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Analysing developments impacting business

THE (COMPETITION) APPEAL TRIBUNAL ADOPTS STRICT INTERPRETATION OF LIMITATION PERIOD AND CONDEMNS 'FORUM SHOPPING'

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India's appeal tribunal for competition matters - the National Company Law Appellate Tribunal (NCLAT) - has dismissed an appeal filed by a natural person - Pankaj Raj (Informant) - against an order of the Competition Commission of India (CCI). (Maj. Pankaj Rai v Secretary, Competition Commission of India & Ors. (Competition Appeal (AT) No. 01 of 2020), decided on 29 May 2020.).

This judgment sheds light on two substantial procedural aspects - (i) the standard of review to condone delay in filing an appeal under the Competition Act, 2002 (Competition Act), and (ii) the Informant's conduct, which the appeal tribunal perceived as 'offensive and intemperate'.

Background and facts

At the CCI, the Informant, which held a franchise from NIIT Limited (NIIT) in the city of Hyderabad in respect of computer education and training services, brought an action against NIIT alleging several anticompetitive and abuse of dominance conducts.

Amongst other things, the Informant alleged that the NIIT - (i) revoked its franchise rights for an online banking operations course; (ii) ventured into the territory allotted to the Informant; (iii) offered courses at predatory prices; (iv) adopted differential pricing for consumers in metros; and (v) poached its consumers through its online portal.

The CCI, in its review, found NIIT not to be dominant in the relevant computer education market in India. The CCI noted further that the differential pricing does not appear arbitrary. Accordingly, the CCI did not find any *prima facie* infringement of the Competition Act and closed the matter without the need for any further Director General's investigation.

The Informant, instead of approaching the specialised appeal tribunal, ie the NCLAT, challenged the CCI's order before the Hon'ble High Court of Telangana. The High Court dismissed the petition and pointed out the alternative and statutory remedy available at the NCLAT. Incidentally, the Informant had challenged the Telangana High Court decision at the Hon'ble Supreme Court of India but withdrew it and approached the NCLAT. The delay in approaching the NCLAT was assessed as 708 days.

Without reviewing the merits, the NCLAT dismissed the appeal as time-barred and made the following observations.

Meaning of 'sufficient cause' to condone delay under the Competition Act

The NCLAT noted that, in terms of the Competition Act, the limitation period of 60 days to lodge an appeal is extendable if the Informant provides a 'sufficient cause'. Even so, the NCLAT decided that pursuing litigation for 693 days before the High Court is not a 'sufficient cause' for the purposes of the Competition Act.

Interestingly, the Informant had sought to justify approaching the NCLAT on two grounds: (i) NCLAT's location in New Delhi was daunting for the Informant located in Hyderabad; and (ii) given that one of the allegations was that the CCI order was obtained fraudulently, the order could legitimately be challenged in any court.

The NCLAT, however, disagreed. It reasoned that if a statutory remedy of appeal is provided, the Informant cannot circumvent it and approach the High Court. Emphasising the statutory remedy as an efficacious remedy, it denounced the practice of choosing remedies, under the pretext of the order being obtained by fraud or violating natural justice, and thereby, indulging in forum shopping.

The NCLAT also underlined that the statute calls for expeditious disposal of appeals, preferably within six months, and therefore, the application of the Limitation Act, 1963 (Limitation Act) is excluded by implication.

Conduct of the Informant

The NCLAT found the Informant's conduct was generally disrespectful towards the judicial institutions. In particular, it found that although an alternative statutory remedy was available, the Informant adamantly pursued the writ appeal (at the High Court) and review petition (at the Supreme Court).

The NCLAT regretted the conduct of the Informant calling into question the CCI's decision-making process and for adopting 'offensive and intemperate' language in the written submission.

Comment:

Given the multiple judicial review-based challenges to the CCI's decisions pending in several High Courts, it would be interesting if the Informant prefers an appeal to the Supreme Court.

As noted in our June 2020 newsletter available [here](#), e-commerce entities such as Amazon and Flipkart are pursuing a similar challenge at the Karnataka High Court.

Note that the Informant pursued the NCLAT appeal *pro se* (ie, argued as a petitioner-in-person). Whilst it is unclear if the absence of an effective legal representation played any material role in NCLAT's analysis, its dismissal of an appeal based upon a strict interpretation of the limitation period (rather than merit review) is likely to engage the Supreme Court's interest. In sum, the jury is still out on the interpretation of the limitation period in the Indian competition law.

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