# CLT NEWSLETTER

*A Monthly Issue published by LL.M. Students of NALSAR University of Law, Hyderabad.*

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***"If you have an apple and I have an apple we exchange these apples then you and I will still each have one apple. But if you have an idea and I have an idea and we exchange these ideas, then each of us will have two ideas."***

**- GEORGE BERNARD SHAW.**

Dear readers,

The idea of starting a newsletter has evolved from batch after batch having toiled to gather the same information individually and the research becoming incomplete due to insufficiency of time or inability to locate resources. We find it highly improbable for a single individual to keep track of updates in all areas of legal development consistently all the time. Hence, the objective of this newsletter is to remove these difficulties and the idea is to promote teamwork, encourage new ideas and gain more knowledge by joint effort.

Through this first issue of our newsletter, the LL.M. Batch at NALSAR wishes to proudly announce our initiative of starting a Newsletter by the name of **"CLT Newsletter"** which is pioneered by the Corporate Law Team members that comprise of the LL.M. first and second year students. We find it important to stress on the fact that the newsletter aims to reach out to the entire LL.M. family, irrespective of the specialization they opt for.

As a saying goes, "realisation should become inspiration and inspiration should be transformed into action". Through this initiation, we have transformed our realisation into action and look forward to your support and contributions in the coming newsletters, which will be, published every month end. We ring in the New Year by introducing this first issue of January 2009. And we urge our readers to start today and act towards realising their dreams!

**CLT Newsletter Team.**

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**CLT Newsletter Team:**
**Student Editors**: *Vasundhara Ravi*
*Ashutosh Kumar*
**Contributions By**: *Sourabh Bharti, Mrutyunjaya Hallikeri, Vandan K. Baxi & Chitra Subbiah.*
**Designs and Layout By:** *Vandan K. Baxi & Mrutyunjaya Hallikeri.*

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**Contact us or send in your feedback at:**
cltnewsletter@gmail.com

**DEFINITION OF 'MEMBER': DOES IT NEED A RE-LOOK***

**Introduction**

Indian capital market witnessed a massive growth in last two decades. However, this growth has not matched with supporting infrastructure to handle the growing volume of paper that has flooded in the volatile market. This caused problems, like, delay in transfers, long settlement periods, bad deliveries etc. as an ultimate answer to these problems the government passed The Depositories Act, 1996 and in parallel made certain changes in Companies Act, 1956. One of the important amendments was introduced of section 41(3), which relates to the definition of member. In this article, author would like to analysis how far both the Acts sync with each other.

**Definition of Member**

Section 41 of Companies Act defines member as;

[1] The subscribers of the memorandum of a company shall be deemed to have agreed to become members of a company, and on its registration, shall be entered as members in its register of members.

[2] Every other person who to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

[3] Every person holding equity share capital of a company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company.

First clause ratifies the general principle of member, under virtue of subscribing to the memorandum person becomes member. Under Section 41(2) a person must give his consent in unequivocal terms by applying in writing for allotment of shares and has right to get share certificate within stipulated time period. Certificate under the common seal of the company is prima facie evidence of the title of the member to the shares specified therein[1].

But confusion arises on definition of member under clause (3) of said Section, which states that ' Every person holding equity share capital of a company and whose name entered as beneficial owner in the records of depository'. It has been introduced as a consequential amendment by Depositories Act, 1996. In this definition the main question arises regarding status of preferential share holders registered under depository system which is still unsolved.

**Introduction of Depository System**

The depository system is a new clearing and settlement system. under the depository system, the practice of holding and moving scrip of quoted shares is replaced by a safe and dependable computerised book entry system. All shares of companies listed on exchanges investors have depository system accounts, reconsolidated into a few jumbo certificates and stored centrally.[2]

**Status of Preferential Shareholder**

The Depositories Act describes the beneficial owner as "A person whose name is recorded as such with depository".[3] The cumulative reading of section 5&6 makes it clear that any person makes as agreement with the depository to avail its service is a beneficial owner and who surrenders his certificate of security to issuer. As observed in the above paragraphs Section 41(3) deems only the person who holds equity share capital and whose name is entered in the records of the depository as a member of company.

The Depositories are eligible to hold all securities in dematerialise form, but unlike the take over regulation which defines 'shares' and expressly excludes preference shares.[4] Neither the Depositories Act nor SEBI regulation defines shares and excludes preference shares. Companies Act expressly defines share capital in two categories vis-à-vis preference share capital and equity share capital[5], hence share includes preference share also. Now the question which pops up is whether the person holding preferential share and whose name is

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[1] The Companies Act, 1956, Sec.84.

[2] P Kallu Rao " Depository System: A Boon For Indian Capital Market", 25 (10) Chartered Secretary 934 (1995)

[3] The Depositories Act, 1996, sec. 2 (1) (a)

[4] SEBI (Acquisition and Takeovers) Regulations, 1996, Reg. 28.

[5] Companies Act, 1956,Sec. 84.

entered as a beneficial owner in the register of depository is a member?

**Status of Preferential Share Holder**

As per section 10(1) of the Depositories Act, the depository shall be the registered owner for the purpose of ownership of security but sec. 10(3), the share holder shall be entitled to all the rights and benefits in respect of securities held in the depository. As per sec. 10(2), the depository shall not have any voting rights or any other rights in respect of securities held by it. Thus section does not clarify who will have the voting rights on the shares held by the depository. Under the Companies Act,1956 every member of a company limited by shares has a right to vote, if holding equity capital then every resolution or if holding preferential share capital then where their interests directly affected.[6] According to section 41(2) every person who agreed to become member & his name is registered in register of members under sec. 150 of the Companies Act, 1956.

Every depository mandatorily maintains a register and an index of beneficial owners in the manner provide in Sec. 150,151,152 of the Companies Act, 1956. According to Sec. 152A where such register and index is maintained, it is deemed to be an index of members for the purpose of the Companies Act, hence all the beneficial owners including preferential shareholders who holds shares in dematerialised forms should be deemed to the members of the company and have voting rights. Thus if Section 10 of the Depositories Act read together with Section 41(3) of the Companies Act, leads to the confusion that whether equity share holding beneficial owners of the company are only members of the company and entitled to all the rights of the members.

Every public company making initial public offer or right issue or an offer for sale of securities, unless enters into an agreement with the depository for dematerialisation of securities proposed to be issued to the public shall not make such issue.[7] According to Sec. 68B of the Companies Act, initial public offer made by the company for a sum of rupees ten crore or more, shall be only in dematerialised form complying with the requisite provisions of depositories Act. Depositories Act provides a choice to the security holder to either receive the security certificate or hold securities with depository,[8]even if holds in dematerialised form still reserves a choice to opt out of the depository any time.[9] It may lead to a mystification that if the person receives the share certificate for preferential shares ha has acquired, his name and shares held by him will be entered in the register of members of the company. Since Section 150 does not make any distinction between preferential and equity shares is members, and automatically he falls under section 41(2) and becomes member of the company. In a instance if the persons opt to hold share with depository and registered himself as a beneficial owner, through according to Sec. 152A as observed above is a member, but according to sec. 41(3) only the beneficial owner who holds equity shares is member, hence he is not member of the company since he holds preferential shares. The section seems to be contradictory with each other.

**Conclusion**

The depository system was brought in to speedup the process & to do away with the cumbersome method of holding and transferring the securities. Few of the relevant amendments were brought in through the Depositories Act, 1996 only with sync with new system. One such amendment was introducing Sec. 41(3) of the Companies Act, but leads to the perplexity that Sec. 10 of the The Depositories Act, 1996 & Section 41(3) of Companies Act, when read in light of the status of preferential share holder's rights and benefits as a member of the company. Further as observed above under Sec. 152A in the line of Sec. 150 of the Companies Act, uncertainty remains in the mind that Sec. 41(3) narrow downs the application of Sec. 152A. hence the discussion could be concluded with a question in the mind that does the definition of member need a re-look.

***Mrutyunjaya S. Hallikeri**, *LL.M. Final Year, NALSAR University of Law, Hyderabad.*

[6] Sec. 67, The Companies Act,1956.

[7] SEBI (Disclosure and Investor Protection) Guidelines, 2000.

[8] Sec. 8, The Depositories Act, 1996.

[9] Sec. 5 & 14, The Depositories Act, 1996.

## SOFTWARE PATENTABILITY: A ROLLER COASTER RIDE*

In US a very narrow range of claims are excluded from patentability. In *Diamond v Chakrabarty 447 U.S. 303 (1980),* US Supreme Court had delivered the much quoted judgement stating "anything under the sun created by man is patentable." Hence we have seen a continuous trend in US where patents are allowed for those inventions which lie on the border of patentable and non patentable subject matter. Whether it comes to tinkering with life forms or interfering with nano particles, the US patent system is increasingly becoming comfortable with such inventions. But one area, which has seen a roller coaster ride, is the field of software technology. Though US is arguably the most liberal jurisdiction when it comes to patenting inventions in the field of software technology, yet time and again there have been decisions which have unsettled the seemingly settled waters. A casual glance through US decisions on the subject will clarify the above-mentioned point. The debate on this point began with *Gottschalk v Benson (1972) 409 US 63,* where US Supreme Court apparently held that any claim which pre empted a mathematical formula would be rejected. Though the decision was legally sound in the light of the peculiar facts of the case, yet it was taken as a judicial dictate against software patents in general. *Parker v. Flook (1978) 437 US 584,* concretised this impression by holding that if the only novel thing about any invention is a mathematical formula, then it is non patentable. After hitting the ebb the concept of software patentability went for an upswing with the decision in Diamond *v Diehr (1981) 450 US 175* where "Claim as a whole approach" was followed. This opened the doors for those inventions that primarily depended upon mathematical formula or an algorithm (which ultimately makes up computer software) to be give patent protection.

Now, hold your breath for another free fall. Much celebrated, later abandoned, *Freeman- Walter- Abele Test* which got its name from three different decisions again required us to determine if the invention claimed an algorithm directly or indirectly. if the answer was yes, then to ascertain if it contained anything novel other than the program or was it applied in any manner to physical elements or process steps . *In Re Alappat (1994) 33 F 3d 1526,* brought much relief to those who were scared by that sudden dip brought by *Freeman- Walter- Abele Test where* it was held that laws were designed to protect inventions which transform an article into a different state or thing and in the present case the invention claimed calculations to transform digitised waveforms into anti aliased pixel illumination data and that was enough for it to be a patentable invention. It was held that if a machine produced "useful, concrete and tangible result", it was patentable and to be contrasted with disembodied mathematical concept. The ups and downs continued with *In re Lowry (1994)32 F 3d 1579*, and *In re Warmerdam (1994) 33 F 3d 1361*, the former case upholding a claim for a computer memory organised in accordance with the 'attributive data model' whereas the latter case rejecting a claim (assumed to be on the basis of *Freeman- Walter- Abele Test*) for navigating robotic machines to avoid collisions with the help of a computer program. In *State Street v. Signature (1998) 149 F 3d 1368,* the Court of Appeals for the Federal Circuit re-examined the mathematical algorithm and re- established the 'useful, concrete, and tangible' test for analysing software patent applications. It was further stated that if an invention has a 'practical utility' it would be patentable irrespective of the fact that it contains an algorithm. The claimed invention was a programmed computer, which executed a business method. The court in no uncertain terms held, 'whether the claims are directed to subject matter within section 101 should not turn on whether the claimed subject matter does "business'' instead of something'.

And if you are thinking that law in US is now settled and you can take some guidance from it, then you are in for another tummy churning fall. A recent

Judgement in the US, *In Re Bernard L. Bilski and Rand A. Warrsaw*, (2008) 545 F.3d 943 US court of appeals of the federal Circuit, has rejected software patent for a business method. Here, it was held that a claim for the process of determining risk in commodity transactions was not patentable. The unnerving part is not the rejection of the patent but another shift in the test applicable to decide whether an invention involving software is patentable or not. Here it gave a two-point test to determine if the invention is patentable or not. The two decisive factors are:

1. Claimed process is tied to a particular machine or apparatus; or
2. It transforms a particular article into a different state or a thing i.e. claimed process has a practical application of a fundamental principle to transform specific data.

The Indian Patent Office, which has issued the Draft Manual of Patent Practice and Procedure (2008) takes inspiration from the US and UK decisions on the subject and provides for the possibility of patenting the software-based inventions. It divides applications related to computer inventions under the following categories:

(a) Method/process
(b) Apparatus/system
(c) Computer program product.

The manual out rightly rejects any patent for computer program product as it says that claims relating to computer program product are computer programs per se, expressed on a computer readable storage memory. But for the first two categories, it talks about application of "technical effect" test to determine the patentability. Similarly mathematical methods are unpatentable but their application if results in a technical effect would be considered for patentability.

The draft manual is now open for public comments. Hence, it would be interesting to see the impact of the *In Re Bilski* on the final approach taken by the Indian Patent Office, though it can be argued that requirement of technical effect in the Indian manual is not very different from the requirements highlighted in the US decision.

* ***Sourabh Bharti***, *LL.M. Final Year, NALSAR University of Law, Hyderabad.*

## IP UPDATES

**a. Toothbrushes In Court: Design Registration In India.**
**December 2008.**

A toothbrush has become the object of dispute recently, when Colgate Palmolive had registered three toothbrush designs with the Patent and Design Office against which its rival, Anchor Health and Beauty Care, filed petitions seeking cancellation of those designs. Anchor claimed the designs could not be registered afresh as similar products had already been registered as designs in India. After a series of hearings through 2007 and 2008, the Assistant Controller of Patents and Designs held that the three models registered as toothbrushes by Colgate Palmolive satisfied the definition of "design" under the Designs Act, 2000. During hearing, every portion of the toothbrush – head, bristles and handle – was rigorously scrutinized. The Patent and Design Office found that all the designs were different from products registered earlier. Colgate Palmolive had registered the few designs that matched earlier. The Patent and Design Office's decision has precluded Anchor from manufacturing and marketing toothbrushes with features similar to the three designs at the centre of the row. Anchor moved an appeal in the Calcutta High Court seeking cancellation of the registrations and a stay on the Patent and Design Office's decisions till the matter is resolved. The Court has admitted the appeal but refused to grant any interim stay. The key statute which comes into scrutiny is the Designs Act, 2000 which lays down the steps in the registration of an industrial design which include, among other things, preparation of a representation of a design along with providing a statement of novelty which is included on the representation in order to specify the claim. This dispute over designs shows the burgeoning IP protection of designs in India.

**b. US-Based Drugmaker Alcon Wins Trademark Case Against Indian Rival Ajanta Pharma.**
**November 2008.**

US-Based drug maker Alcon has won a trademark case against Indian rival Ajanta Pharma, preventing the latter from selling its popular eye drop under the brand Travaxo in India. The Bombay HC gave an injunction in favour of Alcon and barred Ajanta from using Travaxo on grounds of trademark infringement. The medicine directly competes with Alcons Travatan in the highly competitive Rs 33,000-crore drug retail market.

Indian courts in the recent past have ruled in favour of the original trademark holder. The same court ruled in favour of Swiss major Roche's drug Valcyte against Cipla's similar drug Valcept.

**c. Court upholds Roche plea on trademark infringement by Cipla**
**December 30, 2008.**

Also, recently The Bombay High Court upheld the plea of Swiss Multinational Drug Company "Roche" for an injunction and restrained domestic generic drug maker "Cipla" from using the trademark. Valcept for its generic version of an anti-infection drug valganciclovir. The court held that Cipla's trade name "Valcept" is confusingly similar to that of Roche's "CellCept" which is a patented medicine used in the prevention of organ rejection in patients receiving kidney, heart or liver transplants.

## SECURITIES LAWS UPDATES

**a. New compliances necessary for Mutual Funds.**

On the basis of the consensus reached by the Advisory Committee of Mutual Funds on the practice of Mutual Funds offering indicative portfolios and indicative yields in their debt /fixed income products, that such practice should be prohibited as it may be misleading to the investors, SEBI through its circular **SEBI/IMD/CIR No. 14/151044/09 dated January 9, 2009,** has directed all the Mutual Funds and distributors that they shall not offer any indicative portfolio and indicative yield nor any communication in this regard. The Asset Management Companies and Trustees shall monitor the compliance of the same and report to SEBI. This step comes after several schemes having failed to match the indicative returns mentioned by several schemes as a means to attract investors.

**b. New Master Circular on Anti Money Laundering Issued by SEBI.**

The Prevention of Money Laundering Act, 2002 (PMLA) was brought into force with effect from 1st July 2005. Subsequently, SEBI issued necessary guidelines in 2006 to all securities market intermediaries as registered under Section 12 of the SEBI Act, 1992. These guidelines were issued in the context of the recommendations made by the Financial Action Task Force (FATF) on anti-money laundering standards and compliance of the same is imperative for international financial relations for the country.
Recently, SEBI on December 19, 2008 has issued a Master Circular **(ISD/AML/CIR-1/2008)** which contains Introduction, Background, Policies and Procedures to Combat Money Laundering and Terrorist financing, Guiding Principles, Obligations to establish policies and procedures.

**c. Amendment to SEBI (DIP) Guidelines, 2000 relating Qualified Institutional Placement 'QIP's.**

SEBI has amended Chapter XIII-A of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 through vide circular no. SEBI/CFD/DIL/DIP/33/2008/08/12 dated December 8, 2008.
The amendments made in this Chapter on "Guidelines for Qualified Institutions Placement (QIP)" enables a listed company to make a combined offering of Non-Convertible Debentures (NCDs) with Warrants. Qualified Institutional Buyers (QIBs) can subscribe to the combined offering of NCDs with Warrants or to the individual instruments, i.e., either NCDs or Warrants, where separate books are run for NCDs/ warrants. The company is however required to obtain relaxation from the applicability of the provisions of Rule 19(2) (b), read with Rule 19(4) of the Securities Contracts (Regulation) Rules, 1957 for listing/ trading of the warrants.

**d. Guidelines issued by SEBI in respect of exit option to Regional Stock Exchanges.**

SEBI Board has approved the guidelines to provide an exit option to such Regional Stock Exchanges (RSEs) whose recognition is withdrawn and/or renewal of recognition is refused by SEBI and RSEs who may want to surrender their recognition. In all such cases, an appropriate order will be passed by SEBI. As per the said guidelines, such RSEs (or their successor entities) may

be permitted to retain movable and immovable assets and to deal with such assets as they deem fit subject to compliance requirements as laid down by SEBI. The circular has been issued in exercise of powers conferred under Section 11 (1) of the Securities and Exchange Board of India Act, 1992, to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

## FOREIGN EXCHANGE LAWS UPDATES

**a. RBI allows Non-Deposit taking NBFCs to raise Short Term Foreign Funds with Prior Approval.**
**December 28, 2008**

Taking into consideration, the need for enhanced funds for increasing business and meeting regulatory requirements, the Reserve Bank of India has recently allowed Systemically Important Non-Deposit taking Non-Banking Financial Companies (NBFCs-ND-SI) to raise funds by issuing Perpetual Debt Instruments. The RBI has decided as a temporary measure, to permit NBFCs-ND-SI to raise short- term foreign currency borrowings, under the approval route. The Perpetual Debt Instruments (PDI) may be issued as bonds or debentures by NBFCs-ND-SI.

**b. Settlement system under Asian Clearing Union (ACU) Mechanism.**
**December 26, 2008**

From January 01, 2009, in order to facilitate transactions / settlements, participants in the Asian Clearing Union have been given the option to settle their transactions either in ACU Dollar or in ACU Euro. Accordingly, the Asian Monetary Unit (AMU) shall be denominated as 'ACU Dollar' and 'ACU Euro' which shall be equivalent in value to one US Dollar and one Euro, respectively. This is in connection to Article IV (b) and (c) of the General Provisions of Agreement establishing the Asian Clearing Union for channelling transactions through the Asian Clearing Union (ACU) in terms of which, the Asian Monetary Unit is denominated as "ACU Dollar".

**c. Liquidity Adjustment Facility – Repo and Reverse Repo Rates Reduced.**
**January 2, 2009**

On a review of current global and domestic macroeconomic situation, the Reserve Bank has decided to reduce the fixed repo rate (the rate at which RBI lends short-term fund to banks) has been brought down from under the Liquidity Adjustment Facility (LAF) by 100 basis points from 6.5 per cent to 5.5 per cent and the reverse repo rate (the rate at which banks park their surplus funds with RBI) by 100 basis points from 5 per cent to 4 percent with immediate effect.

Accordingly, the daily reverse repo and repo auctions, including special term repo auctions, under LAF would be conducted at the revised rates with effect from January 5, 2009.

**d. Liberalisation of External Commercial Borrowings (ECB) Policy January 2, 2009**

ECB up to USD 500 million per borrower per financial year will now be permitted for Rupee expenditure and / or foreign currency expenditure for permissible end - uses under the Automatic Route. Accordingly, the requirement of minimum average maturity period of seven years for ECB more than USD 100 million for Rupee

capital expenditure by the borrowers in the infrastructure sector has been dispensed with.
Also, in order to further develop the telecom sector in the country, payment for obtaining license/permit for 3G Spectrum will be considered an eligible end - use for the purpose of ECB.
The borrowers will from now on have extended flexibility to either keep their funds off-shore or keep it with the overseas branches / subsidiaries of Indian banks abroad or to remit the funds to India for credit to their Rupee accounts with AD Category I banks in India, pending utilisation for permissible end-uses. However, as of now the rupee funds cannot be invested in capital markets, real estate or for inter-corporate lending.

**e. Instruments for Augmenting Capital Funds-Urban Co- operative Banks.**
**January 13, 2009**
Urban Co- operative Banks (UCBs) may issue Perpetual Cumulative Preference Shares (PCPS) / Redeemable Non-Cumulative Preference Shares (RNCPS) / Redeemable Cumulative Preference Shares (RCPS) with the prior permission of the respective Registrar/Central Register of Cooperative Societies (RCS/CRCS) granted in consultation with the Reserve Bank. These three instruments will be collectively referred to as Tier II preference shares. These Tier II preference shares should be issued at par and as per the terms and conditions laid down by RBI.

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## CORPORATE LINGO

**"Getting yourself familiarized with commercial terms"**

***Arbitrage:***
Often referred to as 'money minting machine' it is a method of making profit by exploiting price differences of identical or similar financial instruments, on different markets or in different forms. It is a risk free method of generating profit. The term is mainly applied to trading in financial instruments, such as bonds, stocks, derivatives, commodities and currencies.

***Derivative:***
Means an instrument, to be settled at a future date, whose value is derived from change in interest rate, foreign exchange rate, credit rating or credit index, price of securities or a combination of more than one of them.

***Private Equity Fund:***
It is a collective investment scheme (fund) that invests in companies and/or entire investment units with the intention of obtaining a controlling interest (usually by becoming a majority shareholder) so as to be in a position to restructure the target company's reserve capital, management and organisational infrastructure.

***Foreign Currency Convertible Bonds (FCCBs):***
It is an international offering of security to raise funds from abroad. In the form of unsecured bonds carrying a fixed rate of interest and an option for conversion into equity shares of the issuing company, at a pre- determined price after a stipulated period.

# LANDMARK DECISIONS (TAXATION/SEBI/ARBITRATION/COMPANY CASES)

## TAXATION:

**[1] Vodafone Tax Controversy: Vodafone International Holdings BV v. Union of India (W.P. No. 2550 of 2007)**

Known to everyone as the Vodafone Tax dispute, it involved $2 billion capital gains tax and made a very high profile case in the history of Income Tax disputes.

In this case the petitioner company had raised two major issues.

(1) Constitutionality of certain amendments introduced by the 2008 Finance Act and (2) the validity of show-cause notice issued by the Department to the petitioner.

On the constitutionality, the Court took a very straight step and held that constitutional validity cannot be challenged *in abstracto* and has to be assessed in the context of specific facts. Here, the petitioner had not presented before Court the agreement between the parties to the transaction, and in the absence of such basic facts, the Court drew an adverse inference and refused to examine constitutional validity.

On the challenge to the show-cause notices, the Court relied on a series of Supreme Court and High Court decisions and held that the show cause notice was in the eyes of law totally unwanted and the threshold required by the Department was only a *prima facie* existence of jurisdiction which they were unable to establish.

Though Bombay HC rejected the petition on the basis of the absence of merits, however, what makes the decision one of possible significance is the fact that the Court spent considerable time discussing the merits of the dispute and in arriving at conclusions that would be of persuasive value in any subsequent litigation. For one, the Court repeatedly asserted that the transfer was not of the shares of a Cayman Islands situated company, but of assets situated in India. It also discussed and relied on the 'effects doctrine', which is a principle of international law granting a State, jurisdiction over actions, which, although carried out outside its territory, have effects within. Following the application of this principle in few recent decisions on the scope of the MRTP Act, the Court held that since the "*very purpose of entering into agreements between the two foreigners is to acquire the controlling interest which one foreign company held in the Indian company, by other foreign company*", it would be taxable in India.

**[2] Clifford Chance v. The Deputy Commissioner of Income Tax, MANU/MH/1217/2008**

Clifford Chance – a leading UK-based law firm – had provided certain advisory services for certain resident and non-resident clients who were engaged in certain projects in India. The firm had separately billed its clients for the work it had done in India and the work done outside India. The issue was whether the whole of the fees received for the services were chargeable in India, or whether only that part of the fees which was received for the services rendered in India was chargeable to tax in India.

In this case, the core issue, which has been dealt by the court, is that of the taxation of non-residents under Section 9 of the Income Tax Act, 1961. Section 9(1) deals with "income deemed to accrue or arise in India".

While interpretating Income Tax Act, 1961 the Supreme Court of India relied on *Ishikawajima* and held that the fees

would be taxable only where the service was both *utilized* and *rendered* in India.

The Court's decision can be read in two ways. The Court might have intended to say that under principles of statutory interpretation, an explanation cannot curtail the clear scope of a section. Alternatively, the Court's decision may be explained by arguing that the explanation does away only with "*residence or place of business or business connection in India*", and not with all the requirements of territorial nexus. Thus, while the nexus need not be as deep as "*residence or place of business or business connection in India*", it was still essential that the services should be *rendered* in India. Thus, the explanation only intended to avoid a strong nexus, but did not entirely do away with nexus.

## SEBI:

**[1] In Re: Competent Professional Limited. (Formerly Known As Tandon Financial Consultants Limited); In Re: Sub Broker, National Stock Exchange of India Limited; In Re: Scrip of Eider InfoTech Limited, 15 Jan 2009:**

In this case, Eider InfoTech Ltd ("EIL") was incorporated in 1990 and listed under various stock exchanges through out India. But while conducting investigation by SEBI it was found that in its capital Due diligence Charge it had allowed client to build up of artificial volumes and price in the scrip, which violated Securities and Exchange Board of India (Procedure for Holding Enquiry by the Enquiry Officer and Imposing Penalty) Regulations, 2002 - SEBI (Prohibition of Fraudulent and various regulations in Unfair Trade Practices relating to Securities Market) Regulations, 1995, Securities and Exchange Board of India (Stock Brokers and Sub Brokers) Regulations, 1992, and Code of Conduct.

The tribunal held that by not exercising due diligence in its dealings with the client, applicant allowed the client to indulge in creating false and misleading appearance of trading in the scrip, which resulted in building up of artificial volumes and price in that scrip; this is detrimental to the interest of investors and the orderly development of the securities market and Penalty in form of warning given on said company.

**[2] Dilip S. Pendse V. Securities and Exchange Board of India, Appeal Decided on 20.11.2008: GTL ILLEGAL CARRY FORWARD CASE**

In this case, SEBI received a complaint from TFL regarding the illegal carry forward transactions in the shares of GTL by Pendse. As per the investigation of SEBI, Nalini Properties Private Limited ('Nalini'), a company controlled by Pendse, had executed certain transaction in shares of GTL in year 2000.

The Show Cause Notice alleged that the transaction had actually not been executed and by only passing the book entries relating to this transaction, Nalini and others indulged in falsification of accounts and records.

On the basis of the allegation, SEBI debarred Pendse from dealing in securities market for two years for violating the Securities Contract Regulation Act, 1956 and SEBI (Fraudulent and Unfair Trade Practice relating to the Securities Market) Regulation, 1995.

The first allegation of SEBI was that Pendse breached Section 13 of SCRA. SEBI alleged that Pendse through Nalini executed "off-market transaction" (not being covered by spot transaction under Section 18 of SCRA), which is deemed to be invalid and illegal.

The second allegation of SEBI was that the charge of violation of

Regulation 6 of the FUTP Regulation i.e. Pendse sold 25000 shares off market to a broker at Rs. 1400 and when the shares were finally sold on stock exchange by Niskalp, the latter got a price of only Rs 125 per share. Thus there were substantial losses incurred by Niskalp through chain of fictitious transaction, which was created by Nalini. TFL also complained to SEBI regarding the transactions, which were created by Pendse. SAT rejected the allegation on the grounds that there was no evidence to show that the accounts and records were falsified to perpetrate the alleged fraud. Further it was pointed out that SEBI and SAT are not concerned with the dispute between TFL and Pendse. Therefore, on the above grounds stated, SAT struck down the Impugned Order pending against Pendse.

After reading the judgments carefully one can observe that Pendse through his controlled companies and associates may be involved in some kind of circular trading. However SEBI officer while drafting of SCN and the Impugned Orders failed to gather proper evidence in support of the charges levied against Pendse and failed to incorporate all the grounds for providing their case as required under the laws of India.

## ARBITRATION

**[1] Comed Chemicals Ltd V. C.N. Ramchand,**
**SC Arbitration Petition 17 of 2007, Decided On 06 Nov. 2008**

The petition was filed under section 11 of the Arbitration and Conciliation Act,1996 praying Chief Justice of India to appoint third arbitrator as presiding arbitrator or appoint sole arbitrator as deemed fit in the facts and circumstances of the case.

The major issue which was discussed before the Hon'ble court is that whether the disputed matter would fall under the ambit of the nature of 'commerce' or not. Because in integrated business world 'commerce' is an emphatic word to encourage alternate dispute resolution process.

In this case, the Supreme Court has provided an expansive scope to the phrase "commercial" in International Commercial Arbitration. The importance of this lies in the fact that, keeping in with the rise of international commercial arbitration as an effective, alternative means of dispute resolution, most jurisdictions around the world are expanding its scope to include disputes which were hitherto considered fit for resolution only by the municipal Courts.

The apex Court stated that if the nature of work undertaken by the respondent is such that "it is inextricably linked with functions which could be undertaken by a businessman or by a Company and such activities form an integral part of his activities, there is element of `commerce'". Thus, the Court propounded a new test to bring professional services under the ambit of 'commerce' i.e. if the work discharged by the professional can be done by companies or a businessman and such work forms the core of his activities, then the contract is invariably commercial in nature. However, the Court refused the blanket extension of 'commerce' to all employment contracts stating that if the contract is merely that of a employee-employment or master-servant, then the matter cannot be referred to Arbitration Tribunal.

On the basis of above reasoning court accepted the appeal and appointed sole arbitrator for resolving dispute.

## THE NEW COMPANIES BILL, 2008: A GLANCE

Some major changes as per the Companies Bill, 2008 in comparison to Companies Act, 1956, are as follows:

**a. One Person Company (OPC)**
Clause 3(1)(c) of the bill introduces the concept of OPC. The basic requirement for the OPC the MOA should mention the name of the person who shall, in event off death or disability, etc, of the member, become the member of the company. The phrase 'OPC Ltd.' should follow the name of the company.

**b. Restrictions on Auditors to undertake certain services**
Clause 127 of the Companies Bill, 2008
An auditor can render additional services as approved by Board or Audit Committee. However, certain restrictions have been imposed on an auditor appointed to audit accounts of the company.

**c. Independent Director**
Clause 132(3) of the Companies Bill, 2008
Listed company with paid-up capital above prescribed limit should have at least one-third independent directors. In case of other companies, Central Government can prescribe minimum number of independent directors.

Clause 132(6) of the Companies Bill, 2008
Independent directors will not be entitled to any remuneration except sitting fees and reimbursement of expenses. He will be entitled to profit related commission and stock options as approved by members.

Clause 142(2) of the Companies Bill, 2008
Alternate director appointed to independent director should also be independent director.

Clause 132(5) of the Companies Bill, 2008 defines Independent Director.

**d. Duties of Director**
Clause 147(2) of the Companies Bill, 2008
It has been for the first time that the duties of director have been codified and its contravention by the director has been made punishable with fine which shall not be less than one lakh rupees but which may extend upto five lakh rupees, as per clause 147(7) of the Bill.

**e. Key Managerial Personnel**
As per Clause 2(1)(zza) of the Companies Bill, 2008, Managing Director or Manager or Chief Executive Officer, Company Secretary and Chief Financial Officer will be 'key managerial personnel'

Clause 151 of the Companies Bill, 2008
Details of their appointment are to be entered in a register and return filed with ROC.

Clause 178 of the Companies Bill, 2008
Companies having share capital above prescribed limits should have whole time key managerial personnel.

If there is any vacancy in any of these posts, it should be filled in 6 months. It is not clear whether one individual can occupy two or three of these positions.
No qualifications have been prescribed for the post of 'key managerial personnel', except in case of Company Secretary.

**f. Class Action Suit (CA)**
Clause 216 introduces the provision related to CA, to according which at the event creditor if they of the opinion that the management or affairs of the company is being conducted in a manner prejudicial to the interest of the company, its members or creditors approach the tribunal for relief.

Given in the next page is a tabular comparison of the new Companies Bill, 2008 with the Companies Act, 1956, which shows the rearrangement of the old sections in the new Bill.

## THE COMPANIES ACT, 1956 v. COMPANIES BILL, 2008: A COMPARISON

| Chapter | Title | Clause numbers of 2008 Bill | Corresponding sections of Companies Act, 1956 |
|---|---|---|---|
| 1 | Preliminary | 1 to 2 | 1 to 6 |
| 2 | Incorporation of companies | 3 to 21 | 11 to 54 |
| 3 | Prospectus and allotment of securities | 22 to 36 | 55 to 81 |
| 4 | Share capital and debentures | 37 to 65 | 82 to 123 |
| 5 | Acceptance of deposits by companies | 66 to 78 | 58A to 58B |
| 6 | Registration of charges | 69 to 77 | 124 to 145 |
| 7 | Management and administration | 78 to 109 | 146 to 197 |
| 8 | Declaration and payment of dividend | 110 to 115 | 205 to 207 |
| 9 | Accounts of companies | 116 to 122 | 209 to 223 |
| 10 | Audit and auditors | 123 to 131 | 224 to 233B |
| 11 | Appointment and qualification of directors | 132 to 153 | 252 to 284 |
| 12 | Meeting of board and its powers | 154 to 173 | 285 to 308 |
| 13 | Appointment and remuneration of managerial personnel | 174 to 178 | 309 to 311 |
| 14 | Inspection, Inquiry and Investigation | 179 to 200 | 234 to 251 |
| 15 | Compromise, Arrangements and Amalgamations | 201 to 211 | 390 to 396A |
| 16 | Prevention of oppression and mismanagement | 212 to 217 | 397 to 409 |
| 17 | Registered Valuers | 218 to 223 | New provision |
| 18 | Removal of names of companies from the Register | 224 to 228 | 560 |
| 19 | Revival and rehabilitation of sick companies | 229 to 244 | 424A to 424L |
| 20 | Winding up | 245 to 340 | 425 to 559 |
| 21 | Companies incorporated outside India | 341 to 355 | 591 to 608 |
| 22 | Government companies | 356 to 357 | 617 to 620 |
| 23 | Registration offices and fees | 358 to 365 | 609 to 614A |
| 24 | Companies to furnish information and statistics | 366 | 615 |
| 25 | Nidhis | 367 | 620A |
| 26 | NCLT and NCLAT | 368 to 395 | 10FB to 10GF |
| 27 | Special Courts | 396 to 406 | New provision |
| 28 | Miscellaneous | 407 to 426 | 621 to 658 |