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India: And the Juggernaut Rolls On...

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On February 1, 2017, the Hon'ble Finance Minister of India presented the Union Budget for 2017-18. Historically the Union Budget is all about funding deficits, rollbacks, government initiatives and the likes; however, this year's speech by the hon'ble minister, hinted upon a proposal which may completely change the enforcement of the competition regime in India.

The hon'ble minister (and thus, by implication, the Central Government) has proposed "*to rationalize the number of tribunals and merge tribunals wherever appropriate*" [emphasis added].

This article examines the scope of the government's aforementioned proposal and the impact of the same on one of the new entrants to the array of "tribunals" in India – the Competition Appellate Tribunal.

## 1. Tribunals v Courts

The Supreme Court of India, in *Harinagar Sugar Mills Ltd v. Shyam Sundar Jhunjunwala*, held that "[B]y Courts is meant 'courts of civil judicature' and by 'tribunals' those bodies of men who are appointed to decide controversies arising under certain special laws" [emphasis added].

The most basic and the fundamental feature that is common to both courts and tribunals is the discharge of judicial functions. Tribunals are exclusively constituted to carry out certain judicial functions in addition to certain administrative / regulatory functions, in a manner that may be distinct from traditional courts. For instance,

unlike courts, persons not having any judicial experience may be present amongst members presiding over tribunals, which are created as specialist bodies.

In layman terms, it may be sufficient to say that the only substantial difference between the Courts and the Tribunals is that the 'Courts' are general Courts, dealing with all sorts of matters, whereas the 'Tribunals' are the specialized Courts, dealing with the matters for which they are created.

## 2. Establishment of COMPAT

In light of economic liberalization and reforms introduced in 1991, India decided to replace its erstwhile competition regime - the Monopolies and Restrictive Trade Practices Act 1969 (which had aimed at restricting the growth of monopolies in the market) - with a modern competition law in sync with established competition law principles. Accordingly, the Competition Act 2002 ('**Act**') was enacted. The Act sought to establish the regulator thereunder – the Competition Commission of India ('**CCI**').

However, before the CCI could be fully constituted, a public interest litigation was filed in the Supreme Court of India, challenging its constitution. The matter was finally disposed by the Supreme Court in January 2005 after the government gave an assurance to amend the Act and create a separate adjudicatory appellate authority, while leaving the expert regulatory space for the CCI. In light thereof, the Act was amended in September 2007 to provide for, among other things, the establishment of a **Competition Appellate Tribunal ('COMPAT')** to be headed by a judge to adjudicate appeals against orders of the CCI and to determine compensation claims arising out of the decisions of the CCI.

COMPAT was thereafter, duly established in May 2009 and, for the purposes of discharging its functions under the Act, had the same powers as have been vested in a civil court under the Code of Civil Procedure, 1908. Appeals against any decision / order of the COMPAT lies directly with the Supreme Court of India, thereby bestowing upon the former, the status equivalent to the High Courts in the country.

Thus, suffice to say that the COMPAT was not only duly established as a mechanism for hearing and disposing off matters specifically in relation to competition law issues in India, but also addressed the technical discrepancies relating to the adjudication of competition issues by individuals not holding judicial powers, the *raison d'être* for the delay in the enforcement of the Act in the first place.

## 3. COMPAT and Budget 2017-18

Currently, India has a number of 'tribunals' that look into appeals made from orders of specific sectoral regulators. These include the Telecom Dispute Settlement and Appellate Tribunal (TDSAT), Securities Appellate Tribunal, Competition Appellate Tribunal (COMPAT), National Company Law Appellate Tribunal and Debt Recovery Appellate Tribunals – which look into appeals against orders passed by the National Company Law Tribunals (NCLTs) and Debt Recovery Tribunal (DRTs), respectively – and a host of other such bodies.

There is speculation that COMPAT may be one of the first tribunals to be wound down in the near future<sup>2</sup> in consonance with the statements made by the Hon'ble Finance Minister as part of his budget speech.

At this juncture, where so much is being done by the Hon'ble Prime Minister to attract foreign investments into India, such a move may be seen as indecision by the Indian government towards its own policies, increase the sense of discomfort amongst the foreign investors seeking 'specialist' alternative dispute resolution forums against India's myriad of historically long-winded court systems, as well as gravely affecting the country's present situation of pending cases, not only before the COMPAT, but before all other similarly placed 'tribunals'.

#### 4. Concluding Words

With so much time, effort and monies having been spent on the establishment of appropriate 'specialist' *fora*, the government's proposal for the 'rationalization of tribunals' is seemingly indecisive at best and apocalyptic at worst, especially in an economy such as India.

Practically, we have seen the government drag its feet on the constitution of specialist tribunals (the fiasco encircling the constitution of the Airport Economic Regulatory Authority Appellate Tribunal, being a case in point) in complete and utter disregard to the interests of the general public, the public exchequer as well as the country's reputation on an international scale.

With the government's proposal of disbanding / merging 'tribunals', the basic premise of establishing *specialist* forums will be rendered moot and we will be back to the archaic era of the extremely overwhelmed Indian courts (and now 'merged tribunals') hearing and adjudicating cases where they might not have subject-matter specialization, and even that may come after an inordinately long delay.

#### Footnotes

1. AIR 1961 SC 1669

2. *Budget hints at phasing out tribunals, COMPAT may be the first to go*; Business Standard, Feb 1, 2017, issue

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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