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Investors lament lack of exits

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The top foreign law firms for India-related work


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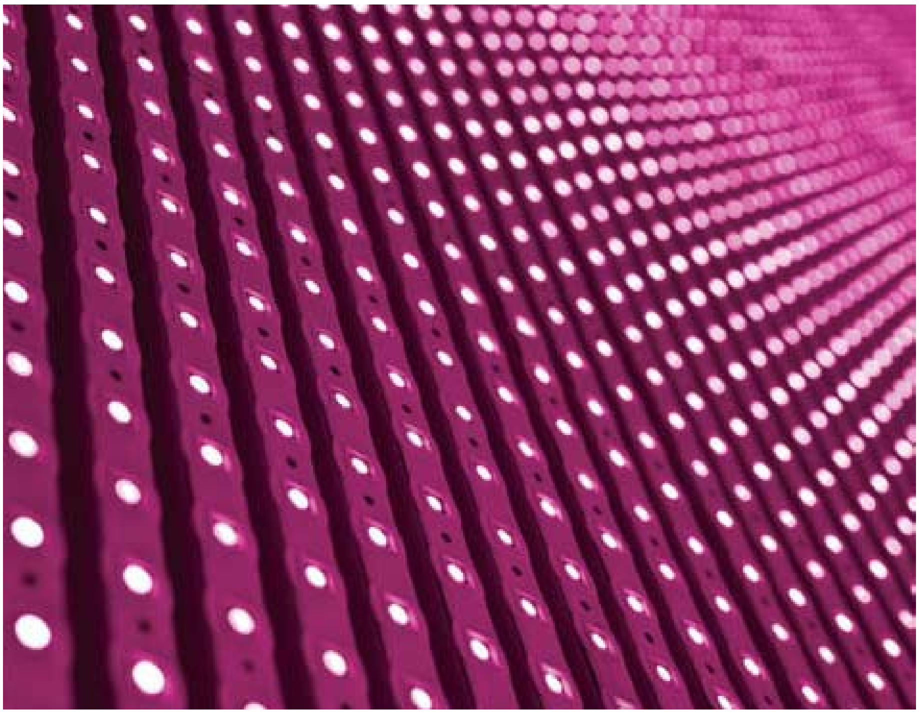
POWER

# ISTS status sought for power project



The Power Transmission Corporation of Uttarakhand (PTCUL) is currently implementing a power transmission system that aims to take power from hydropower plants situated in the four major river basins in Uttarakhand to the central transmission grid maintained by the Power Grid Corporation of India through a common extra high voltage transmission system.

The project, the Uttarakhand Integrated Transmission Project (UITP), will cost approximately ₹25 billion (US$443 million) to develop.

PTCUL filed a petition before the Central Electricity Regulatory Commission (CERC) to have UITP recognized as an inter-state transmission system (ISTS) under the CERC (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010.

PTCUL is having problems financing UITP as the returns for this project are to be recovered from beneficiary utilities located outside the state. Obtaining ISTS status will allow PTCUL to collect transmission charges from beneficiaries outside the state.

This is a unique project where a state corporation is building an integrated transmission system primarily to supply power outside the state. This is also the first project where ISTS recognition is being sought at the project planning stage. ISTS status is usually granted after the construction and commissioning of a system.

Trilegal is representing PTCUL on the matter. The firm's team includes partner Sitesh Mukherjee, counsel Sakya Singha Chaudhuri and associates Anand Shrivastava and Mandakini Ghosh. Mercados EMI is the technical consultant to PTCUL.

INTELLECTUAL PROPERTY

# Copyright bill gets presidential nod

The Copyright (Amendment) Bill, 2012, which was passed by parliament last month, has received the president's assent and was recently notified in the official gazette.

The bill, which had been hotly debated, discussed and revised several times, had languished in parliament for two years. It was offered full support by both houses of parliament.

The Copyright (Amendment) Act, 2012, which amends the Copyright Act, 1957, ensures that India's copyright laws conform to international treaties.

The act expands the definition of a copyright and introduces a system of statutory licensing to protect owners of literary or musical works. It also safeguards performers' rights, giving them greater ownership and protection of their works. Its provisions include allowing performers to make sound or visual recordings of their performances and reproduce them in any medium, issue copies to the public and sell or rent copies of the recording.

However, some lawyers point out that the act still contains ambiguities. Ranjana Adhikari, a lawyer at Nishith Desai Associates, says the amendments "have created many legal and business paradoxes," including in relation to the collection and disbursements of royalties.

"Would producers collect fees from platform owners and then pass it on to music composers, script and screenplay writers and the like, or would this be the sole prerogative and responsibility of copyright societies?" she asked. "The way the law reads today, it is not clear how the mechanics of this shall work."

For more analysis of the Copyright (Amendment) Act, see the legislative and regulatory update (page 10) and our correspondent columns on pages 60 and 64.

# Legislative and regulatory update

INTELLECTUAL PROPERTY

## Copyright amendment bill gets final nod

In May the Indian government passed the much awaited Copyright (Amendment) Bill, 2012. This bill will benefit lyricists, music composers, artists and other authors of original works, but could spell bad news for producers using such works. The bill has now been notified in the official gazette.

**Key provisions**

1. The original author of any literary, musical, dramatic or artistic work, which has been incorporated in a cinematograph film is considered to be the first owner of the work.
2. Authors of literary or musical works (i) incorporated in films, or (ii) sound recordings (which are not part of films) are entitled to receive royalties for exploitation of their work (except during communication about a film in cinema halls), even if they have assigned the copyright in those works, or may not have a performer's right. These rights cannot be assigned or waived by right holders (except in favour of legal heirs and copyright societies). Any agreement that seeks to assign or waive the above rights will be void.
3. The author of a work is entitled to royalties and other considerations even if the copyright in their work has been assigned to make a cinematograph film or sound recording.
4. Performers (like authors) have the right to claim royalties.
5. Performers have moral rights, similar to authors, to claim paternity and damages if their work is distorted.
6. Producers can obtain licences for cover versions of a work only if the cover version is made in the same medium as the last recording of the original work (unless the medium of the last recording is no longer in current commercial use). Other conditions may also apply.
7. Any broadcasting organization that proposes to communicate a published work through a television or radio broadcast, or through a performance of any published musical, lyrical work and sound recording, may do so by obtaining a statutory licence after giving prior notice of their intention to the owners of the rights.

SECURITIES LAW

# AIF regulations to govern all investment funds

The Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, (AIF Regulations) regulate all forms of investment vehicles set up in India to pool money from investors (Indian or foreign). The funds must be registered under these regulations unless they have been specifically excluded in the AIF Regulations.

### Scope of regulations

The SEBI (Venture Capital Funds) Regulations, 1996, (VCF Regulations) have been repealed. However, existing VCFs will continue to be regulated until the existing fund or scheme managed by the fund is wound up. Unregistered pools of capital must register under the AIF Regulations within six months (or 12 months at SEBI's discretion) and are not permitted to raise any new capital until they have registered.

### Fund categories

The AIF Regulations have defined several categories of funds with the intent to distinguish the investment criteria and relevant regulatory concessions they are allowed. They are:

Category I is for AIFs with a positive spillover effect on the economy, such as venture capital funds, SME funds, social venture funds, infrastructure funds and other AIFs as may be specified.

Category II is for AIFs which are given no specific incentives or concessions by the government or any other regulator, including private equity funds, debt funds and other funds not classified as category I or III.

Category III applies to AIFs, including hedge funds, which trade with a view to make short-term returns, employ diverse or complex trading strategies and may employ leverage including through investments in listed or unlisted derivatives.

### Valuation and reporting

AIFs must inform investors about the methodology used to value their assets. These valuations must be carried out by an independent valuer appointed by the AIF for category I and II funds. Funds in category III are not obliged to have an independent valuer.

All AIFs are required to provide annual reports to their investors within 180 days from the end of the year. In addition to the annual report, category III AIFs are required to provide quarterly reports to its investors within 60 days from the end of each quarter. (For more on AIF regulations, see our correspondents' views on page 62.)

# SEBI streamlines FII debt limit process

In a circular on 6 February 2009, the Securities and Exchange Board of India (SEBI) introduced an open bidding process to allocate a cumulative debt investment limit of US$15 billion for foreign institutional investors (FII) s in corporate debt. On 26 November the following year, SEBI increased the corporate debt limit to US$20 billion and the government debt limit to US$15 billion.

SEBI has now streamlined the debt limits allocation process through a circular on 27 April. It has provided greater certainty with regard to the timing of the auction, and has laid down a framework that is likely to prevent concentration of debt limits in the hands of a few FIIs.

### Timing of auction

The April circular states that the auction will be conducted on the 20th of every month, if the free limit in any category (government debt old, government debt long-term, corporate debt old, and corporate debt long-term infra with one year lock-in and one year residual maturity clause) exceeds ₹10 billion (US$180 million).

### Bid amount

Although the minimum bid amount was reduced from ₹2.5 billion to ₹10 million through a SEBI circular on 18

November 2011, the minimum ticket size was not specifically reduced from ₹1 billion. The April circular reduces the minimum ticket size to ₹10 million.

### Allocation method

The April circular has shrunk the maximum bidding limit for an FII from ₹20 billion, stating that no single bidder will be allocated more than ₹2.5 billion, or one-tenth of the free limit, whichever is higher.

SEBI's circular on 26 November 2010 permitted a single bidder to bid for more than one entity if it provided due authorization to act in that capacity by those entities. In order to bid for multiple entities, bidders would also have to provide the stock exchanges with details of the limits it has been allocated for the entities it has bid for. The April circular adds that if a single entity bids on behalf of multiple entities, then such a bid would be limited to ₹2.5 billion, or one-tenth of the free limit for each single entity.

## Finance ministry liberalizes QFI route

The Ministry of Finance issued a press release on 29 May to remove the bottlenecks and stimulate foreign investments via the qualified foreign investor (QFI) route.

### Corporate bonds

The Finance Ministry has created a separate sub-limit of US$1 billion for QFIs to invest in corporate bonds and mutual fund debt schemes.

The QFI route now provides foreign investors with an option for direct investment.

Previously, QFIs were forced to invest in non-convertible debentures listed on the stock exchange through the foreign institutional investment route.

### Widening QFI jurisdictions

In order to qualify as a QFI, investors resident in a particular jurisdiction must ensure that the securities regulator of their jurisdiction is a signatory to the International Organization of Securities Commissions Multilateral Memorandum of Understanding and is compliant with Financial Action Task Force (FATF) standards.

The European Commission (EC) and the Gulf Cooperation Council (GCC) as collective bodies are members of FATF. However, not every country which is a member of the EC or GCC is an FATF member in its individual capacity. In its press release, the government clarified that the residents of the six member countries of the GCC and the 27 member countries of the EC are eligible to qualify as QFIs.

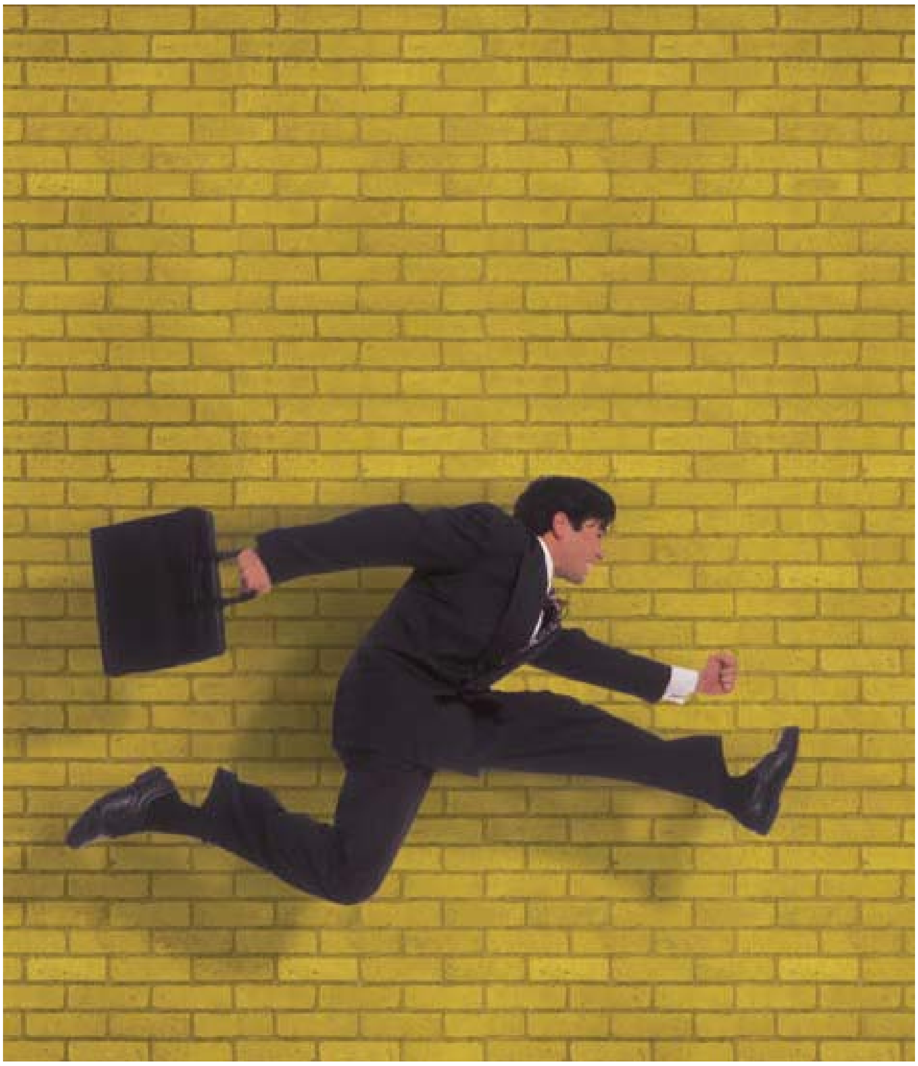
### Removal of five-day limit

Earlier, funds remitted by QFIs in an Indian rupee account for investments were required to be transferred to the designated overseas bank account of the QFI if such funds were not invested within five working days of the remittance. The Finance Ministry has dispensed with this five-day limit, allowing the QFI to have the freedom to retain the amounts in their India accounts.

### Separate accounts

QFIs were previously allowed to invest only through the rupee pool bank account of their qualified depository participant. Now, QFIs can open separate non-interest-bearing rupee bank accounts with authorized dealer banks in India to undertake transactions using this route.

Overall, these changes indicate that the Finance Ministry recognizes the initial failure of the QFI route and has taken steps to remedy this.



*The legislative and regulatory update is compiled by **Nishith Desai Associates**, a Mumbai-based law firm. The authors can be contacted at nishith@nishithdesai.com. Readers should not act on the basis of this information without seeking professional legal advice..*

# Court judgments

**INTELLECTUAL PROPERTY**

## Copyright Board cannot issue interim orders

Allowing an appeal in *Super Cassettes Industries Ltd v Music Broadcast Pvt Ltd*, the Supreme Court ruled that the Copyright Board cannot issue interim orders while it considers the merits of complaints made – under section 31 of the Copyright Act, 1957 – against owners of copyright who withhold works from the public. If a copyright owner's refusal to grant a licence is found to be unreasonable the Copyright Board can allow compulsory licences.

A three-judge bench of the apex court held that quasi-judicial tribunals such as the Copyright Board "exist in order to preserve the status quo, but not to alter the same" and if parliament "had intended that the Copyright Board should have powers to grant mandatory injunction at the interim stage, it would have vested the board with such authority".

Music Broadcast (MBPL) had broadcast sound recordings owned by Super Cassettes using a mutually agreed voluntary licence. However, after the Copyright Board set the terms and conditions for a compulsory licence of recordings owned by Phonographic Performance Limited in August 2010, MBPL asked Super Cassettes to grant it a licence at the same rate, as it was more favourable. Super Cassettes responded by offering a licence under the terms of the voluntary licence, which had since expired.

Subsequently, MBPL was refused an interim compulsory licence by the Copyright Board on the grounds that it did not have powers to grant interim relief. Overruling the order, Delhi High Court held that the power to grant interim relief is not dependent on any statute or legislation but that it is a common law principle.

In appeal before the Supreme Court, Super Cassettes argued that the Copyright Board, being a creature of a statute, had to be governed by the statute. The judgment puts an end to a much debated copyright issue of recent times.

## Musicians denied rights from radio broadcasts

Ruling in *Indian Performing Rights Society Ltd v Aditya Pandey & Ors*, a division bench of Delhi High Court held on 8 May that radio stations that broadcast or communicate sound recordings need pay royalty to only the owner of the sound recording and not the owner of the lyrics or the musical works that have been incorporated into it.

In arriving at this judgment the court relied on the Copyright Act, 1957, as amended by the Copyright (Amendment) Act, 1994. The Copyright (Amendment) Act, 2012, which recently came into effect, will have a bearing in adjudicating future disputes in this area as it provides that copyrights held by lyricists and musicians cannot be assigned to producers, as was the practice until now.

Noting that a recorded song "is the result of the merger of the creative talent" of the lyricist, the composer and the singer, the judgment said that the Copyright Act, 1957, "requires it to be held that creating of a sound recording is through the simultaneous integration of the differentiated and ... the integrated whole". When the sound recording is broadcast to the public "it is an exercise of the ownership right on its own strength".

The Indian Performing Rights Society had argued that the right of lyricists and composers to perform their work in public or communicate it to the public (a right conferred by section 14a(iii) of the act) is distinct from and not a sub-set of the right to make a sound recording (a right under section 14a(iv) of the act). As a result each right may be assigned or licensed individually.

**INFORMATION TECHNOLOGY**

## Website ordered to remove defamatory content

In an interim order in *Nirmaljit Singh Narula v Indijobs at Hubpages.com*, Delhi High Court ordered a website to remove defamatory content and directed it to divulge the identity of a blogger who wrote the content in question.

The closely watched dispute relates to issues such as liability of intermediaries and jurisdiction of websites, and relies extensively on new regulations that follow on from the passing of the Information Technology (Intermediaries Guidelines) Rules, 2011.

The dispute between Narula – a preacher commonly known as Nirmal Baba – and Hubpages.com centred on an allegedly false and defamatory article about him that was hosted on the website, which was written by a blogger registered under the name Indijobs. Narula filed a suit for mandatory injunction and damages against the website and the blogger after he sent the website a cease and desist notice, which it resisted.

The court observed that Narula had made a prima facie case against Hubpages.com for not complying with its obligations under the Information Technology (Intermediaries Guidelines) Rules read with section 79 of the Information Technology Act, 2000, to remove illegal information.

Delhi High Court also ordered that in the event of non-compliance with the injunction within 36 hours, the registrar of the domain – defendant No. 5 in the case – was to specifically block the access to the website in India.

**ARBITRATION**

## Parties can challenge delayed award

A division bench of Bombay High Court recently held that a delay by an arbitrator to pass an award is "a misconduct as contemplated under the act" [Arbitration and Conciliation Act, 1996] and "the delayed award in question, in our view, is bad in law".

Dismissing an appeal in *Bharat Oman Refineries Ltd v M/s Mantech Consultants*, the court upheld a September 2011 decision by a single judge to set aside an arbitration award made in August 2006, on the ground that it was made after a delay of two years and four months.

The court held that parties would be "remedy-less" if deprived of their right to apply to the court to set aside such an award under section 34 of the act.

The contract between Bharat Oman Refineries and Mantech Consultants had stipulated that the arbitration award be made within one year of the conclusion of arguments. Proceedings before the arbitrator had concluded in April 2004.

Pointing out that the jurisdiction of an arbitrator "depends upon the arbitration clause in the agreement itself", the division bench said that the time limit provided in the arbitration agreement in a given case cannot be said to have been extended by an act or conduct of one side or the other.

The court held that the doctrine of waiver or deemed waiver or estoppel "is always based on facts and circumstances of each case, conduct of the parties in each case and as per the agreement entered into between the parties".

The permission and or consent to extend the term of the arbitrator, which is required to be in writing according to the agreement, cannot be deemed to have been granted on the basis of alleged unilateral waiver by only one party. The parties and the arbitrator have to stand by the terms of the contract.

**Corporate criminal liability**

# Action against director only if company accused

Is an authorized signatory or director of a company liable for prosecution under section 138 of the Negotiable Instruments Act, 1881, or section 67 of the Information Technology Act, 2000, without the company being named as an accused?

Ruling simultaneously in *Aneeta Hada v M/s Godfather Travels & Tours Pvt Ltd*, *Avnish Bajaj v State* and *Ebay India Pvt Ltd v State,* a three-judge bench of the Supreme Court considered if this was also true in the context of any person mentioned in sections 141(1) and 141(2) of the Negotiable Instruments Act, and section 85 of the Information Technology Act, which are identical.

Applying the doctrine of strict construction, the Supreme Court held that commission of an offence by a company "is an express condition precedent to attract the vicarious liability of others". As the words person and company appear in section 141 of the Negotiable Instruments Act, which deals with offences by companies, the court ruled that it is "absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof".

Accordingly, the apex court ruled that an authorized signatory or director of a company cannot be prosecuted for issuing a dishonoured cheque or for any offence under Section 67 read with section 85 of Information Technology Act without the company itself being arraigned as an accused person.

This ruling clarifies that an individual's liability as per a penal provision is vicarious and unless the principal entity, the company, is prosecuted as an accused, the subsidiary entity, the individual, cannot be held liable.

*The update of court judgments is compiled by* ***Bhasin & Co, Advocates****, a corporate law firm based in New Delhi. The authors can be contacted at lbhasin@bhasinco.in or lbhasin@gmail.com. Readers should not act on the basis of this information without seeking professional legal advice.*