
ADVANCED COURSE ON COMMERCIAL MATTERS



PROGRAMME REPORT P 965

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INTRODUCTION

The rapid growth of industrialization and globalization has cast additional burden on judiciary, and wide range of responsibility. In present times, the High courts are approached to decide very complex and high value disputes and issues be it related to advance ruling, or validity of award passed in domestic or international arbitration, or disputes between regulators, other government agencies and corporate entities. These issues are new as well as technical in nature, and require an in-depth knowledge and practical understanding. The NJA will organize two conferences to equip judges with knowledge and understanding on emerging issues in commercial world, nature of transactions and expectations from the government and the corporate world.

Contents:

- Transfer Pricing Agreements
- BEPS
- Tax Treaties
- GAAR Rules
- Advance Ruling
- International Arbitration

DAY 1

SESSION 1 TO 4

The day was chaired by Hon'ble Justice S A Bobde, Judge, Supreme Court of India.

Resource Persons:

1. Mr. Porus Kaka
2. Mr. Sanjay Sanghvi
3. Mrs. Pramila Srivastava

Deliberations:

Session 1: Interpretation of International Tax Law & Transfer Pricing

Session 2: BEPS, Tax Avoidance & Black Money

Mr. Porus Kaka took above two sessions. In course of these sessions, he deliberated and discussed various areas which concern the participant judges. Following are brief of what was discussed during the sessions:

1. History of tax treaty, international taxation and basic treaty concept was discussed at length.
2. Sources of International Tax Law
 - a. Domestic Statutes
 - b. Tax Treaties and Model
 - c. Commentaries
 - d. Circulars
 - e. Judgments & Precedents
3. Domestic Statute Law: Principal sections of the Income Tax Act, 1961 in which the basic principles of international tax law are enshrined as under:
 - a) S.5. Scope of income
 - b) S.9. Income deemed to be accrued or arise in India
 - c) S.90. Double Taxation Relief; power to enter into treaties

- d) S.92. Computation of income from financial transactions having regard to arm's length price, commonly referred to as 'Transfer Pricing.'
4. Contract between countries governing issues of allocation of taxing rights on the basis of residence and/or source. Undertaken with a view to grant relief for:
- a) Avoidance of double taxation
 - b) Prevention of fiscal evasion
 - c) Promotion of mutual economic relations, trade and investment.
 - d) Facilitate exchange of information and mutual agreements among Contracting States
5. Object of Tax Treaties:
- a) Treaties cannot levy tax but can give relief- Azadi Bacho Andolan 263 ITR 706 (SC)
 - b) The Andhra Pradesh High Court in Sanofi's 354 ITR 316 (AP) made some key observations about the importance of DTAA's and their relevance in the global scenario
 - c) In recognition of the pejorative effect of double taxation on exchange of goods and services and movement of capital, technology and persons, agreements/treaties/conventions/ protocols were entered into for removing obstacles that double-taxation presents to development of economic relations between nations.
 - d) Treaties or Conventions are thus instruments signaling sovereign political choices negotiated between States to avoid double taxation through restriction of tax claims in areas where overlapping tax claims are expected, or at least theoretically possible
6. Basic Treaty Principles:
- a) Treaty commitments must be honored by the parties in good faith
 - b) A party may not invoke the provisions of its internal law as justification for its failure to honor its treaty commitments
 - c) A treaty should be interpreted in good faith in accordance with the ordinary meaning of its terms, in their context and in light of its object and purpose
7. General rule of interpretation [Article 31]:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

“The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; ...”

8. Lead role of OECD in international tax and model treaties consisting of Articles and Commentaries. The commentary explains what the article means it's literally like having a legislation work by parliament with an annexure telling you what Parliament intended it to be so that when people signed treaties corporates, investors all of them not only know the article but they also know what is meant by the article because the whole purpose of a tax treaty is to avoid double taxation and give clarity to those who are engaged in cause cross border transactions. China, India and many other countries who are observers to the O.E.C.D., not members to the O.E.C.D. have put their own reservations. Now though, these reservations are put through by the state but they are ultimately enforced by the revenue authority and many decisions of the courts in India have said that these views of the revenue are not binding on the courts when they take the decision.
9. Now India is a leading member of this UN Tax Committee and the view is that India is closer to the UN model and its commentary rather than the O.E.C.D. model.
10. There are basically three taxation systems in the world. They are based on residency. They are based on territory. And they are based on citizenship. These decide how countries are going to impose tax. Some impose it on residents. Some pose it only on transactions within their territory or with their territory. Some like the United States impose it on all citizens wherever located and wherever resident. In the last ten years, that trend is reversed. I have seen many people giving up their green cards rather than acquiring them. And that is because if you are based in India you will still be liable to US tax which includes federal and state. US has state taxes also which go up to forty nine percent. India's maximum tax rate with surcharge is 33%. So we've seen

situations where actually people are now surrendering their green cards because United States cases on a citizenship basis.

11. The transfer pricing basically means that we will look at a third party transaction to determine your profits to ensure that you do not adjust them to come to a lower profit in the country of source or residence.
12. The provisions of the treaty are specifically to give clarity to investors and also to give relief. The answer is that there is a power of the executive in article 295 of the Constitution to enter into tax treaty. This power is not curtailed by parliament. Secondly section 90 of the Income Tax Act specifically gives the power to the government to enter into treaties as a part of domestic law, and it provides that the treaty will apply when it has been signed.
13. Major Decisions:
 - a) Asia Satellite Telecommunications Co. Ltd v Director of Income Tax 332 ITR 340 Delhi High Court
 - b) Sanofi Pasteur Holdings SA 354 ITR 316 Andhra Pradesh High Court
 - c) Verizon Communication Singapore Pte Ltd (33 Taxmann Com 70 (MAD)
 - d) Serco BPO Pvt Ltd. V. AAR, 280 CTR 1 (P&H)
14. Methods of Transfer Pricing
 - a) Comparable Uncontrolled Price Method (CUP)
 - b) Resale Price Method (RPM)
 - c) Cost Plus Method (CPM)
 - d) Profit Split Method (PSM)
 - e) Transactional Net Margin Method (TNMM)
 - f) Any other method that may be prescribed by the Board
15. Major Decisions on Transfer Pricing:
 - a) Vodafone India Services (Bom HC) [2014] 50 taxmann.com 300
 - b) Maersk Global Centres (India) (P.) Ltd. [2014] 43taxmann.com100 (Mum - SB)
 - c) Li & Fung [40 Taxmann.com 300 (Del)]
 - d) EKL Appliances Limited [2012] 345 ITR 241 [Delhi]
 - e) Carlyle India Advisors P. Ltd. [357 ITR 584 (Bom HC)]

f) Cushman & WakeField India Pvt Ltd 46. Taxmann.com 317(Del)

16. Base Erosion and Profit Shifting (BEPS):

- a) OECD initiative, approved by the G20
- b) Designs adopted by corporations to avoid taxation
- c) Exploits loopholes in tax laws and legal regulations
- d) Involves profit 'disappearing' or, shifting of gains to tax heavens
- e) Practice of BEPS is not illegal

17. What is BEPS?

- a) Core work of the OECD is to remove barriers to cross-border trade and investment through designing international standards to eliminate double taxation.
- b) Many rules work well but some may have also resulted in double non-taxation
- c) Governments need resources and to ensure the fairness of the tax system
- d) Prevention of double taxation important but recognition that the issue of double non-taxation due to base erosion and profit shifting
- e) Number of structures take advantage of asymmetries in domestic and international tax rules
- f) Artificial separation of allocation of taxable profits from the jurisdiction where these profits arise/the place of economic activity

18. Application of BEPS by Indian Court:

1. Additional Director of Income-tax, (International Taxation), Dehradun v. Baker Hughes Singapore Pte Ltd 57 taxmann.com 191 (Del)(ITAT)

“As for the BEPS considerations, base erosion and profit shifting is a tax policy consideration which is relevant for the process of law making, but it cannot have a role in the judicial decision making process because judicial process will infringe neutrality if it is to be swayed by such policy consideration”

Deliberations:

Session 3: The Economics of Advance Pricing Agreements

Mr. Sanjay Sanghvi took this session, below are the highlights of what was discussed and deliberated upon:

1. Advanced Price Mechanism: Purpose
 - a) FM's Budget Speech 2012- APA introduced to bring down tax litigation significantly and provide tax certainty to foreign investors
 - b) To provide 'certainty' and 'unanimity' of approach in determining ALP of 'international transactions'
 - c) Thus, to reduce tax litigation on account of TP
2. APA: Meaning

An agreement between 'tax payer' (resident/non-resident) and CBDT determining ALP or manner of determination of ALP.
3. Binding effect of APA:
 - a) APA is binding on the person entering into international transaction (taxpayer) and the CIT (including income-tax authorities subordinate to him)
 - b) Binding only in respect of transaction in relation to which the APA has been entered into
 - c) Not binding if there is change in law or facts having a bearing on such APA. [section 92CC (6)]
 - d) CBDT empowered to declare an APA as void ab initio if APA has been obtained by fraud or misrepresentation of facts. [section 92 CC(7)]
 - e) Non-compliance with terms of APA including 'critical assumptions' may lead to cancellation of the APA.
 - f) Transactions covered under APA not subject to regular audit by Transfer Pricing Officer (i.e TP assessment proceedings).
4. International Perspective:
 - a) USA
 - APA regime since 1991, specific APA team in IRS.
 - APA Program merged with U.S. Competent Authority (USCA) that resolves transfer pricing cases under the mutual agreement procedures of the United States' bilateral tax treaties.
 - Information collected in APA process deemed as "tax return information" thus no loss of any confidential information.

- Annual reports disclosing various details relating to APA and MAP for general information to the public.
- b) United Kingdom
- ‘Rollback’ facility available
 - Her Majesty Revenue and Customs (HMRC) recommends having bilateral APA
 - Even on receipt of unilateral APA, HMRC may communicate with the other Administration (where tax treaty exists) to ascertain entering into a bilateral APA process unless
 - Unnecessary delay caused due to bilateral process
 - No APA process in other jurisdiction
 - Alternatively, HMRC’s ability to give effect to a mutual agreement reached with a treaty partner to eliminate double taxation under the terms of a treaty will not be restricted by the terms of a unilateral APA.

Deliberations:

Session 4: Cross Border Transaction Exchange Control & the law

Mrs. Pramila Shrivastav, former Income-Tax Commissioner, discussed exchange control at length and briefly touched upon various areas i.e FEMA, FERA and PMLA. She also shared her experience on various points including Foreign Account Tax Compliance Act (FATCA) of U.S.A.

DAY 2

Session 5 to 8

The Day 2 was chaired by Hon'ble Justice A.K. Sikri, Judge, Supreme Court of India.

Resource Persons:

1. Mr. Sujit Ghosh
2. Mr. Milan K Shah

Deliberations:

Session 5: Issues arising out of interplay between laws pertaining to Foreign Trade and central tax laws.

Session 6: One transaction many taxes: The continuing tussle between the States and the Center to levy taxes on certain transactions.

Hon'ble Justice A.K. Sikri started the session with an introductory note followed by deliberations and discussion by Mr. Sujit Ghosh. The speaker and the Hon'ble chair for the session tried to cover two aspects, firstly, foreign trade and central tax which included foreign trade development and regulations vis-a-vis central tax laws on one hand and the meaning and various facets of Double Taxation avoidance agreement (DTAA). Justice A.K. Sikri explained the concept of double taxation giving examples of NRI's and Foreign Companies established in India and who are governed by the tax laws of the local country as well the countries where they are established or working and how this double taxation discourages foreign trade, foreign collaborations. He stated that thus to control this problem of double taxation the concept of DTAA came. Justice also deliberated upon the comprehensive treaties multilateral and bi-lateral treaties.

Mr. Sujit Ghosh deliberated and discussed various areas, which concerned the participant judges. Following is in brief of what was discussed during session 5:

- History of Foreign Trade Development and Regulation and history of Import Legislations.
- Brief analysis of Foreign Trade Regulation Act with specific reference to Section 91.
- Finance Act and Foreign Trade Policy and its benefits.

- Supreme Court Judgments on Director General of foreign Trade and latest developments in the field of foreign trade and regulations.

Justice Sikri concluded the session by citing a case that came before him while he was presiding over the Tax bench.

In the next session Mr. Sujith Ghosh deliberated upon:

- Separation of power between the state and center stating that it is a fundamental. He enumerated which kinds of taxes falls within the domain of Centre and which are for the state.
- How to resolve the conflict when federal government imposes tax on something which is in the exclusive domain of the state.
- Landmark judgment of *Federation Of Hotel & Restaurant vs Union Of India & Ors* given by Hon'ble Justice Venkatachaliah
- Concept of Aspect theory and how it is used as a yardstick by Supreme Court and other High Courts to ascertain the validity of tax vis-à-vis Separation of power.
- Canadian Jurisprudence elaborating the concept theory specifically Art 91 and 92 of Canadian Constitution.

He further elaborated upon how a same transaction may have different aspects and how different aspects of same transaction could be taxed by different authorities. He also gave an example of taxing an immovable property when it is rented. Judgment of the Delhi High Court, *Retailer association* judgment of the Bombay High Court, *Home Solutions retails*. First judgment whereby Justice A.K Sikri discussed with regard to renting of immovable property and its taxation. Various aspects of taxation and transfer of intangible property were explained citing various judgments like *Tata Consultancy Services* case, *BSNL V. Union of India* etc.

Deliberations:

Session 7: Taxation of E-Commerce Transactions

Session 8: Addressing the Tax Challenges of the Digital Economy

Mr. Milan Shah clubbed Session 7 and session 8 stating that e-commerce is a subset of the overall digital economy. The key points of his discussion were:

1. Overview of the sector
2. Typical Business models in digital economy
3. Key income tax issues in digital economy with case studies
4. Overview of BEPS Action Plan 1

He started his discussion by explaining what is meant by ecommerce i.e. buying / selling of products/provision of services by businesses through an electronic medium not requiring any human inter-face and uses technologies such as electronic funds transfer, supply chain management, Internet marketing, online transaction processing etc. Followed by stating that there's no human interface required and that is where the tax challenge kind of arises.

He states that this system of ecommerce is an ecosystem and most of the transaction as one would see is online, on digital and that is where the challenges come across because a customer could be located in country 'A', the website hosted on server in country B and ware-house would be in country 'C'. Giving this example he explains how you to divide the tax rules amongst this.

The Mr. Shah deliberated upon various e-commerce ecosystem in India also including the Apps environment like:

- Online travel, ticketing
- Online Retail
- Online market places
- Online deals/ comparison
- Online portals, classifieds, advertising

The he gives statistics of India's e-commerce market which is estimated to be around USD 22bn... Growing at ~35% CAGR since 2009 and the typical Operating structure in e-commerce sector in India.

He also discussed with the participants the concept of Cloud Computing and Other Digital economy businesses which included Participative networked platforms like social networking and App stores like Apple store, Play store.

Other areas deliberated upon by the speaker were:

- Key Income-tax issues in Digital economy which included:
 1. Nexus: The ability of a company to have significant digital presence in the economy of another country without being liable to taxation due to lack of nexus under the current international rules
 2. Data: The attribution of value created from the generation of marketable location relevant data through the use of digital products and services
 3. Characterization: The characterization of income derived from new business model and the application of related source rule: Royalty vs Fees for technical Services vs Business Income
- Key Income-tax provisions impacting Digital economy. Provisions of the Income-tax Act, 1961 (Sections 5, 9, 44DA, 90, 115A) and the Provisions of Tax treaty (Articles 5, 7 and 12) were discussed.
- Aspects relating to 'Royalty' i.e. Royalty payable by Government, Royalty payable by resident, and Royalty payable by non- resident. Provisions under the Act and the Treaty with regard to Royalty which included Section 9(1)(vi), Expansion of the definition of Royalty, fees for technical services.
- Concept of Beneficial Ownership (BO), OECD MC 2003 (Articles 1, 10, 11 and 12)
- Definition of FIS under India-US Treaty, concept of 'make available'

Further Mr. Milan Shah proceeded with various case studies that included case study on online advertising, case study on cloud computing.

Following cases were discussed in the case studies given by the speaker as favorable and unfavorable:

1. *Bharti AXA General Insurance Co. Ltd., In Re [2010] 194 Taxman (AAR)*
2. *IMT Labs (India) (P.) Ltd., In re [2006] 287 ITR 450 (AAR)*
3. *Cargo Community Network (P.) Ltd., In re [2007] 289 ITR 355 (AAR)*
4. *Kotak Mahindra Primus Ltd. v. DDIT [2007] 11 SOT 578 (Mum.)*

Further he discussed the Structure of Permanent Establishment rule under OECD Model Convention (OECD MC) and Tax treaty provisions, foreign enterprises control over the place,

High Powered Committee (HPC) set up by CBDT in December 1999 and its recommendations.
Some Indian cases which were in this regard:

1. *Dun and Bradstreet Espana (272 ITR 99)(AAR)(22004)*
2. *Galileo International Inc. (116 ITD 1)(Del)(2007)*
3. *eBay International AG (140 ITD 20)(Mum)(2012)*
4. *Swiss Server Case (German Tax Court of First Instance)(2001)*

Apart from Indian cases International cases discussed in the session were:

1. Sweden : PE on account of software, server (Advance Ruling of 2013)
2. Spanish Ruling on Website [Ruling of Central Tax Court][2013]

Last part of the session was an overview of the BEPS Action Plan 1, Tax challenges in Digital Economy, various recommendation to overcome the key tax issues identified and lastly the session was concluded with discussion of India's development post final BEPS Action Plan 1.

DAY 3
Session 9 to 12

Resource Persons:

1. Mr. Anand Desai
2. Mr. Sajan Poovayya
3. Mr. Rahul Matthan

Deliberations:

Session 9: Development of Technology Law Jurisprudence in India

Session 10: The Game of Chance and Game of Skill: Legality of Online Poker in India

Mr. Anand Desai took both the above sessions and discussed the latest developments and the amendments made in our Information Technology Act, 2000 and also highlighted the cases that contain the interpretation of legality of online poker in the country. Some highlights of his sessions are as follow:

1. History of Internet was discussed and how the internet in the early 90's was only restricted to research proposes.
2. In 1999, prompted by United Nations Commission on International Trade Law's Model Law on Electronic Commerce and developments in certain Asian countries like Singapore, the Indian legislature moved towards framing a legislation governing electronic transactions.
3. The Information Technology Bill was referred to a 42 member parliamentary standing committee following which it received Presidential assent on June 9, 2000 and became the Information Technology Act, 2000 ("IT Act").
4. Key amendments in 2008 Act:
 - a) Technology neutrality adopted.
 - b) Privacy safeguards enhanced: Section 43A inserted prohibiting unauthorized disclosure of "sensitive personal information". A new section 72A inserted criminalizing disclosure of information in breach of a lawful contract.

- c) New sections added to cover offences such as identity theft, cyber terrorism, violation of privacy, cheating by personation, transmitting sexually explicit act, child pornography etc.
 - d) Intermediary liability recast: As a result of the much publicized case of Avnish Bajaj Vs NCT Delhi (2005) 3 CompLJ 364 Del) where the CEO of eBay India was made a co-defendant on allegations that eBay facilitated sale of pornography through its website.
 - e) Formation of the Indian Computer Emergency Response Team.
 - f) Formation of the National Nodal Agency.
 - g) The amendments under Section 69 gave the power to the State to issue directions for interception or monitoring or decryption of any information through any computer resource.
5. The exclusion of games of “mere skill” from the ambit of gambling has created ambiguity as to which games are games of “mere skill” as opposed to “games of chance”. In *Dr. K.R Lakshmanan Vs State of Tamil Nadu and Another* (AIR 1996 SC 1153), the Supreme Court held that the expression “mere skill” would mean substantial degree or preponderance of skill. Whether a game is of chance or skills is a question of fact to be decided on the facts and circumstances of each case (*Manoranjithan Manamyil Mandram v. State of Tamil Nadu*, AIR 2005 Mad 261).
6. In *State of Andhra Pradesh Vs K. Satyanarayana and Ors.*, (AIR 1968 SC 825) the game of Rummy was examined on the principles of skill versus chance and it was held that rummy is not a game entirely of chance like the ‘three-card’ game which is a game of pure chance. The Supreme Court provided a reasoning that rummy requires certain amount of skill because the fall of the cards has to be memorized and building up of rummy requires considerable skill in holding and discarding cards.
7. The Karnataka High Court in *Indian Poker Association and Ors. Vs State of Karnataka and Ors* (Writ Petition Nos. 39167 to 39169 of 2013 decided on October 8, 2013) recently clarified that no specific license or permission was required in Karnataka for conducting the game of poker if it is played as a game of skill. The court did not go into the substantial merits of whether poker was a game of skill or not.

8. In West Bengal, games of cards like Poker is specifically excluded from the definition of “gaming and gambling” and one can organise such games by obtaining appropriate license under the law.
9. Can owners of gaming houses derive profits from players? The Supreme Court in State of Andhra Pradesh Vs. K. Satyanarayana and Ors., (AIR 1968 SC 825) addressed this point, in context of physical clubs and held:
 - a) An extra charge for playing cards (unless it is extravagant) would not show that the club was making a profit or gain so as to render the club into a common gambling house.
 - b) The court also noted that, any nominal fee charged per person for playing in the card room, as sitting fees, is not such a heavy charge in a members' club as to be described as an attempt to make a profit or gain for the club. The court also noted that, if there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of Rummy or any other game played for stakes, the offence may be brought home.

The sessions ended with taking questions from the participants on these two topics.

Deliberations:

Session 11: Privacy and Data Protection Issues

Mr. Rahul Matthan started the session with a discussion on the ways in which we use internet and how internet has penetrated in our day to day activities and how the government is also going electronic. He pointed out various incident where personal information is out in the public forum and what harm does it cause. Below are some of the major highlights of the session:

1. Identity theft is one of the major concern in US as the social security can pretty much do anything. And in the US, to recover from identity theft could take as much as two or three years. And in that two or three year period. It's very hard to get a job. It's very hard to take a loan.
2. But the right to privacy there must be at least thirty five forty cases in variety in medical privacy, criminal privacy so there's the autoshankar case where his autobiography was to be printed

3. It's not correct to say that India don't have the concept of privacy in our statute. India has many statutes in which the principles of privacy are articulated - our telecom statutes have it. Banking credit statutes have it. India has this concept of privacy where in certain specific vertical you are required to keep things confidential and private and it applies to private players also and not just to state players. But India never had and still don't have a consolidated law relating to privacy.
4. But in 2008, an amendment was suggested to the Information Technology Act, 2000. That amendment introduced section 43A which in its substantive part is the sum and substance of privacy law 132 today with the rules that was enacted later. So it's really important to understand what Section 43A says. It introduces the concept of what is called sensitive personal information. Certain types of information such as biometrics medical information medical history. Financial information like bank accounts credit card information etc. These will be categorized as sensitive personal information.
5. And any organization that is collecting sensitive personal information cannot do so without prior consent which means that you have to get the permission of the person to collect. You can only do so for a lawful purpose and when you collect it. You must give the person you're collecting it from, knowledge of the purpose for which it is being collected. You must also give that person knowledge of who is the recipient of this information or people who collect personal sensitive information are required to only collected and keep it for as long as he's required to fulfill that purpose.
6. In Europe for instance there's a law which says you cannot transfer it to a company which is situated in a country which has less stringent laws as compared to Europe in that case. India has a very similar provision which is you cannot transfer it to any person who does not abide by rules which are at least as strict as we have and Rule eight talks about the security practices and procedures that you have to follow and this of everything is the most technical rule it talks about.
7. Since the passing of the IT rules a high level Committee chaired by Justice AP shah, was constituted. Shah committee actually issued a report and that report as talked about, is a proposed privacy legislation.

Session 12: Liability of Internet Intermediaries

Mr. Sajan Poovayya emphasized the definition of technology and its impact on our life today. He discussed the liability of internet intermediaries in detail and also shared his experience of being counsel in the Shreya Singhal case before the Supreme Court. Some of the highlights of the session are as follows:

1. An intermediary in very simple terms is somebody who no doubt, participates in the process but is only a passive participant though at some point of time that passive participation may take an active role in terms of being the impetus for the transaction. They don't become transacting party themselves in other words.
2. The function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; the intermediary does not initiate the transmission or select the receiver of the transmission and select or modify the information contained in the transmission. The intermediary observes due diligence while discharging his duties. As a result of this provision, social networking sites like Facebook, Twitter, Orkut etc. would be immune from liability as long as they satisfy the conditions provided under the section. Similarly, Internet Service Providers (ISP), blogging sites, etc. would also be exempt from liability. However, an intermediary would lose the immunity, if the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act.
3. In *Anderson v New York Tel. Co.*, the Court was asked to determine whether a telephone company could be held liable as a publisher of a scurrilous message that a third party recorded and made available to the public by inviting anyone interested to dial in and listen (35 NY2d 746). The Court adopted the opinion of Justice Witmer in his dissent at the Appellate Division, concluding that the telephone company could not be considered a publisher, because in "no sense has * * * [it] participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility" (42 AD2d 151, 163). *Anderson* also holds that even if the telephone company could be counted as a publisher, it would be entitled to a qualified privilege

subject to the common law exception for malice or bad faith (42 AD2d, at 163-164). Anderson emphasized the distinction between a telegraph company (in which publication may be said to have occurred through the direct participation of agents) and a telephone company, which, as far as content is concerned, plays only a passive role. The Anderson doctrine parallels the case before us. Prodigy's role in transmitting e-mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers' conversations. In this respect, an ISP, like a telephone company, is merely a conduit. Thus, we conclude that under the decisional law of this State, Prodigy was not a publisher of the e-mail transmitted through its system by a third party. Moreover, we are unwilling to deny Prodigy the common law qualified privilege accorded to telephone and telegraph companies. The public would not be well served by compelling an ISP to examine and screen millions of e-mail communications, on pain of liability for defamation. Considering that in the case before us there is no basis upon which to defeat the qualified privilege, it should and does apply here. The Appellate Division aptly concluded that even if Prodigy "exercised the power to exclude certain vulgarities from the text of certain [bulletin board] messages," this would not alter its passive character in "the millions of other messages in whose transmission it did not participate" (250 AD2d 230, 237), nor would this, in our opinion, compel it to guarantee the content of those myriad messages. We agree with the Appellate Division in its conclusion that, in this case, Prodigy was not a publisher of the electronic bulletin board messages. We see no occasion to hypothesize whether there may be other instances in which the role of an electronic bulletin board operator would qualify it as a publisher.

DAY 4
Session 13 to 16

Resource Persons:

1. Mr. Yogesh Singh
2. Mr. Somasekhar Sundaresan
3. Mr. Lalit Kumar

Deliberations:

Session 13: New takeover code 2011 - new era or damp squib?

Mr. Yogesh Singh started the session with what is the need for the takeover code and why do we talk about takeover code so much these days? He gave the background about what are the key milestones in the evolution of the takeover code and how takeover regulations were essentially imbedded as part of the listing agreement that companies enter into. So whenever a company has to list itself under Stock Exchange it enters into a listing agreement which is a very critical document for the company to be compliant with and as part of that there were provisions regarding how the companies major share purchases should be carried out, how the minority shareholders interest should be protected. He further deliberated the following:

1. Justice Bhagwati Committee was constituted to review the code. There was a track committee which was appointed to look, to assess and to give recommendations under the chairmanship of C Ashutan and in 2011 the takeover code was implemented.
2. The takeover code provides for broadly three key concepts: one if people are acquiring any substantial stake in a company then they have to give an opportunity to exit to the public shareholders also. So public shareholders are given an open offer on the same terms as the offer made to majority shareholders. Requirement regarding disclosure is again very critical because a public shareholder investor might be sitting in Bhopal and would not have any idea what the company is doing, company may be listed on the Bombay Stock Exchange but actually operating from Chennai and therefore the disclosure requirement ensures that gradually what are the key changes in shareholding control related issue which are happening are being disclosed to the SEBI so that investor can get a copy of those disclosures. And the third is general compliances in terms of

ensuring that different participants who are involved in the listed company are also playing their part. They include market makers, brokers, managers of the funds.

3. Allow a mandatory exit in case there is a substantial change in ownership or control of the company and ensure that securities market operate in a fair and transparent manner.
4. The legislation also does not deal with what happens if in during the pendency of an open offer the convertible security is converted into normal equity shares. What are the rights that will be there?
5. Certain exemptions need further clarification for example this whole competent authority related matter.

Deliberations:

Session 13: M&A/Shareholders disputes: Issues with dispute resolutions

Mr. Somasekhar Sundaresan: His discussion was centred on M & A and shareholder disputes and what sort of issues arise in dispute resolution, what these agreements essentially contain and what are the areas in which disputes emerge. Delisting regulations deal with taking a listed company out of the stock market and taking it private. Disputes over share purchase agreements when parties intentions change when they are parties to agreement but their disputes emerge over whether to enforce agreement, on what are the areas where one could assail an agreement as being contrary to law and therefore not worthy of being implemented.

Disputes over corporate family settlements. It has been seen the reliance family settlement in the whole interplay it went all the way to the Supreme Court with some twenty one days of hearing in the Supreme Court where the question was can publicly listed companies be segregated and separated on commercial terms dictated by a family. Shareholder's agreements are agreements among substantial shareholders- broadly they cover how large shareholders get together to determine the manner in which they will run a company.

Let's say two people come together to run a company. They want to be equal partners and let's say they collectively own 70% of a company, thirty five percent each. Each may want to ensure that the other is not more than him in degree of control. So they can have an agreement saying neither party will buy shares without the consent of the other party.

- Provisions entailing share transfer restrictions
 - Right of first refusal
 - Right of last refusal
 - Tag-along rights
 - Drag-along rights
 - Contractual lock-in of shares
 - Covenants not to buy further shares

Rule that any fetter on transferability of shares is per se in conflict with company law and therefore not enforceable. This question keeps coming up time and again different benches have taken different view some benches have added the new ones of saying “If it's in your articles of association then perhaps it's a contract that binds the community of shareholders at large and therefore forcible”. There are those who said that even if it's in the articles it would be repugnant to the scheme of company law

The takeover regulation says that if you buy more than twenty five percent in a listed company offer the same terms to the others.

The legal question therefore is would the open offer be mandatory provision or a directory provision. If it's mandatory the consequences have to follow that it was mandatory at that point in time no other interpretation is possible, you didn't do it you can cross it. It is held to be directory in nature the timing is also being held to be directory in nature. There is a decision of the SAT which went to the Supreme Court and did not get disturb the case of Hardy oil vs SEBI. This was a case where an international acquisition took place and the question before the SAT was that SEBI choose not to act on an agreement signed abroad for an indirect acquisition. At that point in time the open offer to have been made it was not made it was made subsequently when the original transaction was closed. And therefore invalidate the Indian acquisition and the SAT said no it is not a mandatory provision. It is not a condition precedent to a completion of a transaction. It is a condition in law and therefore directory.

Forward contracts in securities are prohibited under SCRA (Securities contract regulation Act). So any share purchase agreement would typically be assailed saying this is a forward contract.

Deliberations:

Session 14: Criminality in Economic Laws

Mr. Somasekhar Sundaresan: In this session he talked about the enforcement issues and judicial determination of issues that get thrown which is equally important to bear in mind the context and environment in which these laws operate and society operates. Following were the topics for deliberation during the course of the session:

1. The Indian political economy will be the interplay between law politics and economics.
2. How virtually every business law is a criminal law?
3. This environment of criminality that's come into economic law is something that I thought I should leave behind for the session and speak about how the law governing doing business is permanent say criminal law and that's a very unique situation in India like a breach of takeover violation in U.K. or US will never take you to jail, I mean you have a explicit every provision of securities law is criminal law
4. SEBI Act provides a good case study: Section 24 criminalizes everything contravention of every single provision of the Act, rules and regulations
5. Punishable with fine, imprisonment or both
6. Typically, complainant can only be the regulator
 - SCRA uses "or by any person" for complainant
 - Ejudsem Generis may get applied
7. Composition of offences not attracting prison

Deliberations:

Session 15: Companies Act, 2013 new era in Investor Protection

Mr. Lalit Kumar: He started the session with what the new law seeks to achieve which include Attempt to align corporate functioning and regulation with good global practices or make even better, Enhanced disclosure & transparency provision of adequate and timely information, Greater check on financial reporting & auditors, Enhanced shareholders' democracy/activism, Protection of shareholders' rights, Equitable treatment of all shareholders, Enhanced regulatory oversight, Effective redressal of grievance, Whistle Blower Mechanism and Check on corporate

frauds. He also discussed the new Investor Protection Measures which the new Companies Act, 2013 provides for Investor protection. For instance:

1. Stringent punishment for fraud
2. Class Action
3. Empowerment of the National Company Law
4. Tribunal
5. Enhanced duties of directors towards investors
6. Role of auditors

DAY 5
Session 17 to 20

Resource Persons:

1. Mrs. Dharmishta Raval
2. Mr. Sandeep Parekh
3. Mr. Nehal Vora
4. Mr. V.S. Sundaresan
5. Mr. R.K. Nair

Deliberations:

Session 17: Powers of SEBI - judge, jury and executioner?

Mrs. Dharmishta Raval; She expanded the session's meaning by saying that SEBI legislate, SEBI is the investigator, SEBI has police power, SEBI is a quasi judicial authority and SEBI is an executioner. During the course of this session, she discussed the following points:

1. Preamble of SEBI Act says: Protect the interest of investors, Regulate the securities market, Develop the securities market.
2. Charging section of SEBI Act- Section 11 casts a duty to carry out the above 3 objectives by such measures as it thinks fit.
3. Section 2(h) of SC(R)Act defines" securities" as,-
 - a. Shares, scripts, bonds, debentures or other marketable securities of a like nature in or of any incorporated company or other body corporate
 - b. Units of mutual fund or collective investment scheme
 - c. Security receipt under SARFESI Act
 - d. Government Securities
 - e. Any instrument declared by the Central Government as Security.

She further elaborated listing agreements, regulations of securities market, market manipulation and important case laws.

Deliberations:

Session 18: Insider trading, Fraud and Manipulation in the Securities Markets

Mr. Sandeep Parekh: He started the discussion by giving background of Fraud and Manipulation in Ponzi Schemes. He discussed at length efficient capital markets hypothesis (ECMH) theory and its application by the US courts in fraud cases. He discussed the concepts of fraud and misrepresentation under common law and its applicability to stock exchange transactions. He also highlighted the most common ways in which fraud and manipulations are done in the securities market. He pointed out the Economics and morality of permitting/prohibiting insider trading and who is 'insider', 'connected person', what is 'unpublished price sensitive information'. He discussed the theories under US Law relating to insider trading i.e. Classical theory, Misappropriation theory and Possession theory. He concluded by discussing the genesis and evolution of the Tippee Liability citing the case of *Dirks v. SEC*. He concluded the session with discussing cases and answered questions from the participants.

Deliberations:

Session 19: Public offer of securities and IPOs

Mr. Sandeep Parekh introduced Mr. Sundaresan and informed that he had been with SEBI for a very longtime dealing with public offers, capital raising, etc. He further introduced Mr. Nehal, who brings in the market perspective and currently is the Chief Regulatory Officer of B.S.E. They both took the session and deliberated on the following topics:

1. How the primary market functions and what the regulatory framework SEBI has put in place and then basically the rules which are to be governed and followed by the companies to raise the money from the capital, to raise money from the public and recent reform that have been brought in public issue of securities.
2. if you want to raise money from outside India it is ECB (External Commercial Borrowings) if it is a equity it is called ADR or GDR if it is hybrid product it is called Foreign Currency Convertible Bonds.
3. Recently, we have new concept called masala bonds, which means you can raise rupee denominator from outside India. So in masala bonds what happens is the currency risk is

taken by the investor not by the company whereas in External Commercial Borrowing you borrow in terms of foreign currency so the currency risk is borne by the company whereas in a masala bond the currency risk is borne by the investor who is investing money in that company.

4. We have three types of investors in the market - which you call segmented. One is called qualified institutional buyers, basically it is like banks or you know institutional investors who have the ability to assess on their own, the second category is called High net worth individuals, the third category is called retail individual investor.
5. SEBI (ICDR) Regulations, 2009: Eligibility criteria, Minimum Dilution, Allocation in net offer to public, Lock-in requirements, Disclosures and Pricing.
6. Recent Major Reforms: Minimum allotment to retail individual investors, Rejection framework, Simplified norms for capital raising and listing by technological start-ups and Streamlined public issuance process
7. How the secondary market infrastructure in the country is far superior than that for the primary market.
8. In terms of the purpose of a Stock Exchange, the Securities Contract (Regulation) Act of 1956 prescribes conditions and gives the recognition to an Exchange. It basically has two fold purpose for developing the primary market which allows the people who save money to invest into companies which need money. Very conceptually a very commonsense approach and once the investors have invested they need to have a place where they can transfer their ownership to some other person. Common platform where the person initially invested sell securities to some other person is called secondary market. So the primary market is where companies come and access money from the people who want to save money to invest into their projects give a good valuation and then you have a secondary market where investors who have initially invested are in a position to transfer their ownership seamlessly to another investor.

The session ended with taking questions from the participant judges.

Deliberations:

Session 20: Mutual funds, Collective Investment Scheme, Investment Advisor and Portfolio Management regulations of SEBI - an introduction

Mr. R.K. Nair started the session saying that insurance sector which is completely a different sector if one look at the financial market. He discussed what are mutual funds and structure of mutual funds in depth. He also deliberated on following areas:

1. Issues & Challenges related to CIS Regulations
2. Prize Chits and Money Circulations (Banning) Act, 1978:
 - a) Central Act But administered by State Governments
 - b) The act bans promotion or conduct of any prize chit or money circulation scheme and provides for imprisonment and penalty in case of failure to comply with the provisions
 - c) The act bans any prize chit or money circulation scheme or enrolment or participation as members in those schemes or receiving or remitting money under those schemes
 - d) MLM activities are understood to fall under the purview of State Govts. under this Act
3. Portfolio Management Services (PMS): Portfolio Managers in India are required to register under the SEBI (Portfolio Managers) regulations, 1993. As on Dec 31 2015, there are 221 Portfolio Managers registered with SEBI. Investors are required to invest at least Rs. 25 lakhs to avail Portfolio Management Services. Portfolio Managers provide one or more of the following services:
 - a) Discretionary PMS - where the Portfolio Manager takes all the decisions on investments of the client.
 - b) Non-discretionary PMS - where investor takes the final decision based on Portfolio Manager's advice and Portfolio Manager executes the same.

- c) Advisory PMS - where the Portfolio Manager provides only advice to the clients and the decision of investing as well as execution lies with the client.
4. Major policy developments in recent past:
- a) Minimum net worth requirement for Portfolio Manager increased from Rs 50 lacs to Rs 2 crore excluding minimum Capital Adequacy/ Net worth requirement for any other activity (2008)
 - b) Requirement of segregation of listed securities in individual client accounts. (2008)
 - c) Performance fees, if charged, shall be mandatorily on the basis of high-water mark principle. (2010)
 - d) Portfolio managers to accept first single lump-sum investment amount, as funds or securities from clients, of atleast Rs 5 lacs. (2010)
 - e) Disclosure Document to be placed on the website of Portfolio Manager to ensure that the clients have updated information. (2010)
 - f) Portfolio managers to keep the funds of all clients in a separate bank account maintained by the portfolio manager.
 - g) Portfolio Managers not to organize investment portfolios as "Schemes" akin to Mutual Fund Schemes while marketing their services to clients. (2010)
 - h) Minimum investment per client increased from Rs 5 lacs to Rs 25 lacs. (2012)
 - i) Segregation of unlisted securities in individual client accounts. (2012)
 - j) Portfolio managers are required to submit a monthly report as per the prescribed format containing details such as no. of investors, AUM managed, performance etc. to SEBI only. Pursuant to CIC order dated January 17, 2013 SEBI has started putting these monthly reports on the SEBI website.

DAY 6
Session 21 to 23

Resource Persons:

1. Mr. Amitabh Kumar

Deliberations:

1. *Anti-competitive agreements-dynamics of cartels, oligopoly and vertical restraints on price and consumers.*
2. *Abuse of Dominant Position*
3. *Merger Control*

Director In-Charge, Dr. Geeta Oberoi informed the participants that Mr. Amitabh Kumar would be dealing with Competition law and related aspects for the session 21, 22 and 23.

In the beginning, Mr. Amitabh shared his experience as a member of competition commission in 2004 and talked about the History of Competition Act so as to cover the following areas.

1. Constitution challenge to the Competition Act, 2002 in Brahmadatt v. Union of India case. Where he discussed and highlighted one of the question that was challenged that if the commission is headed by a Judge how it can decide the dispute because no where a competition agency is headed by a judge and for that he sighted various examples of different countries around the globe.

Thereafter, Mr. Amitabh discussed about the Economic aspects of competition law, wherein he discussed the followings:

1. Indian Economic schools teach only the procedural aspects of the law and not the substantive part of the law because it is very difficult to understand as we go through we will see why it is so difficult to understand because there are spaces where you have to draw science of economics.
2. Further elaborating the science of economics he said that it is not exactly based on the same rules of evidence that normally go with the judiciary, the history of this law can be traced back to 1889 when the first Canadian law, competition law was enacted but then it

was never implemented and therefore, mother of every competition law is supposed to be a American law called Sherman Act of 1889.

3. Till 1980s there were very few countries probably 25-35 countries in the world who had competition law and suddenly it exploded and the reasons are not that all countries wanted to have free market economies but the reason was that the industrialized countries of the west were forcing it down to every country since there, commercial enterprises were not able to compete in the trade with those countries. They were not getting the level playing field so if American company comes to India and suppose wants to sell a product which is controlled by monopolist in India, the monopolist will do everything to not let it come.
4. Thereafter, Mr. Amitabh discussed about the existing system then i.e. MRTP. He said in 1991 when the government embarked on the economic reforms in this country, they realized that MRTP Act is one of the single source of preventing free market and investments. So they did two things, firstly lot of provisions were deleted or made inactive. By 1999, the Singapore declaration came in and they in world trade conference said that the competition should also be one of the issues that should be discussed. On that count India set up a high power committee known as the Raghavan Committee in 1999. They came up saying that the MRTP act is beyond repairs or amendments, it cannot be converted in to a modern competition law and so they suggested a new law that gave birth to the Competition Act.
5. Competition Act is based on the same economic principles on which the Sherman Act evolved or evolved in the European Union where there is no law but it is governed by treaty of Rome.
6. Thereafter, he discussed elaborately on various provision of completion law citing plethora of examples in context of India and in the end he discussed about the concept of duopoly by citing day to day examples.

DAY 7

Session 25 to 28

The day was chaired by Hon'ble Justice Sujata V. Manohar, Former Judge, Supreme Court.

Resource Persons:

1. Mr. Rakesh Jain
2. Mr. Tejas Karia
3. Mr. Atul Sharma

Deliberations:

Session 25: Public Procurement Processes

Mr. Rakesh Jain took the participants through procurement, existing instructions, principles laid down by Supreme Court, Salient features of Public Procurement Bill, Important Audit Findings and Best Practices. He explained fundamental principles which includes Open tendering, Effective Advertisement, Non-discriminatory tender conditions & Technical specifications, Public tender opening and Award to most advantageous bidder. He also explained in detail the principles laid down by Supreme Court that:

- a) Government organizations are not allowed to work in secrecy in dealing with contracts, barring rare exceptions.
- b) Reasons for administrative decisions must be recorded, based on facts or opinions of knowledgeable persons again based on facts.
- c) Tendering Process or Public Auction is the basic requirement for the award of any contract.
- d) Adequate publicity is essential.
- e) Officers engaged in public procurement have to perform fiduciary duty.
- f) Bid evaluation has to be strictly in accordance with the bid evaluation criteria stated while inviting the bid.

He also described the weaknesses in the existing system which are: Absence of a dedicated Policy making Department, Absence of Legal Framework, Absence of Standard Documents,

Nomination basis, Limited number of Suppliers / List of Registered Vendors, Two Envelope System, Delay in Tender Processing and Award Decision, Works contract and Negotiation.

He further discussed the “Best Practices in Power Grid” which are: Implementation of Integrity Pact, Independent External Monitor, Single stage two Envelope Bidding procedure, Performance based evaluation of the vendors, e-procurement from January 2012, e-reverse Auction, Conductor Inventory and Independent Quality Assurance and Inspection Wing.

Deliberations:

Session 26: Judicial Intervention in International Commercial Arbitration: Implications and Recent Developments

The subject of session was judicial intervention in international commercial arbitration: implications and recent developments.

Mr. Tejas began the session by introducing himself and briefly outlined the area of discussion. He touched upon and elaborated the following areas:-

- How far the courts should intervene in the international arbitration process.
- Parties’ autonomy in choosing a forum.
- Parties from different jurisdictions, their privacy and rights.

Thereafter, he focused and elaborated the point that there are no standard rules and every jurisdiction has a different style of handling this kind of issues with regard to the international arbitration.

On this point he talked about the question whether India is a destination or a hub for international commercial arbitration. In order to elaborate, he discussed about amendment in Indian arbitration Act, wherein he discussed part I i.e. domestic arbitration and part II i.e. International Arbitration. To explain the jurisprudential aspects of Indian arbitration and to elaborate the topic further he cited various examples such as Bhatiya International and Satyam ventures.

Mr. Tejas pointed out the followings lacuna in Arbitration laws as far as India is concerned:-

- Lack of proper institution arbitration in India
- International Commercial Arbitration seat in India
- Vast and difference between the Jurisdictions
- Lack of Specialization

- Hierarchy of Courts

Further, He cited and compared India with countries such as London and Singapore with respect to International arbitration. He said as per Indian law there is no arbitration agreement, but as per English law or Singapore law the courts would not interfere and that's where you are dragging an Indian party to a foreign jurisdiction where clearly as per Indian law there is no arbitration agreement. So, those are the cases where the court can intervene and exercise the jurisdiction by injunction preventing parties from proceeding with those cases.

While dealing with section 8, 9 and 11 of the Arbitration Act Mr. Tejas said that the other hallmark of arbitration is competence, and that is where the party autonomy and the power of tribunal to decide its own jurisdiction comes into picture. Also there is a tussle between jurisdiction of a court to decide the existence and validity of arbitration and power of tribunal to decide the same issue. At the time of referring the matter to arbitration section 11 and at the time of appointment of arbitration, and also at the time of granting injunction under section 9, court has to come to a prima facie decision whether there is an arbitration agreement or not, and whether that decision is binding or the tribunal is actually constituted or whether the court should only limit to its existence on, not going to the question of validity.

He cited two land mark cases first is Mac Donald case before Delhi High Court, wherein he said that court granted anti- arbitration injunction. The grounds were very specific. It is to be oppressive vacious and abuse of law and forum convenient because if one forum is more convenient and parties have agreed to that forum and there is no point dragging some other parties to the different forum where the parties had no agreement at the time of entering the contract, only exceptional cases where either you have not entered to raise all the disputes in arbitration and some of the disputes can be raised in the national courts.

Another case was SVP and Patel engineering in which he said that the court also has to get into the validity aspect, which has now been with the amendment has been over turned in that sense is that it says that irrespective of any judgment decision, decree of the court the matter has to be referred to arbitration, therefore the scope of enquiry now, in section 8 is quite narrow, it is only limited to prima facie validity of existence of arbitration, but there is also an issue which now would come before the court in the cases after the amendment in certain cases where there are statutory bodies.

Concurring with Mr. Tejas, Hon'ble Justice Sujata v. Manohar took over the session and pointed out that the whole idea is not who needs whom, the idea is not to take away some jurisdiction from somewhere give it to somebody else. The idea is that looking to the extent of litigation that is not there just in our court but the other courts also, perhaps not with the same extent but they do have a similar problem. If arbitration is an alternative to litigation, it gives relief to the courts also and it gives relief to the parties also. Therefore, we have to examine our system in a way where we can have a fair adjudication per decision making, not necessarily adjudication because arbitration is not necessarily legal adjudication but it is a decision making, a decision which is acceptable to the parties they have chosen for their own forum for decision.

Hon'ble Justice Sujata v. Manohar raised the following questions before the participants:-

- Are we having a system where you have a fair decision making process?
- Are we just prolonging disputes unnecessarily? And ;
- How far intervention is required?

To explain these questions, Hon'ble Justice Sujata v. Manohar shared her experience from 50th anniversary of the New York convention in Beijing and compared the system in India and around the globe. She cited various article of New York Convention to explain the relevancy of International arbitration law in Indian context. Hon'ble Justice Sujata v. Manohar also talked about various provisions of Arbitration Act and Companies Act, particularly emphasizing on Section 34 and 37 of Arbitration Act and Section 391-397 of old Companies Act.

Deliberations:

Session 27: The Tensions between Confidentiality and Transparency in International Arbitration

Topic of this session was transparency and confidentiality of international arbitration proceedings.

Briefly outlining the topic Hon'ble Justice Sujata V. Manohar posed a question that this problem also arises in case of domestic arbitrations, because this is a private settlement of disputes and if any third party asks for a copy of the award, we don't give it, that is a very limited view thereafter, she handed over the session to Mr. Tejas Karia.

Mr. Tejas took over the session and elaborated the Jurisprudential aspect of Confidentiality and transparency, its importance in context of India and International arbitration. He highlighted the advantages and disadvantages to this approach. He said Confidentiality has its own advantages as well as disadvantages.

While pointing out the advantages he said the advantage of arbitration is, we know and when we are asking the difference between arbitration and the litigation is one of the foremost concerns, which parties have is the confidentiality.

Pointing out the disadvantages and elaborating the concept of confidentiality in arbitration he said confidentiality comes up for various reasons, one is that it is commercial in nature, so they want to have the hearing in public, they don't want to kind of, have the trade secrets or commercial confidential information to be disclosed in public. If the matter goes for litigation, anybody can watch and have also the pleadings taken out of the court officially or unofficially so that is the disadvantage of the litigation process.

He further added that the parties who want to have the disputes settled, they prefer confidentiality and that is one of the reasons why the parties choose arbitration over litigation.

To support his point he cited one case of UK court, where the court has decided that the concept of private arbitration, they write simply from the fact that the parties have agreed to submit to arbitration particular dispute arising between them and only between them.

In context of India he said In India there is no jurisprudence in relation to the implied obligation of confidentiality. In context of conciliation section 70 and 75 of arbitration act refers to confidential nature of material disclosed, but there is no express provision in relation to confidentiality in arbitration proceedings.

Further He added that so as far as conciliation in part III is concerned they have the requirement of the confidentiality but the arbitration proceeding in part I or in enforcement of award part II there is no concept of confidentiality. It is inconsistent with international practice where most jurisdiction are silent on issue of confidentiality.

Again discussing on transparency and confidentiality, he said all kinds of arbitrations for example, international commercial arbitration is essentially a private affair between the parties, and therefore confidentiality concerns are often override the need of transparency. So you need to have confidentiality instead of transparency.

While concluding he said there is no difference between Indian jurisprudence and law and other jurisdictions because confidentiality is a subject where it is not kind of, there is no legislation as such it is left with the parties to agree and enforce the rights against each other, because there is no kind of requirement to codify such an obligation.

Deliberations:

Session 28: Economic Regulation of Airports

Mr. Atul Sharma firstly discussed the general framework of economic regulation within the country which is the background relevant for the purposes of really understanding the nuances and differences that the airport regulation would have with regulations. Secondly he discussed the scheme of statute as far as airports are concerned and then he discussed the principles of the regulation that are involved. He also mentioned that simply opening F.D.I. may not have been enough for the purpose of really promoting growth and re kindling that growth in economic development of airports. He then introduced the participants judges to all the Regulatory Bodies/Sectoral Policies i.e. Directorate General of Civil Aviation DGCA and Airport Infrastructure Policy and also the Key Regulations (with rules issued thereunder) i.e Airports Authority of India Act, 1994, Aircraft Act, 1934, The Airport Economic Regulatory Authority of India Act, 2008, Other applicable legislation including the FEMA, environmental laws, labour, taxation, Proposed Legislations - Civil Aviation Authority of India Bill, 2012. He further explains how AERA determines the tariff for aero services taking the following into consideration:

- a) Capital expenditure incurred and timely investment in improvement of airport activities;
- b) The services provided, its quality and other relevant factors;
- c) The cost of improving efficiency;
- d) Economic and viable operation of major airports;
- e) Revenue received from services other than the aeronautical services;
- f) The concession offered by the Central Government in any agreement or MoU or otherwise; and
- g) Any other factor which may be relevant.

He further touched upon the concept of till and popular models of tills i.e. light touch, Single Till, Dual till and Hybrid Till. The session was concluded with the questions from participant judges.

DAY 8

Session 29 to 31

The day was chaired by Hon'ble Justice A.K. Goel, Judge, Supreme Court of India.

Resource Persons:

1. Mr. Richard Tan

Deliberations:

Session 29: Domain Name Dispute Resolution

Mr. Richard Tan started the first session with his brief personal background followed by the theme of first session i.e. Domain Name Dispute. He gave a general background of the World Wide Web internet, the growing concerns relating to intellectual property issues associated with domain names and the increasing number of abusive domain name registrations. Giving this background he stated that a White Paper was produced by the United States Department of Commerce, called as WIPO to conduct a study and make recommendations for a uniform approach to resolving trademark/domain name disputes involving cybersquatting. Internet Corporation for Assigned Names and Numbers, a non-profit California-based corporation was formed in 1998 for the purpose of, among other things, to address the management of the domain name system. He further explained how WIPO with the help of member states tried to resolve domain name disputes, by aiming to formulate an internationally uniform and mandatory procedure to deal with what frequently developed into cross-border disputes. Creation of an online administrative dispute resolution procedure, which would have universal application for all .com, .net and .org registrations through WIPO's report and recommendation. He also stated other recommendations made by WIPO and the formation of The Uniform Domain Name Dispute Resolution Policy (UDRP).

Mr. Tan discussed in detail the UDRP which included its applicability, UDRP Standing, Remedies and Published Decisions, UDRP panel to resolve domain name dispute, its key design elements and how WIPO plays a role as UDRP Provider.

Some Important Decisions of the Indian Courts regarding Cybersquatting discussed in the session were:

- *Yahoo! Inc. v. Akash Arora & Anr.*
- *Rediff Communication Ltd. v. Cyberbooth and Anr.*
- *Aqua Minerals Ltd. v. Parmod Borse*
- *Pen Books Pvt. Ltd. v. Padmaraj*
- *Satyam Infoway Ltd. v. Siffynet (P) Ltd.*

Deliberations:

Session 30: FRAND licensing disputes

This session was on FRAND licensing disputes. In this Session Justice A.K. Goel explained the position of patent, trademark, copyright and competition laws in India. Justice also touched upon the fundamental rights under the constitutional scheme in this regard.

The session was then taken over by Mr. Richard Tan, the key points of his discussion were:

1. Role of Intellectual Property
2. Standard Essential Patents (SEPs)
3. Standard Setting Organizations (SEOs)
4. Licensing of SEPS and FRAND Licensing
5. Issues relating to FRAND disputes
6. Mechanisms for Resolving FRAND Disputes
 - Courts, Arbitration and ADR
 - WIPO arbitration and mediation

Under the first head he explained the role of patents in promotion of innovation and economic growth, how it helps in development of new technologies and competition increase consumer choice, spur economic development and lower prices. In the Second and third key points i.e. Standard Essential Patents (SEPs) and Standard Setting Organizations (SSOs) he elaborated on what SEPs and SSOs are, their concept giving few examples in this regard.

In the next part which was on Licensing of Standard Essential Patents (SEPs) and FRAND Licensing Mr. Tan discussed the role and function of SSOs, and what exactly are standard “essential patents”, stating it as a patent that covers the technology and essential to implement the technology standard (but some standards bodies may have slightly different definitions of

what constitutes an essential patent). He also explained the meaning of “FRAND” licensing terms (sometimes known as “RAND”) Fair, Reasonable and Non-Discriminatory terms.

Further the issues relating to FRAND Disputes was discussed which included Type of Claim asserted, SSO Policy in issue, Choice of Law (What law governs FRAND commitments?), Threshold Determination of Essentiality, SSO policies may condition FRAND commitments on essentiality of patents but SSOs do not certify essentiality, and other issues relating to patent validity, patent infringement and enforceability.

Followed by the speaker further stating the Mechanisms for Resolving FRAND Disputes like approaching the Courts, Arbitration and ADR. It also included the issues relating to jurisdiction and advantages of arbitration and mediation.

Lastly, he explained the role of WIPO Arbitration and Mediation for Resolving FRAND Disputes.

Deliberations:

Session 31: Interim Measures in International Commercial Arbitration and Recent Developments including Emergency Relief Arbitration

Mr. Richard Tan explained the Interim Measure of protection - a temporary measure that is granted to protect the legitimate interests of a party during an arbitration before the hearing or final award. He also highlighted the Examples of interim measures a party may need:

- a) restraining a breach of contract (e.g. call on a bond/guarantee)
- b) restraining a breach of confidentiality
- c) preserving evidence
- d) inspecting property
- e) selling deteriorating cargo
- f) taking samples
- g) preserving assets out of which an award might be satisfied (freezing or Mareva injunctions)
- h) obtaining security
- i) anti-suit injunction

He further put forward that arbitral tribunals and the national courts may be empowered to grant interim measures (depending on the *lex arbitri* and the applicable arbitration rules/the arbitration agreement). Also, availability of such relief depends on legislative provisions for the extent to which arbitral tribunals and the courts are granted such powers and arbitration rules which grant arbitral tribunals such powers. He also explained that the laws of some countries may not confer powers to the arbitral tribunal to grant interim measures e.g. China, Greece, Italy and Argentina.

He also explained why should a party need to go to a national court in a dispute which is subject to arbitration?

- a) the arbitral tribunal may not have been constituted
- b) the arbitral tribunal may have no powers or limited powers to grant interim measures
- c) the orders of the arbitral tribunal can only bind parties to the arbitration; third parties may need to be restrained (e.g. Mareva or freezing injunctions) in which case a party may have to go to the court
- d) the orders of the arbitral tribunal may not be easily enforceable as an award under the New York Convention may be a need for *ex parte* relief so that the other side is not warned

He pointed out that the party requesting such an interim measure must satisfy the tribunal that

- a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered,
- b) Such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted
- c) There is a reasonable possibility that the requesting party will succeed on the merits of the claim

Further coming to the end of the session, he explained the enforcement of an Emergency Arbitrator's Order or Award that some jurisdictions have enacted specific legislation to support EA relief e.g. Singapore. "Orders" and "Awards" may be enforceable under the laws of some countries by the courts.