NATIONAL JUDICIAL ACADEMY

Annual National Seminar on Working of the First Level Commercial Courts in India

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Programme Report

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RESOURCE PERSONS

- Hon’ble Justice Dr. Mukundakam Sharma, Chairman, Vansadhara Water Disputes Tribunal
- Hon’ble Justice R.C. Chavan, Former Judge, Bombay High Court
- Mr. Rakesh Kumar, Director, Economics, Competition Commission of India
- Mr. Radhakrishnan Nair, Former Member (Finance & Investment), Insurance Regulatory Development Authority
- Mr. Anand Desai, Managing Partner, DSK Legal
- Mr. Pravin Anand, Managing Partner, Anand and Anand
- Mr. Atul Sharma, Founding Partner, Link Legal
- Mr. Lalit Kumar, Partner, J Sagar Associates
- Mr. Dheeraj Nair, Partner, J Sagar Associates
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DAY 1: 24th September, 2016

Session 1 Part A: Introduction: Why Commercial Courts – Contours of Jurisdiction

Speakers: Hon'ble Justice Mukundakam Sharma, Hon'ble Justice R.C. Chavan

Mr. Rajesh Suman, Programme Coordinator welcomed the gathering and discussed the objectives of the conference. He said that some attempts were made in the past by a few High Courts (Delhi, Bombay, Madras and Calcutta) to establish commercial benches. But, this legislation, 'The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015', ('the Act') provides for establishment of Commercial Courts all over India.

This legislation, the speaker said, was a response to the changing needs and demands of the economy. A need was felt to have specialized courts for disposal of commercial disputes in India and the Act was finally enacted after going through the following developments at the level of Law Commission and the Legislature:

- 2003: 17th Law Commission of India; Report No.188 "Proposals for Constitution of Hi-tech Fast Track Commercial Divisions in High Courts".
- 2009: Commercial Division of High Courts Bill 2009 was introduced in the Parliament. Passed by the Lok Sabha.
- 2010: After Some Amendments suggested by the Select Committee of the Rajya Sabha, revised Commercial Division of High Courts Bill was introduced in the Rajya Sabha.
- 2011: During the course of the debate concerns were raised by the Members of the Rajya Sabha about the redrafted Bill and the Government withdrew the Bill.
- 2013: The Ministry for Law and Justice referred the Bill to the 20th Law Commission for its views on the proposed Bill.
- 2015: 253 Report "Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015" proposed changes in the Bill. Bill was passed by both the Houses of Parliament and is assented by the President on 31/12/2015.

The remarkable feature of this legislation is that the way Commercial Courts function will serve as a basis for civil justice reform in this country. The special procedures such as Time limits for filing of written statement, pleadings, filing of documents, Effective disclosure norms are important in this regard. In the United States, similar reforms were brought about long ago in civil procedure which led to decrease in the number of cases going to federal civil trials.

The speaker said that for the purposes of dispensation of justice, it is very important to understand the context and nature of commercial disputes in India. The role of judges and the courts in interpretation of contracts becomes very crucial for effective dispute resolution. It follows that understanding the context of legislation and its historical background is critical for the job of judging. The conference comprehensively focuses on the context and nature of commercial disputes in India.

Justice Mukundakam Sharma shared following views:

The Commercial Courts Act brought in a lot of important changes. Technology and business have progressed leaps and bounds in the last few decades. That necessitated changes in law to keep up with the global economy. Global trade commerce is very important for economic growth and development. Laws need to changed and updated to keep up with the changing needs and demands of the global economy. There is pressure of the international community on India to keep up with the changing global scenario. In 1991, India opened up its economy. In 1995, India became a signatory to the TRIPS agreement. The TRIPS agreement required changes in laws of all the signatories to keep up with the changing scenario. A change in law will result in a change in the justice delivery system. China has IP courts from bottom to top of the hierarchy. It has specialized courts for IP cases.

The changing demands of the period necessitated changes in justice delivery system. No foreign investor likes to wait 10 years to get a decision on his investment. Change was necessary. The result of that need is the Commercial Courts Act. It is important to understand the intention of the legislature before attempting to interpret the provisions of the Act.

With the Arbitration and Conciliation Act, 1996, the impetus was early disposal of arbitration cases. Section 34 of Arbitration and Conciliation Act, 1996 is important in this regard and Supreme Court gave a very extensive reading to 'public policy'. In Arbitration Amendment Act, the term 'public policy' was defined.

Following are the advantages of having special courts in the form of commercial courts:

- It leads to increase in rate of disposal of cases.
- It sharpens the understanding of the judges.
- It improves efficiency of the judges as they gain more experience in the same field.
- It also reduces caseload.

The speaker suggested that it is best to have special courts manned by a judge for not more than 3 years. Section 2 (c) of the Commercial Courts Act defines the term 'commercial dispute'. It receives a very broad definition in the Act. Appropriate time limits have been fixed under the Act. The speaker said that this was enacted with high hopes and raised expectations of the foreign investors and stakeholders.

Justice R. C. Chavan shared following views:

The object of the Commercial Courts Act is not to create a special forum for the wealthy. It is to get the economy unclogged. The Commercial Courts Act is a reminder by the Legislature to the Judiciary to start using provisions in the Civil Procedure Code, 1908 regarding speedy disposal of cases.

It is very necessary to understand why commercial disputes arise. Most commercial disputes don't come to court. They are settled outside court through alternative methods of dispute resolution. If the genesis of a particular legislation is understood, it is better for the dispensation of justice. The metric for judicial performance be the number or value of properties that get unclogged by the speedy disposal of cases by the judiciary. That makes judges more dutiful.

Session 1 Part B: Interpretation of Construction and Infrastructure Contracts

Speaker: Mr. Atul Sharma

Mr. Atul Sharma shared following views:

In the International Arbitration Regime**,** we have something called the Redfern Schedule. It is composite document with four steps. Parties sit together in a collaborative manner and decide what documents are required to be disclosed.

The Oxford dictionary defines infrastructure as 'the basic physical and organizational structures and facilities (e.g. buildings, roads, and power supplies) needed for the operation of a society or enterprise.'

Following points were related to the definition of 'infrastructure':

- The basic physical systems of a business or nation.
- Transportation, communication, sewage, water and electric systems are all examples of infrastructure.
- These systems tend to be high-cost investments, however, they are vital to a country's economic development and prosperity.
- Infrastructure projects may be funded publicly, privately or through public-private partnerships.

Following are different modes of creating infrastructure:

- By the Government on its own:
    a) Though its own agencies
    b) By engaging private contractors
- By Public Private Partnership (Concession model):
    a) Design, Build, Finance, Operations & Transfer Contracts
    b) Operation and Management Contracts

In India, for the last 10 to 15 years, the government did not have the finances for development. That's why it took to new approaches like PPP – Public Private Partnership, which is government and private working together. We had a few success stories and a few failures.

Following points were discussed in relation to PPP:

- The 'Public Private Partnership' (PPP) model has established itself as a preferred mode of project implementation, especially in infrastructure projects such as highways, airports, urban infrastructure, transit systems, and ports.

- It is a very effective way to combine private sector efficiencies and public sector safeguards in delivering services to get sustainable outcomes.
- Concession Agreements are the most prominent examples of implementation of PPP Model across infrastructure sectors.

A concession agreement is a negotiated contract between a company and a government that gives the company the right to operate a specific business within the government's jurisdiction, subject to certain conditions. The speaker discussed the following points in this regard:

- Asset and/or service, which has traditionally been provided by the government are provided by the private sector entity under the contractual arrangement.
- In consideration of providing service, the private sector entity receives grant of certain rights and/or financial support from the government.
- The government may exercise some control over the functioning of the private entity by appointing supervising committees, or nominee or by requiring government approval of certain activities

There is a distinction between the terms ‘development’ and ‘construction’. They mean two very different things. Construction can be understood as a subset of development.

Several legal and regulatory changes have been made in various Acts to enable PPPs in the infrastructure sector, across power, transport, telecom and other sectors:

- The Airport Authority of India Act, 1994
- The Electricity Act, 2003
- National Highways Acts, 1956
- Indian Port Act, 1908
- The Indian Telegraph Act, 1885

Commonly adopted forms of PPP contracts:

- Build-Own-Operate-Transfer (BOOT)
- Build-Operate-Transfer (BOT)
- Design-Build-Operate-Transfer (DBOT)
- Build-Lease-Transfer (BLT)
- Operate-Maintain-Transfer (OMT)
- Management Contracts

Financing of the projects has two components – Equity (shareholders) and Debt (banks). Financing agreements are very important and need to be very carefully drafted.

Historically, people used go to banks to get loans based on personal guarantees. That may be termed Full Recourse funding. But, today in the modern world, with increasing business complexity and vast scale projects, we have Limited Recourse funding in which the lender has recourse only to the project, the project receivables and the project equity. In the case of Limited

Recourse funding, Substitution Rights are necessary to be obtained. Substitution rights can be exercised in the event of default.

Step In Clause – A Step-In clause permits a funder to step-in to another party's shoes on a development – typically the employer's. It is primarily intended to give the funder comfort that, in the event of the employer defaulting on its loans, the funder can take over the development in the employer's place to get it completed and then sell the development to pay off the debt.

Before drafting a construction contract, the suitability of the structure of the contract needs to be assessed objectively. The suitability of the structure of a construction contract depends on the following factors:

- Nature of Project - Complexity of Engineering, Time Constraints
- Parties Involved
- Commercial Consideration
- Taxation Advice
- Bankability – Requirements of Equity and Debt Financers

In a Construction or Infrastructure Contract, the important clauses are:

- Scope of work
- Step down Provisions
- Conditions Precedent
- Obligations of the Parties
- Contract Price
- Payment Terms
- Financial Obligations
- Extension of Time (source of dispute)
- Claims and Procedure of Claims
- Event of Defaults and Cure Period
- Termination & Termination Payments
- Dispute Resolution

An EPC Contract (Engineering, Procurement and Construction) comprises three components:

- Engineering – Preparation of engineering designs, plans and technical specifications of equipment, cost estimations, preparation of performance standard maintenance and training manuals.
- Procurement – Provision of all temporary and permanent equipment, procurement of same from third parties OEM, procure delivery to the site, make provisions for preventive and breakdown maintenance and spare parts;
- Construction – Arrange for construction/erection, carrying out tests and completion of the work and correction of defects

Construction contracts are of the following types:

- Fixed Price Lump Sum Contract
- Cost Plus (Delhi and Mumbai Airport)
- Cost Plus (Fixed Percentage) or Guaranteed Maximum Price
- Unit Price (Bill of Quantity or Schedule of Rates Based)

In relation to Design and Build Contracts, the speaker made the following points:

- Contractor is responsible for designing, preparation of technical specifications and detailed drawings, procurement, construction, testing and commissioning and meeting the employer’s requirements.
- Employer’s requirements can be prepared by Employer or its consultant or Design-Build contractor.
- Design and Build contract has the advantage of single point responsibility and thus there is scope for innovation.
- From a risk sharing perspective, Design and Build Contracts are the best. They shift the entire risk to the contractor. They are priced high because they are loaded with risk.
- In Design and Build Contracts, Engineering and BOQ should be done after the award of contract, not at bid stage.

Case Study

The speaker then, discussed a case study in relation to Design and Build contract.

A facility for research in the field of Molecular Biotechnology was to be set up. The proposed facility was required to be set up in highly populated area in the city and safety of the population on account of possible leakages of virus and bacteria might lead to serious health hazard.

Description of work: Set up a laboratory for carrying out prescribed activities as per internationally accepted of construction. The facility in development of area of 45 Acres of land was to include:

- Administrative block to accommodate about 200 employees
- Residential Block
- Technician Rooms
- 15 Laboratories
- 4 Training Rooms
- 10 Isolation Rooms
- Storage Areas
- X – Ray Facility

The scope of work was to include all designing, civil, electrical, technical/mechanical, landscape and other related works for completion of the Project on design and build basis. Payments were to be made on achievement of milestone agreed on beforehand. The time for completion of project was 36 months from date of Letter of Intent.

Two bids were received for the execution of the project. The first bid was for Rs. 75 crores based on BOQ items and price for each item of work. The second bid was for Rs. 140 crores, in lump sum. The main difference between both the bidders was that they proposed to use fundamentally very different technologies for the project. The first bidder proposed using a concrete box (old and primitive technology) and the second bidder proposed using a steel box (latest technology). The award of work to the first bidder was challenged by the second bidder in the court.

Session 2: Intellectual Property Rights Relating to Registered and Unregistered Trademarks, Copyright, Patent and Design

Speakers: Justice Mukundakam Sharma, Mr. Pravin Anand

Justice Mukundakam Sharma shared following views:

Intellectual Property is the creation or invention of the wisdom of persons. All other movable properties can be safeguarded in a bank or other places. IP cannot be stored in a box. Therefore we have a protection for the Intellectual Property created by a person or a group in the form of design, trademark.

India became a signatory to the TRIPS agreement in the year 1995. The TRIPS Agreement required the signatories to update their laws to keep up with the growing demands of the global economy.

In trademarks, the main issue is that of infringement or passing off. In relation to trademarks, Delhi, Bombay, Madras and Calcutta High Courts have delivered landmark judgements in various cases. The world of Copyrights is fast evolving with newer challenges emerging each day. Within the ambit of copyright laws, fall cinema, music and the book publishing industry. The speaker made it clear that is the responsibility of the Judiciary to enforce rights provided by laws. Enforcement of rights can be done through injunction.

Piracy is a growing concern, especially with the exponential growing of Information Technologies. In the year 1993, the Delhi High Court for the first passed what is called a John Doe Order in relation to infringement.

If the identity of the infringer is not established, then John Doe order is issued. The speaker said that injunction suits have 3 essential elements:

- Prima facie
- Irreparable loss
- Balance of convenience

In 2006, the US Supreme Court decided the famous eBay case. It was held that in IP cases, public interest is also one of the important factors to be considered. Indian courts also adopted the same approach.

In a well-known case, a person narrates a script or a story to X. X, violating the implicit confidentiality, makes a film based on the script. The court held that, confidentiality is applicable and injunction was granted.

Mr. Pravin Anand shared following views:

Indian IP law is strong and in many respects, stronger than the US IP law. There is a need for understanding the genesis of law relating to IP. Creators/inventors constitute a very small section of the population.

There are around 20 International Treaties concerning IP:

- The PARIS Convention – for all Intellectual Property.
- The BERNE Convention – for Copyright.
- The TRIPS Agreement – covering all Intellectual Property.
- Patent Cooperation Treaty – for Patents.
- The HAGUE, MADRID, NICE Conventions.
- The ROME Convention - for Phonograms, Broadcast, etc.
- Modern Conventions – WPPT and WCT
- The LOCARNO Treaty

Following major issues with regard to IP law were presented:

- Issues of International Importance (e.g. Parallel Importation) Vs. Local Importance (e.g. Territorial Jurisdiction).
- There are huge similarities among IP laws of nations but some subtle differences exist.
- Recognition of Torts through common law.

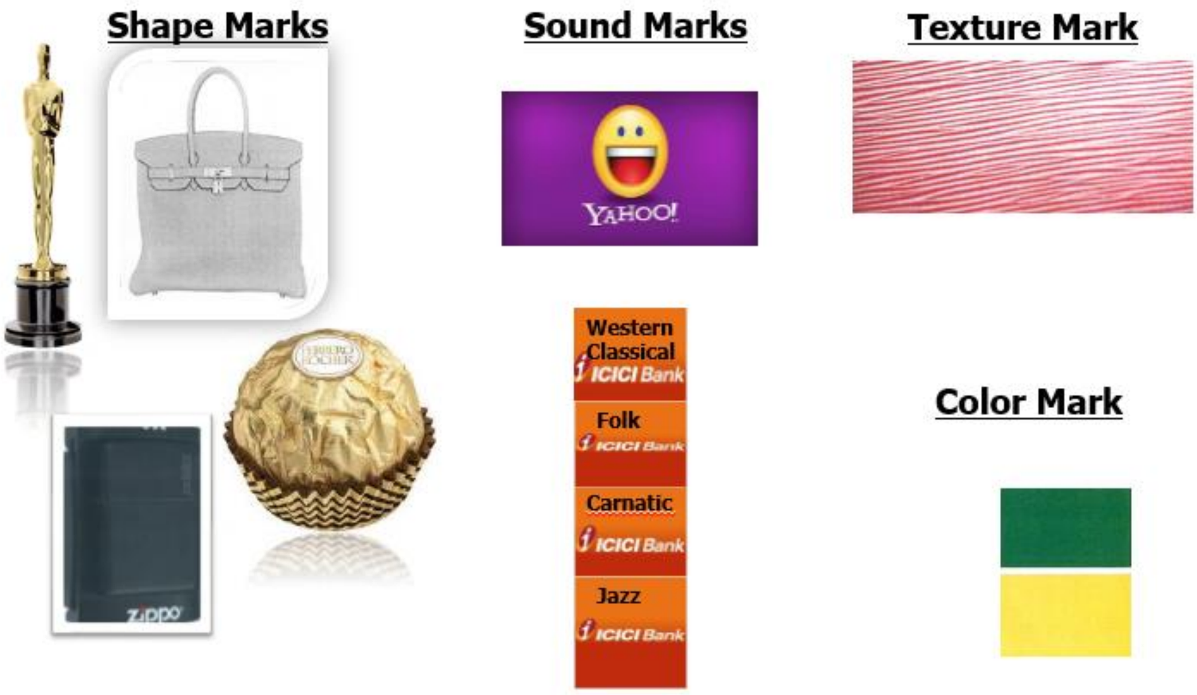
The following legislations govern IP in India:

- Patents Act, 1970 – Inventions
- Trade Marks Act, 1999 – Trade marks
- Copyright Act, 1957 – Works
- Design Act, 2000 – Designs of mass produced articles
- Semiconductor Chip, Geographical Indications, IT Act, Biological Diversity

There are 68 marks well-known by the Trade Marks Registry.Some of the trade marks recognised as well-known by the Delhi High Court are Microsoft, Bose, Autodesk, Adobe, Disney, Toyota, Prius, John Deere, TATA, GE, Polo.

Trans-border reputation is becoming an increasingly important concept in the IP world. In the regard, the speaker discussed the case of *Toyota Jidosha Kabushiki Kaisha v. Mr. Deepak Mangal & Ors. , CS (OS) 2490 of 2009.* “PRIUS”, the world’s first hybrid car witnessed spill over of its immense reputation in India, much prior to its national launch. Defendants’ adoption of PRIUS as part of the trading name for business of sale of automobile spare parts likely caused confusion and deception. Defendants' prior knowledge of PRIUS trademark was found certain and adoption was held as being dishonest.

The following picture shows some of the unconventional trademarks in use:



Regarding the emerging concept of personality rights in relation to IP, following cases were discussed.

- Tanishq Advertisement Case
- TATA Cyrus Mistry case
- Gulaab Gang case
- Phoolan Devi case
- Rajnikanth case
- Arun Jaitley case
- Daler Mehndi doll case
- TATA Turtle case

Following landmark cases in Indian Trademark law were discussed:

- In the case of *Toyota v. Deepak Mangal [2016]*, it was held that judicial notice could be taken up suo motu by Courts for deciding reputation of a trademark. In addition to damages, Plaintiffs were given the liberty to recover actual costs of litigation including fee of counsel.

- In the case of *WWE v. Reshma Collection [2014,* on the question of jurisdiction, it was held that the Plaintiff could avail territorial jurisdiction by carrying on business through websites despite no physical presence.
- In the case of *Milmet Ofthlo v. Allergan Inc. [2004],* the test for protecting reputation should be whether the IP in question is used first in the world, not first in India.
- In the case of *Mac v. Laverana [2016],* International evidence relevant for deciding reputation of a trademark was clarified to be registrations, internet documents, sales.
- In the case of *Tata Steel v. Union of India [2016],* mass abandonment orders of over 1 lakh Trade Mark applications was stayed.
- In the case of *Autodesk v. AVT [2008],* the guidelines for conducting raids, appointment and role of local commissioners were laid down.
- In the case of *Cartier v. Gaurav Bhatia [2015],* the highest ever damages of INR 10 million was granted against Defendants selling counterfeits of the Plaintiff's products online.

The high cost of litigation in the IP world is becoming a growing concern for companies and individuals. In the case of *Timken Company vs. Timken Services Private Limited (2013)*, the court required the parties to submit their estimate of future cost before the commencement of trial. The estimate of the other side would enable decision on how to conduct litigation and permit transparency.

Regarding customs and enforcement and measures that could be taken to protect IP following cases were discussed:

- In the Nokia case, an order was passed by the Customs authority for seizure of goods bearing the impugned mark N95 without recordal with customs.
- In the MontBlanc case, valuation of seized goods for the purpose of submitting Bond and Bank Guarantee was made. The value was declared by the importer.
- In the Chanel case, an order was passed by the Customs authority, for issuance of show cause notice without submitting bond and bank guarantee.

With regard to Parallel Importation, the case of *Samsung v. Kapil Wadhwa* was discussed.

- Division Bench of the Delhi High Court reversed the order of Single Judge that recognized 'National Exhaustion' in India.
- The Division Bench held that India follows 'International Exhaustion'.
- The Court continued injunction on meta-tagging and hyper-linking.
- The Court directed the Defendants to put up signage indicating that goods were grey market goods.
- Samsung has preferred an appeal to the Supreme Court.
- Other companies and associations are likely to intervene.

Following best practices for the Judiciary were discussed :

- Studying and reliance on foreign laws and cases helps.
- Insistence on NIL suppression
- Granting status quo orders in pre-launch cases of IP
- Writ Jurisdiction – e.g. stay on mass abandonment of over one lakh trade mark applications (*Tata Steel v. Union of India*)
- Recognizing the importance of commercial disputes and the relevance of quick decisions to the Indian economy and international trade: Staples case in the Delhi High Court and Merck case in the Supreme Court.
- Taking suo motu cognizance of reputation of trademarks through material available in public domain (books, articles) – *Toyota v. Deepak Mangal* in the Delhi High Court.

There have been only two patent trials in India since 1947. Only seven cases were tried by the Supreme Court. Patents in India are protected, sadly, because of the compulsion of the TRIPS Agreement, rather than for promotion of innovation.

In the Novartis case, the Additional Solicitor General called India 'the Pharmacy of the World', justifying low protection of IP. There has been a serious challenge of the link between innovation and patent system in press.

In the pharma world, this resulted in two effects:

- It led to a low level of basic research and development.
- India has the cheapest medicines in the world.

The speaker discussed the following landmark cases in Indian Patent law:

- Bishwanath Prasad's case (1979) – Mere workshop improvements are obvious
- Monsanto case (1986) – Prior public knowledge is to be judged through the eyes of the person in pursuit of that knowledge.
- J. Mitra's case (2008) – Unamended provisions apply till amendment is brought into force.
- Novartis case (2013) – Bioavailability and not therapeutic efficacy hit by Section 3(d).
- Dr. Alloys Wobben's case (2nd June 2014) – Challenges to validity are limited.
- Cipla case (2012) – Principles of Natural Justice apply to patent law.
- Glaxo Smith Kline's case (2008) – EMR Rights that have been accrued remain after repeal.

The positive changes that have been brought in the field of IP law were discussed.

A National Intellectual Property Rights policy has been introduced by the Govt. of India. Several tax benefits have been provided under IP law.

Nitto Denko case is a very important case in the IP world.

- Number of examiners being increased
- Work patent (make in India) – expedited examination

- Time limit to be reduced – estimate by 5 years

The National IPR Policy:

- Established IP Promotion and Development Council to create awareness.
- Increased funding to identified inventors and researchers.
- Fee waivers for first time filings.
- Support services to MSMEs for increased innovation.

Some initiatives taken by the government in this regard were discussed:

- Make in India – fee reduction for startups.
- Digital India – promoting digitization across industries.
- Uniformity of practice – guidelines for search and examination, Pharma, Biotech, TK, biological material, (CRI – withdrawn and re-introduced).
- The term 'startup' has been defined:
    a) Turnover should not be more than US $ 4 million in the last 5 years
    b) Should be incorporated not more than 5 years ago.
    c) Innovating, developing and commercializing new products, services, processes or IP.
- Patent applications filed by start-ups to be fast tracked
- Panel to facilitate filing of applications by start ups
- Tax breaks for income from patented inventions (rate reduced: 33% to 10%)

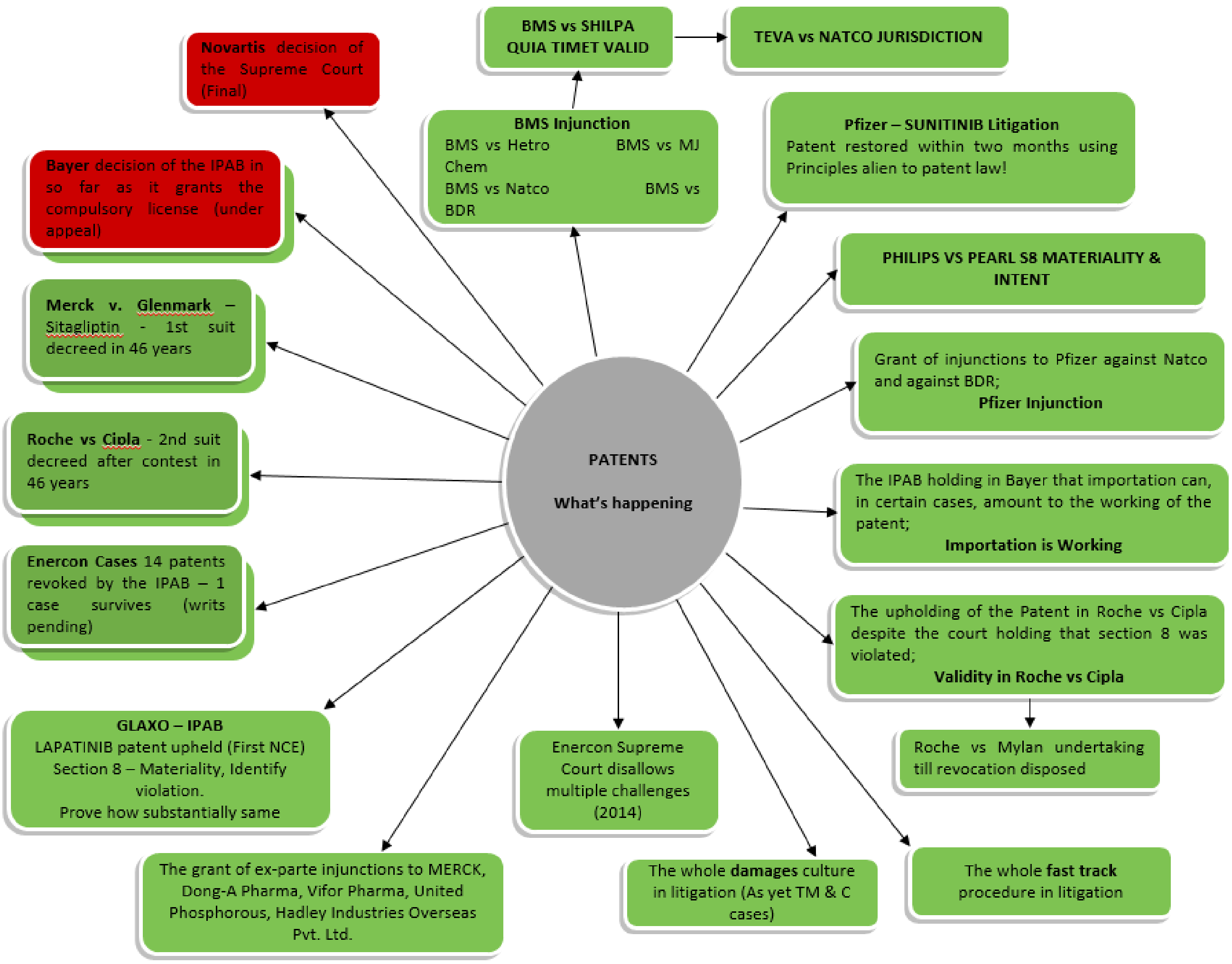
Some statistics reflects that India ranks lowest in the number of students taking courses in Science and Technology, Engineering and Mathematics (STEM) in the world.

- India – 4 out of 1000
- South Korea – 46 out of 1000
- Germany – 76 out of 1000
- Japan – 110 out of 1000

The cheap and quick-fix innovation called Jugaad, which is being touted as India's way of Innovation is not sustainable.

The case of *BMS v. Hetero Labs (2009),* is a landmark one in patent litigation because this is the first case of granting ex-parte injunction in a patent matter.

Two cases namely, Novartis and Roche were discussed. In the Novartis case, the court held that section 3 (d) of the Patents Act, 1970 acts as a second tier for pharmaceutical patents. The first tier is novelty, utility and non-obviousness. Efficacy means "therapeutic efficacy" for pharmaceutical substances ("therapeutic" not defined). Inherent properties of new form cannot be considered for section 3(d). In the Roche case, the court held that section 3 (d) is not a defence to patent infringement. And that section 3 (d) is not a patentability standard.



The above diagram shows the important cases in Patent Litigation.

In relation to Compulsory Licensing in IP, the speaker discussed the following points:

- Section 84 (Normal) – Bayer & BMS, AstraZeneca
- Section 92A (Doha) – Pfizer and Roche vs Natco
- Section 92 (National Emergency)

Following positive movements that have happened in the IP world were discussed:

- Section 39 is to be taken seriously but foreign filing certificate (15 days).
- Section 8 – Chemtura diluted after Philips and Roche.
- Multiple Dispute Resolution bodies – Pre-grant Post-grant IPO (ENERCON Case), IPAB, Courts, Customs.
- Importance of expert testimony for deciding complex issues discussed in *Merck v. Glenmark*.

- Defined rules on construction of patent claims in the case of *Roche v. Cipla*.
- First Certificate issued for validity under section 113 of the Patents Act to MERCK for Sitagliptin.

In relation to Roche Appeal, following points were discussed:

- Suit decreed (patent valid and infringed)
- Role of experts
- Claim construction principles
- Coverage vs Disclosure (Polymorphs)
- Obviousness test
- Admissions and prosecution history estoppel
- Damages were granted. There were only a few months to expiry. So, no injunction was granted.

The Philips DVD and VCD case is the first case in India to have defendants deposit royalty in court during litigation.

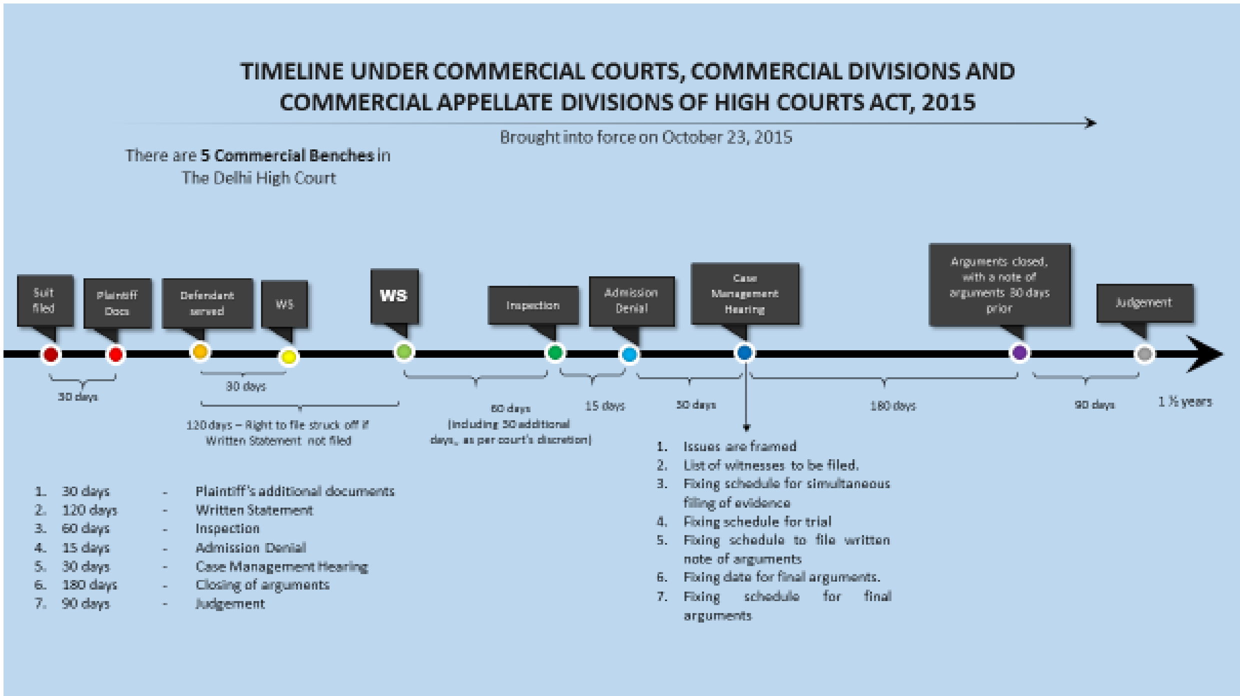
The following best practices for judges in Patents cases were discussed:

- Recording Evidence on POSA
- Exploring the story of the inventor
- Being beware of hindsight in obviousness analysis
- Expert should not get a contingent or disproportionately high fee
- Affidavit of Accounts Expert should have technology background relevant to industry and justify royalty by comparative and other methods
- Demonstration of success of technology in the marketplace.
- Exploring hot tubbing to expose experts
- Preferring infringement and validity by same court – quick filing to invoke ENERCON.

The following issues related to the concept of Copyright were discussed:

- Automatic protection upon creation/invention in all Berne countries
- Registration is not compulsory – Copying essential
- Protected subject matter – Works (4+2), Moral rights, Broadcast Reproduction rights, Performers rights
- Author, owner, exclusive rights, Infringement, defenses, remedies
- Software cases, Music cases, DU Book Publishing case, Fashion cases Section 15 (2), Internet cases

About fast track disposal of cases and remedies under the Commercial Courts, Commercial Divisions and Commercial Appellate Divisions of High Courts Act, 2015, following chart regarding timeline of various stages of trial was discussed.



Original jurisdiction vests with 6 High Courts out of which Delhi, Bombay, Madras and Calcutta are most important. Delhi High Court handles 70% of the Intellectual Property work. The speaker concluded his speech by talking about various new initiatives taken by several High Courts and Trial courts in conducting trial and examination of evidences and witnesses. For instance witnesses were being examined via video conference and electronic courts are being hold with no paper being used at all.

Session 3: Disputes Relating to Carriage of Goods

Speakers: Mr. Anand Desai, Mr. Dheeraj Nair

Mr. Dheeraj Nair shared following views:

The movement of goods or property is an integral part of economic development. The Commercial Courts Act provides for speedy disposal of high value transactions and disputes, which involve commercial disputes and commercial questions of facts and law. Early disposal of such disputes creates a responsive and time-efficient legal system.

The laws governing carriage of goods in India were discussed. Goods can be carried by land (including inland waterways), sea, air or a combination of these modes of transportation (multimodal transport system). Different laws govern such different modes of carriage of goods:

For carriage of goods by land:

- Carriage by Road Act, 2007
- The Railways Act, 1989

For carriage of goods by air:

- The Carriage by Air Act, 1972

For carriage of goods by sea:

- The (Indian) Bills of Lading Act, 1856
- The Carriage of Goods by Sea Act, 1925
- The Merchant Shipping Act, 1958

For multimodal transportation of goods:

- The Multimodal Transportation of Goods Act, 1993

Disputes in respect of 'Carriage of Goods' are 'commercial disputes'. Section 2 (c) of the Commercial Courts Act defines a commercial dispute and includes disputes arising out 'carriage of goods'. Section 2 (i) defines 'specified value' in relation to a commercial dispute, to mean the value of the subject-matter in respect of a suit as determined in accordance with Section 12 which shall not be less than one crore rupees or such higher value, as may be notified by the Central Government.

Section 6 of the Act provides that the jurisdiction of a Commercial Court is to try all suits and applications relating to a commercial dispute of a Specified Value arising out of the entire territory of the State over which it has been vested territorial jurisdiction. Disputes in respect of 'carriage of goods' of the 'specified value' would be triable by Commercial Courts or Commercial Divisions of High Courts, as the case may be. Sections 16 to 20 of the Civil Procedure Code, 1908 would determine the territorial jurisdiction of courts.

However, Section 11 provides for a bar of jurisdiction of Commercial Courts where the jurisdiction of the civil court is either expressly or impliedly barred under any other law for the time being in force.

The speaker discussed the following points with regard to Carriage by Road Act, 2007:

- Carriage by Road Act, 2007 came into force on March 1, 2011 superseding the erstwhile Carriers Act, 1865. The Carriage by Road Rules, 2011 came into force on the same day. This Act provides for the regulation of common carriers, limiting their liability and declaration of value of goods delivered to them to determine their liability for loss, or damage to, such goods occasioned by their negligence or criminal acts, their servants or agents and for incidental matters. Carriage by Road Act 2007 does not apply to the Government or private carriers. It only applies to common carriers as defined under section 2 (a) of the Act.
- As per Section 2 (a) of Carriage by Road Act, 2007, a 'common carrier' is defined as "a person engaged in the business of collecting, storing, forwarding or distributing goods to be carried by goods carriages under a goods receipt or transporting for hire of goods from place to place by motorized transport on road, for all persons undiscriminatingly and includes a goods booking company, contractor, agent, broker and courier agency engaged in the door-to-door transportation of documents, goods or articles utilizing the services of a person, either directly or indirectly, to carry or accompany such documents, goods or articles but does not include the Government".
- The term 'private carrier' has not been defined under the Act. A private carrier is distinct from a common carrier in that it has the discretion to refuse to sell its services. A private carrier does not make a general offer to carry goods and enters into a contract with other parties to carry goods on mutually agreed terms.
- The rights and liabilities of a common carrier are well defined under the Act. Under Section 8, every consignor is required to issue a 'goods forwarding note' which would declare inter alia value and nature of the consignment.
- Consignor is responsible for the correctness of the particulars in the goods forwarding note, and is liable to indemnify the common carrier for any loss or damage suffered by him by reason of incorrectness or incompleteness of the particulars on the note.
- As per Section 10 of the Act, the liability of a common carrier for loss of, or damage to any consignment, shall be limited to ten times the freight paid or payable (as per Rule 12 of the Carriage by Road Rules, 2011) having regard to the value, freight and nature of goods, documents or articles of the consignment, unless the consignor or any person duly authorized in that behalf has expressly undertaken to pay higher risk rate fixed by the common carrier, under Section 11.
- As per Section 10 (2), for any delay in delivery up to the mutually agreed period, the liability is limited to the freight charged. Under Section 12, a common carrier is liable to the consignor for the loss or damage to any consignment, where such loss or damage has

arisen on account of any criminal act of the common carrier, or any of his servants or agents. Unlike in CPC or Indian Evidence Act, the plaintiff does not bear the onus to prove such negligence or criminal act.

- Section 15 provides for common carrier's right to sell the goods in case of consignor's default to take delivery of the goods. In case of non-perishable goods, a prior notice of 30 days is required before the common carrier can exercise his right to sell.
- Section 16 provides that a prior notice by the consignor to the common carrier for loss or damage is mandatory for instituting any suit or other proceedings, such notice should be served within a period of 180 days from the date of booking the consignment.
- Under Section 17 of the Act, a common carrier is responsible for the loss, destruction, damage or deterioration in transit or non-delivery of any consignment entrusted to him for carriage, arising from any cause except Acts of God, war, riots and civil commotion, arrest, restraint or seizure under legal process, or an order, restriction, or prohibition imposed by the Government. However, even in above cases, common carrier is required to exercise due diligence and care to avoid such loss, destruction, damage or deterioration.
- Types of commercial disputes that may arise under the Act:
    a) Interpretation of goods forwarding notes – effect and affixation of liability in view of the declaration thereon.
    b) Determination of delay, negligence or lack of due care by common carriers.
    c) Extent of liability of common carriers under the Act.
    d) Limitation of liability of carriers, when applicable.
    e) Legality in the exercise of right to sell by common carriers.

In relation to carriage of goods by rail, the speaker discussed the following points:

- The Railways Act, 1989 came into force on July 1, 1990 superseding the erstwhile Indian Railway Act, 1890. Carriage of Goods has been dealt with in inter alia Chapter IX-XI of the Act (Sections 61-112). The Act provides for inter alia responsibilities, duties and liabilities of the Indian railway administration as a carrier of goods, provision for rates and procedure required to be complied with and redressal mechanism for grievances related to carriage of goods.
- The Railway Claims Tribunal Act, 1987 provides for the establishment of a Railway Claims Tribunal for enquiring into and determining claims against a railway administration for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to it and connected matters. This Act has an overriding effect. Section 15 read with Section 13 of the Railway Claims Tribunal Act, 1987 ousts the jurisdiction of civil courts.
- By virtue of the above sections read with Section 11 of the Commercial Courts Act, 2015, Commercial Courts will not have jurisdiction over disputes arising out of carriage of goods by railway administrations.

The speaker discussed the following points in relation to Carriage by Air Act, 1972:

- Carriage by Air Act, 1972 came into force on May 15, 1973, superseding the erstwhile Indian Carriage Act, 1934. It is an Act to give effect to:
    a) The Warsaw Convention (Convention for the Unification of Certain Rules relating to International Carriage By Air, 1929 as amended by the Hague Protocol on September 28, 1955.
    b) The Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air) signed on May 28, 1999.
- The Act makes provision for applying the rules contained in the said Conventions to international and non-international carriage by air and for matters connected therewith.
- The above Conventions govern the liability of air carriers for injury or death of passengers, for destruction or loss of or damage to baggage and cargo, and losses caused by delay in international carriage of passengers, baggage and cargo. These Conventions have been incorporated as Schedules to the Act.
- The Warsaw Convention regulates the liability for international carriage of persons, luggage or goods performed by aircraft for reward. The Warsaw System allowed four choices of jurisdiction for filing of a claim by the passenger namely, place of issue of ticket, principle place of business of the carrier, the place of destination of the passenger and the place of domicile of the carrier. Through the Montreal Convention a fifth jurisdiction is added which is the place of domicile of the passenger, provided the airline has a presence there. Therefore an Indian would be able to file claim in India even if the journey was undertaken outside India.
- Under Article 5 of this Convention, the consignor is required to issue an air consignment note to the carrier, declaring inter alia the value of the goods. If the carrier accepts goods without such note, he loses his right to seek benefit of the limitation of liability under the Convention for loss of, damage to or destruction of goods:
    a) 250 Francs per kilogram for registered luggage and goods
    b) 5,000 Francs for the hand luggage per passenger
- The above limit of 250 Franc for registered luggage does not apply in cases where the consignor has declared the value at delivery and has paid a supplementary sum. In such cases, carrier is liable to pay the declared amount, unless he proves that the declared value is greater than the actual value.
- Further, such limitation does not apply in case of willful misconduct of the carrier.
- Article 29 sets the limitation period of 2 years from the date of arrival or expected arrival at destination for instituting any claim for damages.
- The Montreal Convention was signed in the year 1999, and changed several aspects of the Warsaw Convention system. The provisions of the Montreal Convention have been enshrined in Schedule III to the Act, and are applicable to carriage by air that is not international.
- Liability has been fastened to the carriers for damages sustained in the event of the destruction, damage or loss to cargo. However, the carriers are not liable in case of any inherent defect in such cargo, defective packing, act of war etc. Under Article 22 of the

Convention in the case of carriage of baggage, the liability of the carrier in the case of destruction, loss, damage, or delay is limited to Rs. 20, 000 per passenger. The said Article provides that in the case of carriage of cargo, the liability of the carrier is limited to a sum of Rs. 350 per kilogram. However, the above limits for carriage of baggage and cargo do not apply in cases where the consignor has declared the value at delivery and has paid a supplementary sum. In such cases, carrier is liable to pay the declared amount, unless he proves that the declared value is greater than the actual value.

- Under Article 31, a complaint is a pre-condition for instituting any action against the carrier, except in cases of fraud. Such complaint should be made forthwith after discovery of the damage, and, at the latest, within 7 days from the date of receipt of checked-in baggage and 14 days from the date of receipt of cargo. In case of delay, such complaint should be made within a period of 21 days from the date on which cargo was placed at his disposal.
- The right to claim damages is extinguished if no action is instituted within a period of 2 years from the date of arrival or expected arrival at destination for instituting any claim for damages.
- Given the aforesaid limitation of liability of carriers under the Act, the value of disputes concerning loss, damage or destruction of baggage/luggage of passengers, generally would not meet the 'Specified Value' under the Commercial Courts Act i.e. Rs. 1 Crore. However, there may be cases where the plaintiffs would seek to get around this limitation by alleging willful misconduct or recklessness of the carrier. The veracity of such allegation would be crucial to determine the jurisdiction of the Commercial Courts.

In relation to carriage by sea, the speaker discussed the following points:

- Commercial transactions through sea are extremely important for economic growth. Therefore, the law relating to carriage by sea becomes extremely important.
- The law relating to shipping in India is contained in the Indian Bills of Lading Act, the (Indian) Carriage of Goods by Sea Act, 1925 and the Merchant Shipping Act, 1983.
- The Indian Carriage of Goods by Sea Act, 1925 applies to carriage of goods by sea under bills of lading, or similar documents of title, from a port in India to any other port in or outside India. The substantive rights, recognized by the statute, are of equal application to foreign merchant ships as they are to Indian merchant ships. The Brussels Convention, 1922 has been adopted by virtue of the Act and has been made applicable to India.
- Carriage of goods covers the period from the time when the goods are loaded on to the vessel till the time that they are discharged.
- The Indian Carriage of Goods by Sea Act, 1925 establishes the responsibilities, liabilities, rights and amenities of a carrier covered by the bill of lading. Under Article III to the Schedule to the Act, the Carrier is responsible to inter alia make the ship seaworthy, properly man, equip and supply the ship, and properly and carefully load, handle, stow, carry, care for and discharge the goods.
- A Bill of Lading issued by the carrier constitutes prima facie proof of the receipt of goods by him.

- The Shipper is deemed to have guaranteed to the carrier the accuracy of the marks, numbers, quantity and weight of the goods at the time of shipment, and is liable to indemnify the carrier from any loss, damage and expenses arising out of any inaccuracy in such particulars.
- Under Article III Clause 6, notice of loss or damage is to be given at the time of taking delivery at the destination, or within 3 days of delivery if damage is not apparent. Else, such delivery is prima facie evidence of the delivery of goods by the carrier as described in the Bill of Lading.
- The suit to be brought within one year after delivery of goods, or date of delivery, or within an additional 3 months if allowed by Court, unless parties agree to a longer period.
- Under Article III Clause 8, clauses, covenants or agreements excluding or lessening the liability of the carrier for negligence, fault or failure in duties and obligations of carrier, are null and void.
- As per Article IV of the Schedule:
- "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.
- Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section."
- Clause (2) of Article IV excludes the liability of the carrier in case of any act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of ship, fire (unless caused by the actual fault or privity of the carrier), perils, dangers and accidents of the sea or other navigable waters, act of God, act of war, arrest of seizure under legal process, quarantine restrictions, act or omission of the shipper or owner of the goods etc.
- Clause (5) of Article IV, limits the liability of the carrier to 666.67 Special Drawing Rights per package or unit or two Special Drawing Rights per kilogram of the gross weight of the goods, unless the nature and value of goods have been declared by the owner of the goods before shipment and inserted in the Bill of Lading. However, this limitation does not apply in cases of proven acts or omissions of the carrier done with the intent to cause damage, or recklessly and with knowledge that damage would probably result.
- Given the aforesaid limitation of liability of carriers under the Act, value of disputes concerning loss, damage or destruction of cargo, in several cases, may not meet the 'Specified Value' under the Commercial Courts Act i.e. Rs. 1 Crore. However, there may be cases where the plaintiffs would seek to get around this limitation by alleging willful misconduct or recklessness of the carrier. The veracity of such allegation would be crucial to determine the jurisdiction of the Commercial Courts.

The speaker discussed the following provisions of the Multimodal Transportation of Goods Act, 1993:

- The Multimodal Transportation of Goods Act, 1993 was introduced to give the exporters a sense of security in transporting their goods. Multi-modal transportation reduces logistics costs of exporter and makes products more competitive in the international market. This Act provides for regulation of the multimodal transportation of goods, from any place in India to a place outside India, on the basis of a multimodal transport contract and for matters connected therewith or incidental thereto.
- Section 2 (k) defines 'multimodal transportation' to mean carriage of goods by at least two different modes of transport under a multimodal transport contract from a place of acceptance of the goods in India to a place of delivery outside India.
- Section 2 (m) defines a 'multimodal transport operator' (MTO) to mean any person who:
    a) Concludes a multimodal transport contract on his own behalf or through another person acting on his behalf
    b) Acts as principal, and not as an agent either of the consignor, or consignee or of the carrier participating in the multimodal transportation, and who assumes responsibility for the performance of the said contract
- Section 2(la) defines 'Multimodal transport document' to mean a negotiable or non-negotiable document evidencing a multimodal transport contract and which can be replaced by electronic data interchange messages permitted by applicable law. It is to be regarded as a document evidencing title of the consignor, and a prima facie evidence that the MTO has taken charge of the goods. Under Section 10, MTO can insert a reservation on the document if he has reason to believe that the particulars of the goods furnished by the consignor are not accurate. Failing such insertion, he is deemed to have accepted the goods in apparent good condition.
- Section 13 provides for the liability of a MTO for loss resulting from:
    a) Any loss of, or damage to the consignment
    b) Delay in delivery of the consignment
    c) Any consequential loss or damage arising from such delay
- However an MTO shall be liable only in instances where such loss, damage or delay in delivery of consignment took place at a time when the consignment was in the charge of such multi-modal transport operator. The MTO shall not be liable if he proves that no fault or neglect on his part or that of his servants or agents had caused or contributed to such loss, damage or delay in delivery.
- Moreover, the MTO shall not be liable for loss or damage arising out of delay in delivery including any consequential loss or damage arising from such delay unless the consignor had made a declaration of interest in timely delivery which has been accepted by the multimodal transport operator.
- Section 15 provides that when the nature and value of the consignment have not been declared and the stage of transport where loss or damage occurred is not known, the liability of the MTO would not exceed 2 SDR per KG of the gross weight of the consignment lost or damaged or 666.67 SDR per package or per unit whichever is higher. If the multimodal

transport does not include carriage of goods by sea or inland waterways, such liability would not exceed 8.33 SDR per KG of the gross weight of the consignment.

- Under Section 16, when the nature and value of the consignment have not been declared and the stage of transport where loss or damage occurred is known, the liability of the MTO is determined in accordance with the provisions of the relevant law in relation to the mode of transport when the consignment was lost or damaged.
- Section 17 provides for assessment of compensation. It is to be assessed with reference to the value of the consignment at the place where, and the time at which, the consignment is delivered or should have been delivered. The value of the consignment is determined according to the current commodity exchange price, or, if there is no such price, according to the current market price, or, if the current market price is not ascertainable, with reference to the normal value of a consignment of the same kind and quantity.
- Loss of right of operator to limit liability (Section 18) – The limitation of liability does not apply in cases where the loss, damage or delay in delivery of consignment resulted from an act or omission of the MTO with intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.
- Limitation of liability on total loss of goods (Section 19) – The MTO is not, in any case, liable for an amount greater than the liability for total loss of goods for which a person will be entitled to make a claim against him under the provisions of the Act.
- Section 20 requires that a notice should be given by the consignee to the MTO regarding the general nature of loss, or damage to the goods at the time of handing over of the consignment, or within a period 6 consecutive days if the damage is not apparent.
- Section 22 provides for the MTO's right of lien over the consignment in case of non-payment of his dues as per the contract
- Section 24 sets the limitation period of 9 months from the date (a) of delivery of the goods; (b) when the goods should have been delivered, and (c) on and from which the party entitled to receive delivery of goods has the right to treat the goods as lost under Section 13(2) of the Act.
- Section 25 provides for the jurisdiction for instituting suits and includes:-
    a) The principal place of business, or, in the absence thereof, the habitual residence, of the defendant; or
    b) The place where the multimodal transport contract was made, provided that the defendant has a place of business, branch or agency at such place; or
    c) The place of taking charge of the goods for multimodal transportation or the place of delivery thereof; or
    d) Any other place specified in the multimodal transport contract and evidenced in the multimodal transport document.

The speaker discussed the following aspects of Commercial Courts Act, 2015:

- Under Section 12, the Specified Value of the subject-matter of the commercial dispute in a suit, appeal or application is determined in the following manner:

a) where the relief sought is for recovery of money, the money sought to be recovered in the suit or application inclusive of interest, if any, computed up to the date of filing of the suit or application
b) where the relief sought relates to movable property or to a right therein, the market value of the movable property as on the date of filing of the suit, appeal or application

- Disputes arising out of carriage of goods, mostly pertain to recovery of money as compensation towards loss, damage or destruction of goods, or towards indemnity. Some disputes also arise out right to lien of the carrier, or an injunction against the carrier from exercising his right to sell the goods. In such cases, the value of the goods become relevant.
- Section 12(3) bars an appeal or civil revision from an order of a Commercial Division or Commercial Court finding that it has jurisdiction to hear a commercial dispute under the Act.
- Section 16 read with Schedule I amends the CPC with regard to Commercial Disputes. Some of the important changes include:
    a) If written statement is not filed within a period of 30 days from the date of receipt of summons, the Defendant may be permitted to file the same within a period 120 days for reasons to be recorded in writing and upon payment of costs. After 120 days, the Defendant would lose its right to file the Written Statement;
    b) Objections to jurisdiction and valuation of the Suit should be reasoned;
    c) All relevant documents are required to be filed with the Plaint along with a declaration on oath that all documents in the power, possession, control or custody of the plaintiffs relevant to the dispute have been disclosed and produced. Only in cases of urgent filings, the Plaintiff can seek leave to rely on additional documents and file the same within a period of 30 days.
    d) Case Management Hearing wherein the dates for the trial are fixed. While fixing such dates, the Court has to ensure that the arguments are concluded within a period of 6 months from the date of first Case Management Hearing.

Mr. Anand Desai began by examining the elements the questions of law and facts that need to be considered in a carriage of goods case:

- Who is the shipper?
- Has he correctly declared what he is shipping?
- Is it of a special value, which has been declared?
- If it is of a special value, who is the insurer?
- If something goes wrong, who will be liable?
- Who will be entitled to compensation?
- If it is cross-border shipment of goods, where does jurisdiction lie?

The speaker discussed the following cases in relation to carriage of goods:

- In the case of *Tata Chemicals Ltd. vs. Skypak Couriers Pvt. Ltd. (2002) CPJ 24 (NC),* the question of the value and effect of small print on the consignment note came up before the court. It was held that a condition in a contract, limiting the liability of one party, though signed by both parties must be construed strictly. The small and fine print should be clearly discernible and should draw the pointed attention of the consumer. Such a term could be in bold print and it should be easily readable so that a consumer can read and understand it. A condition in small print would amount to communication only when the attention of the consumer is specifically drawn to it.
- In the case of *Patel Roadways vs. Birla Yamaha Ltd., AIR 2000 SC 1461,* it was held that the liability of a common carrier under the Carriers Act is that of an insurer. In a case of claim of damage for loss to, or deterioration of goods entrusted to a carrier it is not necessary for the plaintiff to establish negligence. Even assuming that the general principle in cases of tortious liability is that the party who alleges negligence against the other must prove the same, the said principle has no application to a case covered under the Carriers Act.
- In the case of *A.S. Navigation Co. vs. Jethala AIR 1959 Cal 479,* it was held that if the loss or damage arises from the neglect, fault or failure in the duties and obligations as provided in the statutory Articles or rules then a clause in the bill of lading exempting the carrier from liability for such loss and damage would be null and void and of no effect.
- In the case of *Bharathi Knitting Co. vs. DHL Worldwide Express Courier (1996) 4 SCC 704,* the issue of deciding the possibility of awarding damages in excess of the agreed limitation of liability of the carrier under the contract came up before the court. It was held that the parties having agreed to the terms restricting the liability of the carrier, were bound by the same.
- In the case of *Maharashtra State Electricity Board vs. P.B. Salunke AIR 2009 Bom 185,* a transformer was damaged during transit by toppling down from the trailer. The vehicle carrying the transformer, had inadequate carrying capacity compared to the weight of the transformer. It was held that the transporter was negligent in handling the transformer and was liable to pay damages.
- In the case of *Nagpur Golden Transport Co. vs. Nath Traders AIR 2012 SC 357,* the issue of whether a common carrier would be entitled to the damaged goods after paying for the damage caused during transportation came up before the court. It was held that the common carrier would be entitled to the value of the damaged goods, else the consignee would stand unjustly enriched.
- In the case of *Brakes India Ltd. & Ors. vs. BIC Logistics Ltd. O.S.A. No. 329 of 2010 (Mad HC),* the plaintiff had entrusted certain automobile spare parts to the defendant, who is a public carrier to be transported to Jamshedpur. The spare parts were not received on account of the murder of the driver and the cleaner of the container. The question of liability of the carrier in the said circumstances came up before the court. It was held that the defendant was not liable to pay the amount claimed in the suit, as per Clause 17 of the Carriage by Road Act, 2007, i.e. if a loss has been occasioned by a public enemy, the common carrier is not liable.

- In the case of *Shipping Corpn. of India Ltd. v. Bharat Earth Movers Ltd., (2008) 2 SCC 79,* the question of the applicability of the Indian Carriage of Goods by Sea Act, 1925 vis-à-vis the Japanese Carriage of Goods by Sea Act, 1992 came up before the court. It was held that a bare perusal of Section 2 of the Act, demonstrates that the same applies to the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in or outside India. Thus, the Indian Act shall apply only when the carriage of goods by sea in ships, takes place from a port situated within India and not a port outside India.
- In the case of *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries, (1990) 3 SCC 481,* the question of whether Indian law would be applicable in case of disputes pertaining to goods shipped from ports outside India came up before the court. It was held that for the application of Indian law, the port of origin has to be an Indian Port. Goods shipped from Africa and carried to Cochin, will not be governed by India law.
- In the case of *Contship Container Lines Ltd. & Co. Ltd. vs. D.K. Lall AIR 2010 SC 1704,* there was a charter-party agreement between the buyer and carrier. The contract made the charterer responsible to pay demurrage in case of delay. The dispute arose over the payment of demurrage. It was held that the delivery of the Bill of Lading was delayed by the agent of the carrier. The agent of the carrier was guilty of breach of his statutory duty and negligence. The agent of the carrier, jointly with the ship-owner was liable to pay damages to the seller.
- In the case of *M/s. Jeeves Impex vs. Maersk Line India Pvt. Ltd.,* the plaintiff did not receive the amounts payable on the goods. Defendant No. 2 was to route the payment to the Plaintiff through the Defendant No. 2's bank. Defendant No. 2 was also supposed to receive goods in exchange of the original Bills of Lading from Defendant No. 1. The goods were ultimately received by Defendant No. 2 but no payment was received by the Plaintiff and Defendant no 3. There was a claim of invoice and damages for an export transaction based on an alleged oral contract between the Plaintiff and Defendant No 1. The Plaintiff failed to produce any evidence concerning its contract with Defendant No. 2. Plaintiff's claim against Defendant No. 1 for recovery of the balance of its invoice value is invalid and therefore, Defendant No. 1 cannot be held liable.
- In the case of *Ellerman & Bucknall Steamship Co. Ltd. v. Sha Misrimal Bheraji, AIR 1966 SC 1892,* the Supreme Court said that a bill of lading serves three purposes:
    a) It is a receipt for the goods shipped containing the terms on which they have been received;
    b) It is evidence of the contract for carriage of goods; and
    c) It is a document of title for the goods specified therein.
- In the case of *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries, (1990) 3 SCC 481,* the Supreme Court said that a bill of lading is not a negotiable instrument in the strict sense of the transferee deriving a better title than the transferor. The transferee of a bill of lading gets no better title than the transferor himself had. A bill of lading is intended to provide for the rights and liabilities of the parties arising out of the contract of affreightment. If the consignee claims the goods under a bill of lading

he is bound by its terms. It cannot be said that the shipper, did not know the conditions of carriage printed on the reverse.

- In the case of *Shipping Corpn. of India Ltd. v. Bharat Earth Movers Ltd., (2008) 2 SCC 79,* it was held that invoice is not a part of the Bill of Lading. The value of the goods is required to be stated on the Bill of Lading so as to enable the shipping concern to calculate the quantum of freight. It cannot, in the absence of any statutory provisions, be held to be incorporated therein by necessary implication or otherwise.
- In the case of *Anil & Co. vs. Air India AIR 1986 Del 312,* the Plaintiff booked certain goods with Air India for carriage to New York. The New York Banker was named as the consignee in the airway bill. Air India carried goods to Paris and entrusted the carriage of the said goods to Trans World Airlines for delivery to New York. Trans World Air Lines wrongly delivered the goods. It was held that Air India was liable for the value of the goods as the consignment was negligently and without authority delivered by the Trans World Airlines.
- In the case of *Gujarat Urja Vikas Nigam ltd. vs. Air India Ltd. 2009(2) C.P.J. 378,* the complainant's goods ordered from London were transported by air. At the time of taking delivery, Air India stated that the goods were mishandled or were missing. The goods were later found to be auctioned and subsequently purchased. It was held that as there was gross and willful negligence on the part of Air India, the deficiency in service was apparent. Complainant was held to be entitled to the full value of goods with interest, and costs.
- In the case of *Ethiopian Airlines vs. Ganesh Narain Saboo (2011) 8 SCC 539,* a three judge bench of the Supreme Court was asked to determine whether Ethiopian Airlines would be governed by the Carriage by Air Act, 1972. It was held that according to Indian Law, Ethiopian Airlines could be subjected to a suit under the Carriage by Air Act, 1972. Ethiopian Airlines must be held accountable for the contractual and commercial activities and obligations that it undertakes in India. Countries who participated in trade, commerce and business with different countries ought to be subjected to normal rules of the market.
- In the case of *Virendra Khullar vs. American Consolidation Services Ltd. & Ors. I (2004) CPJ 73 NC,* the appellants had entrusted consignments of men's wear apparels in to Respondent No.1. In the Bill of Lading issued by the shipping carriers, name of consignee was changed from Central Fidelity Bank to Coronet Group Inc., amongst several other changes. The Appellant filed a complaint for the cartons sent through cargo. Respondent No. 1 contested the complaint and pleaded that no payment was made for services provided and the receipt, custody and forwarding of the goods of the complainants were governed by the bailment agreement, which stated that after the delivery by Respondent No.1, the liability for the care, custody, carriage and delivery of goods was of that concerned carrier. Respondent No.1's plea was that it acted only as a consolidator and not a carrier and therefore, it cannot be held liable in a case of negligent act or carelessness while handling of the shipment. The Supreme Court accepted the plea of Respondent No. 1 and also held that Respondent No. 2, i.e. the bank cannot be held liable for the deficiency of service, as the amount was not collected from the consignee.
- In the case of *Namrata Singh & Ors. vs. DGCA & Ors. WP(C) 1867/2012 (Del HC),* the question of whether or not the crew was covered under the insurance policy came up before

the court. Respondent 3 lent his aircraft for enabling a medical evacuation of a critically ill patient in Patna. The aircraft encountered a thunderstorm and crashed over Parvatia Colony in Faridabad, which resulted in the death of all the occupants on board. It also resulted in the death of three persons on the ground and damage to immovable property. A legal notice for claims was sent by the petitioners and in response respondent no 3 denied its liability. The United India Insurance Company was made to pay compensation along with interest to the Petitioners.

- In the case of *Dilawari Exporters vs. Alitalia Cargo (2010) 5 SCC 754*, it was held that as regards a contract for carriage of goods by air, an air waybill is prima facie evidence of conclusion of contract, of the receipt of the cargo, and of the conditions of carriage.

The speaker, thereafter, discussed various legislations that govern the carriage of goods by different means in India.

The Carriage by Road Act, 2007 was enacted to cope with the pace of modern development of Road transport. It was enacted on September 29, 2007. The Act:

- Provides for registration of common carriers;
- Provides for execution of a goods forwarding note which describes goods, and goods receipt;
- Allows limits of liability of common carriers, except in case of loss caused by criminal act;
- Provides that consignor/consignee need not prove negligence;
- Regulates the carriage of dangerous and hazardous goods;
- Provides that no suit can be filed against a common carrier for loss, unless notice in writing is given within 180 days from date of booking of the consignment.

Salient features of The Indian Carriage of Goods by Sea Act, 1925:

- The Indian Carriage of Goods by Sea Act, 1925 was passed to establish the responsibilities, liabilities, rights and amenities of a carrier covered by the bill of lading.
- It applies to ships carrying goods from any port in India.
- No implied contract of seaworthiness of vessel, subject to diligence of carrier as to seaworthiness – but proof to be by carrier.
- Notice of loss or damage to be given at the time of taking delivery at destination, or within 3 days of delivery if damage is not apparent.
- Suit to be brought within one year after delivery of goods, or date of delivery, or within an additional 3 months if allowed by Court, unless parties agree to a longer period.
- No exclusion of liability permitted for negligence, fault or failure in duties and obligations of carrier.

Bill of Lading:

- A Bill of Lading is the symbol of the goods, and the right to possess those passes to the transferee of the bill of lading.
- The transfer is symbolic of the transfer of the goods themselves and until the goods have been delivered, the delivery of the duly endorsed Bill of Lading operates as between the transferor or transferee, and all who claim through them, as a physical delivery of the goods would do.

Carriage by Air (Amendment) Act, 2016:

- Amendment made to Section 4A of the Carriage By Air Act, 1972;
- The Central Government may, having regard to the objects of the Act, and if it considers necessary or expedient so to do, by notification in the Official Gazette, give effect to the limits of liability, revised by the depository under rule 24 of Chapter III of the Third Schedule to this Act, for the purposes of determining the liabilities of the carriers and extent of compensation for damages under the said Chapter of that Schedule.

Salient features of the Multimodal Transportation of Goods Act, 1993:

- Carriage of goods may be executed by sea, air or land or by a combination of more than one. A carriage by one of the said modes is termed unimodal and a carriage carried out by a combination of two or more, is called multimodal transport.
- The Act provides for the regulation of multimodal transportation of goods from India to outside India.
- Requires registration to carry on such business.
- Requires issuance of a negotiable or non-negotiable multimodal transport document as a document of title.
- Consignor must make disclosures as required, and indemnifies operator against loss resulting from inadequacy or inaccuracy of disclosures.
- Provides for assessment of compensation for loss or damage to consignment.
- Notice of loss or damage to be given at the time of taken delivery at destination, or within 3 days of delivery if damage is not apparent.
- Suit to be brought within one year after delivery of goods, or date of delivery, or within an additional 3 months if allowed by Court, unless parties agree to a longer period.
- No exclusion of liability permitted for negligence, fault or failure in duties and obligations of carrier.
- The Multimodal Transport Operator shall not be liable if he proves that no fault or neglect on his part had contributed to such loss, damage or delay in delivery.
- The Act restricts any action of liability against the carrier if such action is not brought within nine months from:
    a) The date of delivery of the goods, or
    b) The date when the goods should have been delivered, or

c) The date on and from which the party entitled to receive delivery of the goods has the right to treat the goods as lost under sub-section (2) of section 13

Session 4: Interpretation of Distribution & Licensing Agreements and Disputes Arising Thereunder

Speakers: Mr. Anand Desai, Mr. Pravin Anand

Mr. Anand Desai shared following views:

Section 2 (1) (c) (ix) of the Commercial Courts Act, 2015 defines commercial dispute as inter alia a "commercial dispute" means a dispute arising out of distribution and licensing agreements.

The current distribution channels into three categories were discussed:

Supply

- Food Products
- Pharma Products
- Convenience Products
- Steel, Cement, Petrol

Supply and service

- Electronics
- Automobiles

Service

- Travel services (Hotels, Flights, Cars)
- Technology
- Accounting and Legal
- Internet Websites, Apps, Television Signals

Licensing is a temporary or incomplete right or transfer. Goods can be manufactured under a brand through a licensing agreement. Licensing can be found in the following areas:

- Manufacture of branded goods under a trademark and/or technology transfer license
- Contract manufacturing agreements
- Working a patent for manufacturing
- Copyright exploitation – films, music (sub-dividing rights)
- Format exploitation for television (Big Boss, America Has Got Talent)
- Franchises – for sale of goods or services (Mc Donald's, KFC)
- Technology/software

- Internet connectivity, websites, apps, links to websites
- Information
- Celebrity/brand endorsements and association

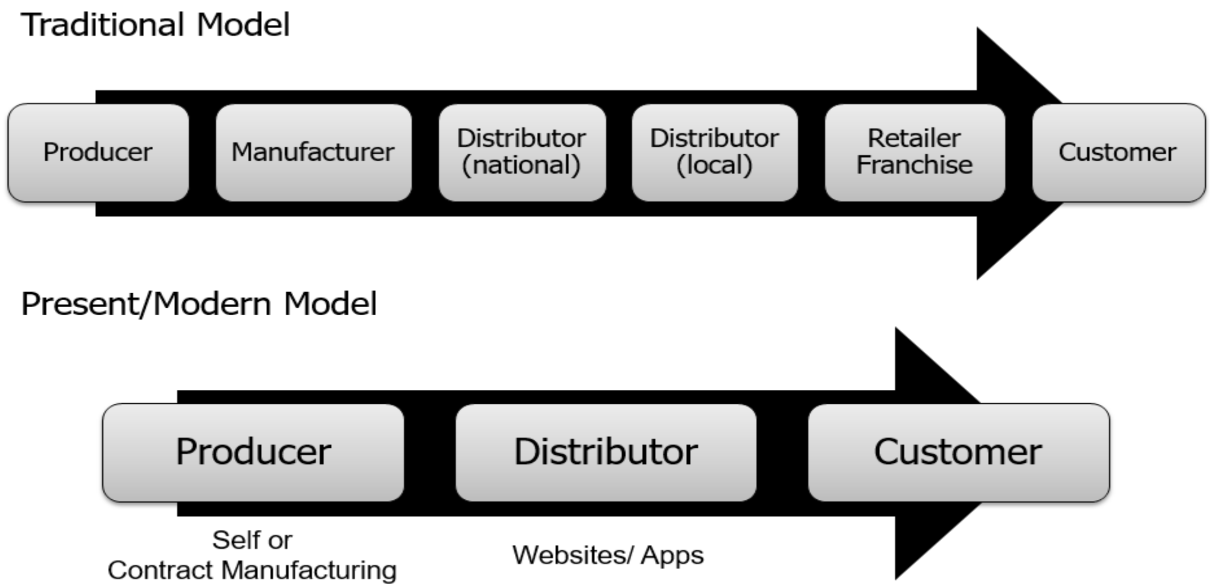
Gathering of information is a colossal business in itself. We live in an information age.

Some key terms to be kept in mind while drafting licensing and distribution agreements:

- Parties, and right to assign
- Scope in detail, including advertising & promotion
- Consideration
- Responsibilities of parties, time of performance, reputation
- Representations / warranties
- Liability / indemnities – security to meet liability?
- Geographical coverage
- Exclusivity
- Period / Tenure
- Breach / infringement and effect
- Termination and its consequences
- Dispute resolution clauses
- Applicable law and jurisdiction (multiple jurisdictions)
- [Equal vs unequal bargaining position] – signing on the dotted line

It is quite common for both the distributor and the manufacturer to advertise for the product.

There has been a huge shift in the way supply chain management is done over the last few years, particularly with the advent of Information Technology. The following flow chart depicts the same.



The need for middlemen has been eliminated on a vast scale, which inevitably resulted in huge increases in efficiency. It gave rise to entrepreneurship in niche areas, which helped in economic growth and development.

The following issues about Distribution networks were discussed.

Case Studies (Parle G and Patanjali)

Parle G is the biggest biscuit brand in the world. The key to its success is the strategic advantage it has in the location of its various manufacturing units. They are located close to rural and suburban areas. For Parle, distribution channels consist of:

- Parle Depots
- Wholesalers and Distributers
- Retailers

Parle G employed an enviable marketing strategy which helped it gain deep inroads in the markets it serves.

Patanjali is another success story of large distribution networks. Consumer goods are available in a multitude of product categories ranging from shampoo and toothpaste to biscuits and noodles, and desi jeans. The company manufactures through self-owned and third-party factories.

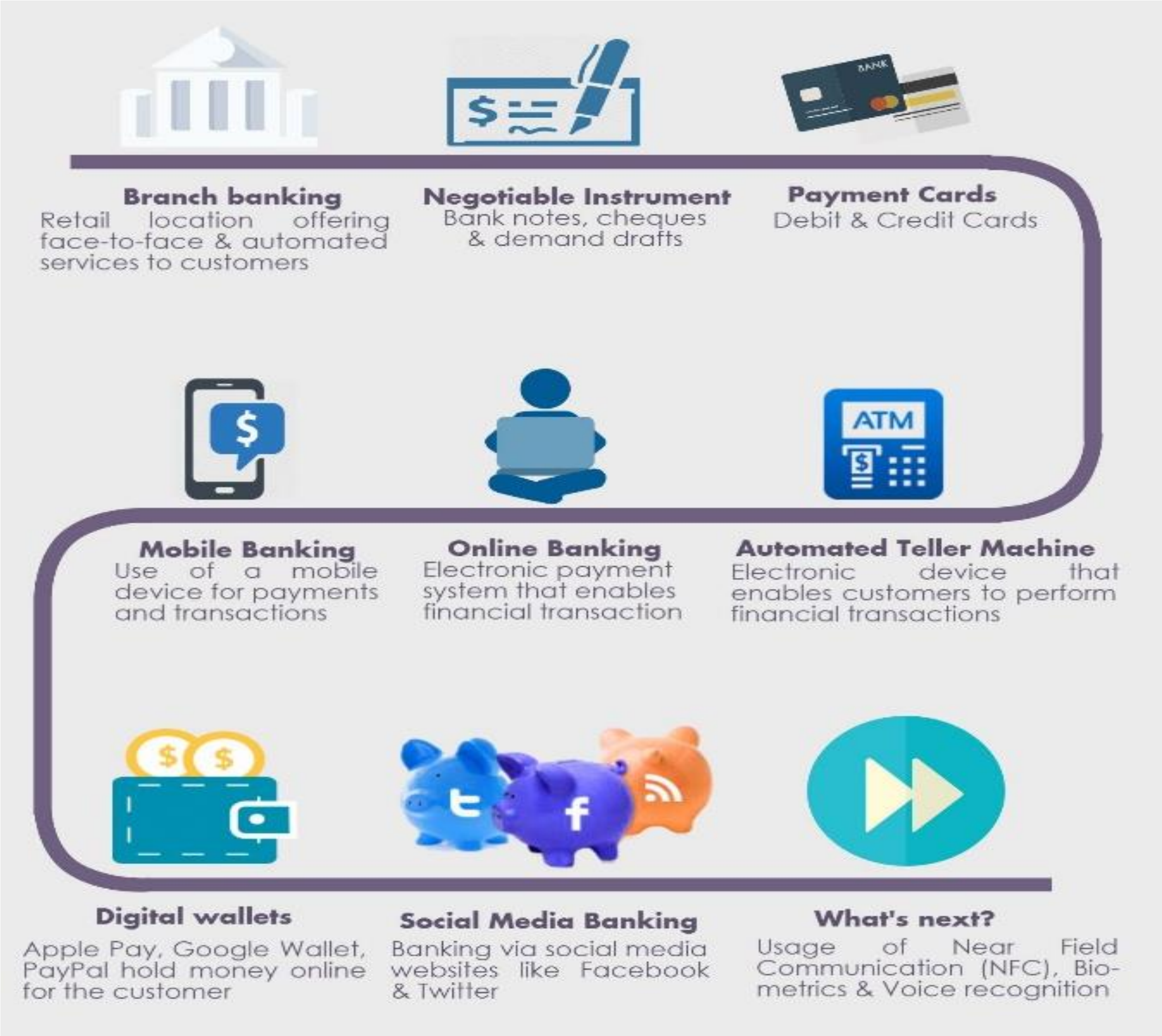
Currently, the distribution network of Patanjali consists of:

- 1200 Patanjali Chikitsalayas (Medical Centers)
- 2500 Aarogya Kendras
- 7000 stores in villages
- Tie-ups with Big Bazaar, Reliance Retail, Star Bazaar
- Tie-ups with e-retailers such as Amazon, Big Basket & Grofers
- 250 mega stores in tier 1 & tier 2 cities (to be launched)

About liability of celebrities in cases of celebrity endorsements the important point to understand here is that most consumers buy a particular product or service because a particular celebrity has endorsed that product or service. It is the face of the celebrity that brings sales to a company. Backlash from the controversy on Maggi, which was endorsed by Amitabh Bachchan and Madhuri Dixit led to the draft Consumer Protection Bill, 2015 which targets celebrities for misleading ads. The Standing Committee has recommended strict penalty on such offenders with classifications for first time, second time and subsequent offences. If follows that celebrities have to be very cautious about the quality of the products they may choose to endorse.

Thereafter, the speaker discussed the change in distribution channels in the Information Technology, Communications sector and the music industry. Online commerce or Electronic commerce as it is generally called, evolved very novel and creative ways of distribution channels. A typical e-commerce site acts a platform that connects buyers and sellers. Thereby, escaping liability for any manufacturing defect of any product sold on its site.

The speaker subsequently discussed evolving channels of distribution in the banking and financial sector. The following diagram provides an overview of the typical distribution channels in the banking sector.



The speaker discussed the following cases in relation to licensing and distribution agreements:

- In the case of *Mumbai Metropolitan Region Development Authority vs. Unity Infraproject Ltd. 2008 (5) Bom.C.R. 196*, the Bombay High Court said that in interpreting a contract, the Court cannot place emphasis on an isolated provision divorced from the context and unrelated to the other provisions which govern contractual obligations. Contracts represent business understandings between the parties. The duty of the Court when called upon to assess where the balance lies in a contractual dispute, is to read the contract as a whole in order to understand the business meaning which the parties attributed to their obligations.

The law is not divorced from business realities nor can the vision of the judge who interprets the law be disjointed from the modern necessities to make business sense to business dealings.

- In the case of *Cadbury India Ltd. vs. L. Niranjan, I (2007) CPJ 40 (NC)* before the National Consumer Disputes Redressal Commission, worms were found in Cadbury chocolates. It was the case of the manufacturer that the liability was with the retailer/vendor under the distribution agreement. But, the NCDRC held that the local authority was duty bound to take action and verify such chocolates and also that it was the duty of the manufacturer to prevent such things from happening. To prevent this practice, the petitioner in his advertisements, as a matter of routine, should make it clear that consumer should not purchase such chocolates from a retailer who does not have a refrigerator or a visi-cooler.
- The Supreme Court, in the case of *Gujarat Bottling Co. Ltd. & Ors. vs. Coca Cola Co. & Ors., 1995 SCC (5) 545* held that a negative stipulation in an agreement for grant of franchise viz. a commercial agreement where under both the parties have undertaken obligations for promoting the trade for their mutual benefit is enforceable if it operates only during the period of the agreement, except in cases where the contract is wholly one sided.
- In the case of *Ozone Spa Pvt. Ltd. vs. Pure Fitness & Ors., 222 (2015) DLT 372*, the Plaintiff was engaged in the business of providing services in relation to fitness, spa, salon, etc. and in furtherance of the same, it entered into a Franchise Agreement. A dispute arose between the Parties when the Defendant started a competitive salon business under the name of 'Hair Masters' for which it adopted the entire look and feel, layout, choice of color combination etc. of the Plaintiff's salons. In addition to the breach of confidential information and trade secrets of the Plaintiff (part of the operation manual provided to franchisees), the Defendant diverted customers, poached well-trained staff and used the uniforms of the Plaintiff's salon. The Court injuncted the Defendant.
- The Bombay High Court in the case of *Mahyco Monsanto Biotech vs. Union of India and Subway Systems vs. State of Maharashtra, W.P.(C) 9175 & 497 of 2015*, held on the difference between 'transfer of rights to use' and 'permissive use' in relation to the levy of sales tax and service tax. Monsanto's case was that of licensing technology through the medium of seeds, which subsequently could be sub-licensed to third parties. Subway's case was of a franchising agreement through which it licenses its trademarks and other confidential information to run outlets in different territories. The principle difference between the two was the re-vesting of rights on expiration of the term of the agreement. It was held that the essential factor to determine taxation is the time for which use is granted. If the arrangement/transaction has an expiry date, i.e. the licensor has divested his rights for a certain period of time and has been re-vested with them on expiration, it would qualify as permissive use. However, if the rights granted are not re-vested with the assignor, he shall be liable to pay VAT.
- In the case of *EuroKids International Pvt. Ltd. vs. Bhaskar Vidhyapeeth Shikshan Sanstha, 2015 (4) BomCR 734*, the Bombay High Court held that the Respondent had agreed not to use any trade mark and copyright of the Petitioner upon termination of the Franchise Agreement and such right is enforceable in law and violation of any such negative covenant can be restrained by an order of injunction of that Court.

- In the stay application of *Chokhi Dhani Resorts Pvt. Ltd. vs. M/s. Essem Recreation, 2013 (4) CDR 1963 (Raj)* before the High Court of Rajasthan (Jaipur Bench), a clause in the agreement specified the effect of termination to the effect that the trade name 'Chokhi Dhani' permitted to be used by the Respondent-Franchisee during the tenure of agreement, shall revert to the Appellant-Franchiser on the termination of the agreement, and that the Respondent shall not carry on the business under the said trade name after the termination of the agreement, the Respondent was injuncted from using the said trade name 'Chokhi Dhani' for its business, but not from carrying on the business or from providing the services, as such clause would be contrary to Section 27 of the Contract Act.
- In the case of *A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), affirming, 114 F.Supp.2d 896 (N.D. Cal. 2000)*, Napster, a peer to peer file-sharing platform, assisted in repeated infringement of copyright law as users uploaded and downloaded copyright protected sound recordings. Napster contended "fair use" since the music exchanged was for personal use of the users. The panel stated that the injunction must devise a remedy that takes into account the technological limits and recognize that Napster could not read files stored on the computers of individual users. This decision led to the temporary closure of Napster and change in the structure from a free to paid service for online streaming

Technology has increasingly solved more and more problems in relation to licensing and distribution arrangements. The speaker talked about new and creative business models of companies such as Netflix Originals and Uber Technologies Inc. They have reshaped and redefined distribution models in the entertainment and road transit industries respectively.

Mr. Pravin Anand shared following views:

Distinction between Assignment of Intellectual Property and a License.

- Right to use – License
- Transfer of Property – Assignment

Licenses are of three types:

- Sole license – the licensor and the licensee are both entitled to use the IP that is licensed.
- Exclusive license – only the licensee can use the IP. Even the licensor is barred from using the IP.
- Non-exclusive license – the licensee, the licensor and any third party can be given an additional license to use the IP.

All Intellectual Property is now governed by the Commercial Courts Act.

Either the licensor or an exclusive licensee can sue. The non-exclusive licensee generally does not have the right to sue.

Generally, disputes arise in the following cases:

- When quality of the licensed product falls
- Payment is not made

- Other breaches

There are three important presumptions to be kept in mind in relation to copyright assignment:

- In a copyright assignment, if the territory is not specified, it will be deemed to be India.
- If the duration of the assignment is not specified, it will be deemed to be 5 years.
- If the right (Satellite, Cable TV, Internet, Mobile Platform) which has been assigned in a copyright assignment, has not been exercised within a period of one year from the date of assignment, it will be deemed to revert back to the assignor.

The Copyright Amendment Act, 2012 brought in new presumptions to be made in an assignment. It declares what cannot be assigned. It brought in a provision under which creators (authors, artists, and composers) would be entitled to a royalty mandatorily. Any assignment to the contrary is null and void.

Any assignment or license of a patent must be recorded under the provisions of Sections 68 and 69 of the Patents Act.

If there is an assignment of Trademark, recording of the same is required under law.

Know-how can be confidential or publicly known. If it is confidential (e.g. Trade secrets for manufacturing, pricing, sourcing, marketing), it is protected by contract and tort law. Angostura Bitters, Coca Cola Formula and Dal Bukhara are very famous examples of know-how and trade secrets.

In a particular case, the Delhi High Court created a Confidentiality Club, in which the advocates for both the parties argued in a video conference and had access to confidential documents which were stored in a sealed cover.

The speaker discussed the following cases in relation to various IP rights:

- Telemechanique case
- Sergi case
- Dristan, K.R. Berry and TI Raleigh cases in the Supreme Court of India
- John Brady’s case (Suppliers of Panels, Fodder making machines)
- Konrad Weidman (licensee)
- Enercon GmbH v. Wind World (International Commercial Arbitration)
- Sephi v Roli Books (in the Delhi High Court)

Dilution of brand value caused by improper use by the licensee is a growing concern in the IP world. Care needs to be taken in that regard.

DAY 2: 25th September, 2016

Session 5: Interpretation of Insurance and Re-Insurance Agreements and Disputes Arising Thereunder

Speakers: Mr. R.K. Nair

Mr. Nair shared following views:

The nature of financial assets unlike physical assets, is intangible. One cannot feel or touch a financial asset. This feature of the insurance contracts necessitates regulation of the industry on a different level.

According to statistics, Indians invest 50% of their wealth in physical assets and the rest in financial assets.

Regarding distinction between banking companies and insurance companies. Banks undertake what may be called credit risk. Insurance companies undertake what is called insurance risk. In the insurance sector, companies are carriers of risk. Banks oil the engines of the economy. Insurance companies pool the risks of several people and function on the basis of what may be called the law of large numbers.

There are 3 types of insurance:

- Life insurance
- General insurance (property)
- Reinsurance

With the introduction of Insurance Amendment Bill, 2005, India has opened up the market for reinsurance. Foreign insurance companies can now have branches in India. There are 54 insurance companies operating in India. Out of which 24 are life insurance companies and the rest are general insurance companies, out of which one is a reinsurance company. Employees' State Insurance Corporation is one of the largest insurance corporations in the world.

An insurance policy:

- Protects the policy holder against risk.
- Is an indemnity, which is protection against loss (caused by theft, fire)

As India transitions from a savings-oriented economy to a consumption-oriented economy, protection of wealth becomes very important. It is done primarily through obtaining insurance policies. Protection of wealth against risks is the main business of the insurance sector.

An actuary is a business professional who analyzes the financial consequences of risk. Actuaries use mathematics, statistics, and financial theory to study uncertain future events, especially those of concern to insurance and pension programs.

Insurance Regulatory Development Authority is the regulator for the insurance industry. It is product of financial sector reforms.

Regarding the evolution of insurance industry in India it was discussed that prior to the year 1990, there was only one regulator in the Indian financial market, i.e. the Reserve Bank of India. After the advent of globalization and liberalization in the early 1990s, the Securities Exchange Board of India and other regulators were set up. In the year 1993, R.N. Malhotra was appointed as the Chairman of a Committee which gave recommendations for opening up of the insurance sector. In the year 1996, an interim non-statutory body by the name, Insurance Regulatory Authority was created. Development of the insurance market was not a function of the IRA. On 19th April, 2000, Insurance Regulatory Development Authority was created primarily for two purposes:

- Protection of the policy holder
- Development of the insurance market in India

In the late 1990s, insurance penetration in India was very low. Therefore, IRDA was given the task of development of the insurance sector.

The term Insurance Density may be defined as the total amount of premium divided by the total population. Insurance Density = Total amount of premium / Total population

The United Kingdom has the largest insurance market in the world. The speaker traced the beginnings of the insurance industry in the world. In early 16th century, the idea for insurance business occurred to a group in a coffee shop in the United Kingdom. There were several ships on the harbor alongside the coffee shop. Underwriting the risks associated with the ships not returning after sail was taken up by a group of people. It is in the UK, that the idea of insurance was born.

Insurance plays a very important role in the economy in terms of risk management. Any kind of entrepreneurship involves risk. If a portion of that risk is sold to the insurance companies in the form of insurance policies, entrepreneurs can focus their efforts on the development of their businesses.

The first insurance company in India was established in the year 1818. The Insurance Regulatory and Development Authority of India Act, 1999 governs the insurance sector in India. IRDA is a quasi-judicial body. The most important function of IRDA is the protection of the policy holder. Section 14 of IRDAI Act, 1999 lays down the duties, powers and functions of IRDAI.

The functions of the Insurance Regulatory Development Authority of India are:

- Issuing to the applicant a certificate of registration, renew, modify, withdraw, suspend or cancel such registration;
- Protecting the interests of the policy holders in matters concerning assigning of policy, nomination by policy holders, insurable interest, settlement of insurance claim, surrender value of policy and other terms and conditions of contracts of insurance;
- Specifying requisite qualifications, code of conduct and practical training for intermediary or insurance intermediaries and agents;
- Specifying the code of conduct for surveyors and loss assessors;

- Promoting efficiency in the conduct of insurance business;
- Promoting and regulating professional organisations connected with the insurance and re-insurance business;
- Levying fees and other charges for carrying out the purposes of this act;
- Calling for information from, undertaking inspection of, conducting enquiries and investigations including audit of the insurers, intermediaries, insurance intermediaries and other organisations connected with the insurance business;
- Control and regulation of the rates, advantages, terms and conditions that may be offered by insurers in respect of general insurance business not so controlled and regulated by the tariff advisory committee under section 64 (u) of the Insurance Act, 1938 (4 of 1938);
- Specifying the form and manner in which books of account shall be maintained and statement of accounts shall be rendered by insurers and other insurance intermediaries;
- Regulating investment of funds by insurance companies;
- Regulating maintenance of margin of solvency;
- Adjudication of disputes between insurers and intermediaries or insurance intermediaries;
- Supervising the functioning of the tariff advisory committee;
- Specifying the percentage of premium income of the insurer to finance schemes for promoting and regulating professional organisations referred to in clause (f);
- Specifying the percentage of life insurance business and general insurance business to be undertaken by the insurer in the rural or social sector.

The principal legislations relating to the insurance business in India are:

- Insurance Act, 1938
- The Insurance Laws Amendment Act, 2015
- Life Insurance Corporation Act, 1956
- Indian Contract Act, 1872
- The General Insurance Business (Nationalization) Act, 1972
- The Marine Insurance Act, 1963
- The Competition Act, 2002
- The Actuaries Act, 2006

IRDA created the Integrated Grievance Management System under which all insurance grievances are required to be uploaded immediately and displayed on the IGMS website. This pushes the insurance companies to redress grievances quickly. Loss assessors are the approved intermediaries of the IRDA.

Regulation 12 of the IRDAI (Insurance Surveyors and Loss Accessors) Regulations, 2015 mandates appointment of Surveyors and Loss Assessors by the insurance company to assess loss under a policy of Insurance in respect of (a) Motor Insurance – above Rs. 50,000/- (b) other than Motor Insurance above Rs. 1,00,000/.

Insurance Regulatory and Development Authority (Protection of Policyholders' Interests) Regulations, 2014 provides the following fundamental rights for the policy holders:

- Right to Professional diligence
- Right to protection against unfair contract terms
- Right to protection against unfair market conduct
- Right to protection of personal information
- Right to requirement of fair disclosure
- Right to receive suitable advice
- Protection from conflict of interest of advices

From time to time, IRDA issues various regulations which govern the operation of insurance business in India. Some key terms as defined by IRDA:

- Complaint – Any communication that expresses dissatisfaction about an action or lack of action about the standard of service/deficiency of service of an insurance company and/or any intermediary or asks for a remedial action.
- Inquiry – Communication for the primary purpose of requesting information about a company and/or its services.
- Request – Communication soliciting a service such as a change or modification in the policy.

The Insurance Ombudsman scheme was created by the Government of India for individual policyholders to have their complaints settled out of the courts system in a cost-effective, efficient and impartial way. There are 17 Insurance Ombudsman benches across India.

- Insurance Ombudsman started operating from November 11, 1998.
- The Governing Body of Insurance Council has the power to appoint the members. The GBIC looks after the Administration, Staffing, Budget, and Preparation of Annual Report.
- Selection Committee comprises:
  a) Chairman, IRDA
  b) Representative of the Council and the Life Council
  c) Representative of Govt. of India
- Has a term of 3 years or till 65 years of age. Not eligible for reappointment.

Jurisdiction of Insurance Ombudsman:

- Pecuniary – Compensation of up to 20 lakhs can be granted
- Territorial – Branch/Office where insurer complained against is located.

Complaints on personal lines of insurance include:

- Any partial or total repudiation of claims by an insurer.
- Any dispute in regard to premium paid or payable in terms of the policy.
- Any dispute on the legal construction of the policies in so far as such disputes relate to claims.
- Delay in settlement of claims.
- Non-issue of any insurance document to customers after receipt of premium

A complaint shall be considered as disposed of and closed when:

- The company has acceded to the request of the complainant fully.
- Where the complainant has indicated in writing, acceptance of the response of the insurer.
- Where the complainant has not responded to the insurer within 8 weeks of the company's written response.
- Where the Grievance Redressal Officer has certified that the company has discharged its contractual, statutory and regulatory obligations and therefore closes the complaint.

The speaker summarized the important principles of insurance law as follows:

- Uberrima fides is a Latin phrase meaning "utmost good faith" (literally, "most abundant faith"). This means that all parties to an insurance contract must deal in good faith, making a full declaration of all material facts in the insurance proposal.
- Proximate cause is an event sufficiently related to a legally recognizable injury to be held to be the cause of that injury. Proximate cause was defined in the case of Pawsey v Scottish Union & National Insurance Company (1908) as the active and efficient cause that sets in motion a train of events which brings about a result, without the intervention of any force started and working actively from a new and independent source.
- The Rule of Contra Proferentem – Contra Proferentem is a Latin term, which literally means "against the offeror". In the context of insurance contract interpretation, it means that in case of ambiguities in the interpretation of the insurance contract, it is interpreted against the insurer. Generally, the policy holder is favored.The speaker said that several insurance companies started implementing quasi-judicial mechanisms for quicker disposal of claims. A judicial officer is appointed within the company and all the claims are looked into by him. This is becoming increasingly popular and effective in the insurance industry.

A question was raised by one the participants as to whether the report submitted by the Loss Assessor could be admitted as evidence in court. Mr. Nair answered that question in the affirmative as the above-mentioned report has legal sanctity. Justice Chavan later clarified that the report of a Loss Assessor cannot be seen on par with the investigation report of a competent police authority.

Session 6: Joint Venture Agreements: Definition, Disputes & Resolution

Speakers: Mr. Lalit Kumar, Mr. Yogesh Singh, Mr. Rakesh Kumar

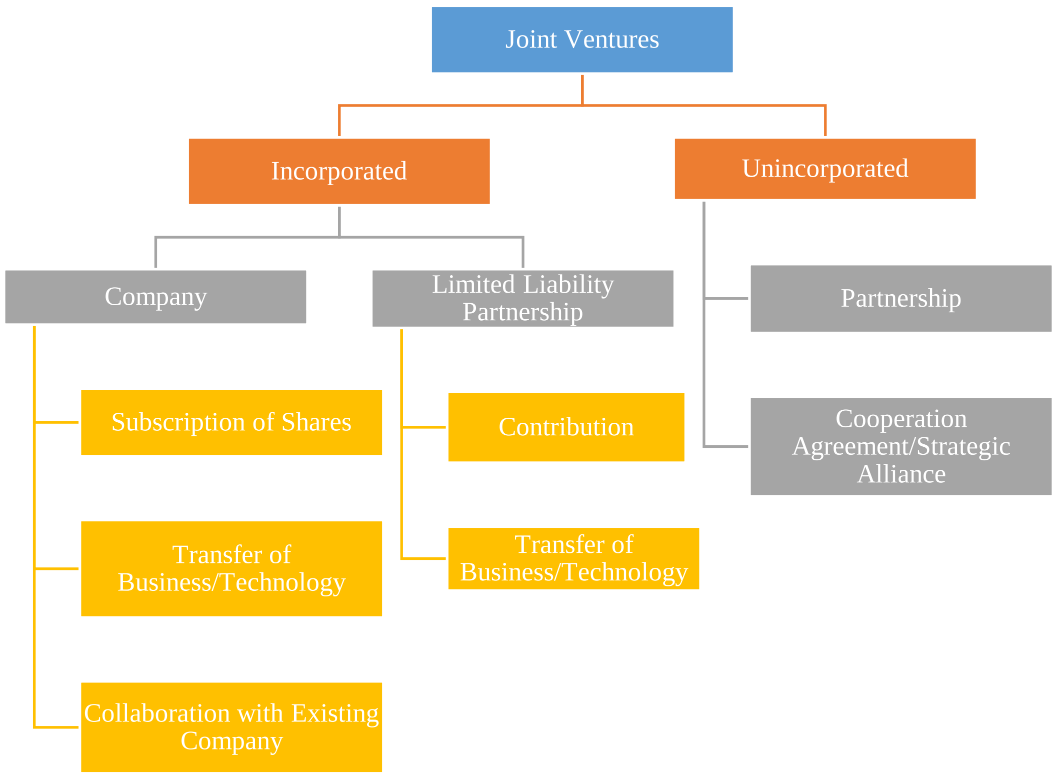
Mr. Yogesh Singh shared following views:

Essential elements of a Joint Venture:

- Separate Legal Entity
- Common Objective
- Asset Contribution (tangible or intangible)

- Sharing of Risks and Profits

A Joint Venture can be an incorporated or unincorporated entity.



The speaker talked about the documentation required for a Joint Venture company. The following clauses need to be given special attention when drafting a JV Agreement:

- Object and scope of JV
- Participation of JV Partners
- Future issuance of capital (big source of dispute)
- Financial arrangements
- Composition of board
- Management of JV Company
- Distribution of profits
- Transferability of shares
- Deadlock Resolution
- Restrictive Covenants on JV Partners and the JV company
- Reserve Matters (key matters)
- Appointment of Higher Management
- Non-Compete Clause

- Confidentiality Clause
- Indemnity Clause

The speaker then discussed some funding options available for a JV Company. Equity (shareholders' funds) and Debt (banks' loans) are the two major modes of funding a JV. In relation to Equity financing, when foreign investors enter India, they are required to comply with the provisions of the Foreign Exchange Management Act, 1999.

Shares in a JV Company can be understood as a bundle of rights.

- Voting rights (differential)
- Right to Nominate Director
- Voting in General Meetings
- Right to Receive Dividend
- Right to Transfer of Shares
- Right to Receive Winding-up Proceeds (Bankruptcy Code)

The speaker discussed the following restrictions in JV Share Transfer:

- Pre-Emptive Right
- Right of First Offer
- Right of First Refusal
- Drag Along Right
- Tag Along Right

The speaker briefly discussed the following points in relation to Reserved Matters:

Types of votes:

- Affirmative: Requiring the affirmative vote of the right-holder
- Negative: Granting a veto to the right-holder

Matters that may be listed in Reserved Matters:

- If outside the scope of the normal day to day working of the company.
- If impacts shareholders' current or future shareholding in the company.

Common examples include:

- Appointment/removal of senior management or statutory auditors of the company.
- Changes in capital structure, mergers and acquisitions, creation of subsidiaries.
- Large capital expenses, acquisitions of outside entities, entering into indebtedness.

The speaker discussed the importance of the following clauses in the context of a JV Agreement:

- Non-compete clause – Restriction on entering into a similar trade or business.
- Non-solicit clause – Restriction on soliciting company's employees or customers may be enforced on a case to case basis.

The speaker talked about the events that could lead to a deadlock in a JV Company:

- Refusal by shareholder to give its consent at shareholders' meeting
- Failure of the Board of Directors to agree on any matter
- Failure to gather the requisite quorum at the Board meetings

The following attempts could be made to resolve a deadlock in a JV Company:

- Sale of Shares on Fair Price
- Sale of Shares to Third Party
- Sale of Business to Third Party and Winding-Up
- Winding-up
- Casting Vote of Chairman
- Appointment of Third Party Expert
- Russian Roulette

Intellectual Property is a big source of disputes in Joint Ventures. When the JV Partners form a JV, they may conduct business under a new brand name or the JV Partners may decide to assign or license the right to use the intellectual property of the JV Partners.

The speaker talked about the rights of the non-defaulting party in case of an event of default by one party in a JV.

- Acquire the shares of the defaulting party at a discount to fair value
- Sell its shares to the defaulting party at a premium to fair value

The speaker then talked about arbitration as a choice for the JV partners in case of a dispute. Any commercial matter, if it arises out of or relates to a contract, can be referred to arbitration. Disputes between JV Partners often relate to transfer of shares, non-compete, and intellectual property. The standard arbitration clause in a JV Agreement:

"In the event of any dispute, controversy or difference between the Parties arising out of or relating to this Agreement (including a dispute relating to the validity or existence of this Agreement and any non-contractual obligations arising out of or in connection with this Agreement) (a Dispute), any party to the Dispute shall be entitled to refer the Dispute to arbitration (Notice of Arbitration) to be resolved in the manner set out in this Clause. This Agreement and the rights and obligations of the Parties shall remain in full force and effect pending the award in such arbitration proceeding."

Thereafter, arbitrability of disputes was discussed by the speaker. The law is not settled on the issue of whether or not oppression and mismanagement is arbitrable.

Arguments against reference to arbitration:

- Sukanya: If there is a bifurcation of reliefs, two fora could decide on similar issues.
- Bennett Coleman: Companies Act requires the Company Law Board to decide the dispute.
- Mere arbitration clause cannot oust the jurisdiction of the Company Law Board.

Arguments for reference to arbitration:

- Various High Courts held that Sections 397 and 398 of the Companies Act do not cast an exclusive jurisdiction on the Company Law Board.
- If Civil Courts can hear a petition under Sections 397 to 402, an arbitral tribunal should also be able to hear the same dispute.

A question was raised by one of the participants as to whether a Joint Agreement is permissible between the members of a family. Mr. Yogesh answered that in the affirmative. There is no restriction on family members coming together for a Joint Venture. In this regard, family members as JV partners need to be careful about conflict of interest.

Mr. Lalit Kumar shared following views:

Call and Put Options:

- Both Call and Put Options are enforceable in the case of a JV Company.
- Put Options from Foreign Exchange Management Act perspective:
    a) No assured return at the time of exit
    b) 1 year lock-in period
    c) Exit as per the price prevailing at the time of exit
- Call and Put Options from Securities Exchange Board of India's Perspective:
    a) The title and ownership of the underlying securities should be held continuously by the selling party for a minimum period of one year from the date of entering into the contract.
    b) The price or consideration payable for the sale or purchase of the underlying securities pursuant to exercise of any option contained therein, is in compliance with all the laws for the time being in force as applicable.
    c) The contract is settled by way of actual delivery of the underlying securities.

The speaker discussed the following points with regard to Reserved/Veto matters in a JVA:

- There are no specific provisions regarding reserved matters in any legislation.
- Different legislations construe it differently.
- There is no complete clarity under Companies Act, 2013, FDI Policy, SEBI Regulations, Insurance Act about treatment of reserved matters.

- Competition Commission of India in the recent case of Caladium Investment/Bandhan Financial Services held that the reserved matters including (i) change in the auditors of the company and (ii) amendment to MOA/AOA will amount to negative control.
- They are provided at both the Board and the Shareholders' level.
- The quorum of parties is required when reserved matters are taken up.
- They can be better protected now by providing an entrenchment provision in the Articles of Association.

On the subject of concept of control with respect to Reserved Matters, the speaker discussed the following points:

- The subjective and inclusive definition of control has to include de-facto and de-jure control. Control is defined as follows:

"Control" includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner:

Provided that a director or officer of a target company shall not be considered to be in control over such target company, merely by virtue of holding such position.

- Control has two distinct and separate features, namely:
    a) The right to appoint majority of directors (factual part)
    b) The ability to control the management or policy decisions (subjective part)
- The right to control can accrue in any of the following manner:
    a) Through Shareholding
    b) Through Management Rights
    c) Through Investment/Shareholders' Agreement
    d) Voting Agreements
    e) In other manner
- Regulation 4 (Acquisition of Control) of Takeover Code provides that irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with the regulations.

The speaker then discussed the case of *SEBI v. Subhkam Ventures (I) Private Limited* in which, the issue was whether the rights such as the right to nominate a director on the board of the company, the right to be present to constitute quorum and the affirmative voting rights all of which is essentially "negative control rights" constituted "control" for the purposes of the takeover code. SEBI's position was that the definition of "control" would include veto rights since such negative control would effectively control the management and policy decisions of a company.

Differing from the SEBI's position, Securities Appellate Tribunal (SAT) in its order dated January 15, 2010 held that "control" means positive control, that is, the ability to cause a company to perform certain actions, and that it did not cover rights constituting "negative control", i.e. the right to prevent the company from doing certain actions. The SEBI had appealed the aforesaid decision of SAT before the Supreme Court.

Both SEBI and Subhkam Ventures reached an out of court settlement in the matter and the Supreme Court passed an order disposing off the appeal. The Supreme Court's order dated November 16, 2011 accepting the out of court settlement between SEBI and the respondents, specifically states that the question of law (i.e., whether negative control is control) remains open and that the SAT decision would not be treated as precedent. This observation has far reaching ramifications.

In relation to Transferability of Shares, the speaker made the following points:

- Right of First Offer/Right of First Refusal/Lock in/Tag Along/Drag Along/Call Option/Put Option.
- They are now enforceable both in a private limited company and a public limited company.
- Concept of "absolute discretion of the board" is to be provided in the Articles of Association of a Private Limited Company.
- Section 58 (2) of the Companies Act, 2013 provides that a contract with respect to transferability of shares will be enforceable as a contract even in the case of a public company.
- The Supreme Court in the case of Rangaraj held that it has to be ensured that provisions of transferability are provided in the Articles of Association of the company to make them binding on the company and the shareholders.

The speaker discussed the following points in relation to Non-compete/Non-solicit clause in a Joint Venture Agreement:

- It is usual to insert a non-compete clause in a JVA, but enforcement specific or otherwise is a big question mark, though, Indian law is different from usual common law rule of "reasonable restriction" acceptability.
- Section 27 of the Indian Contract Act renders "void" a non-compete restriction except in case of "sale of a business" with goodwill and that too with specific limitations on duration, scope and geographic extent.
- Selling Shareholders cannot be prevented from undertaking employment in a competing business.
- Confidentiality obligations are enforceable.
- Non-solicitation clause is enforceable.

The speaker touched briefly upon Representations and Warranties in a JV Agreement:

- Representation is a statement of facts that relate to a state of affairs that exists in the present or existed in the past. The purpose of representation is to induce reliance, establish standard and to allocate risk. Remedy for misrepresentation would be avoidance and restitutionary recovery or damages.

- Warranty is a promise that a statement is true. The purpose of warranty is to provide indemnity if a statement is not true and to allocate risk. Remedy for breach of warranty would be damages
- Discussed the case of Ranbaxy vs. Digene

In relation to the concept of Indemnity, the speaker discussed the following points:

- Indemnity – Indemnities are often considered in the context of liability to reimburse a contracting party from liabilities asserted by third parties (non-contracting parties).
- Generally, all possible triggering events are provided including a party's own negligence in a triggering event.
- There exist some pre-conditions to indemnity rights (such as notice of potential claim, restriction on settlement without consent of indemnifier, monetary limits).
- Enforceability of liquidated damages – In India, liquidated damages becomes a cap – penal damages will not be enforced.
- Threshold for invoking indemnity claims – individual and aggregate thresholds.
- Use of escrow by acquirer to recover indemnity claims

On the concept of Liquidation Preference at the time of Winding Up of a JV Company, the speaker discussed the following points:

- It is permitted under the Companies Act in the event of winding up.
- It can be contractually agreed for both in the event of winding up and also when the sale of shares/companies takes place (such as Trade Sale).
- In the event of winding up, it is best enforced when the instruments held are preferred instruments, for example, preference shares/debentures.
- In case of equity shares it is more of a contractual right than a legal right.
- Generally, preference is provided to the extent of amount invested by the investor.

<u>Mr. Rakesh Kumar shared following views:</u>

In a Joint Venture, two or more parties agree to pool their resources for the purpose of accomplishing a specific task. Each partner is responsible for profits, losses and costs associated with it. A Joint Venture is an entity on its own, separate and apart from the participants' other business interests.

A Joint Venture may take on any legal structure as it is a distinct legal entity from its partners. Joint Ventures can be classified into four categories:

- Joint production of goods and services
- Joint distribution or marketing

- Joint purchasing
- Joint Research and Development

In a Joint Venture, the Joint Venture Agreement is the most important document. It sets out all the partners' rights and obligations, objectives of the JV, and initial contributions by the partners.

Joint Venture can be used as a legal route by a company to partner with a local business to enter a foreign market. It allows companies to gain competitive advantages as follows:

- Lower costs
- Gain access to another company's technology
- Increase revenues and customer base
- Expand product distribution

The speaker made a distinction between a JV and a Merger & Acquisition. Merger happens when two similar sized companies integrate their businesses to operate as a unified entity. Acquisition happens when one company (generally the larger one), buys another company (generally the smaller one).

The speaker then talked about JVs in the context of competition. Competition may be defined as an economic situation in which sellers strive to increase or protect their market share.

The benefits of competition:

- Reduces slack in the production process
- Incentives for efficient production
- Faster pace of invention/innovation
- Lower prices for consumers/quality improvements
- Opportunity to new firms to enter and compete

The speaker then discussed the mandate of CCI and its role in ensuring a free market.

The Competition Act, 2002 is an Act, to provide, keeping in view of the economic development of the country, for the establishment of a Commission to:

- Prevent practices having adverse effect on healthy competition
- Promote and sustain competition in markets
- Protect the interests of consumers
- Ensure freedom of trade

Contemporary economic complexities demand industrial cooperation. That enables partners to produce that which may be beyond the productive capacity of its individual members. Joint Ventures threaten to reduce actual or potential competition between rivals.

The speaker then discussed some of the disadvantages of a JV in the context of competition:

- The ability and incentive to compete against one another may be compromised.
- Parties to a JV are uniquely able to raise prices or limit output, quality, service, or innovation.
- It limits participants' independent decision making

The speaker discussed Sections 3, 4, 5 & 6 of the Competition Act.

Lastly, the speaker discussed the legality of the Non-compete clause in a JVA. He said that the clause may fall foul of Article 19 of the Constitution, the Contract Act or the Competition Act, among others. From a competition perspective, Non-compete restriction is allowed only if it is ancillary to the main transaction.

Session 7: Procedure; Collection & Disclosure of Data; Case Management under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015

Speaker: Justice R.C. Chavan

This was a very interactive session. Many participants raised several questions and some practical and procedural issues relating to the functioning of commercial courts. Justice R.C. Chavan commenced the session by talking about execution of decrees passed by commercial courts. He said that commercial courts are fundamentally civil courts, except that they deal exclusively with commercial matters. The fact that they deal with specialized matters does not make their other powers (vis-à-vis civil court) any less effective. Order 21 of CPC applies to commercial courts. Commercial courts should execute the decrees they pass.

In answer to a question from one of the participants, Justice Raghuram clarified that it is a settled principle that all courts are tribunals, but not vice versa. The parliament or state legislature is authorized to delegate judicial functions to any court and tribunal within their authority.

The Civil Procedure Code has provisions for speedy disposal of cases. Rules of pleadings are very appropriate. They require proper disclosures. It also provides, interrogatories, discovery, and examination of parties. It is unfortunate that the judiciary has not made the best use of the law.

Commercial Courts Act can be seen as putting old wine in a new bottle in that it has many provisions which are part of the CPC.

Amended provisions (schedule in section 16):

- Costs should follow events and be realistic
- Order 6 Rule 3 amended – Forms – statement of facts in chronological order

- Verification of pleadings – by an affidavit (statement of truth) – reduces perjury or false statements
- Denial by the defendants – in manner prescribed – specific denial
- Disclosure, discovery and inspection of documents

If the provisions of the Act are implemented in letter and spirit, then there will be a great reduction in the number of cases that go to trial. The days when civil trial could be completed in one day will be a reality.

In commercial matters, most of the evidence is documentary – in the form of e-mails, contracts. There is not much for the parties to plead falsely.

The Indian Evidence Act and the Information Technology Act contain the provisions relating to electronic records. The definition of document has been expanded to include an electronic document.

If any electronic record is tampered with, the details of the tampering will be available.

Summary judgement is a very important provision in the new Act. This provision makes quick disposal of suits at an early stage possible. Grounds for summary judgement:

- Party may apply.
- Dispute is based on documents.

Rule 5 provides for Case Management Hearing Order 15A.

A judgement of Justice Dalveer Bhandari says that judges should frame a time-table for disposal of cases. It is good practice to maintain time-frames or case disposal schedules in courts. It will be of immense help to the litigants, advocates, witnesses and the judges. When litigants embark on a journey of litigation, the judiciary has a duty to inform the litigant of the time-frame or schedule of cases.

The judge should take control of the automobile called the justice delivery system, not the litigant or any other entity. The speaker said that judges' control over trial is of utmost importance. A judge should not abdicate his responsibilities for the sake of making a career. Duty comes before career advancement.

The Commercial Courts Act was enacted to ensure faster disposal of cases relating to commercial disputes. All Commercial Courts should function keeping that in mind. Judges should develop the ability to see through the parties' intention and tease out the actual dispute between the parties. That will make disposal of cases far easier than otherwise.

It is unfortunate that the legislature had to remind the judiciary that there are provisions in the CPC, which enable judges to dispose of cases quickly. This Commercial Courts Act acts as a reminder to the judiciary. Commercial disputes are a big cause for stalling growth of the economy.

If these disputes are disposed of quickly, then it would be a huge boost to the economy. The Judiciary should act and contribute its part in the economic development of the nation.

Justice Raghuram said that the enactment of this legislation by the legislature constitutes the recognition that the engines of modern economies run on commerce. It is very important for India to have a responsive and strong legal system to compete in this globalized world. The Judiciary should make its contribution in the development of the nation.

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