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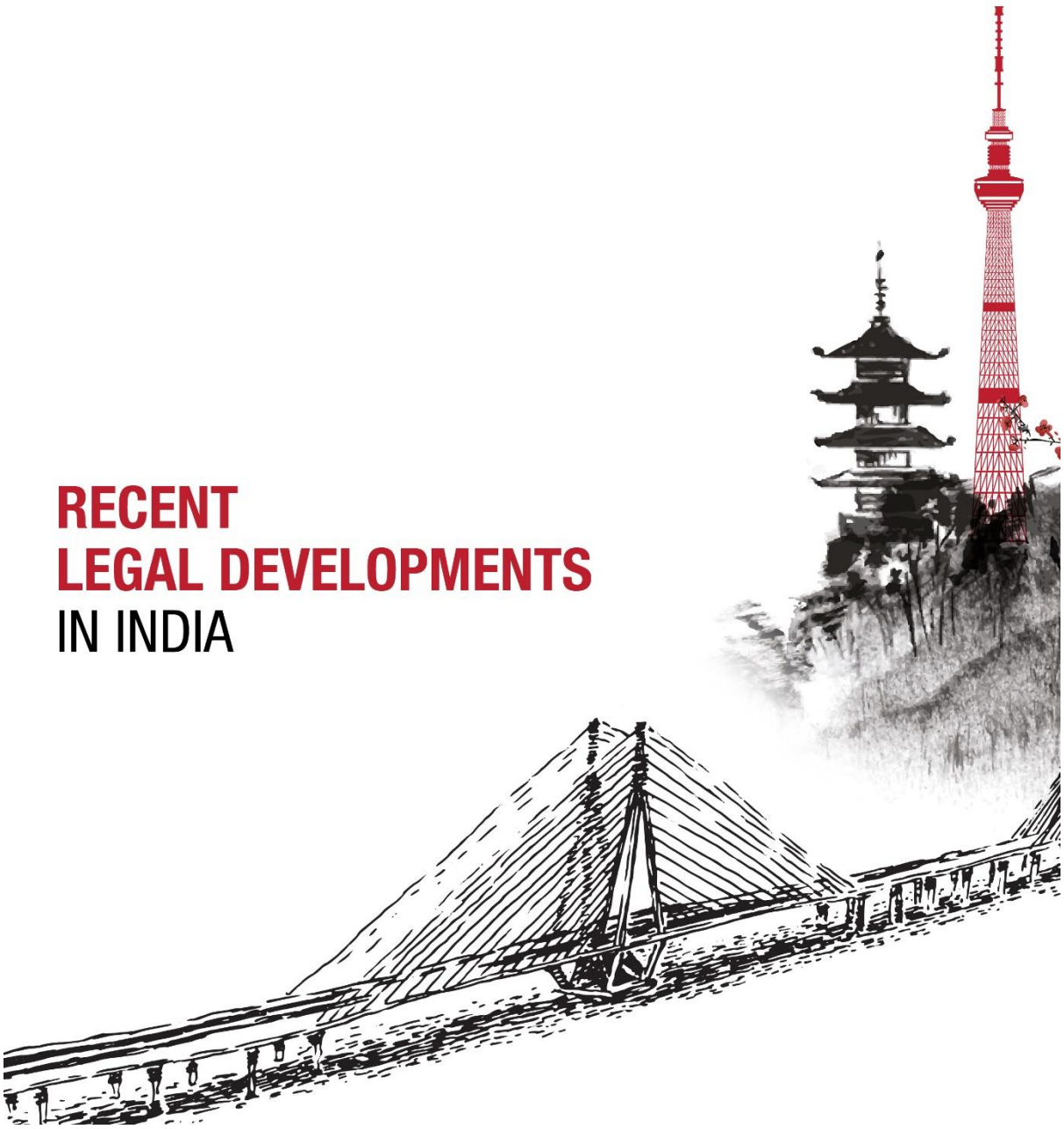
RECENT LEGAL DEVELOPMENTS IN INDIA



INDUSLAW 日本のニュースレター

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INDUSLAW 日本のニュースレター brings you key regulatory and legal developments across various sectors in India occurring over the last three months.

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1. 銀行および金融

1.1. RBI が新たな 対外商業借入の方針を公表

2019 年 1 月 16 日、インド準備銀行[1]（RBI）が改訂後の対外商業借入の方針（**新しい ECB の方針**）を公表した。

RBI は通貨に応じて ECB を介した起債の二層構造を導入した（外貨建て ECB とルピー建て ECB）。 新しい ECB の方針の主な特徴は以下のとおりだ。

(i) ルピー建ての借入の借り換えおよび返金する機能が縮小され、外国資本所有者からの会社間貸付を介して ECB を調達する場合のみ許容されるようになった。

(ii) 借入の金額にかかわらず、全ての ECB の最短平均償還期間は 3 年。

(iii) 既存の部門に関する制限は差し替えられ、全ての資格のある借り手は自動ルートにおいて特定の会計年度に最大 7 億 5,000 万米ドル、または、同等の金額の ECB を調達することが可能。

2. 資本市場とグローバルオファリング

2.1. 資本調達とテクノロジースタートアップのインスティテューショナル・トレーディング・プラットフォームへの上場

2018 年 12 月 12 日、インド証券取引委員会（**SEBI**）[2]は「2018 年資本の発行と開示条件の規制（**ICDR 規制**）」のインスティテューショナル・トレーディング・プラットフォーム（**ITP**）に関連する規制に対する修正を原則承認した。

主な修正点を以下に挙げる。

(i) 発行人の ITP 上場の有資格条件が改訂された。資格を持つスタートアップが ITP に上場するには、少なくとも 2 年にわたり事前に発行した資本の 25%が（a）適格機関投資家、（b）50 億ルピー以上の自己資本を持つ家族信託、（c）カテゴリーIII の海外証券投資家、（d）1 億 5,000 万ドル以上の運用資産を持ち、管轄区域で金融セクターの監督機関に登録している合同運用投資ファンドのいずれかによって保有されている必要がある。

(ii) 企業の発行後の資本の 25%以上を一人の人物が個人で、または、数名が協力して保有することを禁止する制限が解除された。

(iii) 最少応募および最少売買単位がそれぞれ 20 万インドルピーおよび 20 万インドルピーの倍数に引き下げられた。

(iv) 公募に準じた上場の場合の割当先の最小数が 200 から 50 に引き下げられた。

(v) 公募価格の最小額が 10 億インドルピーから 1000 万インドルピーに引き下げられた。

3. 最高裁が Monsanto の特許を回復

2019 年 1 月 8 日、インド最高裁はデリー高等裁判所の判決を覆した。デリー高等裁判所は雑種種子の遺伝子組み換え技術に対する Monsanto の特許には特許性がないと判断していた。インド最高裁はこの判決について、この決定に至るまでに求められる基準に達するほど特許性の問題が十分に精査されていなかったことを理由に挙げていた。

最高裁は、このような技術的な課題を解決するためには、化学、生化学、バイオ技術および微生物学のプロセスに関する技術的証拠および鑑定書が必要だと指摘した。デリー高等裁判所の裁判官は、最終的な段階においてこのよ

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[1] *インド準備銀行（RBI）はインドの中央銀行である。インド経済の金融政策の規制を主な任務とする。*

[2] *インド証券取引員会（**SEBI**）は証券における投資家の利益を守り、1992 年インド証券取引委員会法の規定に従って、証券市場の発展の推進、および、規制を行うために設立された。*

うな証拠を検討した後、特許の妥当性について決定すべきであった。

4. 政府と規制、テクノロジー、メディアと通信

4.1. 新しい小売支払いシステムの認可に関するRBIの方針書

5. 財政の安定の観点から小売支払いシステムへの市場集中リスクを軽減し、イノベーションと競争を促すため、RBIはより多くのプレーヤーが全インドの支払いプラットフォームへ参加し、推進する上での今後の手順を解説する方針書を公表した。

1. BANKING AND FINANCE

1.1. RBI ISSUES A NEW EXTERNAL COMMERCIAL BORROWING POLICY

Introduction

Towards the end of last year, the Reserve Bank of India[3] (the "**RBI**") in its Statement on Developmental and Regulatory Policies [4] proposed to consolidate regulations governing all types of borrowing and lending transactions between a person resident in India and a person resident outside India in both foreign currency and Indian Rupee ("**INR**"). Pursuant to the statement, the RBI notified the Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 (the "**Regulations**") on December 17, 2018 superseding the previous regulations.

With the intent of further improving the ease of doing business in India, in line with the revised Regulations and to further rationalise the existing framework for external commercial borrowings ("**ECB**") and INR denominated bonds, the RBI issued a revised ECB policy (the "**New ECB Policy**")[5] on January 16, 2019. The New ECB Policy has come into effect immediately.

Key Features

Change in Structure

The previous framework for raising loans through ECB consisted of three tracks and a regime for Rupee denominated bonds (commonly known as masala bonds) listed on foreign debt exchanges. In particular, that framework essentially provided for: (a) Medium term foreign currency denominated ECB with minimum average maturity of 3 (three) to 5 (five) years, except in the case of manufacturing sector companies who could raise foreign currency denominated ECBs with a minimum average maturity period of only 1 (one) year ("**Track I**"); (b) Long term foreign currency denominated ECB with minimum average maturity of 10 (ten) years ("**Track II**"); (c) INR denominated ECB with minimum average maturity of 3 (three) to 5 (five) years, except in the case of manufacturing sector companies who could raise INR denominated ECBs with a minimum average maturity period of only 1 (one) year ("**Track III**"); and (d) INR denominated bonds issued by an Indian entity in foreign markets of which the interest payments and principal reimbursements were denominated in rupees ("**Rupee Denominated Bonds**").

The New ECB Policy has collapsed the existing four-tiered structure into just two tiers, depending on the currency. Tracks I and II have been merged into the category Foreign Currency Denominated ECB ("**FC ECB**"). Track III and Rupee Denominated Bonds have been merged into the category Rupee Denominated ECB ("**INR ECB**").

This new framework is now instrument neutral and we note that in

[3] *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.*

[4] Available at: https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=45658

[5] A.P. (DIR Series) Circular No. 17 available at https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11456&Mode=0

particular, in relation to INR ECB, it includes both the private placement or listing of Rupee denominated bonds overseas. The New ECB Policy further clarifies that it shall not apply to investments in non-convertible debentures in India made by registered foreign portfolio investors ("**FPIs**").

Expansion in the List of Eligible Borrowers

The previous framework provided for a specific list of eligible borrowers under each track. The New ECB Policy, however, permits a wider set of end-users to tap overseas markets for loans. The list has now been expanded to include all entities eligible to receive foreign direct investment ("**FDI**"), essentially permitting them to borrow through the ECB route.

Additionally, Port Trusts, Units in SEZs, SIDBI, EXIM Bank, registered entities engaged in micro-finance activities, (including registered not for profit companies, registered societies and trusts, cooperatives and non-government organisations) can also borrow under the New ECB Policy.

In the context of eligible borrowers, we would stress that the language of the New ECB Policy refers to entities eligible to receive FDI and therefore we query to what extent the Indian borrower actually has to have any FDI.

On the assumption that it does not, the new framework is considerably more liberal than the previous regime. It should also be noted that the New ECB Policy contains a specific section on ECB for start-ups, subject to a cap on borrowings of USD 3,000,000 (United States Dollar Three Million) per year.

Recognised Lenders

Under the New ECB Policy, recognised lenders are required to be a resident of a country which is FATF or IOSCO compliant and multilateral and regional financial institutions will also be recognised, if India is a member country. Individuals will also be recognised lenders, to the extent that they are foreign equity holders, or they subscribe for bonds or debentures listed abroad. Generally, these changes increase the number of lending options available for borrowers and should further allow the entry of new lenders.

End Use Restrictions

Under the New ECB Policy, we note that the end restrictions on the use of ECB are broadly similar to the previous framework: real estate activities; investments into the capital markets; equity investments; and on-lending remain prohibited. We do draw your attention to the permissible use by an Indian borrower of ECB for both working capital and general corporate purposes, if it is raised from a foreign equity holder.

However, the ability to refinance and repay other Rupee denominated loans has been narrowed and it is now only permissible if the ECB is raised through an inter-company loan from a foreign equity holder. We note that for the purposes of the New ECB Policy, a foreign equity holder is defined to mean:

- a direct foreign equity holder, holding at least a 25% (twenty-five per cent) equity in the Indian borrower; or
- an indirect foreign equity holder, holding a minimum 51% (fifty-one per cent) indirect equity holding in the Indian borrower; or
- a group company with a common

overseas parent.

Minimum Average Maturity Period

The previous framework provided for multiple minimum average weighted maturities, depending upon the amount of borrowing. However, under the New ECB Policy, the RBI has kept the minimum average maturity period at 3 (three) years for all ECBs, irrespective of the amount borrowed.

Nevertheless, if a manufacturer raises overseas debt of up to USD 50,000,000 (United States Dollar Fifty Million) in a financial year, the minimum average maturity period will be 1 (one) year. Further, any ECBs raised from a foreign equity holder utilised for specific purposes [6] will have a minimum average weighted maturity of 5 (five) years.

Borrowing Limit

The previous framework provided for individual limits for the amount of ECB which may be raised in a financial year under the automatic route. ECB proposals beyond those limits came under the approval route.

Under the New ECB Policy, existing sector wise limits have now been replaced, and all eligible borrowers may now raise ECBs of up to USD 750,000,000 (United States Dollar Seven Hundred and Fifty Million) or its equivalent in any particular financial year under the automatic route. In the case of any FC ECB inter-company loan raised under the automatic route from a direct foreign equity holder, note that the ECB liability to equity ratio cannot exceed 7:1. However, an exception has been made in the context where existing ECB liabilities (in aggregate with the new loan) of less than USD 5,000,000 (United States Dollar Five Million). Note further that any applicable sectoral debt to equity caps also need to be observed.

IndusLaw View

While the New ECB Policy is part of the on-going efforts of the Government of India to rationalise and liberalise multiple regulations framed under the Foreign Exchange Management Act, 1999, it raises some interesting consequences.

The Government appears to be opening up the debt market to attract potential foreign currency inflows by significantly expanding the list of eligible borrowers. While prima facie, this might be a positive step forward, in light of potential currency depreciation against the dollar, Indian borrowers will need to carefully consider hedging options and the cost of those hedging options to protect against future currency risk.

The additional requirement imposed on recognised lenders to be a resident of FATF or IOSCO compliant countries should strengthen the anti-money laundering and anti-terrorism financing frameworks, though having said that, in the case of inter-company loans, there appears to be no requirement for the foreign equity holder to be resident in such a compliant jurisdiction.

Notwithstanding the relaxation of the rules, and the encouraging

[6] Please refer to point 2.1(v) of the New ECB Policy available at: https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11456&Mode=0

developments generally in the insolvency resolution process, foreign lenders are likely to continue to view the difficulty in enforcing security in an event of default situation, question marks relating to mandatory prepayment events occurring during any lock-in period and the complexity of entering into water-tight intercreditor relationships with existing lenders as lingering concerns.

Critically, refinancing options for Indian corporates have essentially been narrowed. Under the previous ECB framework, companies were able to refinance rupee denominated debt with Track II or Rupee Denominated Bonds. However, under the New ECB Policy, Rupee denominated debt can now only be refinanced in the local market, or through an intercompany loan from a foreign equity holder.

Finally, with a view to further rationalising the regulation of debt instruments in general, we would recommend reviewing the ECB framework in the context of the regime for subscription for non-convertible debentures by FPIs. In particular, we raise the question about the intent and purpose of continuing separate tracks?

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1.2. RBI ISSUES GUIDELINES FOR TOKENISATION OF PREPAID CARD TRANSACTIONS

The RBI has released guidelines on the tokenisation for debit, credit, and prepaid card transactions as a part of its continuous endeavour to enhance the safety and security of the payment systems in the country.[7] Tokenisation involves a process in which a unique token masks sensitive card details. Thereafter, in lieu of actual card details, this token is used to perform card transactions in contactless mode at Point Of Sale (POS) terminals, Quick Response (QR) code payments, and other similar mechanisms.

These guidelines permit authorised card payment networks to offer card tokenisation services to any token requestor (including third party app providers), subject to conditions enumerated in these guidelines. A card holder may avail these services by registering the card on the token requestor's app after giving explicit consent. No charges shall be recovered from the customer for availing this service.

All extant instructions of the RBI on safety and security of card transactions, including mandate for Additional Factor of Authentication (AFA) and PIN entry shall be applicable for tokenised card transactions also.

1.3. RBI POLICY PAPER ON AUTHORISATION OF NEW RETAIL PAYMENT SYSTEMS

With a view to minimize the market concentration risk in retail payment systems, from a financial stability perspective and to foster innovation and competition, the RBI has published a policy paper outlining potential steps to encourage more players to participate in and promote pan-India payment platforms[8]. Some of the policy measures proposed are:

- Permitting multiple entities to

[7] Available at: https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11449&Mode=0

[8] Available at: https://rbi.org.in/scripts/PublicationReportDetails.aspx?UrlPage=&ID=918

provide operations (either for similar payment services or distributing payment services across multiple entities) to aid increased competition. It was noted that a number of payment systems are restricted to single operator which was seen as having systematic and operational risk.

- Permitting receipt of applications for all payment systems open on-tap and prescribing of specific "point of arrival" metrics so that entities unable to achieve capacity and scale within a defined time-line can exit.
- Liberalize entry point norms including review of the entry point capital (net-worth) requirement, by a judicious approach of reduction depending on the risk levels of the respective system and an analysis of capability-potential of the entities.
- It was also suggested that payment systems should have: (i) physical presence in the country, (ii) impeccable track record, and (iii) to conform to the best overall standards including those pertaining to customer service and efficiency.

The RBI is now taking a public consultation of the policy paper to obtain the views of stakeholders and members of public. The last date to submit the comments is February 20, 2019.

2. CAPITAL MARKETS AND INTERNATIONAL OFFERINGS

CAPITAL RAISINGS AND LISTINGS FOR TECH START-UPS ON THE INSTITUTIONAL TRADING PLATFORM

Introduction

In 2015, the Securities and Exchange Board of India[9] ("**SEBI**") framed the regulatory framework for the Institutional Trading Platform (the "**ITP**"), a stock exchange platform for start-ups in the technology sector, by introducing amendments to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (the "**ICDR Regulations**").

The objective of these amendments was to enable the listing of new age start-ups in sectors such as e-commerce, data analytics, bio-technology and other technologically driven industries, providing an opportunity for the public to invest in these start-ups, and create an additional source of funding, generally limited to venture capitalists and private equity funds. Although there was and has been a growing interest among start-ups to list, the framework had a tepid market response as the norms framed therein still required start-ups to comply with the complex requirements under the ICDR Regulations.

Earlier in June, 2018, to address issues relating to the ITP framework, SEBI constituted a group, which included representatives from the Indian

[9] *The Securities and Exchange Board of India or **SEBI** was established to protect the interests of investors in securities and to promote the development of, and to regulate the securities market in accordance with the provisions of the Securities and Exchange Board of India Act, 1992.*

Software Product Industry Round Table (ISPIRT), The Indus Entrepreneurs (TIE), the Indian Private Equity and Venture Capital Association (IVCA), law firms, merchant bankers and stock exchanges, to look into and review the ICDR Regulations with the objective to simplify the process for listing start-ups in India. The group held extensive consultations with stakeholders and submitted its recommendations to the Primary Market Advisory Committee (the "**PMAC**") of SEBI and based on those recommendations, SEBI published a consultation paper containing certain proposals for changes to the ITP framework seeking public comments. Taking into consideration PMAC's recommendations and public comments on the consultation paper, the board of directors of SEBI (the "**Board**") in their board meeting on December 12, 2018, provided its in-principle approval for amendments to the regulations relating to the ITP in the ICDR Regulations as set out below.

The Approved Amendments

Renaming the Platform

The Board approved the proposal to rename the platform as the 'Innovators Growth Platform' (the "**IGP**"). The change in name is aimed to provide clarity and position the platform for new age start-ups.

Eligibility

Existing Provision

Regulation 283 of the ICDR Regulations provides for the eligibility conditions for issuers to be listed on the ITP, which essentially included: (i) an issuer which intensively uses technology, information technology, intellectual property, data analytics, bio-technology or nano-technology to provide products, services or business platforms with substantial value addition ("**Eligible Start-ups**") and at least 25% (twenty five per cent) of its pre-issued capital is held by qualified institutional buyers as on the date of filing of the draft information document or draft offer document with the Board, as the case may be; or (ii) any other issuer in which at least 50% (fifty per cent) of the pre-issued capital is held by qualified institutional buyers as on the date of filing of the draft information document or draft offer document with the Board, as the case may be ("**Other Eligible Start-ups**").

Approved Amendment

The Board approved the proposal of retaining the definition of "Eligible Start-ups". Further, the Board approved the proposal to amend the eligibility criteria pertaining to investors in Eligible Start-ups. As per the approved new eligibility norms, for an Eligible Start-up to list on the IGP, 25% (twenty five per cent) of its pre-issued capital, for at least a period of 2 (two) years, should have been held by: (i) a Qualified Institutional Buyer; (ii) a Family trust with net-worth of more than INR 5,000,000,000 (Indian Rupees Five Billion) (approximately ; (iii) a Category III Foreign Portfolio Investor; (iv) a pooled investment fund with minimum assets under management of USD 150,000,000 (United States Dollar One Hundred and Fifty Million) and registered with a financial sector regulator in the jurisdictions where it is resident. The fund should be a resident of a country whose securities market regulator is a signatory to the International Organization of Securities Commission's Multilateral Memorandum of Understanding

(Appendix A Signatories) or a signatory to a bilateral memorandum of understanding with SEBI and not a resident in a country identified in the public statement of Financial Action Task Force as deficient in anti-money laundering and combating financing of terrorism; (v) Accredited Investors ("**AIs**") for the purpose of the IGP, shall include: (a) any individual with total gross income of INR 5,000,000 (Indian Rupees Five Million) annually and who has a minimum liquid net worth of INR 50,000,000 (Indian Rupees Fifty Million); or (b) any body corporate with net worth of INR 250,000,000 (Indian Rupees Two Hundred and Fifty Million). However, not more than 10% (ten percent) of the pre-issued capital of the issuer can be held by AIs.

Cap on Holding the Post-Issued Capital

Existing Provision

Regulation 283(2) of ICDR Regulations stipulates that no person, individually or collectively with persons acting in concert, shall hold 25% (twenty five percent) or more of the post-issued capital in the company.

Approved Amendment

The Board approved the proposal to delete the existing requirement, capping the holding of not more than 25% (twenty five percent) of the post-issued capital by any person, individually or collectively with persons acting in concert, in the company.

Minimum Application and Trading Lot Size

Existing Provision

Pursuant to Regulation 286 of the ICDR Regulations, the minimum application size for an issuer to be listed on the ITP shall be INR 1,000,000 (Indian Rupees One Million). Similarly, pursuant to Regulation 289, the minimum trading size lot of the issuer shall be INR 1,000,000 (Indian Rupees One Million).

Approved Amendment

The Board approved to amend Regulation 286 and Regulation 289 of the ICDR Regulations and reduced the minimum application and trading lot size to INR 200,000 (Indian Rupees Two Hundred Thousand) and in multiples of INR 200,000 (Indian Rupees Two Hundred Thousand) thereof.

Minimum Reservation for Specific Category of Investors

Existing Provision

For listing pursuant to a public offer, Regulation 287(2)(a) and (b) of the ICDR Regulations mandates that the allocation in the net offer to public category shall be in such manner that 75% (seventy-five per cent) of the net public offer should be allocated to institutional investors and the remaining 25% (twenty-five per cent) to non-institutional investors.

Approved Amendment

The Board has approved the proposal to remove the need to have a minimum reservation for a specific category of investors in case of a net offer to public and as such there shall not be any requirement of minimum reservation of allocation to specific categories of investors.

Minimum Number of Allottees

Existing Provision

Regulation 287(1) of the ICDR Regulations stipulates that the number

of allottees shall be more than 200 (two hundred) in case of a listing pursuant to a public issue.

Approved Amendment

The Board has approved the proposal to drop the minimum number of allottees from 200 (two hundred) to 50 (fifty) in case of a listing pursuant to a public issue.

Minimum Offer to Public

Existing Provision

Regulation 31 of ICDR Regulations provides that the minimum offer to the public shall be subject to the provisions of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulations) Rules, 1957 (the "**SCRR**") requiring a minimum offer size of INR 1,000,000,000 (Indian Rupees One Billion).

Approved Amendment

The Board has approved the proposal, reducing the minimum size of the offer to the public from INR 1,000,000,000 (Indian Rupees One Billion) to INR 10,000,000 (Indian Rupees Ten Million). However, such minimum net offer by the issuer to the public should be in compliance with the minimum public shareholding requirements mandated under rules 19(2)(b) and 19A of the SCRR read with regulation 38 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (the "**LODR Regulations**"). Regulation 38 of the LODR Regulations requires a listed entity to comply with the minimum public shareholding requirements as specified in rule 19(2) and rule 19A of the SCRR. In particular, clause (b) of sub-rule (2) of rule 19 of SCRR lays down limits of minimum offer and allotment to the public and rule 19A lays down requirements for maintaining a minimum public shareholding at 25% (twenty-five per cent).

Migration to the main board

Existing Provision

Under Regulation 292, an entity listed on the ITP may, at its option, migrate to the main board of that after expiry of 3 (three) years from the date of listing, subject to compliance with the eligibility requirements of the stock platform.

Approved Amendment

The Board has approved the proposal that the IGP be designated as the main board platform for start-ups with an option to trade under the regular category after completion of 1 (one) year of listing, subject to compliance with exchange requirements.

IndusLaw View

By giving in-principle approval, SEBI has brought about much needed amendments to the provisions of the ICDR Regulations pertaining to the ITP. However, by retaining the definition of Eligible Start-ups, SEBI has lost the opportunity of expanding the scope of Eligible Start-ups who can be listed on the IGP to include all start-ups in India irrespective of their business model or sector that they deal in. The Board's approval to widen the eligibility norm for investors should provide the opportunity for most Eligible Start-ups to list themselves on the IGP.

The shareholding structure of the majority of Eligible Start-ups in India is generally diverse and there are hardly any Eligible Start-ups that would be funded by institutions falling under

the definition of a Qualified Institutional Buyer, to the extent of 25% (twenty-five percent) of the pre-issued capital. The inclusion of family trusts and accredited investors is a welcome step for angel investors and offshore funds who often constitute the majority investors in the early stages of Eligible Start-ups. However, the proposed amendments approved by SEBI are silent about the applicability of certain relaxations provided to Eligible Start-ups to Other Eligible Start-ups.

Clearly, by reducing the number of allottees, the minimum size of the trading lot and the application size, the Board wants more Eligible Start-ups to list themselves on IGP. The new approved amendments should bring relief to promoters and other investors who want to retain a majority holding, since they don't have to dilute their shareholding after an issue below 25% (twenty-five percent). The provisions in relation to migration to the regular board of the stock exchange, with a reduced timeline of 1 (one) year, certainly provides a shot in the arm for the start-up ecosystem in India and the IGP should provide a welcome alternative to those companies who are looking to broaden their potential funding avenues.

Authors: Anupam Prasad | Saksham Madan

3. INTELLECTUAL PROPERTY

3.1. SUPREME COURT SETS ASIDE DELHI HIGH COURT JUDGMENT, RESTORES MONSANTO'S PATENT

Introduction

On January 8, 2019, the Supreme Court of India over-ruled a decision of the Delhi High Court, which held that Monsanto's patent for technology to genetically modify hybrid seeds was unpatentable, on the grounds that it had not sufficiently examined the question of patentability to the required standard, in reaching such a decision.

Background

Monsanto had licensed its Bollgard Technology to Indian seed companies, including Nuziveedu Seed Limited ("**Nuziveedu**"), Prabhat Agri Biotech Limited and Pravardhan Seeds Private Limited. Under the license agreement, these companies were supposed to sell certain seeds and pay a contractually-agreed trait value to Monsanto. Later on, these seed companies demanded a reduction of this trait value because the Indian central and state governments passed new price control orders fixing trait fees and the retail prices of seeds.

Since Monsanto refused to reduce the trait value, in October 2015, a group of 8 (eight) Indian seed companies, including Nuziveedu, stopped paying royalties to Monsanto. In response, Monsanto terminated their license agreements and in 2016, filed a suit in the Delhi High Court against Nuziveedu and the others, seeking an injunction against them for patent and trademark infringement. During the pendency of the proceedings, the defendants filed a counter-claim seeking revocation of the patent. The single judge of the Delhi High Court (the "**Single Judge**"), without getting into the issue of the validity of the patent, in view of the counter-claim at the interim stage, held Monsanto's termination of the contract illegal, and allowed Nuziveedu and the others to continue using the technology, provided that the trait value was paid

till the suit was finally disposed of.[10] Monsanto and the Indian seed companies preferred appeals against the order of the Single Judge before a division bench of the Delhi High Court (the "**Division Bench**").

Surprisingly, the Division Bench, through its judgment dated April 11, 2018, revoked the patent and in particular, the Division Bench held as follows:

"*98 …transgenic plants with the integrated Bt. Trait, produced by hybridization (that qualifies as an "essentially biological process" as concluded above) are excluded from patentability within the purview of section 3(j), and Monsanto cannot assert patent rights over the gene that has thus been integrated into the generations of transgenic plants*."

This judgment of the Division Bench was challenged by Monsanto before the Supreme Court.

Issues for Consideration Before the Supreme Court

The Supreme Court did not decide on the issue of whether the patent falls under Section 3(j) of the Indian Patents Act, 1970 (the "**Patents Act**"), which excludes plants, animals and essentially biological processes for the production of plants and animals from patent protection. The Supreme Court based its judgment on the following two issues:

- whether Monsanto had consented to a summary adjudication regarding the validation of its patent ("**Issue 1**"); and
- whether the Division Bench was correct in invalidating the patent without a trial ("**Issue 2**").

Analysis by the Court and Judgment

Decision on Issue 1

While dealing with Issue 1, the Supreme Court agreed with Monsanto's arguments that there is no reason for Monsanto to have consented to a summary adjudication of an existing patent, and to have risked losing the same, without being granted an opportunity to lead evidence to oppose the counter-claim. The Supreme Court held as follows:

"*9. The plaintiffs had never consented to a summary adjudication regarding the validity of its patent. The consent referred to by the Division Bench, had been given only to decide whether the plaintiffs' patent had been infringed or not, as also the scope of the patent, so as to allow or disallow the relief of injunction. It is incomprehensible that the plaintiffs holding a valid registered patent under the Act nonetheless would have agreed to a summary consideration and validation or invalidation of the patent.* "

The Supreme Court also held that the Division Bench should not have assumed the powers of the Single Judge, and should have confined its adjudication to the question on whether the grant of an injunction was justified.

Decision on Issue 2

With respect to Issue 2, the Supreme Court observed that the Division Bench had erred by going into complex issues of facts without the benefit of expert evidence through a trial. In fact, the defendants had contended in their

[10] Monsanto Technology LLC & Ors. vs. Nuziveedu Seeds Ltd. & Ors., CS(COMM) 132/2016. Order dated March 28, 2017.

appeal that the issues were complicated, and required expert evidence to be considered in a full-fledged trial. The Supreme Court, therefore, held the following:

"*22. The Division Bench ought not to have examined the counter-claim itself usurping the jurisdiction of the Single Judge to decide unpatentability of the process claims 1-24 also in the summary manner done. Summary adjudication of a technically complex suit requiring expert evidence also, at the stage of injunction in the manner done, was certainly neither desirable or permissible in the law. The suit involved complicated mixed questions of law and facts with regard to patentability and exclusion of patent which could be examined in the suit on basis of evidence.*"

Section 64 of the Patents Act provides for the revocation of a patent, based on a counter-claim in a suit. It presupposes a valid consideration of the claims in the suit. Therefore, the counter-claim cannot be adjudicated summarily without recording the evidence of all the parties, as was erroneously done by the Division Bench.

In this case, the Division Bench's error was even more serious, given that the counter-claim for the revocation of the patent was neither argued nor adjudicated by the Single Judge. In fact, the Supreme Court clarified that the Single Judge was correct in not considering the counter-claim in the injunction order dated March 28, 2017.

Conclusive Decision

The Supreme Court held that the issue regarding the exclusion of the patent under Section 3(j) of the Patents Act was a heavily mixed question of law and facts, which required formal proof and expert evidence. Given that this issue was pending before the Single Judge, the Division Bench should not have proceeded to decide the validity of the patent. In view of the above, the Supreme Court upheld the nature of the injunctive relief granted by the Single Judge, and held that the relief granted merited no interference during the pendency of the suit. The Supreme Court, while restoring the patent, remanded the suit to the Single Judge for disposal, in accordance with law.

IndusLaw View

The present dispute between the parties is complex in nature, involves various issues, including:

- whether the patented DNA sequence was a plant or a part of a plant;
- whether the nucleic acid sequence trait once inserted could be removed from the plant variety or not; and
- whether the Patent is valid in light of the provisions of the Protection of Plant Variety and Farmers' Right Act, 2001.

The Supreme Court held that, in order to settle such technical issues, technological and expert evidence pertaining to chemical, biochemical, biotechnical and microbiological processes is required. Only after considering such evidence at the final stage, should the Division Bench have decided upon the validity of the patent.

Further, in a patent infringement suit, the primary defence available to the defendant under Section 107 of the Patents Act is to challenge the validity of the patent under Section 64 of the Patents Act. A court, at the interim stage, can decide on the infringement

and validity of the patent but, technically, it cannot revoke the patent without first recording the evidence of the parties.

The Supreme Court was correct in observing that, unless the scope of an invention has been assessed through elaborate evidence and witnesses, courts cannot be expected to make a meaningful ruling on patent validity. Since the matter had not reached the stage of trial, the Division Bench should not have decided the question of patent validity and ought to have confined itself to the examination of the validity of the order of injunction granted by the Single Judge.

Further, while deciding the case in a summary manner, the Division Bench had placed reliance on an alleged consent from Monsanto. However, it would be absurd to suggest that a patentee would ever waive such a valuable right, and it would be irrational to suggest that a patentee would not consent to the grant of a right in its favour. Moreover, the defendants had themselves pleaded that, given the nature of the dispute, technical evidence and full-fledged trial is necessary.

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4. CORPORATE & COMMERCIAL LAWS

4.1. THE COMPANIES (AMENDMENT) ORDINANCE, 2019

On January 12, 2019, the Government of India promulgated the Companies (Amendment) Ordinance, 2019 (the "**Ordinance**") to give continuing effect to the Companies (Amendment) Ordinance, 2018 and to amend the Companies Act, 2013.

The Amendments and their Effects

Section 2(41): Definition of "financial year"

The application for adopting a different financial year was to be made to a 'Tribunal' which shall henceforth be made to the 'Central Government'.

Section 10A: Commencement of Business

The Ordinance prevents a company incorporated after the Ordinance, from operating, unless the directors file a declaration within a period of 180 (One Hundred and Eighty) days from the date of incorporation in a prescribed form.

Section 12: Registered office of company

The Registrar is now empowered to conduct a physical verification of the registered office on reasonable cause to believe that no business or operations are being carried out by the company.

Section 14: Alteration of Articles

Application for alteration of the articles of association, giving effect to the conversion of a public company to a private company are now required to be made to the Central Government instead of the Tribunal.

Section 77: Duty to register charges

The creation of charges has to be registered within 30 (thirty) days of creation which, on an application, may be extended by the Registrar by an additional 30 (thirty) days, or upon application, by further 60 (sixty) days from the date of application for which an *ad valorem* fee shall be levied. The relevant rules are awaited in this regard.

Section 86: Punishment for contravention

Any wilful provision of false or incorrect information or knowingly suppressing any material information relating to the registration of charges shall be deemed to be a fraud, punishable by relevant penal provisions.

Section 164: Disqualification of a director

A person is disqualified for appointment as a director of a company for reasons set out in Section 164, such as, conviction for offence of dealing in related party transactions, insolvency, conviction due to moral turpitude. The amendment provides that disqualification from appointment in one company will disqualify such person from all other directorships he holds.

Section 248: Power of the Registrar to remove the name of the company

In view of the newly inserted provisions of Section 10A and 12(9) as discussed above, the relevant amendments have been made in Section 248 of the Companies Act, 2013.

Section 441: Compounding of offences

The charge for compounding of offences has been increased from INR 500,000 (Indian Rupees Five Hundred Thousand) (approximately JPY 7.7 million) to INR 2,500,000 (Indian Rupees Two Million and Five Hundred Thousand).

Section 454A: Penalty for repeated default

The Ordinance prescribes a penalty of twice the amount prescribed for repeated defaults by companies or any person who has already been subjected to a penalty under the Companies Act, 2013, if the subsequent default is repeated within 3 (three) years of date of order imposing the original penalty.

To conclude, the Ordinance re-categorizes the existing penal provisions for administrative default as civil penalties, which should provide relief to corporate management.

5. INFORMATION AND BROADCASTING

5.1. IAMAI RELEASES CODE OF CONDUCT FOR ONLINE CONTENT PROVIDERS

The Internet and Mobile Association of India (IAMAI) has released a 'Code of Best Practices' for online curated content providers. The code proposes guidelines for self-regulation of content and also imposes obligations on content providers to have an internal grievance redressal mechanism for content related issues. Additionally, the code provides that the Ministry of Information and Broadcasting [11] and the Ministry of Electronics, Information and Technology[12] to receive complaints from consumers and forward them to content providers. Currently, about 9 (nine) online content providers have signed this voluntary code.

[11] *The Ministry of Information and Broadcasting is entrusted with the task of disseminating information about government policies, schemes and programmes through the different medium of mass communication covering radio, television, press, social media, printed publicity like booklets; posters, outdoor publicity including through traditional modes of communication such as dance, drama, folk recitals, puppet shows etc.*

[12] *The Ministry of Electronics, Information and Technology regulates matters relating to information technology, electronics; and internet (all matters other than licensing of Internet Service Provider).*

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