Foreword

With the passage of time we are now moving towards the last quarter of the year 2012. The month of September also has its importance as the International Bar Association conference 2012 is just round the corner. It is that time of the year when legal fraternity from all around the world assembles at a common platform to discuss the legal reforms. While keep same in mind the latest edition of our monthly newsletter Indian legal Impetus includes the article on the topic from diverse legal areas.

The latest major development in the Indian economy wherein Indian Government allowed and introduced changes in FDI policies wherein FDI in Multi Brand Retail sector is allowed up to 51%, in Civil Aviation Sector upto 49%, in Broadcasting Sector FDI is increased from 49% to 74% and in Power Sector upto 49%. The policies for the same as issued by Department of Industrial Policy & Promotion (DIPP) are covered in this edition.

The cover article in this edition is regarding introduction of the provisions which authorized a scheme by Central Board of Direct Tax which specifying the manner, procedure and any other general matter in respect of Advance Pricing Agreements.

The issue also covers the aspect regarding the issue of shares with differential voting rights. Further in the Corporate Section there is another article regarding the Partial Fungibility of Indian Depository Receipts in respect of conversion of up to 25 percent of Indian Depository Receipts (IDRs) into underlying shares.

Indian Medical Device industry is a big industry and an overview on the same is provided on the same to make it understand better by way of an article on the same.

In the Intellectual Properties Rights Patent’s section we present an article regarding the aspect of Green IP and the status of same in India and around the world. Article presents an overview regarding the advantage of provision related to Green IP. This edition also includes an article related to the Patents wherein it is discussed that Patents which are against the public morality and order of the state would not be protected under the Patent Act. Further in Patent section we also discussed the problem of non practicing entities and the challenge in front of law makers to stop the misuse of the patent law by these entities by way of an article on non practicing entities. In patent section we also provide an overview on the issue of Patent Licensing in terms of FRND (Fair, Reasonable and Non-Discriminatory).

Further in IPR section an important issue which is discussed, is the Intellectual Property Rights in live sports events and the protection provided to the same in India as well as around the world. Another article which discusses the complexity in deciding the protection to a design under various Intellectual Property Law and the importance of choosing the proper protection for the same is also included in this edition.

From the area of Competition Law in relation to Intellectual Property Law, we present an overview on conflict between the two laws and conflict resolution for the same.

In litigation section we take a look at the status of foreign judgments and their applicability in the Indian court by way of an article on the same topic. We also look at the concepts and prospects of online Arbitration through an article on the same topic.

Finally in our judgment section we discussed an important judgment on the topic of status of ‘goodwill as intangible assets for claiming depreciation’. Further we have discussed a landmark judgment on the question of deciding alimony in matrimonial cases.
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FDI IN MULTI BRAND RETAIL TRADING

While this edition was in print, the Department of Industrial Policy & Promotion vide Press Notes No.5 (2012 Series), No.6 (2012 Series), No.7 (2012 Series) & No.8 (2012 Series) has issued the guidelines and permitted the FDI in Multi Brand Retail Trading Sector, Aviation Sector, Broadcasting and Power Sector respectively. This major development need to be a part of our IBA edition as it will completely change the face of Indian economy and will allow major foreign investment in these sectors. The investor sees India as one of the major market to invest due to the size of the market hence this change in FDI policy would bring an influential change in Indian Foreign reserves.

In this regards Department of Industrial Policy & Promotion vide Press Note No.5 (2012 Series) have reviewed the extant policy on FDI and decided to permit FDI, up to 51%, under the Government route, in Multi-Brand Retail Trading. The following states which are in agreement to the said Policy are Andhra Pradesh, Assam, Delhi, Haryana, Jammu & Kashmir, Maharashtra, Manipur, Rajasthan, Uttarakhand, Daman & Diu and Dadra and Nagar Haveli (Union Territories). However, it has been further clarified that Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of multibrand retail trading. The present FDI policy in Multi Brand Trading is subject to specified conditions:

(a) Foreign investor has to bring minimum amount of US $100 million. Foreign investor has to further invest 50% of total FDI brought in into ‘backend infrastructure’ within three years of the first tranche of FDI. Expenditure on land cost and rentals, if any, will not be counted for purposes of back end infrastructure.

(b) Foreign investor has to procure at least 30% of the value of manufactured/processed products purchased sourced from Indian ‘small industries’ which have a total investment in plant & machinery not exceeding US $1.00 million. This procurement requirement would have to be met, in the first instance, as an average of five years’ total value of the manufactured/processed products purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis. Government will have the first right to procurement of agricultural products.

(c) Foreign investor has to give self-certification to ensure compliance of the above conditions which could be crosschecked, as and when required. Accordingly, Foreign investor shall maintain accounts, duly certified by statutory auditors.

(d) Retail sales outlets may be set up only in cities with a population of more than 10 lakh as per 2011 Census and may also cover an area of 10 kms around the municipal/urban agglomeration limits of such cities; retail locations will be restricted to conforming areas as per the Master/Zonal Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking; In States/Union Territories not having cities with population of more than 10 lakh as per 2011 Census, retail sales outlets may be set up in the cities of their choice, preferably the largest city and may also cover an area of 10 kms around the municipal/urban agglomeration limits of such cities. The locations of such outlets will be restricted to conforming areas, as per the Master/Zonal Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking.
(a) The establishment of the retail sales outlets will be in compliance of applicable State/Union Territory laws/regulations, such as the Shops and Establishments Act etc.

FDI in Civil Aviation Sector:

Vide Press Note No. 6 (2012 Series) has reviewed the extant policy on FDI in relation to the Civil Aviation Sector and decided to permit the foreign airlines also to invest in the capital of Indian Companies, operating scheduled and non-scheduled air transport services up to 49% of their paid-up capital. However, it has been clarified that the revised FDI policy on Civil Aviation Sector is not applicable to M/S Air India Limited. Also, the present FDI policy in Civil Aviation Sector is subject to the following specified conditions:

a) FDI by the foreign investor is to be made under the Government approval route.

b) The 49 percent limit will subsume FDI and FII investment.

c) The investment made in the Civil Aviation Sector need to comply with the regulations of SEBI (Securities and Exchange Board of India), such as the Issue of Capital and Disclosure Requirements (ICDR) Regulations/Substantial Acquisition of Shares and Takeovers (SAST) Regulations, as well as other applicable rules and regulations.

d) A Schedule Operators Permit can be granted only to a company:
   i. Which is registered and has its principal place of business within India.
   ii. Whose Chairman and at least two-thirds of the Directors are citizens of India and
   iii. The substantial ownership and effective control of which is vested with Indian nationals.

e) All the foreign nationals who are likely to be associated with Indian Schedules and non-Scheduled air transport services for the purpose of investment in civil aviation sector shall be cleared from the security point before deployment.

f) All technical equipment that might be imported into India for the purpose of investment in civil aviation sector shall also require the clearance from the relevant authority in the Ministry of Civil Aviation.

FDI in Broadcasting Sector:

Vide Press Note No. 7 (2012 Series) has reviewed the extant policy on Foreign Investment in Companies operating in the Broadcasting Sector in a below mentioned manner subject to the terms and conditions as may be specified by the Ministry of Information and Broadcasting from time to time:

a) Teleports (setting up up-linking HUBs/Teleports), Direct to Home (DTH), Cable Networks (MSOs operating at National or State or District level and undertaking upgradation of networks towards digitalization and addressability:

   For the above mentioned section, foreign investment limit has been increased from 49 percent to 74 percent subject to the following conditions:
   i. Foreign Investment up to 49 percent is being permitted under automatic route and
   ii. Foreign Investment beyond 49 percent to 74 percent is being permitted under the Government Route.

b) Mobile TV:

   For Mobile TV permitting Foreign Investment up to 74 percent is subject to the following conditions:
   i. Foreign Investment up to 49 percent is being permitted under automatic route and
   ii. Foreign Investment beyond 49 percent to 74 percent is being permitted under the Government Route.

It has been further clarified that the Foreign Investment in the Companies engaged in the above mentioned activities of I and B sector, shall include in addition to FDI, investment by Foreign Institutional Investors (FIIs), Non-Resident Indians.
FDI IN POWER EXCHANGES

Vide Press Note No. 8 (2012 Series) has reviewed the extant policy on FDI and has decided to permit FDI up to 49 percent in Power Exchanges, registered under the Central Electricity Regulatory Commission (Power Market) Regulations 2010. And, the present FDI policy on Power Exchanges is subject to the following specified conditions:

a) FDI in Power Exchange would be subject to an FDI limit of 26 percent and an FII limit of 23 percent of the paid-up capital.

b) Further FII investment would be permitted under the Automatic Route whereas FDI would be permitted under the Government Route.

c) Non-resident investor/entity including persons acting in concert will not hold more than 5 percent of the equity in Power Exchange companies and

d) The FDI in Power Exchanges would be made in compliance with the SEBI Regulations, other applicable laws/regulations, security and other conditionalities.
ADVANCE PRICING RULES- THE WAIT IS OVER

Manoj K. Singh & Smeeksha Bhola

INTRODUCTION

With globalization of the economy the trade between parties across the boundaries of the nation has also ascended. The augmentation of trade has also given rise to complex issues that emerge from transactions entered into between related parties in different countries belonging to the same group. The problem in this respect needs a certain solution wherein both related parties has entered in to a contract and same needs to analyze from the point of view of payment of tax for the same.

Transfer pricing, as provided in Section 92, 92A to 92F, of the Income Tax Act of 1961 is the process of determining Arm’s length Price for inter-country transactions between two or more related parties, so that a fair price is arrived. Restrictions relating to Transfer pricing are in place to ensure that the transaction is entered at fair price, that is, the price that will be charged in case of unrelated parties. Transfer pricing gives rise to lot of litigation. In recent assessments of transfer pricing, Tax authorities have raised huge tax demands.

Introduction of the Advance Pricing Rules can be seen as an attempt to reduce the frequency of litigation relating to transfer pricing.

Advance pricing agreements basically refers to agreement between tax authorities and tax payer ahead of time, clearly spelling out in advance the transfer pricing methodology, i.e. an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events), which will be complied by the tax payer.

The Finance Act, 2012 (Act) has brought the provision related to Advance Pricing Agreement and the same came into effect on 1st July, 2012. The provisions on Advance Pricing Agreement provided in the Act authorized Central Board of Direct Taxes to prescribe a scheme specifying the manner in respect of APA. The Notification on Advance pricing Rules’ provides a mechanism for entering into Advance Pricing Agreement. The said Notification on Advance pricing Rules is a welcome step and was highly awaited by tax authorities and industry in general.

THE MAIN FEATURES OF ADVANCE PRICING RULES ARE:

1. Eligibility:
A person undertaking an International transaction or contemplating to enter into an International transaction shall be eligible to enter in to an agreement under the APA rules.

2. Application for APA:
Application for an APA is required to be made in Form No. 3CVD to the Director General of Income Tax (DGIT) (or the competent Authority in the case of bilateral or multilateral APA) along with requisite fee. A company planning to enter into an APA, is required to furnish details of the proposed international transaction, including its structure and information about the company and the group.

3. Method to be applied:
The most appropriate method can be one of the six methods provided in the Act mentioned herein below:
• Comparable uncontrolled price method;
• Resale price method;
• Cost plus method;
• Profit split method;
• Transactional bet margin method;
• Such other method as may be prescribed by the Board.

1 Notification No. 36 of 2012 dated 30th August, 2012 issued by Central Board of Direct Taxes
4. Change in ‘Critical assumptions’:
In case of change in one of the critical assumptions, on which such APA was entered, the APA shall not be binding on the Board or the taxpayer,

5. Pre-filing Consultation available:
Any person proposing to enter into an APA shall make an application in writing in form 3CEC to the DGIT. Such pre-filing consultation shall among other things determine the scope of the agreement, identify the suitability of International transaction for the agreement, discuss broad terms of the agreement.

6. Fee Applicable:
The fee schedule for making the application is as follows:

<table>
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<tr>
<th>Amount of International transaction entered into or proposed to be undertaken in respect of which an agreement is proposed during the proposed period of agreement</th>
<th>Fees in Indian Rupees</th>
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</thead>
<tbody>
<tr>
<td>Amount not exceeding INR 1000 million</td>
<td>1 million</td>
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<tr>
<td>Amount not exceeding INR 2000 million</td>
<td>1.5 million</td>
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<td>Amount exceeding INR 2000 million</td>
<td>2 million</td>
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7. Withdrawal of Application:
The applicant may withdraw the application of APA in Form No. 3CEE at any time before the finalization of the terms of the agreement.

8. Time frame for applying under these Rules:
If an application is made for an International transaction of continuing nature, then such application should be made before the first day of the previous year relevant to the first assessment year for which the application is made. In any other situation, such application should be made before entering into the International transaction under consideration.

9. Terms of the agreement:
The terms of the agreement will include international transaction, transfer pricing methodology, determination of Arm’s length price, critical assumptions, any other conditions, other than those provided in the act.

10. Amendments to application:
An applicant may request in writing for amendment to an application at any stage, before the finalization of the terms of the agreement.

11. Annual Compliance Report:
The assesses shall furnish an annual compliance report to Director General of Income Tax (International taxation) in Form 3CEF for each year covered in the agreement.

12. Compliance Audit of the Agreement:
Transfer pricing officer having Jurisdiction over assessee shall carry out the compliance audit of the agreement for each of the years covered in the agreement.

13. Revision of Agreement:
The agreement may be revised either suo-moto by Board or on request of assessee, due to change in critical assumptions, failure to meet a condition, subject to which an agreement has been entered, change in law, request from competent authority in other country requesting revision of agreement in case of bilateral or unilateral agreement.

14. Renewal of Agreement:
An agreement may be renewed after making an application for a new agreement, all procedure relating to fresh agreement will be carried, however no pre-filing consultation is required.

15. Bilateral and multilateral Advance pricing agreements:
In case of bilateral and multilateral APAs, the APA process would be required to be initiated by Associated Enterprise in the other country. Then the Competent Indian Authority will be required to ascertain willingness of the of the Competent authority in the other country for initiation of negotiations . The applicant taxpayer will not be entitled to be part of discussion between the competent authority in India and the Competent authority in the other country or countries.
CONCLUSION

Advance pricing Rules have been introduced with the objective to provide much required certainty on transfer pricing related issues. Nationally as well as internationally, Advance Pricing Agreement mechanism has been recognized as one of the most effective tool to manage critical transfer pricing issues. Moreover, APA team shall include experts in economics, statistics, law or any other field in order to go to the root of the transaction in a more refined and technical way; this will ensure accuracy, transparency in APA mechanism. Finally, it can be expected that litigation arising from transfer pricing related issues will reduce and hence same will go a long way in increasing confidence of international investors in Indian Market.
Securities and Exchange Board of India (SEBI) attempt to this Indian Depository Receipt (IDR) partial fungibility is in light of the former finance minister Pranab Mukherjee, Union Budget proposal for Financial Year 2013 for improving the attractiveness of IDRs as an instrument for attract foreign entities to list their IDRs on domestic bourses and to prescribe a framework for two-way fungibility of IDRs. Investor can convert up to 25 per cent of their IDRs into underlying of a company into overseas listed equity shares in a financial year.¹

The fungibility issue is seen as one of the major factors restraining foreign entities from listing their IDRs. Currently, Standard Chartered Plc, which is listed on London Stock Exchange and Hong Kong Stock Exchange, is the only entity that listed its IDR in India. The global banking major came out with its IDR issue in May 2010 and was listed on the Bombay Stock Exchange (BSE) and the National Stock Exchange (NSE) in June 2010.

**EFFECT**
The two-way fungibility would enable Indian shareholders to convert their depository receipts into equity shares of the issuer company and vice versa.

**BACKGROUND**
Investment in IDR is an interesting opportunity for the Indian investors who are looking for investing their funds in foreign equity. IDR are meant for foreign companies looking to raise capital in India. IDR means any instrument in the form of a depository receipt created by Domestic Depository in India against the underlying equity shares of issuing company which is located outside India. Thus Indian IDR holders would thus indirectly own the equity shares of overseas issuer company. IDR are to listed and denominated in Indian currency. An issuing company cannot raise funds in India by issuing IDR unless it has obtained prior permission from SEBI.

**REGULATORY FRAMEWORK**

**IDR [INDIAN DEPOSITOREY RECEIPT]**
An IDR is an instrument denominated in Indian Rupees in the form of a depository receipt created by a Domestic Depository (custodian of securities registered with the Securities and Exchange Board of India) against the underlying equity of issuing company to enable foreign companies to raise funds from the Indian securities Markets².

**ELIGIBILITY FOR ISSUE OF IDRS**
An issuing company may issue IDRs only if it satisfies the following conditions:-

a) Its pre-issue paid-up capital and free reserves are at least US$ 100 millions and it has had an average turnover of US$ 500 million during the 3 financial years preceding the issue.

b) It has been making profits for at least five years preceding the issue and has been declaring dividend of not less than 10% each year for the said period.

c) Its pre-issue debt equity ratio is not more than 2:1.

d) It shall fulfill the eligibility criteria laid down by SEBI from time to time in this behalf.

**REQUIREMENT FOR INVESTING IN IDRS**
Following are the requirements which are to be met before investing in IDRs:

¹ SEBI Circular No. CIR/CFD/DIL/10/2012, dated 28th August, 2012
² www.sebi.gov.in
i. IDRs can be purchased by any person who is resident in India as defined under FEMA.

ii. Minimum application amount in an IDR issue shall be Rs. 20,000.

iii. Investments by Indian companies in IDRs shall not exceed the investment limits, if any, prescribed for them under applicable laws.

iv. In every issue of IDR—
   a) At least 50% of the IDRs issued shall be subscribed to by QIBs [Qualified Institutional; Buyers];
   b) The balance 50% shall be available for subscription by non-institutional.

**CONCLUSION**

To improve the attractiveness and long-term sustainability of IDR instruments a framework for two-way fungibility of IDRs will be issued separately so that other foreign companies other than Standard Chartered Plc shall issue fresh IDRs. Accordingly, suitable instructions for modifying the existing legal framework governing IDRs, in order to implement the decision to allow redemption of IDRs into underlying equity shares and re-conversion of equity shares of a foreign issuer (which has already listed their IDRs) into IDRs, will be issued separately.

✦ ✦ ✦
One of the main rights attached with shares is the right to vote. Shares with differential voting rights (DVR’s) are those shares which have higher or lower voting right as compared to Ordinary Equity Shares. They are listed and traded in the same manner as ordinary equity shares but are usually traded at a discounted price due to low voting rights. Shares with higher voting rights are issued by the promoters body to themselves or their relatives to increase their control in the decision making process of the Company which is in excess of their economic interest in the Company and shares with lower voting rights are issued to outsiders/passive investors who are not much interested in the decision making process but are interested in financial gains like shares with discounted rate and/or shares with higher dividend rate. Issue of Shares with DVR’s is also done by the Companies to protect themselves from corporate actions such as takeovers.

**LEGAL ASPECT**

Prior to the enforcement of The Companies (Amendment) Act, 2000, Companies in India were not allowed to issue equity shares with differential voting rights but after the said amendment act Section 86 (New Issues of Share Capital to be only of Two kinds) of the Companies Act, 1956 was substituted to include equity share capital with voting rights or with differential rights as to dividend, voting or otherwise in accordance with such rules and subject to such condition as may be prescribed and Section 88 (Prohibition of issue of Shares with disproportionate rights) of the Act was repealed.

The Central Government also notified The Companies (Issue of Share Capital with Differential Voting Rights) Rules, 2001 wherein the conditions for Issue of Share Capital with Differential Voting Rights were set out. The conditions are as follows:

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1. The company has distributable profits in terms of Section 205 of the Companies Act, 1956 for three financial years preceding the year in which it was decided to issue such shares.

2. The company has not defaulted in filing annual accounts and annual returns for three financial years immediately preceding the financial year in which it was decided to issue such share.

3. The company has not failed to repay its deposits or interest thereon on due date or redeem its debentures on due date or pay dividend.

4. The Articles of Association of the company authorises the issue of shares with differential voting rights.


6. The company has not defaulted in meeting investors’ grievances.

7. The company has obtained the approval of shareholders in General Meeting by passing resolution as required under the provision of sub-clause (a) of subsection (1) of section 94 read with subsection (2) of the said section.

8. The listed public company obtained approval of shareholders through Postal Ballot.

9. The notice of the meeting at which resolution is proposed to be passed is accompanied by an explanatory statement stating –

   a) the rate of voting rights which the equity share capital with differential voting right shall carry;

   b) the scale or in proportion to which the voting rights of such class or type of shares will vary;

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1 The Companies ((Issue of Share Capital with Differential Voting Rights) Rules, 2001
c) the company shall not convert its equity capital with voting rights into equity share capital with differential voting rights and the shares with differential voting rights into equity share capital with voting rights;

d) the shares with differential voting rights shall not exceed 25% of the total share capital issued;

e) that a member of the company holding any equity share with differential voting rights shall be entitled to bonus shares, right shares of the same class;

f) the holders of the equity shares with differential voting rights shall enjoy all others rights to which the holder is entitled to excepting right to vote as indicated in (a) above.

Tata Motors was the first Company in India to issue rights shares with DVR option in 2008 followed by Pantaloon Retail (India) Ltd which issued bonus shares with DVR option in 2009. But after the case of Anand Pershad Jaiswal v. Jagatjit Industries Limited\(^2\) where after the issue of Shares with DVR's; the voting rights of the promoters increased to 62% who held only 32% of economic stake in the company, concerns were raised that issue of shares with DVR's may become a tool in the hands of the promoters to increase their control and voting rights in the company by way of issuing shares with superior voting rights to themselves, hence in July 2009, SEBI made amendments in the Listing agreement whereby a new Clause 28 A was inserted which can be read as follows\(^3\):

28 A The company agrees that it shall not issue shares in any manner which may confer on any person, superior rights as to voting or dividend vis-à-vis the rights on equity shares that are already listed

CONCLUSION

Shares with DVR's are good option for those Companies where the promoters want to bring public funds in their company without losing control over the decision making process at the cost of an increased dividend rate. It is also beneficial for those shareholders who are more interested in higher rate of dividend rather than taking part in the decision making process of the Company. The amendment in the Listing Agreement has restricted Listed Companies to issue shares with DVR’s having superior rights with respect to voting or dividend but the option remains open for Private and Public Limited Companies.\(^2\)^\(^3\)

\(^2\) Manu/CL/0002/2009

\(^3\) Circular No. SEBI/CFD/DIL/LA/2/2009/21/7 dated July 21,
India has emerged as one of the leading markets for pharmaceutical products. Increase in the private healthcare infrastructure, widening rural markets, and inclusion of newer technologies have placed healthcare as an independent sector in India. With privatization of healthcare, the medical devices sector is growing too.

In order to regulate the import, manufacture, distribution and sale of drugs and cosmetics, the Drugs and Cosmetics Act, 1940 ("D&C, Act") was introduced in India in 1940. However, no separate legislation/regulation has been enacted for regulating the import, manufacture, distribution or sale of medical devices in India till date by the Government of India.

The Central Drugs Standard Control Organization (CDSCO) is the key medical regulatory organization in India. Since 2006, both the Indian Department of Science and Technology and the Ministry of Health and Family Welfare have sought to completely restructure the regulations for the medical devices. Till date, neither of these attempts has been successful. Medical device market is quite diverse which includes medical and diagnostic equipment; medical implants like heart valve and cardiac stents, pacemakers, cannulae, knee joints; and lower end plastic disposables, blood bags, IV sets, syringes etc. In light of its widespread applicability, overall medical device market is experiencing reasonable growth.

Historically, most Indians had very limited access to any type of modern medical service. Today, however, the situation is much improved. There is a growing awareness about health issues within India, an increasing demand for quality care at affordable prices, further the Indian Healthcare industry is in a steady growth trajectory and is expected to grow in the next few years.

The Indian economy is worth about US$1,243 billion and rapidly getting bigger [1]. The GDP growth reached 9% in the year to March 2008[2]. The 2010-11 budget extended the coverage to another 20% of the Indian population covered by the National Rural employment Guarantee Act (NREGA) programmes, who have worked for more than 15 days during the preceding financial year[3]. Budget 2010-11 also allocated US$ 2,920 million under the National Rural Health Mission (NRHM), an increase of 15% over the previous year[4].

REGULATIONS ON MEDICAL DEVICES IN INDIA

Undoubtedly, the medical devices and surgical instruments are currently not covered under the regulatory framework in India. However, any device which is intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified by the Central Government by notification in the Official Gazette would be considered as a drug under the D&C Act and provisions of D&C Act and Rules made therein would be applicable on such device. From time to time, Ministry of Health and Family Welfare, Government of India vide gazette notifications has notified certain medical devices as drugs under the D&C Act.

Prior to 2005, only medical devices such as disposable hypodermic syringes, tubal rings, condoms, metered dose inhalers, were required to be registered in India. In 2005, the Ministry of Health and Family Welfare (MOHFW) vide gazette

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1  IMF, World Economic Outlook Database (October 2009).
3  Union Budget 2010: Private hospitals likely to benefit”, Economic Times, (February 26, 2010)
4  “More for public health, less for research” Business Standard (February 27, 2010).
notification dated 6 October 2005[5] further notified 10 sterile devices (“Notified Medical Devices”) to be considered as drugs and consequently regulated their import, sale and manufacture under Section 3(b) (iv) (defined below) of the D&C Act.

REGULATING AUTHORITY FOR NOTIFIED MEDICAL DEVICES

In India, the Central Drugs Standard Control Organization (‘CDSCO’) is the main regulatory body currently regulating import, sale and manufacture of medical devices which have been notified as drugs by virtue of Section 3(b) (iv) of the D&C Act. The CDSCO lays down standards of drugs, cosmetics, diagnostics and devices and issues licenses to drug manufacturers and importers. It also lays down regulatory measures, amendments to Acts and Rules and regulates market authorization of new drugs, clinical research in India and standards of imported drugs etc. The CDSCO has setup a separate division which is called Medical Device Division in order to facilitate matters related to Notified Medical Devices. The hierarchy of medical device division of the CDSCO in India is as follows:

Drug Controller General of India (DCGI)  
Deputy Drugs Controller (India)  
Assistant Drugs Controller (India)  
Medical Device Cell  
Diagnostics Cell  
Drug Inspectors  
Technical Data Associates  

REGULATORY OVERVIEW OF THE NOTIFIED MEDICAL DEVICES

The main regulatory Notified Medical Devices in India has been the Drugs and Cosmetics Act, 1940 (‘Act’) and the Drugs and Cosmetics Rules, 1945 (‘Rules’). Notified Medical Devices are currently covered under the definition of Drugs under the Act Section 3 (b) (iv) which reads as follow:

“b) “drug” includes—

…

(iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board."

The provisions of the Rules also deal with Notified Medical Devices and as they are currently defined as drugs and import and/or manufacture of them requires licenses to be obtained from the appropriate licensing authority as laid down under the Rules.

Rule 22 of the D&C Rules states that the licensing authority may with the approval of the Central Government by an order in writing delegate the power to sign licenses and Registration Certificate and such other powers as may be specified in the order to any other person under his control.’

Rule 109A deals with labelling of medical devices and states that: “The labelling of Medical Devices shall conform to the Indian Standards Specifications laid down from time to time by the BIS[6] in addition to any other requirement prescribed under the said rules.”

Rule 125A states that the standard for medical devices is stated in Schedule R1 namely, Sterile Disposable Perfusion sets for single use only (Sections 2 and 3 of item 1 of IS 9824:1981 read with the Amendment number 1); Sterile Disposable Hypodermic syringes for single use only (IS 10258:1982) and Sterile Disposable Hypodermic needles for single use only (IS 10654:1991) must conform to the Indian Standards specification laid down by the Bureau of Indian Standards (‘BIS’).

According to the BIS, the BIS product certification scheme is essentially voluntary in nature, and is largely based on ISO Guide 28, which provides general rules for third party certification system of determining conformity with product standards.

5 http://www.cdsco.nic.in/medical%20device%20A42.html

6 Bureau of Indian Standards
Currently medical devices and surgical instruments are not covered under mandatory certification.

THE MEDICAL EQUIPMENT AND HOSPITAL PLANNING DIVISION COUNCIL (MHDC) OF BIS DEALS WITH MEDICAL DEVICES

The Programme of Work prepared & updated Sectional Committee wise as on 1 March 2012 deals with “Standardization in the field of Surgical Instruments, Medical Equipment, Surgical Dressings, Artificial Limbs, Rehabilitation Equipment, Diagnostic Kits, Veterinary Surgery Instruments, Dental Equipment, Laboratory Instruments & Equipment, Hospital Planning and Healthcare Services”. It is stated that this publication will provide the community of Standards users a convenient tool for obtaining the latest information about all the published new and up coming Standards in the field of Medical Equipment & Hospital Planning. List of Indian Standards under BIS Certification Scheme along with list of licensees, ISS wise, is also given in this programme of work.

SIGNIFICANT NOTIFICATIONS/GUIDELINES OF CDSCO WITH RESPECT TO NOTIFIED MEDICAL DEVICES

CDSCO vide gazette notifications issued on 5 September, 2007 has notified [7] that Free Sale Certificate in country of origin issued by the Ministry of Health/National Regulatory Authority is a pre-requisite for the registration. Any change in the Design and/or change in material and/or change in composition of an already approved/registered medical device will require prior approval of Drugs Controller General of India (“DCGI”).

Based on large number of requests seeking clarity on issues relating to registration, manufacture and import of Notified Medical Devices, from both manufacturers of Medical Devices and their representatives from India and abroad, CDSCO has time and again come up with clarifications & explanations on the guidelines. It has stated vide Notification dated June 2008[8] that for the purpose of registration of medical devices and in order to calculate the fees required to be deposited with the application, a group or family of devices manufactured by or for the same manufacturer and which has the same basic design, performance characteristic relating to device safety, effectiveness of the device and its intended use (which includes variation in sizes and shapes) would be considered one single device. It was also clarified that a device may also include package of various devices or sub systems that are required to be used together as a single functioning device.

On 20 March 2009, the Central Drugs Standard Control Organization (CDSCO) clarified that sterile medical devices such as spinal needles, insulin syringes, endotracheal tubes, cardiac patches, and extension tubes were also required to be registered.

On 4 August 2010 CDSCO released new guidelines for document submission for medical device product registration [9]. Under CDSCO’s current system, medical devices requiring registration need approval from the DCGI. After receipt of the application with fees, evaluation begins. DCGI may require clinical testing in India or request information on clinical trials performed abroad.

In light of developing clearer provisions with regard to regulation of Medical Devices, the Government upon the recommendation of the DCGI and examination by the Expert Committee, has further confirmed 11 devices such as Spinal needle, Insulin syringes, three way stop cock as an accessory of I.V. Cannula/Catheter/Perfusion Set, Introducer sheath, Cochlear implant, Close wound drainage set, AV fistula needle, Extension line as an accessory of Infusion set, ANGO kit/PTCA/ Cath Lab kit, Measure volume set and Flow regulator as an accessory of

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7 [http://www.cdsco.nic.in/HTML/ADDITIONAL%20CLARIFICATION%20TO%20GUIDELINES%20FOR%20IMPORT%20OF%20MEDICAL%20DEVICES.htm](http://www.cdsco.nic.in/HTML/ADDITIONAL%20CLARIFICATION%20TO%20GUIDELINES%20FOR%20IMPORT%20OF%20MEDICAL%20DEVICES.htm)

8 [http://www.cdsco.nic.in/Clearification%20on%20MD.pdf](http://www.cdsco.nic.in/Clearification%20on%20MD.pdf)

Infusion set as drugs vide notification dated 5 March, 2012[10].

**NEW PROPOSED MEDICAL DEVICES REGULATION BILL**

In 2006, the *Medical Devices Regulation Bill (MDRB)* was proposed by the Ministry of Science and Technology. The MDRB was designed to consolidate laws related to medical devices and establish the Medical Device Regulatory Authority of India (MDRA). This proposal was aimed at establishing and maintaining a national system of controls for the quality, safety and availability of medical devices in India. If enacted, the MDRB will govern all medical devices throughout India. Companies wishing to import devices into India or manufacture products locally will have to comply with the design, manufacturing, packaging, labeling, import, sale, use, and disposal requirements of the MDRB. Also the bill will expand the list of products requiring registration.

The Bill provides for the creation of a Medical Device Regulatory Authority which has been empowered with extensive powers relating to fining and imprisoning defaulters. Besides looking to harmonize the standards in accordance with the global norms to push the export potentials, the Bill also seeks to lay down concrete norms on import of devices and their conformity with the Indian standards. Standards notified by the Bureau of Indian Standards or other international standards making bodies like International Organization for Standardization (ISO), may be incorporated for harmonization. The Bill seeks to regulate the design, manufacture, packaging, labelling, import, sale, usage and disposal of medical devices in India.

With a view to raise the level of control on Medical Devices, the Drug Technical Advisory Board (DTAB) in India has submitted the final draft of the guidelines on medical devices and has recommended strict implementation of Indian Conformity Assessment Certificate (ICAC) for the medical devices manufactured, imported and marketed on Indian market under Schedule M III of Drugs & Cosmetics Rules 1945. The Medical Devices have been classified into Class A, B, C & D as per their level and intended use. It is provided that all Medical Devices sold in India (except for custom made devices, meant for a particular patient use) should, as a general rule, bear the Indian Conformity Assessment Certificate mark (ICAC) to indicate their conformity with the provisions of this schedule.

**PROPOSED NEW CLINICAL TRIAL REGULATIONS**

Additionally, the MDRB discusses clinical trials and Clinical Research Organizations (CROs) in India. If the bill is approved, some high-risk medical devices will require local clinical trials in India in addition to foreign clinical data. In general, more-stringent regulations will apply to CROs and clinical trials.

**RECENT UPDATES**

In January 2011, the Ministry of Health and Family Welfare issued a notification to amend the Drugs and Cosmetic Rules with some minor proposals (draft rules) on clinical trial establishments. There are also proposed additions that stress the quality of clinical trials, the need for proper procedures and requirements for skilled CRO staff.

On 11 May 2011, CDSCO released draft guidelines on reporting serious adverse events (SAEs) for medical devices in clinical trials. At present, CROs and medical companies are using multiple different formats to report SAEs. CDSCO is trying to standardize the reporting procedure.

The Health Ministry is planning to amend the Drugs and Cosmetics Rules to introduce certain provisions relating to medical devices and diagnostic reagents. As per media reports, the Ministry will frame draft rules in respect to labelling, manufacturing, shelf life and other matters relating to medical devices and publish them for seeking feedbacks from the stakeholders, before making effective the same.
CONCLUSION
The Indian medical devices and supplies market is at a nascent stage and was estimated at US$2.75 billion in 2008. This is about 1.25% of the global medical devices and supplies market of around US$220 billion in 2008. By 2012, India’s medical devices market is expected to nearly double to around US$5 billion.[11] The production of low value medical supplies and disposables is dominated by domestic manufacturers, whereas the high end medical equipment is generally imported.[12] In the future, due to the huge market opportunity in India, more and more foreign medical device companies are expected to explore Indian market for their products.

With an evolving regulatory situation, medical device companies are required to stay up-to-date in order to achieve success in India. The Indian government is working on a comprehensive regulatory framework for the medical device sector. India’s health authorities plan to issue a set of guidelines to define and regulate medical devices as a separate category.

The growth of Indian medical devices industry is driven by a host of factors and is sure to see exponential growth in the coming years. Some market drivers for this industry are:

a) An increase in the Gross Domestic Product growth of the Indian economy
b) Increase in the Healthcare Expenditure
c) Improvement of overall health status
d) Changing of demand pattern for medical devices in India due to a rise of lifestyle-related diseases such as diabetes, cardiovascular disease etc.
e) Increasing of Medical Tourists
f) Increasing of medical infrastructures like hospitals, specialized diagnostic centers, laboratories

In a nutshell, continued flow of investment in private sector infrastructure has resulted in a steady increase in the market for medical equipments and supplies. It is estimated that the market will continue to grow. Further, the recent liberalization of trade and investment laws makes India one of the most promising markets for medical device manufacturers. It is predicted that India will be the most populous country in the world by 2050. India will make its mark as a growing market, potential partner in manufacturing and R&D, and as a preferred destination for clinical trials.

11  Medical Devices and Equipment in India (June 2009), Cygnus Research
12  “Medical Devices: Sector Analysis, Recommendation for NIPER-Ahmedabad” (June 2009), National Institute of Pharmaceutical Education and Research.
“Today’s clean-tech intellectual property is tomorrow’s oil.”

Andy Hannah, CEO of Plextronics

In today’s technology driven era when everybody is talking about environmental protection then anything created which has benefits for environment, technology and mankind really sparkles more than a diamond. To move away from carbon dependent economy to one that is carbon free is an enormous challenge confronting humanity. Intellectual Property Rights (IPR) can be a vital enabler of growth and innovation in the field of green technology.

Recognizing the importance of IPR, Jacques de Werra, Professor of Contract Law and Intellectual Property Law, University of Geneva opined that IP is technologically neutral – it protects all types of creativity. It is not green in and of itself but with political will it can be made “green.”

GREEN TECHNOLOGY

Green Technology, also known as Environmental Technology or Clean Technology is the application of one or more of environmental science, green chemistry, environmental monitoring and electronic devices to monitor, model and conserve the natural environment and resources, and to curb the negative impacts of human involvement.

The use of green technologies limits the global warming caused as a result of greenhouse gas emissions, allow us to save the non-renewable energy and find alternative sources of energy such as, wind, solar, biomass, etc.

GREEN INTELLECTUAL PROPERTY (GREEN IP)

Green intellectual property refers to the protection of innovations in the field of green technology. It is a concept where innovations which are helpful to environment in one or the other way are legally protected.

It is pertinent to note that one of the primary motives of granting monopoly rights was to promote technological innovation and environmental benefit. Since green technologies tend to protect the environment by reducing the hazards caused to nature by the human intervention, it is essential to take an initiative for providing a fast track procedure for protection of Green Intellectual Property.

Any technology that causes an appreciable reduction in the adverse impact on the environment resulting from any human activity simultaneously maintaining the same level of activity can be considered as green technology. Admittedly, an effective system of Green IP protection coupled with effective government policies and commercialization methodologies can provide the most efficient framework for the global diffusion of green technologies.

Since 2009, many patent offices, mainly in industrialized countries, have put in place schemes to fast track ‘green’ patent applications. These include the UK IP office, the United States Patent and Trademark Office (USPTO), the Korean Patent Office, the Australian IP Office, the Japan Patent Office and the Canadian IP Office. In April 2012, the Brazilian National Institute of Industrial Property (INPI) announced a pilot program to accelerate green patent applications. The objective is to encourage innovation in green technologies by bringing new products to the marketplace more quickly.

Considering the myriad benefits of Green IP, even developing countries, including India, need to access their IPR system and start a special system which accelerates the Green IP protection process. The features of this special system can also include

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creation of a database having innovations related only to green technologies, so as to facilitate innovators, end users and leading players in the field across the globe.

**NEED OF GREEN IP**

Today for someone adopting a green concept may be a style statement but this is actually the need of the hour. Reportedly, China emits more CO\(_2\) than the US and Canada put together – up by 171% since the year 2000. India is now the world’s third biggest emitter of CO\(_2\), pushing Russia into fourth place.\(^4\)

Although, the carbon-based energy sources are expected to continue meeting the world’s seemingly infinite global energy demand for years to come, it is also unambiguous that major advancements in the field of clean energy technologies are essential to conserve the finite natural resources.

Therefore, there is a pressing need to improve our IP system

- to encourage innovations in the field of green technologies;
- to disseminate and promote green technologies worldwide;
- to encourage consumers to favour products and services which integrate green technologies; and
- to permit the transfer of green technologies to other nations.

**INITIATIVES**

It is very clear that to conserve natural resources that are depleting at a very fast rate and are non-renewable in nature, initiatives for the deployment of green technologies should be taken both by the government and the private sector. Consequently, industrialized countries and emerging economies have made large and effective investments in Research & Development of green technological innovations.

The various technology cooperation programs in the clean energy sector include:

- Launched on September 16, 2010, “IPC Green Inventory” is an initiative of World Intellectual Property Organization (WIPO). This on-line tool is linked to the International Patent Classification (IPC) system and facilitates searches for patent information relating to environmentally sound technologies (ESTs). As it contains around 200 topics directly relevant to ESTs, this can be very helpful in identifying existing and emerging green technologies and potential partners for further research & development (R&D) and commercial exploitation.

- US-China “Clean Energy Research Centre”, created in 2009 by US and China to facilitate joint research and development of clean energy technologies by specialized teams of researchers, scientists and engineers from both the countries. A US-China Renewable Energy Forum has also been established to facilitate cooperation on IP matters related to clean energy.

- Launch of a “Joint Clean Energy Research and Development Centre (JCERDC)” by the US and India, in 2009, to advance Clean Energy and address global energy and environmental sustainability challenges.

- Creation of “Green Technology Pilot Programme,” by the United States Patent and Trademark Office in 2009 to accelerate the examination of patent applications related to energy conservation, environment protection, green technologies, and reduction in carbon emission.

- Another instance includes expenditure of 211 million USD in 2001 by oil giant British petroleum (BP) on replacing their old logo with a new green colour based ‘helios logo’ designed to represent energy in its many forms.

- Launch of “The Eco-Patent Commons,” an innovative green community, in February 2008, by a number of large multinational firms such as Sony, IBM, Nokia etc., in collaboration with the World Business Council for Sustainable Development (WBCSD). This community aims to share knowledge and patents related to the environment, energy saving, pollution prevention, recycling, or water conservation. Each participating organization as well as any third party has free access to this community and no registration or notice is required to access the protected technologies.

\(^4\) [http://www.geiper.in/Publications/GreenIP.pdf](http://www.geiper.in/Publications/GreenIP.pdf)
CONCLUSION

In the years to come, the increased R&D and deployment of green technologies will certainly play a major role in stimulating economic growth. Today, when the problem of greenhouse gas emission, depletion of ozone layer, and deterioration of natural resources are at alarming stage there is an urgent need to propel technological innovation and R&D in the field of green technology.

There can be an array of diverse policy approaches, but the basic principle will be the same - encouraging innovation and commercialization of breakthrough in local as well as global markets. In addition to the initiatives taken by the Government, even the multinational firms need to come up with more and more ideas and innovations in clean energy sector. For example, Nokia, introduced a patent to the community for recycling mobile telephones. This patent is available in “The Eco-Patent Commons” and can be accessed by the third party without any royalty fee.
ORDRE PUBLIC AND MORALITY EXCLUSIONS FROM PATENTABILITY

Kailash Choudhary

There are various theories given by different persons to explain the claim and justification of patent system. Among these various theories “incentive” or the “reward theory” are the most common. To simplify patents are rewards in the form of monopolies granted to persons who has developed new, inventive and useful products or processes and in return it is expected that such rewards will foster inventors to come up with useful inventions at higher rate. However this is a debatable issue that whether patent system has foster a higher rate of new useful inventions.

In developing countries, patent system is not just only to increase the innovation, but is attuned to take into accounts the concerns of “access” to technology most significantly in the field of pharmaceuticals and public health. Hence it is evident that the patent regime cannot be segregated from other public policies such as moral values and health. Right from start there is conflict between the patent rights on one hand and the public policies, social values and fundamental rights on the other. The issue is to balance out between these conflicting and competing concerns and to come up with regime that would, while promoting innovation, does not erode important issues.

This article seeks to appraise the patent and public order or morality interface from the point of view of the ex-ante mechanism i.e. ways in which countries sought to limit the grant of patents to certain categories. Broadly such exclusions include public order or morality, methods of medical treatment, plants and animal varieties, discoveries, mere combinations, derivatives etc. The exclusion under public order or morality will be taken up in this article.

PUBLIC ORDER OR MORALITY

The exclusions of ‘public order’ or ‘morality’ from patentability vary from country to country as the scope of application of these exclusions largely depends upon local cultures and practices. What is considered as immoral in one country can be considered as normal practice and comes under public order. The terms ‘public order’ or ‘morality’ are full of ambiguity and vary according to the practices of the particular state. Looking into the issue that whether law is a reflection of morality or the same can be divorced from the former, the positivist school of law states that the law should be separated from morality and should be based on logic and reasons. However the school of natural law argues that law reflects the morals and norms of the society and it cannot be based purely on rules of reason and logic.1

Accordingly the positivist will argue that the patent shall be granted as long as the invention in novel, inventive and useful and morality should have no role to play in the grant of the patent. On the other hand school of natural law will present opposite views that an invention which offends society’s morals should not be granted patents reason being the natural schools fundamentals principle that the law is a reflection of morals of the society and something which offends morality of society cannot be given a legal character.

ARTICLE 27.2 OF TRIPS

Article 27.2 of the Trade Related Intellectual Property rights (TRIPs) allow member countries to exclude form patentability such inventions which may offend the morality or public order of the its society. Nothing has been clearly defined in the TRIPs with respect as to what comes under the morality.

Article 27.2 of TRIPs states that “Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law”.

The words ordre public and morality exclusions as provided in Art. 27.2 are not easy to define. According to one interpretation ordre public means “expresses concerns about matters threatening the social structures which tie a society together i.e. matters that threaten the structure of civil society as such” and morality means “degree of conformity of an idea to moral principles”. Both ordre public and morality are reflective of then prevailing principles, socio-cultural and religious values of member countries thus it is not possible to provide objective definition of the same.

The latter half of the Art. 27.2 defines to some extent the aspects of such exclusions as those invention whose commercial exploitation is banned in order to protect human, animal or plant life or the environment and not merely because the existing law of the state prohibits exploitation of such inventions.

POSITION IN UNITED STATES

United States of America never had an exception of morality or ordre public in their patent laws however such requirement was fixed by the Courts but the same was used rarely. In the mid twentieth century the USPTO started banning patents on gambling machine on morality grounds however the same came to end in 1980’s when the Court held that inventions for gambling machines are no more or less immoral than invention such as gun which may used for killing people.

The USPTO in late nineties invoked moral utility doctrine in order to check the controversial applications related to biotechnology inventions. But the same was criticized by the Courts because according to them it is the legislature not the executive which can define the boundaries of the law. Hence there are very few examples where the morality exception was raised by the USPTO.

POSITION IN EUROPEAN UNION

The European Union adopted a different approach by inserting the morality and public ordre clause in the patent laws since very beginning. Unlike TRIPs the European Patent Convention mandatorily requires its members to provide for morality exclusions. Further the EPO later on issued Biotech Directive – 98/44/EC which bars certain biotechnological invention derived from the destruction of human embryos or manipulation of genetic structures. EPO is very stringent on this morality and public ordre exclusion and unlike US first asks the question before deciding for the grant of the controversial patents.

Article 53(a) of the European Patent Convention 2000 provides that European patents ‘shall not be granted in respect of inventions the commercial exploitation of which would be contrary to “ordre public” or morality’ and that ‘such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting states’.

Rule 28 Exceptions to patentability: Under Article 53(a), European patents shall not be granted in respect of biotechnological inventions which, in particular, concern the following:

a) processes for cloning human beings;
b) processes for modifying the germ line genetic identity of human beings;
c) uses of human embryos for industrial or commercial purposes;
d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.

In the case of Onco-Mouse the exclusion under Article 53(a) of the EPC was argued for the first time. In this case the subject matter of patent

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application was a mouse which has been genetically modified to carry an oncogene in order to make them more vulnerable to cancer. The object of the invention is to use these modified mice in cancer research. Upon examination of the application the EPO rejected the application stating that the animal varieties are not patentable. However on appeal the Technical Board of Appeal applies the morality clause under Article 53(a). The technical board is of view that genetically modifying a mammal and that to ensure that it will develop cancer was very problematic as the same cause suffering to the animal. However the Board of Appeal forwarded the application back to the examination division stating that while considering morality, the Office should balance inventions utility to the mankind with the suffering caused to the animals. The Board accordingly held the genetically modified mouse to be patentable on the grounds that the same was for the benefit of the humanity.

Since then there are several cases like The Plant Genetic Systems Case, The Transgenic Animals decision, The Wisconsin Alumni Research Foundation (WARF) case etc. where exclusion under Art. 53(a) has been discussed in detail.

POSITION IN INDIA

The Indian Patents Act, 1970 provides a statutory provision regarding the public order or morality exclusion.

Section 3(b) states that "an invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment".

Further the draft manual of Patents also provides some examples which come under exclusion on the grounds of public order or morality. However the exclusion as provided under the law is yet to be scrutinized by the Indian Courts. In the case of Novartis AG v. Uol & Ors. the IPAB denied patent on the ground that the prices of the drug Gleevec is excessively high and was out of reach of common man. The IPAB held that "in our view [the drug] is too unaffordable to the poor cancer patients in India. Thus, we also observe that a grant of product patent on this application can create havoc to the lives of poor people and their families affected with the cancer for which this drug is effective. This will have disastrous effect on the society as well. Considering all the circumstances of the appeals before us, we observe that the Appellant’s alleged invention won’t be worthy of a reward of any product patent on the basis of its impugned application for not only for not satisfying the requirement of section 3(d) of the Act, but also for its possible disastrous consequences on such grant as stated above, which also is being attracted by the provisions of section 3(b) of the Act which prohibits grant of patent on inventions, exploitation of which could create public disorder among other things."

It is interested to note that the IPAB has rejected the above case on the ground of public order and not on the grounds of morality. At present the case is pending before the Supreme Court of India.

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3 [1993] 24 IIC 618
4 Harvard/Transgenic Animals, T 315/03 (2006) OJEPO 15, 29 (TBA)
6 M.P. No. 1 to 5 /2007 in TA/1 to 5 /2007/PT/CH, (IPAB)
INTRODUCTION
The term Non Practising Entities or NPE is used for individual inventors, universities, both small and large patent aggregators who did not commercialize their patents and their primary purpose is to enforce their patents through licenses or litigation. Primarily the term NPE is used for individual inventors and universities who did practise or commercialize their inventions on their own. NPE's are also termed as 'patent troll' who's one and only purpose is to grab patents and use them against companies which manufacture similar products. Patent troll is a negative and controversial term. Primary functions of the non practising entities are as follows:

- A non-practising entity (NPE) hold's the patents but do not manufacture products based on patents;
- Buys patent portfolio from one company in order to sue another company by claiming that one of its patent is being infringed;
- Enforces patent rights through licenses or litigation for individual inventors who do not use patented inventions;
- NPEs sole agenda is to enforce patent rights with using those patents themselves.

NPES VS. PRACTICING ENTITIES
Both practicing and non practising entities hold the patent ownership however only the practising entities actually makes, uses or sells a product for which patent is granted. On the other hand non-practicing entities generally acquires patents with a primary purpose of robustly enforcing those patents against practising entities. Generally practising entities acquires patents through their own research and development but in contrast non practising entities acquire patents from other inventors or companies who are not using the same. The primary purpose of the practising entities is to commercialize products based on the patents and in case someone else infringes their products then to enforce patent rights through litigation. The primary purpose of the non practising entities is to gather patents and enforce patent rights through litigation or negotiation for licenses.

RECENT TRENDS: NEW ENTITIES IN THE NPE SYSTEM
NPEs have been emerging as a prominent feature in the developed countries IP landscape since last many years. NPE's have increasingly become the source of curiosity for manufacturing companies. Now NPEs are playing a challenging role which is more intricate and refined than the redundant role of Patent troll. In recent years, entities acting as “brokers” or “clearinghouses” for IP and have boosted the span of secondary markets in IP. NPEs generally do not have or retain patent ownership which they handle and sustain by charging commission in the transactions. These Firms are actually turning very complex concepts like patents and patent litigation into a commodity which can be freely bought and sold in the market by increasing the liquidity and reducing the transaction cost for potential buyers. For example a company Ocean Tomo, a clearinghouse has earned huge attention for high-profile patent auctions over the last few years. Ocean Tomo characterizes himself as a “merchant bank,” and also involved in financing sales and licensing patent rights.1

Another term used for these entities is “patent aggregator”. These patent aggregators business is to obtain large number of patent rights, either for defensive purposes or for earning licensing revenue or both. Patent aggregators typically do not practise the patent or IP assets they acquire and hold, rather they prefer to license the same. Now a days the aggregators are offering defensive licenses which eliminate the threat of being sued

on those patents. One well known patent aggregator who provides defensive licenses in consumer electronics, media and software is RPX. It was founded in 2008 and has acquired 1500 US and international patents since then.2

**CONTROVERSY BEHIND NON-PRACTISING ENTITIES**

Business model of NPEs was criticised by the industry. The main argument of the critics was that NPEs could misuse the patent system to an extent that could at last spoil the incentives to innovate by “true” innovators that really make goods and offer services. Other reasons for opposition of NPC’s are

- NPEs do not fear of liability, counterclaim or unfair trade practises unlike their competitors who make and sell products. Thus NPEs do not behave like true business competitors.
- Settlements in law suit instituted by NPEs are very common which results in money spinning. It is believed that 9 out of 10 suits instituted by NPEs end in a settlement.
- NPEs due to their business model always remain well positioned to extract huge money by settlements from alleged infringers. Also the alleged infringes due to high cost and risk involved in the infringement suits always remain inclined towards settlement.
- NPEs diminish competition in the market as they do not use the invention and increase prices while companies with a product or services are charged through litigation for their contribution. The volatility of patent infringement litigation and the defence of lawsuits is moving money away from true inventors and the development of new products.
- NPEs are immune to infringement claim or counter claim hence defendants cannot counter that the plaintiff is infringing his patents and get injunctive relief as a defensive means for hindering business operations.
- NPEs are generally not engaged in promoting innovation and new products in the market as they don’t create patent, they simply buys the same and protect the same for others.
- Individual inventors or SMEs who sells their patents to NPEs are paid with very small amount while NPEs earn huge amount of settlement or licensing.

**NEGATIVE IMPACT OF NPEs**

At present NPEs account for half of the patent lawsuits in Unites States. However the success rate of the suits bought by NPEs is very low i.e. around 8 per cent where a suit brought by real competitor’s success rate is around 40 per cent. The major reason behind this is settlements by the defendants with the NPEs as they cannot afford the huge cost of litigation and damages if they lost the suit. It was observed that in a lawsuit brought by the NPEs the median decline in common stock value of a defendant is USD 20.4 billion.

The above problem is best illustrated in a recent case **NTP, Inc. v. Research in Motion, Ltd. (RIM)** Wherein NTP instituted a patent infringement suit against the RIM which resulted in a settlement for USD 612.5 million. However in this case the trial court has just awarded damages for USD 50 million and also casted doubts on the validity of some of the NTP’s patents. Further the USPTO also review the questionable patents of the NTP and has invalidated some of its patents. But before the final determination of the case and the validity of the NTP’s patents both RIM and NTP settled their dispute by settlement. The settlement done by RIM is viewed as a result of pressure from investors and costumers who was worried about RIM’s ability to continue with the wireless services. This case is best example of influence of NPEs in the industry, where the same was able to obtain a very profitable settlement even though valuation of the suit much lower and validity of the infringed patents is also in question.

**CONCLUSION**

Non practising entities are performing valuable functions of facilitating markets for technologies which left unnoticed because of lack of resources and expertise of the inventors to successfully license or enforce their patents. NPEs can be termed as departmental stores for patents, offering one stop shopping for purchasing and licensing of

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patents. Further they also help individual inventors to generate revenue out of their inventions despite not having resources to work and commercialize their patents. It is beyond doubt that an efficient patent system also needs intermediaries who can reduce the transaction costs between the inventors and those who manufacture and commercialize them. NPEs are market architects who take unused or under used assets and build value and add liquidity to the market through legitimate monetization efforts. However in order to check the negative impact of NPEs, rules and regulations to guide the activities of the NPEs should be created. Till date no guideline or statute is prescribed by any country for regulating business of NPEs.
FRAND AND OTHER PATENT LICENCES

INTRODUCTION
Patent is a monopoly right conferred upon by the Patent Office on an inventor to exploit his invention for a limited period of time.

Patents are predominantly used to protect an invention from being abused by competitors.

WHAT DO WE MEAN BY THE TERM ‘PATENT LICENSING’?
A patent licence is an agreement that transfers less than ownership rights in a patent or, which grants certain rights to the licensee. A patent licence can be exclusive or non-exclusive, for a specific field of use or for a specific geographical area. It is common for companies engaged in complex technical fields to enter into dozens of licence agreements associated with the production of a single product. There are four types of patent licenses- compulsory licence, cross-licensing, defensive patent licence and reasonable and non-discriminatory (FRAND).

WHAT IS FRAND?
FRAND stands for Fair, Reasonable and Non-Discriminatory. It is also known as Reasonable and Non-discriminatory terms (RAND). It is a licensing obligation that is frequently required by standard-setting organizations for members that participate in the standard-setting process. The term FRAND has not been defined. The individual terms are defined as under:

Fair primarily relates to the underlying licensing terms. The term ‘Fair’ means terms which are not anti-competitive and that would not be considered unlawful if imposed by a dominant firm in their relative market.

Reasonable refers mainly to the licensing rates. According to some people, a reasonable licensing rate is a rate charged on licenses which would not result in an unreasonable aggregate rate if all licenses were charged a similar rate.

Non-discriminatory relates to both the terms and the rates included in licensing agreements. As the name suggests this commitment requires that the licensor treats each individual licensee in a similar fashion. This allegiance is included in order to maintain fairness in the competitive market with respect to existing competitors and to ensure potential new entrants are free to enter the market on the same basis.

FRAND requires that holders of essential patent do not discriminate, and do not restrict competition downstream. Licensors must avoid discriminating:

1. against and between other technology providers (e.g., by requesting unremunerated grant-backs, discriminating against IP-rich licensees and diminishing innovation incentives and technology competition);
2. against and between rival firms in downstream markets (e.g., by refusing to provide reciprocal licenses to rival manufacturers of standardized components or products);
3. against and between licensees in downstream markets (e.g., by offering royalty rebates and incentives, particularly when such discrimination is linked to exclusive or preferential supplies - resulting in “primary line” antitrust injury).

FRAND (fair, reasonable and non-discriminatory) licenses allow companies to develop open standards for systems such as 3G mobile networks by sharing information and technology. Standards bodies typically require that companies participating in the development of a standard agree to licence any relevant patents they hold on FRAND terms if their technology is essential to the standard.

Standard Setting Organizations set common standards for a particular industry in order to ensure compatibility and interoperability of devices manufactured by different companies.
They have rules that govern ownership of patent rights that apply to the standards the organization has adopted. One of the most common rule is that a patent that applies to the standard must be adopted on “reasonable and non-discriminatory terms” (RAND) or on “fair, reasonable, and non-discriminatory terms” (FRAND). The two terms are interchangeable.

The term FRAND is mostly preferred in European countries and the term RAND is preferred in the United States of America. The rules framed by this organization are intended to prevent its members from engaging in licensing abuse based on the monopolistic advantage generated as a result of having their intellectual property rights included in the industry standards. The members of this organization are required to offer FRAND licence to anyone, not necessarily members of the organization.

**RECENT JUDGMENTS AND NEWS ON FRAND PATENT LICENSES**

In June 2012, the Federal Trade Commission (FTC) asked the US International Trade Commission (ITC) to carefully reconsider banning products like the Xbox 360 that allegedly infringe upon patents that are required to be fairly licensed as part of standards agreements. FTC has issued a statement to the ITC in both the Apple vs. Motorola and Motorola vs. Microsoft cases now pending, saying that it’s concerned a company might make a promise to license a standard-related patent under fair, reasonable, and non-discriminatory (FRAND) terms, and then fight to ban products using those patents as a way to negotiate higher, unfair rates. That’s exactly what Apple and Microsoft claim Motorola is trying to do, but so far they haven’t been successful — Moto won ITC rulings saying the Xbox 360 infringed several FRAND patents on H.264 video encoding and that the iPhone and iPad infringe a FRAND patent on wireless communications.

It has become a serious international issue as companies like Motorola and Samsung rely heavily on their standards-related patents in various lawsuits.

The most talked about lawsuit was the **APPLE v. SAMSUNG (2011)**.

The biggest lawsuit had two smartphones giants, on one side world’s most valuable company Apple Inc. which changed mobile users experience with its iPhone and iPad and on the other the world’s largest mobile phone manufacture Samsung Electronics.

On April 15, 2011, Apple sued its component supplier Samsung in the United States District Court for the Northern District of California, alleging that several of Samsung’s Android phones and tablets, including the Nexus S, Epic 4G, Galaxy S 4G, and the Samsung Galaxy Tab, infringed on Apple’s intellectual property: its patents, trademarks, user interface and style. Apple’s complaint included specific federal claims for patent infringement, false designation of origin, unfair competition, and trademark infringement, as well as state-level claims for unfair competition, common law trademark infringement, and unjust enrichment. Further, Apple also stated that Samsung had breached its FRAND commitments made on December 14, 1998 and specific FRAND commitments for the two asserted declared essential patents on May 16, 2006 and August 07, 2007, respectively. Also Samsung seeks to enjoin Apple from selling products that support the UMTS standard and by refusing to offer Apple a license to declared-essential patents on FRAND terms.

Samsung challenged the validity of Apple’s patent. But, it failed to prove the same. The nine member jury sided with Apple, deciding that not a single Apple patent was invalid. The jury has ruled that Samsung willfully infringed a number of Apple patents in creating a number of devices. Justice Lucy H. Koh ordered Samsung Electronics Co. Ltd. to pay Apple $1.05 billion in damages.

After winning a battle on the home pitch, Apple is targeting other major Android players like HTC and Google (Motorola). Foss Patent’s recent publication reveals that Apple has made an offer to license certain FRAND, or standard essential, patents in the region, which Motorola is forced to accept in order to avoid breaking antitrust laws. In fact, Google is already investigated by the EU for FRAND patent
abuse in the region, which means that it can’t keep refusing a patent license to Apple in hopes of using those FRAND patents as leverage to squeeze out a better settlement with the iPhone maker in the future.

In 2011, the European Commission issued a framework for analyzing FRAND issues. The guidelines issued by the EC explain that FRAND licensing prevents patent-holders from “making the implementation of a standard difficult” by refusing to license, requesting “excessive” fees, or imposing “discriminatory” royalties. Where there are disputes (which are not atypical in determining the reasonableness of royalties), analysis of whether fees are “unfair or unreasonable” is to be based on whether the fees “bear a reasonable relationship” to the patent’s economic value.  

Now, let us analyze the other patent licenses available to a patent holder apart from FRAND.

1. A **compulsory license**, also known as statutory license or mandatory collective management, provides that the owner of a patent licenses the use of their rights against payment either set by law or determined through some form of arbitration. In essence, under compulsory license, an individual or company seeking to use a patent can do so without seeking the patent holder’s consent, and pays the patent holder a set fee for the license.

In March 2012, India issued its first compulsory licence to NATCO in the Bayer v. Natco patent suit. The Patent Controller had earlier ruled that the Bayer price (Rs 280,000 per month) was too high for most Indians and only about 2% could afford that. The compulsory license achieved its objective with the price of sorefanib tosylate coming down to Rs 8,880. Bayer argued that the fact that they had brought down the price to Rs 30,000 wasn’t considered by the Patent Controller. They also said that revoking the compulsory license won’t hurt ‘public interest’ because Cipla was already selling the drug for Rs 5,400.

2. A **cross-licensing** agreement is a contract between two or more parties where each party grants rights to their intellectual property to the other parties. In Patent law, a **cross-licensing agreement** is an agreement according to which two or more parties grant a license to each other for the exploitation of the subject-matter claimed in one or more of the patents each owns. The term “cross licensing” implies that neither party pays monetary royalties to the other party, however, this may be the case. For example, Microsoft and JVC entered into a cross license agreement in January 2008.

3. The **Defensive Patent License (DPL)** is a patent license proposed by Jason Schultz and Jennifer Urban, directors of the Samuelson Law, Technology & Public Policy Clinic at the University of California, Berkeley as a patent licensing equivalent of the GPL copyright license. It requires entities licensing their patents under the DPL to license all of their patents under the DPL, with free licenses granted to all other DPL participants. DPL participants remain free to launch patent lawsuits against non-participants.

**CONCLUSION**

The lack of transparency in the patent licensing procedure and the application of FRAND has made it essential for the courts to come out with a harmonized interpretation of FRAND. FRAND obligation places both contractual and antitrust-related limits on the ability of the patent holder to exercise its patent in licensing negotiations, but the actual scope of those constraints is unclear.

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1 Please note that I have added this new information.
INTRODUCTION

Copyright is a right provided to the author in original literary, dramatic, musical, artistic, cinematography films and sound recording under the Indian Copyright Act, 1957. Apart from all the things mentioned above there is no Copyright provided under the Act. In the contemporary period the activities like sports events have taken a centre stage when it comes to the entertainment. The sport events are televised world wide through modern technology and they have a huge viewership around the world. A sports event has more number of viewers internationally in comparison to the viewer locally just because the reach of the viewer has increased due to the emergence of the modern technology. Now a question of contention which needs to be answered is regarding copyright in the sports events televised live on the various networks.

Under the Indian copyright Act 1957 there is no specific section or provision where the live sports event is protected. The only section where we can include the live sports event under the ambit of Copyright Act is section 13 (b) wherein the copyright is provided to the cinematography films.

If we look the definition of cinematography film under the Indian Copyright Act 1957 in section 2 (f), it provides that “cinematograph films means any work of visual recording on any medium produced through a process from which a moving image may be produces by any means and includes a sound recording accompanying such visual recording and cinematograph shall be construed as including any work produced by any process analogous to cinematography including video films”

Before moving towards the protection provided to the live sports events under the Indian legal system we look towards the protection provided under the US Laws to the same.

PROTECTION UNDER THE US LAW

Under US Law there was no protection provided to the live events prior to 1976 but after 1976 protection was made available to the sports events when they are in fixed medium. The relevant case in this respect is National Basketball Assoc v Motorola Inc1. In this case, the court addressed the issue of copyrightability of sports content under US Copyright Law. While deciding the case, this court also addressed the “original works of authorship” issue. In addition to this justification, the Court explained why the sporting events could not be considered as copyrightable subject matter. The NBA’s complaint asserted six claims for relief: (i) state law unfair competition by misappropriation; (ii) false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (iii) false representation of origin under Section 43(a) of the Lanham Act; (iv) state and common law unfair competition by false advertising and false designation of origin; (v) federal copyright infringement; and (vi) unlawful interception of communications under the Communications Act of 1934, 47 U.S.C. § 605. Motorola counterclaimed, alleging that the NBA unlawfully interfered with Motorola’s contractual relations with four individual NBA teams that had agreed to sponsor and advertise SportsTrax.

The district court dismissed all of the NBA’s claims except the first -- misappropriation under New York law. Hence the issue before the Hon’ble US Supreme Court was “are the state law misappropriation and Lanham Act claims”.

The Hon’ble US Supreme Court held that “Sports events are not “authored” in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen.

1 (2nd Cir. 1997) 105 F.3d 841.
Unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script. Preparation may even cause mistakes to succeed, like the broken play in football that gains yardage because the opposition could not expect it. Athletic events may also result in wholly unanticipated occurrences, the most notable recent event being in a championship baseball game in which interference with a fly ball caused an umpire to signal erroneously a home run.

In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute “original works of authorship” under 17 U.S.C. §102(a). Section 102(a) lists eight categories of “works of authorship” covered by the act, including such categories as “literary works,” “musical works,” and “dramatic works.” The list does not include athletic events, and, although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.”

**INDIAN JUDICIAL SCENARIO**

The Indian copyright act has specifically provided the classes of works under Section 13 on which copyright subsists and apart from cinematography films there is no scope of any rights on the live event televised around India. The interpretation of Section 13 (b) is required in order to view the extent of protection provided to the live sports events. The infringement of the rights related to the sports event is a question need to be answered till date by Indian judiciary as the question has been raised but not properly answered by the Indian courts.

On minutely analyzing the definition of cinematography films provided under Section 2(f) of the Indian Copyright Act, 1957 it means the work which is recorded on a fixed medium be it video cassettes, tapes or compact-discs. A sports event which is televised live cannot be said to be recorded till it is saved in a fixed mediums mentioned above as they are televised when they are happening. If the work is first recorded and then broadcast over the network with some special graphics then it may be said the work is related to the cinematographic film.

In case of *ESPN Stars Sports Vs. Global Broadcast News Ltd. and Ors*. Plaintiff contended that it entered into an exclusive license Agreement whereby the former was granted exclusive rights to make live and/or delayed and/or pay broadcasts of feeds of the cricket matches by terrestrial television, cable television and/or satellite television in India and other specified countries. Allegation were made against the Defendants that it used the footage for creating program which they commercially exploited. Hence, the plaintiff sought permanent injunction to restrain them from utilizing the footage of plaintiff’s the case was not decided on merits and the question regarding the Copyright in the live events remained unanswered as suit was dismissed on the technical grounds.

In case of *ESPN Software India Private Ltd. Vs. Tudu Enterprise and Ors*. It is related to the Unauthorized Transmission of event under Section 37(3) of Copyright Act,1957. Defendants had unauthorisingly and without entering into contracts either with distributor of Plaintiff or with Plaintiff itself were transmitting networks channels of Plaintiff and showed events to their subscribers and violated Plaintiff’s broadcast reproduction right. The court has to decide whether, Defendant’s act of unauthorisingly transmitting networks channels of Plaintiff was justified - Held, Plaintiff’s channels were paid channels and viewed by persons who were subscribers through authorized cable operators - Therefore, only authorized licenses could use/distribute encrypted channels. Licensed cable operators used decoder or decryption device which have unique numbers given by Plaintiff to its licensed cable operators. Further, unauthorized cable operators indulge in illegal capturing of sports signals of Plaintiff which were illegally transmitted - Further, unlicensed broadcast of reproduction rights vested in Plaintiff by operating signals, transmit to India in foregoing manner was illegal, unfair and deserves to be prohibited -Defendants in suit had not signed any licensed agreement with Plaintiff’s distributors and was not authorized to distribute channels over their cable operators and transmission of these
channels was violation of Section 37(3) of Copyright Act and thus was not justified.

Even though court has recognized the rights to distribute live sports event is an infringement of Copyright of the official broadcaster under section 37(3) of the Indian Copyright Act, 1957 but if we look it from the definition and the provision provided under the Act as discussed above then it is quite appropriate to say that there is no provision related to copyright in the live sports events till date. The issue was not discussed in length in any of the cases till date. The interpretation provided in the NBA Case by US Supreme Court is appropriate to be applied in the cases where there is a claim of copyright in the live sports events.

CONCLUSION

In today’s time when the issue of copyright in the live sports event is of utmost significance there is a need that the issue must be thoroughly dealt with. The live sports events involve a huge amount of economic value that it cannot be ignored and be dealt in a manner which will lead to the death of the whole genre of events because nobody would like to invest in a sports event when he is not sure that how much rights he will be able to safeguard in case of infringement of his copyright. The Courts in India till date are providing recognition to the Copyright on live sports events but same is quite opposite to the law prevailing in the US in regards to the same subject. It is quite appropriate to analysis the definition of Cinematography films given under the Copyright Act, 1957 as the there is no other provision wherein we can say that protection is provided under the Act to the live sports events. If we differentiate as per the theory of NBA case then it is possible to provide the Copyright in sports event in fixed form when the same is recorded in any form. Hence there is a need of the hour that the law in this regards should be clear and should be in co-ordination with the international law.
*IntrODuCtIOn*

The exclusive rights to use provided to an author for the creation of some literary, artistic, musical, dramatic, cinematography and sound recording are called Copyright whereas exclusive rights provided to the creator of a distinctive design are called Design protections. The two concepts are quite different but they can overlap each other when a particular design is a subject matter of design protection but there is also a possibility of Copyright protection for the same as well. The same problem has been dealt with in both copyright Act, 1957 and Design Act, 2000.

**LEGAL PROVISION RELATED TO THE SUBJECT MATTER OF DESIGN**

A design or a shape of a product can be a subject matter of Trademark, Copyright as well of Design. In order to safeguard right related to a distinctive shape it is of utmost importance that the proper mode of protection should be chosen to get maximum out of the intellect put in creation of the shape. One wrong move can easily ruin all the efforts made in creation of the design. More specifically it could be said that the confusion related to the registration of design is mainly concerned with the copyright and design registration as the any design which is distinctive and can be represented graphically will get registration under the Trademark Act, 1999. The confusion comes when deciding between copyright and design protection. For better understanding the problem it is relevant to go through the provision of both Acts dealing with the same issue.

**SECTION 15 (2) OF THE COPYRIGHT ACT 1957 PROVIDED THAT**

According to Section 15 (2) of The Copyright Act, Copyright in any Design which is capable of being registered under the Designs Act, 1911 (2 of 1911), but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright, or, with his license, by any other person.

**WHEREAS SECTION 2(D) OF THE DESIGN ACT, 2000 PROVIDES**

d) “design” means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957

Analyzing both the section mentioned above it can easily be observed that the intention of the legislature while drafting the two enactments was to provide protection to a unique design but at the same time they tried to make sure that unnecessary monopoly should not be created due to abuse of the law. The special section regarding the protection of design is added in Copyright Act, 1957 due to the fact that the protection provided under the copyright Act is for sixty years from the date of death of the owner of the Copyright whereas the protection under Design Act, 2000 is only for fifteen years.

**INTERNATIONAL OUTLOOK REGARDING THE CONFUSION RELATED TO DESIGN AND COPYRIGHT PROTECTION**

The eligibility of the protection of a design is totally dependent upon concept of ‘appeal to’ and are...
judged solely by the eye' which is given under the definition of design under the Design Act, 1999. In Interlego A.G. Vs. Tyco Industries INC\(^2\), the Court held that a shape has to be tested by two criteria, one positive and one negative, and both must satisfy in full in order to qualify as a design within the definition of the Act. First, the primary essential before a shape can be registered as a design is that it should have eye-appeal and in this context (a) the eye is that of the prospective customer and (b) the appeal is that created by a distinctiveness of shape, pattern or ornamentation calculated to influence the customer's choice.

When a design which is not technical in nature and the same is different from the usual design of the product to which the same is applied then the same design is the subject matter of the design registration under the Design Act, 2000. If a owner instead of going for the design registration claims the copyright in the same then the protection of design is provided till the reproduction of fifty article of the same product to decision regarding the protection of the design is of utmost importance.

In Copinger and Skone James, the learned author laid down the principle which clearly states that every artistic work, the design of which is reproduced or is intended to be reproduced in more than fifty articles, was to be excluded from protection under the Copyright Act, as this would affect many engravings and photographs of a purely artistic character. In Cimon Ltd. Vs. Benchmade Furniture Corp\(^3\), Jackett P., held that a design which relates to shape or configuration of an article is not itself an objection provided that it is a design to be applied to the ornamenting of an article, and is eligible for registration even though it requires that its purpose of ornamenting be accomplished in whole or in part by constructing the article or parts of it in certain shape or shapes.

In Bayliner’s case\(^4\) the court held that what constitutes a design refers to those essential characteristics which it possessed when being made. In Interlego A.G. Vs. Tyco Industries INC\(^3\), the Court held that a shape has to be tested by two criteria, one positive and one negative, and both must satisfy in full in order to qualify as a design within the definition of the Act. The primary essential before a shape can be registered as a design is that it should have eye-appeal that is, the eye is that of the prospective customer and the appeal is that created by a distinctiveness of shape, pattern or ornamentation calculated to influence the customer’s choice.

**INDIAN LEGAL SCENARIO**

In a recent judgment of Microfibres Inc vs. Giridhar & co\(^6\), the questions to be decided of was if designs in question was capable of being registered under the Designs Act, 2000 and has not been so registered whether the Appellant was entitled to seek protection under the copyright law as the designs had not been registered under the Design’s Act — Held, if the design is registered under the Designs Act, the Design would lose its copyright protection under the Copyright Act — If it is a design registrable under the Designs Act but has not so been registered, the Design would continue to enjoy copyright protection under the Act so long as the threshold limit of its application on an article by an industrial process for more than 50 times is reached — But once that limit is crossed, it would lose its copyright protection under the Copyright Act.

In Samsonite Corporation vs. Vijay Sales\(^7\) the court specifically dealing with the subject of confusion regarding the subject matter of design and copyright discussed the following issues:

a) The case debated on the effect of the absence of a specific meaning for work ‘design’, for the purpose of Copyright Act,1957 –It was held that since the meaning of ‘design’ was defined in the Designs Act, 1911, hence the provisions had to be read together for the purpose of deciding the question.

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\(^2\) 1988 RPC 343 \\
\(^3\) (1965) 1 Ex. C.R. 811 \\
\(^4\) 1987 FSR 497 \\
\(^5\) 1988 RPC 343 \\
\(^6\) 2009(40)PTC519(Del) \\
\(^7\) 73(1998)DLT732
b) The case dealt with the effect of non-registration of the design under Section 15 of the Copyright Act, 1957 – It was found that the design drawn was clearly within the definition of design under the Designs Act, 1911 and within the meaning of the Copyright Act – It was ruled under Sections 47 & 2(5) of the Designs Act, 1911, that the plaintiff could not claim the protection under the Copyright Act, 1957, with reference to the drawings.

c) The case debated on the scope of requirements of law in relevance to the users of the international design – It was ruled that general understanding meant that the nature of the article concealed in the design should be suited to production in quantity – The article would be excluded which would normally be or only capable of being produced singly such as non-reproducible or artistic creation or architectural works.

d) The case discussed the criteria to determine whether drawings could be the design within the meaning of Section 2(5) of the Designs Act, 1911 - It was held that the purpose and the intention would be relevant criterion to consider if the drawings were design in the light of the provisions of the Designs Act, 1911 and Section 2(c)(1) of the Copyright Act, 1957. Hence from the above discussion it is very clear that a subject matter of design would have to appeal to the eye in a sense that it looks different from the usual shape of a particular product. The design falling in category discussed above should be applied for the registration under the Design Act, 2000. The decision regarding a particular design is dependent upon the fact and circumstance of each particular case. A design applied to a particular product might be unique in reference to a particular product whereas the same design can be taken as a usual design in relation to another products. For example a heart shape Specs can be distinctive and can become a subject matter of design registration whereas heart shape applied to greeting cards may not become so.

CONCLUSION
The design of a product as being a work of intellect deserves the protection from unauthorized use hence the protection is provided to the same under the Trademark, Copyright as well as under the Design Act. The type of protection chosen for the protection of rights in a design is a delicate issue which if not considered properly would let the owner regret later on. There are numerous cases wherein the owner has lost the protection over his design right due to improper mode chosen by him.
Intellectual property (IP) is a term referring to a number of creations of the mind for which property rights are recognized in the corresponding fields of law. Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs. Common types of intellectual property include copyrights, trademarks, patents, industrial design rights and trade secrets in some jurisdictions.

Now, the question of contention is that, how far we can say that these rights are exclusive in nature and how often they are termed as monopolistic rights? The Intellectual property rights such as Patents, Trademarks, and Copyrights etc. are given to an owner of the rights for a particular period of time in some cases and in some cases perpetually. More often than not they will turn into monopolistic rights. But as far as India is concerned, monopoly is restricted and any attempt to create a monopolistic business is against the law under Competition Act, 2002. This situation leads to a problem of balance between the IP rights and creation of monopoly. This particular problem is addressed in the newly constituted Competition Act, 2002 which has replaced Monopoly and Restrictive Trade Policies Act, 1969.

Section 3 (5) of the Act is reproduced below:

*Nothing contained in this section shall restrict—*

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(a) the Copyright Act, 1957 (14 of 1957);
(b) the Patents Act, 1970 (39 of 1970);
(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
(e) the Designs Act, 2000 (16 of 2000);
(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

The Indian Competition Act, 2002 recognizes the importance of IPRs such as patents, copyrights, trademarks, geographical indications, industrial designs and integrated circuit designs. While Section-3 prohibits anti-competitive agreements, sub-section (5) thereof says that this prohibition shall not restrict “the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights” enjoyed under the statutes relating to the above mentioned IPRs.

By implication, unreasonable conditions imposed by an IPR holder while licensing his IPR would be prohibited under the Competition Act. This provision is not very dissimilar to the laws in other countries. In some jurisdictions, restrictions that have been regarded as unreasonable, and anticompetitive, include: agreements restricting prices or quantities of goods that may be manufactured, or curbing competition between the licensee and the licensor, stipulating payment of royalty after the license period, certain types of exclusivity conditions, patent pooling, tie-in arrangement, and so.

**IMPORTANCE OF PROTECTION**

The main reason why an IPR is granted is to give an incentive for innovation, research and investment. In a sense, IPRs also create competition in innovation. Competition in innovation will provide improved product with less price. For the benefit of the society the protecting the intellect of a person will be most important ingredient. Protection provided, will help a creator in attaining benefits from labour put in by him and moreover, it will drive him further to attain better ways to achieve the desired results. Absent the IPR protection, other firms would be able to take a free ride on the R & D investment made by the inventor.
CONFLICT BETWEEN IPR’S AND COMPETITION LAW

The conflict arises between IPR and competition law because Intellectual Property Rights creates market power, even a monopoly, depending upon the extent of availability of substitute products. Intellectual Property Rights restricts competition, while competition law provokes it. Hence, competition law is against the use of unreasonable exercise of market power or the abuse of dominant position obtained as a result of the Intellectual Property Rights. In the EU, the US, and in other jurisdictions as well, there are a number of cases which bring out the contradictory pulls emanating from competition law and IPRs. In both jurisdictions, the courts recognize that firms that enjoy a dominant position due to the IPR might in exceptional circumstances have a duty to supply or license the IPR.

In the Volvo case1, while recognizing the company’s copyright in spare parts, the court pronounced that in three circumstances refusal by a dominant firm to supply a dealer on fair terms may amount to abuse of the power: charging unfair prices, refusing to supply spare parts to dealers to whom it refused a license, and failing to supply spare parts for old models.

In the Magill case2, the company wanted to produce for TV viewers a comprehensive guide to the programs of the existing three TV stations. However, the TV stations refused to allow Magill to publish their programs citing copyright infringement. The court held this to be abuse of dominance arising from the copyright.

In the Microsoft case, the company’s refusal to give to its competitor’s complete information for interoperability between their software and Microsoft Windows was held by the European Commission to be a violation of its competition law. (The case is under appeal).

Competition law recognizes the IP Rights but they tend to curb the practice of anti-competitive practices adopted by the IP rights holders. A holder of the IP rights can take any step for stopping infringements of his rights moreover he can put reasonable restriction upon the licensee to safeguard his rights under the various IP laws. But if the restriction imposed crosses the line of reasonable restriction then they will come under the purview of anti-competitive activities.

REASONABLE CONDITIONS

Section 3(5) of the Act declares that “reasonable conditions as may be necessary for protecting” any IPR will not attract section 3. The expression “reasonable conditions” has not been defined or explained in the Act. By implication, unreasonable conditions that attach to an IPR will attract section 3. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with IPRs. For example, a licensing arrangement may include restraints that adversely affect competition in goods markets by dividing the markets among firms that would have competed using different technologies. Similarly, an arrangement that effectively merges the Research and Development activities of two or only a few entities that could plausibly engage in Research and Development in the relevant field might harm competition for development of new goods and services. Exclusive licensing is another category of possible unreasonable condition. Examples of arrangements involving exclusive licensing that may give rise to anti-competition concerns include cross licensing by parties collectively possessing market power, grant backs and acquisitions of IPRs.

Reasonable condition can also be dependent on fact and circumstance of particular case. What might be reasonable in one case might not be reasonable in another case.

RESTRICTION ON ANTI-COMPETITIVE ACTIVITIES UNDER VARIOUS IPR LAWS IN INDIA

The anti-competitive activities are also recognized under various IPR laws.

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1 Volvo v Veng, 238/87, ECR 1988, 6211
Under Indian Trade Marks Act, 1999, section 29(8) (a) says that:

A registered trade mark is infringed by any advertising of the trade mark if such advertising—

(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters.

Again in section 30 (1) it is provided that:

(1) Nothing in section 29 shall be construed as preventing the use of a registered trade mark by any person for the purpose of identifying goods or services as those of the proprietor provided the use—

(a) is in accordance with honest practices in industrial or commercial matters, and

(b) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trade mark.

Under Indian Patents Act, 1970 section 84(1) there is a provision of compulsory licenses wherein it is said:

At any time after the expiration of three years from the date of grant of a patent, any person interested may make an application to the controller for grant of compulsory license on patent on any of the following grounds, namely:

(a) that the reasonable requirement of the public with respect to the patented invention have not been satisfied; or

(b) that the patented invention is not available to the public at a reasonable affordable price, or

(c) that the patented invention is not worked in the territory of India.

The compulsory licensing is also recognized under Indian Copyright Act, 1957 under section 31 wherein it is said that:

(1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work—

(a) has refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or

(b) has refused to allow communication to the public by 76[broadcast], of such work or in the case of sound recording the work recorded in such [sound recording], on terms which the complainant considers reasonable;

Keeping an eye on the abovementioned provisions of various IPR laws in India, it can be easily deduced that not only Competition law but IP laws are also keeping a check on anti-competitive activities. Proper checks and balance are put in place in order to make sure that no one takes the advantage of the protection provided to him under IPR laws and general public will not be at the receiving end due to the protection to an IPR. The basic aim of any government is to be a welfare government. The rights of country's citizens should be properly looked after. To do that, it is necessary to have provision of various laws of a country synchronized.

This will provide a proper balance between rights of Intellectual property right holder and general public.

CONCLUSION

The competition among the industry or business is healthy for the customers to get commodities at reasonable price and of best quality. Without competition in the market there will be monopoly and in a monopolistic market consumer welfare is last thing in a producer or manufacturer mind. The ultimate aim for him will be maximization of profit. The MRTP Act, 1969 was enacted to curb the practice of monopolistic business but the aim for which the MRTP Act was enacted were not achieved so there was a need for complete overhauling of the Act. The Competition Act, 2002 came in to force in order to keep a check on the anti-competitive practices which were not kept under old Act. Intellectual property rights, which are monopolistic in nature, tend to create right for the creator and can only be use by him and none else. The rights given to an IP right holder is also acknowledged under Competition Act, 2002 but it also tends to create conflicts as the IP rights are
monopolistic in nature whereas Competition Act curbs anti-competitive activities. Under Competition Act, 2002 intellectual property rights holder can restrain any person from infringing his rights and he can also impose any reasonable conditions in order to safeguard any of his rights provided to him under various Intellectual Properties law. Under various IPR laws, the anti-competitive activities are kept in check so that the monopolistic rights should not be detrimental to the welfare of general public.
Do we need a ‘World Court’? Well! Considering the pace at which our world is fast becoming a global village, a world court is one such idea whose time has come. Yes, there are certain international courts Viz. International Court of Justice in Hague, International Criminal Court in Hague again etc. but the extent of their jurisdiction and the scope of enforceability of the judgments and awards passed by them is certainly an issue of concern and has rightly perturbed not only the legal experts across the world but also the Statesmen and politicians.

Enforceability of Foreign judgments and awards passed by the courts located outside the politico-geographical boundary of a country is a grey area of International Law and involves complex issues of law. The tall and steep walls of Sovereignty protecting the unchallenged supremacy of the Nations in their international and intra-national affairs are probably the biggest hurdle in the enforceability of foreign awards and judgments.

As is the case with the third world countries, enforceability of foreign judgments in India has attracted mixed reactions from the legal experts across the world. If perceiver’s view of reality is to be believed then enforcing a foreign judgment or award in India is a tough nut to crack. However, the reality is substantially different from the above mentioned perceivers view of reality. The position of Indian legal system is crystal clear with respect to enforceability of Foreign Judgments and awards in India. Let’s make an attempt to reproduce it.

The Indian Legal System categorizes Foreign Judgments and Awards from all the quarters of the world into two groups Viz. (a) Judgments and Awards coming from the ‘Reciprocating Territories’ of India and (b) Judgments and awards coming from the ‘Non-Reciprocating Territories’ of India. Let’s first examine the enforceability of Judgments from the non-reciprocating territories of India.

The Judgments coming from the ‘non-reciprocating territories’ of India are required to pass through the sieve of ‘Indian Judiciary’ before they could be enforced. In other words, for enforcing a foreign Judgment or an Award from a ‘Non-Reciprocating Territory’ of India, a fresh suit in an Indian Court with appropriate Jurisdiction needs to be instituted. Further, Judgments from a ‘Non-Reciprocating Territory’ only have evidentiary and persuasive value in the eyes of India Judiciary and they must be filed for enforcement within three years from the day when they were originally passed.

However, it does mean that scope of enforceability of Foreign Judgments from ‘Non-Reciprocating Territories’ in India is limited or the approach of Indian Judiciary is parochial. No doubt that Foreign Judgments from Non-Reciprocating Territories need to pass through the sieve of Indian Judiciary but the sieve used is broad and spacious enough to allow the sink in of ‘the cause of Justice’ upheld by the courts of Foreign Countries.

In the case of Formosa Plastic Corporation Ltd. Vs. Ashok Chauhan & Ors.¹ the Hon’ble High Court of Delhi emphatically reiterated the well settled principle of law in India with respect to foreign Judgments. The principle states that “it is not open to the Court trying the suit on a foreign judgment to decide whether the decision of the foreign Court on the materials put before it is right or not”.

The Court further observed that while adjudicating the suit on a foreign judgment, the duty of the Court is “merely” to see that the foreign Court has applied its mind to the facts of the case and the law on the point.

The Hon’ble High Court of Delhi firmly established the above mentioned principle by citing an old Judgment delivered in the case of Dr. Kulwant

**Vs. Dhan Raj Dutt**2. In this case it was held that if a foreign court has strictly followed ‘the procedure’ and has given full opportunity to the defendant to appear and raise a defense, then, even if that judgment is passed ex-parte it shall be considered to have been decided on merits.

**SHALIG RAM VS. FIRM DAULATRAM KUNDANMAL3**

In this case a summary suit was instituted in the Bombay High Court. The defendant, at that point in time, was a resident of the former State of Hyderabad (a foreign territory). The defendant, however, appeared in obedience to the process of the Court and applied for leave to defend the suit without any objection to the jurisdiction of the High Court of Bombay. The defendant was granted the leave to defend.

The Court, within the prescribed time but on the default of the defendant, passed an ex parte decree against the defendant. The decree was transferred to a Court in Hyderabad, interestingly, a foreign Court at that juncture of history. The defendant took an objection that the decree of a foreign court was not executable.

It was ultimately decided by the Hon’ble Supreme Court of India that once the defendant has submitted to the jurisdiction of a foreign Court, a decree passed by that court, even if ex-parte, is a valid foreign decree.

Moving on, let’s try to examine the scope of enforceability of judgments coming from the Reciprocating Territories of India.

**WHAT IS A RECIPIROCATING TERRITORY?**

The definition, explanation and scope of Reciprocating Territories of India flows from section 44-A of the Code of Civil Procedure, 1908 (the Code). A bare perusal of section 44-A of ‘the code’ suggests that a reciprocating territory means any country or territory outside India which the Central Government may by notification in the official gazette, declare to be a reciprocating territory for the purpose of section 44-A.

Interestingly, a decree passed by a ‘superior court’ located in any of the reciprocating territories, as notified by the Union of India, can be executed in India merely by filing a certified copy of that decree in the concerned District court of India. On filing a certified copy of the decree from a ‘Superior Court’, the concerned District court in India may treat the decree as if it was passed by itself. For the purpose of this section a ‘superior court’ would mean any such court in a reciprocating territory, as may be specified in the notification for Reciprocating Territories. Further, as per the explanation given in ‘the code’ a decree for the purpose of this section would mean any decree or judgment of a superior court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty. The section further prescribes that such a decree shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

In the case of **N.P.A.K. Muthiah Chettiar (died) and Ors. Vs. K.S. Rm. Firm Shwebo, Burma and Ors.4**, the Hon’ble High Court of Madras observed that with regard to decrees of a reciprocating territory contemplated in the explanation to Section 44-A no suit is necessary but the same can be executed by the application of the provisions of Section 47, Civil P. C. The distinction that has to be borne in mind is that reciprocating territories enjoy greater privilege regarding execution of decrees of their superior Courts in our country than are enjoyed by the non-reciprocating territories.

In the case of **Kevin George Vaz Vs. Cotton Textiles Exports Promotion Council5**, the Hon’ble High Court of Bombay clarified the above discussed position of the Indian Legal System vis-à-vis Foreign Awards from Reciprocating and Non-Reciprocating territories of India.

It is also pertinent to highlight that reciprocity is a bilateral arrangement and Reciprocating Territories are not an exception to this rule. All the reciprocating

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2 AIR 1935 Lah 396
3 [1963]2SCR574
4 AIR1957Mad25
5 2006(5) BomCR555
territories of India mutually agree to enforce court orders passed by the Indian Courts in their country as well. In the back drop of globalization and rapid integration of world economies, such mutuality appears to be the need of the hour. An optimist would like to perceive such mutuality and reciprocity as the stepping stone towards the ultimate goal of conceptualizing a ‘World Court’.

RECIROCATING TERRITORIES OF INDIA

In exercise of the power conferred by section 44-A of ‘the code’, the central government of India has notified 11 territories as Reciprocating Territories of India. The names of these territories are as follows;

1. United Kingdom
2. Aden
3. Fiji
4. Republic of Singapore
5. Federation of Malaya
6. Trinidad and Tobago
7. New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa
8. Hong Kong
9. Papua and New Guinea
10. Bangladesh
11. United Arab Emirates

Thus we see that a foreign judgment from a reciprocating territory has a special status in India. For enforcement of a foreign judgment from a reciprocating territory a law suit is not required to be instituted. However, it is also pertinent to mention that no foreign judgment shall be held conclusive if it attracts any of the clauses mentioned in section 13 of ‘the code’. Section 13 of the code reads as under;

13. When foreign judgment not conclusive. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

a. where it has not been pronounced by a Court of competent jurisdiction;
b. where it has not been given on the merits of the case;
c. where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [India] in cases in which such law is applicable;
d. where the proceedings in which the judgment was obtained are opposed to natural justice;
e. where it has been obtained by fraud;
f. where it sustains a claim founded on a breach of any law in force in [India].

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To differentiate Conventional Arbitration which requires the applicability of Arbitration and Conciliation Act, 1996, the Online Arbitration, as the name suggests, besides the applicability of Arbitration and Conciliation Act, 1996 also requires the aid of technological related laws, particularly the Information Technology Act, 2000. In other words, it can be said that Online Arbitration is a blend of conventional Arbitration with the taste of technology in it.

The Arbitration and Conciliation Act, 1996 from the point of view of Online Arbitration can be separated into three parts:

1. The arbitration agreement,
2. The arbitral proceedings and
3. The arbitral award and its enforcement

Section 4 and Section 5 of the Information Technology Act read with Section 65 B of the Evidence Act provides for legal recognition to electronic records and signatures.

By closely observing the provisions of Arbitration and Conciliation Act, 1996 in concurrence with Information Technology Act, we must observe the above mentioned three pointers separately initiating with the first segment that is Arbitration Agreement.

**ARBITRATION AGREEMENT**

The arbitration agreement entered into between the parties by exchange of emails through no formal agreement in writing signed by the parties is valid and enforceable as the validity of such agreements is upheld by Hon’ble Supreme Court of India in the matter of “Shakti Bhog Foods Ltd. Vs. Kola Shipping Ltd.” AIR 2009 SC 12 and “Trimex International FZE Ltd. Vs. Vedanta Aluminum Ltd.” (2010) 3 SCC 1.

Like Conventional Arbitration, the Online Arbitration can either be Ad-hoc Arbitration or Institutional Arbitration.

Moreover, whether the Arbitration is either Online or Offline, in both the scenario the parties or the Institutions should clearly spell out:

(a) the law governing the arbitration agreement;
(b) the law governing the contract;
(c) the procedural law;
(d) language of the procedural law;
(e) the jurisdiction of the court (whether exclusive or non-exclusive)
(f) the place of arbitration
(g) the language of the proceedings, and
(h) other procedural details

The procedure relating to the use of technology in case of Online Arbitration have to either agreed by the parties or laid down by the Institutions. Unlike the individual parties the Institutions are in a better position to clearly lay down the details which are necessary and required in case of an Online Arbitration so that the parties are not faced with any additional difficulty when they follow the rules of a particular Institution and for this particular reason also the Institutions acquire more importance.

It is particularly important to spell out these details because Online Arbitration, unlike Conventional Arbitration, is not by physical meeting of parties and arbitrators but is a virtual meeting. It is very much necessary that extra caution needs to be taken and minute details need to be put into the rules and procedures keeping this aspect in view. Since it is inevitable that the arbitration proceedings are meant to be confidential in nature, the infrastructure that is agreed to be used by the parties should not only provide confidentiality of data but should also be reliable.

**ARBITRAL PROCEEDINGS**

The second part being arbitral proceedings which are fundamental in nature, it is seen that the agreement or the institutional rules followed by the parties should clearly spelt out the procedures...
which would be adopted by the parties. The Statement of Claim and defense, etc which is required to be sent by transmitting the physical copies can be transmitted in electronic form. Parties to the arbitration can be sent through emails by attaching PDF files and the signed copies besides the above mode can be sent through courier later on and once again Section 4 and 5 of the Information Technology Act, read with Section 65B of the Evidence Act come to the aid of the parties. Such pleadings can be transmitted in electronic form without losing recognition of law.

The alternative Dispute Resolution system is used for early disposal of dispute in a cost effective manner. The aim and objective of Arbitration and Conciliation Act, 1996 is, to provide quick and effective remedies to dispute and all the requirements of this objective is fulfilled by Online Arbitration.

In the conduct of the proceedings, there could be technical difficulties such as electricity failure, system failure, link failure, etc which need to be taken care of in the agreement or the Institutional rules so that either an alternate provision is made and the information or data fed in the system can be retrieved.

International Chamber of Commerce (ICC) has also showed the way and framed certain Standards for Online Arbitration which are as follows:

(a) the rules for giving file names with a unique name/identifier for each electronic document.
   o To identify the originator,
   o Class of document
   o Place of arbitration
(b) This file naming system shall be used throughout the arbitration for all electronic documents.
(c) The file name and the date of the original document (e.g. the date shown on a letter that is submitted as evidence) shall appear on the first page of the electronic document, either at the top right corner or at the bottom.
(d) If data loss occurs and the affected participant cannot itself reconstitute the lost electronic documents, the other participants shall help to reconstitute the electronic file(s) by providing copies of the pertinent files that they control.
(e) Mode of transmission and storage of emails
(f) Whether any confirmation of receipt of email has to be given.
(g) File format for sending attachments, like PDF, Doc, HTML, ASCII
(h) Rules for audio and video conferencing

The arbitral tribunal, in consultation with the parties, will issue directions giving details for the conference, such as:

1. day and hour and applicable time zone;
2. places where a conference front-end is required;
3. who shall participate and number of persons at each front-end;
4. special requirements, such as visualization of documents;
5. any other requirements.

It is necessary that the parties should decide the procedural requirements of having the virtual proceedings which have to be clearly spelt out including the details for exchange of pleadings, video conferencing and audio conferencing.

It is noteworthy to mention that in certain circumstances, parties and the arbitrators may be placed at different ends of the system in different geographical areas. Various combinations may arise, for instance, a party may be sitting with an arbitrator at one end while the other two arbitrators may be sitting at the second and the third end and the other party may be sitting at the fourth end. Therefore, in such cases like the instance mentioned above the allegations of non compliance of Section 12 and Section 18 of Arbitration and Conciliation Act, 1996 may arise. Hence, the rules for holding the arbitration proceedings should be formulated in such a manner that in holding of virtual proceedings equality and impartiality to the parties is ensued.

**ARBITRAL AWARD AND ITS ENFORCEMENT**

Now the third part relates to the legal sanctity of Online Award. Much important thing is that Section 31(1) of the Arbitration and Conciliation Act, 1996
lays down that the arbitration award shall be in writing and shall be signed by the members of the arbitral tribunal and hence Section 51 of the Information Technology Act, 2000 provides that the digital signature have the same effect as a paper signature.

As stated in the earlier part of the article, being an Online Arbitration, the procedures relating to use of technology to be either agreed upon by the parties or laid down by the Institutions. Section 31 of the Arbitration & Conciliation Act requires the award to be in writing and signed by the arbitrators. The award can be issued though email by sending scanned signed copies in PDF format. The actual signed copies can be sent through post.

In an alternative, the arbitrators can also put their digital signatures and provide accuracy and integrity to the award. For enforcement of the award, the original signed copy received by post or the digitally signed awards, as the case may be, can be filed before the courts.

Model law of electronic Commerce promotes the equivalent approach whereby electronic documents can be considered original for enforcement. The New York and Geneva Convection requires filing of original or duly authenticated copy of the award for enforcement.

The very vital legal issue comes as to the court which any party should approach for enforcement of the Online Arbitral award. The question what does constitute place of court, the place where Online Arbitration agreement was signed or sitting place of arbitrators?

CONCLUSION

Online Arbitration should be a preferred way of dispute resolution since it is fast, economic and efficient. Online Arbitration is still conducted by traditional arbitration rules even though it is a new method to conduct dispute resolution. The parties and the arbitrators in an online arbitration should always consider the legality of the applicable arbitration agreements and procedures, choice of law, seat of arbitration and form of the awards. These precautions will assist online arbitration to work within the framework of existing national and international treaties. However, online arbitration should develop its own rules over the course of time. It is clear that Online Arbitration is not different from what the conventional arbitration is. The only difference is the omission of physical platform and introduction of a virtual platform.

In conclusion, online arbitration is possible and online arbitral awards should therefore have the same effect of traditional arbitral awards. Online arbitral awards are binding and final, subject to set aside only for the same limited procedural grounds as traditional arbitral awards.

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1 Section 5- Legal recognition of digital signatures—Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person (hence, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government.

Explanation.—For the purposes of this section, “signed”, with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression “signature” shall be construed accordingly.

2 Section 36- Enforcement.—Where the time for making an application to set aside the arbitral award under award shall be endorsed under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

3 Section 2 (e)- “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.
The Supreme Court of India has very recently on 22.08.2012 in the case of CIT Vs Smifs Securities Ltd., declared that goodwill would fall under the expression “any other business or commercial right of a similar nature” under clause (b) of Explanation 3 of section 32(i) of the income Tax Act, 1961. The apex court further stated that the principle of *ejusdem generis* would strictly apply while interpreting the said expression which finds place in Explanation 3(b). Consequently, “Goodwill” is an asset under Explanation 3(b) to s. 32(1) & eligible for depreciation.

The Supreme Court held this ruling while deciding the vital issue of the above said case – “Whether goodwill is an asset within the meaning of Section 32 of the Income Tax Act, 1961, and whether depreciation on ‘goodwill’ is allowable under the said Section?”

**BRIEF FACTS OF THE CASE**

The taxpayer company, Smifs Securities Limited had entered into a Scheme of Amalgamation with YSN Shares & Securities Private Limited (Transferor company), pursuant to which the assets and liabilities of the Transferor company were transferred to Smifs Securities Limited. The Scheme was duly approved by the High Courts of Bombay and Calcutta.

In this amalgamation process of the companies, goodwill had arisen in the books of Smifs Securities Limited due to the excess consideration paid to the Transferor company, over and above the book value of the assets taken over.

The taxpayer claimed depreciation on goodwill under section 32(1)(ii)(1) of the Income-tax Act, 1961 considering the same to be an intangible asset. The depreciation on goodwill was not allowed by the Revenue Authorities. On appeal, both the Commissioner of Income-tax [CIT(A)] and the Income-tax Appellate Tribunal (Tribunal) decided the issue in favour of the taxpayer company i.e. Smifs Securities Limited and allowed depreciation on goodwill. When the matter went for further appeal, the High Court held that no question of law arose in the appeal and dismissed the same. Aggrieved with this order the “Revenue” further appealed to Hon’ble Supreme court.

**A DISCUSSION ON THE ISSUE AND ANALYSIS OF THE JUDGEMENT**

Generally intangible assets are such types of assets which emanates some very remarkable values and importance for an Organisation or Company but they are not in the nature of tangible assets. ‘Goodwill’ is also an intangible and vital part of such intangible assets. Although, Income Tax Act, 1961 does not provide definition of the ‘Goodwill’, yet it is referred precisely under Section 55(2)(a) of the said Act, wherein it is reorganized as a ‘Capital Asset’ which is used for computation of Capital Gains.

Therefore when the ‘Goodwill’ is purchased while the incident of mergers and acquisitions, then the cost of Acquisition is treated to be the ‘Amount of Purchase price’ and Goodwill is embedded in it. On the other hand if this Goodwill is not purchased or being transferred from other organization or company then it is a self generated Goodwill and in that case the cost is computed to be ‘Nil’.

It is not like all the intangible asset which are eligible for depreciation. whether an intangible asset is entitled to get Depreciation or not, can be decided on finding the real nature of intangible asset in regard to rights obtained by Acquiring company. It is also pertinent to note that for the purpose of deciding the real nature of transaction, merely the various types of nomenclatures which

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1 (Civil Appeal No. 5961 of 2012 (Arising out of S.L.P. (C) No. 35600 of 2009)
are generally provided as ‘Entries’ in Books of Accounts is an irrelevant factor.

Goodwill consists of several components and depreciation is granted for those intangible assets only which can be recorded as Goodwill by the efforts of Taxpayer, if the taxpayer can establish the same.

Like various other issues, allowability of tax depreciation on Goodwill was also surrounded by contrary rulings. The Hon'ble Supreme Court has expressed its view through this above said judgement that Depreciation can definitely be claimed on Goodwill and it also possess the statutory assistance on applying the principle of ejusdem generis with the concerned proviso.

Uncertainty and litigation on eligibility of depreciation on intangible assets embedded within goodwill was expected to continue before this judgement of the Supreme Court, due to lack of clarity on the subject and contrary views held by the judicial authorities. This decision of the Hon’ble Supreme Court is not very detailed and the apex Court has applied the principle of the “ejusdem generis” to hold that goodwill would be in the nature of an intangible asset eligible for depreciation under section 32 of the Act. For the purpose of the ready reference of the concerned provision it reads as –

Explanation 3.-- For the purposes of this Sub-section, the expressions ‘assets’ and ‘block of assets’ shall mean--

(a) tangible assets, being buildings, machinery, plant or furniture
(b) intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature.

The Supreme Court emphatically stated that goodwill is in the nature of ‘any other business or commercial rights of similar nature’ and the principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b).

Furthermore on a careful reading of the Supreme Court’s decision and the law under the Direct Taxes Code (DTC), (15th Schedule) it definitely suggests, on the basis of golden interpretation rule that – Depreciation is allowable on Goodwill under the DTC also although the same is not clearly and specifically mentioned in the DTC.

All Such contradictions and the disputes will most probably be diluted after this landmark judgement of the Hon’ble Supreme Court and simultaneously **benefit the branded companies also**, in cases of mergers and acquisitions. This ruling may be successful in putting a conclusive end to all such concerned disputes and issues.

★★★
INTRODUCTION
Alimony also commonly referred to as, maintenance, settlement and spousal support. It can best be understood as the support extended in terms of money, property etc by one’s ex-spouse as ordered by a court in a divorce case.

A PEEP THROUGH INTO GOVERNING LAWS FOR ALIMONY IN INDIA
As Alimony germinates from divorce, we will discuss briefly the laws governing divorce in India. In India divorce is governed by different laws for different communities. As in case of Hindus, Sikhs, Buddhists and Jains it is governed by the Hindu Marriage Act, 1955. The Dissolution of Muslim Marriage Act, 1939 governs divorce for Muslims, for Christians it is made possible by way of the Indian Divorce Act, 1869 and Parsi can seek for divorce under the Parsi Marriage and Divorce Act, 1936.

There is a Special Marriage Act, 1954 for inter community marriages and divorces. The various laws were created to provide individual treatment to different communities and these have evolved through case laws over the past few decades.

EXISTING TENETS FOR DECIDING ALIMONY IN INDIA & THE INDIAN SCENARIO
In most cases in India, the fulcrum of divorce litigation is alimony, while in other countries its division of property; mostly in developed countries. This may be as a result of economic independence of women in such countries. It is seen that in developed countries alimony is made available mostly in cases involving wealthy couples or old couples who are ending long marriages.

Whereas in India the alimony is decided on the basis of income and background of the couple. In few cases, alimony paid to the wife is based on the standard of living enjoyed by the couple while married. There is no fixed parameter for deciding the amount of alimony to be provided, law on this aspect is still developing, and it is mostly based on cases and orders already passed and taking into consideration the facts of the case to be decided.

As far as the issue of division of property is concerned, the same is primarily decided on the facts of each case and for this principles of equity are used. This is required because our law is not clear on the concept of common matrimonial property. It is deemed that a property in India belongs to the person in whose name it is bought, even if it has been acquired during the course of marriage. Hence, even if a wife pays for some property and it is in the name of her husband, there is no way to prove during divorce proceedings that it rightfully belongs to her unless the wife produces evidence that she had paid for the said property.

While there have been recent judgment whereby because of social changes where women are no longer dependent on their husbands or other family members, their pleas for alimony need to be looked into with all facts, and it should be ensured that one of the spouses should not be enriched at the cost of the other. The verdict involving a Delhi based couple, where the wife wanted divorce, on account of physical abuse by her husband. She was supporting four children on a monthly income of rupees nine thousand (Rs. 9,000) went to the court to get a divorce and alimony. Instead, this woman has been ordered to pay her husband a monthly alimony of rupees five hundred, on account of the medical certificates that he presented in front of the court proving that he needed medical treatment and that he was without any livelihood. He convinced the court that he needed financial help more than his wife.
It’s an order that has taken many by surprise. A woman being asked to pay her husband alimony is not something that has happened many times in the past and whether it will now set a trend remains to be seen. It is felt by many that this order should be challenged as it will send out a not so positive message.

On the other hand there has been a recent judgement of trial court, perhaps one of its kinds, mentioned below in detail, which is a complete breakthrough perhaps in the history of alimony granted to the wife by the husband.

**RECENT BREAKTHROUGH IN GRANTING ALIMONY**

We can easily say that this could perhaps be one of the biggest divorce settlements cleared by a trial court in recent times in India. In a recent case where a Delhi-based couple mutually agreed to part ways after 20 years of marriage with the wife been granted full and final alimony of rupees five crore (Rs. 5,00,00,000).

The couple who got married in the year 1992, filed for divorce in February 2012, the husband initially agreeing to pay rupees one crore as the full and final alimony (settlement for divorce) later though the man had to pay rupees four crore more.

The husband has already paid Rs 50 lakh to the wife. The agreement states that out of rupees five crore, the husband has to make a fixed deposit of rupees two crore and fifty lakhs for his minor daughter. The remaining amount will be used by the wife to buy a house of her own.

Counsel for the husband, said that the couple has reached upon an agreement which will allow them to visit their children as and when they want. By way of this settlement both the husband and wife have sorted out their differences and have further undertaken not to interfere in future in each other’s lives. The counsel further said stated, “As such the entire matrimonial disputes at the end of day boil down to payment of alimony and once it is sorted, the couple can withdraw all the litigations against each other and thereafter live happily.”

The couple has two minor children; a boy and a girl, they have agreed upon taking the custody of one child each. While the husband will take care of his son, the wife will raise their daughter.

After the hearing, the family court gave its approval on the basis of the settlement deed, which stated that after the realization of rupees five crore, the right of the wife on the properties of the husband will stand extinguished.

This case is an answer to all questions that have been raised on the deciding tenets for divorce. In divorce cases, the courts must factor in the wife’s status and lifestyle while fixing alimony to ensure that she lives in reasonable comfort considering her status and mode of life she was used to when she lived with her husband, considering in the above mentioned case the husband being a wealthy businessman the amount decided as alimony was not repressive for him.

Therefore the amount of alimony to be paid cannot be fixed by law as it varies from case to case; the most important aspect is to maintain a balance while deciding the same. Should cater the dependent spouse with reasonable comfort as was given during the existence for their marriage and should not be repressive for the other spouse to provide the same. Further it would not be wrong saying that if India faces more divorces in the coming years (and if they involve high profile cases as well), the time is not far when the law in India too just like in abroad will evolve to allow a better sharing of matrimonial property between divorcees.
NEWSBYTE

NON-RESIDENT GUARANTEE FOR NON-FUND BASED FACILITIES ENTERED BETWEEN TWO RESIDENT ENTITIES

Reserve Bank of India vide RBI/2012-13/179 A. P. (DIR Series) Circular No. 20, dated August 29, 2012 has introduced a reporting format to capture Non-resident guarantee for non-fund based facilities entered between two resident entities issued and invoked.

Authorized Dealer Category-I banks are required to furnish such details by all its branches, in a consolidated statement, during the quarter, as per the format in Annex to the Chief General Manager, Foreign Exchange Department, ECB Division, Reserve Bank of India, Central Office Building, 11th floor, Fort, Mumbai – 400 001 (and in MS-Excel file through email) so as to reach the Department not later than 10th day of the following month.

OVERSEAS INVESTMENT BY INDIAN PARTIES IN PAKISTAN

Reserve Bank of India vide RBI/2012-13/198 A. P. (DIR Series) Circular No. 25 dated 7th September 2012, has allowed the overseas direct investment by Indian Parties in Pakistan under the approval route.

Earlier, investment in Pakistan was not permitted as per Regulation 6 (2) of the Notification No. FEMA 120/RB-2004 dated July 7, 2004 [Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004.

EXTERNAL COMMERCIAL BORROWINGS (ECB) POLICY – REPAYMENT OF RUPEE LOANS AND/OR FRESH RUPEE CAPITAL EXPENDITURE – USD 10 BILLION SCHEME

RBI vide RBI/2012-13/200 A.P. (DIR Series) Circular No. 26 dated 11 September, 2012 has reviewed the scheme for the maximum permissible ECB that can be availed of by an individual company, and has decided the following changes:

a. to enhance the maximum permissible limit of ECB that can be availed of to 75 per cent of the average foreign exchange earnings realized during the immediate past three financial years or 50 per cent of the highest foreign exchange earnings realized in any of the immediate past three financial years, whichever is higher;

b. in case of Special Purpose Vehicles (SPVs), which have completed at least one year of existence from the date of incorporation and do not have sufficient track record/past performance for three financial years, the maximum permissible ECB that can be availed of will be limited to 50 per cent of the annual export earnings realized during the past financial year; and

c. The maximum ECB that can be availed by an individual company or group, as a whole, under this scheme will be restricted to USD 3 billion.

Earlier, the maximum permissible ECB that can be availed of by an individual company under the scheme is limited to 50 per cent of the average annual export earnings realized during the past three financial years.

EXTERNAL COMMERCIAL BORROWINGS (ECB) POLICY – BRIDGE FINANCE FOR INFRASTRUCTURE SECTOR

RBI vide RBI/2012-13/201 A.P. (DIR Series) Circular No. 27 dated 11 September, 2012 on a review has decided to allow refinancing of bridge finance (if in the nature of buyers’/suppliers’ credit), with an ECB under the automatic route subject to the following conditions:-

a. The buyers’/suppliers’ credit is refinanced through an ECB before the maximum permissible period of trade credit;
b. The AD evidences the import of capital goods by verifying the Bill of Entry;
c. the buyers’/suppliers’ credit availed of is compliant with the extant guidelines on trade credit and the goods imported conform to the DGFT policy on imports; and
d. The proposed ECB is compliant with all the other extant guidelines relating to availment of ECB.

RBI clarified that, the borrowers should approach the Reserve Bank under the approval route only at the time of availing of bridge finance which will be examined subject to the following conditions:

a. the bridge finance shall be replaced with a long term ECB;
b. the long term ECB shall comply with all the extant ECB norms;

RBI further clarified that, the designated AD - Category I bank shall monitor the end-use of funds and banks in India will not be permitted to provide any form of guarantees for the ECB. All other conditions of ECB, such as eligible borrower, recognized lender, all- in-cost, average maturity, end-use, maximum permissible ECB per financial year under the automatic route, prepayment, refinancing of existing ECB and reporting arrangements shall remain unchanged and should be complied with.

TRADE CREDITS FOR IMPORT INTO INDIA

RBI vide RBI/2012-13/202 A.P. (DIR Series) Circular No. 28 dated 11 September, 2012 had decided to allow the companies in the infrastructure sector, where “infrastructure” is as defined under the extant guidelines on External Commercial Borrowings (ECB) to avail of trade credit up to a maximum period of five years for import of capital goods as classified by DGFT subject to the following conditions:

a. The trade credit must be abinitio contracted for a period not less than fifteen months and should not be in the nature of short-term roll overs; and
b. AD banks are not permitted to issue Letters of Credit/guarantees/Letter of Undertaking (LoU)/Letter of Comfort (LoC) in favour of overseas supplier, bank and financial institution for the extended period beyond three years.

The all-in-cost ceilings of trade credit will be as under:

<table>
<thead>
<tr>
<th>Maturity period</th>
<th>All-in-cost ceilings over 6 months LIBOR*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to one year</td>
<td>350 basis points</td>
</tr>
<tr>
<td>More than one year and up to three years</td>
<td></td>
</tr>
<tr>
<td>More than three years and up to five years</td>
<td></td>
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</tbody>
</table>

* for the respective currency of credit or applicable benchmark

RBI further clarified that, the all-in-cost ceilings include arranger fee, upfront fee, management fee, handling/ processing charges, out of pocket and legal expenses, if any.

ESTABLISHMENT OF LIAISON OFFICE (LO) / BRANCH OFFICE (BO) / PROJECT OFFICE (PO) IN INDIA BY FOREIGN ENTITIES – CLARIFICATION.

Reserve Bank of India vide RBI/2012-13/211 A. P. (DIR Series) Circular No. 31 dated 17th September, 2012 has clarified that permission to establish offices, in India by foreign Non-Government or Government Organizations/Non-Profit Organizations/Foreign Government Bodies/Departments, by whatever name called, are under the Government Route as specified in A. P. (DIR Series) Circular No. 23 dated December 30, 2009. Accordingly, such entities are required to apply to the Reserve Bank for prior permission to establish an office in India, whether Project Office or otherwise.

A NEW ONLINE TOOL FOR MAKING REQUEST FOR CORRECTION OF CLERICAL ERRORS IN THE TRADE MARKS RECORDS

On 18th September, 2012, CGPDTM launches a new online tool for making any correction in the data entered in the Trade mark Office official database.
The one of its kind step is taken by Trademark office in order to overcome the problem faced by the Applicants due to data wrongly entered in the Official Records. In case of any clerical error(s) found in the data entry of an application for the registration of trademark or in the record of the registered trademark, any concerned applicant/proprietor/their authorized agent may avail this facility and apply for the correction of the errors on part of Trade Mark Office by creating a login Id on the Portal provided for the same. The Applicant needs to upload the supporting documents or proofs along with the request for the correction required to be made.

According to CGPDTM, the competent officer will keep record of all the corrections and will scrutinize such request on the basics of records and supporting documents uploaded by the concerned authority and will correct the relevant records.

This tool is meant for only corrections in clerical or typographical errors in the trademark records and not for any change or amendment occurs during the whole course of the application.

This is a good initiative taken by CGPDTM, which helps in reducing the clerical/typographical errors in the trademark records.

**REJECTION OF APPEAL OF BAYER BY IPAB**

On September 17th 2012, the Intellectual Property Appellate Board (IPAB) dismissed Bayer’s request for a stay order against the Compulsory License (CL) granted by the Patent Controller on March 9, 2012 to Natco for Nexavar, a drug to treat renal cell and hepato-cellular carcinoma (cancer). Bayer in its appeal before the IPAB had said that the CL decision of the Indian Patent Controller is illegal and unsustainable, and had filed for an immediate stay during the pendency of the appeal. This decision of IPAB comes as a relief to the patients who will now be able to have this drug at a far cheaper rate than being offered by German pharmaceutical major Bayer.
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