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League sports – Applicability of competition law

By **Vidushpat Singhania**

While cricket is the king of sports in India, other team sports like football and hockey and recently even Formula 1 races are gaining popularity and viewership with large corporates evincing interest in sponsorship and willing to invest in building brands and some even acquiring popular overseas clubs that attract a young audience. IPL is now in its fifth season and its continued success has clearly demonstrated the commercial viability of franchisee, endorsement and broadcasting rights for club and league sports. The moot question therefore is whether league and club events can be held outside the National Sports Federation (NSF) and if yes, the real benefits of such events including increasing the popularity of such sports.

Sports events worldwide are organized in a pyramid structure, where a particular sport is governed and regulated by a single International Federation (IF) with various NSFs affiliated to it. The IF governs the regulatory aspect i.e. laying down the rules of the sport, eligibility criteria and playing conditions. The IF also makes the annual calendar for that sport and conducts the world championship and other international level events. A corollary at the national level would be that the NSF would follow the regulations of the IF as a condition of its membership and have exclusive powers to make the annual calendar, develop grass-root level of sport and conduct tournaments and training camps in the country.

The importance of the pyramid structure and the risk to the sports due to multiple sport federations have been recognized by IOC and have been addressed in the European Commission's Helsinki Report and the White Paper on sport. Integrity, uniformity and strict control over regulations ensure that non-discriminatory uniform rules are applied to the sport worldwide and encourage growth of the sports across the globe. It includes sporting sanctions like disciplinary action, suspensions, fines and bans for behavior contrary to the spirit of sports which lie at the core of the sporting movement and can be applied only within the sporting structure.

The directions of the Delhi High Court directing the Competition Commission of India (CCI) to undertake enquiry against the All India Chess Federation for preventing its players from taking part in a tournament outside its aegis, BCCI's sanctions on the Indian Cricket League and the conduct of the World Series Hockey by the Indian Hockey Federation allegedly fall within the ambit of the IF/NSF trying to curb the advent of breakaway leagues through their rules.

The challenges to the IF/NSFs' rules restricting rival tournaments and release of players for these tournaments (e.g. India) have come under the scanner of competition/anti-trust laws like abuse of dominant position and anti-competitive agreements leading to unreasonable restraint of trade. The sports industry is unique because the pyramid structure which ensures monopoly is essential in maintaining the integrity of sport and unlike other industries, the industry thrives on competition rather than from the lack of it. This reasoning gives birth to the exception of 'Specificity of Sport' i.e. certain sporting activities are excluded from the purview of the competition laws.

The European courts while creating this exception have divided the IF/NSF activities into two parts. The first being pure sporting functions whereas the second being activities having a substantial economic impact.

Pure sporting activities like laying down the rules of the sport, defining the size and weight of the ball and dimensions of the playing field are excluded from the ambit of competition laws. But activities of the IF/NSF having substantial economic impact are within the purview of the competition law. The regulatory power of the IF/NSF if used to gain commercial and financial advantage would fall within this ambit provided the following conditions are satisfied:

1) That the agreements are not anti-competitive i.e. they do not attempt/cause appreciable adverse effect on competition; and/or
2) That they are not abusing their dominant position and are not imposing unfair or discriminatory conditions.

The European courts have held that these conditions in the sporting sector are satisfied when a particular rule though restricting competition has a larger public objective and this objective can be achieved only by applying certain restrictive rules that are essential for the integrity, continuity, organization and conduct of the sport at national and international levels, and the rule is applied uniformly and transparently.

The Competition Commission of India is faced with a similar task today to recognize the specificity of sport and carve out exceptions in the Indian scenario. The decision of the CCI will have a huge impact on the Indian sport industry as many a corporate await a chance to start their own breakaway leagues and commercially gain from the revenues generated from these leagues.

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CIRCULARS

FDI Policy changes – Consolidated document released

Circular 1 of 2012 effective 10th April, 2012 is the fifth edition of the consolidated FDI policy issued by the Department of Industrial Policy & Promotion in the Ministry of Commerce. Some of the important changes introduced are:

- Investment by registered FIIs in commodity exchanges will no longer require Government approval bringing it on par with that of foreign investment in infrastructure companies in the securities markets.
- For NBFCs, the activity of 'leasing and financing' would cover only 'financial leases' and not 'operating leases'.
- On conversion of ECBs, royalty, etc., into equity, allotment of equity shares under Government route will be restricted for import of capital goods and machinery and such facility will, henceforth, not be available for second-hand machinery.
- The aggregate limit of 24% for FII investment in the capital of an Indian company under the Portfolio Investment Scheme can be increased, subject always to specific sectoral caps. A special resolution by the Board and RBI's prior approval will be required in such cases.

AD Category-II banks empowered to issue forex pre-paid cards

Reserve Bank of India has allowed Authorised Dealer Category-II banks also to issue forex pre-paid cards to residents travelling on private/ business visits abroad, subject to adherence to KYC/AML/CFT requirements (hitherto reserved only for AD Category 1 Banks). Reserve Bank of India's A.P. (DIR Series) Circular No. 104, dated 4th April, 2012 further states that AD Category-II banks have also been allowed to open Nostro accounts subject to conditions like opening of only one Nostro account for each currency, utilization of balances in the account for settlement of remittances sent for permissible purposes and not in respect of forex prepaid cards and non-maintenance of idle balance. Such accounts will also be subject to reporting requirements as prescribed.

Foreign Currency Account (FCA) abroad for the purpose of overseas direct investments

An Indian party will now be allowed to open, hold and maintain Foreign Currency Account (FCA) abroad for the purpose of overseas direct investments subject to conditions. Hitherto, Reserve Bank of India's prior permission was required for such purpose. RBI's A.P. (DIR Series) Circular No. 101, dated 2nd April, 2012 specifies several conditions like the Indian party being eligible for overseas direct investments and the host country's regulations stipulate that the investments into the country are required to be routed through a designated account. Further, any amount received in the said account by way of dividend and/or other entitlements from the subsidiary shall be repatriated within 30 days from the date of credit. The Indian party should submit details of debits and credits in the FCA on yearly basis to the designated AD bank with a certificate from statutory auditors. The FCA so opened has to be closed immediately or within 30 days from the date of disinvestment from JV/WOS or cessation thereof.

External Commercial Borrowing Policy relaxations

The ECB policy has been further liberalized as follows:

- *Relaxations for infrastructure and power companies*

Indian companies in the power sector have been allowed to utilise 40 per cent of the fresh ECB raised towards refinancing of the Rupee loan(s) availed by them from the domestic banking system, under the approval route, subject to conditions. Further, ECBs under the automatic route have been allowed for capital expenditure for the purpose of maintenance and operations of toll systems for roads and highways provided they form part of the original project. As per RBI A.P. (DIR Series) Circular No. 111 dated 20-4-2012 issued in this regard, the liberalizations are as per announcements made in Budget 2012.

- *Refinancing/rescheduling of existing ECBs*

Borrowers desirous of refinancing/rescheduling an existing ECB can raise fresh ECB at a higher all-in-cost under the approval route subject to the condition that the enhanced all-in-cost does not exceed the all-in-cost ceiling prescribed as per the existing guidelines. Hitherto, such refinancing was permissible if the fresh ECB was raised at a lower all-in-cost. RBI A.P. (DIR Series) Circular No. 112 dated 20-4-2012 issued in this regard states that the modifications will come into force with immediate effect and will be subject to review.

NEWS NUGGETS

Anti-monopoly action against Apple in Russia

Russia's Federal Anti-Monopoly Service has started investigation into alleged discriminatory exemption of customs duties favoring Apple's ipad to the exclusion of other tablet producers/importers. The problem began last year when the Federal Customs Service changed classification codes for tablet computers with GPS hardware and Customs classified these tablets as navigators instead of computers, resulting in a 5 percent import duty on such tablets. The Customs however, offered to withdraw the duties if companies were able to demonstrate that the tablets were really computers and not navigators. As per reports, the Information & Computer Technologies Industry Association had met the Customs chief in February this year to explain that Apple's ipad is not a navigator but a computer, which led to the department declaring ipad as computer and hence the duty free treatment.

US court allows ex-employees to pursue class-action suit against IT major

The United States District Court for the Northern District of California has allowed former employees of Tata Consultancy Services (TCS) to pursue a class-action law suit, in a dispute over wage deductions [*Gopi Vedachalam* v. *TCS* – Order dated 4-2-2012]. The petitioners have charged TCS with breach of contract and violations of California's Labor Code and Unfair Competition Law. The court granted in part the motion for class certification while observing that a class-wide proceeding will generate common answers regarding whether defendants (TCS) engaged in practices that violated the parties' agreements and the California law. Classes certified are "all non-U.S. citizens who were employed by Tata in the United States for the specified period" and "all non-U.S. citizens who were employed by Tata in California within the specified period".

The court found that the interests of the named plaintiffs are reasonably co-extensive with the absent class members and that burden to demonstrate that issues for the breach of contract claim common to the national class predominates over issues affecting only the individual members. It was also noted that the plaintiffs had satisfied their burden as to predominance of common issues in case of salary deductions, pay back of refund cheques and the waiting period penalties. Interestingly, argument of the plaintiff that many class members fear retaliation from defendants if they file individual suits and that many of them currently reside in India, which would pose substantial barriers to bringing individual actions, was not disputed by TCS.

RATIO DECIDENDI

Foreclosing free competition by boycotting auction by persons controlling 75% of relevant market liable to penalty

The Competition Commission of India, in one of its recent orders, has held that explosive manufacturers had formed a cartel to control prices. A total penalty of approximately Rs. 60 crores has been imposed on 10 manufacturers for such violations (individual penalty being 3% of average 3 years turnover). The Commission accepted the finding of the DG that the explosive manufacturers/ suppliers were not engaged in fixation of bid prices under an agreement and the instances found could not be taken cognizance of as they were prior to the date of notification of Sections 3 & 4 of the Competition Act, 2002. But the CCI found that the explosive manufacturers/ suppliers were acting in a concerted manner when they did not participate in the electronic reverse auction conducted by the informant, Coal India. It held that the said action being a manipulation of the bidding process is violative of Sections 3(3)(b) and 3(3)(d) of the Act.

The Commission noted that the explosive manufacturers/ suppliers named in the matter controlled about 75% of the relevant market and by boycotting an auction a large part of the market had been foreclosed for a fair and free competition. Interestingly, earlier the DG had held that there was no evidence of any cartelization for the period post notification of section 3 provisions [*Coal India* v. *Gulf Oil Corporation – Order dated* 16-4-2012 in Case No. 6 of 2011].

Arbitration – Dispute when cannot be referred to Arbitrator

In a recent judgment, the Division Bench of the High Court of Delhi, has upheld the order of the Single Judge, which had held that only where the parties intended to reflect the intention that the dispute is to be submitted to a person who in-turn would hold an inquiry in the nature of a judicial enquiry i.e. it would have pleadings before it and evidence followed by hearing, would the parties be said to have agreed to refer their dispute(s) to arbitration. In the instant case, the High Court while referring to the dispute resolution clause in the Memorandum of Family Settlement between the parties held that the clause only brought out the intention of the parties to refer the disputes to a Dispute Resolution Committee which may act as an umpire, referee or an arbitrator. The Court, therefore, held that the Single Judge was correct in dismissing the application under Section 9 of Arbitration

and Conciliation Act, 1996, since the dispute resolution clause which drew reference to words such as umpire, referee or an arbitrator could only be considered as providing the Dispute Resolution Committee the discretion to choose either of the modes of dispute resolution i.e. whether to act as an umpire, referee or arbitrator. Accordingly, it held that till such time the Dispute Resolution Committee, exercised such discretion, it could not be urged by any party that the said memorandum made reference or contemplated to refer the dispute to a Committee of Arbitrators [*Jagatjit Jaiswal* v. *Karamjit Singh Jaiswal* – Judgment dated 16-4-2012 in FAO(OS) 500/2007].