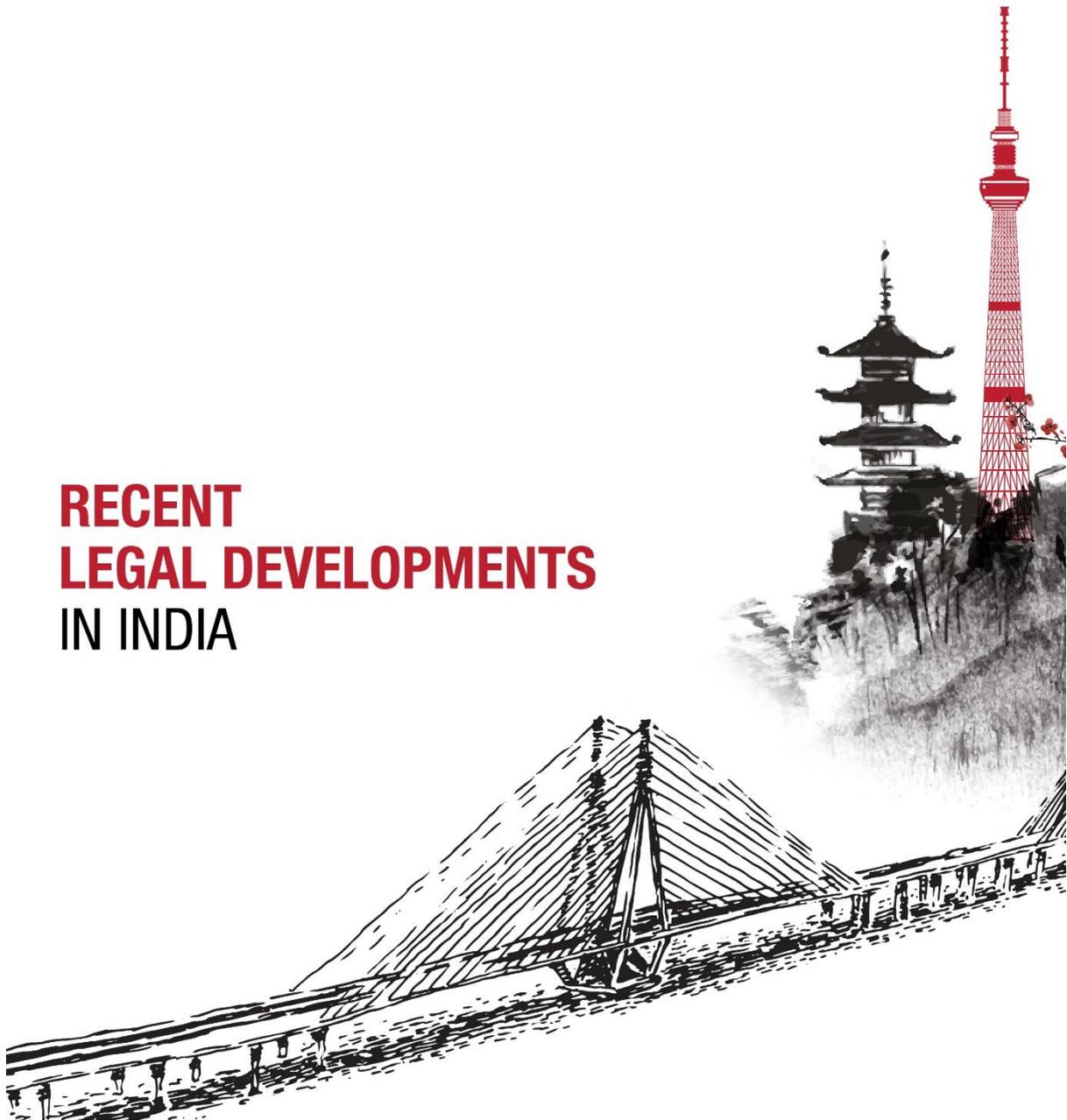


RECENT LEGAL DEVELOPMENTS IN INDIA



The IndusLaw 日本 of ニュースレター brings you the key regulatory and legal developments in various sectors in India

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A. Foreign Direct Investment - Notifications by DIPP¹ and RBI²

1. RBI

Prudential Guidelines - Banks' investment in units of REITs and InvITs

Banks are allowed to participate in Real Estate Investment Trusts ("REITs") and Infrastructure Investment Trusts ("InvITs") within the overall ceiling of 20 per cent of their net worth permitted for direct investments in shares, convertible bonds/ debentures, units of equity-oriented mutual funds and exposures to Venture Capital Funds ("VCFs") [both registered and unregistered], subject to the following conditions:

- Banks should put in place a Board approved policy on exposures to REITs/InvITs which lays down an internal limit on such investments within the overall exposure limits in respect of the real estate sector and infrastructure sector;
- Banks shall not invest more than 10 per cent of the unit capital of an REIT/InvIT; and
- Banks should ensure adherence to the prudential guidelines issued by RBI from time to time on Equity investments by Banks, Classification and Valuation of Investment Portfolio, Basel III Capital requirements for Commercial Real Estate Exposures and Large Exposure Framework, as applicable.

Full text of the guidelines is available at: <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOT12802F4E1F007E31489ABEA23B7AEAE55C85.PDF>

Setting up of IFSC Banking Units ("IBUs") - Permissible activities

RBI has made modifications to earlier RBI circular DBR.IBD.BC.14570 /23.13.004/2014-15 dated April 01, 2015, in relation to Permissible Activities for IBUs. Based on suggestions from stakeholder, RBI has made the following modification to the aforesaid circulars:

- The fixed deposits accepted from non-banks by the IBUs cannot be repaid prematurely. However, fixed deposits accepted as collateral from non-banks for availing credit facilities from IBUs or deposited as margin in favour of an exchange, can be adjusted prematurely in the event of default in repayment of the loan or meeting a margin call.
- An IBU can be a Trading Member of an exchange in the IFSC for trading in interest rate and currency derivatives segments that the banks operating in India have been allowed to undertake as per the extant RBI directions.
- An IBU can become a Professional Clearing Member (PCM) of the exchange in the IFSC for clearing and settlements in any derivatives segments.
- IBUs are allowed to extend facility of bank guarantees and short term loans to IFSC stock broking/commodity broking entities.

Full text of the notification is available at: <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10918&Mode=0>

¹ Department of Industrial Policy and Promotion or DIPP is the nodal government authority having the primary responsibility to promote foreign direct investment in India.

² Reserve Bank of India or RBI is the central bank of India. Its primary responsibility is to regulate the monetary policy of the Indian economy.

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NBFC-MFIs Interest Rate

The RBI has communicated through a press release that the applicable average base rate to be charged by Non-Banking Financial Company - Micro Finance Institutions ("NBFC-MFIs") to their borrowers for the quarter beginning April 01, 2017 will be 9.35% (nine point three five percent).

Full text is available at: <https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR264636DA14B903B84AC59819161B239673B7.PDF>

2. FDI

Investment by Foreign Portfolio Investors in Government Securities

The limits for investment by foreign portfolio investors (FPIs) in Government securities were last increased in terms of Medium Term Framework (MTF) announced vide A.P. (DIR Series) Circular No. 4 dated September 30, 2016.

The limits for investment by FPIs in Central Government Securities and State Development Loans (SDLs) for the quarter April-June 2017 are proposed to be increased by Rs. 110 billion and Rs. 60 billion respectively.

Full text of the notification is available at: <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10902&Mode=0>

B. Intellectual Property Law

CASE LAW: *Rubiks Brand Ltd & Anr. v/s Mahesh Vaman Manjrekar & Ors (Bombay HC)*

A single-judge bench of the High Court of Bombay (the "Court"), in its recent judgment *Rubiks Brand Ltd & Anr. v/s Mahesh Vaman Manjrekar & Ors*, ruled that the adoption of a well-known trade mark 'Rubik's Cube' as a title of a film by the Defendants is an act of passing off. The Court restrained the Defendants from working on film or material bearing title or name 'Rubik's Cube' and not to release the film with the name.

Background:

Rubiks Brand Ltd (the "Plaintiff"), the owner of the popular puzzle and toy branded 'Rubik's Cube', sued Mahesh Manjrekar, a notable film producer and director, and others (the "Defendants") alleging that the Defendants are passing off its well-known trade mark 'Rubik's Cube' by adopting the same as title of a proposed Marathi film.

It was argued by the Plaintiff that it has the exclusive right to market and distribute Rubik's Cube puzzle. Though there is no Indian trademark registration, the Plaintiff claimed reputation and has several international registrations for the mark 'Rubik's Cube'. The Plaintiff also contended that the mark 'Rubik's Cube' is an invented and coined word and refers to one and only one item, namely, the puzzle and toy of the Plaintiff and no one else. It was alleged that the adoption of the mark by the Defendants as a film title is an act of passing off and the same is resulting in dilution of the trade mark.

The Defendants believed that the name 'Rubik's Cube' of an extremely popular puzzle has achieved an almost legendary status in the public domain and can be freely adopted and used, including as the title of their film.

Findings:

The Court prime facie found that the adoption of the mark by the Defendants is an act of passing off. Rubik's Cube has enormous popularity and the Defendants cannot claim that they are not aware of the Plaintiff's mark.

The Court noted that the Defendants' promotion poster for the film had four of the six colours of the Rubik's Cube puzzle and the film's tagline 'you rarely get the combination right, even in love' has direct reference to the toy itself.

For these reasons, the Court held that the Plaintiff has a reputation and goodwill in the name and mark 'Rubik's Cube' and that the adoption of the mark as a film name or title is a form of misrepresentation. It leads the consumer to believe that the Defendants' film

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has something to do with the Plaintiff's mark thereby causing considerable damage to the reputation and goodwill of the Plaintiff's mark.

The Court also reiterated the principle that the intention of the Defendants is immaterial in deciding the case of passing off.

CASE LAW: *Sunil Mittal & Anr. Vs. Darzi on Call*

The High Court of New Delhi (the "Court") recently held that Mr. Sunil Mittal and Darzi (India) LLP ("Plaintiffs") had made a prima facie case in establishing trademark rights over the word DARZI and granted an injunction restraining another party from using the trade name and mark 'DARZI ON CALL'.

Background:

The Plaintiffs claimed to have started their business in 1981 under the trade name and mark, 'THE DARZI' in relation to tailoring services. The Defendant operating under the name 'DARZI ON CALL' ("Defendant") was also engaged in the same nature of services as that of the Plaintiffs. Upon knowing that the Defendant had started using an identical or deceptively similar trade name and mark 'DARZI ON CALL' as well as a stylized logo with letter 'D', the Plaintiffs issued a cease and desist notice to the Defendant claiming common law and statutory trademark rights over the name and mark THE DARZI. However, the Defendant had not stopped using the mark.

Pursuant to the same, a suit for trademark infringement and passing off was filed by the Plaintiffs. An ex parte injunction order was passed by the Court by whom the Defendant was restrained from using the trade name and marks having the word 'DARZI'.

Countering the Plaintiffs' claims and contentions, during the hearing for the interim injunction application as well as in its written statement, the Defendant claimed that its trademark was very different from the Plaintiffs' trademark which was filed for registration as 'THE DARZI' with the tagline 'The Suit People' in a composite label form.

The Plaintiffs had not claimed protection for the words 'THE DARZI' or 'DARZI' per se. The Defendant also claimed that use to the word 'DARZI' independently cannot function as a trademark as use of the same for tailoring services would make it generic and descriptive of the trade.

Findings:

The Court considered the pleadings and contentions of both the parties and squarely applied the facts of this case to the facts in *Info Edge (India) Pvt. Ltd. Vs. Shailesh Gupta* 2002 (24) PTC 355 (Del.), by which interim injunction was granted against the user of "NAUKARI.COM", at the instance of prior user of "NAUKRI.COM". Both trade names were used for the business of a job / employment portal in this case. It was held that if a product is marketed in a particular area or place under a descriptive name and has gained a reputation thereunder, the name which distinguished it from competing products will be protected against descriptive use.

The Court in the present case observed as below:

"My experience of life in the city of Delhi, to the high-end section of the society wherein both Plaintiffs and the Defendant claim to be providing tailoring services, is that the words Tailors and / or Drapers are used to describe the nature of the business being provided by a tailor under a trade name."

The Court considered that the name 'DARZI' was hence no longer descriptive or generic. Elaborating on the same, the learned Judge also said that though 'DARZI' was an Urdu word (and was an accepted term in Hindi language) for tailor, he has not come across any person or entity providing tailoring services describing it as that of a DARZI in recent times. Additionally, even the Defendant had failed to cite any example of the same.

On the basis of the above, the Court made the injunction order passed earlier absolute till the disposal of the suit.

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C. Infrastructure

CASE LAW: *Energy Watchdog & Ors. v/s. Central Electricity Regulatory Commission*³

The Supreme Court of India in *Energy Watchdog & Ors. v/s. Central Electricity Regulatory Commission* set aside the orders passed by the Appellate Tribunal for Electricity ("APTEL") dated 7 April 2016 (the "APTEL Order")⁴ and the Central Electricity Regulatory Commission ("CERC") dated 6 December 2016 (the "CERC Order")⁵ relating to compensatory tariff awards granted to certain power generating companies, mitigating an increase in costs incurred by such companies where tariffs have been determined through a process of competitive bidding.⁶

1. Background

A brief background to this matter is set out below.

- Adani Power Limited ("APL") had entered into separate power purchase agreements ("PPAs") with the Gujarat and Haryana state utilities for the supply of power. APL assumed responsibility *inter-alia* to tie up the fuel linkage and imported coal from Indonesia at applicable prices.
- Subsequently, due to an increase in the costs of coal imported from Indonesia, the PPAs became commercially unviable for Adani. The unforeseen rise in price of importing coal from Indonesia was on account of change in

law in Indonesia that took place in 2010 and 2011 (the "Indonesian Regulations")⁷ which aligned the export price of coal from Indonesia to international market prices (instead of the price that was prevalent for the last 40 years).

- As a result thereof, APL approached the CERC seeking either *discharge* from the PPAs on account of *frustration* or to restore APL to the same economic condition prior to implementation of the Indonesian Regulations.
- APL argued that the Indonesian Regulations effectively made the performance of the PPAs *impracticable* since the economic assumptions behind the bids were negated by an unprecedented and unforeseeable rise in the price of imported coal.
- The CERC initially rejected APL's claims on the grounds of *force majeure* and/or change in law. However, after constituting a committee to look into as well as find an acceptable solution for the difficulties alleged by APL, the CERC proceeded to grant a compensatory tariff.
- On appeal, the APTEL held that APL was entitled to relief, but disagreed with the CERC on the grounds that *force majeure* was made out on the facts and the CERC could not exercise its general powers to grant compensatory tariff upon the execution of the PPAs.
- The APTEL found that *inter-alia*:
 - the relief available to APL should be determined by the terms of its PPAs with the respective state distributors and that the PPAs provided *inter-alia* for a broad range of circumstances which could be defined to be an event of *force majeure*; and

³ Please refer to: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=44760>

⁴ Please refer to: <http://aptel.gov.in/judgements/Full%20Bench%20Judgment%2007.04.16.pdf>

⁵ Please refer to: <http://www.cercind.gov.in/2016/orders/155MP2012.pdf>

⁶ Tariff-based competitive bidding is a process in which the power generating companies quoting the lowest average electricity tariffs for a proposed project get to set up such a project.

⁷ *Indonesia Regulations (No. 17 of 2010)*

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- a change in Indonesian law pursuant to the Indonesian Regulations (which impacted the coal price for APL), did not constitute a change in law under the PPAs, but could constitute *force majeure*.
- The APTEL referred the matter to the CERC to consider the impact of the Indonesian Regulations and whether they could constitute a *force majeure* event, granting compensatory relief. The CERC, by its order dated 6 December 2016, arrived at a certain determination for compensatory tariff to be granted on account of *force majeure*.
- The APTEL Order and the CERC Order was challenged before the Supreme Court.

2. Key Issues

The key issues addressed by the Supreme Court are set out as below.

- 2.1 Whether the sale of electricity by a generating station in one state to a consumer in another state will qualify as a 'composite scheme' under section 79 of the Electricity Act, triggering the jurisdiction of the CERC? ("Issue 1")
- 2.2 Whether the rise in fuel prices caused by the Indonesian Regulations qualify as a 'Force Majeure Event' rendering the PPAs frustrated or impossible for performance? ("Issue 2")
- 2.3 Whether a change in law in India or a change in law in Indonesia will qualify as a 'change in law' under the PPAs? ("Issue 3")

3. Analysis

3.1 Issue 1

In addressing Issue 1, the Supreme Court held that where a tariff was determined by a transparent process of bidding by power companies in India, such tariff must be in

accordance with the guidelines issued by the Central Government.

The relevant PPAs, which dealt with the generation and supply of electricity, were governed either by: (i) the State Commission, in case the generation and supply takes place within the *same* State; or (ii) the CERC in case the generation and sale takes place between more than one State.

The Supreme Court held that in case of inter-State supply, the transmission or wheeling of electricity will qualify as a 'composite scheme' as in such cases, the generation and sale of electricity occurs in more than one State. Further, the CERC, while exercising its jurisdiction in such cases, the Supreme Court noted that the CERC was bound by guidelines issued by the Central Government.

3.2 Issue 2

In case of *force majeure*, the Supreme Court cited various English and Indian case-law and held that a case of 'frustration of a contract' under section 56 of the Indian Contract Act, 1872 *cannot* be made merely on the grounds of onerous performance or one mode of performance becoming impossible to perform.

If there are *alternative* modes of performance, it will not be a case of frustration under such contract. An event of *force majeure* leading to the frustration of a contract may be derived only in case of an unforeseen event or circumstance that wholly or partly prevents the affected party in the performance of its obligations under such contract.

The Supreme Court, also held that the mere rise in the price of coal will not amount to frustration of the PPAs. Further, as APL voluntarily agreed to quote energy charges as non-escalable (in order to be competitive) to procure the award of the contract, the change in price of the raw material cannot be held to constitute *force majeure*.

3.3 Issue 3

The Supreme Court held that a change in *Indonesian* law does not qualify as a 'change in law' in India under the guidelines issued by

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the Central Government read along with the PPAs and took the view that the term 'all laws' provided in the PPAs would only include the laws of India, including electricity-related laws unless any specific reference to foreign laws has been made.

In this context, it is pertinent to note that the Supreme Court rejected the contention of the power generators that in every other clause of the PPA, references had explicitly been made to 'Indian Law' and stated that as such it would be unsafe to rely upon such other clauses of the PPAs.

However, a change in the *coal policy* of the Indian Government leading to economic implications and affecting the manner and extent to which coal is sourced will amount to a 'change in law' clause in the PPAs.

The Supreme Court also held that the modification of the New Coal Distribution Policy, pursuant to a letter dated 31 July 2013 issued by the Ministry of Power and the revised tariff policy dated 28 January 2016, did amount to a change in Indian law and would be covered by the 'change in law' clause in the PPAs.

Therefore, in the case of such 'change in law' in India, the power generator will be entitled to compensatory tariff to the limited extent of the impact of the change in the policy and will be effective from such date as decided by the CERC.

4. IndusLaw View

This landmark judgement by the Supreme Court drives home and settles the point that only the CERC will have jurisdiction over disputes relating to generating companies and power purchase agreements for the supply of electricity to more than one state. The judgement also underlines that the CERC will be governed by the guidelines issued by the Central Government and can grant relief in the exercise of its regulatory powers only with respect to power purchase agreements.

The Supreme Court has further cast in stone that a mere *rise* in price of a raw materials cannot be construed to be a case of *frustration*

or *force majeure*. It is amply clear from the judgement that an unexpected rise in the price of coal will not absolve generating companies from performing their obligations under a contract, in particular, since such power generators factor in such commercial risks in the bid process.

The key take away from this judgement is that generally, a party will not be absolved from performing its contractual obligations, simply because its performance has become more *onerous* on account of unforeseen turn of events. Power generating companies will not be able to seek a revision in electricity tariffs merely because of a change in the cost of procurement of fuel sources.

The judgement is likely to lead to power companies to become much more cautious in agreeing to non-escalable rates in their PPAs while quoting energy charges in a process of competitive bidding. While hedging for currency fluctuations in case of the supply of off-shore resources is a common occurrence, bidders should carefully consider whether hedging for *change in law* is commercially available in the market.

Given the Supreme Court's comments on the meaning of law in the PPA, project developers would be advised to expressly negotiate that a change in law includes a change in law in a foreign jurisdiction to mitigate supply chain risk and we question to what extent the Supreme Court's judgement may have been different if the definition of *law* in the *change in law* clause was expressly defined to include the laws of Indonesia in the context of APL's fuel supply linkages.

D. Insurance

The Insurance Regulatory and Development Authority of India ("IRDAI") has notified the Insurance Regulatory and Development Authority of India (Payment of commission or remuneration or reward to insurance agents and insurance intermediaries) (First Amendment) Regulations, 2017 which inter alia replaces Regulation 5(f) of the Insurance Regulatory and Development Authority of India (Payment of commission or remuneration or reward to insurance agents

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and insurance intermediaries) Regulations, 2016 with the following provision:

“The maximum rate of commission or remuneration payable by an insurer shall not exceed either: -

- *The maximum specified by these regulations; or*
- *Any other rate of commission or remuneration approved by the Authority under any other Regulations or guidelines whichever is lower.”*

Full text of the notification is available at:

https://www.irdai.gov.in/ADMINCMS/cms/whatsNew_Layout.aspx?page=PageNo3134&flag=1

E. Employment Law

On April 12, 2017, through Employees' Provident Funds (Fourth Amendment) Scheme, 2017, a new provision Rule 68BD has been inserted in the Employees' Provident Funds Scheme, 1952, which provides that a member of Employees' Provident Fund (EPF) being a member of a co-operative society or a housing society having at least 10 members of EPF, can withdraw upto 90 per cent from the fund for purchase of dwelling house/flat or construction of dwelling house/acquisition of site.

Full text of the amendment is available at:

<http://www.labour.nic.in/sites/default/files/Notification%20for%20insertion%20of%20para%2068BD%20%28group%20housing%20provisions%20for%20EPF%20subscribers%29%20in%20EPF%20Scheme%2C%201952.pdf>

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