of a listed company where a person acquired more than 25% of the voting rights of the company.

²⁴ Only three such attempts, it appears, have been successful: the takeover of Mindtree Limited by Larsen and Toubro Limited in 2019, the takeover of Zandu Pharmaceutical Works Limited by Emami Limited in 2008 and the takeover of Raasi Cements Limited by India Cements Limited in 1998. Some commentators, however, have opined that this is simply a result of India’s favourable economic conditions. Should its economic climate deteriorate (as is possibly the case at the time of writing), the number of hostile takeovers shall increase. Refer to Shaun J Mathew, ‘Hostile Takeovers in India: New Prospects, Challenges and Regulatory Opportunities’ (2007) Columbia Business Law Review 800.

means to spur the market for takeovers,²⁵ this appears to have made little impact. In fact, almost half of the takeover bids recorded between the years 1997-1998 and 2014-2015, inclusive, were by incumbent owners looking to consolidate their holdings.²⁶

The failure of India's takeover laws to create takeover activity of any note has led some commentators to argue that they strengthen the position of incumbent owners.²⁷ The need to make a takeover bid imposes an added cost on bidders, lowering the likelihood that they shall attempt to take control over companies regulated by the Takeover Code. It forces the acquirer to secure the finances to purchase many more shares than they originally envisaged, in addition to the costs that accompany the takeover bid process itself. When such additional costs come to undermine the economic feasibility of a takeover, these requirements, far from facilitating a market for corporate control, become inadvertent takeover defences.²⁸ Many jurisdictions where corporate shareholding is highly concentrated have experienced similar problems.²⁹

B. Fairness

The core rationale underlying Indian takeover law, recognised by the various committees that have contributed to its development, is the need to ensure fairness and the equality of opportunity to all shareholders.³⁰ This principle was central to the United Kingdom's City Code on Takeovers and Mergers ("**City Code**"),³¹ from where the concept of the mandatory takeover bid originated.³² Shareholders selling a 'controlling block' of shares are often given a 'control premium' – a better price for selling their shares since such shares collectively give an acquirer control over the company. Takeover bids negate this advantage by giving all shareholders an equal opportunity to sell their

²⁵ Justice PN Bhagwati Committee, Report on Takeovers (SEBI 1997) para 1.1.

²⁶ Umakanth Varottil, 'The Nature of the Market for Corporate Control in India' (2015) NUS Law Working Paper No 2015/011, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698474> accessed 27 March 2020.

²⁷ *Ibid.*

²⁸ Umakanth Varottil, 'Comparative Takeover Regulation and the Concept of Control' (2015) Singapore Journal of Legal Studies 208, 213.

²⁹ For a similar argument from Europe, for instance, refer to Marco Ventrizzo, 'Takeover Regulation as a Wolf in Sheep's Clothing: Taking UK Rules to Continental Europe' (2008) 11 University of Pennsylvania Journal of Business Law 135.

³⁰ Justice PN Bhagwati Committee (n 25); C Achuthan Committee (n 7) para 9.

³¹ City Code, general principle 1 ("All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected").

³² While the City Code was itself enacted in 1968, mandatory takeover bid requirements were introduced to it in 1972, in response to a defensive acquisition of shares intended to thwart bids for a corporation. Refer to Ventrizzo (n 29) 145.

shares, on conditions which accompanied the sale of the controlling block.³³ Mandating such a bid ensures that the control premium is dispersed among shareholders, ensuring that no individual share of the company is more valuable than others, merely by being part of a controlling block.³⁴

Additionally, mandatory takeover bid requirements offer an exit opportunity to shareholders in the case of a change in the control of a company's management. Such an exit opportunity is necessary since a change in control potentially implies a change in the company's policies, and it may be difficult for a shareholder to exit later on similar terms, should changes to the company's policies be detrimental to the shareholder's interests.³⁵ A takeover bid presents minority shareholders with a decision: in their estimation, will the management provided by an acquirer take the company's shares to a price that is higher than the premium being offered by the acquirer? Unless the answer to such a question is in the affirmative, exiting the company becomes a rational choice for the shareholder.³⁶ Shareholders are, therefore, likely to stay in the case of value-enhancing takeovers, while exiting in the case of value-reducing takeovers.

C. Striking a balance

For the reasons enumerated above, far from being a universal positive, takeover regulation in economies like India must perform a delicate balancing act between maintaining a healthy market for corporate control and ensuring that shareholders' rights are protected.³⁷ While mandatory bid requirements have rightfully been hailed as a net benefit for shareholders,³⁸ the obstacles

³³ Takeover statutes are designed in a manner that require the acquirer to pay the best possible price for shares purchased in a mandatory takeover bid. For Indian law in this regard, refer to regulation 8 of the Takeover Code, which requires the acquirer to pay the best possible price, obtained on comparison of the prices of the triggering acquisition and other recent acquisitions, the market value of the shares and that obtained on valuation of the shares, among others.

³⁴ For a discussion of this concept, refer to Ruth Luttman, 'Changes of Corporate Control and Mandatory Bids' (1992) 12 *International Review of Law and Economics* 497, 498-499.

³⁵ Varottil (n 28) 213.

³⁶ Hubert de la Bruslerie, 'Equal Opportunity Rule vs. Market Rule in Transfer of Control: How Can Private Benefits Help to Provide an Answer?' (2013) 23 *Journal of Corporate Finance* 88.

³⁷ C Achuthan Committee (n 7) 9. The Achuthan Committee makes several allusions to the need for such a balance. In fact, one of the fundamental objectives of takeover regulation, in the view of the committee, is "[t]o balance the various, and at times, conflicting objectives and interests of various stakeholders in the context of substantial acquisition of shares in, and takeovers of, listed companies".

³⁸ Varottil (n 35). As Professor Varottil writes, upon comparing the positives and negatives of mandatory bid requirements, "Despite some critique of the [mandatory bid requirement], its rationale as founded on the basis of the equal opportunity principle is unassailable...".

they imply for a change in a company's ownership demand careful consideration. The high concentration of shareholding in the Indian market allows for little room for error in striking this balance.

Maintaining such balance is particularly important when the acquisition is indirect. Such acquisitions are not triggered by a bid for control over the target company, but over a separate entity upstream. This impacts how one must view both, considerations of efficiency and fairness. Mandatory bid requirements, in such cases, place a regulatory cost on changes in control that have a weaker nexus to the company triggering the bid, thereby creating additional obstacles for the market of corporate control. Shareholders, too, are less likely to be impacted by a takeover upstream. This is particularly so when an indirect acquisition is merely incidental to the primary acquisition since an acquirer that did not intend to take control of a company in the first place is less likely to make significant changes to its functioning.

For these reasons, while there is considerable uniformity in how direct acquisitions are treated internationally,³⁹ such convergence is absent in the case of indirect takeovers. Different jurisdictions have evolved different models for the treatment of indirect acquisitions, demonstrating a lack of international consensus on how such cases are to be treated. We shall explore such models in the coming chapter.

II. APPROACHES TO INDIRECT ACQUISITIONS

Across the world, in regulating indirect acquisitions, jurisdictions have attempted to balance two competing considerations. On the one hand, minority shareholders must not be left stranded, should indirect acquisitions become an artifice through which a company is acquired downstream (echoing the fairness argument). On the other hand, over-regulation must be avoided, lest it choke merger and acquisition activity altogether (echoing arguments of efficiency). As we shall see later, jurisdictions such as New Zealand have also paid heed to the third principle of international 'comity'; according respect to the policies of other jurisdictions by ensuring that their laws do not place an undue burden on international transactions.

With these considerations in mind, approaches of different jurisdictions to indirect acquisitions may be plotted along a rudimentary 'fairness-efficiency'

³⁹ Of the ten jurisdictions the authors of this article have studied, only one, the United States, does not mandate takeover bids for direct acquisitions. While the remaining jurisdictions differ in the triggers they prescribe, the need for a mandatory takeover bid appears universal.

spectrum. For ease of understanding, we broadly categorise the approaches we study into ‘efficiency-heavy’, ‘balanced’, and ‘fairness-heavy’ models.

A. Efficiency-heavy models

Weighing towards the efficiency-end of this spectrum are countries that exempt indirect acquisitions from mandatory takeover bid requirements. Some outliers, like the United States of America, provide for no mandatory takeover bid provisions whatsoever, regardless of the type of acquisition.⁴⁰ Even within more conventional legal frameworks, however, various jurisdictions offer exemptions to indirect acquisitions in certain circumstances, to ensure that mandatory takeover bid requirements do not become too onerous.

For instance, while the laws of Australia ordinarily mandate a mandatory takeover bid where a person comes to control more than 20% of a company’s voting, whether directly or indirectly,⁴¹ they accord certain protections to ensure that these requirements do not become overly cumbersome. Where an acquirer makes a secondary acquisition of a company pursuant to the acquisition of a listed company,⁴² such takeover bid requirements do not apply.⁴³ As a result, even though the existence of intermediary entities does not ordinarily insulate an acquirer from a mandatory takeover bid, attempts at a merger or acquisition are not bogged down by a multiplicity of takeover bid requirements. In order to ensure that such exemptions are not misused, the Australian Takeovers Panel is empowered to declare the circumstances of specific transactions ‘unacceptable’, denying them the benefit of such exemption.⁴⁴

Structuring mandatory bid requirements in this manner ordinarily ensures that any merger or acquisition transaction triggers a maximum of

⁴⁰ Federal securities laws of the United States eschew prescribing mandatory bids, instead only placing information requirements on potential acquirers. An underlying theory, explaining the American approach, is offered in Geoffrey P Miller, ‘A Simple Theory of Takeover Regulation in the United States and Europe’ (2009) 42 *Cornell International Law Journal* 301. Much of the United States’ federal law on takeovers comes from amendments made by the Williams Act of 1968 to the Securities Exchange Act of 1934. While these allow potential acquirers to make ‘tender offers’ to a company’s shareholders to acquire control therein, the same is not mandatory. Individual states may, however, place additional requirements, the analysis of which is outside the scope of this article.

⁴¹ Corporations Act 2001, s 606 (1)(c) read with s 611, item 1.

⁴² This includes companies listed in Australia, as well as a select group of foreign stock exchanges recognised as ‘approved foreign markets’ by the Australian Securities and Investments Commission.

⁴³ Corporations Act 2001, s 611, item 14.

⁴⁴ *Ibid* s 657A.

one takeover bid. This potentially leads to situations where minority shareholders do not necessarily have an exit option, signalling that fairness concerns do not always warrant the imposition of too significant a regulatory burden. To avoid shareholder harm, however, the Australian model creates a safeguard in the form of the oversight of the Takeover Panel, which may mandate a takeover bid in case greater protection is warranted.

B. Balanced models

Between the two extremes is an approach that many jurisdictions dub the ‘chain principle’.⁴⁵ Chain principle provisions, which feature in the takeover statutes of the United Kingdom,⁴⁶ Hong Kong,⁴⁷ and Singapore,⁴⁸ highlight the manner in which a person that acquires control over a company may, by the virtue of such control, indirectly acquire control over a second company. Each of these provisions specifies that such situations shall only trigger mandatory takeover bid requirements where one of two requirements are met: *first*, such second company is ‘significant’ in relation to the company directly acquired by such person,⁴⁹ or *second*, where a significant motivation for the upstream transaction was such acquisition of control over the second country.

In clearly setting out both – the need for takeover bids, as well as exemptions for incidental indirect acquisitions – without giving primacy to either, this approach balances the rights of shareholders to an exit option and the need to keep merger and acquisition activity from becoming unduly difficult. Unlike the Australian approach, which requires the regulator to pro-actively

⁴⁵ There appears to be some confusion on what the ‘chain principle’ actually entails, possibly because most jurisdictions which incorporate the chain principle set out both - the manner in an indirect acquisition may occur, as well as exemptions where the company acquired indirectly forms a small part of the primary transaction. This has led to commentators using the term to imply vastly divergent ideas. While some understand the exemptions to be at the heart of the principle, i.e., that indirect acquisitions may trigger takeover bids only if they form substantial part of the primary transaction, others use it to refer to the fact that the acquisition of a company implies the acquisition of all downstream entities. For the former reading, refer to Shroff (n 12). For the latter, refer to Abhijit Joshi, ‘Takeover Law in India’ (2011) 24 International Law Practicum 74. While this article uses the term in the former sense, as a convenient short-hand to indicate a middle-of-the-road approach, the authors claim ignorance as to its correct usage.

⁴⁶ City Code, r 9.1, note 8.

⁴⁷ The Codes on Takeovers and Mergers and Share Buy-backs, r 26.1, note 8.

⁴⁸ Singapore Code on Takeovers and Mergers 2019, reg 14.1, note 7.

⁴⁹ Different jurisdictions take different approaches in attributing such significance. Jurisdictions variously use factors such as assets, market values, sales and profits as markers for significance. While the United Kingdom and Hong Kong specify numerical thresholds to measure such significance (at 50% and 60% of the company acquired in the primary acquisition respectively), Singapore leaves such question to the discretion of its Securities Industry Council.

restrict transactions where shareholders may be left stranded, this specifies a mandatory takeover bid as being the norm. By encoding the exemption to transactions where an indirect acquisition is only incidental, on the other hand, it ensures that such transactions cannot be targeted nonetheless by a regulator.

C. Fairness-heavy models

Several jurisdictions prefer to impose a takeover bid for indirect acquisitions of a company, regardless of whether the same formed a significant part of the primary acquisition. The European Union (“EU”), for instance, directs its member states to place mandatory takeover bid requirements on persons that acquire control over listed companies, whether directly or indirectly.⁵⁰ It suggests no exemptions or relaxations for indirect acquisitions. While EU member states are granted discretion in determining how the directive applies to their own jurisdiction,⁵¹ most major jurisdictions, including France,⁵² Germany,⁵³ Italy,⁵⁴ and Netherlands⁵⁵ have incorporated such provisions in their own domestic laws governing takeovers, without offering any explicit exemptions for indirect acquisitions. As we shall see in the coming chapter, India follows a similar approach.

Interestingly, however, some such jurisdictions allow domestic regulators the discretion to grant exemptions in the case of an indirect acquisition. For instance, the *Autorité Des Marchés Financiers*, France’s financial markets regulator, may waive the requirement for a mandatory takeover bid where it believes that a company being acquired indirectly does not constitute ‘an essential asset’ of the company being acquired in the primary acquisition.⁵⁶ Such an approach permits a country to ensure the highest degree of protection for shareholders in its jurisdiction while retaining the flexibility to let through cases where the risk of shareholder harm is low.

⁵⁰ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004, L 142/12 (EU Takeover Directive), art 5(1).

⁵¹ *Ibid* art 5 (3).

⁵² General Regulation of the *Autorité Des Marchés Financiers*, art 234-2.

⁵³ Securities Acquisition and Takeover Act, s 35(1).

⁵⁴ Legislative Decree No 58 of 24 February 1998, Consolidated Law on Finance pursuant to Articles 8 and 21 of Law no 52 of 6 February 1996, art 106(1).

⁵⁵ Act on Financial Supervision 2006, s 5: 70(1).

⁵⁶ General Regulation of the *Autorité Des Marchés Financiers*, art 234-9 read with art 234-8.

III. INDIRECT ACQUISITIONS IN INDIA

In the previous chapter, we traced a fairness-efficiency spectrum, plotting the manner in which various jurisdictions deal with indirect acquisitions and related aspects at different points of the spectrum. In this chapter, we shall explore the development of Indian law on indirect acquisition and examine its trajectory. As we shall see, Indian jurisprudence on indirect acquisition largely stands on the fairness end of this spectrum.

There are principally two triggers for mandatory takeover bids in India—one, a *quantitative* trigger, should one's shares or voting rights in a company exceed specified thresholds,⁵⁷ and two, a *qualitative* trigger, should one come to acquire 'control' over a company.⁵⁸ An act of 'acquisition', whether of such voting rights or control, is key to both sets of triggers.⁵⁹

There are instances, however, where neither of these triggers is directly set off. The Linde-Praxair transaction, for instance, did not contemplate any change in the entities that held shares in Linde India, or the number of shares held by them. There was no *direct* acquisition of shares in Linde India by any entity. However, looking through the multiple layers of entities operating above Linde India and examining the manner in which its immediate shareholders exercised their rights in it, it is evident that the underlying global transaction had resulted in a change in the persons which would ultimately exercise control over Linde India. In the process of consolidation of the upstream entities, Linde would be surrendering its position of effective control over Linde India in favour of the consolidated entity which was formed as a result.

Along with direct acquisitions of shares, voting rights, and control, such an *indirect* change in voting rights or control is also understood to be an 'acquisition' under the Takeover Code.⁶⁰ The legal effect of an indirect acquisition of such nature is similar to that of a direct acquisition of a company,

⁵⁷ Takeover Code, reg 3. Regulation 3 mandates a takeover bid where an acquirer, along with parties acting in concert, acquires 25% or more of the shares or voting rights in a company. Additionally, regulation 3 places a separate mandatory takeover obligation in instances where the acquirer along with its concert parties already holds 25% of the voting rights in listed company, acquires more than 5% of voting rights in such company during a financial year.

⁵⁸ Takeover Code, reg 4.

⁵⁹ Takeover Code, reg 3 ("No acquirer shall acquire shares or voting rights in a target company..."); reg 4 ("Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company...").

⁶⁰ Takeover Code, reg 2(1)(b) ("acquisition" means, directly or indirectly, acquiring or agreeing to acquire shares or voting rights in, or control over, a target company").

and should the thresholds for voting rights or control be met by such indirect acquisition, a mandatory takeover bid obligation may be triggered.⁶¹

Within our ‘fairness-efficiency’ paradigm, India’s stance on indirect acquisitions under the Takeover Code is undoubtedly fairness-heavy. This has, however, not always been the case. In fact, takeover regulation in India did not originally contemplate even indirect acquisitions. This concept gained relevance through legislative and judicial discourse as the Indian body of law on takeover regulation developed. When, in the year 1997, the need for a mandatory takeover bid for indirect acquisitions became part of Indian law, substantiality came to play a role in whether an indirect acquisition would trigger a takeover bid. It is only thereafter that India adopted its current fairness-heavy approach. We shall explore this trajectory as we traverse through subsequent parts of this chapter.

A. India and Indirect Acquisitions: A History

Indirect acquisition, as a concept, was not contemplated by SEBI when it first formalised and introduced a takeover regime through the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 (“Takeover Code 1994”). However, SEBI’s subsequent regulatory experience with takeovers helped identify several lacunae in the Takeover Code 1994.⁶² Pertinently, for the purposes of this article, it was noted that the law was incapable of regulating a situation where a person would acquire an unlisted holding company (or a block of unlisted investment companies) and thereby also gain control over a listed company.⁶³

The Bhagwati Committee, which was tasked with recommending changes to the takeover regulation framework, took note of this nuance and suggested recognising indirect acquisitions as a distinct concept, which would be necessary to create a more robust takeover regulation framework. While takeover regulation should not impose onerous conditions that inhibit acquisitions and takeover activity, the committee argued, it should also not allow for takeovers to be transacted in a “clandestine manner without protecting the interests of the shareholders”.⁶⁴

⁶¹ Takeover Code, regs 3/4 read with reg 5 and reg 2(1)(b).

⁶² Justice PN Bhagwati Committee (n 25) Preface, para 5; Securities and Exchange Board of India, ‘Frequently Asked Questions on SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011’ (SEBI) <https://www.sebi.gov.in/sebi_data/faqfiles/sep-2019/1567577569364.pdf> accessed 27 March 2020.

⁶³ Justice PN Bhagwati Committee (n 25), Applicability of the Regulations, para 3.34.

⁶⁴ *Ibid*, The Approach of the Committee, para 1.1.

The committee's recommendations led to the recognition of indirect acquisitions as a distinct concept under the Takeover Code 1997. Originally, the regulations stipulated that 'indirect acquisitions' involved the acquisition of shares or control in a listed company by way of acquisition of control in its *holding company*.⁶⁵ The provision was eventually amended in 2002 to broaden the scope of the term – it would now include indirect acquisitions through all companies, whether these be holding companies, or otherwise.⁶⁶ Separately, the Takeover Code 1997 made the acquisition of 'control' over a listed company a trigger for a mandatory takeover bid,⁶⁷ which could occur directly or indirectly.⁶⁸

B. Proportionate Interest or Effectuality?

The introduction of the notion of indirect acquisitions gave rise to the question of when an indirect acquisition would occur, leading to a mandatory takeover bid obligation falling upon an acquirer. Consider the following example - company A holds a 35% stake in a listed company, B (the target). Company C acquires a 60% stake and a controlling interest in company A. In such a situation, would company C be required to make a mandatory takeover bid for the shares in company B? Competing arguments were made for the adoption of one of the following two tests for making this determination:

- a) *Proportionate interest test*: This test involves a mathematical calculation of the acquirer's proportionate interest in the target company.⁶⁹ In the example above, therefore, company C's proportionate interest in company B would be understood as 60% of 35%, i.e., 21% - this would, therefore, not give rise to a mandatory takeover obligation.
- b) *Effectuality test*: This test involves a determination of whether the upstream acquisition of shares, voting rights, or control in the intermediate company would have an effect on the manner in which the intermediate company would exercise its voting rights or control in the target company.⁷⁰ Going back to our example, since company C, by virtue of its acquisition of the 60% stake and controlling interest

⁶⁵ Takeover Code 1997, explanation to regs 10 and 11 ("...acquisition shall mean and include: (b) indirect acquisition by virtue of acquisition of holding companies, whether listed or unlisted, whether in India or abroad.").

⁶⁶ Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Second Amendment Regulations 2002, reg 6.

⁶⁷ Takeover Code 1997, reg 12.

⁶⁸ Takeover Code 1997, reg 2(1)(c).

⁶⁹ Nishith Desai Associates, 'Public M&As in India: Takeover Code Dissected' (*Nishith Desai Associates*, August 2013) <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Ma%20Lab/Takeover%20Code%20Dissected.pdf> accessed 1 April 2020.

⁷⁰ Shroff (n 12).

in company A, would also be in a position to influence the manner in which company A exercises its control and voting rights in B. Effectively, company C does not merely control 21% of company B's voting rights, as would be its proportionate share, but the full 35% that company A holds. This would result in a mandatory takeover obligation being imposed on company C.

The proportionate interest test had gained acceptance initially and was predominantly relied upon by those within the industry.⁷¹ However, others believed that this test lacked the subjectivity required to make a determination on the indirect acquisition of control since it was merely reflective of the economic benefit to the acquirer and failed to take into account the voting and control that could be exercised by them.⁷² This led to the development of the more robust effectuality test. This test gained significant credence once it was adopted by SEBI in the *NRB Bearings* order under the provisions of the Takeover Code 1997.⁷³

In *NRB Bearings*, the United States-based Timken Company (the acquirer, "TC") had entered into a stock and asset purchase agreement with the Bermuda-incorporated company, Ingersoll-Rand Company Limited ("IR"). Pursuant to this agreement, among other things, TC would acquire voting securities held by IR in IR's wholly-owned French subsidiary, Nadella S.A. ("Nadella"). Nadella held 26% of the shares in NRB Bearings Limited ("NRB"), the target, a company listed on stock exchanges in India. In response to the issue of whether TC's agreement with IR would give rise to the obligation of making a mandatory takeover bid, SEBI held that the transaction would amount to an indirect acquisition of shares in NRB and would, therefore, breach the threshold for making an open offer. It held as such since, by agreeing to purchase the voting securities in Nadella, TC had indirectly become entitled to exercise the entirety of the 26% voting rights in NRB.⁷⁴ Following *NRB Bearings*, the effectuality test has come to be accepted as the norm for determining the indirect acquisition of control.⁷⁵

⁷¹ Nishith Desai Associates (n 69) 2.

⁷² *Ibid* 3.

⁷³ *Timken Co., In re (Acquisition of Shares/Voting Rights/Control of NRB Bearings India Ltd. and SNL Bearings Ltd.)*, 2003 SCC OnLine SEBI 84.

⁷⁴ *Ibid*.

⁷⁵ OCL Iron and Steel Limited, 'Informal Guidance, CFD/PC/KJ/OW/5853/2013' (SEBI, 14 March 2013) <www.sebi.gov.in/enforcement/informal-guidance/mar-2013/informal-guidance-in-the-matter-of-m-s-ocl-iron-and-steel-limited_24462.html> accessed 1 April 2020; Arch Pharamalabs Limited, 'Informal Guidance CFD/DCR/TO/DV/19298/12'(SEBI, 28 August 2012) <https://www.sebi.gov.in/sebi_data/attachdocs/1346316669791.pdf> accessed 1 April 2020.

Separately, TC had also applied to SEBI seeking an exemption from making a mandatory takeover bid, relying on, among other contentions, the fact that Nadella's shareholding in NRB represented just 3.1% of its total assets and that it was merely a financial investor in NRB. While it would grant TC an exemption from making an open offer, subject to the passing of a special resolution by NRB's shareholders ratifying the indirect acquisition (with Nadella abstaining from voting), SEBI rejected the argument that NRB's inconsequentiality to the larger transaction warranted a relaxation of mandatory bid requirements.⁷⁶ As we shall see, this argument – referred to as the 'chain principle' in this article⁷⁷ – found acceptance under Indian law subsequently, if only for a short period of time.

C. The Chain Principle

The Bhagwati Committee, which first advocated the introduction of indirect acquisitions into Indian jurisprudence, also proposed the recognition of the chain principle. The chain principle, the committee suggested, was relevant to instances of acquisition of shares or control in a company⁷⁸ where either a) such company's shareholding in the target company constituted a substantial part of its total assets or b) the acquirer's primary objective for acquiring the company was to gain control of the target company. If either of these situations were to arise, the acquirer would be required to make a mandatory takeover bid for shares in the target company.⁷⁹ Despite this proposal, however, the chain principle did not find mention in the Takeover Code 1997. The Takeover Code 1997, in the manner promulgated, was not very far from current Indian law on the question of indirect acquisitions.

The principle would, however, subsequently be read into Indian takeover law in 2005 by the Indian Supreme Court, in *Technip SA v SMS Holding (P) Ltd.*. While *Technip* involves a complex set of facts, it is relevant for our purposes to note that Technip S.A., ("**Technip**") a company incorporated in France acquired 29.68% of the shareholding in Coflexip S.A. ("**Coflexip**"), another French-incorporated company. At the time of the acquisition, Coflexip held approximately 50% of the shares in Indian listed company, South East Asia Marine Engineering and Construction Limited ("**SEAMEC**"), which

⁷⁶ *Timken Co., In re (Acquisition of Shares/Voting Rights/Control of NRB Bearings India Ltd. and SNL Bearings Ltd.)*(n 73).

⁷⁷ There is no consensus, however, on what the 'chain principle' actually refers to (n 45).

⁷⁸ The committee only made reference to the acquisition of a single company in this regard, possibly owing to the fact that at the time of making this recommendation, the committee envisaged indirect acquisitions to mean acquisitions where the intermediate company would be the holding company of the target.

⁷⁹ Justice PN Bhagwati Committee (n 25), Applicability of the Regulations, para 3.35.

constituted 2% of its asset base at the time. This gave rise to the question of whether Technip's acquisition of shares in Coflexip would necessitate making a mandatory takeover bid for shares in SEAMEC, despite its relative insignificance. The case was brought on appeal to the Supreme Court against successive orders by the SEBI and the Securities Appellate Tribunal holding that an indirect acquisition of control had occurred, which necessitated that a mandatory takeover bid be made.

The Supreme Court, relying on foreign jurisprudence and the report of the Bhagwati Committee, held that an indirect acquisition would give rise to an obligation for a mandatory takeover bid only where either a) the object behind acquiring shareholding, voting rights, or control in the intermediate company was to secure control of the target company, or b) the shareholding of the intermediate company in the target company constitutes a substantial part of the assets of the intermediate company. Analysing the facts of the case, the Supreme Court concluded that the shareholding of Coflexip in SEAMEC did not constitute a substantial part of the assets of Coflexip and there was insufficient basis to suggest that the ultimate objective of the transaction was the acquisition of control over SEAMEC. As a result, it held that no mandatory takeover obligation would need to be imposed on Technip.⁸⁰

With the Supreme Court's *Technip* decision, Indian law moved, for a time, towards taking a more balanced, acquirer-friendly approach, contemporaneous with jurisdictions such as the United Kingdom, Hong Kong, and Singapore.⁸¹ Soon, however, Indian takeover law would undergo a reboot, pushing its approach on indirect acquisitions back to the fairness-heavy extreme which continues to this day.

D. The reversal post-Technip

Close to a year from the Supreme Court's decision in *Technip*, SEBI, in its order in *Everest Industries Ltd. v Holcim (India) (P) Ltd.*, ruled that *Technip* was to be read to mean that factors such as intention and size of the target were irrelevant to the test of indirect acquisition. While the order was ultimately set aside on appeal, the chain principle and the test for indirect acquisition were not definitively decided upon by the Securities Appellate Tribunal, thereby obscuring the standard laid down by the Supreme Court in *Technip*.⁸²

⁸⁰ *Technip SA v SMS Holding (P) Ltd.*, (2005) 5 SCC 465.

⁸¹ Refer to City Code, r 9.1, note 8; The Codes on Takeovers and Mergers and Share Buy-backs (n 47); Singapore Code on Takeovers and Mergers 2019 (n 48).

⁸² Adjudication Order No. AP/AO-13/2006-07, para 23 <https://www.sebi.gov.in/sebi_data/docfiles/15393_r.html> accessed 1 April 2020.

Indirect acquisitions were deliberated upon, yet again, once the Achuthan Committee was constituted. The Achuthan Committee, set up to review the Takeover Code 1997, grappled with the question of whether a mandatory takeover bid obligation should arise only when the target company represents a material or substantial component of the primary acquisition, particularly where the primary transaction is being undertaken overseas.⁸³ It also considered whether the intention (or the lack of it) to acquire control over the target company would be relevant to the analysis.⁸⁴

The Achuthan Committee concluded that irrespective of the materiality of the target company and the intention to acquire control so long as there was a change in control or thresholds for shares or voting rights were met, the obligation to make a mandatory takeover offer should arise. It arrived at the conclusion based on an empirical analysis of listed companies in India whose controlling interest was held by either another listed Indian company or by an overseas entity.⁸⁵ Since most listed companies were found to be non-material to their controlling entities, it argued that exempting such companies from mandatory takeover obligations would deprive their shareholders of their “legitimate right to get an exit opportunity”. This would be particularly so in global transactions of a large scale, where the listed Indian company would invariably constitute a miniscule portion.⁸⁶ The committee further argued that a substantiality test would be discriminatory to small transactions.⁸⁷

Detracting from the standard for mandatory takeover bids adopted in *Technip*, the Achuthan Committee recommended that, without exception, all indirect acquisitions that triggered the share or voting rights thresholds or those which resulted in a change in control would be subject to the mandatory takeover bid requirement.⁸⁸ This led to the reversal of India’s position on indirect acquisitions, and the chain principle, as a concept, was entirely done away with the introduction of the Takeover Code in 2011.

IV. A BLUEPRINT FOR LIBERALISATION

In the fairness-efficiency spectrum sketched out earlier, India has laid strong emphasis on promoting fairness. Commentators see India’s takeover regime

⁸³ C Achuthan Committee (n 7), paras 5.2-5.4.

⁸⁴ *Ibid* para 5.4.

⁸⁵ *Ibid* para annexure.

⁸⁶ *Ibid* para 5.6.

⁸⁷ *Ibid* para 5.6.

⁸⁸ *Ibid* para 5.8.

as a distant outlier in comparison to its peers, with a focus on protecting minority shareholders so strong that it may inadvertently be unfriendly to acquirers.⁸⁹ With its insistence on ensuring that minority shareholders are offered an exit option for every change in control, Indian law has declined to offer acquirers safe harbours for upstream transactions, regardless of how minor the downstream listed entity may be. The costs this approach places on acquirers can be considerable. Acquirers may find themselves stranded in expensive attempts to buy out shareholders of companies, the acquisition of which was never in their contemplation. They may even have to make multiple cascading takeover bids, should they take over the listed parent company of a listed subsidiary.⁹⁰ While India's commitment to its small investors is commendable, in view of the adverse impact of its laws on takeover activity, there is a strong need for a recalibration of Indian takeover law towards a more moderate position on the fairness-efficiency spectrum.

Moreover, Indian mandatory takeover bid requirements do not merely have an impact on domestic firms. In fact, in a study of recent public announcements conducted by us, we found that in a majority of indirect acquisitions, the primary acquisition occurs overseas. Of the 15 indirect acquisitions that have triggered a mandatory takeover bid between April 1, 2017 and March 31, 2020, in 10 instances (representing 66.67% of all indirect acquisitions), the primary acquisition took place overseas.⁹¹ Research suggests that the imposition of takeover bid requirements in such cases results in investor ambivalence and create less value for target company shareholders.⁹² Occasionally, owing to differences between Indian law and that of other countries, foreign acquirers have even been unable to benefit from exemptions generally available to their Indian counterparts.⁹³ Even if other jurisdictions favour a more liberal outlook, therefore, Indian law can hinder mergers and acquisitions occurring in such jurisdictions, should a listed Indian entity lie somewhere down the chain of ownership. The

⁸⁹ Varottil (n 28) 221.

⁹⁰ In *Daiichi Sankyo*, for instance, Daiichi Sankyo Company Limited's takeover of Ranbaxy Laboratories Limited through a takeover bid triggered a successive takeover bid for Zenotech Laboratories Limited. While the case revolved around the offer price for the latter bid, whether such cascading bids were mandated was not in contention. Refer to *Daiichi Sankyo Co.Ltd. v Jayaram Chigurupati*, (2010) 7 SCC 449: AIR 2010 SC 3089.

⁹¹ See (n 13) and the accompanying text.

⁹² Bikram Jit Singh Mann and Reena Kohli, 'Target shareholders' Wealth Creation in Domestic and Cross-border Acquisitions in India' (2011) 21 *International Journal of Commerce and Management* 63. The authors argue that cross-border acquirers, in bids to escape mandatory takeover bid requirements, seek exemptions from SEBI or attempt litigation. This results in considerable uncertainty as to whether such cross-border acquisitions shall be consummated at all. The phenomenon, the authors note, is unique to India.

⁹³ See (n 4) and the accompanying text.

frustration of other countries' chosen policies in this manner lies against the principle of 'comity', which we explore further below.

A. The Comity of Nations

'Comity' is the practice amongst political entities of giving due deference to the legislative, executive or, judicial acts of another.⁹⁴ This is not a legal principle but a *political* one – while sovereign entities have no such obligation to one another, an expectation of comity flows from the respect and deference that they ordinarily confer to one another.⁹⁵ Ordinarily, Indian courts have only entertained the principle of comity in the sense of 'judicial comity'⁹⁶ – the principle that courts of one jurisdiction must give effect to laws and judicial decisions of another.⁹⁷ More relevant to us, however, is the notion of 'prescriptive comity'.⁹⁸ Prescriptive comity is the respect that nations grant one another, by limiting the reach of their laws.⁹⁹ Should a jurisdiction consider an action legal in its territory, particularly when conduct of the kind is ordinarily well regulated, prescriptive comity demands that other jurisdictions do not affect its legality through the extra-territorial application of its laws.¹⁰⁰

Due to the globalised nature of markets, where individual transactions can impact multiple countries, the regulation of takeovers is an arena where prescriptive comity assumes particular importance. While India certainly has a right to impose takeover bid obligations on international acquirers if Indian entities are involved in the transaction, out of respect to other jurisdictions, this right must be exercised carefully. India should only look to obstruct a transaction permitted in another jurisdiction if its interest in doing so is at least comparable to that of such other jurisdiction. Certainly, where Indian companies are fundamental to international transactions, it is the duty of SEBI to intervene and safeguard the interests of Indian investors. Where such transactions bear only the thinnest nexus to India, however,

⁹⁴ *Black's Law Dictionary* (Bryan A Garner ed, 11th edn, Thomson Reuters, 2019).

⁹⁵ *World Sport Group (Mauritius) Ltd. v MSM Satellite (Singapore) Pte. Ltd.*, (2014) 11 SCC 639; AIR 2014 SC 968, para 20.

⁹⁶ *India Household and Healthcare Ltd. v LG Household and Healthcare Ltd.*, (2007) 5 SCC 510; AIR 2007 SC 1376; *CBI v Mulangi Krishnaswamy Ashok Kumar*, 1999 SCC OnLine Bom 179; (1999) 3 BomCR 189.

⁹⁷ *World Sport Group* (n 95), para 20.

⁹⁸ Prescriptive comity, as an idea, arises from the dissenting opinion of Justice Scalia in the American Supreme Court case of *Hartford Fire Insurance Co. v California*, 509 US 764 (1993).

⁹⁹ *Ibid* 817.

¹⁰⁰ A similar argument has been offered, in the context of antitrust law in the United States, in Stephen D Piraino, 'A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act' (2014) 40 Hofstra Law Review 1.

Indian interference negates the will of other sovereigns. In the past, other jurisdictions have voluntarily stepped away from exercising such authority. One such case, that of New Zealand, is discussed below.

1. The Case of New Zealand

Takeovers, in New Zealand, are regulated by the ‘Takeovers Code’ (“**New Zealand Code**”), which forms part of the Takeovers Regulations 2000.¹⁰¹ It prescribes a ‘fundamental rule’, pursuant to which no person that holds less than 20% of a company’s voting rights may increase their holding to over 20%,¹⁰² without one of the mechanisms it provides, most prominent amongst which is a mandatory takeover bid.¹⁰³

Till 2009, the New Zealand Code took a similar position on indirect acquisitions as India. Any acquisition upstream, if it allowed the acquirer to control more than 20% of a company’s voting rights, would come under the purview of the New Zealand Code, potentially triggering a mandatory takeover bid.¹⁰⁴ While New Zealand’s Takeover Panel would occasionally exempt acquirers from the requirement of making a takeover bid, when applications were made in this regard,¹⁰⁵ the same was only on a case-by-case basis with no general policy in this regard.

In 2009, the Takeovers Panel of New Zealand released a consultation paper, mooted possible changes to its approach to indirect acquisitions. It observed that overly restrictive indirect acquisition laws would make the incorporation of listed subsidiaries an anti-takeover measure, meant to frustrate attempts by others to take control of the parent entity.¹⁰⁶ Noting

¹⁰¹ The name of the regulations was changed from the erstwhile ‘Takeover Code Approval Order 2000’, pursuant to regulation 4(2) of the Takeovers Code Approval Amendment Regulations 2018. The Takeovers Code (the “New Zealand Code”) forms the schedule to the regulations and is sanctioned by reg 2 thereof.

¹⁰² New Zealand Code, r 6.

¹⁰³ *Ibid* r 7.

¹⁰⁴ Takeovers Panel, *Upstream Takeovers: A Consultation Paper Issued by the Takeovers Panel 2009* (Upstream Takeovers Consultation Paper), para 6 <<https://www.takeovers.govt.nz/assets/LawReform/Consultations/d7bdab45c4/Upstream-Takeovers-17-April-2009.pdf>> accessed 25 March 2020 (“Upstream Takeovers Consultation Paper”).

¹⁰⁵ Instances include Takeovers Code (ABC Learning Centres Limited) Exemption Notice 2004, SR 2004/391 (exempting ABC Learning Centres Limited and its wholly-owned subsidiaries from making a takeover bid due to their indirect acquisition of Kidicorp Group Limited, since such acquisition was an incident of a significant merger between Australian entities) and Takeovers Code (Newmont Mining Corporation) Exemption Notice 2002, SR 2002/27 (exempting Newmont Mining Company and its subsidiaries from making a takeover bid due to their indirect acquisition of Otter Gold Mines Limited, since the same represented less than 1% of their primary acquisition of the Australian company, Normandy Mining Limited).

¹⁰⁶ Upstream Takeovers Consultation Paper, para 48.

how large, high-value foreign transactions were particularly impacted by its position on indirect acquisitions, it argued that liberalising its approach was essential for compliance with the principles of international comity, which would demand that New Zealand must not impede on foreign transactions that are appropriately regulated, unless the same poses a risk to New Zealand's own investors.¹⁰⁷

Without making much change to the statutory provisions that govern New Zealand's takeover law, New Zealand has since released a detailed guidance note on upstream acquisitions.¹⁰⁸ Among other things, the guidance note provides a detailed statement on the approach that New Zealand's Takeovers Panel in processing applications for an exemption from takeover requirements in the case of an indirect acquisition, clarifying that exemptions would ordinarily be given where such indirect acquisition was not the purpose underlying the transaction.¹⁰⁹ Without binding the Takeovers Panel into a position where it cannot intervene on behalf of New Zealand's investors, the guidance note gives potential acquirers a reasonable degree of certainty that indirect acquisitions in New Zealand that are incidental to a larger transaction shall not ordinarily trigger a takeover bid.

Just as New Zealand relaxed its laws on indirect acquisition in the interests of comity, due to the impact they had on foreign transactions, it is imperative for India to consider offering a path to safeguard upstream transactions that only incidentally lead to an indirect acquisition from onerous regulatory costs. Below, we discuss some of the options available to India in this regard.

B. The Way Forward

Although there is a need for India to recalibrate its approach to indirect acquisitions, this need not mark a radical departure from the past. India has made a policy choice to place minority shareholders' interests at the forefront of its takeover regulation. The dangers of an over-emphasis on this objective have been detailed across this article. These dangers do not warrant that fairness considerations are abandoned, however, but only that necessary course-corrections are made so that other vital considerations are given their

¹⁰⁷ *Ibid* paras 78-79.

¹⁰⁸ Takeovers Panel, *Guidance Note on Upstream Acquisitions 2014*, <<https://www.takeovers.govt.nz/assets/GuidanceNotes/UpstreamAcquisitions/7f24047459/Guidance-Note-on-Upstream-Acquisitions-14-April-2014.pdf>> accessed 26 March 2020.

¹⁰⁹ *Ibid* para 4.3. The guidance note places a twin test for exemption: (a) whether the upstream target is listed on a stock exchange that New Zealand recognises, and (b) whether it forms the purpose of the primary acquisition. Ordinarily the value of the indirectly acquired company, as a percentage of the upstream target, serves as a proxy for identifying the purpose of the transaction.

due. Accordingly, any changes to the law must aim to reduce the cost of a change in control, while preserving India's focus on shareholder protection and ensuring that indirect transactions do not become a duplicitous avenue for effecting direct acquisitions.

With the need to maintain such a balance in mind, we see two directions available to India, should it liberalise its approach to indirect acquisitions: (a) modifications to the trigger for a mandatory takeover bid, in line with the international practice we have observed; and (b) the introduction of whitewash provisions, which have long been in the consideration of Indian law-makers.

1. Trigger Modifications

The trigger requirements for an indirect acquisition may be amended in line with international practice, in order to ensure that *bona fide* upstream acquisitions, carried out without an indirect acquisition as their focus, are exempted from a takeover bid requirement. We suggest two approaches for this purpose:

- a. *Reintroducing the chain principle*: Suitable amendments may be made to regulation 5 of the Takeover Code, to restrict 'indirect acquisitions' to those that are not a significant part of the primary acquisition, or a significant motivation for such acquisition. An objective test may be put in place for such 'significance', which may be measured along a comprehensive set of factors, including assets, market capitalisation, sales, profits, etc., in order to ensure that significant Indian entities do not escape the radar merely because the wrong metric was used to judge their value. While other jurisdictions place the threshold for such substantiality at 50-60%,¹¹⁰ even a much lower threshold (in the range of 10-20%), such that it operates as a *de minimis* exemption, may bring significant relief to acquirers. It is in such cases that the impact of a takeover bid requirement on efficiency considerations is particularly egregious. Ordinarily, should a company not meet this threshold, it is unlikely that it was a major target for the upstream acquisition, and upstream acquirers may not be motivated to bring in large scale policy changes in its functioning. Accordingly, the need for an exit option for existing shareholders would be less pressing. As an additional safeguard, to eliminate situations where small shareholders are likely to be side-lined, SEBI's Takeover Panel may be given the discretion to declare an exemption inapplicable, should it believe that

¹¹⁰ See (n 49).

a takeover bid is warranted even for an insignificant indirect acquisition, in line with the power of the Australian Takeover Panel to declare ‘unacceptable circumstances’.¹¹¹

- b. Allowing exemptions:* While SEBI is empowered to grant acquirers an exemption from making an open offer in circumstances it sees fit,¹¹² it may be helpful to specify that exemptions may be granted on the subjective satisfaction of SEBI that the indirect acquisition of a company would be unduly restricted in case a mandatory takeover bid requirement is imposed. While this may be done through an amendment to the regulations, to mirror French law on the matter,¹¹³ it may be simpler for SEBI to release guidelines on the same, in line with the approach of New Zealand.¹¹⁴ The criteria so specified need not be binding, thereby ensuring that SEBI’s Takeover Panel retains its flexibility in granting exemptions, while giving respite to acquirers. Such guidelines may detail the various factors that SEBI may consider in granting an exemption, which may include the significance of the indirectly acquired entity to the larger transaction, how dispersed the shareholding of the entity being acquired is, the frequency with which shares of the entity are ordinarily traded, or other criteria that may be deemed significant. This approach shall boost efficiency in a way that is similar to the statutory adoption of the chain principle while giving SEBI greater discretion to protect small shareholders’ interests. Given the sensitivity of transactions for which such an exemption shall be sought, due care must also be given to ensure that applications are disposed of in an expeditious manner and confidentiality is maintained.

2. Whitewash Provisions

As an alternative to mandatory takeover requirements, ‘whitewash provisions’ may be added to the Takeover Code, whether universally or only for indirect acquisitions. Whitewash provisions allow an acquirer to avoid a takeover bid requirement, should the shareholders of the target company pass a resolution to such effect. This allows a means for the costs of a change in control to be reduced while empowering shareholders to take a decision on whether they consider a takeover acceptable. While whitewash provisions shall be of little utility where the primary acquisition is hostile, they

¹¹¹ See (n 44) and the accompanying text.

¹¹² Takeover Code, reg 11(1).

¹¹³ See (n 56) and the accompanying text.

¹¹⁴ See (n 108) and the accompanying text.

may allow takeover bid requirements to be relaxed in the case of a friendly takeover.

Whitewash provisions, a mainstay of international takeover regulation,¹¹⁵ are not new to Indian law. In the Takeover Code 1997, such a provision served as an exemption from takeover bid requirements in the case of a change in control.¹¹⁶ The Achuthan Committee mooted introducing similar provisions to the Takeover Code. While the Committee considered such provisions desirable,¹¹⁷ it eventually relented from adding them to Indian law, given the issues that then plagued shareholder voting.¹¹⁸ As times have changed, however, and e-voting mechanisms have become more robust, the time may be ripe to consider bringing such provisions back into Indian law.

For whitewash provisions to be effective in ensuring that fairness considerations are given their due, protections must be built in to ensure that minority shareholders are heard. Much like the Takeover Code 1997 (in its final, amended form),¹¹⁹ a whitewash provision may provide that mandatory takeover bid requirements do not apply where the shareholders of the company being acquired pass a special resolution ratifying such change in control. In order to ensure that persons exercising control over the company, who may stand to benefit from the indirect acquisition, do not muscle out minority shareholders, the same may be combined with a “majority of minority” requirement, i.e. that in addition to 75% of a company’s shareholders ratifying a change of control, a majority of the *minority* shareholders of the company must also accede to such a change of control. Interested persons, such as the upstream acquirer, may be excluded from voting for such a resolution. Additional measures may be taken to ensure that participation is broad-based. Much like the Takeover Code 1997, which mandated that the option of voting through postal ballot also be allowed in relation to such a resolution, effective participation by all shareholders of the company may be ensured by mandating that postal ballot and e-voting options are allowed to shareholders. With such safeguards in place, whitewash provisions may create a route through which companies can avoid making a takeover bid, even as fears regarding the voting process, such as those raised by the Achuthan Committee, are allayed.

¹¹⁵ Refer, for instance, to City Code, r 9, note 1 on dispensations from r 9 (United Kingdom); New Zealand Code, rr 7(c) and (d) (New Zealand); Corporations Act 2001, para 611, item 14 (Australia).

¹¹⁶ Takeover Code 1997, reg 12. Curiously, however, no such whitewash provision covered quantitative takeover triggers.

¹¹⁷ C Achuthan Committee (n 7), para 12.18.

¹¹⁸ *Ibid* paras 12.18-19.

¹¹⁹ Takeover Code 1997, reg 12.

CONCLUSION

The regulatory regime governing takeovers in India, unless calibrated in a manner that causes minimal inconvenience to potential acquirers, may curtail the flow of takeover activity, given the substantial costs of compliance it imposes. Shareholding in Indian companies is typically highly concentrated, which already makes contests for control difficult. Any further curtailment of such activity may have negative system-wide ramifications, including dissuading foreign investors due to the high transaction costs of doing business in India. This is of particular importance in current times, given the incumbent government's focus on encouraging increased foreign investment. As a member of a wider global community, India must also accord its international peers respect for the economic policies they choose and ensure that it does not hinder international financial activity without legitimate cause.

Achieving these targets would require making a change in the paternalistic regulatory approach we have hitherto adopted in overseeing corporate activity. Liberalising our approach to indirect acquisitions would be a significant move in this direction. This article attempts to lay the blueprint for how such change may be achieved. We recommend solutions that retain the prominence that Indian law currently offers minority shareholders, while bringing down the regulatory costs applicable to mergers and acquisitions. Striking such a balance, in our view, shall permit greater efficiency in the Indian economy, without making merger and acquisition transactions unfair to small investors.

ARBITRABILITY OF INTELLECTUAL PROPERTY DISPUTES IN INDIA: A CRITIQUE

*Badrinath Srinivasan**

Arbitration is increasingly becoming the default commercial dispute resolution mechanism across the world. Recognising this, many States are reserving lesser classes of disputes for resolution in courts and are enlarging the scope of arbitrable disputes. One such class of disputes is those concerning intellectual property (IP) rights. In India, the shift has not been taking place in a linear fashion. This paper surveys the law on the topic, explores the non-linear movement towards a liberalized arbitrability regime of IPR disputes, and critically evaluates the law on the subject.

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I. INTRODUCTION

Intellectual property includes patents, trademarks, copyright, designs, geographical indications, plant varieties, semiconductor layouts, etc. Intellectual property law protects intangible property, that is, the product of creation by the mind. A notable aspect of many of the species of intellectual property is that the holder of the intellectual property discloses it to the public in exchange for monopoly rights over the intellectual property for a specific time. The monopoly rights include the right to assign or licence the right to another person. At the end of the monopoly period, the right ceases and the property is open to the public for use. Of course, some species of intellectual property do not conform to some or many of these characteristics. Some are not purely creations of mind but perform other significant roles such as identifiers of brand, quality, etc., and deserve protection from the State as they are useful to public.

The basis for protection of such property has a direct implication on the arbitrability of disputes concerning such property. Generally, arbitration is a private and confidential dispute resolution mechanism. On the contrary, the grant of monopoly rights by the state and protection thereto are not purely private matters and the authorities are expected to act in a transparent and open fashion. Whether disputes arising from the grant of protection to intellectual property could be resolved through the private and confidential process of arbitration is questionable. Nevertheless, questions have arisen whether disputes regarding exercise of some of the disputes, especially those relating to licensing or assignment of IP rights, could be arbitrated. Now that arbitration has become the default dispute resolution mechanism in the commercial world, many States are beginning to reserve lesser classes of disputes for resolution in courts and are enlarging the scope of arbitrable disputes. Disputes under the intellectual property law in many jurisdictions,

especially those traditionally regarded as economically developed, have also been subjected to this phenomenon.¹

This paper surveys the law in India on the topic,² explores whether there has been a movement towards a liberalised arbitrability regime of intellectual property law disputes in India and, if so, to what extent.³ It then puts forth two arguments: *First*, there is no reason why arbitrability of IP disputes should not be in *parimateria* with arbitrability standards relating to real property. *Second*, the world is moving towards the liberalisation of arbitrability of intellectual property disputes. However, the existing arbitrability regime of IP disputes in India is stifling the smooth resolution of commercial disputes, and is way behind many advanced economies. If India aspires to become an economic powerhouse and a hub of international arbitration, the courts have to liberalise the arbitrability of IP disputes.

The paper proceeds as follows: Part II provides a descriptive comment on the law of arbitrability of IP disputes in India. In this regard, cases concerning the issue of arbitrability are analysed descriptively in a chronological order. Such a perspective is important considering that it gives us a broad picture of how courts have handled the issue relating to arbitrability of IP disputes in India. Part III discusses the position in various jurisdictions and critically evaluates the non-arbitrability doctrine in its application to IP disputes in India. Part IV concludes by arguing that India's aspirations for becoming a hub of international arbitration would be possible only if its regime on IP arbitration is liberalised.

II. ARBITRABILITY OF IP DISPUTES IN INDIA

A. What is Arbitrability?

It is important, at the outset, to clarify what arbitrability as referred to in this paper means. Arbitrability in its widest import has been referred to mean the following: (i) The capability of a dispute being resolved through arbitration according to the laws of a state; (ii) The capability of a dispute being resolved through arbitration according to the agreement between the

¹ See, Part III of this paper.

² The paper is based on the law prevailing as on 14 April 2020.

³ For a survey on the Indian law on the subject, see, Kshama A Loya and Gowree Gokhale, 'Arbitrability of Intellectual Property Disputes: A Perspective from India' (2019) 14 *Journal of Intellectual Property Law & Practice* 632-641; Utkarsh Srivastava, 'Putting the Jig Saw Pieces Together: An Analysis of the Arbitrability of Intellectual Property Right Disputes in India' (2017) 33 *Arbitration International* 631-646.

parties; and (iii) The capability of a dispute being resolved through arbitration in view of the reference by the parties to arbitration.⁴ In the first sense, States reserve certain matters for resolution through courts or other specific for a and such matters cannot be resolved through arbitration. Even though a dispute may be arbitrable, the parties may have excluded such dispute from the scope of the arbitration agreement. For instance, parties may specifically exclude an issue relating to liquidated damages from being referred to arbitration. Thus, the second facet of arbitrability tests whether a dispute could be resolved through arbitration in light of the agreement between the parties. In the third sense, arbitrability is tested on whether the parties had actually referred a dispute to arbitration, even though it is covered by the arbitration agreement. This paper mainly concerns itself with arbitrability as used in the first sense.

Section 2(3) of the Arbitration and Conciliation Act 1996 (“Arbitration Act” or “1996 Act”) provides that Part I of the 1996 Act shall not affect any other law for the time being in force by which certain disputes may not be submitted to arbitration. Section 34(2)(b)(i) of the 1996 Act allows setting aside of an arbitral award on the ground that the subject matter of the dispute is not capable of settlement by arbitration under the law in force. Under Part II of the 1996 Act, non-arbitrability is a ground for refusing enforcement of foreign arbitral awards.⁵

Most of the disputes that are non-arbitrable have been so declared by courts.⁶ Very few disputes have been expressly barred by statutes from arbitration. The law regarding non-arbitrability has been analysed in depth by the Supreme Court of India in *Booz Allen and Hamilton Inc. v SBI Home Finance Ltd.*⁷ and the decision holds the field on the issue.

B. Booz Allen and Hamilton Inc. v SBI Home Finance Ltd.

In *Booz Allen*, the Supreme Court recognised as a matter of principle that any dispute that could be decided by a civil court could also be resolved through arbitration but added a caveat that the legislature has, expressly or impliedly, reserved certain categories of disputes from being arbitrated. Such categories, according to the Supreme Court, were actions *in rem* as opposed

⁴ See, *Booz Allen and Hamilton Inc. v SBI Home Finance Ltd.*, (2011) 5 SCC 532, para 34, where the Supreme Court listed out the three facets of arbitrability.

⁵ See, sections 48(2)(a) and 57(1)(b) of the 1996 Act.

⁶ See, *Booz Allen and Hamilton Inc. v SBI Home Finance Ltd.*, (2011) 5 SCC 532, para 36.

⁷ (2011) 5 SCC 532.

to actions *in personam*. Since actions *in rem* determined rights not only as between the parties to the action, but also against the world itself, including any other person claiming an interest in the subject-matter, the Supreme Court held that such actions could not be arbitrated. On the other hand, actions *in personam* were actions pertaining to rights and interests of the parties between themselves and therefore the court was of the view that such actions could be arbitrated.

Historically, the distinction between *in rem* and *in personam* actions is intimately connected to the nature of jurisdiction that a court exercises.⁸ In the case of actions *in rem*, the jurisdiction is possessed by the court in whose jurisdiction the property or the *res* rests. In respect of actions *in personam*, the jurisdiction is generally where the defendant is domiciled or where the cause of action arose. Further, this distinction has been maintained over centuries under the rubric of tangible property. As a result, the distinction between actions *in rem* and *in personam* presents fundamental classification challenges in respect of actions with regard to enforcing intellectual property rights, which are intangible.⁹ The situation is complicated since jurisdictions in respect of intellectual property rights are regarded as *sui generis* and differ, at times, vastly, in comparison with tangible property.¹⁰

The crucial aspect determinative of arbitrability is the nature of judgment sought by the aggrieved. If the judgment would affect the world at large, then such a judgment is a judgment *in rem* and is not arbitrable. But if the judgment sought would determine the rights of persons, a dispute seeking such a judgment would be arbitrable. For instance, proceedings initiated by a member of the public before the Registrar against patenting a purported invention calls for a judgment as regards grant of monopoly rights over the thing (or process) sought to be patented to the exclusion of world at large. Therefore, what is sought in essence is a judgment *in rem*, although the dispute is between two persons- the applicant and the party opposing the grant of patent. It is this critical distinction that would determine the arbitrability of a dispute seeking a judgment relating to an intellectual property right.¹¹

⁸ WW Buckland and Arnold D McNair, *Roman Law and Common Law: A Comparison in Outline* (1965) 89.

⁹ See, Part II of the Paper.

¹⁰ However, for certain purposes, intellectual property is regarded as intangible property.

¹¹ *Booz Allen* recognises the arbitrability of another species of rights: subordinate rights *in personam* arising out of rights *in rem*: “38. Generally and traditionally all disputes relating to rights *in personam* are considered to be amenable to arbitration; and all disputes relating to rights *in rem* are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights *in personam* arising from rights *in rem* have always been considered to be arbitrable.”

C. Sukanya Holdings (P) Ltd. v Jayesh H. Pandya

*Sukanya Holdings (P) Ltd. v Jayesh H. Pandya*¹² has far-reaching consequences on the arbitrability doctrine. The Supreme Court held in the case that a suit in which an application under Section 8 of the 1996 Act has been filed should be a “matter” in respect of which the parties have agreed to refer to arbitration. In respect of disputes that were either outside the scope of the arbitration agreement or between persons who were not parties to the arbitration agreement, Section 8 would, according to the court, not apply. The court clarified that as regards disputes that were partly-arbitrable, bifurcation of the cause of action was not permitted under the law. This implies that IR disputes cannot be referred to arbitration if a part of the subject matter or some (including one) of the parties to the dispute are not parties to the arbitration agreement.¹³

Sukanya Holdings was recently considered by the Supreme Court in *Ameet Lalchand Shah v Rishabh Enterprises*,¹⁴ in the context of the recent amendments to Section 8 of the 1996 Act. The court took note of the 2015 amendments to the 1996 Act and held that ‘party’ in the amended Section 8 was clarified to include persons claiming through or under such party also.¹⁵

Rarely have IP statutes declared disputes as non-arbitrable. The law on the issue has been explicated by judicial decisions. Historically, issues regarding arbitrability of IPR seem to have been raised as independent grounds in the late 1980s. Courts have clearly held that disputes regarding the validity of intellectual property rights are not arbitrable.¹⁶ However, the issue as to whether rights relating to licensing of intellectual property rights can be arbitrated has remained unanswered decisively, although courts have leaned in favour of arbitrability of these disputes.¹⁷

Booz Allen holds the field as regards arbitrability of disputes. Most decisions employ the tests propounded in *Booz Allen* to decide whether a dispute is arbitrable. Often, a dispute is not just about the arbitrary classification of

¹² (2003) 5 SCC 531: AIR 2003 SC 2252.

¹³ See, Part III of this paper.

¹⁴ (2018) 15 SCC 678.

¹⁵ See also, *Chloro Controls India(P) Ltd. v Severn Trent Water Purification Inc.*, (2013) 1 SCC 641; *Reckitt Benckiser (India) (P) Ltd. v Reynders Label Printing India (P) Ltd.*, (2019) 7 SCC 62. See also, *Mahanagar Telephone Nigam Ltd. v Canara Bank*, 2019 SCC OnLine SC 995, which considers the applicability of arbitration agreement to non-signatories where they are an affiliate of a party to the arbitration agreement.

¹⁶ See, for instance, *Lifestyle Equities CV v QD Seatoman Designs (P) Ltd.*, MANU/TN/3292/2017, para 5(t):2017 SCC OnLine Mad 7055.

¹⁷ *Lifestyle Equities CV v QD Seatoman Designs (P) Ltd.*, MANU/TN/3292/2017, para 5(p): 2017 SCC OnLine Mad 7055.

whether it is an IP dispute or a contractual dispute, etc., but it is about the relief claimed by the plaintiff. Whether the relief claimed can be granted by an arbitral tribunal has been dealt with in *Sukanya Holdings* and it still holds the field. The remaining portion of this part discusses how courts have decided issues relating to arbitrability of IP disputes.

D. Mundipharma AG v Wockhardt Ltd.

*Mundipharma AG v Wockhardt Ltd.*¹⁸ is one of the earliest cases on the arbitrability of IPR and requires close analysis. Section 20 of the Arbitration Act 1940 provided for reference of disputes in a suit to arbitration if there was an arbitration agreement between the parties. Mundipharma AG and Wockhardt Ltd entered into an agreement for licensing of technology. The agreement contained clauses relating to arbitration and confidentiality and provided that during the currency of the agreement and three years thereafter, Wockhardt would not compete with Mundipharma AG. Disputes arose and Mundipharma sought interim relief restraining Wockhardt from infringement of copyright over packaging, breach of confidentiality and breach of license agreement. Mundipharma wanted these disputes to be referred to arbitration. The court held that infringement of copyright and the remedies therefor such as damages or injunction cannot be made a subject matter of arbitration.¹⁹

However, the court did not give detailed reasons as to why the position is so nor did it cite precedents in support of its conclusion on non-arbitrability. Non-arbitrability of IP disputes was taken as a given.

E. Angath Arts (P) Ltd. v Century Communications Ltd.

In *Angath Arts (P) Ltd. v Century Communications Ltd.*,²⁰ the Bombay High Court did not discuss the issue of arbitrability of IPR disputes since no argument was raised to that effect. Nevertheless, the case is notable because the matter was referred to arbitration. The dispute was between the assignor and assignee of rights in a film. The assignor and the assignee had entered into an agreement which afforded joint ownership of the copyright in the negative of the film. The assignee was free under the agreement to exploit the copyright by entering into agreements with others, provided the assignor

¹⁸ 1990 SCC OnLine Del 269; ILR (1991) 1 Del 606.

¹⁹ 1990 SCC OnLine Del 269; ILR (1991) 1 Del 606, para 14. The court dismissed the petition on the ground of non-arbitrability and also on various other grounds.

²⁰ 2008 SCC OnLine Bom 475; (2008) 3 Arb LR 197.

was made a confirming party. The agreement also contained an arbitration clause. The assignor alleged that the assignee had negotiated with a third party to exhibit the film abroad without the assignor's consent. Hence, the petitioner approached the Bombay High Court for an injunction restraining the respondents from transferring, licensing or sub-licensing any rights in the copyright of the film to any third party, pending constitution of the arbitral tribunal and reference to arbitration.

The crucial aspect of the case is that the petition was filed under Section 9 of the 1996 Act but the court did not go into the issue of arbitrability of the dispute although it pertained to copyright.

F. Ministry of Sound International Ltd. v Indus Renaissance Partners Entertainment (P) Ltd.

In *Ministry of Sound International Ltd. V Indus Renaissance Partners Entertainment (P)Ltd.*,²¹ Ministry of Sound International Ltd (MSIL), an Irish company, licensed certain trademarks and copyrights it owned to Indus Renaissance Partners Entertainment Ltd (IRPEL). MSIL terminated the licence agreement. Disputes arose and MSIL filed a suit against IRPEL and other persons seeking an injunction and damages. Some of the defendants were not parties to the licence agreement. IRPEL filed an application seeking reference of the matter to arbitration as per the arbitration clause. MSIL objected on several grounds, including the non-arbitrability of the subject matter, breach of confidentiality obligations and infringement of intellectual property, and that some defendants were not parties to the licence agreement.

The court rejected MSIL's objections: on facts, the defendants who were not parties to the arbitration agreement either themselves stated that they were not planning to enter into any agreement with MSIL or conceded that they defendant would not use the plaintiff's IP without the plaintiff's permission.

On the ground of non-arbitrability, the court justified the arbitrability of the disputes for the reason that the licence agreement as a commercial document had to be afforded a common sense interpretation and that the agreement was for authorising the licensee to use the trade marks/copyright. The court clarified that the agreement was governed by English laws which permitted the tribunal to grant injunctive relief. Consequently, the court referred the matter to arbitration.

²¹ 2009 SCC OnLine Del 11:(2009) 156 DLT 406.

Whether one would treat a dispute connected to an agreement licensing an intellectual property right could be considered as a contractual issue or an IP issue. Where courts have considered them to be a contractual issue, they have been referred to arbitration.

G. Tandav Film Entertainment (P) Ltd. v Four Frame Pictures

In *Tandav Film Entertainment (P)Ltd. v Four Frame Pictures*,²² Tandav Films Entertainment P Ltd (“Tandav Films”) entered into an exclusive licence agreement in June 2002 wherein Mr Jaideep Sahni, licensed exclusively the writer’s rights in relation to the script of a Hindi film, Khosla ka Ghosla, to Tandav Films. Consequent to the said agreement, Tandav Films signed several licence agreements relating to dialogues, screen play, music, etc. In May 2003, Tandav Films signed a Memorandum of Understanding with Padmalaya Telefilms Ltd (“Padmalaya”) for a joint venture for the making of the Hindi film. Tandav Films entered into an agreement with UTV Software Communications Ltd (“UTV Software”) and Living Media India Ltd (“Living Media”) wherein certain exclusive rights (“Exclusive Rights Agreement”) relating to the film were transferred to UTV Software for 15 years. The said agreement contained an arbitration clause. The film released in 2006 and was successful in the box office.

Given the success, it was decided to re-make the film in Tamil under the title “Poi Solla Porom” (We are Going to Lie). The rights in the musical works in the Tamil film were assigned to Big Music and Home Entertainment (“Big Music”).

Tandav Films filed a suit restraining UTV Software, Living Media and Big Music from infringing its copyright in music in the Hindi film. A connected suit was filed by Tandav Films along with Padmalaya restraining Four Frames Pictures, which represented the director of the Tamil film, UTV Software and Mr. Jaideep Sahni, restraining them from releasing the Tamil film.

UTV Software filed an application under Section 8 of the 1996 Act relying on the arbitration clause in the Exclusive Rights Agreement. The Single Judge of the Bombay High Court allowed the application and dismissed the suit. On appeal, Tandav Films argued that except for UTV Software, no other defendants were parties to the arbitration agreement and that by virtue of *Sukanya Holdings*, arbitration would not lie. The Division Bench of the Bombay High Court, which heard the appeal, ruled that the appeal was not

²² 2009 SCC OnLine Del 3930: (2010) 1 Arb LR 79 .

maintainable. On the question as to whether *Sukanya Holdings* applied, the court held the defendants other than UTV Software derived their rights from UTV Software or were merely *proforma* parties. The court clarified that its views were only tentative and that the arbitral tribunal under Section 16 of the 1996 Act could decide the issues.

Whether a party impleaded as a defendant was a primary party or a party which derived its rights from a party to the agreement is also material on whether the dispute was arbitrable or not. In *Tandav Film*, the court held that the defendants other than the party to the agreement held rights that could be traced to the defendant which was a party to the agreement. The next case, *R.K. Productions*, decided otherwise.

H. R.K. Productions (P) Ltd. v N.K. Theatres (P)Ltd.

In *R.K. Productions (P) Ltd. v N.K. Theatres (P)Ltd.*,²³ the Division Bench of the Madras High Court had to decide whether the subject matter of the dispute between the parties was arbitrable. The dispute arose out of the assignment agreement between RK Productions Pvt Ltd (“RK Productions”) and NK Theatres Pvt Ltd (“NK Theatres”) where the former assigned the right to remake the Tamil film “3” in Telugu. Under the assignment agreement, NK Theatres had to pay about Rs 2.35 crores to RK productions before the delivery of the prints but NK Theatres failed to do so. Based on an undertaking to pay the said amount and three cheques for Rs. 1.35 crores, NK Theatres obtained the prints and entered into an assignment agreement with Mango Mass Media Private Limited (“Mango Mass”) for exploitation of satellite rights of the suit film. Mango Mass entered into an agreement with Zee Telugu Limited (“Zee”) to broadcast the film in the latter’s channel. RK Productions issued a letter to Gemini Industries & Imaging Private Limited, the lab, asking it not to issue satellite clearance of the lab without NK Theatres clearing the dues. Further thereto, RK Productions filed a suit seeking a permanent injunction against NK Theatres, Mango Mass and Zee from infringing the plaintiff’s copyright, especially its satellite rights.

NK Theatres objected to the filing of the suit and sought reference of the dispute to arbitration in view of the arbitration clause in its agreement with RK Productions, the plaintiff. The Single Judge of the High Court agreed with the contention of NK Theatres and referred the matter to arbitration. On appeal, the Division Bench relied on *Sukanya Holdings* and held that since reliefs were sought against Mango Mass and Zee, who were not parties

²³ 2012 SCC OnLine Mad 5029; (2014) 1ArbLR34.

to the arbitration clause, and since those issues were inextricably linked to the issues as regards infringement by NK Theatres, the reference to arbitration by the Single Judge of the High Court was not correct. The Division Bench ordered continuance of the suit. It appears that NK Theatres sought leave to appeal from the Supreme Court but the same was not granted.²⁴

I. SAIL v SKS Ispat and Power Ltd.

In *SAIL v SKS Ispat and Power Ltd.*,²⁵ Steel Authority of India Limited (“SAIL”) filed a suit in the Bombay High Court for permanent injunction against SKS Ispat & Power Ltd (“SKS Ispat”) and two others for infringing SAIL’s trademarks and against passing off by the defendants of their goods as SAIL’s goods. SAIL also claimed damages in the suit. The defendants filed a petition (Notice of Motion, in Bombay High Court parlance) for reference of the matter to arbitration under Section 8 of the 1996 Act in view of the arbitration agreement between SAIL and SKS Ispat.

The court dismissed the petition on the ground that the reliefs of infringement and passing off did not fall within the jurisdiction of the arbitrator. The view of the Single Judge was based on three grounds:

- A trademark and the rights connected therewith were matters *in rem* and were not amenable to resolution by a private forum;
- Disputes regarding infringement and passing off do not and did not arise out of contract;
- Except for SKS Ispat, the other defendants were not parties to the arbitration agreement. By virtue of *Sukanya* holdings, the entire subject matter had to be referred to the court even if a part of it was covered by the arbitration clause.

Another Single Judge of the Bombay High Court attempted to distinguish *Steel Authority of India* in *Eros International Media Ltd. v Telex Links India (P) Ltd.*²⁶ by stating that *Steel Authority of India* did not lay down a broad proposition that all disputes relating to trademarks and passing off were actions *in rem* and non-arbitrable. The Court considered the observations in *Steel Authority of India* were facts specific in that the disputes there

²⁴ See Order dt.14 October 2014 in *N.K. Theatres (P) Ltd. v R.K. Productions (P) Ltd.*, SLP (C) Nos. 16103-16104 of 2013 reported as MANU/SCOR/41792/2014.

²⁵ 2014 SCC OnLine Bom 4875.

²⁶ 2016 SCC OnLine Bom 2179; (2016) 6 Arb LR 121. See, the later portions of Part II for a discussion of the decision.

did not arise out of the arbitration agreement. This take on *Steel Authority of India* not correct. In *Steel Authority of India*, the Single Judge held:

*“The present suit, firstly, is for reliefs against infringement and passing off, which by their very nature do not fall within the jurisdiction of the Arbitrator. The rights to a trademark and remedies in connection therewith are matters in rem and by their very nature not amenable to the jurisdiction of a private forum chosen by the parties. Secondly, the disputes concerning infringement and passing off do not arise out of the contract between the parties dated 1 June 2011, which contains the arbitration agreement.”*²⁷

It is clear that the Single Judge clearly held that the reliefs of infringement and passing off of trade marks were not arbitrable.²⁸

J. Euro Kids International (P) Ltd. v Bhaskar Vidhyapeeth Shikshan Sanstha

*Euro Kids International (P) Ltd. v Bhaskar Vidhyapeeth Shikshan Sanstha*²⁹ is an important decision from the arbitrability perspective. It presents a classic example of how Indian courts attempted to extricate disputes regarding personal rights from the clutches of the non-arbitrability doctrine, especially in the absence of an authoritative ruling of the Supreme Court on the issue.

The dispute related to the use of copyrighted material and trademarks of the franchisor by the franchisee owing to non-renewal of the franchise agreement. Under the franchise agreement, the franchisor granted the franchisee the right to use the franchisor's trademarks and copyrighted material. On expiry of the agreement, the franchisor called upon the other party to desist from using the said trademarks and copyrighted material. The franchisee refused and the matter was referred to arbitration. Pending the arbitration, the franchisor approached the High Court under Section 9 of the 1996 Act seeking an injunction against the franchisee from using the franchisor's trademarks and copyrighted material. The franchisor relied on a negative covenant in the agreement which prohibited the franchisee from using the trademarks and copyrighted material of the franchisor in the event of termination of the agreement. Since the franchisee did not comply, the franchisor

²⁷ 2014 SCC OnLine Bom 4875, para 4, <<https://goo.gl/tUZTx6>> accessed 25 August 2018.

²⁸ Also see, *Deepak Thorat v Vidli Restaurant Ltd.*, 2017 SCC OnLine Bom 7704, para 7, where the court read *Steel Authority of India* as holding that disputes relating to infringement and passing off were non-arbitrable.

²⁹ 2015 SCC OnLine Bom 3492.

approached the Bombay High Court seeking an injunction under Section 9 of the 1996 Act.

When the franchisee contended that the disputes related to intellectual property rights which were not arbitrable, the court disagreed and allowed the petition for interim relief. The court held that the dispute did not relate to the ownership of the trademark or of the copyrighted material and was therefore not a dispute regarding a right *in rem*.

Since the petition was for enforcement of a negative covenant in a franchise agreement, the dispute was arbitrable and the court had the power to restrain the franchisee from violating the negative covenant under Section 9 of the 1996 Act.

K. Eros International Media Ltd. v Telex Links India (P)Ltd.

In *Eros International Media Ltd. v Telex Links India (P)Ltd.*,³⁰ Eros International Media Limited (Eros) and Telex Links India Pvt Ltd (Telex) signed a term sheet wherein Eros granted Telex content marketing and distribution rights in respect of certain films. The term sheet contained an arbitration clause. The parties were to enter into a comprehensive agreement that would supersede the term sheet. Disputes arose between the parties and Eros filed a suit in the Bombay High Court for infringement against Telex and seven others who claim to have used the copyrighted material pursuant to a sub-licence from Telex. Telex filed a petition under Section 8 of the 1996 Act for referring the dispute to arbitration. Eros argued that the dispute was not arbitrable. Rejecting this contention, the court held that the dispute was arbitrable. Following propositions summarises the court's decision in the matter:

- Merely because Section 62 of the Copyright Act 1957, or the corresponding provision in the Trade Marks Act 1999³¹ confers jurisdiction on the District Court in respect of infringement matters cannot be a ground for holding the disputes in the matter as non-arbitrable. This provision only defines the entry level of such actions in the judicial hierarchy.
- Intellectual property laws do not stand distinct from the general body of law. Although IPR are special rights, they are merely species of property.
- Actions of infringement between two claimants of copyright are not actions *in rem* but are only actions *in personam*. On the other hand, registra-

³⁰ 2016 SCC OnLine Bom 2179; (2016)6 Arb LR 121.

³¹ Trade Marks Act 1999, s 134.

tion gives the holder a right against the whole world. But infringement or passing off actions, whether in trademark or copyright, bind only the parties. To illustrate, A may succeed in an infringement action against B but this will not mean that A will succeed in an infringement action against C.

- The commercial parties have consciously chosen a particular method of dispute resolution, arbitration and these actions cannot be characterised as actions *in rem*.
- Many copyright assignment agreements contain arbitration clauses. No law prohibits disputes from these agreements from being arbitrated. Doing so would amount to turning intellectual property law on its head and would result in uncertainty in commercial transactions. There are many complex commercial agreements dealing with intellectual property rights in some way or another. Ousting these from the scope of arbitration clauses contained therein would be against domestic and international commerce.
- Defendant Nos. 2 to 8, the sub-licensees have filed affidavits agreeing to arbitration as per the arbitration clause in the term sheet. They are persons “claiming through or under” Telemax, which was the licensee as per the term sheet.

Therefore, the Single Judge of the Bombay High Court referred the matter to arbitration.

L. Indian Performing Right Society Ltd. v Entertainment Network (India) Ltd.

In *Indian Performing Right Society Ltd. v Entertainment Network (India) Ltd.*,³² the Bombay High Court had to decide whether disputes in respect of copyright infringement under a licence agreement were arbitrable.³³ Indian Performing Right Society Limited (IPRS) and Entertainment Network (India) Ltd (ENIL) entered into an agreement whereby IPRS licensed the right to broadcast songs of its members to ENIL for royalty as the consideration. Disputes arose between the parties, the matter was referred to arbitration, and the arbitrator passed the award. IPRS challenged the award before the Bombay High Court on the ground that the award dealt with issues that were not arbitrable. It was contended on behalf of IPRS that the arbitrator framed an issue on whether the use or broadcast of a sound recording with the permission of the owner of the copyright in the sound recording but without

³² 2016 SCC OnLine Bom 5893.

³³ Inika Charles, ‘On the “Apocalyptic” Arbitrability of Copyright Disputes: IPRS v Entertainment Network’ (*SpicyIP* 24 September 2016) <<https://spicyip.com/2016/09/on-the-apocalyptic-arbitrability-of-copyright-disputes-iprs-v-entertainment-network.html>> accessed 4 September 2018.

the permission of the owner of the copyright in the literary work and/ the or musical work infringes the copyright in literary work and/or musical work. There was a prayer for a declaration that the broadcast of sound recording by the claimant did not infringe any copyright of the respondent and/or its members.

The court held that since Section 62(1) of the Copyright Act 1957 mandated suits relating to infringements to be brought before the District court, it cannot be referred to arbitration. Further the court held that similar to the *Steel Authority of India Ltd* case, the right conferred by the copyright law on the holder was a right *in rem* and are not amenable to private dispute resolution processes. The court distinguished *Eros International* by stating that the issues involved in the particular case different as the present case concerned the entitlement of IPRS to royalty in relation to sound recordings and for injunction against IPRS from wrongful demands. These, according to the courts, could not be arbitrated in view of the *Booz Allen and Steel Authority of India Ltd* cases.

M. Impact Metals Ltd v MSR India Ltd

In *Impact Metals Ltd. v MSR India Ltd.*,³⁴ the Hyderabad High Court was faced with an appeal against an order rejecting an application under Section 8 of the 1996 Act filed before the trial court seeking reference of the dispute that formed the subject matter of the suit to arbitration. A manufacturing agreement was executed between Impact Metals Ltd (“Impact Metals”) and others on the one hand and MSR India Ltd (“MSR India”) and others on the other for manufacture and supply by Impact Metals of certain goods. The agreement contained an arbitration clause.

MSR India filed a suit complaining that Impact Metals stole their invention and filed an application for grant of patent rights in respect of an invention which was of MSR India. Hence, MSR India sought injunction restraining Impact Metals from using MSR India’s IPR and for damages.

Impact Metals filed an application under Section 8 seeking reference of the dispute to arbitration in view of the arbitration clause. The Trial court rejected the said petition. On a petition for revision, the High Court held that the dispute was covered by the agreement between the parties and was hence to be referred to arbitration. Importantly, the court rejected the argument that the dispute could not be referred to arbitration since the Copyright Act 1957 conferred jurisdiction specifically on the District Court. The Court

³⁴ 2016 SCC OnLine Hyd 278.

cited Para 36 of the Supreme Court's decision in *Booz Allen* and held that there is no express or implied bar on reference of such disputes to arbitration.

Interestingly, the court rejected the argument that copyright was a right *in rem* on the ground that MSR India did not cite any judgment in this regard. Ultimately, the High Court allowed the revision petition.

MSR India filed a petition for leave to appeal to the Supreme Court but the Supreme Court refused to interfere with the decision of the Hyderabad High Court.³⁵

N. Deepak Thorat v Vidli Restaurant Ltd.

In *Deepak Thorat v Vidli Restaurant Ltd.*,³⁶ one Vithal Venkatesh Kamat, who is a registered proprietor of the trade mark "Vithal Kamats" Original Family Restaurant Achha Hai, Sachha Hai ' and claims ownership of all combinations or variations thereof. Vidli Restaurant Ltd and Deepak Thorat entered into a franchise agreement along with Vithal Venkatesh Kamat, who had licensed the trade marks to Vidli Restaurant Ltd. The franchise agreement permitted Deepak Thorat to use the above trade mark on a non-exclusive and non-transferable basis, subject to certain restrictions. The agreement had a negative covenant that Deepak Thorat shall not use the trade mark on expiry or early termination of the franchise agreement. Vidli Restaurant Ltd. invoked arbitration since Deepak Thorat purportedly breached negative covenant. Pursuant to an application for interim relief, the arbitrator exercised his powers under Section 17 and granted an interlocutory injunction restraining Deepak Thorat from using the trade mark. Deepak Thorat appealed to the Bombay High Court against the order of the injunction.

One of the contentions raised by the franchisee was that the dispute was non-arbitrable. The court rejected the contention and held that the licence to use the trade mark was a part of the franchise agreement. The court took note of the clause in the agreement which expressly recognised the franchisor's right to injunction in the event of breach of the negative covenant. It was the view of the arbitrator that the arbitration was not an action for infringement or passing off. The High Court concluded that since the arbitration did not remotely concern the adjudication of the franchisor's ownership right or the right to use the relevant trademark or to restrain the franchisee from using the trademark or any other deceptively similar mark based on the franchisee's right as an owner or user of the trade mark, the dispute was

³⁵ *MSR India Ltd. v Impact Metals Ltd.*, MANU/SCOR/23906/2018.

³⁶ 2017 SCC OnLine Bom 7704.

arbitrable. The fact that the dispute related to the enforcement of the negative covenant tilted the view of the High Court in favour of arbitrability. The High Court opined that the interim injunction ordered by the arbitrator was not an order *in rem* nor was the claim to the said order sourced in a right *in rem*.

O. Uday Chand Jindal v Galgotia Publications (P)Ltd.

In *Uday Chand Jindal v Galgotia Publications(P)Ltd.*,³⁷ the Delhi High Court was concerned with an assignment agreement where the author made several allegations of breach of the said agreement, including non-payment of royalty, adaptation of the author's work without permission, breach of author's moral rights, etc. The author also alleged that the terms of the assignment agreement were harsh. The Copyright Board had previously heard the matter and concluded that the author did not establish that the terms of the agreement were harsh. The Board dismissed the matter on the grounds that there was an arbitration clause and that it did not have jurisdiction over the breach of an author's moral rights.

The author appealed and argued that since the matter involved disputes that were non-arbitrable, the matter as a whole had to be adjudicated by the Board in view of the decision of the Supreme Court in *Sukanya Holdings (P) Ltd. v Jayesh H. Pandya*.³⁸

The court rejected the contentions of the author and held that since the author had agreed to the terms of the agreement, including the arbitration clause, he cannot contend that the said clause was of no consequence. On this basis, the court dismissed the appeal of the author, thereby recognising that disputes regarding the harshness of the assignment agreement were to be taken up before the arbitrator. The court rejected the contention of the author that the Copyright Board could decide on claims relating to moral rights. The court also did not decide on the applicability of *Sukanya Holdings*. Therefore, although the court did not go into the question as to the arbitrability of disputes relating to the breach of moral rights of an author, it appears from the judgment that the court did not consider the matter as beyond the scope of arbitration.

³⁷ 2017 SCC OnLine Del 10626; (2017) 72 PTC 492.

³⁸ (2003) 5 SCC 531.

P. Shanthi Thiagarajan v KE Gnanavelraja

*Shanthi Thiagarajan v KE Gnanavelraja*³⁹ concerned assignment of rights to remake a popular Bollywood film. Viacom 18 Medial Private Limited (“Viacom”) had the rights to remake the famous movie ‘Special 26’ directed by Neeraj Pandey. Viacom assigned the rights to remake the film in Tamil to the plaintiff, Shanthi Thiagarajan. Thereafter, Shanthi Thiagarajan entered into an agreement with M/s. RPP Film Factory assigning the said rights to remake the film in Tamil. The agreement also allowed M/s. RPP Film Factory to further assign the rights to remake ‘Special 26’. When the appellant heard that the respondent, KE Gnanavelraja, was producing a film that was allegedly a remake of ‘Special 26’, she filed a suit and also an application for interim injunction. KE Gnanavelraja contended that in furtherance of the agreement between the appellant and M/s. RPP Film Factory, the latter had entered into an agreement with the respondent for remaking the film.

The court heard the application for interim injunction and refused to accede to the prayer of the appellant. On appeal, the Division Bench of the High Court rejected the appellant’s contentions. The court was of the view that the no *prima facie* case was established in the appellant’s favour in view of the agreement between the respondent and KE Gnanavelraja. Further, since the film remade in Tamil was due for release within a few weeks therefrom, the court was of the opinion that the balance of convenience was in the respondent’s favour and that the plaintiff could be monetarily compensated.

The court considered the agreement between the appellant and RPP Film Factory which contained an arbitration clause, to which KE Gnanavelraja was bound as an assignee. The court contemplated the possibility of an action of copyright infringement against an infringer not being an action *in rem* in all occasions, despite copyright being a right *in rem*. The court qualified this observation as only a *prima facie* view, which had to be decided in the suit. The court eventually dismissed the appeal.⁴⁰

The aforesaid descriptive analysis would reveal that courts have held the following factors as relevant to the question of arbitrability:

- Whether the dispute dealt with a right *in rem*? *Steel Authority* and *Indian Performing Right Society* are such examples where the court held that the right in dispute was a right *inrem* and so a dispute was not arbitrable while

³⁹ AIR 2018 Mad 81.

⁴⁰ The case of *Nuziveedu Seeds Ltd. v Monsanto Technology LLC*, 2018 SCC OnLine Del 8326, which concerns the Protection of Plant Varieties and Farmers’ Rights Act 2001 is likely to raise questions relating arbitrability of disputes under the said Act but it appears that it is not an issue before the court. Hence, the case is not discussed here.

in cases such as *Euro Kids* and *Deepak Thorat*, the court decided that the issue did not pertain to a right *in rem*.

- Whether the defendant held independent rights *vis-à-vis* the plaintiff or whether the rights were derived from those held by the defendant which was a party to the arbitration agreement? In *R.K. Productions* for instance, the defendants were not treated as holding derivative rights from the defendant which was a party to the arbitration agreement. Contrarily, in *Tandav Film*, *Eros International* and *Shanthi Thiagarajan*, the defendants were considered to hold derivative rights and so the court held that the matter was arbitrable.
- Whether the relief claimed was a purely IP related relief such as infringement or whether the issue was styled as a contractual issue? In *Ministry of Sound*, *Impact Metals*, *Deepak Thorat* and *Uday Chand Jindal*, for example, the court styled the issue as a contractual issue while in cases such as *Mundipharma* and *Steel Authority*, the court classified the issue to be purely IP related issue.

III. ISSUES RELATING TO ARBITRABILITY IN IP DISPUTES

A. Four Approaches to Arbitrability of Intellectual Property Disputes

Often, courts world over have been called upon to decide whether disputes involving intellectual property rights are arbitrable. The general and widely-accepted position seems to be that wherever the dispute is against the state in relation to the nature, scope, extent or validity of such exclusionary rights, such a dispute is non-arbitrable. All other disputes involving intellectual property rights have been held to be arbitrable. There are of course exceptions to this: some jurisdictions are liberal in allowing arbitration of IP disputes while some considerably restrict arbitrability of IP disputes.

There are primarily four approaches to arbitrability of IP disputes.⁴¹ The first approach, although uncommon now, completely prohibits reference to arbitration of all kinds of disputes relating to intellectual property disputes or specific species of intellectual properties. South Africa is regarded

⁴¹ See, Therese Jansson, 'Arbitrability Regarding Patent Law –An International Study'(2011) 1 JurisdikPublikation 49-76, <http://juridiskpublikation.se/wp-content/uploads/2014/10/12011_Therese-Jansson.pdf> accessed 25 August 2018; Dario Moura Vicente, 'Arbitrability of Intellectual Property Disputes: A Comparative Survey'(2015) 31 Arbitration International 151.

as one of the jurisdictions that seems to make all disputes regarding patents non-arbitrable.⁴²

The second approach places a limited ban on arbitrability of IPR disputes or disputes relating to species of IPR. Here, the private law issues arising out of contract such as breach of IPR assignment or licensing agreements are made arbitrable while public law related disputes such as the scope of the grant of IPR or the validity of the grant of IPR by the state are non-arbitrable. Germany and Sweden seem to be typical examples of this approach.⁴³ Some jurisdictions such as Italy, Spain, Portugal and France allow arbitrability of licensing/ assignment issues even if a claim regarding validity or scope of the IPR grant by the State is ancillary to the main issue.⁴⁴

In the third approach, all disputes regarding IPR are made arbitrable. In respect of public law issues relating to scope and validity of IPR, decisions by the arbitral tribunal on those disputes bind only the parties (*intra partes*) to the dispute and not third parties. USA is a characteristic example of this approach.⁴⁵ Section 294(a) of the patents statute declares enforceable an agreement referring disputes relating to patent validity or infringement to arbitration.⁴⁶ Section 294(c) makes the award final and binding between the parties. However, there is another element to such arbitrations in USA. Section 294(d) provides that when an arbitral award is made, the patentee, his assignee or licensee shall give a written notice to the Director of US Patents and Trademarks Office, who shall enter the same in the record of the

⁴² Dario Moura Vicente, 'Arbitrability of Intellectual Property Disputes: A Comparative Survey' (2015) 31 *Arbitration International* 151, 153. Section 18(1) of the Patents Act 1978 (South Africa) provides: "(1) Save as is otherwise provided in this Act, no tribunal other than the commissioner shall have jurisdiction in the first instance to hear and decide any proceedings, other than criminal proceedings, relating to any matter under this Act." Although the common notion seems to be that South African Patents Act, 1978 does not permit arbitrability of patent disputes, sections 79(8) and 80(3) speak of arbitration of disputes relating to compensation in cases of acquisition by the State of inventions and patents. See, the Patents Act 1978 (South Africa), available at <http://www.cipc.co.za/files/9513/9452/7965/Patent_Act.pdf> accessed 25 August 2018.

⁴³ See, Therese Jansson, 'Arbitrability Regarding Patent Law –An International Study'(2011) 1 *JurisdikPublikation* 49, 60-65 <http://juridiskpublikation.se/wp-content/uploads/2014/10/12011_Therese-Jansson.pdf> accessed 25 August 2018.

⁴⁴ See, Therese Jansson, 'Arbitrability Regarding Patent Law –An International Study'(2011) 1 *JurisdikPublikation* 49, 59<http://juridiskpublikation.se/wp-content/uploads/2014/10/12011_Therese-Jansson.pdf> accessed 25 August 2018; Dario Moura Vicente, 'Arbitrability of Intellectual Property Disputes: A Comparative Survey' (2015) 31 *Arbitration International* 151, 155.

⁴⁵ See, Therese Jansson, 'Arbitrability Regarding Patent Law –An International Study'(2011) 1 *JurisdikPublikation* 49, 65 <http://juridiskpublikation.se/wp-content/uploads/2014/10/12011_Therese-Jansson.pdf> accessed 25 August 2018.

⁴⁶ See, 35 US Code § 294 - Voluntary arbitration, <<https://www.law.cornell.edu/uscode/text/35/294>> accessed 25 August 2018.

prosecution of the patent. Section 294(e) states that the award is unenforceable until the notice is given as per Section 294(d).⁴⁷ Similarly, disputes relating to validity, infringement and ownership in copyright and trademark disputes have also been held to be arbitrable in USA.⁴⁸ Hong Kong also seems to fall in this category.⁴⁹

Under the fourth approach, all IPR disputes are arbitrable with an effect *in rem*. The arbitral award passed, including those relating to scope and validity, have effect universally (*erga omnes*). This approach is typified by Swiss Law, which makes all disputes arbitrable.⁵⁰ If an award is passed on the scope or validity of an IP and if it is accompanied by a certificate of enforceability by a Swiss Court with jurisdiction, the decision is entered in the federal Intellectual Property Register.⁵¹

It appears that the Indian approach is somewhere between the first and the second approaches discussed above. In some cases, courts have held that IP disputes per se involved rights *in rem* and were not arbitrable⁵² while in certain cases, courts agreed that only some IP related issues were not arbitrable and that others were.⁵³

A substantial number of foreign investments in India are coupled with some level of IP licensing or technology transfer. Any dispute under such transactions also involves the use of IP rights. If a restrictive regime on IP disputes arbitration is continued to be followed, parties would seldom choose India as the seat of arbitration. Therefore, it is in the interests of

⁴⁷ *Ibid.*

⁴⁸ Gary Born, *International Commercial Arbitration*, vol I (Wolters Kluwer, 2014) 992.

⁴⁹ Section 103D(1) of the Hong Kong Arbitration Ordinance states: “An IPR dispute is capable of settlement by arbitration as between the parties to the IPR dispute.” Further, the said law also affords protection to a third party licensee. Section 103E of the said Ordinance provides: “(2) The fact that an entity is a third party licensee in respect of the IPR does not of itself make the entity a person claiming through or under a party to the arbitral proceedings for the purposes of section 73(1)(b). (3) However, sub-section (2) does not affect any right or liability between a third party licensee and a party to the arbitral proceedings whether— (a) arising in contract; or (b) arising by operation of law.”

⁵⁰ Article 177 of the Swiss International Private Law Statute of 1989 states that any “dispute involving property may be the subject matter of an arbitration”. See, Dario Moura Vicente, ‘Arbitrability of Intellectual Property Disputes: A Comparative Survey’ (2015) 31 *Arbitration International* 151, 155. The term “property” in Article 177 could also translate as “economic interest”. See, Gary Born, *International Commercial Arbitration* vol I, (Wolters Kluwer, 2009) 778.

⁵¹ Therese Jansson, ‘Arbitrability Regarding Patent Law –An International Study’ (2011) 1 *Jurisdik Publikation* 49, 66-67 <http://juridiskpublikation.se/wp-content/uploads/2014/10/12011_Therese-Jansson.pdf> accessed 25 August 2018.

⁵² See, for instance, *Steel Authority* and *Indian Performing Right Society*, discussed in Part II of this Paper.

⁵³ See, for example, *EuroKids*, *Deepak Thorat*, *Ministry of Sound*, *Impact Metals*, *Deepak Thorat* and *Uday Chand Jindal*, discussed in Part II.

India's aspirations to become a hub of international arbitration to provide for arbitrability of IP disputes at least in respect of assignment of IP rights and other such private law rights.

B. Is Arbitration Excluded if a Specific Court is statutorily provided?

Many classes of disputes have been excluded from arbitration on the ground that the relevant statute specifically designates a particular court to decide disputes relating to the statute.⁵⁴ Similar provisions exist in IP law as well.⁵⁵ Can such provisions which confer jurisdiction on specific courts determine non-arbitrability of the subject matter? In *Eros International*, GS Patel, J. opined:

“What Sections 62 of the Copyright Act, 1957 and the Trade Marks Act, 1999 seem to do, I believe, is to define the entry level of such actions in our judicial hierarchy. They confer no exclusivity and it is not possible from such sections, common to many statutes, to infer the ouster of an entire statute. These sections do not themselves define arbitrability or non-arbitrability. For that, we must have regard to the nature of the claim that is made.”

GS Patel, J. concluded that the aforesaid provisions conferring jurisdiction on specific courts do not define arbitrability or non-arbitrability.

Jurisdiction is conferred by statute for all civil disputes, irrespective of the nature of their subject-matter or pecuniary value. Take the simple case of a contract for sale of goods. Disputes arise out of the contract and the buyer sues the seller for Rs. 1 lakh. By statute, a particular court of law is conferred with jurisdiction depending on the subject-matter and pecuniary value. Would this conferment of jurisdiction on a specific court mean that arbitration is excluded? If this argument is taken to its logical end, none of the disputes can be referred to arbitration.

Another argument against arbitrability on this ground would be that where a statute specifically reserves a subject matter to be referred to a specific court, it alone can have jurisdiction over the matter. However, this argument is not sustainable for the following reasons:

⁵⁴ See, for instance, tenancy matters, where the rent control laws designate small causes court and the civil court (junior division) as the courts having jurisdiction to decide eviction disputes (Section 33 of the Maharashtra Rent Control Act 1999).

⁵⁵ See, for instance, section 62 of the Copyright Act and section 134 of the Trade Marks Act.

- Consider a hypothetical scenario where the legislature enacts a law allocating disputes to specific courts based on subject-matter instead of pecuniary value. Would disputes that were arbitrable till now cease to be so because of such conferment? There appears no legitimate reason as to why conferment of jurisdiction on specific courts should make those disputes non-arbitrable.
- There should be some legitimate reason why the legislature is deemed to have reserved certain subject matter for determination by specific courts to the exclusion of arbitrators.
- Conversely, it is possible that a particular class of disputes may not be arbitrable even if no specific court is afforded jurisdiction specifically. Consider the case for a suit for declaration of title over a land worth Rs. 1,00,000/-. No special law confers jurisdiction on a particular court to decide the subject-matter. Yet, since it is an action *in rem*, the dispute cannot be arbitrated.

Therefore, the argument that specific courts have been granted jurisdiction to decide on IP related disputes cannot be a reason for declaring such disputes as non-arbitrable in the absence of public policy reasons in support thereof. It is important to distinguish between two aspects here: one, statutes, including IP statutes may designate particular courts to deal with certain disputes. Such designation, *per se*, cannot exclude arbitration of such disputes. However, there might be public policy reasons as to why certain courts are granted the jurisdiction to decide certain matters: for instance, the issue relating to validity of a registered trademark even in a case of infringement of trademarks can be decided only by the Intellectual Property Appellate Board.⁵⁶ There is a basis for grant of such a power on a specific court: registration of a trademark grants exclusivity to use the trademark⁵⁷, in opposition to the rest of the world. A dispute regarding such exclusivity can be decided only by a public forum.

⁵⁶ Section 125(1) of the Trade Marks Act 1999 provides: “(1) Where in a suit for infringement of a registered trade mark the validity of the registration of the plaintiff’s trade mark is questioned by the defendant or where in any such suit the defendant raises a defence under clause (e) of sub-section (2) of section 30 and the plaintiff questions the validity of the registration of the defendant’s trade mark, the issue as to the validity of the registration of the trade mark concerned shall be determined only on an application for the rectification of the register and, notwithstanding anything contained in section 47 or section 57, such application shall be made to the Appellate Board and not to the Registrar.”

⁵⁷ *Patel Field Marshal Agencies v P.M. Diesels Ltd.*, (2018) 2 SCC 112: MANU/SC/1509/2017, para 23.

Therefore, mere conferment of jurisdiction on a particular court cannot be determinative of non-arbitrability, unless public policy reasons exist to refrain from referring a category of disputes to arbitration.⁵⁸

C. Nature of Actions in IP Law and Infringement

The civil law remedies under IP Law include remedies against the State regarding the grant of monopolies, disputes relating to licensing/ assignment of IP rights, and other actions. These remedies are enforced under special laws. Despite specific statutes affording recognition to these remedies, violations of intellectual property rights are nothing but violations of property rights. It is to be noted that IPR violations were classified as torts.⁵⁹

In cases of immovable property, disputes under licence agreements are arbitrable. So it is perplexing why disputes relating to intellectual property, which are nothing but incorporeal property are not arbitrable. IP Laws are a part of the general body of laws.⁶⁰ Before being considered as a specialised subject, infringements/ violations of IP rights were considered to be injuries caused to incorporeal property under tort law.⁶¹ Tortious acts which arise in relation to a contract are arbitrable.⁶² If so, there is no reason why infringement actions which have a nexus with the contract cannot be arbitrated.

Issues arising from licence agreements are disputes relating to the scope of licensing rights granted under the licensing agreement and the breach thereof by the licensee. Although such actions may be styled as “infringements”, these concern the extent to which the licensee can exercise his contractual

⁵⁸ See, section 103D (4) of the Hong Kong Arbitration Ordinance, which clarifies: “For the purposes of sub-section (1), an IPR dispute is not incapable of settlement by arbitration only because a law of Hong Kong or elsewhere— (a) gives jurisdiction to decide the IPR dispute to a specified entity; and (b) does not mention possible settlement of the IPR dispute by arbitration.”

⁵⁹ See, for instance, Francis Hilliard, *The Law of Torts or Private Wrongs* vol II (Little, Brown & Co 1861) 18; AM Wilshire, *The Principles of the Law of Contracts and Torts* (Sweet & Maxwell 1922) vi; Charles Adams, ‘Indirect Infringement from a Tort Law Perspective’ 42 *University of Richmond Law Review* 635, 637 (2008).

⁶⁰ David D Caron, ‘The World of Intellectual Property and the Decision to Arbitrate’ (2003) 19 *Arbitration International* 441-449, 442; William W Park, ‘Irony in Intellectual Property Arbitration’ 19 *Arbitration International* 451-455, 451.

⁶¹ Francis Hilliard, *The Law of Torts or Private Wrongs* vol II (Little, Brown & Co 1861) 18; AM Wilshire, *The Principles of the Law of Contracts and Torts* (Sweet & Maxwell 1922) vi; Charles Adams, ‘Indirect Infringement from a Tort Law Perspective’ 42 *University of Richmond Law Review* 635, 637 (2008).

⁶² See, *Renuagar Power Co. Ltd. v General Electric Co.*, (1984) 4 SCC 679; AIR 1985 SC 1156. Also see, *Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24 (holding that tortious actions are suitable for resolution by alternative dispute resolution processes).

right *vis-à-vis* the IPR licensed. A dispute regarding an IPR can be compared with those relating to licensing⁶³ of immovable property or bailment⁶⁴ of moveable property. The transfer in those cases is of a specific right (easements) or of possession for a specific purpose (bailment). Although the owner holds the ownership of immovable or moveable property, which is a right *in rem*, a licence or a bailment respectively is a contractual transaction between the owner and the other party. Consequently, an action regarding the scope of contractual rights or a breach of a contractual term cannot be stated to be a pure action *in rem*.⁶⁵

These two concepts- actions *in rem* and actions *in personam* as grounds for classification of actions into non-arbitrable and arbitrable respectively require a deeper analysis. Notice the contradictory views of High Courts on whether IP related disputes are actions *in rem* or *in personam*: In *Eros International Media Ltd. v Telemax Links India (P) Ltd.*,⁶⁶ a Single Judge of the Bombay High Court held that an infringement action was an action *in personam*.⁶⁷ Another Single Judge of the Bombay High Court in *Indian Performing Right Society Ltd. v Entertainment Network (India) Ltd.*⁶⁸ disagreed with the former view and distinguished it.⁶⁹

The classification of actions into those *in rem* and those *in personam* for the purpose of determining arbitrability is ripe for disputation since there are a lot of grey areas in the classification. Considerable confusion arises in this classification, whose antiquity can easily be traced to Roman law, if not earlier.⁷⁰ More than a century back, the various usages of this classification was identified and the need for differentiating these usages was felt.⁷¹

The confusion in respect of intellectual property claims arises because of the dual nature of the right to remedies in certain cases. Suppose there is a non-exclusive technology licensing agreement where a patented technology is licensed for a limited period. The agreement provides that the licensor shall be entitled to damages if the licensee violated the terms of the agreement. It is

⁶³ Indian Easements Act 1882, s 52.

⁶⁴ Indian Contract Act 1872, s 148.

⁶⁵ The distinction between rights *in rem* and *in personam* has been criticised as regards personal actions based on contract where the plaintiff is also the holder of the right *in rem*. See, Shalev Ginossar, 'Rights in Rem - A New Approach' (1979) 14 Israel Law Review 286, 290.

⁶⁶ 2016 SCC OnLine Bom 2179: (2016) 6 Arb LR 121.

⁶⁷ Para 17.

⁶⁸ 2016 SCC OnLine Bom 5893.

⁶⁹ Paras 133-135.

⁷⁰ *Salmond on Jurisprudence* (PJ Fitzgerald ed, 12thedn, 2016) 237.

⁷¹ Walter Wheeler Cook, 'The Powers of Courts of Equity, Part I'(1915) 15 Columbia Law Review 37, 39 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11652&context=journal_articles> accessed 5 September 2018.

true that like real property, the right of the owner of intellectual property is a right *in rem*. At the same time, the right of the owner as licensor against the licensee is also a right *in personam*. This dual nature of the right to remedies seems to create confusion in order to determine arbitrability. The ultimate reason why the classification of *in rem* and *in personam* was recognised to determine arbitrability was to ensure that the rights of third parties who might have an interest over the subject in issue do not get trampled upon.⁷²

But whether actions involving rights *in rem* will affect third parties cannot be taken as granted. To give an example, a two-wheeler negligently rammed a car causing damage to the latter. The car owner's right over his property is a right *in rem* but there is no reason why the dispute regarding the liability to compensate that arises owing to the incident (damage to the car) cannot be arbitrated.⁷³

Now, coming back to the case of a licence of intellectual property, the owner theoretically has the option of choosing his role *ex post facto* and seek remedies appropriately. But there is a catch: the parties have agreed to go for arbitration in respect of any dispute that may arise under or in relation to the agreement. This must mean that the owner of the IP has already opted for the role: that of a licensor of intellectual property. As a result, it must mean that the right sought to be enforced is that of the licensor. Having agreed to an omnibus arbitration clause, the licensor cannot later resile from the agreement. Given the public policy reasons in giving effect to arbitration clauses and given the absence of public policy reasons against giving effect to these clauses, there is no reason why this exercise of implied option should not be recognised.⁷⁴

D. Arbitrability of Disputes under IP Licensing/ Assignment Agreements

Frequently, owners of intellectual property rights may not want to exploit the rights by themselves. They licence or assign the said rights through contractual instruments called licensing or assignment agreements. These agreements have received statutory recognition under various intellectual property laws.⁷⁵ Such laws go a step further and regulate the licensing/ assignment

⁷² *Booz Allen and Hamilton Inc. v SBI Home Finance Ltd.*, (2011) 5 SCC 532, para 28.

⁷³ *See, Afcons Infrastructure Ltd. v Chorian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24, para 19.

⁷⁴ The concept of rights *in rem* and *in personam* are more nuanced than what was analysed in *Booz Allen*. *See*, for instance, Thomas W Merrill and Henry E Smith, 'The Property/ Contract Interface' (2011) 101 *Columbia Law Review* 773-852.

⁷⁵ *See*, for instance, Section 70 of the Patents Act 1970 (empowers the registered grantee or the proprietor of a patent to license the patent right); Section 37 of the Trade Marks Act

requirements. For instance, The Patents Act 1970 requires licensing of patents to be in writing in the “form of a document embodying all the terms and conditions governing their rights and obligations and duly executed.”⁷⁶

As stated before, most economically developed jurisdictions hold intellectual property disputes as arbitrable. Some jurisdictions have even gone to the extent of holding issues relating to validity of intellectual property rights in disputes relating to licensing of intellectual property rights as arbitrable. For instance, in *Soci te’ Liv Hidravlika D.O.O. v S.A. Diebolt*,⁷⁷ the Paris Court of Appeal held that where an issue regarding validity of the patent is before the arbitrator incidentally in a contractual dispute, the arbitrator can rule on the incidental issue which will bind the parties alone, even though third parties could claim nullity of the patent notwithstanding the ruling in favour of validity in that case by the arbitrator.

In the context of trademarks, disputes regarding enforcement of negative covenants not to use the licensed trademarks subsequent to expiry of franchise agreements are arbitrable.⁷⁸ What follows from the above proposition is that disputes regarding enforcement of negative covenants not to use the licensed trademarks subsequent to expiry of a licence or assignment agreement are arbitrable since under franchise agreements as dealt with in *Deepak Thorat* and *Euro Kids International* assigned the right to use the trademark to the franchisees. Therefore, there is nothing wrong in such disputes being agreed to be arbitrated.

E. Subsequent Assignees as Persons Claiming under the Party to the Arbitration Agreement

Contrast the decision of the Division Bench of the Madras High Court in *Shanthi Thiagarajan v KE Gnanavelraja*⁷⁹ with that of another Division Bench of the same High Court in *R.K. Productions (P)Ltd. v N.K. Theatres*

1999 (recognizing the right of a trademark proprietor to assign the trademark; Section 30 of the Copyright Act 1957 (empowering the copyright holder to license any interest in the copyright); Section 22(1)(a) of the Designs Act 2000; Section 16(1)(c) of the Protection of Plant Varieties and Farmers’ Rights Act 2001; and Section 20 of the Semiconductor Integrated Circuits Layout-Design Act 2000.

⁷⁶ Patents Act 1970, s 68. See also, section 42 of the Trade Marks Act 1999 which lays down certain conditions for assignment of trademarks, irrespective of whether they are registered or not.

⁷⁷ Paris Court of Appeal (1st chamber), February 28, 2008, cited and quoted in Dario Moura Vicente, ‘Arbitrability of Intellectual Property Disputes: A Comparative Survey’ (2015) 31 *Arbitration International* 151, 155.

⁷⁸ See, *Deepak Thorat* and *Euro Kids International* cases discussed in Part II of the Paper.

⁷⁹ AIR 2018 Mad 81.

(P)Ltd.⁸⁰ In both the cases, the parties to the subsequent assignment agreements were also impleaded and injunction was sought against those persons as well. While in *R.K. Productions*, the High Court sought to apply *Sukanya Holdings*, the Division Bench in *Shanthi Thiagarajan* held, albeit *prima facie*, that the subsequent assignees were also bound by the assignment agreement under which the arbitration clause sought to be invoked existed.

It is submitted that the view of the Division Bench in *Shanthi Thiagarajan* is on the right track considering that the subsequent assignees claim their rights through the original assignee who was a party to the arbitration agreement. So is the case of *Tandav Film*, where the Bombay High Court decided on similar lines.⁸¹

Section 8(1) of the 1996 Act was amended by the Arbitration and Conciliation (Amendment) Act 2015, which enabled a party to the arbitration agreement or “any person claiming through or under him” to apply to a judicial authority before which an action is brought in a matter that is the subject of the arbitration agreement. The amendment, as is well-known, was pursuant to the 246th Report of the Law Commission of India, which observed that “party” should also include “any person claiming through or under” the party to the arbitration agreement.⁸² However, the Government did not accept the Law Commission’s recommendation to modify the definition of the party but sought to include the phrase in Section 8 of the 1996 Act. Even so, the legislative intent is to cover situations such as those in *RK Productions* and *Shanthi Thiagarajan*. The Supreme Court recently considered the expression “claiming under” in *Cheran Properties Ltd. v Kasturi and Sons Ltd.*⁸³, where it held:

“29... The expression ‘claiming under’, in its ordinary meaning, directs attention to the source of the right. The expression includes cases of devolution and assignment of interest (*Advanced Law Lexicon* by P. Ramanatha Aiyar). The expression “persons claiming under them” in Section 35 widens the net of those whom the arbitral award binds. It does so by reaching out not only to the parties but to those who claim under them, as well. The expression “persons claiming under them” is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is

⁸⁰ 2012 SCC OnLine Mad 5029; (2014) 1 Arb LR 34.

⁸¹ See, Part II of the Paper.

⁸² Law Commission of India, Report No. 246: *Amendments to the Arbitration and Conciliation Act 1996* (August 2014) <<http://lawcommissionofindia.nic.in/reports/Report246.pdf>> accessed 14 August 2018.

⁸³ (2018) 16 SCC 413.

derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it..."
(Emphasis supplied)

A similar consideration would apply under Section 8 of the 1996 Act for the expression and such awards would bind the subsequent licensees also.⁸⁴ Therefore, the view that the subsequent assignees were totally unconnected to the original agreement cannot be a correct view. Their right is derivative and cannot exist independent of the original assignee. At the same time, whether the subsequent assignees would be bound by an arbitration clause between the assignor and the original assignee is a vexed question that has no easy answers.

F. Compulsory Mediation

Recently, the Commercial Courts Act 2015 (Commercial Courts Act) has been amended to bring in the concept of compulsory mediation.⁸⁵ Section 12A(1) of the Commercial Courts Act provides that a suit which does not contemplate urgent interim relief shall be instituted only after the plaintiff exhausts the remedy of pre-institution mediation as provided in the rules made by the Central Government. Further thereto, the Central Government published the Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018 (2018 Rules).⁸⁶ Under the 2018 Rules, the Central Government has notified the State Authority and District Authority under the Legal Services Authorities Act 1987 to whom applications for pre-institution mediation has to be submitted.⁸⁷ Section 12A(5) provides that the settlement arrived at under Section 12A would have the same status and effect as if the settlement is an arbitral award on agreed terms under Section 30(4) if the Arbitration Act.⁸⁸

⁸⁴ This is not to mean that *Sukanya Holdings* would have no application in a circumstance where the defendants are parties who do not claim under or through the assignee of the assignment agreement. See, for instance, *Ameet Lalchand Shah v Rishabh Enterprises*, 2017 SCC OnLine Del 7865.

⁸⁵ See, the Commercial Courts Act 2015, as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act 2018.

⁸⁶ The rules are available at <<https://goo.gl/XVLMX9>> accessed 27 August 2018.

⁸⁷ The notification dt. 3.7.2018 is available at <<https://goo.gl/nV93yr>> accessed 27 August 2018.

⁸⁸ Section 12A(5) provides: "*The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996.*"

Since a settlement agreement has the same status as an arbitral award, the relevance of pre-compulsory pre-institution mediation is likely to arise in respect of disputes relating to intellectual property rights. Strictly speaking, in view of Section 12A (5), a settlement agreement in respect of a non-arbitrable dispute cannot be valid if the dispute between them cannot be arbitrated in the first place. However, after the amendments have been brought into force, courts have recognised settlement agreements in respect of IP disputes, thus indirectly affirming arbitrability of such disputes.

For instance, in *Reckitt Benckiser (India) (P) Ltd. v Surekhaben L. Jain*,⁸⁹ Reckitt Benckiser (India) P Ltd (“Reckitt”) filed a civil suit seeking permanent injunction against the defendants for the use of the certain trademarks on the ground that these marks were a colourable imitation/ substantial reproduction of Reckitt’s trademarks. During the course of the proceedings, the matter was referred to mediation and a settlement agreement was entered into between the parties. Among other things, the settlement agreement recognised Reckitt as the owner of its trademarks and that the defendants would not use the impugned trademarks. A decree was drawn up in terms of the settlement agreement.

Thus, it would be seen that the dispute did not pertain to contractual rights or rights *in personam* but were with regard to enforcement of rights *in rem*. Given that decrees were drawn up on the basis of settlement agreements meant that such a decree was binding on the parties. If such rights *in rem* could be subject matters of settlement between the parties, there is no reason why determination of such disputes could not be through arbitration. It is pertinent to note that Section 12A (1)⁹⁰ does not exclude non-arbitrable disputes from reference to pre-institution mediation. In fact, the provision makes it mandatory to refer the dispute to pre-institution mediation. The only exception is where the suit contemplates an urgent interim relief. Therefore, the Commercial Courts Act 2015 itself contemplates ADR processes in respect of disputes *in rem* as well. Thus, Section 12A (5) grants settlement agreements the same status as an arbitral award, which is binding on the parties and the parties claiming under the parties.⁹¹

Therefore, by enactment of Section 12A, it could be argued that the range of non-arbitrable disputes has been constricted to the extent that disputes

⁸⁹ 2019 SCC OnLine Del 11367.

⁹⁰ Section 12A(1) reads: “A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.”

⁹¹ Section 35 of the 1996 Act reads: “Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.”

regarding enforcement of IP rights *in rem* (mainly infringement actions) can be resolved through non-court/consensual processes but the same would be binding on the parties and those claiming under them.

IV. CONCLUSION AND WAY FORWARD

While we are still grappling with the possibility of arbitrability of IP disputes under licensing agreements, many jurisdictions have found solutions to balance the sanctity of arbitration agreements and the public policy concerns that are central to the question of arbitrability of IP disputes. Some jurisdictions have made all disputes relating to IP, including validity thereof arbitrable⁹² but have restricted operation of the latter determinations as judgments *in personam*, that is, those affecting only the parties to the disputes and not the world at large.⁹³ Some jurisdictions have afforded an additional layer of protection: they have allowed arbitrability of validity related questions if they are incidental to deciding the dispute and have regarded determinations on such questions as judgments *in personam*.

For a long time, parties in India⁹⁴ and world over have agreed that transactions involving intellectual property would be arbitrated.⁹⁵ A substantial number of transactions in international and domestic commerce contemplate licensing or transfer of some intellectual property and contain arbitration clauses to resolve disputes arising therefrom. If disputes involving IP rights in all these disputes are to be resolved in courts, it will not only amount to undermining the arbitration agreement between the parties, which they consciously entered into, but it would also amount to substantial delay in deciding those disputes, and flood the already crowded court docket.

⁹² See, Chandni Ghatak, 'Arbitrability of IP Disputes in India: Lessons from Hong Kong' (*IndiaCorpLaw*, 10 March 2019) <<https://indiacorplaw.in/2019/03/arbitrability-ip-disputes-india-lessons-hong-kong.html>> accessed 14 April 2020 (analysing the Hong Kong Arbitration Law on the subject).

⁹³ See, Part III of this paper.

⁹⁴ See, for instance, (*Firm*) *Gulab Singh-Jobri Mal v Dharmal-Dalip Singh*, 1936 SCC OnLine Lah 16; *K.M. Oosman and Co. v K. Abdul Malick Sabib*, 1949 SCC OnLine Mad 101; *Dharam Dutt Dhawan v Ram Lal Suri & Sons*, 1953 SCC OnLine P&H 61 (where the copyright licensing agreement executed in 1937 contained an arbitration clause).

⁹⁵ Disputes arising out of intellectual property rights are the fifth most common types of international arbitration disputes. See, L Mistelis and C Baltag, *International Arbitration: Corporate Attitudes and Practices* (2008) 9<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf> accessed 29 August 2018; Also see, Trevor Cook and Alejandro I Garcia, *International Intellectual Property Arbitration, Arbitration in Context Series*vol2 (2010) 49-50; Pinsent Masons LLP, *Pre-empting and Resolving Technology, Media and Telecoms Disputes* (2016) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/Fixing_Tech_report_online_singles.pdf> accessed 7 September 2018.

Given the enormous amount of investment and the need for settlement of disputes arising therefrom in an efficient manner, it would do well for India to consider liberalisation of arbitrability of IP disputes in the immediate future. The narrow range of non-arbitrable IP disputes in international hubs of arbitration would make it difficult for India to aspire to become such a hub with the extant constricted regime of arbitrability of IP disputes. At the same time, arbitration should not be used to bulldoze the rights of stakeholders who may not be parties to the arbitration agreement. The need to find this balance is an immediate concern which the courts will do well to address. Given that Section 12A allows parties to resolve IP disputes through mediation and grants settlement agreements entered into through mediation the status of arbitral awards, there is no reason why the traditional position that disputes involving rights *in rem* are non-arbitrable should be maintained.

RELEVANCE OF COMMON OWNERSHIP IN COMPETITION ANALYSIS IN INDIA

*Akanshha Agrawal and Anupriya Dhonchak**

Concerns around the anti-competitive effects of common ownership by institutional investors in competing firms have previously been raised by scholars. Recent empirical evidence has further fueled the debate, causing the European Commission to use common ownership as an ‘element of context’ in two high profile combination assessments. An allegation concerning the anti-competitive impact of substantial common ownership in Ola and Uber was recently raised before the Competition Commission of India (CCI). Through this paper, we highlight the relevance of common ownership in competition analysis in India, arguing for increasing its significance in both ex ante and ex post review. We locate the CCI’s findings within the larger debate on the anti-competitive effects arising out of common ownership and argue that it generates anti-competitive market structures, allowing firms to potentially evade competition scrutiny for lack of direct evidence. With respect to abuse of dominance, we examine recent dilutions of the definition of control across Indian and international jurisprudence to argue that common ownership could potentially allow firms to be considered part of a ‘group’ within the Act. For anti-competitive agreements, we look at the possibility of collusion facilitated by common investors, and finally, in the context of ex ante review, we discuss the possible role of common ownership in triggering merger notifications. In light of this, we emphasise that competition policy in India must engage with the anti-competitive effects of common ownership in different industries more comprehensively and urgently.

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* The authors are students at the National Law University, Delhi. The authors would like to thank Prof. Aditya Bhattacharjea for his helpful comments and the NLSBLR team for their editorial assistance.

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INTRODUCTION

The general assumption behind the application of competition policy is that competitors in the market are independent of each other and that the goal of shareholders in any company is to maximise the profits earned by the company that they have invested in.¹ Common ownership threatens to unsettle this very presumption. Common ownership or horizontal shareholdings exist when common investors simultaneously own significant stakes in corporations that are horizontal competitors in a product market.² Due to such ownership, the management of rival companies might indulge in practices that would ultimately lead to the joint maximisation of profits earned by the institutional investors of both companies.³ This end goal discourages rigorous competition between competing firms. The competition concerns increase with the increasing control of the investor on the company. This theory is placed on a similar ground as cross holding where a company directly holds shares in a competing company.⁴ It is important to note that the anti-competitive impacts of cross holding have already been widely recognised.⁵

The debate surrounding anti-competitive impacts of common ownership recently resurfaced and gained traction with the publication of empirical studies focused on airline,⁶ retail banking,⁷ and pharma⁸ industries, concluding that common ownership leads to anti-competitive effects such as price

¹ Margrethe Vestager, 'Competition in Changing Times' (FIW Symposium, Innsbruck, 16 February 2018) <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-changing-times-0_en> accessed 31 October 2019.

² Einer R Elhauge, 'The Causal Mechanisms of Horizontal Shareholding' (2019) 82(2) *Ohio State Law Journal* <<https://ssrn.com/abstract=3370675>> accessed 31 October 2019.

³ Vestager (n 1).

⁴ *Dow/DuPont* (Case COMP/M.7932) Commission Decision 27 March 2017 (2017/C 353/05) Annex 5, para 45.

⁵ European Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (2004/C 31/03); Robert Reynolds and Bruce Snapp, 'The Competitive Effects of Partial Equity Interests and Joint Ventures' (1986) 4(2) *International Journal of Industrial Organization* 141.

⁶ José Azar, Martin C Schmalz and Isabel Tecu, 'Anti-Competitive Effects of Common Ownership' (2018) 73(4) *Journal of Finance*.

⁷ José Azar, Sahil Raina and Martin C Schmalz, 'Ultimate Ownership and Bank Competition' [2019] <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252> accessed 31 October 2019.

⁸ Miguel Antón, Florian Ederer, Mireia Giné, Martin C Schmalz, 'Common Ownership, Competition, and Top Management Incentives' [2018] ECGI Finance Working Paper

increases and lack of innovation in the market. A significant development post this is the increasing vigilance of competition regulators towards this issue. In early 2018, the European Commission's Competition Commissioner Margrethe Vestager announced that with companies getting more and more linked, the Commission has launched an investigation into the extent of common ownership and the anti-competitive impacts it might have.⁹

The EU Competition Commission for the first time took notice of the gravity of concerns raised by common ownership in the Dow/DuPont merger proceedings.¹⁰ The two major factors that the Commission considered were the concentrated market structure and the extent of common ownership in the relevant industry.¹¹ The Commission was of the view that significant common shareholding between competing firms in a concentrated market is likely to have negative impacts on competition.¹² Notably, the Commission concluded that common ownership is required to be an 'element of context' while assessing the competition concerns in the market.¹³ This reasoning of the Commission was again reflected in the Bayer/Monsanto merger proceedings.¹⁴

The competition concerns arising from common ownership have also come to the notice of the US Department of Justice (DOJ). Andrew Finch from the Antitrust Department of the DOJ noted that significant antitrust concerns can arise if a common shareholder is in a position to influence decisions taken by competing firms such that it leads to coordinated effects.¹⁵ This was following the allegation against Value Act for using its voting shares to influence the merger of Baker Hughes and Halliburton, two of the largest providers of oilfield products, which finally ended with Value Act entering into a settlement agreement.¹⁶

511/2017 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802332> accessed 31 October 2019.

⁹ Vestager (n 1).

¹⁰ *Dow/DuPont* (n 4).

¹¹ *Dow/DuPont* (n 4) Annex 5, para 2.

¹² *Dow/DuPont* (n 4) Annex 5.

¹³ *Dow/DuPont* (n 4) Annex 5.

¹⁴ *Bayer/Monsanto* (Case COMP M.8084) Commission Decision 21 March 2018.

¹⁵ Andrew Finch, 'Concentrating on Competition: An Antitrust Perspective on Platforms and Industry Consolidation' (Fifth Annual Tech, Media and Telecom Competition Conference, Washington DC, 14 December 2018) <<https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-keynote-address-capitol>> accessed 31 October 2019.

¹⁶ United States Department of Justice, 'Justice Department Obtains Record Fine and Injunctive Relief against Activist Investor for Violating Premerger Notification Requirements' (12 July 2016) <<https://www.justice.gov/opa/pr/justice-department-obtains-record-fine-and-injunctive-relief-against-activist-investor>> accessed 31 October 2019.

The Indian industrial landscape has witnessed extensive common ownership, particularly in the online economy. A few examples include, Tiger Global's investment in both Flipkart and Shopclues, which are competitors in the online fashion retail segment.¹⁷ It also holds a large stake in the online fashion industry, wherein its portfolio includes five of the most funded start-ups in the industry.¹⁸ Nexus Venture Partners had invested in competing firms Snapdeal and Shopclues, Norwest Venture Partners in Sulekha and Quikr, engaged in the business of online classifieds, Sequoia invested in the following competing firms in different industries: Zaakpay and Citrus (online payment gateways), Peppertap and Grofers (online grocery delivery), TinyOwl and Zomato (online food delivery) and Practo and 1mg (online doctor search).¹⁹ Further, global players have also invested in start-up ventures engaged in the same line of business.²⁰ eBay's investment in Snapdeal²¹ and Alibaba's investment in Paytm and Snapdeal²² also evidence this trend.

CCI'S STANCE ON COMMON OWNERSHIP

The allegation against softening of competition due to substantial common ownership by institutional investors in Ola and Uber was recently raised before the Competition Commission of India (CCI).²³ The CCI dismissed the allegation due to lack of available evidence of anti-competitive effects arising from common ownership. However, it is still important to study this case for it brings to light the Indian competition watchdog's stance on competition concerns arising out of common ownership.

It was alleged in this regard that multiple common investors i.e. Tiger Global Management LLC, Didi Chuxing, Sequoia Capital and more recently,

¹⁷ IS Punit, 'Tiger Global is Now the Biggest Investor in Online Fashion Retail in India' (*Quartz*, 27 July 2016) <<https://qz.com/india/741924/tiger-global-is-now-the-biggest-investor-in-online-fashion-retail-in-india/>> accessed 26 December 2019.

¹⁸ *Ibid.*

¹⁹ M Dalal and S Verma, 'Sequoia Capital Bets Big on Hyperlocal Start-ups in India.' *Livemint* (Bengaluru, 14 August 2015) <<https://www.livemint.com/Companies/L6dVNpTc4PhbadvXeCDY5H/Sequoia-Capital-bets-big-on-hyperlocal-startups-in-India.html>> accessed 26 December 2019.

²⁰ Smriti Parsheera, Ajay Shah and Avirup Bose, 'Competition Issues in India's Online Economy' (2017) NIPFP Working Paper 194/2017, 21 <https://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf> accessed 26 December 2019.

²¹ M Dalal and S Verma, 'Does eBay have a Sweetheart Deal with Snapdeal?' *Livemint* (Bengaluru/New Delhi, 21 March 2015) <<https://www.livemint.com/Companies/7sYyArLcfy2CLmluhKDUOL/Does-eBay-have-a-sweetheart-deal-with-Snapdeal.html>> accessed 26 December 2019.

²² Parsheera (n 20) 21.

²³ *In Re: Meru Travel Solutions (P) Ltd. v ANI Technologies (P) Ltd.*, CCI Case No 25-28/2017: 2018 SCC OnLine CCI 46.

Soft Bank hold substantial shares in both Ola and Uber.²⁴ Further, the presence of nominee directors by such investors on the Boards of both the entities would strengthen the combined market position and adversely impact competition in the relevant markets.²⁵ Meru argued that such common ownership allowed Uber and Ola to function as a dominant group in the market. The abuse of such dominance was sought to be established via predatory practices of the entities providing costly driver incentives and incurring sustained losses because of pricing their services below variable costs.²⁶

Pertinently, with respect to common ownership, the CCI sought further information regarding the shareholding pattern of major shareholders; details of any cross-shareholding as well as funds raised in the form of share capital and/or loans/bonds etc. from the major investors along with their names, terms of investment, rights in management *etc.* along with copies of the agreement(s), if any; details of board composition, nominee directors (if any) including details of investors who have the right to nominate such director(s); copies of the agreement(s) with the drivers stating separately the terms and conditions relating to Minimum Business Guarantee (MBG) *etc.*²⁷ Even though the CCI did not adjudicate upon the anti-competitive impacts of common ownership, it noted that by virtue of such ownership, it will keep a close watch on Ola and Uber. The breadth of information sought by the CCI evidences the regulator's vigilance towards control and influence of common investors in both entities, which may not always be apparent.

Through this paper, we locate the CCI's findings within the larger debate on the anti-competitive effects arising out of common ownership. We argue that since common ownership gives rise to anti-competitive market structures and evades competition scrutiny for lack of direct evidence, it must be accorded greater relevance in *ex ante* and *ex post* competition analysis by the CCI. Since the *Meru* case dealt with an *ex post* violation, Part I of the paper examines the relevance of common ownership in such a case. We acknowledge that *ex post* review requires evidence of violation and discuss the possibility of *firstly*, a lower standard of control, allowing firms with common ownership to be considered part of a group if one can exercise control over the other, for an accusation of abuse of dominance, and *secondly*, a broad understanding of collusion which can be facilitated through common ownership. Part II of the paper deals with *ex ante* merger regulation where we note that common investors holding shares in rival companies should trigger a merger notification, relying on the definition of control and

²⁴ *Meru Travel* (n 23) para 17.

²⁵ *Meru Travel* (n 23) para 17.

²⁶ *Meru Travel* (n 23) para 18.

²⁷ *Meru Travel* (n 23) para 23.

review thresholds in the Competition Act as well as the exemptions under the Combination Regulations. In light of this, we emphasize that competition policy in India must engage with the anticompetitive effects of common ownership in different industries more comprehensively and urgently.

PART I: EX POST ANALYSIS

A. Abuse of Dominance

A possible way of targeting common ownership is the application of rules of abuse of dominance. A lower standard for determining control is instrumental for common ownership to emerge as a means through which firms can exercise control over each other and even be considered a ‘group’ for the purposes of section 4. Interestingly, in the case of *British American Tobacco*, the European Court of Justice held that common ownership can be covered within abuse of dominance if the shareholding resulted in effective control or some influence in the strategy of the competitors.²⁸

For finding an abuse of dominance in the present case, Meru had alleged that *firstly*, Uber and Ola are individually and collectively dominant in the relevant market and *secondly*, on account of common ownership, the two companies form part of a group within the definition of Section 5 and were thereby dominant as a group.²⁹ The CCI dismissed the first allegation arguing that the firms are not individually dominant as they pose a competitive threat to each other³⁰ and they cannot be collectively dominant as the Act does not allow the same.³¹ A discussion of this is beyond the scope of this paper and it will only focus on the allegation pertaining to common ownership.

Ola and Uber had objected to Meru’s allegation by noting that the standard of applying the definition of ‘group’ under section 5 for the purposes of section 4 was different from that applicable for Section 6.³² It is notable that this has no statutory basis as the Act prescribes the same definition of group to be used for the purposes of Sections 4, 5 and 6.³³ Neither did the OPs cite any case law to substantiate their claim in this regard. Further, it is pertinent to note that ‘group’ was inserted into s. 4(1) by the Competition

²⁸ *British American Tobacco Co. Ltd. v Commission of the European Communities* (142 & 156/84) [1987] ECR 4487; [1988] 4 CMLR 24 at [37]-[40] and [65].

²⁹ *Meru Travel* (n 23) para 40.

³⁰ *Meru Travel* (n 23) para 41.

³¹ *Meru Travel* (n 23) paras 42, 43.

³² *Meru Travel* (n 23) para 30.

³³ The Competition Act 2002, s 4 Explanation (c).

(Amendment) Act 2007, which must be considered as a clear expression of legislative intent to scrutinize the activities of firms forming a ‘group’ for the purposes of assessing abuse of dominance. As per the Competition (Amendment) Act 2007, ‘group’ is not defined narrowly so as to include only equity ownership, but also includes control over the management or affairs of an enterprise.³⁴

As per the Act, a common investor will have to exercise control over the firms to constitute a group.³⁵ Ola and Uber argued that the shareholding and right to appoint directors by common investors fell outside the definition of “control” under Explanation (b)(i) to Section 5 of the Competition Act.³⁶ However, this is highly debatable in light of SoftBank then holding a 15% share in Uber, with 2 of 17 directors on the board³⁷ and 26% share in Ola³⁸ with 1 director on a board of 7³⁹ and the power to appoint 1 more.⁴⁰

In the present case, the CCI did not return a definitive finding on this issue and merely noted that even if Meru’s allegation, that Ola and Uber formed part of one group on account of common ownership, were to be accepted, it could not form the basis of investigation without evidence of abuse as per section 4(2) of the Act.⁴¹ Given the evolving competition jurisprudence, we argue that common ownership can potentially amount to control within the meaning of Section 5, allowing the firms concerned to be considered a group for the purpose of an allegation of abuse of dominance under Section 4.

1. Expanding the Definition of Control

In the present case, CCI discussed gradations in different standards of control and noted that even material influence falling short of control is relevant

³⁴ The Competition Act 2002, s 4 Explanation (c).

³⁵ The Competition Act 2002, s 5.

³⁶ *Meru Travel* (n 23) para 32.

³⁷ *Meru Travel* (n 23) para 32; Heather Somerville, ‘SoftBank is Now Uber’s Largest Shareholder as Deal Closes’ *Livemint* (San Francisco, 19 January 2018) <<https://www.livemint.com/Companies/2mmSo6tJoN7UNkmrtJHJ4O/SoftBank-is-now-Ubers-largest-shareholder-as-deal-closes.html>> accessed 31 October 2019.

³⁸ ‘Why is Ola Balking at SoftBank’s Offer of Another \$1 Billion Investment?’ *Business Today* (4 December 2018) <<https://www.businesstoday.in/top-story/why-is-ola-balking-at-softbank-offer-of-another-1-billion-investment/story/297103.html>> accessed 31 October 2019.

³⁹ ANI Technologies Private Limited, <<https://www.tofler.in/ani-technologies-private-limited/company/U72900KA2010PTC086596>> accessed 31 October 2019.

⁴⁰ Mihir Dalal and Shrutika Verma, ‘Ola Boardroom Row Pits SoftBank against Bhavish Aggarwal’ *Livemint* (Bengaluru/New Delhi, 3 May 2018) <<https://www.livemint.com/Companies/xBREbzT0x6b0ighbICzMij/Ola-boardroom-row-pits-SoftBank-against-Bhavish-Aggarwal.html>> accessed 31 October 2019.

⁴¹ *Meru Travel* (n 23) para 54.

for competition analysis. Interestingly, the CCI held that investment by the common investors in Ola and Uber do not suggest possession of control by the investors in the entities. This standard of requiring *de jure* or *de facto* control,⁴² is significantly higher than the standard of material influence, which implies the ‘presence of factors which give an investor the ability to influence affairs and management of the enterprise’.⁴³ The CCI acknowledged that as an active investor, SoftBank could exercise material influence over both entities even if it was only a minority shareholder in both.⁴⁴ The international jurisprudence reflects that the concept of material influence is crucial for competition analysis because operational realities do not always mirror formal agreements or equity structures.⁴⁵

It is also important to note that while determining the presence of control in the past, the CCI has used the yardstick of ‘material influence’ over ‘decisive influence’.⁴⁶ The Commission then noted that even in the absence of material influence, merely being a member of the Board of Directors allows access to sensitive information which can facilitate tacit collusion and is highly relevant for competition assessment.⁴⁷ Further, the Competition Law Review Committee 2019, emphasised the need for broadening the definition of control with the introduction of material influence in the assessment.⁴⁸ Following this, the recently introduced Draft Competition (Amendment) Bill, 2020 seeks to broaden the definition of ‘control’ to ‘the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions’.⁴⁹ It is quite evident from the above

⁴² De facto control implies a situation “where an enterprise holds less than the majority of voting rights, but in practice exercises control over more than half of the votes actually cast at a meeting” *Meru Travel* (n 23) para 49.

⁴³ *Meru Travel* (n 23) para 49.

⁴⁴ *Meru Travel* (n 23) para 46.

⁴⁵ The Enterprise Act 2002, s 26(3); Competition and Markets Authority, ‘Mergers: Guidance on the CMA’s Jurisdiction and Procedure’ (January 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2___Mergers__Guidance.pdf> accessed 31 October 2019; South Africa Competition Act 1998, s 12(2)(g); Canada Merger Enforcement Guidelines 2011, para 1.5, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html#s1_1> accessed 31 October 2019.

⁴⁶ *UltraTech Cement Ltd., In re*, Combination Registration C-2015/02/246, CCI Order dated 12.03.2018, paras 12.10, 12.12, 12.13:2018 SCC OnLine CCI 27; *Agrium Inc., In re*, Combination Registration No. C-2016/10/443, order dated 27 October 2017, para 20: 2017 SCC OnLine CCI 80.

⁴⁷ *UltraTech Cement Ltd., In re*, Combination Registration C-2015/02/246, CCI Order dated 12.03.2018, para 12.13:2018 SCC OnLine CCI 27.

⁴⁸ Ministry of Corporate Affairs, *Report of the Competition Law Review Committee* (July 2019) paras 2.1-2.6 <http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf> accessed 31 October 2019.

⁴⁹ Draft Competition (Amendment) Bill 2020 <<http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf>> accessed 31 October 2019.

discussion that the definition of control should be construed broadly and even has the potential to include control exercised by minority shareholders.

Further, it is widely argued that direct control over managerial decisions is not required to affect the behavior of the firm and minority shareholdings can facilitate the exercise of effective control.⁵⁰ In fact, the theory of common ownership is based on investors that do not own majority shares yet exercise influence over decision making in firms.⁵¹

According to the existing literature, there are two primary mechanisms through which a minority shareholder can have direct influence over firm behaviour: voting and voice.⁵² Firms have a voting for various reasons such as any fundamental shift in firm's strategy, selection of board of directors, change in ownership structures, etc.⁵³ Any investor with voting rights can vote in a manner that increases the value of her overall holdings, even if it leads to anti-competitive effects. Any outright majority of shares is not required for influencing decisions. Consider this for example, if an investor holds 25% of the shares, she will be in effective control if none of the other shareholders hold more than 1%.⁵⁴ Another possible way for investors to influence firm behaviour is by informal interaction. According to a survey, investors usually prefer to interact with management and board members outside of formal shareholders' meetings to influence managerial decisions.⁵⁵ Such meetings are easier than formal meetings and would not attract the attention of regulatory authorities. An example of voice being used is the gathering organised by the representatives of large mutual funds in the US for encouraging pharmaceutical firms to unite and maintain uniform price levels.⁵⁶

Post the CCI's ruling in the Meru case, Softbank has only increased its already substantial investment in the rival entities and emerged as the largest shareholder in both Ola and Uber. SoftBank's very high stakes in both Uber and Ola potentially enable it to exercise control over both the firms. In fact,

⁵⁰ Organisation for Economic Cooperation and Development, 'Common Ownership by Institutional Investors and its Impact on Competition' DAF/COMP(2017)10.

⁵¹ *Ibid.*

⁵² Azar (n 6), 6.

⁵³ OECD (n 50) para 51.

⁵⁴ Daniel O'Brien and Steven Salop, 'Competitive Effects of Partial Ownership: Financial Interest and Corporate Control' (2000) 67(3) *Antitrust Law Journal* 559, 577.

⁵⁵ Joseph A McCahery, Zacharias Sautner and Laura T Starks, 'Behind the Scenes: The Corporate Governance Preferences of Institutional Investors' [2016] 71 *Journal of Finance* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1571046> accessed 31 October 2019.

⁵⁶ Caroline Chen, 'Mutual Fund Industry to Drugmakers: Stand Up and Defend Yourself', *Bloomberg* (10 May 2016) <<https://www.bloomberg.com/news/articles/2016-05-09/top-funds-said-to-tell-pharma-leaders-to-defend-drug-pricing>> accessed 31 October 2019.

SoftBank's growing influence over Ola, increasing investments in Uber and encouragement to the rival entities to merge also caused Ola's founders to fear loss of control over the Company and turn down Softbank's offer to invest another 1.1 billion dollars into Ola, which would have increased its stake in the company to over 40%.⁵⁷ The founders of Ola also amended the Company's Articles of Association as per which no investor with more than 10% equity shares in the Company can increase its stake without the prior approval of the founders and the board of directors.⁵⁸

In light of these changing regulatory and market landscapes, the CCI should increase scrutiny of firms with common ownership and consider its relevance while determining whether they constitute a 'group' to establish an allegation of abuse of dominance.

B. Anti-Competitive Agreements

Meru also alleged that Uber and Ola have entered into anti-competitive agreements with their drivers and thereby violated Section 3 of the Act.⁵⁹ The CCI dismissed this on account of Meru's failure to provide evidence.⁶⁰ Additionally, Meru argued that common investors could facilitate collusive arrangement and exchange of sensitive information between competitors.⁶¹ Interestingly, CCI has previously concluded that being on the Board of competitors allows scope for tacit collusion.⁶² In light of this, an investigation into whether common ownership can have similar effects is merited.

There are several factors that motivate competing firms to collude in the market. However, any attempt to directly collude would draw the attention and scrutiny of competition authorities. Firms are thus, more likely to collude with common institutional investors which will avoid such scrutiny. This argument is further strengthened by the recent empirical study which

⁵⁷ Saritha Rai, 'Why Bhavish Aggarwal Turned Down a \$1.1 Billion SoftBank Deal' *The Economic Times* (9 April 2019) <<https://economictimes.indiatimes.com/small-biz/startups/features/why-bhavish-aggarwal-turned-down-a-1-1-billion-softbank-deal/article-show/68788526.cms?from=mdr>> accessed 26 December 2019.

⁵⁸ Sayan Chakraborty and Mihir Dalal, 'Snapdeal Effect? Ola Restricts SoftBank Rights, Strengthens Those of Founders' *Livemint* (Bengaluru, 18 May 2017) <<https://www.livemint.com/Companies/hgo0yvhnvF4VnkCCchubUM/Snapdeal-effect-Ola-restricts-SoftBank-rights-strengthens.html>> accessed 26 December 2019.

⁵⁹ *Meru Travel* (n 23) para 37.

⁶⁰ *Meru Travel* (n 23) para 37.

⁶¹ *Meru Travel* (n 23) para 44.

⁶² *Ultra Tech Cement Ltd.*, In re, Combination Registration C-2015/02/246, CCI Order dated 12.03.2018, para12.13:2018 SCC OnLine CCI 27.

concluded that commonly owned firms are much more likely to enter into joint ventures, alliances and other explicit coordination.⁶³

The acquisition of shares and seats in the management could potentially create a structure that can be used for cooperation and the same could allow the common investor to act as a “cartel ringmaster”.⁶⁴ This is based on the theory of coordinated effects, wherein a common institutional investor can facilitate coordination of market strategies between competing firms.⁶⁵ In this case, an investor owning shares in multiple firms can act as a cartel ringmaster, i.e., an initiator in charge of coordination,⁶⁶ and pass information between parties.⁶⁷ Sharing information and influencing decisions motivated by individual gains of the investor would essentially lead to tacit collusion in the market.⁶⁸

This argument is strengthened by the broad definition of agreement under the Indian competition regime. This merely requires concert or meeting of minds between the parties. It is commonly acknowledged that no direct evidence would be available for establishing the presence of anti-competitive agreements and reliance needs to be placed on ‘fragmentary, sparse and circumstantial evidence’.⁶⁹ As noted above, the opening up of a channel for agreement by institutional investors creates a high likelihood of companies to collude in a manner which can evade the scrutiny of the CCI.

It has been openly acknowledged by large passive investment firms such as Vanguard⁷⁰ and Black Rock⁷¹ that they are regularly and actively involved in discussions and managerial decisions of the firms they invest in. This exposes the weakness in Uber and Ola’s argument that active investment by SoftBank cannot be investigated under Section 3 as Softbank is neither

⁶³ Jie He and Jiekun Huang, ‘Product Market Competition in a World of Cross Ownership: Evidence from Institutional Blockholdings’ (2018) 30 Review of Financial Studies.

⁶⁴ Edward B Rock and Daniel L Rubinfeld, ‘Antitrust for Institutional Investors’ (2017) New York University School of Law, Law & Economics Research Paper Series, Paper 17-23, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998296> accessed 31 October 2019.

⁶⁵ *Ibid.*

⁶⁶ Andrea Günster, Martin Carree and Mathijs A van Dijk, ‘Do Cartels Undermine Economic Efficiency?’ (36th EARIE Annual Conference, Slovenia, 3-5 September 2009).

⁶⁷ Rock and Rubinfeld (n 64).

⁶⁸ OECD (n 50) para 92.

⁶⁹ *Director General (Supplies & Disposals), In re*, Ref Case No 01 of 2012 (CCI), para 26:2013 SCC OnLine CCI 55.

⁷⁰ Charles Stein, ‘Vanguard’s McNabb Says Firm is Not Passive on Governance’ *Bloomberg* (4 March 2015) <<https://www.bloomberg.com/news/articles/2015-03-04/vanguard-s-mc-nabb-says-firm-is-not-passive-on-governance>> accessed 31 October 2019.

⁷¹ Black Rock ‘Proxy Voting and Shareholder Engagement FAQ’ <<https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-faq-global.pdf>> accessed 31 October 2019.

a competitor nor a provider of goods or services at different levels of production of the supply chain.⁷² It is noteworthy that while handing down this ruling, the CCI was mindful enough to note that, ‘anticompetitive effects of common ownership may arise more as an error of omission than as an error of commission’.⁷³ The CCI held that it would be vigilant and ensure the presence of Chinese walls or other safeguards to prevent any adverse effect on competition caused by common ownership in Ola and Uber.⁷⁴ It also expressed willingness to take action if an inquiry revealed ‘compelling evidence’ of the anti-competitive effects of common ownership in any concentrated industry.⁷⁵ We acknowledge that the finding on abuse of dominance or anti-competitive agreement, being ex post in nature, will require evidence of violation of the Act leading to anti-competitive effects. The CCI’s decision cannot be criticized in this regard for its ex post analysis of refusing to find fault on account of lack of evidence. However, it does pose some interesting questions regarding the future of investigations into common ownership based on thresholds for establishing control as discussed earlier. In the next part, we examine the possibility of according greater weightage to common ownership in the CCI’s ex ante analysis in merger regulation.

PART II: EX ANTE ANALYSIS

Uber and Ola contended that as per precedent in other Asian jurisdictions, for instance Singapore, Malaysia and the Philippines, inquiries into their common ownership were premature and warranted only after an actual merger between the two entities.⁷⁶ However, Meru’s case did not require triggering of merger review and thus, the CCI did not elaborate on this prong. Since the Malaysian competition regulator does not have the power to review mergers,⁷⁷ and Singapore and Philippines have specific thresholds which trigger mandatory notifications to the relevant competition regulators, leading to a structure of *ex ante* merger review⁷⁸ similar to the Indian framework, the relevance of the OP’s argument here is limited. Even though the present case did not analyse the investment structure through the lens of merger review, we discuss it here since this is often the most commonly used mechanism

⁷² *Meru Travel* (n 23) para 34.

⁷³ *Meru Travel* (n 23) para 56.

⁷⁴ *Meru Travel* (n 23) para 57.

⁷⁵ *Meru Travel* (n 23) para 46.

⁷⁶ *Meru Travel* (n 23) para 32.

⁷⁷ ‘Merger Control 2019’ *Global Legal Insights* <<https://www.globallegalinsights.com/practice-areas/merger-control-laws-and-regulations/malaysia>> accessed 31 October 2019.

⁷⁸ Singapore Competition Act 2004, s 54; Philippine Competition Act 2014, s 16.

to target common ownership. We argue that common ownership allows a structure which can trigger merger review before the CCI.

Under the combination assessment framework, any proposed combination which meets the specified asset or turnover threshold mentioned in the Act is required to be notified before the CCI.⁷⁹ A possible concern with regards to triggering merger review in India is the high threshold whereby the merging firms may evade scrutiny under merger control rules if they either fail to meet the thresholds or fall under any exception. The CCI had also raised this concern in the present case.⁸⁰ However, we look at the present threshold requirements, minority investment exceptions and deemed approval guidelines of the CCI while relying on a broad definition of control (as discussed in Part I of the paper), to argue that common ownership can trigger merger review.

A. Introduction of New Thresholds

The international debate on the need to introduce additional thresholds for merger review gained widespread attention after LinkedIn's acquisition by Microsoft for \$26.2 billion in an all cash deal failed to trigger existing thresholds.⁸¹ This ultimately led to the introduction of deal/transaction value thresholds in Austria and Germany, wherein the high value of deals can trigger combination assessment before the competition regulator.⁸² The concern has also been expressed in India wherein the Report of the Competition Law Review Committee noted a statutory lacuna in this regard. It was argued that digital markets with evolving business models have led to firms being asset light, thereby allowing them to escape competition assessment.⁸³ The Committee recommended introducing an enabling provision within the Act which will allow introduction of necessary thresholds to ensure that transactions which will have an appreciable adverse effect on competition do not escape scrutiny.⁸⁴ Following this, the recently introduced Draft Competition (Amendment) Bill, 2020 also acknowledged the need to broaden the scope of review of the CCI and thereby empowered the central government, in public interest and in consultation with the CCI, to prescribe any new criteria for

⁷⁹ The Competition Act 2002, ss 5, 6.

⁸⁰ *Meru Travel* (n 23) para 45.

⁸¹ Richard Waters, 'Microsoft-LinkedIn Deal Raises New Competition Concerns' *Financial Times* (4 November 2016) <<https://www.ft.com/content/d5ceda60-a1e1-11e6-82c3-4351ce86813f>> accessed 31 October 2019.

⁸² Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG) (July 2018) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&cv=2> accessed 31 October 2019.

⁸³ Report of Competition Law Review Committee(n 48) paras 5.1-5.14.

⁸⁴ Report of Competition Law Review Committee(n 48) paras 5.1-5.14.

combination assessment.⁸⁵ By doing this, the Bill is advocating for a broader threshold to include more transactions under its scanner. These developments, along with the expansion in the definition of control discussed in Part I, ease the CCI's ability to review the control exercised by common investors over competing firms, which in the present case would bring SoftBank's control over Uber and Ola under scrutiny prospectively.

B. Narrowing the Minority Investment Exception

The Combination Regulations exclude certain investments which lead to less than 25% of the total shares or voting rights by the acquirer in the target enterprise and are made 'solely for investment' or 'in the ordinary course of business'.⁸⁶ These are termed as minority investments. This business as usual nature of Softbank's activities to hedge its risks by spreading its investments was emphasized by the OPs in their objection against Softbank's alleged orchestration of control over the OPs by consolidations in the market.⁸⁷

However, the CCI has been constantly narrowing the scope of such an exemption and looking at the impact of the acquisition in the market rather than mere change in the shareholding structure of the target enterprise. Perhaps the most notable assessment of the CCI in this regard was the proposed acquisition of a 0.12% stake in addition to a preexisting 8.75% stake in India Ideas by Claymore Investments Mauritius.⁸⁸ Interestingly, the additional investment did not even require a board seat.⁸⁹ However, this was still notified and subsequently cleared by the CCI.⁹⁰ Similarly, the CCI has also assessed a proposed investment of a 9.57% stake along with a right to nominate a director in the board of ANI Technologies by Copper Technology.⁹¹ In another arguably minority investment where Eithad Airways proposed to acquire 24% share in Jet Airways, the CCI considered a range of factors and the effect of the proposed combination in the relevant market.⁹² By doing this, the CCI has considerably narrowed the scope of the minority investment exception.

⁸⁵ Draft Competition (Amendment) Bill 2020, s 5 <<http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf>> accessed 31 October 2019.

⁸⁶ The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011, Item I, sch I.

⁸⁷ *Meru Travel* (n 23) para 31.

⁸⁸ *Claymore Investments (Mauritius) Pte. Ltd., In re*, Combination Registration No. C-2018/12/623, order dated 10 January 2019 (CCI).

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Copper Technology Pte. Ltd., In re*, 2017 SCC OnLine CCI 100:Combination Registration No. C-2017/08/525, order dated 1 September 2017.

⁹² *Eithad Airways PJSC, In re*, 2013 SCC OnLine CCI 132:Combination Registration No. C-2013/05/122, order dated 12 November 2013.

Notably, the same now finds widespread acknowledgement in international jurisprudence whereby the competition regulators of European Union,⁹³ South Africa,⁹⁴ United Kingdom,⁹⁵ and United States⁹⁶ have increased scrutiny of minority investments and stressed upon the need for considering a broad range of factors and existing market dynamics to see the ability of a minority investor to exercise control over the investee. Again, advocacy for a broader definition of control (as noted in Part I) along with narrowing the minority investment exception have found footing in the Indian landscape where the Competition Law Review Committee took note of the international consensus in this regard and stressed upon the need to follow the same in India.⁹⁷

C. No Exception Under Green Channel Clearance

The CCI recently introduced an amendment to the Combination Regulations introducing Green Channel clearance whereby certain transactions which pass the notification thresholds will not have to be notified and will be deemed to be approved merely by submitting certain information before the CCI.⁹⁸ The criteria requires that the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control do not produce/provide similar or identical or substitutable product(s) or service(s).⁹⁹ This will mean that an investor can avail the benefit of the Green Channel route if it can demonstrate that it does not have any shares in the investee's competitor. To illustrate by looking at the present case, if Soft Bank wishes to avail the Green Channel benefit while investing in Uber, it should not have any share in Ola. Therefore, an institutional investor which invests in competing firms cannot avail the benefit of this and will be required to notify the proposed transaction to the CCI in the event it meets the specified thresholds.

⁹³ OECD Policy Roundtable – Definition of Transaction for the Purpose of Merger Control Review,85, <<http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf> > accessed 4 April 2020.

⁹⁴ *Ibid* 162-163.

⁹⁵ CMA (n 45) paras 4.14-4.29.

⁹⁶ OECD Policy Roundtable (n 93) 198.

⁹⁷ Competition Law Review Committee Report (n 48) paras 6.3-6.7.

⁹⁸ The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations 2019, 13 August 2019 <<https://www.cci.gov.in/sites/default/files/notification/210553.pdf>> accessed 10 November 2019.

⁹⁹ *Ibid*, sch III.

CONCLUSION

The debate surrounding common ownership has become so widespread that it has even caught the attention of popular media. As of March 2019, Berkshire Hathaway was the largest shareholder in the four largest US Airlines.¹⁰⁰ In an interview with Warren Buffet, CNBC's Becky Quick remarked, "You know, Warren, it does occur to me, though, if you're building up such a significant stake in all the major players, is that anything that's, like, monopolistic behavior? Is there any concern to think that you would say something to the airlines to make them make sure that they're not competing on price quite the same? What would keep somebody from worrying about that?"¹⁰¹ When institutions have the ability to soften competition, it is likely that they will find a way.¹⁰² It is quite clear that going forward common ownership is going to play a larger role in the competition analysis by regulators across the globe.¹⁰³

Prof. Elaughe has argued that the law should not wait for clearer proof on causal mechanisms between common ownership and corporate conduct by citing empirical,¹⁰⁴ theoretical,¹⁰⁵ and mathematical¹⁰⁶ studies highlighting ample proof of such causal mechanisms.¹⁰⁷ These causal mechanisms do not require direct communication from horizontal shareholders to dampen competition but these communications do exist sometimes and where they do, the anticompetitive effects are amplified.¹⁰⁸ Scholars argue that competition enforcement, as is generally the case, must focus on anti-competitive market

¹⁰⁰ Katherine Chiglinsky, 'Buffett's Course Reversal on Airlines Sparks Talk of Acquisition' *Bloomberg* (22 March 2019) <<https://www.bloomberg.com/news/articles/2019-03-22/buffett-s-course-reversal-on-airlines-sparks-talk-of-acquisition>> accessed 10 November 2019.

¹⁰¹ Here is the full transcript of billionaire investor Warren Buffett's interview with CNBC (CNBC, 27 February 2017) <<https://www.cnbc.com/2017/02/27/billionaire-investor-warren-buffett-speaks-with-cnbc-s-becky-quick-on-squawk-box.html>> accessed 10 November 2019.

¹⁰² OECD (n 50) 21.

¹⁰³ Aditya Bhattacharjea has noted this in passing while discussing predatory pricing and platform competition in Aditya Bhattacharjea, 'Predatory Pricing in Platform Competition: Economic Theory and Indian Cases' in Ashish Bharadwaj and others (eds), *Multi-dimensional Approaches Towards New Technology* (Springer 2018) 228 <https://link.springer.com/chapter/10.1007/978-981-13-1232-8_11> accessed 31 October 2019.

¹⁰⁴ Einer R Elhauge, 'How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It' at Part I (August 2019) (reviewing major empirical studies).

¹⁰⁵ Posner, Scott Morton and Weyl, 'A Proposal to Limit the Anticompetitive Power of Institutional Investors' (2017) 81 *Antitrust Law Journal* 669; Scott Morton & Hovenkamp, 'Horizontal Shareholding and Antitrust Policy' (2018) 127 *Yale LJ*, 2034, 2035.

¹⁰⁶ Azar (n 6) 1522, 1525 (adopting the modified HHI which measures horizontal shareholding concentration).

¹⁰⁷ Elhauge (n 2).

¹⁰⁸ Elhauge (n 2).

structures instead of behavioral solutions that are hard to monitor and even harder to find evidence for in individual instances.¹⁰⁹ Through this paper, we established that there is a strong presumption that common ownership in firms can lead to anticompetitive conduct by these firms. However, since such a presumption is almost never actionable, we discuss the increasing relevance of common ownership in CCI's ex post and ex ante review.

The paper highlights that even though the CCI agreed to monitor the operations of Ola and Uber, it did not order an investigation into the matter because of lack of evidence of an ex post violation. This keenness by the CCI is indicative of its attempt to ensure that sensitive information is not shared between competitors. The same approach was also reflected in a combination registration in the marine transportation industry.¹¹⁰ There, the CCI noted the submission of the parties that the proposed combination would not lead to any spillover effects. However, by way of caution, it accepted a voluntary commitment to introduce a 'rule of information control' which severely restricted the sharing of information between the parties and receiving information from third parties.¹¹¹ The order given by the CCI in the *Meru* case also recognizes the potential of softening competition through common ownership.¹¹² These recommendations highlight the CCI's eagerness in both appreciating the threats to competition posed by common ownership as well as in ensuring that appropriate safeguards are put in place to ensure further competition among firms in the market. In light of these recommendations, this paper addressed the gap in current literature regarding both the anticompetitive market structures that such ownership facilitates as well as a brief survey of the possibility of adding common ownership to the CCI's radar in a timely manner by exploring the options to examine it under both ex ante and ex post review. In the other cases and appeals filed by *Meru* alleging abuse of dominance via predatory pricing against Uber and Ola, the issue of common ownership has not received any attention.¹¹³ Thus,

¹⁰⁹ Elhauge (n 2).

¹¹⁰ *Nippon Yusen Kabushiki Kaisha Ltd., In re*, Combination Registration No C-2016/11/459, CCI Order dated 29 June 2017: 2017 SCC OnLine CCI 152.

¹¹¹ *Ibid* para 25.

¹¹² *Meru Travel* (n 23) para 56.

¹¹³ *Meru* had filed information against Uber alleging abuse of its dominant position via predatory pricing in Delhi NCR (*Meru Travel Solutions (P)Ltd.v Uber India Systems (P)Ltd.*, Case No 96 of 2015: 2016 SCC OnLine CCI 12) The CCI dismissed the information for its inability to find a prima facie case as there were doubts about the credibility of a report by Tech Sci relied upon by *Meru*. CCI adopted the view that the relevant market was Delhi and not Delhi NCR. *Meru* appealed the case to COMPAT, which held that the relevant market should have been Delhi NCR (*Meru Travels Solutions (P)Ltd. v Competition Commission of India*, Appeal No 31 of 2016:2016 SCC OnLine Comp AT 451). It also noted that the statistical findings in the Tech Sci Report were not substantively challenged before the CCI. Thus, COMPAT directed the Director General (DG) to conduct an investigation

it is important to accord common ownership the significance it merits in ex post review pertaining to allegations of abuse of dominance and anti-competitive agreements as well as ex ante review concerning merger control. This would require effective engagement of competition policy, particularly because of the evolving regulatory and market landscapes governing platform competition in the online economy. Finally, without appreciation of the dynamic harms that common ownership can cause and discussion of the various possibilities to incorporate its relevance in competition assessment, it would continue to evade the Indian regulator's scrutiny.

against Uber, based on Meru's allegations of abuse of dominance. Uber appealed against COMPAT's order before the Supreme Court of India, which dismissed the appeal and held that there should be no interference with the investigation ordered (*Uber India Systems (P) Ltd. v Competition Commission of India*, (2019) 8 SCC 697. Previously in a similar case, the CCI had ordered the DG to investigate against Ola based on Meru's allegations of abuse of dominance via predatory pricing by Ola in Bengaluru. Post investigation, however, the CCI concluded based on the economics of network effects in two-sided platform markets that Ola was not dominant in the relevant market and its market share was ephemeral given the stiff competition it faced from Uber (*Fast Track Call Cab (P) Ltd. v ANI Technologies (P)Ltd.*, CCI Case No 21 of 2016, paras 89-92: 2017 SCC OnLine CCI 36).

REAL ESTATE DEVELOPERS AND HOMEBUYERS: FINDING A HARMONY UNDER THE IBC

*Rachita Shah and Arundhati Diljit**

The real estate sector in any economy is of supreme significance. Not only does it serve the economy by enhancing its infrastructure, but also reflects its well-being. In the recent past, the troubles of this sector have exacerbated due to various reasons such as corporate mismanagement and the dearth of liquidity. The failing sector has adversely affected the economy at large, but the ones to suffer the most are the homebuyers. To ensure that interests of both, the developers and the homebuyers are protected, the government and the judiciary have consistently taken steps. While the recent reforms brought in by them, through the 2020 IBC amendment and the 2020 NCLAT order propounding the novel version of the CIRP, serve to ameliorate the situation, they are debatable in terms of their sustainability in law and practice. There is a dire need to identify the problems which still persist in the framework of law for this sector, particularly under the IBC to ensure a unison between the two contesting parties. The authors, through this paper, will delve into the implications of the recent reforms and propose a framework to reconcile the long-standing conflict between the homebuyers and the real estate developers.

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I. INTRODUCTION

In December 2019, the ex-RBI Governor Raghuram Rajan opined that the real estate sector was in deep trouble.¹ He believed that the tribulations of this sector were spreading like fire to other stakeholders in the economy. The NBFCs,² which are the primary source of capital for this sector, were suffering from an acute meltdown since 2018.³ With a severe liquidity crunch,⁴ developers faced an exponentially high burden to complete their projects within the decided timeline.⁵ The said state of affairs gravely affected millions of homebuyers who had put in their hard-earned money into the purchase of flats/apartments in these projects.

The IBC⁶ was introduced in 2016 to streamline the insolvency and bankruptcy process for companies. Today, with a promising track record in resolution of companies,⁷ the IBC endeavours to give a time-efficient remedy

¹ Raghuram Rajan, ‘Exclusive: Raghuram Rajan Explains How to Fix the Economy’ (*India Today*, 9 December 2019) <<https://www.indiatoday.in/business/story/raghuram-rajnan-plan-fix-indian-economy-10-points-1625829-2019-12-06>> accessed 12 June 2020.

² Non-Banking Financial Companies.

³ Aarati Krishnan, ‘NBFC Crisis: A Realty Check’, (*The Hindu*, 27 June 2019) <<https://www.thehindubusinessline.com/opinion/columns/aarati-krishnan/nbfc-crisis-a-realty-check/article28189944.ece#:~:text=After%20the%20dramatic%20default%20by,-failures%20across%20the%20NBFC%20space.&text=The%20funds%20crunch%20caused%20by,downgrades%20of%20some%20NBFCs%20FHFCs.>> accessed 12 June 2020.

⁴ *Ibid.*

⁵ Ashwini Priolker, ‘How Real Estate Developers are Tiding over Liquidity Crisis’ (*Bloomberg*, 3 September 2019) <<https://www.bloombergquint.com/business/how-real-estate-developers-are-are-tiding-over-liquidity-crisis>> accessed 12 June 2020.

⁶ The Insolvency and Bankruptcy Code 2016 (IBC 2016).

⁷ Ishan Bakshi, ‘Insolvency and Bankruptcy Code Should be the Preferred Option for Resolution of Bad Loans, Not the Last Resort’, (*The Indian Express*, 20 November 2019)

to creditors. The homebuyers perceive IBC as a panacea for their troubles against the real estate developers. In an attempt to harmonize the demands of the developers and homebuyers under the IBC, the legislature and the judiciary have been consistently undertaking measures.

It is against this background that the IBC introduced the Insolvency and Bankruptcy Code (Amendment) Act, 2018⁸ and the Insolvency and Bankruptcy Code (Amendment) Act, 2020⁹. The 2018 IBC amendment has now become settled law. However, the 2020 IBC amendment is still being disputed. In addition to these changes, the judiciary has also started experimenting with the IBC to resolve the issues of homebuyers. However, any step that was taken to pacify one side has been disputed by the other. An effective solution to this fallout between the two conflicting interests still remains unattained.

The authors will be delving into the 2020 IBC amendment and a 2020 NCLAT¹⁰ order which proposed a modified CIRP¹¹ for real estate companies. This article is divided into four parts. In the first part, the authors will briefly trace the recent history of remedies available to the homebuyers so far. In the second part, the authors will critique the recent 2020 IBC amendment. The third part is a critical analysis of the order passed by the NCLAT on February 04, 2020 which proposed a modified CIRP for real estate companies. Lastly, upon identifying and explaining the persisting issues in the present framework of the law, the authors attempt to suggest solutions for the same in part four.

II. PART I: THE EVOLUTION OF THE LAWS RELATING TO HOMEBUYERS

The Consumer Protection Act 1986 has always been and still remains a remedy available to homebuyers.¹² However, a systematic regulation particular

<<https://indianexpress.com/article/opinion/columns/essar-steel-case-insolvency-and-bankruptcy-code-rbi-6127721/>> accessed 12 June 2020; CRISIL, 'In Three Years of IBC, More Hits than Misses' (14 May 2019) <<https://www.crisil.com/en/home/newsroom/press-releases/2019/05/in-three-years-of-ibc-more-hits-than-misses.html>> accessed 14 June 2020.

⁸ The Insolvency and Bankruptcy Code (Amendment) Act 2018.

⁹ The Insolvency and Bankruptcy Code (Amendment) Act 2020.

¹⁰ National Company Law Appellate Tribunal.

¹¹ Corporate Insolvency Resolution Process.

¹² *Pioneer Urban Land and Infrastructure Ltd. v Union of India*, (2019) 8 SCC 416 [29]; *M3M India (P) Ltd. v Dinesh Sharma*, 2019 SCC OnLine Del 9949; AIR 2020 Del 23 [22].

to the real estate market began only with the introduction of RERA¹³ in 2016. Although every state had its own law which governed the real estate market, RERA centralised the regulation of the real estate industry. This Act brought in some much-needed transparency in the real estate sector. For this purpose, the Act empowered the Central Government to establish the Real Estate Regulatory Authority¹⁴ and requires the compulsory registration of real estate projects with the mandatory filing¹⁵ of certain data and display of information¹⁶ on the RERA website. This has equipped the homebuyers to make informed choices. It has also provided for remedies in the case of delay and other default.¹⁷

The IBC also came into force in 2016. In the case of real estate sector, the IBC granted homebuyers an additional remedy under which they could approach the NCLT¹⁸ in the event of a default. Even the courts stepped in to secure the rights of these homebuyers on the flats allotted to them. For instance, in *Bikram Chatterji v Union of India*, the Supreme Court did not permit the Noida and Greater Noida authorities and the banks to sell the flats in order to protect the rights of homebuyers.¹⁹ Further, the Supreme Court also recognized that the IBC as an experimental legislation,²⁰ and has taken steps to do complete justice to the homebuyers. For instance, in *Chitra Sharma v Union of India*, the Supreme Court directed a senior counsel to represent the rights of the homebuyers in the Committee of Creditors, and by using its powers under Article 142, ordered a re-commencement of the CIRP process.²¹ However, throughout this period, it was disputed whether the homebuyers were financial creditors or operational creditors. The Insolvency and Bankruptcy Board of India notified a new form, Form 'F' for all creditors "other than financial and operational creditors", to file their claims.²² This further added to the confusion about the position of homebuyers.

The IBC recognises two kinds of creditors who may initiate a CIRP—financial and operational.²³ A financial creditor is a person to whom a finan-

¹³ Real Estate (Regulation and Development) Act 2016 (RERA 2016).

¹⁴ RERA 2016, s 20(l).

¹⁵ RERA 2016, s 11.

¹⁶ RERA 2016, ss 11, 34.

¹⁷ RERA 2016, s 11.

¹⁸ National Company Law Tribunal.

¹⁹ *Bikram Chatterji v Union of India*, 2019 SCC OnLine SC 901 [154].

²⁰ *Swiss Ribbons (P) Ltd. v Union of India*, (2019) 4 SCC 17 [85].

²¹ *Chitra Sharma v Union of India*, (2018) 18 SCC 575.

²² KT Jagannathan, 'Jaypee Homebuyers Get Separate Form to Claim Their Money' (*Hindustan Times*, 18 August 2017) <<https://www.hindustantimes.com/noida/jaypee-homebuyers-get-separate-form-to-claim-their-money/story-6ItgiDtHnS8OQIDuB9wxfl.html>> accessed 14 April 2020.

²³ IBC 2016, s 5.

cial debt is owed, i.e., a debt disbursed against the consideration for time value of money.²⁴ An operational creditor is a person to whom an operational debt is owed i.e. debt in respect of the provision of goods or services.²⁵ The financial creditors have certain additional benefits over operational creditors in initiating an application²⁶, in becoming part of the Committee of Creditors²⁷ and in liquidation.²⁸ Since various cases had brought to light the affliction of the homebuyers, the courts granted them certain rights which were available exclusively to the financial creditors.²⁹ To bring an end to the confusion about the position of homebuyers under the IBC, the government added an Explanation to Section 5, by way of an Ordinance in 2018, which made homebuyers financial creditors.³⁰ The Ordinance got the legislature's approval in the same year.³¹ It was later constitutionally challenged in *Pioneer Urban Land and Infrastructure Ltd. v Union of India*³² wherein its legality was upheld by the Judiciary.

This 2018 IBC amendment added to the long-standing conflict between the homebuyers and the real estate companies as it opened a floodgate of real estate insolvency cases.³³ The possibility of applications being initiated by speculative homebuyers also increased,³⁴ thereby jeopardising projects which were otherwise sound. Thus, by way of 2020 IBC amendment the legislature sought to restore a balance between the interests of homebuyers and developers.

²⁴ IBC 2016, s 5(8).

²⁵ IBC 2016, s 5(21).

²⁶ IBC 2016, ss 7,8, 9.

²⁷ IBC 2016, s 21.

²⁸ IBC 2016, s53.

²⁹ *Chitra Sharma* (n 21).

³⁰ The Insolvency and Bankruptcy Code (Amendment) Ordinance 2018, s 3.

³¹ The Insolvency and Bankruptcy Code (Amendment) Act 2018.

³² *Pioneer* (n 12).

³³ D Dhanuraj, 'RERA and IBC: The Real Solutions for Real Estate' (*Financial Express*, 1 January 2020) <<https://www.financialexpress.com/opinion/rera-and-ibc-the-real-solutions-for-real-estate/1808937/>> accessed 9 June 2020).

³⁴ Dipak Mondal, 'IBC Code: Are Speculative Homebuyers Misusing the Insolvency Law' (*Business Today*, 2 October 2019) <<https://www.businesstoday.in/current/corporate/ibc-code-are-speculative-homebuyers-misusing-insolvency-law/story/382538.html>> accessed 14 April 2020.

III. PART II: THE 2020 IBC AMENDMENT-MINIMUM THRESHOLD FOR HOMEBUYERS

The 2019 Ordinance³⁵ imposed a threshold qualification for homebuyers to initiate a CIRP by mandating that, ‘an application for initiating corporate insolvency resolution process shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class, whichever is less.’³⁶ The legislature gave its assent to this Ordinance in 2020.³⁷

Nevertheless, the 2020 amendment created a furore amongst the homebuyers. A number of writ petitions were filed before the Supreme Court questioning its constitutionality.³⁸ As a response to it, the Supreme Court issued a notice making the amendment inapplicable to applications that were already filed before the NCLT.³⁹ However, the Supreme Court is yet to hear the arguments of both the sides and adjudicate on this matter conclusively. The authors will now examine the constitutionality of this amendment [A] and identify its shortcomings [B].

A. Constitutionality of the 2020 IBC Amendment

At the outset, it is important to note that the judiciary generally restrains itself from questioning amendments which have an economic implication. This has been discussed in great detail in various Supreme Court cases⁴⁰ and has been reiterated by the Supreme Court in the famous *Pioneer* case where it emphasised that, ‘apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts’.⁴¹ The primary challenge in the petition was to the creation of a class within a class which was stated to be in violation of the right to equality as provided under Article 14 of the Constitution. To support their claims the petitioners referred to a number of cases.⁴²

³⁵ The Insolvency and Bankruptcy Code (Second Amendment) Ordinance 2019.

³⁶ The Insolvency and Bankruptcy Code (Second Amendment) Ordinance 2019, s 3.

³⁷ The Insolvency and Bankruptcy Code Amendment Act 2020.

⁴⁰ *State of Gujarat v Shri Ambica Mills Ltd.*, (1974) 4 SCC 656; AIR 1974 SC 1300 [66]-[67]; *VC Shukla v State (Delhi Admn.)*, 1980 Supp SCC 249 [11]; *Bhavesh D Parish v Union of India*, (2000) 5 SCC 471 [26]; *Swiss Ribbons* (n 20).

⁴¹ *Pioneer* (n 12) 15.

⁴² *EV Chinmaiah v State of A.P.*, (2005) 1 SCC 394; *Sansar Chand Atri v State of Punjab*, (2002) 4 SCC 154; *Union of India v SPS Vains*, (2008) 9 SCC 125; *State of U.P. v Mata Tapeshwari Saraswati Vidya Mandir*, (2010) 1 SCC 639.

On an inspection of these cases, it can be noticed that they have not prohibited the creation of a class within a class as long as it passed the test of reasonableness.⁴³ Various cases have allowed the creation of a class within a class⁴⁴ if it passes the test of reasonableness⁴⁵ under Article 14. The test requires the satisfaction of the intertwined dual requirement of the classification having an intelligible differentia (*i*) and a rational nexus to the object sought to be achieved (*ii*).⁴⁶ Therefore, the authors will test the amendment on these two criteria.

1. Intelligible Differentia

The first aspect of the test requires that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group.⁴⁷ In the *Pioneer* case, the Supreme Court concluded that homebuyers are to be considered as financial creditors because they fund real estate projects⁴⁸ and because they get a consideration for the time value of money (as the project in itself would increase in worth, like in transactions with other financial creditors).⁴⁹ However, the authors fail to agree with this reasoning. What sets the homebuyers apart from other financial creditors is that the relation of the company with the latter remains purely financial at all times whereas the homebuyers get their return in the form of possession of their flats. Therefore, unlike in contracts with other financial creditors, the satisfaction of homebuyers' claim lies on the presumption that they would want the possession of the property at the end of the project. However, there may be homebuyers who no longer wish to have possession over the flat or apartment and would rather have the money returned instead. Therefore, this would create the possibility that they would want the project to be stalled, unlike other creditors who would like the projects being completed, so as to ensure that there are better chances of recovering their dues.

Another difference between the homebuyers and other financial creditors is the source from which the tribunals ascertain default. A financial creditor under the IBC⁵⁰ is obligated to provide and regularly update financial infor-

⁴³ *Ibid.*

⁴⁴ *Ravi Paul v. Union of India*, (1995) 3 SCC 300; *Havaldar Bhagat Singh v State of Haryana*, (1996) 8 SCC 649; *Govt. of A.P. v G Jaya Prasad Rao*, (2007) 11 SCC 528.

⁴⁵ *State of W.B. v Anwar Ali Sarkar*, AIR 1952 SC 75.

⁴⁶ *Ibid.*

⁴⁷ *DS Nakara v Union of India*, (1983) 1 SCC 305; AIR 1983 SC 130.

⁴⁸ *Pioneer* (n 12) 40.

⁴⁹ *Pioneer* (n 12) 40.

⁵⁰ IBC 2016, s 215(2).

mation with the IU⁵¹. However, in case of homebuyers, the nature of the debt makes it difficult for them to enter, provide and maintain details with the IU, due to the lack of proof to answer the questions given in the form which they have to submit.⁵² For the homebuyers, information is obtained primarily from the RERA website⁵³ while for all other financial creditors, the IU is the primary source.⁵⁴ The information that is to be displayed on the RERA website depends on the rules made by the respective State governments.⁵⁵ Some of the States have not operationalised their websites,⁵⁶ while others do not have enough information.⁵⁷ This is a relevant factor in justifying the threshold because the RERA website is not as extensive as the IU and many of them do not have adequate information.⁵⁸ This makes it more troublesome for the tribunals to adduce the probity of the applications of homebuyers. Therefore, taking into consideration the distinct nature of the debt and the dearth of information available, homebuyers fall in a class separate from other financial creditors.

2. Rational Nexus

The second aspect of the test requires that the differentia must have a rational relation to the object sought to be achieved by the Act.⁵⁹ The objective of the IBC is to promote entrepreneurship and to balance the interests of the various stakeholders.⁶⁰ The 2020 IBC amendment, by rectifying certain complications raised by the 2018 IBC amendment, serves both these objectives.

The 2018 IBC amendment declaring homebuyers as financial creditors was a genuine attempt to rescue homebuyers. However, the amendment led to a

⁵¹ Information Utilities.

⁵² Insolvency and Bankruptcy Board of India (Information Utilities) Regulations 2017, Schedule, Form C.

⁵³ *Pioneer* (n 12) 5.

⁵⁴ IBC 2016, s 7(4).

⁵⁵ RERA 2016, s 84.

⁵⁶ Ministry of Housing and Urban Affairs, *Real Estate (Regulation & Development) Act, 2016, Implementation Progress Report*, 20 December 2019 <[http://www.mohua.gov.in/upload/uploadfiles/files/RERA_Status_Tracker%20\(20-12-2019\).pdf](http://www.mohua.gov.in/upload/uploadfiles/files/RERA_Status_Tracker%20(20-12-2019).pdf)> accessed 14 June 2020 (Implementation Progress Report).

⁵⁷ Ashwini Kumar Sharma, 'Rera's Three-year Report Card Shows Gaps in Implementation' (*Livemint*, 7 May 2019) <<https://www.livemint.com/money/personal-finance/rera-s-three-year-report-card-shows-gaps-in-implementation-1557237162103.html>> accessed 14 June 2020.

⁵⁸ Ashwini Kumar Sharma (n 57).

⁵⁹ *Anwar Ali Sarkar* (n 45).

⁶⁰ IBC 2016, Preamble; *Swiss Ribbons* (n 20) 9.

deluge in the number of applications which were filed before the tribunals.⁶¹ According to a Government estimate, more than 1800 insolvency cases were pending against real estate companies as in November, 2018.⁶² It is true that the 2018 IBC amendment was brought in since the homebuyers were facing utmost difficulties due to the rising number of incomplete projects. However, it also led to projects being stalled for sundry reasons and thus, appeared to be anti-developer.⁶³ Both the Supreme Court and the NCLAT have recognised that certain homebuyers may approach the court fraudulently or maliciously, not for the possession of the flat/apartment, but instead with the aim of getting a refund.⁶⁴ In light of this, if homebuyers approach the tribunals with some malicious intention or on account of only a few months of delay by the developer for a genuine reason, the otherwise sound projects will be hampered, adversely affecting the entrepreneurial spirit of this sector.

The 2020 IBC amendment, by requiring that a minimum number of homebuyers claim that there has been a default by the developer, ensures to an extent, that cases are not based on *mala fide* considerations of certain individuals. The amendment thereby, encourages entrepreneurship in the real estate sector and balances the rights of the developers and the homebuyers. Therefore, the 2020 IBC amendment satisfies the rational nexus test by serving the objects of the Act.

Presently, the petition challenging the 2020 IBC amendment is pending before the Supreme Court. Even if the Supreme Court invalidates the 2020 IBC amendment for being violative of Article 14 of the Constitution, the aforesaid differences between homebuyers and other financial creditors, and its repercussions, still stand relevant. The peculiar needs of homebuyers are bound to give rise to certain complications in adjudication of real estate insolvency cases. For instance, the possibility of speculative applications by homebuyers looms large as discussed earlier, thereby requiring particular attention. Moreover, the dissimilarity in the information available to homebuyers and other financial creditors for ascertaining default again calls for a closer inspection to ensure that genuine applications of homebuyers are not dismissed. Therefore, the tribunals need to be cautious and bear in mind these differences while adjudicating upon claims by homebuyers. The authors will elaborate upon certain changes which can be brought about in the existing framework, in order to deal with the special needs of homebuyers, in Part IV of the paper.

⁶¹ Dhanuraj (n 33).

⁶² Ashwini Kumar Sharma (n 57).

⁶³ Mondal (n 34).

⁶⁴ *Pioneer* (n 12) 50; *Navin Rabeja v Shilpa Jain*, 2020 SCC OnLine NCLAT 46: Company Appeal (AT) (Insolvency) No. 864 of 2019 [50].

B. Critical Analysis of the 2020 IBC Amendment

The 2020 IBC amendment has raised concerns amongst homebuyers that their right as financial creditors is being diluted.⁶⁵ However, a closer perusal reveals that the addition of a minimum threshold could be obliquely beneficial to even the homebuyers. Litigation under the IBC can be expensive and sometimes time-taking as well, as evidenced by the *Bikram Chatterji* judgment and the *Chitra Sharma* judgment.⁶⁶ Homebuyers who have previously approached the NCLT faced problems in producing evidence to prove their claims.⁶⁷ Even when their case was admitted, due to multiple claims and lack of consensus, a successful resolution plan was often not attained leading to liquidation, which again is time consuming.⁶⁸ Therefore, it would be more beneficial for homebuyers to approach the IBC after having exhausted remedies offered to them by RERA. The added threshold requirement under IBC ensures that in circumstances where the default is not genuine or is capable of rectification by means lesser than taking over control of the management of the company, remedy under RERA would be sought. Further, as discussed earlier, unlike other creditors, speculative homebuyers may be prone to derailing a project because of their desire to obtain a refund as opposed to taking possession of the apartments. For instance, in *Navin Raheja v Shilpa Jain*, the applicants refused to take possession of the flat and instead wanted to get back their money.⁶⁹

The failure to attain the threshold may also indicate that in such cases another remedy may be more suitable.⁷⁰ Therefore, the bar created for initiating cases under the IBC has served the purpose of protecting real estate companies and other homebuyers from speculative cases and also ensures that the remedies offered by RERA and IBC are both availed constructively, as per the needs of the case.

Furthermore, the amendment would prevent multiple litigations with respect to the same issue and ensure that individual applicants would not separately approach the tribunal and instead would file an application together.

⁶⁵ Renu Yadav (n 39).

⁶⁶ Sunita Mishra, 'Five Government Measures that Could Revive Realty in 2020' (*Proptiger*, 7 January 2020) <<https://www.proptiger.com/guide/post/challenges-and-solutions-for-indian-real-estate>> accessed 13 April 2020.

⁶⁷ Vijay K Singh, 'Homebuyers Must be Cautious When Approaching NCLT' (*Livemint*, 2 July 2019) <<https://www.livemint.com/money/personal-finance/opinion-homebuyers-must-be-cautious-when-approaching-nclt-1562083251326.html>> accessed 9 June 2020.

⁶⁸ *Ibid.*

⁶⁹ *Navin Raheja* (n 64).

⁷⁰ Ministry of Corporate Affairs, *Report of the Insolvency Law Committee*, 20 February 2020 [24] (Report of the Insolvency Law Committee).

This can also be inferred from the fact that the minimum threshold has been brought about for another category of creditors given under Sections 21(6A) (a) and (b).⁷¹ This category includes the security or deposit holders who are represented by a trustee or agent or an authorised representative, as well as certain classes of creditors which exceed a specified number, and are represented by a Resolution Professional. Therefore, the minimum threshold requirement has been imposed on such creditors who have the same debt interest and are capable of initiating a single application in the case of a default. Apart from curbing multiple litigations, the threshold also helps the creditors to have a stronger case and reduce the financial burden on them for the litigation.

While the authors recognize all these advantages, the amendment still fails to conclusively ensure that both the parties are adequately safeguarded. Two persisting problems that the authors observe in this amendment are the lack of information available to the homebuyers resulting in their inability to reach out to other homebuyers for satisfaction of the threshold and the non-consideration of genuine applications which fail to meet the required percentage or number. These problems have been further dealt with in Part IVA and Part IVB of the paper.

IV. PART III: THE REVERSE CIRP

In the 2020 order in *Flat Buyers Association Winter Hills-77, Gurgaon v Umang Realtech (P) Ltd. through IRP and Ors*,⁷² the NCLAT propounded a modified resolution process for real estate companies.⁷³ While the initial application in the case was made by two homebuyers, several other homebuyers made separate applications later, who subsequently formed the Flat Buyers Association.⁷⁴ The case of the applicants was that the company had inordinately delayed handing over the possession of the flats/apartments in their project named, ‘Winter Hills 77’, and had also not complied with their promise of compensation in case of such delay.⁷⁵ After delving into the

⁷¹ IBC 2016, s 21(6A); The Insolvency and Bankruptcy Code (Second Amendment) Ordinance, 2019, s 3.

⁷² *Flat Buyers Association Winter Hills-77, Gurgaon v Umang Realtech (P) Ltd.*, Company Appeal (AT) (Insolvency) No. 926 of 2019, [12]-[20] (National Company Law Appellate Tribunal).

⁷³ *Umang Realtech* (n 72) 12-20.

⁷⁴ *Umang Realtech* (n 72) 1, 2.

⁷⁵ *Rachna Singh v Umang Realtech (P) Ltd.*, CP No. IB-1564(PB)/2018, decided on 20-8-2019 (NCLT)[6], [7], [8].

Apartment Purchase agreement, the NCLT admitted the application under Section 7 of the IBC.⁷⁶

Before diving into the new resolution process propounded here, it is pertinent to understand two primary principles that the NCLAT has laid down-

- a. At the CIRP stage, the claim of secured financial creditors on the flats/apartments of the corporate debtor does not have a preference over the claims of the homebuyers, who are unsecured financial creditors, for whom the project has been approved.⁷⁷ This principle arises from the equality for all approach underlying the IBC by virtue of which the CIRP of companies must be done while balancing the interests of all the stakeholders.⁷⁸
- b. In the resolution process of a real estate company, the resolution is made project specific⁷⁹ thereby solely maximising the assets of that specific project. Claims of homebuyers of one project of the real estate company cannot be made before the Resolution Professional appointed for another project.⁸⁰ This principle recognizes that defaults made in one project cannot be attributed to other works undertaken by the real estate company. Since the success of every real-estate project depends on a variety of factors like the location of the project, the land, the permissions, labour, etc., non-completion of one project in due time should not hinder the entrepreneurial spirit of real estate companies.

In Reverse CIRP, the promoter of the company himself is given an option to act as a lender, i.e., a financial creditor. The promoter pools in money to ensure the completion of the project. The secured financial creditors are paid from the amount that is paid to the corporate debtor by homebuyers as part of their instalments or for new bookings.⁸¹ This process calls for a deeper analysis in order to understand its implications and its compatibility with the principles of the IBC.

A. UNDERSTANDING THE MERITS OF THE REVERSE CIRP

The modified resolution process for real estate companies can be a valuable move as it solves the problem of conflicting claims of secured and unsecured

⁷⁶ *Rachna Singh* (n 75) 10, 11, 12.

⁷⁷ *Umang Realtech* (n 72) 4.

⁷⁸ *Umang Realtech* (n 72) 4.

⁷⁹ *Umang Realtech* (n 72) 21.

⁸⁰ *Umang Realtech* (n 72) 21.

⁸¹ *Umang Realtech* (n 72) 20, 27.

creditors. The NCLAT, while laying down the purpose of equitable relief to all stakeholders, demonstrated this conflict.⁸² Banks, financial institutions and other NBFCs are secured creditors who can enforce the security held by them in case their loans remain unpaid to them.⁸³ This security is often the flats/apartments of the projects under the real estate companies. At the same time, homebuyers, also want possession of the flats/apartments allotted to them.⁸⁴ In such a situation, the NCLAT realised that the secured financial creditors would push for liquidation of the company by voting against resolution plans, to ensure preference in distribution of assets under Section 53 of the IBC, instead of trying to save the project.⁸⁵ This is against the objective of using liquidation, only as a last resort.⁸⁶ The Reverse CIRP balances the interests of both these classes of creditors.

The *Umang Realtech* order rightly acknowledged that the homebuyers, unlike other financial creditors, do not have the commercial wisdom to decide which resolution plan is most beneficial to them.⁸⁷ The Reverse CIRP remedies this as well since it maintains status quo in the management of the company but ensures that the promoter pools in funds to complete the project. Moreover, it has been observed that resolution applicants are not interested in an abandoned project due to multi-level complexities.⁸⁸ This makes the CIRP of real estate companies increasingly difficult. It can be observed that very few resolution plans have been approved where the real estate sector is concerned.⁸⁹ The Reverse CIRP gives a chance to the promoters of the real estate companies to revive the project, without automatically displacing them from the working of the company. The project specificity also ensures that only the assets under that specific project are brought in for resolution, thus, eliminating any unnecessary hardship for the company.

B. Critically Analysing the possible contentions against the Reverse CIRP

At the outset, it is observed that the Reverse CIRP process propounded in the Order is one which is shaped by the facts of the case. It cannot therefore be a perfect prototype for other real estate insolvency cases. To use or not to use the Reverse CIRP will be a fact-dependent decision. The Reverse CIRP is

⁸² *Umang Realtech* (n 72) 10, 11.

⁸³ *Umang Realtech* (n 72) 10, 11.

⁸⁴ *Umang Realtech* (n 72) 10, 11.

⁸⁵ *Umang Realtech* (n 72) 4.

⁸⁶ *Swiss Ribbons* (n 20) 11; *Pioneer* (n 12)29.

⁸⁷ *Umang Realtech* (n 72) 8.

⁸⁸ *Mondal* (n 34).

⁸⁹ *Mondal* (n 34).

like a trial resolution process. On failure of resolution by the Reverse CIRP, the NCLAT proceeds with the normal CIRP process.

The authors will investigate whether the Reverse CIRP is compatible with the principles of the IBC. The authors have laid down three possible contentions against it and critically studied them.

1. In allowing the promoter to act as a financial creditor, the NCLAT has contravened the purpose of Section 29A.

Section 29A was inserted through the 2017 amendment to the IBC, to curb defaulting promoters from getting a back-door entry to their companies by submitting a resolution plan.⁹⁰ It disqualifies some persons from being resolution applicants.

To begin with, it is important to note that the Reverse CIRP in fact does not arrive at the stage of inviting resolution plans. As per Section 5(25) and 5(24), a resolution plan is one which is made pursuant to an invitation by the Resolution Professional calling for them under Section 25(2)(h).⁹¹ Under the Reverse CIRP, the Interim Resolution Professional does not make such an invitation, instead it gives an opportunity to the promoters of the company to step in and finance the resolution without entertaining any third-party plans. The Reverse CIRP is an attempt by the NCLAT and the stakeholders to internally resolve the default. It is when such a resolution fails that the normal CIRP process takes way and resolution plans are called. As a result, since the Reverse CIRP is a trial stage before the normal CIRP, the question of Section 29A does not arise.

However, since the Reverse CIRP is not currently found in the scheme of the IBC, it is necessary to see if it leads to the circumvention of the principles mentioned in it. The authors will investigate whether the Reverse CIRP contradicts the essence and purpose of Section 29A.

In *ArcelorMittal India (P) Ltd. v. Satish Kumar Gupta*⁹², the Supreme Court emphasized on the need to give a purposive interpretation to Section 29A.⁹³ The objective of Section 29A is to prevent the initial defaulters of the corporate debtor from re-gaining control of the company, to protect the

⁹⁰ Shivangi Pathak and Aherar Patel, 'Critical Analysis of Section 29A' (*IBC Laws*) <<https://ibclaw.in/critical-analysis-of-section-29a-of-the-code/>> accessed 14 April 2020.

⁹¹ IBC 2016, s5(25), s 5(24).

⁹² *Arcelor Mittal India (P) Ltd. v Satish Kumar Gupta*, (2019) 2 SCC 1 [27].

⁹³ *Ibid.*

creditors.⁹⁴ Uppal Housing Pvt. Ltd. is admittedly the promoter of Umang Realtech.⁹⁵ Therefore, it falls within the ambit of Section 29A, as evidenced by Clause (c) and Clause (g).⁹⁶

In the Umang Realtech order, the home buyers themselves wanted the promoter to pool in money to save the project.⁹⁷ The secured financial creditors also agreed to this framework.⁹⁸ It can be implied here that if the Committee of Creditors would have been formed, the promoter's plan would have been accepted. However, although the Committee of Creditors is given wide powers to assess the viability and feasibility of resolution plans, the proviso to Section 30(4) holds that the Committee of Creditors cannot approve a resolution plan made by an ineligible resolution applicant.⁹⁹

The NCLAT order states that the promoter is to, 'stay out of the CIRP other than to act as a lender'.¹⁰⁰ While there is no further explanation for what is meant by to 'stay out of the CIRP', it can be inferred that the Interim Resolution Professional will continue to have control of the corporate debtor, even though the promoter is pooling in funds. Moreover, to ensure the rightful use of the funds being brought in by the promoter and the homebuyers, every payment must be made by a cheque, signed by the authorised person of the company as well as the Interim Resolution Professional.¹⁰¹ The promoter has to cooperate with the Interim Resolution Professional during the resolution process.¹⁰²

However, despite the NCLAT's attempt to keep the promoter out of the resolution process, it has called on him to use his expertise to assist the Interim Resolution Professional in the resolution process and to lay down how and when the project will be completed.¹⁰³ This implies that the promoter

⁹⁴ *Ibid* [56].

⁹⁵ *Umang Realtech* (n 72) 13.

⁹⁶ IBC 2016, s 29A(c), s 29A(g).

Section 29A(c) makes ineligible promoters of corporate debtors which have a non-performing account at the time of submission of the resolution plan, and at least a period of one year has lapsed from the date of classification of the account as a non-performing account till the date of commencement of the CIRP of the corporate debtor.

Section 29A(g) makes ineligible promoters of corporate debtors in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the NCLT under the IBC.

⁹⁷ *Umang Realtech* (n 72) 1.

⁹⁸ *Umang Realtech* (n 72) 13.

⁹⁹ IBC 2016, s 30(4).

¹⁰⁰ *Umang Realtech* (n 72) 26.

¹⁰¹ *Umang Realtech* (n 72) 26.

¹⁰² *Umang Realtech* (n 72) 26.

¹⁰³ *Umang Realtech* (n 72) 15.

will not only perform the tasks of a financier but also take decisions about the resolution process. While in all other IBC proceedings, the power of the management is completely suspended, the NCLAT in this Order permitted the promoters to access the company accounts with certain conditions.¹⁰⁴ Therefore, although the NCLAT order provides for certain safeguards, it gives a way for the promoter to be involved in the corporate debtor's management during the resolution process. In *Chitra Sharma*, the Supreme Court refused to make an exception to allow the promoters to take control of the resolution. The Court opined that Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance.¹⁰⁵ To permit promoters to participate in the resolution process would undermine the salutary object and purpose of the IBC.¹⁰⁶

As beneficial as it may be, the Reverse CIRP would be violative of Section 29A, a strictly adhered to principle of the IBC.

2. The Order remains ambiguous about the creation of the Committee of Creditors in a Reverse CIRP.

The establishment of the Committee of Creditors gives the creditors a body through which they can represent their demands to the Resolution Professional. Since the formation of the Committee of Creditors and the voting rights given to it are important facets of the IBC, taking it away completely seems like a massive deviation.

In the *Umang Realtech* order, the homebuyers as well as the other secured financial creditors themselves wanted the promoter to pool in funds to revive the project, and therefore, no injustice was done even if no Committee of Creditors was created.¹⁰⁷ However, such a deviation from the scheme of the IBC should not be a precedent. A conflict in the demands made by different group of creditors can only be addressed if a Committee of Creditors is formed.

In *Committee of Creditors of Essar Steel India Ltd. v Satish Kumar Gupta*, the Supreme Court emphasized that the Committee of Creditors has the supreme power in making decisions about whether or not to put the corporate debtor back on its feet.¹⁰⁸ Moreover, the legislative history of

¹⁰⁴ *Umang Realtech* (n 72) 26.

¹⁰⁵ *Chitra Sharma* (n 21) 13.

¹⁰⁶ *Chitra Sharma* (n 21) 30.

¹⁰⁷ *Umang Realtech* (n 72) 1, 2.

¹⁰⁸ *Committee of Creditors of Essar Steel India Ltd. v Satish Kumar Gupta*, 2019 SCC OnLine SC 1478 [79].

the IBC demonstrates the legislature's intention of giving the Committee of Creditors paramount status without judicial intervention.¹⁰⁹ The Committee of Creditors is important not only for voting to decide what happens to the corporate debtor, but also for holding the Resolution Professional accountable.¹¹⁰ The Insolvency Law Committee highlighted that the Committee of Creditors approves all the actions that a Resolution Professional takes and ensures that he does not carry out his duties unfairly to any creditor.¹¹¹ As a result, these functions remain unperformed when a Committee of Creditors is not formed. Therefore, the Reverse CIRP must not contravene this cardinal requirement of forming a Committee of Creditors under the IBC.

3. The resolution process is made project specific which is not compliant with the IBC.

A practical study of the working of real estate companies shows that a separation of projects by the creation of SPV¹¹² is widely found in the real estate market.¹¹³ A SPV is like an independent arm of the parent company, through which the company carries on high risk projects, so as to isolate its liabilities under that project from other projects of the company.¹¹⁴

As per Section 18 of the IBC, all the assets over which the company has ownership rights are to be brought under the control of the Resolution Professional.¹¹⁵ In the *Umang Realtech* case, Umang Realtech Pvt Ltd. is the subsidiary of the Uppal Housing Pvt Ltd,¹¹⁶ which follows a SPV framework. Therefore, the project undertaken by Umang Realtech Pvt Ltd, against which the CIRP was started ('Winter Hills 77'), was rightly separated from the other projects of the parent company. Moreover, all other projects undertaken by Umang Realtech Pvt Ltd were completed at the time of the case¹¹⁷ and therefore, 'Winter Hills 77' was the only project under the subsidiary company. As a result, the project specificity followed in this Order was in

¹⁰⁹ *Essar Steel* (n 108) 79.

¹¹⁰ Report of the Insolvency Law Committee (n 70) 49-50.

¹¹¹ *Ibid.*

¹¹² Special Purpose Vehicle.

¹¹³ Krzysztof Sadecki, 'Investing in Real Estate through an SPV—A Case Study' *Businessman Today* (20 February 2017) <<http://www.businessmantoday.us/investing-in-real-estate-through-an-spv-a-case-study/>> accessed 14 April 2020.

¹¹⁴ Corporate Finance Institute, 'Special Purpose Vehicle', <<https://corporatefinanceinstitute.com/resources/knowledge/strategy/special-purpose-vehicle-spv/>> accessed 14 April 2020.

¹¹⁵ IBC 2016, s18.

¹¹⁶ *Umang Realtech* (n 72) 13.

¹¹⁷ 'Umang Realtech Private Ltd', (PropTiger) <<https://www.proptiger.com/umang-realtech-102867>> accessed 14 April 2020.

compliance with the IBC. Where the companies have established such SPVs, as aforesaid, the insolvency process evidently becomes project-specific.

With the recent crisis in the real estate market, the authors expect that project-level investment will be increasingly preferred, resulting in a SPV framework in the coming times.¹¹⁸ However, in the event where a SPV structure is not followed, while the decision to carry on insolvency proceedings in a project-specific manner is one which may go beyond the boundaries of the IBC at present, the legislature or the judiciary can legalise the same, by considering its advantages. This will be further discussed in Part IV D of the paper.

C. Conclusive Findings on the Reverse CIRP:

The Reverse CIRP is a tool used by the NCLAT to circumvent the drawbacks that arise in the scheme of the IBC, while deciding some real estate insolvency cases. While the authors recognize that the Reverse CIRP has its merits, at present it does not have a genesis in the IBC. The Supreme Court in the *Pioneer* judgment, while discussing the sphere of the IBC, held that the focus of the IBC is to rehabilitate a corporate debtor by replacing its management by means of a resolution plan.¹¹⁹ The NCLAT by propounding the Reverse CIRP overstepped this sphere of the IBC. The Reverse CIRP is therefore, a modified process propounded out of judicial innovation and overpowers the legislative mandate of the IBC.

The Supreme Court in *Essar Steel* has held that the NCLAT is not a court of equity and must therefore, strictly work within the scheme of the IBC.¹²⁰ At the same time, the Supreme Court has also recognized that the IBC is an experimental legislation and ingenuity in its enforcement to satisfy its underlying objectives are necessary.¹²¹ The *Umang Realtech* case has not been appealed in the Supreme Court as of today. If the case is put to test before the Supreme Court and the Supreme Court upholds it, the Reverse CIRP will remain a tool of judicial innovation introduced outside the legislative mandate of the IBC. The authors will discuss possible ways by which the Reverse CIRP can be brought within the ambit of the IBC, without violating its underlying principles in Part IV of the paper.

¹¹⁸ Shrija Agrawal, 'Why SPV is a Preferred Route for Real Estate Investors' (*VC Circle*, 12 August 2008) <<https://www.vccircle.com/why-spv-preferred-route-real-estate-investors/>> accessed 17 April 2020.

¹¹⁹ *Pioneer* (n 12)29.

¹²⁰ *Essar Steel* (n 108) 45.

¹²¹ *Swiss Ribbons* (n 20) 120.

V. PART IV: PROPOSED FRAMEWORK

The 2020 IBC amendment and the 2020 NCLAT order are both steps in the right direction to harmonise the homebuyers and developers under the IBC. However, both these developments suffer from certain glaring predicaments which raise concerns about their sustainability in law and in practice.

The 2020 IBC amendment has created a minimum threshold for homebuyers to file a suit under the IBC, in order to bar insincere suits. However, considering the practical impediments it raises, it seems that even genuine cases would not be able to cross this bar. Similarly, the 2020 NCLAT order is laudable as it solves the conflicting interests of homebuyers and secured creditors. However, it raises serious concerns as it could lead to the circumvention of vital principles of the IBC. The authors believe that these shortcomings call for certain modifications in the law as it stands now. In pursuance of this, the authors, in this Part, shall make some propositions in order to redress the persisting issues in the existing law.

A. Assisting the Homebuyers to Attain the Minimum Threshold

As highlighted in Part II of this paper, the homebuyers face some limitations due to the lack of information which is available to them, hindering them from initiating an application successfully after the coming of the 2020 IBC amendment. A necessary requirement for satisfying the threshold is for homebuyers to have access to the contact details of other homebuyers. However, currently, this information is unavailable to them.

To assist the homebuyers in bringing other homebuyers together in satisfying the threshold, the authors propose the following:

1. To follow the procedure laid out under the Code of Civil Procedure, 1908 for class-action suits

Since an individual homebuyer would find it difficult to reach out to the other homebuyers without the prerequisite information, the tribunals must assist them. Under Order I, Rule 8 of the Code of Civil Procedure 1908,¹²² where a class action suit is made by a person, the court makes a personal service or a public advertisement to invite all other aggrieved persons who

¹²² The Code of Civil Procedure 1908, Order I, r 8.

have an interest in the suit. This procedure is also used in the Consumer Protection Act, 1986¹²³ and the Consumer Protection Act 2019.¹²⁴

Similarly, while respecting the threshold propounded by the 2020 IBC amendment, the authors suggest that, the NCLT can allow the initiation of the application of insolvency by even a single homebuyer. The NCLT can then make a public announcement of this application and invite aggrieved persons to join in to satisfy the threshold. Till the threshold is met, the application shall only remain at a pre-admission stage. Once more applications are received and the threshold is met, the admission stage under Section 7 shall take its natural course. The legislature should permit such a procedure by bringing an amendment to include a pre admission stage for real estate insolvency cases where the threshold is not met. Such a stage will assist the homebuyer in bringing together all persons aggrieved by the real estate developer.

2. Increasing the amount of information available from the RERA Website

The RERA Website is the most easily accessible and comprehensive source of information for a homebuyer regarding any project. However, some states have not operationalised their websites yet.¹²⁵ Even in states where the websites are operational, as of now, they do not show the name and the contact details of the homebuyers.

The RERA website helps homebuyers to garner information to initiate an application under the IBC. Therefore, the concerned state governments need to expedite the setting up of these websites. Further, the government should bring about measures to ensure that the homebuyers are able to know the number of homebuyers in a given project and their contact details to reach out to them. This could ideally be done by bringing about an amendment to RERA. This amendment should require that the developers make the contact details of the homebuyers available on the RERA website. In order to take care of the privacy concerns of these homebuyers, the government could ensure that the information reaches only a limited number of people (i.e. the other homebuyers and the developer) like in the case of IU.¹²⁶ The access to this information could be restricted by way of a password and the requirement

¹²³ The Consumer Protection Act 1986, s 13.

¹²⁴ The Consumer Protection Act 2019, s 38(11).

¹²⁵ Implementation Progress Report (n 56).

¹²⁶ Insolvency and Bankruptcy Board of India (Information Utilities) Regulations 2017, reg 23.

to give the RERA project registration number. This is also in line with the order of the NCLT, Allahabad Bench which held that publication of the details of the creditors is not in contravention to their right of privacy, as it serves the vital interests of the parties and the discipline of the IBC.¹²⁷

B. Discretionary admission of some applications which fail to satisfy the threshold

Another issue with the minimum threshold clause is that it does not cater to the circumstances in which the application is genuine but is falling short of the requisite numbers. There have been various cases where the bona fide claims of homebuyers have been rejected due to a lack of evidence.¹²⁸ In light of this, the authors would like to suggest that the government may grant the tribunals a discretionary right to accept some applications which do not fulfil the required numbers. A similar provision is given to the courts in case of class action suits under the Indian Companies Act, 2013, which allows the court to accept applications even if they do not meet the prescribed number.¹²⁹ In the *Cyrus Mistry* case¹³⁰ the NCLAT had clarified that such a discretion must only be exercised in exceptional circumstances. The same principle could be used for insolvency applications, thereby ensuring that it would not defeat the purpose of the amendment.

C. Fact-based enquiry at the stage of admission for real estate insolvency applications:

As per Section 3(12) of the IBC, a default comes into existence when debt becomes 'due and payable', i.e. the time decided in the contract for payment, has arrived.¹³¹ The NCLT admits a case once the IU, contentions of the creditors and the corporate debtor show the existence of an outstanding debt.¹³² In the admission order for *Innovative Industries Ltd. v ICICI Bank*, it was held that the NCLT only has to ascertain the existence of a debt due and payable, and not deliberate on its extent and composition.¹³³ This position has been consistently followed across all insolvency cases.

¹²⁷ *IDBI Bank Ltd. v Jaypee Infratech Ltd.*, Company Application No. 225/2018 [21]-[23] (National Company Law Appellate Tribunal).

¹²⁸ Vijay K Singh (n 66).

¹²⁹ The Indian Companies Act 2013, s 244.

¹³⁰ *Cyrus Investments(P) Ltd. v Tata Sons Ltd.*, 2019 SCC OnLine NCLAT 858: Company Appeal (AT) No. 268 of 2018 [6].

¹³¹ IBC 2016, s 3(12).

¹³² *SBI v Western Refrigeration (P) Ltd.*, 2017 SCC OnLine NCLT 1766: CP (IB) NO 17/7/ NCLT/AHM/2017 [17].

¹³³ *Innovative Industries Ltd. v ICICI Bank*, (2018) 1 SCC 407 [30].

The authors however, propose that admission applications for real estate insolvency cases should be treated differently. These applications should not only ascertain an outstanding payment, but also make out the need for corporate financial restructuring under the CIRP process. Such an enquiry must be made within the timeline given under the IBC for admission applications i.e. it should not exceed 14 days.¹³⁴ The NCLT should not engage in a long-drawn pre-admission exercise which will defeat the object of the IBC.¹³⁵ Such a fact-based enquiry will help in separating the jurisdictions of the NCLT and the RERA tribunal and further reduces the burden of the NCLT.

D. Use of the Reverse CIRP in Specific Circumstances

The Reverse CIRP, as discussed in Part III, has been able to unite the interests of the homebuyers with the other financial creditors. It also ensures that the project does not come to a grinding halt due to the insolvency application. Although the Reverse CIRP conflicts with certain principles of the IBC, it balances the interests of all the stakeholders and preserves the corporate debtor as a going-concern, both of which are indeed objectives of the IBC.¹³⁶

However, presently, the Reverse CIRP does not find a place in the IBC. The *Umang Realtech* order has not been appealed, and Reverse CIRP remains a judicial innovation, unsupported by the IBC. Despite this lack of legislative backing, other cases have started making use of the Reverse CIRP.¹³⁷

The authors believe that there are considerable benefits in validating the Reverse CIRP and therefore, suggest that an amendment be made to the IBC to that effect. This would serve the dual purpose of making the Reverse CIRP well-grounded in the IBC and ensuring that the ambit of the process is clearly demarcated. Currently, as there is no expressly defined protocol for its application, the Reverse CIRP may be used for cases which do not satisfy the factual criteria of *Umang Realtech*. Such an application of the Reverse CIRP may significantly undermine the legislative mandate of the IBC.

The authors propose that the amendment should clearly lay down the essential requirements for the application of the Reverse CIRP- such that all the creditors must agree to the promoter pooling in funds to save the project, and such that the promoter's involvement in the CIRP should not be

¹³⁴ IBC 2016, s 7(4).

¹³⁵ *Allahabad Bank v Poonam Resorts Ltd.*, Company Appeal (AT) No. 13043 of 2019 [8] (National Company Law Appellate Tribunal).

¹³⁶ IBC 2016, Preamble; *Swiss Ribbons* (n 20) 84.

¹³⁷ *Rajesh Goyal v Babita Gupta*, Company Appeal (AT) No. 1056 of 2019 (National Company Law Appellate Tribunal).

in violation of Section 29A. The amendment should further provide that the Committee of Creditors should be constituted irrespective of complete consensus among the creditors, as it has the important function of overseeing the work of the Resolution Professional and the process as a whole.¹³⁸

Such an amendment would be able to reconcile judicial innovation with the legislative mandate of the IBC.

E. Project Specificity in a Non-SPV framework:

In the rare case where a real estate company does not operate in a SPV framework, or where the SPV also has many real estate projects under it, a question arises about whether the insolvency process can be restricted to that particular project. The authors suggest that such a project-specific framework should be brought in for all real estate insolvency cases and shall attempt to explain its positive implications.

Prior to RERA, 2016, real estate companies were permitted to divert funds of one real estate project to the other.¹³⁹ This implies that the funds of homebuyers of Project A could be instead used for Project B. Such a system was not in the best interest of homebuyers as real estate companies could prioritise their projects and exchange funds. This was substantially stopped after the coming of RERA, 2016. As per Section 4(2)(l)(D) of the RERA, 2016, 70% of the funds given by a homebuyer for one project must compulsorily be used for securing the cost of land and construction of that project.¹⁴⁰ This ensures that the money is used for the project that the homebuyer wishes to finance. Therefore, since a substantial amount of the funding has been separated, to permit the use of assets of one project in the resolution of another, will affect the home buyers of the viable project adversely.

The authors therefore, suggest that where a real estate company does not operate within a SPV framework, the funds which are separated for the use in one project should not be used for the resolution of another. Therefore, in a non-SPV framework also, project specificity should be maintained to the extent of funds which are separated by law (like the RERA under Section 4(2)(l)(D)) or as inferred from the company's balance sheet, and the terms

¹³⁸ Report of the Insolvency Law Committee (n 70) 49-50.

¹³⁹ Sunil Dhawan, 'Builders Can Keep Funds in Separate Account instead of Escrow Account: Will RERA Prevent Misuse?', *The Economic Times* (19 April 2017) <<https://economic-times.indiatimes.com/wealth/real-estate/builders-can-keep-funds-in-separate-account-instead-of-escrow-account-will-rera-prevent-misuse/articleshow/58242934.cms?from=mdr>> accessed 14 April 2020.

¹⁴⁰ RERA 2016, s 4(2)(l)(D).

and conditions of the loan agreements with banks and financial institutions. This entails that common funds of the real estate company, which are not specifically allotted for a project, can be used in the resolution process of any project under the company, in compliance with Section 18 of the IBC. The NCLAT order in *Umang Realtech* also hints at such a framework when it opined that project-specificity can be done where the creditors, land, and other such factors are different.¹⁴¹ To incorporate this proposal, the legislature can add a proviso to Section 18 of the IBC stating that assets specific to a real estate project should not be used for the resolution of another project of the same company.

F. Unsecured Homebuyers during Liquidation

The 2018 IBC amendment concretized the status of homebuyers as financial creditors. However, what is still unclear is whether they are secured or unsecured financial creditors.¹⁴² This question is of ample importance when it comes to liquidation. Section 53 of the IBC provides for a waterfall mechanism i.e. an order of priority for distributing the liquidation assets between the creditors.¹⁴³ According to Section 53, the order of priority, places workmen, secured financial creditors and employees above unsecured financial creditors.¹⁴⁴ As highlighted earlier, very few real estate cases have achieved resolution and most of them end up going into liquidation.¹⁴⁵ Therefore, the order of priority under Section 53 is critical for home buyers.

There exists a view that the Flat/Apartment Purchase agreements reflect whether home buyers are secured or unsecured creditors.¹⁴⁶ Certain Flat/Apartment-Purchase agreements may place the home buyers in a position of secured financial creditors. Under such circumstances, the home buyers are in a higher priority to realise their assets in liquidation, in accordance

¹⁴¹ *Umang Realtech* (n 72) 21.

¹⁴² Aditya Khadria and Sivaprakasam Babu, 'Are Homebuyers Secured Financial Creditors or Unsecured Creditors under IBC', (*The Economic Times*, 10 August 2019) <<https://economictimes.indiatimes.com/wealth/real-estate/are-home-buyers-secured-financial-creditors-or-unsecured-creditors-under-ibc/articleshow/65332287.cms?from=mdr>> accessed 4 June 2020; Abhinav Dixit, 'Are Homebuyers Secured Financial Creditors or Unsecured Financial Creditors under IBC?', (*Centrik*, 17 July 2020) <<https://www.centrik.in/blogs/are-homebuyers-secured-financial-creditors-or-unsecured-financial-creditors-under-ibc>> accessed 4 June 2020.

¹⁴³ IBC 2016, s 53.

¹⁴⁴ *Ibid.*

¹⁴⁵ Vijay K Singh (n 66).

¹⁴⁶ Banikinkar Pattanayak, 'Bankruptcy Code: Are Homebuyers Secured Financial Creditors? Read Builder Agreement Carefully' (*The Financial Express*, 12 July 2018) <<https://www.financialexpress.com/market/exclusive-bankruptcy-code-are-homebuyers-secured-financial-creditors-read-builder-agreement-carefully/1241276/>> accessed 13 June 2020.

with Section 53. However, since all such agreements are standard forms of contract with little to no negotiation power on the side of the buyer, it is extremely rare for the homebuyers to be secured creditors.¹⁴⁷ For home buyers who are unsecured financial creditors, Section 53 raises concerns as it places them much lower on the priority list. The authors will first attempt to understand the rationale behind the priority given under Section 53.

The celebrated *Swiss Ribbons* judgment has highlighted the reason for the order of priority under Section 53, stating that secured financial creditors like banks and financial institutions have the ability to further lend the money received to the economy.¹⁴⁸ This is in compliance with the objective of the IBC to promote entrepreneurship by ensuring the availability of credit in the market.¹⁴⁹ If all homebuyers are given preference over other secured creditors or are placed at par with them under Section 53, it may adversely affect the willingness of institutional lenders to provide credit.¹⁵⁰ This is because a huge chunk of the liquidation assets will be taken by the homebuyers, due to their number and cumulative amount owed to each of them. The secured creditors would find themselves receiving much lesser, leaving them at a severe loss. This would further add to the liquidity crunch in the real estate sector.¹⁵¹

Having dwelled upon the merits of the mechanism provided for in Section 53, the authors are of the opinion that under some circumstances, the banks and other secured financial creditors must not be given priority over unsecured homebuyers. The *Bikram Chatterji* judgment is significant here. In this case, the promoters of the real estate company had siphoned off the funds of the homebuyers for personal expenditures resulting in several defaults.¹⁵² The Noida and Greater Noida authorities as well as the banks and financial institutions had a security interest on the flats booked by the homebuyers.¹⁵³ Under Section 53 of the IBC, these secured financial creditors would have the first priority on the assets of the corporate debtor. This would have left the homebuyers with a meagre or no amount. The homebuyers therefore, petitioned the Supreme Court fearing the loss of their investments under Section 53 in the NCLT proceeding against the real estate company.

¹⁴⁷ *Rachna Singh* (n 75) 12.

¹⁴⁸ *Swiss Ribbons* (n 20) 84.

¹⁴⁹ *Swiss Ribbons* (n 20) 84.

¹⁵⁰ Rohan Abraham, 'Tepid Demand, Risk-Averse Bank Lending Hampers Real Estate Recovery' (*Money Control*, 30 July 2018) <<https://www.moneycontrol.com/news/business/real-estate/tepid-demand-risk-averse-bank-lending-hampers-real-estate-recovery-2781611.html>> accessed 13 June 2020.

¹⁵¹ Ashwini Kumar Sharma (n 57).

¹⁵² *Bikram Chatterji* (n 19) 147.

¹⁵³ *Bikram Chatterji* (n 19) 5, 6.

It was found that some security interests of the banks and Noida and Greater Noida authorities were found to be not in compliance with Section 11(4)(h) of the RERA, 2016.¹⁵⁴ As per Section 11(4)(h) of the RERA, 2016, no mortgage or charge on a flat shall be created after an agreement for sale is executed. Where any such charge is created, the homebuyer's rights and interest in the property will not be affected. Therefore, the Supreme Court upheld this provision and ensured that the homebuyers are not adversely affected by a charge created on their flats after the agreement to sale was executed.¹⁵⁵

Moreover, the Supreme Court observed that the banks had failed to conduct due diligence and ensure that the loan amount was used for the purposes of the project.¹⁵⁶ According to the Court, the Noida and Greater Noida authorities also were in collusion with the promoters.¹⁵⁷ The Supreme Court held:

Bankers have failed to ensure and oversee that the money was invested in the projects. It was diverted elsewhere as rightly found by the Forensic Auditors. Thus, no charge can be said to have been created by bank loans on the projects....Though they (homebuyers) may not be secured creditors, they have a right to be treated in accordance with the law, fairly and they cannot be subjected to a fraudulent action by the promoters, that too in connivance with the bankers and officials of the Noida and Greater Noida authorities.¹⁵⁸

Due to all these factors, the Supreme Court decided that the mortgage created by the bankers or the dues of the Noida and Greater Noida authorities shall not affect the rights or interests of the home buyers.¹⁵⁹ The Supreme Court attached the personal properties of the promoters to compensate the banks and the Noida and Greater Noida authorities, while securing the rights of the home buyers on the flats by appointing a management consulting company to ensure completion of the project.¹⁶⁰

Although this decision did not directly delve into the validity of the order of priority under Section 53, it can be inferred that the Supreme Court took

¹⁵⁴ RERA 2016, s 11(4)(h).

¹⁵⁵ *Bikram Chatterji* (n 19) 134.

¹⁵⁶ *Bikram Chatterji* (n 19) 84.

¹⁵⁷ *Bikram Chatterji* (n 19) 77.

¹⁵⁸ *Bikram Chatterji* (n 19) 127.

¹⁵⁹ *Bikram Chatterji* (n 19) 134.

¹⁶⁰ *Bikram Chatterji* (n 19) 150-54.

notice of the fact that the home buyers would have lost their investments if the company would have reached liquidation in the NCLT proceeding.¹⁶¹

The authors therefore propose that firstly, the NCLT must ensure that the security interest of secured creditors is in compliance with Section 11(4)(h) of the RERA. In other words where the secured creditors had secured their charge on the flats of the homebuyers after the agreement to sale was executed, the homebuyers should be given preference over them under Section 53. This can be brought about by the judiciary by harmoniously construing the RERA and the IBC.¹⁶²

Secondly, where banks or other secured creditors have failed in diligently overseeing how the loan amount was used and colluded with the promoter, the rights of the homebuyers should be given preference in realising from the liquidation assets under Section 53. The Supreme Court in the *Bikram Chatterji* case opined that since the homebuyers are not a party to the agreement between the banks and the Noida and Greater Noida authorities with the developers, if they want to impose a charge on the flats of the homebuyers, it is their duty to ensure that the money is invested in the project itself.¹⁶³ The same principle should be upheld by the judiciary while deciding the order of priority under Section 53.

Therefore, the judiciary under the aforesaid circumstances should not permit the banks and financial institutions to hold preference over unsecured homebuyers during liquidation under the IBC.

VI. CONCLUSION

The real estate sector is of supreme significance for any economy. Due to conflicting interests, the two primary stakeholders of the real estate sector, the developers and the homebuyers, have remained irreconcilable under the IBC. The authors through this paper have attempted to identify their differences and have proposed a framework to help reconcile them.

It is a well settled principle in jurisprudence that every right must be accompanied with an appropriate remedy. The 2020 IBC amendment poses a serious concern for homebuyers regarding access to their legal remedy. As discussed in Part II of the paper, the threshold introduced by the 2020

¹⁶¹ *Bikram Chatterji* (n 19) 7.

¹⁶² *Pioneer* (n 12) 86.

¹⁶³ *Bikram Chatterji* (n 19) 127.

IBC amendment causes significant inconveniences to homebuyers. It hampers their ability to exercise their rights as financial creditors. To achieve the threshold's true purpose, the loopholes need to be plugged.

It is often said that while law should be well-defined, it should not be rigid and should have enough room for discretion. This permits liberal steps to be taken within the confines of the legal system after taking into account the circumstances of the case. However, it is also important to respect the legislative mandate. While the Reverse CIRP proves to be beneficial to balance the interests of all stakeholders, it currently contravenes vital principles of the IBC. What is required to remedy this is a clearly defined protocol within which the Reverse CIRP can be used.

The real estate sector has been plagued with delays, defaults and fraud. More so, with the outbreak of the pandemic, it is expected that the economy will face a bitter contraction of economic activity, resulting in a recession.¹⁶⁴ Lately, the Government announced the Covid-19 economic package which included an extension given to real estate companies to complete their projects.¹⁶⁵ This has added to the long-standing conflict between the two. Thus, at this stage, it becomes crucial to balance the interests of the stakeholders. By strengthening the compatibility between the developers and the homebuyers under the IBC, entrepreneurial spirit of the developers as well as the investment motivation of the home buyers will be encouraged. Taking a cue from Raghuram Rajan,¹⁶⁶ the legislature and the judiciary should take measures before the fire engulfs the entire Indian economy.

¹⁶⁴ Sugata Ghosh, 'How Coronavirus May Cause Legal Wrangles' *The Economic Times* (26 March 2020) <<https://m.economictimes.com/news/politics-and-nation/how-coronavirus-may-cause-legal-wrangles/articleshow/74815141.cms>> accessed 14 April 2020.

¹⁶⁵ Priolker (n 5).

¹⁶⁶ Rajan (n 1).

CASE NOTE: GENERAL MOTORS OVERSEAS CORPORATION V ACIT – (ITAT MUMBAI)¹

*Pragya Kaushik**

A very important concept taught in international taxation is the interpretation of ‘make-available’ vis-à-vis the concept of ‘Fee for Technical Services’. The term ‘make available’ is found in the definition of FTS in many DTAA’s. The meaning of this term ‘make available’ is a hotly debated issue across our country – various interpretations of this term have been given by multiple High Courts and tax tribunals with absolutely no clarity on which interpretation should be considered as the ultimate and final interpretation of this term. Further, there is also no clarification on the interpretation of this term from the Indian Supreme Court or the law makers. One interpretation did, over the years, find acceptance by multiple High Courts and tribunals. In March 2020, however, ITAT Mumbai deviated from this generally accepted interpretation while deciding the General Motors case. By devising its own interpretation of the concept, ITAT Mumbai added yet another dimension to this long and complicated debate on the interpretation of ‘make available’. This article provides a background to this debate and then discusses the interpretation devised in the General Motors case. The article analyzes the impact of this ITAT Mumbai decision on the taxpayers and Revenue and argues that this new interpretation seems to be unnecessarily harsh on the taxpayers. In the General Motors case, the application of Section 44D, Income Tax Act vis-à-vis FTS was also an issue which was briefly dealt with by ITAT Mumbai. Hence, this article will also look at the problems that may arise when we try to understand this entire debate on interpretation of ‘make-available’ in the light of the application of Section 44D, ITA. In conclusion, the article reiterates the need for a clarification from the lawmakers or the Supreme Court on all these issues highlighted in the article.

* I am deeply grateful to Dr. (Prof.) Nigam Nuggehalli for his constructive suggestions and unwavering guidance throughout the process of writing of this case note.

¹ MANU/IU/0432/2020 (ITAT Mumbai).

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INTRODUCTION

‘Fee for Technical services’ (“FTS”), or payment given for technical services rendered, as a part of various business arrangements between residents and non-residents, is an important concept in International Taxation. In this case comment, we are concerned with one kind of business arrangement where a non-resident company sends some of its employees to an associated enterprise (for example, an Indian subsidiary) that is an Indian tax resident. These employees are sent to the Indian enterprise in a secondment arrangement wherein the employees (also called ‘secondees’) have the responsibility of imparting technical training to the employees of the Indian company. This training is usually for quality control purposes and the secondees also perform other associated functions such as management. In such an arrangement, the salaries and other expenses of the secondees are paid to the secondees by the non-resident entity and these salaries and other expenses are then charged by the non-resident company from the Indian company. These amounts which are thus paid by the Indian company to the foreign company are then presented by the foreign company as business income or reimbursements or FTS, as per their tax planning requirements.

The situation we are concerned with in this case note is where there is such a secondment arrangement and the Revenue wishes to treat these payments as FTS and the assessee (foreign company) insists otherwise (for example, the assessee may want to treat these payments as business profits instead of FTS), because the assessee incurs a greater tax liability if such payments are treated as FTS.² The issue which then plagues the judiciary is whether such payments can be

² Usually, the Indian companies in such situations are obligated to withhold the taxes payable by the foreign companies on these payments made by the Indian companies.

classified as FTS or not. To answer that, the courts need to refer to the definition of FTS. This definition is present both in the Indian Income Tax Act, 1961 (“ITA”) and in the Double Taxation Avoidance Agreement (“DTAA”) signed between India and the home country of the foreign company. Section 90(2) of the ITA says that in a situation where both DTAA and the ITA are applicable, the one whose provisions are more beneficial to the assessee will apply.³ Hence, by virtue of Section 90(2), the courts refer to the definition which is more beneficial to the assessee. In this case note, we are concerned with situations where the definition of FTS as given in DTAA is much more beneficial to the assessee than the definition in ITA.

The ‘*make-available*’ clause

Many DTAA have a ‘*make available*’ clause in their definition of FTS - this clause says that payments made in consideration of services are FTS if the services of the transferor (i.e., the foreign company) *make available* technical skill or knowledge or experience to the transferee (i.e., the Indian company) of the services.⁴ For example, Article 12(4)(b) of the India-USA DTAA contains the following ‘*make available*’ clause:

“[...] “*fees for included services*” means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services [...] make available technical knowledge, experience, skill, know-how, or processes, or consist of development and transfer of a technical plan or technical design.”

Now the interpretation of ‘*make available*’ is a recurring debate in the Indian judiciary.⁵ Various High Courts and Income Tax Appellate Tribunal (“ITAT”) benches across the country have tried to interpret this phrase;⁶ and the general understanding that has emerged is that technological skill or knowledge is said to be *made available* when the transferor imparts them to the transferee in a way that in future the transferee is enabled to use that skill or knowledge independently.⁷

³ ITA, s 90(2).

⁴ SC Tiwari, ‘The “Make Available” Cauldron – Has Revenue Lost the Plot?’ (*Taxsutra*, 22 February 2019) <<https://www.taxsutra.com/experts/column?sid=1043>> accessed 18 May 2020.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.* Also see *CIT v De Beers India Minerals (P) Ltd.*, 2012 SCC OnLine Kar 8858; (2012) 346 ITR 467; *Centrica India Offshore (P) Ltd. v CIT*, 2014 SCC OnLine Del 2739 and *Raymond Ltd. v Dy CIT*, (2003) 86 ITD 791 (Mum) (ITAT Mumbai).

The ITAT decision that we will consider in this article has deviated from this interpretation and has given a broader interpretation to this phrase. Further, after giving this peculiar interpretation, the ITAT then held that this FTS payment in the hands of the assessee foreign company will be taxed on gross basis by virtue of Section 44D(b) of the ITA. In the first part, the author will discuss the relevant facts of the case. Then, the author will discuss two key issues involved in this case, particularly focusing on the reasoning behind the ITAT Mumbai's decision and the potential negative impact of this decision on the taxpayers. Through this article, the author is challenging the peculiar interpretation of the 'make available' clause and the reasoning adopted by ITAT to determine whether the concerned payments fall under FTS provisions or not. The author argues that the ITAT, while deviating from the previous interpretation, unnecessarily relaxed the criteria for fulfilling the 'make available' clause and did not consider the potential negative impact this decision will have on the taxpayers. Further, the author will look into the definition of FTS as given in Section 44D, ITA and discuss its impact on the tax liability of the assessee foreign company.

BACKGROUND OF THE CASE

The Management Provision Agreement

The Appellant - General Motors Overseas Corporation ("GMOC")⁸- a US company, entered into a Management Provision Agreement ("MPA") dated 26 December 1995, effective from 16 April 1994 with General Motors India Limited ("GMIL")⁹ for providing executive personnel to GMIL for development of general management, finance, purchasing, sales, service, marketing and assembly/manufacturing activities. MPA provided that salary and other direct expenses related to these personnel were to be charged by GMOC from GMIL. Two personnel were provided to GMIL during the subject year: a) 'President and Managing Director' ("PMD") and b) 'Vice President Manufacturing' ("VP"). Let's take the total payment received by GMOC from GMIL under the MPA with respect to the services of both PMD and VP as the 'total amount'.

⁸ GMOC is engaged in the business of providing management and consulting services solely to the group entities worldwide.

⁹ GMIL is engaged in the business of manufacture, assembly, marketing and sale of motor vehicles and other products in India. Apart from the MPA, GMIL had a separate 'technical information and assistance agreement with M/s Adam Opel AG.

The AAR Ruling

To ascertain the tax liability on the ‘total amount’, GMOC filed an application before the AAR.¹⁰ The AAR ruling held that GMOC has a permanent establishment (“PE”) in India. It further held that on the facts available to the AAR, services of the personnel are ‘managerial’ and not ‘technical or consultancy’ services within the meaning of Article 12.¹¹ Thus, the consideration for these services should be assessable as ‘business profits’ under Article 7¹² read with Article 5¹³ and not ‘fee for included services’ (“FIS”)¹⁴ under Article 12. The AAR left it open to the concerned authorities, in appropriate proceedings, to examine the situation and take appropriate action if they found the situation to be otherwise.

The AO and CIT Ruling

Pursuant to the AAR ruling, GMOC, in its income tax returns disclosed the ‘total amount’ as business receipts. The Assessing Officer (“AO”) directed GMOC to file a copy of the service agreement of the personnel, but it was not filed. Hence, the AO taxed the entire ‘total amount’ as GMOC’s business income under Article 7 on a gross basis and held that as per Article 7(3),¹⁵ the PE’s income must be computed as per Indian law.

Aggrieved, GMOC appealed to the Commissioner of Income Tax (Appeals) (“CIT(A)”) which decided the issue against GMOC. The CIT(A) examined the MPA and the work profiles¹⁶ of the personnel to hold that services rendered by PMD don’t *make available* any technological, experience, skill, know-how or process which enable the person obtaining the services to apply the same; and thus, PMD’s services are not in the nature of FIS as per

¹⁰ Authority for Advance Rulings (“AAR”): Advance Ruling means a written opinion or authoritative decision by an Authority empowered to render it with regard to the tax consequences of a transaction or proposed transaction or an assessment in regard thereto. It has been defined in section 245N(a) of the ITA as amended from time-to-time; refer to <<https://www.incometaxindia.gov.in/Pages/international-taxation/advance-ruling.aspx>> accessed 19 June 2020.

¹¹ India-USA DTAA, art 12—this article explains the taxing provisions with respect to royalties and fees for included services.

¹² India-USA DTAA, art 7 - this article contains taxing provisions with respect to ‘business profits’ of Indian and American enterprises.

¹³ India-USA DTAA, art 5—this article explains the concept of a ‘permanent establishment’.

¹⁴ Alternatively, I will be using the term ‘Fee for Technical Services’ (“FTS”).

¹⁵ India-USA DTAA, art 7(3).

¹⁶ Work Profile of PMD - Chief Executive and Operating Officer of GMIL, and responsible for overall management and direction of GMIL operations. Work Profile of VP - responsible for overall management of GMIL facilities to manufacture and assemble products of GMIL according to required standards and for production of such products according to those standards.

Article 12. Hence, the payment received by GMOC from GMIL under the MPA in connection with PMD's services is to be taxed as business income. However, the VP being a qualified, well-experienced technical personnel, the VP's services were *made available* to GMIL and VP's technical experience was utilized by GMIL in its production activities and hence, the payment received by GMOC from GMIL with respect to VP's services will be FIS under Article 12. Aggrieved, GMOC appealed to ITAT.

KEY ISSUES

1. Does the payment for VP's services qualify as FIS under the India-USA DTAA?
2. Does Section 44D, ITA apply here?

ANALYSIS

ISSUE 1: Payments made to GMOC: Whether Fee for Included Services or not?

On this issue, GMOC argued that technology wasn't '*made available*' by GMOC to GMIL because the services rendered by the secondees were neither technical nor consultancy services; they were only 'managerial' in nature; hence no FIS/FTS (within the meaning of DTAA) arose.¹⁷ To counter this, the Revenue argued that perusal of Memorandum of MPA shows that PMD and VP were not performing 'managerial' functions.

A. ITAT'S Ruling

On this issue, the ITAT, firstly, noted that the revenue has not appealed against CIT(A)'s finding that services rendered by PMD are 'managerial' in nature and thus payments for the same are not FIS under Article 12. Hence this issue survives only to the extent of payments made by GMIL to GMOC for services rendered by the VP.

The ITAT, in its decision, took the following facts into consideration:

- a) That the VP was working with GMOC before being sent to GMIL.

¹⁷ The definition of FIS under article 12 of the India-USA DTAA does not include managerial services. Hence, if an assessee successfully proves that the services rendered were 'managerial' in nature, then the assessee is able to escape the FIS provisions of the DTAA.

- b) That the VP had sufficient knowledge, exposure and experience of the technology and its standards used by GMOC in USA.
- c) That the VP also had the expertise to ensure that these same standards are implemented in India as well. The VP, thus, was not only managing but also ensuring adherence to the standards of GMOC, by continuously monitoring and mentoring the production in India.

Considering all the above facts, the ITAT then went on to hold that:

- a) the expertise, experience, and knowledge of technology of an expert lies in his/her technical mind.
- b) Hence, when such an expert, having the requisite expertise and knowledge, is transferred from one tax jurisdiction to another, it is *not* a mere transfer of employees. Rather, it is a transfer of the technology itself. Thus, it results in technology being *made available* (by transfer on deputation of expert technical employees) by an entity situated in one tax jurisdiction (i.e., GMOC in USA) to another entity in another tax jurisdiction (i.e., GMIL in India).

The AO and CIT(A) were thus held by ITAT Mumbai to be correct in concluding that payment received from GMIL in connection with the VP was covered under FIS provisions.

B. ‘*Make available*’: General understanding versus ITAT’s deviation

There has been a lot of discussion on the interpretation of the ‘*make available*’ clause by ITAT benches and High Courts across the country.¹⁸ High Courts and ITAT benches have usually conducted a deeply factual inquiry in each case so as to determine whether the nature of income is that of FTS or business income, etc. Thus, we are left with a bunch of decisions on both sides with no clarification from the Supreme Court.

However, despite there being multiple decisions on both sides of this issue, there has been a general acceptance by High Courts and ITAT benches across the country of one particular interpretation of the ‘*make available*’ clauses found in various DTAAAs in connection with FTS.¹⁹ This interpretation is that for technological skill or knowledge or knowhow to be *made available* to the recipient, it must be transferred to the recipient in a way that in future, the recipient is able to apply that technological skill or knowledge

¹⁸ Tiwari (n 4).

¹⁹ Tiwari (n 4).

or knowhow without being dependent on the transferor.²⁰ In other words, the secondees having the requisite technical knowledge/skill/expertise (i.e., the VP in present case) must impart his/her knowledge/skill/expertise to the recipient (i.e., GMIL/its employees in the present case) in a way that in the future, once the secondment arrangement is over, the recipient should be able to independently use the imparted knowledge/skill/expertise in the business to ensure that the expected quality standards are maintained.

Such abovementioned transfer of technological knowledge/knowhow/skill has been generally considered and accepted to be the basic element of any arrangement which fulfills the *make available* clauses.²¹ In fact, the explanatory MoU to the India-USA DTAA also supports this interpretation in these following words: -

*“[...] Generally speaking, technology will be considered “made available” when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b) [...]”.*²²

However, in the present case, the ITAT has gone much beyond this interpretation to say that the mere transfer of a skilled employee (having the requisite technical skill/expertise/knowledge) itself, from one tax jurisdiction to other will result in the ‘*make available*’ clause being fulfilled and result in FTS implications.

It’s very strange ITAT didn’t give reasons on why it adopted such a broad interpretation and didn’t even consider the previous interpretation by examining the actual work done by the VP. The ITAT could have examined the material available on record to decide this issue as per the previous interpretation, without having to develop a new interpretation. For example, without going into the new interpretation given by the ITAT and in the absence of the service agreement with the VP, one can also look at the approval letter issued by the Ministry of Industry (approving the MPA), extracted in para XIX²³ of the decision which says that GMOC is to depute some of its employees to provide management and technical service to the joint venture

²⁰ See (n 7).

²¹ Tiwari (n 4).

²² Protocol, Convention between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.

²³ See page no 14, MANU/IU/0432/2020 (ITAT Mumbai).

and to train the personnel of the joint venture so that service of seconded employees could eventually be replaced by Indian personnel, and argue that the previous, generally-accepted interpretation of *make available* is fulfilled here. The impact of such interpretation by itself and vis-à-vis Section 44D(b) is discussed in the next part of this article

ISSUE 2: On Applicability of Section 44D(b), ITA: Taxation on Gross basis versus Net basis

GMOC argued before ITAT that it constituted a PE in India as per Article 5, and that the AO and CIT(A) should have taxed GMOC on net profit basis rather than on gross receipts. Further GMOC had charged GMIL on cost-to-cost basis hence there was no income/profit left to be taxed in GMOC's hands. The Revenue, on the other hand submitted that Article 7(3) of India-USA DTAA clearly provides that only if domestic laws allow deduction, then they would be allowed to calculate the net profit; thus, no deductions would be allowed to calculate net profit if the domestic laws don't provide for the same. It is not in issue here that GMOC had a PE in India.

C. Understanding Article 7(3), India-USA DTAA vis-à-vis Section 44D(b), ITA

The ITAT considered both Article 7(3) of the India-USA DTAA and Section 44D of the ITA and held that a conjoint reading of these two provisions shows that benefit of Article 7(3) is subject to the limitation provided under the domestic law, i.e., Section 44D. To understand this reasoning of the ITAT, let us first understand Article 7(3). Article 7(3) of the India-USA DTAA states:

“In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment, including a reasonable allocation of executive and general administrative expenses, research and development expenses, interest, and other expenses incurred for the purposes of the enterprise as a whole (or the part thereof which includes the permanent establishment), whether incurred in the State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the taxation laws of that State.”

Article 7(3) says that certain expenses are allowed as deductions while calculating the profits earned by an Indian PE of a US company, regardless of

whether those expenses arose in India or elsewhere. However, these deductions are allowed only as per the provisions of and subject to the limitations of the Indian taxation laws.

Section 44D(b), ITA is particularly important here because it says “*Notwithstanding anything to the contrary contained in Sections 28 to 44C, in the case of an assessee, being a foreign company, no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of ... fee for technical services received from ... an Indian concern in pursuance of an agreement made by the foreign company with ... the Indian concern after 31st day of March, 1976 but before the 1st day of April, 2003...*”

There are certain deductions available to companies under Sections 28 to 44C of the ITA. Section 44D(b) disallows foreign companies from availing these deductions in case income by way of FTS is received by such foreign company (from an Indian concern). However, this disallowance is only when such FTS arises from an agreement signed between the foreign company and the Indian concern in the period between 31 March 1976 and 1 April 2003. In case the concerned agreement is not made in this particular time period, then deductions are allowed to the foreign company, subject to other relevant provisions of the ITA or DTAA. The MPA in this case was dated 26 December 1995, effective from 16 April 1994. Thus, this MPA fell squarely within this time period given in Section 44D(b).

D. ITAT's Ruling

Having observed that the benefit under Article 7(3) is subject to Section 44D, the ITAT held that Section 44D(b) clearly disallows any deduction to GMOC for computation of FTS. Hence, the ITAT noted, the AO and CIT(A) were right in holding that GMOC was liable to be taxed on gross basis and not on net basis. Further, the ITAT observed that taxing GMOC on a gross basis wouldn't violate Section 90, ITA²⁴ because the India-USA DTAA, in Article 7(3), itself provides for applicability of domestic law (i.e., Section 44D) and Section 44D doesn't permit any deductions to GMOC in this situation. Hence, GMOC's appeal to the extent of above two key issues was dismissed.

²⁴ Section 90(2) of the ITA says that DTAA's override ITA to the extent they are more beneficial than the ITA.

E. Impact of ITAT's new interpretation in light of Section 44D(b)

As discussed above, the ITAT did not properly explain its reasoning behind adopting such a flexible interpretation of the '*make available*' clause. Even more surprisingly, the ITAT does not seem to have considered the potential negative impact of this decision on the taxpayers, especially when we have a harsh provision like Section 44D(b) operating against taxpayers. If this ITAT decision is followed, the taxpayers who would have ordinarily escaped FTS provisions, including the rigors of Section 44D(b), are now caught under this interpretation. For example, suppose in one such secondment arrangement, the '*make available*' clause was not being fulfilled as per the previous interpretation, then the foreign company in that situation wouldn't have to worry about Section 44D(b), even if the agreement signed in that situation was made in the time period given in Section 44D(b). But now because of this decision, such an arrangement, provided it fulfills the criteria of transfer of technical expert from one tax jurisdiction to another, would be considered as giving rise to FTS and the foreign company in that situation will lose its deductions if the concerned agreement falls foul of Section 44D(b).

By extension this decision has imposed further withholding tax requirements on Indian entities which are responsible for making such payments to foreign entities. This decision and the peculiar interpretation don't require Revenue to even look into the nature of the actual work done by the secondees. This decision has considerably relaxed the criteria needed to fulfill the '*make available*' clauses. This decision will enable the Revenue to capture any such secondment arrangement into its net of FTS provisions and apply Section 44D(b) (wherever applicable) to disallow deductions and impose tax on gross basis, regardless of whether the secondees have actually imparted their knowledge/skill to the recipients in a way that the recipients can independently apply that skill/knowledge in future. If this decision and its reasoning is followed, then it will be especially tricky for the taxpayers to get any relief from the increased tax liability because they lose the benefits of deductions merely due to the fact that the dates of their concerned agreements fall under the timeline given in Section 44D(b) and there is no way for them to change the dates of these agreements at this point of time.

F. Impact of definition of "FTS" under Section 44D, ITA

Another important aspect which the ITAT didn't properly discuss in this decision is the definition of "FTS" as given in Section 44D and the impact

of this definition on the Indian tax liability of the assessee foreign company involved in a similar situation as GMOC. As discussed above, Article 7(3) clearly provides that deductions are to be allowed as per the provisions of and subject to the limitations of the Indian taxation law. Because of this, Section 44D(b) is triggered in this particular fact situation leading to the foreign company being taxed on gross basis on the FTS received.

Now, Explanation (a) to Section 44D says that the term “FTS” as used in this Section is to be understood as defined in the ITA, i.e., in Explanation 2 to Section 9(1)(vii), ITA. This means that for Section 44D to apply, the payments being considered as “FTS” must firstly satisfy the ITA definition of FTS. The ITA definition given in Explanation 2 to Section 9(1)(vii) says:

“...[FTS] means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head “Salaries”.”

Hence, we see that the ITA definition is much wider than the DTAA definition of FTS because the ITA definition accounts for even managerial services (which are not considered at all under the DTAA definition) and mere *rendering* of services is enough for a payment to be considered as FTS under the ITA definition.

Now, we consider two possible situations: first, a situation where the payments in question qualify as “FTS” under both the DTAA and ITA. This leads to a straightforward application of Section 44D if the requisite conditions under this Section are satisfied.

Second, let’s consider a situation where the payments in question do not qualify as FTS under the DTAA definition but are captured by the much wider ITA definition of FTS. In this situation, because these payments will not be treated as FTS under the DTAA, they will then be considered as ‘business profits’ under the DTAA. Assuming there is a PE of the foreign company in India, Article 7 of the India-USA DTAA which deals with business profits will become applicable. Hence, by virtue of Article 7(3), the deductions allowable to the foreign company will have to be considered from the lens of the ITA. This is where Section 44D (under which the ITA definition of FTS is considered relevant) will come into picture because these payments which were treated as ‘business profits’ under the DTAA are also simultaneously qualifying as FTS as per the ITA definition and thus Section 44D will

become applicable to this foreign company, thus impacting the deductions allowed to it, depending on the date of the concerned agreement in that situation.

Oneway for such a foreign company to escape the rigors of Section 44D - in case this foreign company has entered into such a secondment arrangement (for example, the MPA) with an Indian company - is to ensure that it has no PE in India, because Article 7 (which leads to the application of Section 44D) becomes applicable only if the foreign entity has a PE in India. However, if this foreign company has a PE in India, one way to escape the rigors of Section 44D is to ensure that the payments concerned in such secondment arrangements do not qualify as FTS under ITA definition - this will be an extremely difficult task for such foreign companies simply because of the extremely wide scope of the ITA definition of FTS.

Thus we see how even the more restrictive DTAA definition of FTS, no matter how beneficial it is to the assessee foreign company, becomes irrelevant and the tax planning of the assessee is negatively impacted, if the payments concerned qualify as FTS under the ITA and subsequently, if Section 44D becomes applicable to that assessee. Due to this, the question arises whether the entire discussion on interpretation of 'make available' clause, with respect to the application of Section 44D, becomes moot or not. Understanding this discussion on the interpretation of 'make available' clause, including the present ITAT Mumbai decision in the GMOC case, in light of Section 44D thus opens a can of worms; this necessitates at the very least a clarification or an appropriate amendment from the legislature.

CONCLUSION

The article started off with an introductory glimpse into the concept of FTS in relation to the 'make available' clauses present in the India-USA DTAA, seeking to understand this concept as dealt with in the recent ITAT Mumbai decision in *General Motors Overseas Corpn. v ACIT*.²⁵ The article briefly went through the relevant facts, issues and arguments of both the sides and then delved into the decision given by the ITAT. The ITAT, as noted above, deviated from the generally accepted interpretation of the 'make available' clause and went on to hold that transfer of a technical expert, having the requisite technological experience and knowledge, from one tax jurisdiction to another results in satisfaction of the 'make available' clause and leads to FTS implications for the foreign companies. The article went on to look into

²⁵ MANU/IU/0432/2020 (ITAT Mumbai).

the impact of the ITAT decision on the Revenue and the taxpayers, while also keeping in mind the application of Section 44D(b) of the ITA in such a situation. The article then discussed the importance of the definition of FTS as given in the ITA for application of Section 44D and the problems which arise because of the same.

This decision seems to have unnecessarily favored the Revenue by stripping away the requirement to conduct a factual inquiry into the secondment arrangement. This decision will certainly have very harsh implications for the taxpayers. Without really clarifying the issue, this decision has added yet another dimension (to the discussion prevalent on this issue). It will be interesting to see whether there is an appeal against this particular decision in the Bombay High Court and whether the Bombay High Court supports this new interpretation or not. One also needs to keep an eye out for decisions from other ITAT benches or High Courts or even the Supreme Court which refer to this interpretation and their reasons for doing so, because the more support this new interpretation gathers, the greater will be the difficulty for foreign companies in terms of planning their Indian tax liability. It will also be interesting to see if the legislature or judiciary is able to resolve the issues which arise in this discussion on the '*make available*' clauses, because of the requirement of satisfaction of the ITA-definition of FTS for the application of Section 44D.

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