March 2021
Volume II, Issue III

# JUSIP LISTICLE

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GUEST POST

## ROLE OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

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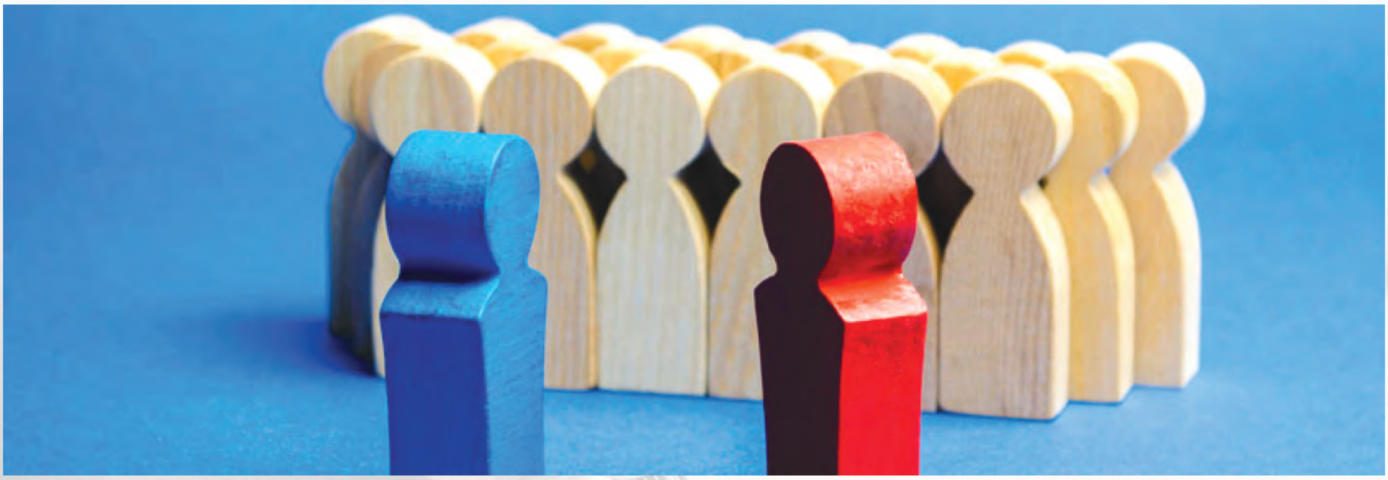
With litigation being considered as the primary way to settle legal disputes, a lot of its complexities are brought to light when people start preferring methods that are less formal, cheaper and offer speedy justice. The Indian Judiciary is plagued and clogged with pending and unsettled cases. In recent years, people's desire for easier access to justice led to other avenues being discussed. The importance of Alternative Dispute Resolution (ADR) arises from the need to avoid the rusty, cumbersome and inadequate court procedures. With the ever- increasing burden of civil litigation, the judicial system finds it difficult to cope. ADR essentially encompasses a variety of streamlined resolution techniques designed to be more efficient than traditional routes. In layman terms, ADR refers to the settling of disputes outside of courts. It's a process that helps parties to resolve disputes without getting into the rigidity of a courtroom trial.



Alternative Dispute Resolution has come a long way in the Indian Judicial system. Its employment is coming more in the mainstream of settlement of disputes with the legal fraternity standing behind it. The variety of methods provide a suitable method of settlement in a more streamlined manner. Various centres all over the country have opened up for executing ADR's principles of resolution of disputes. There still exist discrepancies in the system which needs to be ironed out. Many great things are expected in the near future for it seems that the ADR, in India, is yet to achieve its full potential.

Please visit [*https://www.jusip.in/role-of-alternate-dispute-resolution-adr/*] to read the complete article.

# TRIVIA

## ADR HISTORY IN INDIA

### Pre 1940s

*The Indian Arbitration Act, 1899* was the first legislation governing arbitration in India, which applied only to the Presidency Towns of Calcutta, Bombay and Madras.

Subsequently, the Second Schedule of the Civil Procedure Code, 1908 also dealt with Arbitration.

The Indian Contract Act, 1872 and the Specific Relief Act, 1878 recognised Arbitration as a means to settle disputes. Whether the Act, 1899 could be applied to other towns was up to the Provincial Governments to decide. All in all, the Legislation was done away with since it did not extend to the whole of India.

### 1940s -1996

*The Arbitration Act was enacted in 1940* and was modelled after the English Arbitration Act, 1934.

*The Arbitration Act, 1937* dealt with enforcement of foreign awards (Geneva Convention) and the Foreign Awards Enforcement Act, 1961 was for awards under New York Convention.

The Act, 1940 laid down the framework for domestic arbitration. In ***Guru Nanak Foundation V. Rattan Singh & Ors, 1981,*** the scheme of the Act of 1940 was criticised and the court noted that the same *"had made lawyers laugh and legal philosophers weep."* The Act was later repealed due to the reason that it was not a consolidated law.

### Post 1996

*The Arbitration and Conciliation Act was enacted in 1996* and was modelled after the UNCITRAL Model on International Commercial Arbitration, 1985 and the Conciliation Rules, 1980.

The same has been amended multiple times:

**2015** | With the purpose of making the process robust and preventing judicial intervention;

**2019** | With the purpose of promoting institutional arbitrations; and,

**2021** | With the purpose of determining qualifications of arbitrators and elaborating upon the law pertaining to stay on awards.

# KEY UPDATE

**Extended limitation period comes to an end from 15.03.2021**

The Supreme Court of India, on 8th of March 2021, lifted the indefinite extension it had granted to the period of limitation for filing cases. On 27th March 2020, on account of the COVID19-induced lockdown, the Supreme Court had released an order taking *suo moto* cognizance of the problems being faced by the litigants across the country in filing legal petitions/appeals/applications/suits etc. within the period of limitation. As per this order, the Supreme Court extended the period of limitation under both general and special laws w.e.f. 15th March 2020.

The Supreme Court, however, laid down a few pertinent rules in this regard:

1. The period between 15.03.2020 – 14.03.2021 would be excluded from computation of the period of limitation. Along with this, the balance period of limitation that was remaining for any litigant on 15.03.2020, will be available from 15.03.2021.

2. On the other hand, if the limitation period has expired during the period between 15.03.2020 – 14.03.2021, in spite of any actual balance of limitation period remaining, every litigant is to have a limitation period of 90 days from 15.03.2021. If the balance limitation period remaining as on 15.03.2020 is more than 90 days, the longer one shall apply.

3. The Government of India is to amend the guidelines applicable to containment zones so that *"regulated movement will be allowed for...time bound applications, including for legal purposes".*

# ARBITRATION

**Supreme Court: Condonation of short delays in filing appeals under Section 37 in exceptional cases**

The Supreme Court recently overruled the verdict the case of *NV International v. State of Assam* relating to Section 37 of the Arbitration and Conciliation Act, 1996 which outlines the law relating to appealable orders. In the case titled *Government of Maharashtra v. Borse Brothers Engineers and Contractors Pvt Ltd.*, the Hon'ble

Apex Court held that where, from the perusal of the facts, it is clear that a party has acted in bona fide and was not negligent, a short delay may be condoned. The power to condone however will be at the discretion of the court after they have perused the entire circumstances leading to the delay so caused, so as to ensure that the other party is not adversely affected by the condonation.

**Delhi High Court on Arbitrability of IP Disputes**

**T**he Delhi High Court in *Hero Electric Vehicles Pvt Ltd v. Lectro E-Mobility Pvt Ltd,* dealt with the much-debated aspect of Arbitrability of Intellectual Property Disputes. The issue arose over use of the mark *"Hero". 'Hero Exports',* was earlier a partnership firm of all the family members of the Munjal Group which is composed of four family groups. Hero Exports was transferred to the First Family Group [BM Munjal Family] vide a Family Settlement Agreement (FSA). The same required parties to go into arbitration in case of any disputes. Simultaneously, an agreement with regard to the Trade Marks and Names (TMNA) was also concluded between the four family groups. This agreement granted exclusive rights to the first group of family members to use the mark for electric vehicles. The matter arose when the fourth family group began employing use of the trade mark – *"HERO"* on electric cycles with throttle.

The Court held that the dispute was arbitrable. This was also for reason that the same arose out of contractual arrangements between the parties namely the FSA and the TMNA. Earlier the Hon'ble Apex Court in the case of *Vijay Drolia & Ors v. Durga Trading Corporation* outlined a test to determine the arbitrability of subject matter.

The arbitrability of IP disputes remains a hotly debated topic and the legal positions vary in different countries as well. Many states like France and Japan allow arbitration in IP disputes, but not for validity of registrations.

**If One Party is a Foreign National/Resident/ Incorporated Outside India, Arbitration would be presumed to be an 'International Commercial Arbitration'**

The Supreme Court in the case of *Amway India Enterprises (P) Ltd v. Ravindranath Rao Sindhia* outlined scenarios where *'arbitration'* turns into an 'international commercial arbitration'. The parties to the said dispute were in a contractual relationship where the respondents were tasked with duties pertaining to sale, distribution and marketing of the products of the appellants, 'Amway'. Since the parties could not come to a consensus regarding appointment of an Arbitrator, they approached the Delhi High Court for appointment of the same under Section 11(6), Arbitration and Conciliation Act, 1996. The High Court rejected the appellants plea that the petition was not maintainable since they resided habitually in the United States, and thus the parties approached the Apex Court.

The Hon'ble Court held that *"If at least one of the parties was either a foreign national, or habitually resident in any country other than India; or by a body corporate which was incorporated in any country other than India; or by the Government of a foreign country, the arbitration would become an international commercial arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country carry on business in India through a business office in India."*

**Arbitration and Conciliation (Amendment) Act, 2021: Key Highlights**

The Government of India notified the Arbitration and Conciliation Act, 2021 on 11 March, 2021. The Key Highlights of the aforesaid amendment are:

- **Section 36** shall include the Court's power to award a stay unconditionally, where the case prima facie shows that:

(a) the arbitration agreement or contract was the basis of the award

(b) making of the award was due to fraud or corruption

**Note:** This amendment has been given a retrospective effect from 23rd October, 2015.

- **Section 43J** has been substituted and a new provision outlining the qualifications, experience and norms for accreditation of arbitrators is specified by way of regulations.

- **Schedule VIII** of the Act dealing with "Qualifications of Arbitrators" has been omitted.

# INTELLECTUAL PROPERTY RIGHTS

**"COVISHIELD" Trademark Dispute**

A Pune Commercial Court in a matter between (Plaintiff) *'Cutis Biotech'* a pharmaceutical company and the (defendant) *'Serum Institute of India'*, refused to grant an injunction against the defendant. The dispute arose over usage of the trade name *"COVISHIELD"*. The Plaintiff started using the name after coining it on 25.04.2020 and applied for registration of the same under Class 5. Thereafter, the defendant too applied for a trade mark in the same class on 06.06.2020. The Hon'ble Court opined that there was no *prima facie case of 'prior use'* by the plaintiff as the vaccine does not *"provide a cure to prevent COVID-19"*.

The plaintiff was engaged in the business of manufacturing multiple products such as antiseptic, sanitizers, disinfectant liquid, surface de- containment spray and fruit and vegetable washing liquid since 2020 and the respondent in manufacturing a vaccine for COVID-19 and accordingly the court held that the plaintiff cannot have monopoly over the entire class of goods. Further, it was held that although the Trade Mark was similar, the products for which the same were used were drastically different albeit having a common trade channels. The Court also noted how the plaintiff did not earn any goodwill since entering the market.

**Offence under Section 103, Trade Marks Act Cognizable and Non-Bailable: Bombay High Court**

In the case titled *Piyush Subhashbhai Ranipa v. The State of Maharashtra,* the Bombay High Court rejected an application for anticipatory bail stating that a prima facie offence was made out under Section 104, Trade Marks Act, 1999, Section 63, Copyright Act, 1957 against the accused. The decision of the Bombay High Court resolves the debate around whether offences under the Trademark and the Copyright Act with maximum punishment of 3 years were Bailable or not.

There have been conflicting judicial opinions on the issue where, while the Delhi High Court held that the same were Bailable as there may be a lesser punishment imposed in certain cases, the Kerala and Rajasthan High Court held that the same were not. The Bombay High Court has held that the same were cognizable and non Bailable in the present case based upon earlier decisions pertaining to offences under the MRTP Act, 1966 and the Prevention of Corruption Act.

**No registration required for Copyrights: Bombay High Court**

In the case of *Sanjay Soya vs. Narayani Trading*, the Bombay High Court has recently overruled the nine year old judgment of *Dewani vs. Sonal Infosystems*, wherein, injunction for infringement had been denied on account of the fact that the concerned copyright had not been registered. This was contrary to the copyright law which does not mandate registration for enforcing infringement.

The recent *Narayani Trading* case involved a suit against the Defendant for copying the Plaintiff's label (for sale of soyabean oil), which was a piece of original artistic work – thereby enjoying copyright protection. The Defendant contended that since the Plaintiff's copyright had not been registered, he could not claim infringement, as per the decision in the *Dewani* case.

The Court held that the *Dewani* judgement was per incuriam, since it was made in ignorance of as many as four precedents which had held that copyright registration is optional. It was also held that the *Dewani* judgement wrongly equated the trademark and copyright regimes and failed to realize that the former requires mandatory registration while the latter does not. Section 45 of the Copyright Act clearly states that a copyright *"may"* be registered. The Court also took note of the fact that this automatic protection to copryights, with or without registration, is a *"fundamental principle"* of the Berne Convention and the TRIPS agreement as well.

**Copyright Amendment Rules, 2021 : Key Highlights**

The Copyright Rules, 2013 have been amended w.e.f. 30.03.21, with the following chief amendments.

- In place of the Copyright Board, an ***Appellate Board*** has been instituted. The Chairman and Members of this Appellate Board would be appointed as per the provisions of the Trade Marks Act, 1999.

- There shall be a ***Copyright Journal,*** available at the official website of the Copyright Office. Things like the grant of a compulsory license, licenses for publication/translation/reproduction as well as determination of royalties will be published in this Copyright Journal from now on, instead of the Official Gazette.

- Provision for recognizing serving of *notices and applications through electronic means,* in addition to registered post is also made.

- Period for consideration of application for the registration of a copyright society has been extended from 60 to 180 days.

- Copyright societies are to create a system for payment of royalties through electronic means and make provisions for ensuring that these payments are traceable.

- Copyright societies must take measures to identify and locate owners as well as publish the details of the works and their authors on their websites at the end of every quarter. This is to ensure that there is ease in identifying copyright holders.

- Copyright societies are also to ensure that when royalties are not paid due to inability to locate the owner, such royalties must be kept separately in the copyright societies' accounts. If they remain undistributed for three years from the end of the financial year in which they were collected, the amount will be transferred to the copyright societies' welfare fund.

- Copyright societies are also to make an *"**annual transparency report**"* for each financial year and publish it on their website. Such a report must include the activities of the financial year, refused licenses, amount of royalties collected, paid and yet to be paid etc.

# INSOLVENCY & BANKRUPTCY

**Supreme Court : NCLT may not exercise a "Third option" other than admitting or rejecting an application for CISR under Section 9(5)**

In ***Sodexo India Service (P) Ltd v. Chemizol Additives (P) Ltd,*** the NCLT neither accepted nor rejected the Operational Creditor's (Appellant, herein) application for initiation of corporate insolvency resolution process (CIRP). Rather, it passed an order directing the Corporate Debtor (Respondent, herein) to *"make endeavours for resolution of outstanding debt, failing which the Appellant would be at a liberty to invoke the arbitration clause in their agreement".* The NCLAT upheld this order.

The above order was struck down by the Supreme Court in light of the unambiguous language of Section 9(5) of the Insolvency & Bankruptcy Code 2016, which only allows the Adjudicating Authority to exercise two options – rejecting or accepting the application, based on the facts of the case. The Supreme Court held that the legislature has strictly intended for the Adjudicating Authority to only exercise either of these two courses, and it is not open for it to choose a third course, which has not been postulated by law.

It was also held that the

NCLT/NCLAT is not allowed to justify its act of choosing a third course on the ground of *"ease of doing business"*. *"Ease of doing business"* is merely an objective of the legislation given in its preamble and is meant to be achieved via the provisions of the Code. The Adjudicating Authority cannot use it as a ground to circumvent the provisions of the Code. The Supreme Court also held that the Code does not allow the Adjudicating Authority to make an enquiry regarding the insolvency of the Corporate Debtor with respect to creditors other than the ones who have initiated the Corporate Insolvency Resolution Process.

**Supreme Court: NCLT sole Adjudicating Authority for disputes related to insolvency of Corporate Debtor under Section 60, IBC, 2016**

In ***Gujarat Urja Vikas Limited V. Amit Gupta,*** the Supreme Court has held that when it comes to a dispute arising *"solely from" or "relating to"* the insolvency of the Corporate Debtor, the NCLT will be the adjudicating authority – empowered by Section 60 of the Insolvency & Bankruptcy Code 2016. The Supreme Court, however, placed significance on the condition of *"solely from"* or *"relating to"*, so as to ensure that the jurisdiction of other courts is not uprooted by the NCLT/NCLAT in matters that do not solely arise from or relate to insolvency of the Corporate Debtor.

In this case, the NCLT stayed the termination of the Appellant's Power Purchase Agreement (PPA). The Supreme Court held that the NCLT/NCLAT was empowered to do so under Section 60(5)(c), because the said PPA had been terminated *"solely"* on the ground of insolvency – making this dispute clearly connected to the insolvency of the Corporate Debtor. Had it been a matter *"dehors the insolvency"*, the NCLT/NCLAT would not have the aforementioned jurisdiction. Thus, in order to activate the jurisdiction of the NCLT/NCLAT, a clear nexus must exist between the insolvency of the Corporate Debtor and the dispute at hand.

The Court also held that this is a wide, *"residuary"* jurisdiction exercised by the NCLT/NCLAT, that can extend to matters beyond those clearly provided for in the statute but cannot violate the provisions of the same. On the significance behind this jurisdiction, the Supreme Court said that it was the intent of the legislature to provide for a single forum to exclusively deal with matters of insolvency of the Corporate Debtor. This is important to ensure the efficiency of the insolvency regime, as multiple forums would be an obstacle to speedy justice and cause undue delay.

**Supreme Court: Committee of Creditors shall determine economic issues of Bankruptcy and not the NCLT**

In ***Kalpraj Dharmshi v. Kotak Investment Advisors Ltd,*** the relevant question for consideration before the Apex Court was whether the NCLAT could interfere with the exercise of powers by the Resolution Professional (RP). The Supreme Court, while referring to the process for submission and approval of the resolution plan as laid down in Section 30 & 31 of the IBC, noted that the Law Reforms Committee 2015 was of the clear view that the Committee of Creditors is the only correct forum for deciding key economics in issues of bankruptcy.

Based on the clear intent of the legislature, the Supreme Court held that the *"commercial wisdom of the Committee of Creditors has been given paramount status",* which cannot be interfered with by the NCLT/NCLAT. Thus, the Supreme Court held that the NCLT/NCLAT do not have the authority to review or intrude into a commercial decision taken by the Committee of

Creditors. The Adjudicating Authority's jurisdiction to conduct an enquiry is limited by Section 31 of the Code, which does not allow it to challenge the non-justiciable decision of the Committee of Creditors.

**Moratorium period for insolvency proceedings comes to an end on 25.03.2021: No extension**

In June, 2020, the Central Government had granted a moratorium period for the initiation of those insolvency proceedings that pertained to defaults from or after March 25th 2020. This moratorium period had been granted for a period of 13 months. Along with this, the threshold for initiation of insolvency proceedings had been increased from Rs. 1 lakh to Rs. 1 crore, with the intent of protecting small companies from facing insolvency proceedings.

The said moratorium period expired on 25th March 2021 and no extension has been granted to the same. The Supreme Court also rejected petitions filed to extend the moratorium for 6 more months, though it did rule that no interest would be charged during the previous moratorium period. This suspension will lead to a massive surge of insolvency proceedings.

In this light, the discussion of pre-packs as a resolution mechanism is relevant. A pre-pack resolution mechanism involves an agreement between the creditor and the investor directly, rather than a public bidding process. The government is undergoing discussions to provide for pre-packs as a resolution mechanism, especially since the mechanism is bound to reduce the time period involved in insolvency resolution.

# COMPANY LAW

**Section 421(3) of the Companies Act, 2013 may not be invoked if an aggrieved person has applied for certified copies**

The Supreme Court, in ***Sagufa Ahmed & Ors V. Upper Assam Polywood Products Pvt Ltd,*** adjudicated on the period of limitation and period of condonation of delay under Section 421(3) of the Companies Act, 2013. Per Section 421(3), the period of limitation for an aggrieved party to file an appeal is 45 days, which starts running from the date on which the impugned order of the NCLT is received – whether it is a free copy received on account of the NCLT's duty to provide the same under Section 420, or whether it is via the party's own application. Per the Proviso of the same section, the NCLAT may condone the delay if the appeal is not filed within the stipulated period. The law states that the period for this condonation is 45 days from the date of the expiry of the period of limitation.

In the present case, the Appellants' period of limitation expired on 2.02.20, and period for condonation expired on 18.03.20. The appeal was not filed until 20.07.20. The Appellants sought the protection of the Supreme Court order passed on 23.03.2, via which the period of limitation was extended for all litigants w.e.f. 15.03.20, on account of the lockdown. However, the Supreme Court in the instant case held that its order dated 15.03.20 only extended the period of limitation, not the period for condonation of delay. The two are separate things, and one cannot claim extension for condonation on account of the former. The Court highlighted that the purpose of the Court's order dated 15.03.20 was to benefit vigilant litigants affected by the COVID-19 induced difficulties i.e. *"those who are vigilant about their rights and not those who sleep over them".*

**If promoters are ineligible under Section 29-A IBC, the same may also not propose compromise or arrangement schemes as under Section 230, Companies Act, 2013**

The Supreme Court, via its judgement in ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd,*** demarcated a clear linkage between Section 29A & 35(1)(f) of the Insolvency & Bankruptcy Code 2016, and Section 230 of the Companies Act. The effect is that a person ineligible to submit a resolution plan under any of the clauses of Section 29A of the IBC, is also ineligible from proposing a scheme of compromise and arrangement with Creditors & Members under Section 230 of the Companies Act.

However, it must be kept in mind that Section 230, Companies Act is much broader than Section 29A, IBC. Due to this reason, the aforementioned linkage between the two does not arise in all situations – rather, both must be read in harmony only in a case where Section 230 has been invoked on account of liquidation proceedings under the IBC. The Supreme Court held that it would be a *"manifest absurdity"* if the defaulters barred from a resolution plan are permitted to propose a compromise or arrangement under Section 230. If this is allowed, it would lead to defaulters circumventing the provisions and legislative scheme of the IBC.

**Key Highlights of the Amendment to the Companies Act, 2013**

On account of the recent Amendment of the Companies Act 2013, three changes have come into force recently. Section 92 has been amended w.e.f. 5th March 2021, and Sections 149 and 197 have been amended w.e.f. 18th March 2021.

**-** Section 92 of the Companies Act 2013 mandates for each company to file an annual return. A part of the details required in the annual return, were the details of the foreign institutional investors, including their *"names, addresses, countries of incorporation, registration and percentage of shareholding".* However, the Amendment has omitted the requirement to provide the *"names, addresses, countries of incorporation, registration and percentage of shareholding"* of the foreign institutional investors. The Amendment has also enacted a Proviso to Section 92, which allows the Government to prescribe an abridged form of the annual return to be filed by *"one person companies, small companies, and such other companies as may be prescribed".*

**-** Section 149(9) of the principal

act stipulates that an independent director of a company will not be entitled to any stock options and can only be provided remuneration via the fee as given in Section 197(5), reimbursement of expenses and profit related commission. The amendment has inserted a proviso to this sub-section, carving an exception for independent directors of companies with no or inadequate profits. Such independent directors, can now also receive remuneration in accordance with Schedule V, apart from the fee as provided in Section 197(5). Section 197 has also been amended accordingly, and the words *"or any other non-executive director, including an independent director" have been inserted in sub-section 3.*

# COMPETITION LAW

**WhatsApp 2021 Policy amounts to abuse of dominance: CCI directs DG investigation into the matter**

In January 2021, the Competition Commission of India (CCI) had taken *suo moto* cognizance of issue regarding WhatsApp's new privacy policy whereby, it seeks to share data of its users across all information categories with other Facebook companies. To make things more alarming, WhatsApp has mandated the acceptance of this policy in order for users to continue using the App. In 2016, a similar policy had been introduced by WhatsApp – however, the difference was that in the previous policy the users had the option to *"opt-out"* if they did not wish to share their data with Facebook.

The CCI, via an order dated 24.03.2021, examined the concerns relating to this matter in context of Section 4 of the Competition Act 2002, which relates to abuse of dominant by an entity commanding dominant position in relevant market. In order to identify the relevant product market, the CCI relied on its previous decision in Harshita Chawla vs. WhatsApp Inc. The relevant product market for WhatsApp was identified as *"market fOR OTT (over-the-top) messaging apps through smartphones in India"*, and it was also held that WhatsApp is a dominant player in said market.

It was also noted by the CCI that the conduct of WhatsApp in seeking to share user data with Facebook, in a manner that is neither transparent nor voluntary, appears prima facie unfair to users. It also poses a detriment to consumers, without any acceptable justification. Thus, the 2021 policy is a *prima facie* violation of Section 4 (2) (a) (i) of the Act i.e. abuse of dominance by imposing unfair or discriminatory conditions.

The CCI marked a distinction between the 2016 and 2021 policy to hold that the former was valid on account of the fact that it gave its users an option to "***opt-out***" of sharing its data with Facebook. However, since the 2021 policy did not give any such option, the CCI held that this "***take-it-or-leave-it***" nature of privacy policy merit a detailed investigation in view of the dominant market position and power enjoyed by WhatsApp. Hence, the CCI directed an investigation by the Director General into the matter.



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