

**INDIA LEGAL UPDATE** is a journal of Singhania & Partners to offer a legal perspective on the new business climate and opportunities in India in keeping with the existing laws and panorama of the current happenings and events in Corporate India.

**CONTENTS**

- Competition Commission of India  
*By Sunil Kumar & Shradha Dubey*
- The Duration Test: Qualifying as a Permanent Establishment in India  
*By Kunal Sabarwal*
- International arbitration: Enforcement of Foreign Awards  
*By Vikas Goel & Ritu Chhabra*
- Newsquest
- Synapse



**LEX MERCATORIA**



# Competition Commission of India: Towards a more competitive & fair market

Competition Act, 2002 (Act) in India, marks a landmark shift in approach towards regulating business in India. The Act brings India at par with UK, USA and EU in regulating free market.

By Sunil Kumar & Shradha Dubey

The Act covers those anticompetitive practices that have an appreciable adverse effect (AAE) in India. Specifically, the Act covers Anti Competitive agreements, e.g., Cartel and Abuse of dominant position. The Act provides that the issues of Anti competitive agreements and abuse of dominant position should be determined in "relevant market" in which core issues may cause or are likely to cause AAE on competition. Further, the Act requires regulator to determine dominance not solely on basis of market share but to look into number of factors including market share and for this purpose the Regulator is vested with substantial powers including power to declare agreements void, levy stringent fines and penalties and to block mergers.

Competition Commission of India (CCI/Commission) was established on 14th October, 2003 and started accepting cases under the Act after September 1, 2009. The Commission is vested with both regulatory and quasi-judicial powers to:

- Eliminate practices having AAE on competition.
- Promote and sustain Competition.
- Protect interests of consumers.
- Facilitate competition advocacy and spread awareness.

CCI has suo moto power to enquire whether anti competitive agreement or abuse of



*The act enables commission to regulate market for goods and services as diverse as power, telecom, insurance services, etc.*

clearly demarcate jurisdictions in order to discourage forum shopping. Further, sector regulator may have to deal with different parameters/criterion to safeguard same issues which the Commission is empowered to regulate.

Thus, India has a law to tackle the challenges posed by growth of business by non organic mode, and balancing of free market tenets. Question arising here is how Commission will intervene in deserving cases to regulate the anti competitive conduct of market participants. The Commission will soon have the opportunity to reveal its anti trust agenda and its approach to interpretation and application of the new concepts embodied in the Act. More importantly, its approach to investigation of complaints or information received from affected market players will determine its deterrent impact on the big fish who may be tempted to impose unfair or unreasonable conditions on their smaller competitors.



dominant position causes or is likely to cause AAE on competition but this power must be exercised within one year from date the combination takes effect. CCI may direct any enterprise or person or their associations to discontinue anti-competitive practices. The CCI may on prima facie merit handover cases to Director General (Investigation) for a detailed investigation and based on its findings come out with its verdict



Determination of Abuse of Dominant Position is not based solely on market share held by entity in particular market, but on various factors including market share. It would make the process somewhat unpredictable and complex and could open the Commission to charges of subjectivity. Clause (l) introduced in Section 19 and Clause (m) in section 20, of the Act are two examples of a confused legislation. Clause (l) has been inserted to ascertain dominance of an enterprise in market but appears to provide the Commission a mitigating factor where a dominant enterprise may be making a contribution to economic development. An identical Clause (m) has been inserted in Section 20 of the Act. Erroneous determination of Dominance will discourage firms from pursuing anti competitive conducts, whereas erroneous non determination of dominance will allow them to continue with exploitative conducts.

Two significant features of the Act are that like the EU model, Indian law also adopts "effects doctrine" in preference to "conduct doctrine", and creates an extra territorial jurisdiction empowering the Commission to inquire into an agreement which is entered between foreign entities outside India. The "effect doctrine" is based on principle that any jurisdiction where the effects of any acts are felt should have concurrent jurisdiction over that conduct. However, applicability of the doctrine causes multiplicity of jurisdictions over the conduct which may cause conflict of jurisdictions among countries.

At the same time sector specific legislations already established sector specific regulators like Telecom Regulatory Authority of India (TRAI) for telecom, etc. The absence of clearly carved out legal space for statutory and sector regulator under various legislations and the Act creates an overlap between the domain of sector regulators and the Commission. One view is that such overlaps are unavoidable and the Commission would have to

# The Duration Test

## Geographical and Commercial Coherence of Contracts Essential to Constitute Permanent Establishment

By Kunal Sabarwal



*If an offshore enterprise carries out engineering and construction projects in India, the time spent on each project cannot be combined or clubbed together to determine whether the foreign enterprise would constitute a permanent establishment in India, unless the relevant tax treaty provides for aggregation of time spent on different projects or the activities of different projects of the foreign enterprise are so inextricably interconnected or interdependent that the contracts cannot be isolated from each other.*

### POINT(S) OF LAW

Where an offshore enterprise is carrying out different engineering and construction contracts in India, whether the duration of these contracts could be aggregated so as to calculate the threshold time limit as prescribed in Article 5(2)(i) of the Indo-Mauritius tax treaty to determine whether or not the same constitutes a permanent establishment in India.

### BRIEF FACTS

The offshore enterprise, a tax resident of Mauritius, is engaged in general engineering and construction business. The Offshore enterprise executed three (3) contracts in India and claimed that the income arising out of these contracts would be business profits. Since, it does not have a PE in India, the business profits from these contracts cannot be subject to tax in India. The offshore enterprise claimed that under each of the three (3) contracts, the duration of the work was below the threshold limit of nine months as applicable for assumption of a PE in India under Article 5(2)(i) of the Indo Mauritius DTAA ("DTAA"). The offshore enterprise further contended that

each of the contracts is a separate contract and thus, has to be treated independently from each other and the time spent on these cannot be aggregated to determine the application of duration test. On the other hand, the AO was of the view that all the contracts are to be considered together for calculating the threshold limit of nine months and determining the existence of PE under the DTAA.

CIT(A) rejected the contentions put forth by the AO and held that the duration of the said projects could not be aggregated for the purposes of ascertaining as to whether or not the PE of the assessee can be said to have existed in India.

Against the said order of the CIT(A), the AO preferred an appeal to ITAT, Mumbai.

### DECISION

The ITAT ruled that in light of the provisions of Article 5(2)(i) of the DTAA, the activities of the offshore enterprise in this case cannot be combined together for calculation of the threshold limit as prescribed therein. It also held that Article 5(2)(i) of the DTAA does not provide for the aggregation of number of days spent on various sites, projects and activities.

The ITAT also held that since aggregation of time spent by a foreign entity in engineering and construction contracts is specifically not provided in the Article 5(2)(i) of the Indian-Mauritius Tax Treaty, therefore, it is not open to the Authority to infer the application of such aggregation principle.

## REASONING

As per Article 5(2)(i) of the DTAA, the site, project or supervisory activity should continue for a period of more than nine (9) months so as to constitute a permanent establishment in India. In certain tax treaties, such as India-Australia Tax Treaty and India-Thailand Tax Treaty, the relevant Article specifically provides for aggregation of time spent on various projects.

The ITAT ruled that the aggregation of time spent on various activities should be done only in cases where the activities are so inextricably interconnected or interdependent that these are essentially required to be viewed as a coherent whole. The ITAT also stated that India has entered into various tax treaties with other countries wherein the principle of aggregation of duration of time has been specifically included, in case the activities of foreign entities engaged in construction and engineering contracts are proved to be commercially and geographically coherent with each other.

There are treaties entered into by India with other jurisdictions, wherein the principle of aggregation of duration of time has been specifically excluded for considering whether or not, a foreign entity engaged in construction and engineering contracts would constitute a PE in India.. The ITAT held that the true test is not geographical proximity and commercial nexus, but interconnection and independence of the contracts performed by such foreign entity in India.

The ITAT was of the view that the duration test should be applied in cases where the tax treaty specifically includes/provides for aggregation of time spent in contracts related to engineering and construction contracts of foreign enterprise to determine whether such foreign enterprise would constitute a permanent establishment in India. In the absence of such provision, the activities performed under various

engineering and construction contracts of a foreign enterprise should be so inextricably interconnected or interdependent so that no such contract can be isolated from each other for such foreign enterprise to constitute a permanent establishment in India.



## CITATION

» Case No.  
ITA No. 1532/Mum/2005

» Court  
Income Tax Appellate  
Tribunal Bench 'L'  
Mumbai



## INTERNATIONAL ARBITRATION

# Enforcement of Foreign Awards

By Vikas Goel and Ritu Chhabra



*A foreign award is defined as an arbitral award on differences between persons arising out of legal relationships whether contractual or not, considered as commercial under the law in force in India made or before 11.10.1960 in pursuance of an agreement in writing for arbitration to which either New York Convention or Geneva Convention applies or is made in such territory which central Government declares to be the territories to which either New York or Geneva Convention applies.*

India's global exposure in international arbitration is well-known. Ever since the enactment of the Arbitration and Conciliation Act, 1996, there has been a surge in international commercial arbitration. It is noteworthy that the Arbitration and Conciliation Act, 1996, based on what is popularly known as the UNCITRAL model.

In order to be considered as a foreign award, (for the purposes of the Act) the same must fulfill two requirements. First it must deal with differences arising out of a legal relationship (whether contractual or not) considered as commercial under the laws in force in India. The expression "commercial relationship" has been very widely interpreted by Indian courts. The Supreme Court in the case of R.M. Investments Trading Co. Pvt. Ltd. v. Boeing Co. & Anr while construing the expression "commercial relationship" held: "The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not..."

## CHALLENGE OF FOREIGN AWARDS

In the case of Venture Global Engineering, while relying on its decision in Bhatia International, the Apex Court held that Provisions of Part I would apply even to Foreign Award and accordingly a petition for setting aside a foreign award would lie in India. It is to be noted here that provisions regarding enforcement of foreign award are contained in Part II and there is no specific provision therein for setting aside of foreign award. Only the courts in India can refuse to enforce foreign award on the grounds mentioned in Section 48 (in respect of awards made as per New York Convention) and Section 57 (in respect of awards made as per Geneva Convention).

The Apex court in para 19 of the judgment held that "in any event, to apply Section 34 to foreign international awards would not be inconsistent with section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situated in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke public policy of India, to set aside the award. As observed earlier, the public policy of India includes- (a) the fundamental policy of India; or (b) the interest of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended the definition of public policy can be bypassed by taking the award to be foreign country for enforcement."

## EXECUTION OF FOREIGN AWARD

A person who intends to enforce a foreign arbitral award should apply to the court and produce the original award or certified/authenticated copy thereof, agreement for arbitration and evidence as may be necessary to prove the award is a foreign award.

If the Court is satisfied under provisions of Section 49 that a foreign award is enforceable



under this Chapter, the award shall be deemed to be a decree of that court and that court shall proceed further to execute the foreign award as a decree of that court.

One interesting feature of enforcement of a foreign award is that there is no statutory appeal provided against any decision of the court rejecting objections to the award. An appeal shall lie only if the court holds the award to be non-enforceable. Hence a decision upholding the award cannot be appealed against. However a discretionary appeal would lie to the Supreme Court of India under Article 136 of the Constitution of India. Such appeals are entertained only if the Court feels that they raise a question of fundamental importance or public interest.

## CONCLUSION

The Indian courts have developed a reasoned, cautious and a sophisticated approach concerning the enforcement of foreign judgments and foreign awards. This anticipates well for growth and development of legal jurisprudence in India in the field of "conflict of laws".



## Rupee becomes only 5<sup>th</sup> currency to get a symbol



In keeping with India's growing economic might and its status as a major investment destination, the hitherto humble rupee is all set to get a distinct identity in the form of a new symbol- The Union Cabinet has given its approval to the symbol which combines the Roman letter 'R' with the Devnagri

'Ra'. The symbol will catapult the rupee into the company of four 'elite' currencies which have similarly distinct identities — the US dollar, euro, yen and British pound.

## Exports duty on goods supplied from DTA's to SEZs unjustified

The government's bid to levy export duty on goods supplied to Special Economic Zones from the rest of the country was scuttled with the Supreme Court saying that the extant law doesn't permit such a levy. Currently, sales by SEZ units to domestic tariff area are subject to a Customs duty as SEZs are designated tax-free zones with an obligation to be net forex earners. Although there is no provision in the law for a levy on the reverse sale, the Customs authorities have started demanding a tax.

## FDI lock-in for hotels & tourism projects to go

In an attempt to accelerate foreign investment in the country's hospitality sector, the government has decided to exclude hotel and tourism projects from the purview of the three-year lock-in clause which governs real estate activities. The move is expected to give a fillip to the plans to increase the number of hotel rooms in the country manifold, besides enabling domestic realty majors to induct foreign partners in their projects. Currently, foreign direct investment (FDI) norms forbid foreign investors from repatriating profits back home for three years if investments are made in 'real estate projects' including hotels and tourism-related ventures.

## India to grow at 9.50% in 2010: IMF



India's growth will accelerate to about 9.50 percent in 2010 as robust corporate profits and favourable financing conditions fuel investment, and then settle to 8.50 percent in 2011, according to International Monetary Fund (IMF) projections.

## 3G spectrum auctions concludes after 34 days

The 3G spectrum auctions have finally concluded after 34 days and 183 rounds of aggressive bidding. The government, which was expecting to garner Rs. 350 billion to meet its fiscal deficit, will now rake its avenues worth Rs. 677.19 billion from the sale of 3G spectrum. No single operator has managed to win a pan-Indian 3G spectrum licence.

## Bharti Airtel closes its Acquisition deal with Zain



Bharti Airtel has officially closed its acquisition deal involving the purchase of Kuwait based Zain's African assets. Bharti Airtel intends to launch an airtel brand in Africa in October 2010 and will be investing \$800 million to \$1,000 million in 2010-11 for network rollout and services.

## Union Cabinet approves the greenfield airport in Mopa



The Union Cabinet has given approval for setting up a greenfield airport at Mopa in Goa through Public-Private Partnership on a Build-own-operate-transfer basis. A private entity will be selected for the project through global competitive bidding.



## S&P Legal counsel to Ministry of Power in consortium with PFC

S&P in association with PFC is advising Ministry of Power on legal and regulatory issues for selection of transmission services provider for 2 large Transmission projects. The projects entail system strengthening for the western region and northern region private participation on tariff based competitive bidding.

- Dipak Rao and Santosh Pandey

## S&P Appointed Lenders' Legal counsel to Axis Bank for coal berth project in Orissa

Acting as a legal counsel to Axis Bank for the due diligence and documentation relating to credit facilities of ₹41.4 billion to Essar Paradip Terminals, for a proposed project for development of a deep draught coal berth at Paradip Port, Orissa.

- Dipak Rao and Suneet Kr. Tyagi



## Legal consultancy services for coal based thermal power plant in Adra, West Bengal

Acting as legal counsel to Ministry of Railways in consortium with Pricewaterhouse Coopers for selection of developer for setting up of 1320MW Coal based Thermal Power Plant at Adra, West Bengal. The scope also includes Drafting/Review of bid documents, bid evaluation, assistance on issues with regulatory tariff, environment etc.

- Rohit Jaiswal and Kunal Sabharwal

## Legal Counsel to Kolar Gold PLC, Australian Mining Company

Acting as a legal counsel to an Australian mining company for an acquisition of mining assets in India and potential fund raising on the AIM market.

- Ravi Singhanian and Sunil Kumar



## Legal Counsel to Mormugao Port Trust, Goa

Acting as legal advisor to 'Mormugao Port Trust' for "Providing Transaction Advisory Services for Development of a 4MMTPA Coal Import Terminal at Berth No. 11 at Mormugao Port" for selection of a developer.

-Ravi Singhanian and Dipak Rao

## S&P defends NHAI in an arbitration matter

S&P is defending National Highway Authority of India in an Arbitration matter where the Claimant M/s. Larsen & Toubro Limited has filed claims of more than ₹137 million. The disputes arise out of a contract related to a road/ major bridges project in the state of Andhra Pradesh. The claims pertain to issues related to delay in payment of running bills, introduction of new items during the execution of work, variations, reduction in scope of works etc.

- Shambu Sharan and Kavita Sarin

India Legal Update is published solely for the interests of clients and associations of Singhanian & Partners. This document is for general guidance only and does not constitute definitive advice. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought.  
Copyright © 2010 Singhanian & Partners.

Editor in Chief Ravi Singhanian Editor Manju Mohotra Research Associate Aakanksha Agarwal  
Delhi Shilpa Laharwal Mumbai Bidan Chandran Bangalore Shilpa Shah Hyderabad Tara Sarma