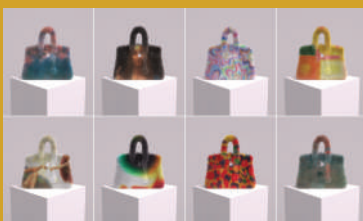


## INTELLECTUAL PROPERTY LAW

### INTERESTING DEVELOPMENTS

The **MetaBirkin - Hermes Dispute** One of the most interesting developments in this month was when Hermes sued MetaBirkin for trademark infringement, trademark dilution and cyber-squatting for its NFTs titled "MetaBirkins". The same feature colourful images of Hermes bags being sold as NFTs.

The suit is going to be instrumental in developing the landscape for similar issues which are already arising due to the growing interest in NFTs.



### Delhi High Court : Restrains use of Plaintiff's registered Trademark "BAAZI"

The Delhi high Court in ***Moonshine Technology (P) (Ltd) Vs TikTok Skill Games (P) (Ltd)***, vide decision dt. 31-01-2022

made several pertinent observations in a Trademark Infringement suit filed by the Plaintiff for their registered mark "BAAZI" against the dishonest adoption of a identical mark for similar services. The Plaintiff and the defendant are both recognised brands in the Indian Gaming Industry. The Plaintiff produced registration

certificates for the mark "BAAZI" and its formative marks to show their prior rights. They were aggrieved for reason that the defendants also started using the aforementioned mark for their services which amounted to "Passing off". The Plaintiff also claimed that the Defendant was widely successful in the same business and hence was a "competitor". On the other hand, the defendant claimed "conjunctive use of the term Baazi with "WinZo" and also that the mark was "descriptive".

The Court at the outset noted that "surely "Baazi"

is not a word apt to describe gaming or wagering services online or as a mobile App. Thus it is a clever and creative use of a common word by the plaintiff for its services”.

In respect to delay and acquiescence, the Court in view of the decision of the Supreme Court in *Midas Hygiene Industries (P) Ltd Vs Sudhir Bhatia*, held that mere delay in bringing action not sufficient to defeat grant of injunction. The Court further stated that in the present matter, there is a likelihood of confusion. Thus, the court opined

that there was a prima facie case for interim injunction for Infringement and Passing-Off. The Court allowed the application and, also restrained the defendants from using the above-mentioned registered trademark.

### **India at WTO: Seeks a waiver of select provisions of TRIPS**

India, along with the support of 64 WTO members, has demanded a waiver of certain select provisions pertaining to copyrights, patents, trade-secrets and other

trade-Related aspects of Intellectual Property Rights Agreement in view of the significant rise in cases of Omicron virus. India along with South Africa placed their demand to prevent, contain and treat those infected. The European Union has submitted a counter proposal to simplify provisions for compulsory licensing requirements for non-patent holders for manufacture of medicines which are patented in such a situation where there is a public health emergency.

## INSOLVENCY & BANKRUPTCY CODE

### **SIMPLIFY**

#### ***What is "Fair Use" under Trade Mark Act, 1999?***

The doctrine of Fair Use outlining the defences for when the registered proprietor of a Trade-mark alleged infringement are defined under Section 30, Trade Marks Act, 1999 as:-

- a) Bonafide Use and adoption
- b) No Dishonest intention to take unfair advantage of or to be detrimental to the distinctive character or repute of Trademark.



**NCLT, Mumbai: Operational Creditor to recover money from client and not agent**

The National Company Law Tribunal (NCLT), Mumbai Bench, in ***THG Publishing (P) Ltd Vs Deadline Advertising***

***(P) Ltd***, decided on 19-01-2022, noted that the agent shall not be held responsible by the Operational Creditor if he/she acts in good faith. THG Publishing invoked Section 9, IBC and initiated Corporate Insolvency Resolution Process

against Deadline P Ltd., for resolution of the operational debt of Rs 9,23,160. The parties were in a principal agent relationship. The Respondent was thus acting as an agent on a commission basis. The client in turn was M/s Avanse Financial Services (P) Ltd in whose name the invoices were being raised. Since the parties were actually in a principal-agent relationship rather than being in a Operational Creditor and Respondent, it was held that the amount would not be called operational debt as defined under Section 3(12), IBC.

### **NCLAT's EPC Construction Resolution**

The National Company Law Appellate Tribunal (NCLAT), in ***IDBI Bank Ltd Vs Liquidator, EPC Constructions (India) Ltd***, decided on 27-01-2022, while overturning the decision of the Adjudicatory Authority (NCLT) held that 223 crores out of the available cash balance shall be distributed in a manner as submitted by the Liquidator. The same was subject to the CoC undertaking that they shall be in compliance with Section 53, IBC, which states that any amount paid in excess

shall be returned as per the waterfall mechanism. The waterfall mechanism gives priority to secured financial creditors over unsecured financial creditors. It says that if a company is being liquidated, these secured financial creditors must be first paid the full extent of their admitted claim before any sale proceedings are distributed to any other unsecured creditor. The Liquidator submitted that after the distribution the liquidation process could run easily as the corporate debtor would have liquidity of almost 80 crores.

## — ARBITRATION, MEDIATION & CONCILIATION —

### **SIMPLIFY**

#### ***Who governs appointment of Arbitrators?***

The Arbitration and Conciliation (Amendment) Act, 2015 grants liberty to the parties to mutually appoint an Arbitrator. The Procedure is described within Section 11 of the Amendment Act, 2015. In case where the parties fail to come to a mutual decision for appointment of Arbitrator, the appointment will be made by either the Supreme Court or the designated institution or person.



#### **Madhya Pradesh High Court : Arbitral Tribunal's jurisdiction in disputes pertaining to "Works Contract"**

The Madhya Pradesh High Court in ***Gayatri Project Ltd Vs Madhya Pradesh Road Develop-***

***ment Corporation Ltd***, decided on 07-01-2022 was faced with the question as to whether the Arbitral Tribunal has exclusive jurisdiction in disputes concerning "works contract". "Works-contract" is a written agreement for the execution of any work

relating to construction, repair or maintenance of any building or super-structure or other works of the State Government or Public Undertaking.

The High Court held that the disputes of "works contract" constituted under the "Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983" could only be raised under the Tribunal as per the Act, 1983 under Section 7.

The court based its decision upon their interpretation of Section 34 of the Arbitration and Conciliation Act, 1996 and held that when the subject matter is not capable of being decided by way of arbitration due to operation of law, it is incumbent

upon the Court to set it aside under Section 34(2)(b)(i), Act, 1996. The Court also placed its reliance on the decision of the Apex Court in *Fiza Developers & Inter Trade (P) Ltd Vs Amci (I) (P) Ltd* wherein the court had noted that if the subject matter is in conflict with public policy of India, the dispute shall be nonarbitrable.

### **Delhi High Court: No unilateral appointment of Arbitrator**

The Delhi High Court in *Envirad Projects Private Limited Vs NTPC Limited* once again noted that no party can alone appoint the arbitrator by themselves and the same is impermissible under law.

The Court was faced with this question once again when a petition was filed under Section 11(6) of the Arbitration and Conciliation Act, 1996. The same prayed for appointment of a sole arbitrator to determine the dispute between the parties. The High Court placed reliance upon two judgements of the Apex Court in *Perkins Eastman Architects DPC & Anr Vs HSCC (India) Ltd and Proddatur Cable TV Digi Services Vs Citi Cable Network Limited*

which held that no party may unilaterally appoint an Arbitrator. The same would lead to defeating the entire purpose of arbitral proceedings which is unbiased adjudication of a dispute between the parties.

## COMPETITION LAW

### **Madras High Court : No civil consequences to follow CCI's order for preliminary enquiry**

The Madras High Court in *MRF Limited Vs Ministry of Corporate Affairs*, decided on 06-01-2022, determined that a Competition Commission of India's Order for a preliminary enquiry must not follow any kind of civil consequences. The facts were as such; it was alleged

that the prices for natural rubber had increased and as a result of the same, the prices of tyres were also increased by many tyre manufactures. However, to the dismay of the complainant when the prices of natural rubber came down significantly, the same was not reflected in cost of tyres which remained the same as they were when rubber was costly. This as per the complainant was owing

to the fact that many major tyre producers were indulging into price parallelism and cartelization. In order to determine price parallelism the most basic parameter is to compare the prices.

However, in the present case, only the prices as increased and decreased of the rubber vis-à-vis tyres were provided without any comparison of major tyre producers



whatsoever, thus, there was no prima facie case to show such cartelization and price. The proceedings thereafter stood complete before the CCI and the decision was kept in sealed cover. The High Court held that there can be no civil consequences and the writ Court cannot interfere since the investigation at the end of CCI is already complete and the order in sealed cover. After the same is opened and provided to the parties, the parties if aggrieved may take recourse to remedies as available to them. In such a case, the High Court held that the at this stage, it shall refrain from interfering so as not to render the entire process before the CCI “unworkable”.

## SIMPLIFY

### ***What do you mean by Dominant Position?***

The explanation to Section 4, Competition Act, 2002 defines “Dominant Position” as a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it

- (i) Operate independently of competitive forces prevailing in the relevant market; or
- (ii) Affects its competitors or consumers or the relevant market in its favour.

## **NCLAT : Ola not guilty of predatory pricing**

The National Company Law Appellate Tribunal in ***Meru Travels Solution (P) Ltd Vs Competition Commission of India***, decided on 07-01-2022 decided two appeals filed by the Appellants, Meru Travels against the order passed by the CCI. As per the amendment under Section 410 of the Companies act, 2013, NCLAT is also the appellate tribunal to hear appeals against any decision made or order passed by the CCI. The CCI determined that Meru Travels as per the Director Generals investigation report was not guilty of abusing its dominant position in the market and did not form any an-

ti-competitive agreements with its drivers. The tribunal while agreeing with the Appellant and by placing reliance upon the decision of the Apex Court in **CCI Vs Fast Way Transmission (P) Ltd** decided in 2018 noted that, *"We do not think that Ola could operate independently of other competitors in the relevant market, and hence it did not enjoy a dominant position in market."*

The Tribunal further held that the agreements between the drivers and Ola are absolutely optional and do not bind them in any manner whatsoever. Further, it was also noted that, *"Ola is working on generating demand through customers discounts and then bringing in more driver to cater to the increased demand. Ola tried to create a win-win for riders and drivers, and of course the enterprise"*. In view of the same the agreements

were deemed not to be anti-competitive or in violation of Section 3, Act.

### **Supreme Court on anti-competitive activities relating to Lotteries**

The Supreme Court in **CCI Vs State of Mizoram**, decided on 19-01-2022 was faced with a rather interesting factual circumstance. A complaint with allegations of bid-rigging, cartelisation with respect to the tender process and collusive bidding for lotteries in the State of Mizoram was filed under Section 3 & 4 along with Section 19(1)(a) of the Competition Act, 2002 before the Competition Commission of India. The CCI, while noting that there was evidence of bid-rigging and cartelisation, held that the complaint was liable to be rejected under Section 4 and Section 3 of the Act. Further, the Commission held that the Respondent-State

could not be considered an enterprise, however they required the Director General to conduct an investigation against the private respondents which found that there was indeed bid-rigging and violation of Section 3. Accordingly CCI ordered for replies to be filed against the DG's findings. That in a turn of events, the State approached the Guwahati High Court challenging the order passed by the CCI and the DG's Report. The Court noted that it found the conduct of the state quite nonappreciable and that interplay between Regulation Act and Competition Act was misunderstood in the present circumstance. In view of the above, the Apex Court held that CCI must conclude the proceedings against the private respondents and also categorically closed the case against the State only.

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