CASES AND JUDGEMENTS.

2006 (2) SCALE 45

Shin Satellite Public Co. Ltd....................Petitioner.

Versus

M/s Jain Studios Limited......................Respondent.

The petitioner was a company registered in Thailand, carrying on the satellite business with three satellites in orbit namely Thaicom-1, Thaicom-2 and Thaicom-3. His activities include broadcasting and internet services to various overseas firms. An agreement was entered between the petitioner and respondent on August 10,1999 for availing broadcast services of the petitioner. The agreement provided for arbitration in case of any dispute arising from the interpretation or from any matter relating to the performance of the agreement or rights or obligations of the parties. The petitioner sent a notice dated September 9, 2004 stating the he had appointed an arbitrator and called upon the respondent to appoint an arbitrator. The respondent challenged the validity of the arbitration clause. Upon his failure to appoint an arbitrator within the stipulated time, the petitioner filed an application under Section 11(6) of the Arbitration Act to make an appointment of an arbitrator.

The Court held that the agreement was valid and enforceable based on the principles of severability. Elaborating on the legal position, the Honourable Court relied on several case laws i.e. Goldsoll v Goldman (1914) 2 Ch 603, Babasaheb Rahimsaheb v Rajaram Raghunath AIR 1931 Bom 264. The learned judge quoted from the Halsbury's laws of England the following principles of contracts in general in relation to severability.

Firstly, severance is not possible where the objectionable parts of the contract involve illegality and not mere promises. Secondly where severance is allowed, it must be possible simply to strike the offending parts but the court will not rewrite or rearrange the contract. Thirdly even if the promises can be struck out, the court will not do so if it alters the scope and intention of the agreement. Fourthly, the contract shorn of the offending parts must retain the characteristics of a valid contract so that if severance will remove the whole or main consideration given by one party the contract becomes unenforceable.

2006 (32) PTC 157 (Del.)

Microfibres Inc.......................................Plaintiff.

Versus

Girdhar & Co & Ors.............................Defendants.

FACTS OF THE CASE:

A Suit alleging violation of copyright in artistic work applied to upholstery fabric was filed. The plaintiff, a corporation based in United States, sells, exports and manufactures upholstery fabrics under the brand name "Microfibre". It commenced business in the year 1962 and has an established presence in various overseas jurisdictions.

In May 2002, the plaintiff discovered that the defendant was manufacturing and marketing upholstery fabrics under the brand name "Velveleen" through it's distributor which infringed the copyright of the plaintiff. An action of passing-off and infringement has been brought against the defendant.

The Counsel for the defendant argued that plaintiff is not entitled to protection under the Copyright Act as they are designs within the meaning of Section 2(d), Designs Act, 2000. The plaintiff has failed to apply for Design registration in the instant case. The counsel argued that the plaintiff was aware that fabrics were protected under Design law as was evident from his registration under the United Kingdom Designs Act. Even the certificate issued by the U.S Copyright Office does not refer to it as artistic works but as fabric designs. The Indian Patents And Designs Office has confirmed vide it's letter dated 19th July, 2002 that fabrics designs are registrable under the Designs Act, 2000. The Counsel further argued that the plaintiff is guilty of *suppressio veri* and *suggestio falsi* based on non-disclosure of criminal proceedings and other legal proceedings where the investigation officer has submitted a report to the Court stating that no case under Copyright law was made out. The counsel argued that a registrable design , once registrable, is not so registered loses protection in case it is reproduced more than 50 times by an industrial process by a copyright owner. Even deceptive similarity between trademarks cannot be established. The counsel for the plaintiff argued that U.K. Designs Act does not exclude artistic works like Indian Law.

The Court held that it was clearly a design and that in view of the absence of a registration no protection could be afforded in terms of Copyright law. Even deceptive similarity could not be established on the facts and circumstances of the case. Further held that ,the said exclusion of artistic works was held to be clarificatory in nature and unlike U.K Design law Indian law excludes them as expressly non-registrable.

Controversy over the transposition of the EUCD into French national law.

The DADVSI Bill ("Droits d'auteur et droits voisins dans la société de l'information" - "Rights of the authors and other related rights in the information society") aims at being the French transcription of the EUCD (European Union Copyright Directive) text which itself is the EU's implementation of the 1996 WIPO Copyright Treaties that the EU Member States have not ratified yet. These Treaties adapted to the digital era most of the Berne and Rome International Conventions' provisions. Long time before the generalization of the high speed internet access, they mentioned the exclusive right for the authors, editors, performers and sound records producers to allow the public communication of their work and performances including through the Internet. Thus they required the signatory States to take action against the neutralization of the DRM (digital rights management), an umbrella term referring to any of several technical protection measures used to enforce pre-defined policies controlling access to software, music, movies, or other digital data.

The EU action was much slower than in the US who adopted the American DMCA (Digital Millennium Copyright Act) in 1998. Indeed the EU first had to harmonize the legislations of its different Member States. At Community level, the Directive 2001/29 of May, 22, 2001 'on the harmonization of certain aspects of copyright and related rights in the information society' provides for rules on the reproduction right, a right of communication to the public, the distribution right and legal protection of anti-copying systems and information for managing rights. It binds all EU signatories and aims at reconciling the Member States' legislations relatively to IP by taking into account the new Its. The final text of the EU Directive has excluded each provision relating to moral rights and exclusively deals with the patrimonial rights, i.e. the economical aspect of the Copyright according to the Common Law Copyright model.

Indeed, the French copyright regime is, as in some other European countries, based on the author right rather than on the producer right. This applies to the moral right of the author, protected by Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works, as well as to the patrimonial right. This centrality of the author right allows at the same time for the best – an extended protection of the author against, e.g. his/her employer – and for the worse – a limited regime of exceptions, even for non-commercial use. Obviously a few changes occurred and came to temperate the principle so as to take into account reality and the scope of the economic constraints faced by the editors, producers, press or authors themselves. But these changes – of which the limits for collective work and the exemption for private copying – remain exceptions to a law which roughly remained the same. However even if the French specificities in the Copyright matter have neither been harmonized nor extended to other Member States, they have not been contradicted.

The EU Directive should have been transposed before December 22, 2002 i.e. 18 months after its publication. But controversy in many of the then fifteen Member States meant that only Denmark and Greece met this deadline. Three Member States out of 25 still have not at present implemented the Directive yet: Spain, Czech Republic and France. Concerning the latter, the European Court of Justice ruled on January 27, 2005 that France was infringing Community Law by not transposing the Directive though a bill was on the National Assembly's desk since November 2003. Since then, the Government took steps to force the Bill through by using an emergency procedure, allowing it to skip the third and fourth readings in the National Assembly and Senate required by the usual procedure.

The first part of the debate took place in the French National Assembly during two nights in last December, just before Christmas, a favorable time for hurriedly adopting controversed legislations. However, the French National Assembly adopted two last-minute amendments on December 22, 2005, and marginally passed a 'global license' proposal that would allow the sharing of music and movie files for personal use, thus legalizing 'peer-to-peer' exchanges[1]. Under the proposed legislation, French Internet users would have seen their monthly service fee increase by •5. The legislation was initially designed to substantiate the French Culture Minister desire to increase penalties of those convicted of piracy but these amendments totally contradicted the spirit of the Bill. It was indeed moving towards a system of 'global license', which the Government and music companies are very hostile to. It generated such a shock wave that the Government decided to suspend the debates in the Assembly for a few months and the Culture Minister did not get any other choice than presenting a new text conciliating the artists' interests and the Internet users' freedom and consumer rights for this March session. The parliamentary discussions started again this March, 7 and three days later the principle of a 'global license' was permanently rejected.

The main goal of the DADVSI Bill is to restrict the rights of digital content purchasers. It most notably forbids them from working around technical content protection measures. Several penalties therefore aim at legally protecting them. The Deputies indeed adopted on March, 17 a wide range of graduated sanctions to fight against piracy.

Firstly, the circumvention of DRM will be punished at three levels:

- The Bill allows a jail term of up to six months and a fine of • 30,000 for those who supply software enabling users to break copyright protection on DVDs or CDs, helping them to be made available on the internet. It directly concerns a web site or a forumer who would disseminate a trick to circumvent a protection measure.
- Hackers caught working individually to decrypt the TPM and break the copyright on discs will face a fine of •3,750.
- The holder or the user of a software developed for circumvention will be liable to a fine of •750. The sanction will however not apply for the acts with interoperability aims or the regular use of acquired rights on the work.

Secondly, the DADVSI Bill makes protected works downloading and diffusion/distribution unlawful, however providing alleged/lighter sanctions compared to the initial draft.

- The internaut illegally downloading music or movies for his personal use will be fined •38 or •150 if he shares on the Internet the downloaded works.
- The Amendment called 'Vivendi Universal' Amendment tacked on a three-year prison sentence and a fine of •300,000 for publishing, distributing or inciting people to use 'exchange' software "manifestly intended to make protected works available to unauthorized persons." The protected works referred to include DVDs and some digital music files, the use of which is restricted by DRM systems. The Judiciary will have to determine how a software, neutral tool, can turn into a "manifestly" real weapon and the publisher will have to prevent this kind of diversions during the software conception.

By allowing the content producers to set up technical measures preventing the private copy and especially by forbidding the buyers to bypass these measures, the DADVSI Bill directly clashes with the exception of private copy. Indeed this exemption provided by the French copyright law is one of the exceptions to the author right as well as to related rights. A special remuneration system has been implemented since 1985 in the French legislation in this case so as to fairly compensate the rights holders' financial loss on works fixed on any carrier. The compensation amount is a flat rate set by a specific commission, collected as a tax paid by the consumer on any audio or video recording media bought[2]. But with the establishment and protection of technical measures arise the contestations of those asserting that the levy system is no longer justified where the copying possibilities are altered or diminished.

The strong will of the French government to put into question the private copy right concerning DVDs has been lately taken over from the Judiciary which has anticipated the transposition of the Directive. The French Supreme Court ('Cour de Cassation') indeed quashed on last February, 28[3] the Paris Appellate Court decision that had ruled that DRM applied on DVDs are illegal with regard to the private copy exception. The Supreme Court however considered there was an infringement of the Articles L.122-5 and L.211-3 of IPC as interpreted with regard to the EU Directive. Indeed it ruled that the infringement to the normal exploitation of the work has to be appreciated by taking into consideration the economic incidence that such a copy can have in the context of a numeric environment.

The DADVSI Bill also introduces into French law the principle of the 'three-step test' that is included in Article 13 of TRIPs Agreement and consists of a set of constraints on the limitations and exceptions to exclusive rights[4]. Besides the legislation acknowledges two new exemptions to copyright: the impossibility to prohibit reproductions in favor of disabled people and the temporary technical copies related to the Internet transmissions ('caching', 'browsing'…). These provisions are not matters of discussion.

Much more commented by the press are the two amendments adopted by French lawmakers last March, 17. They insist on 'interoperability', which would permit an Internet user to copy and read downloaded files on a service of his choice and therefore would break the Apple/iPod exclusivity bond. Apple has indeed always refused to allow its paid-for music files downloaded via iTunes to be converted into another format, which would allow them to be listened to on a music player other than its iPod. Consequently it could decide to pull its music download business out of the French market if the measure bypassing DRM is definitely adopted into law.

In its final form, the Bill includes only very narrow exceptions to anti-circumvention measures and exclusive rights. Indeed, contrary to the DMCA, the EUCD does not contain any exemptions to the prohibition of neutralization of DRM e.g. cryptology, computer security, privacy. As a result, it will surely be regarded as a victory for copyright-owning interests over copyright users' interests.

The DADVSI Bill has already made a great fuss and there are still some hurdles to cross before it becomes law. The French Senate indeed will get its turn in May. So the battle is not over.

[1] France is Europe's third-largest music download market. An estimated 8 to 10 million French people download copyrighted material currently without paying a cent.

[2] The amounts of the levies are the following:
- on Minidiscs : 0,4573 Euro per hour ;
- on audio CDR and CDR-RW : 0,4573 Euro per hour ;
- on video DVD-R and DVD-RW : 1,2577 Euro per hour ;
- on data CDR and CDR-RW : 50,43 Euros per 100 Go ;
- on data DVD-Ram, DVD-R and DVD-RW : 33,80 Euros per 100 Go ;
- on DVHS : 1,2577 Euro per hour ;
- on audio amovible memories : 1,05 Euro per 100 Mo ;
- on MP3 recording players (integrated to the devices) : 1,05 Euros per 100 Mo.

[3] Cass. civ. 1re, Feb, 26, 2006, *Studios Canal, Universal Pictures et Syndicat des éditeurs vidéo vs UFC Que choisir et Stéphane X.*

[4] This article reads, 'Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.'

This article is contributed by Foreign Law Intern, Laurie. Leroy

POLITIKING

1. Resignation of Sonia Gandhi from the Lok Sabha, and the National Advisory Council even as a debate rages in the country regarding the issue of what would constitute an office of profit for disqualifying a member of parliament holding such an office.
2. Amongst some of the recent high profile visitors to India were the American President George Bush, the French president, Russian Premier, Australian Prime Minister, King of Saudi Arabia, Irish Prime Minister, Czech Prime Minister, Bangladeshi Premier with significant political and business implications domestically and globally.
3. The Election Commission has announced a multi-phased election schedule for West Bengal, Kerala, Assam and the union territory of Pondicherry between April 3 and May 8, and a single-phase polling for Tamil Nadu.

IN-HOUSE NEWS

FM created the biggest merger in history of Indian law firms by merging with practices of Little & Co which is a prominent Indian firm with large presence in Mumbai. The merged practice of the firm would be known as Fox Mandal Little (FM Little).

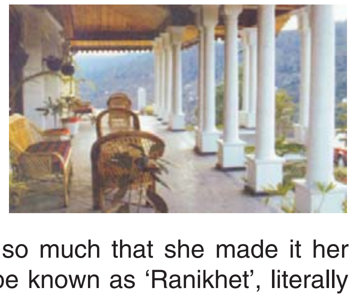
FM Little would have nearly 250 lawyers and fee earners with 150 support staff.

FM Little in Mumbai alone would be 50 lawyers with over 12 partners.

FM South India and Mumbai visited Thailand from 9th-13th February 2006 for their annual retreat.

TRAVEL TALK

RANIKHET



Ranikhet is one of the most beautiful and charming hill resorts of the hills of Uttaranchal. This place gives a breathtaking and mesmerizing view of the majestic Himalayas and the Nanda Devi group of peaks. Its lush green pine and oak forests, attractive plant life and varied fauna are captivating in their own ways. Legend has it that Rani Padmini, queen of Raja Sudhardev, loved this place so much that she made it her abode. Ever since then, this place came to be known as 'Ranikhet', literally meaning "the Queen's Field".

Ranikhet is also a cantonment, established in 1869 when the British troops selected it as a hill station. The Kumaon Regimental Centre, Museum and Memorial stand testimony to this fact. Besides these, there are numerous other places like the Chaubatia Garden, Bhaludam- a small artificial lake and the famous Kalika temple which are worth visiting. The golfers too can have their day at the nine-hole Upat Golf Course, which is just 6 kms from Ranikhet on the Almora road. Ranikhet usually has a pleasant climate. But be it rain, sun or snow, every season has its charm here and this makes it an all-season destination.

Accompanying photographs are from the Windsor Lodge, a perfect and cosy hotel with modern comforts and colonial splendour to make your vacation worthwhile.

FOX MANDAL

- **BANGALORE**
  FM House
  6/12, Primrose Road,
  Gurappa Avenue,
  Bangalore-560025
  Telephone : 91-80-2559 5911
  Fascimile : 91-80-2559 5844
  E-mail : bangalore@foxmandal.com
- **BHUBANESWAR**
  Fox Mandal
  'FM House', HIG-8, BDA Colony,
  Gangadhar Meher Nagar
  Bhubaneswar - 751013, Orissa
  Telephone : 0674-2303327/0674-2303328
  Facsimile : 0674-2303329.
- **CHANDIGARH**
  S.C.O. 3, IInd Floor,
  Sector - 17E, Chandigarh-160 017
  Telephone : 0172-5000090
  Fascimile : 0172-5000090
  E-mail : chandigarh@foxmandal.com
- **CHENNAI**
  FM House,
  29, Kasturi Ranga Road, Alwar Pet,
  Chennai 600 018
  Telephone : 91-44-2498 8040, 2498 6803
  Fascimile : 91-44-2498 6691
  E-mail : chennai@foxmandal.com
- **DHAKA**
  Room No.:- 410,
  Dhaka Chamber of Commerce & Industries
  65/66 Motijheel Areas, Dhaka-1000,
  Bangladesh
  Ph: 00880-9571080
- **HYDERABAD**
  FM House
  22, Rao and Raju Colony, Road No. 2,
  Banjara Hills, Hyderabad-500 034
  Telephone : 91-40-2354 0218/2354 8977
  : 91-40-2355 1804
  Fascimile : 91-40-2354 0219
  E-mail : hyderabad@foxmandal.com
- **KOLKATA**
  12, Old Post Office Street
  Kolkata - 700 001
  Telephone : 91-33-2248 4843/2248 8970
  : 91-33-2248 8565
  Fascimile : 91-33-2248 0832
  E-mail : calcutta@foxmandal.com
- **MUMBAI**
  1105, Dalamal Tower,
  11th Floor, Free Press, Journal Marg,
  Nariman Point, Mumbai-400 021
  Telephone : 91-22-5633 3636
  Fascimile : 91-22-5633 3700
  E-mail : mumbai@foxmandal.com
- **NEW DELHI**
  Litigation Office :
  1, Doctor's Lane, Gole Market
  New Delhi 110 001
  Telephone : 91-11-2336 4586/2334 6872
  Fascimile : 91-11-2374 2591
  E-mail : newdelhi@foxmandal.com
- **Corporate Office :**
  FM House,
  A-9, Sector - 9, Noida-201301
  Telephone : 91-120-2444567/4305555
  Fascimile : 91-120-2542 2222
  E-mail : newdelhi@foxmandal.com

Special Message : We shall appreciate any comments or suggestions that you may have

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HON. EDITORIAL CONSULTANT - KRISHAN MAHAJAN
EDITOR - KAMAL SULTANPURI **SUB EDITORS** - SURBHI GUPTA, SIDDHARTH MISRA & ASHISH GOSAIN.
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FOX MANDAL

NEWS TIME

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Editorial

The disadvantage of illiteracy unites the suffering of the majority in the developing countries. But there is nothing in the international or regional trade and cooperation systems to tackle this. The international and regional organizations fund development through banks. Domestic entitlements for the illiterate majority in each of the developing countries run on public funds channelised through public sector banks. But banking law, international or domestic, does not recognize the acknowledge fact of this disability of the majority. Accordingly banks have targets but no legal duty or accountability to ensure that the entitlements money reaches actually to this illiterate majority. There is no lack of new ideas in public policy and banking concerning the financing of these illiterates. Microfinance is one such idea. But State funded microfinance does no microplanning about the factum of illiteracy which functionally can be divided at least into three areas.

The first of plain language. Banking transactions are documented largely and generally in a language other than the one spoken by the illiterates. Marrying oral contracts to electronic recording as the basis of documentation is possible but not thought of. This is so even though electronic recording makes many banking ideals possible i.e. paperless office, small staff and hence lesser amount on salaries and administration, transparent transactions, reduction of fraud. In India good faith marks massive oral contracts of corporates with farmers of cotton, sugarcane, maize and other farm products. Oral contracts are the foundation of most of business transactions involving the illiterates inter se or with the literate sectors. Electronics would modernize these contracts with benefits to the transactions and the rule of law as well as democratic entertainment.

The second is that of writing disability. Developing countries are rooted in the oral tradition of passing of knowledge by hearing. The first step for the majority into modernization is writing in the native language. If there are too many native languages and the languages do not lend themselves to the written form then banking in a native language becomes impossible. But then banking requires to recognize this in the law concerning its administration and accordingly employ people who can do electronic oral contracting in the native language. Multilingual capacity between the native language and the official colonial language, which dominates written documentation, is by itself a costly achievement and therefore beyond the reach of the illiterate and poor majority. Politics in many of the developing countries has become democratic because the radio and the television have electronically supported the traditional oral debate. However, this remains to be recognized in banking.

The third disability is that of legal language, which is usually in the pre-independent colonial form. State run banks make no effort to understand the oral contract language and put that into writing or on audio/video. English, French, Spanish, Portugese, Dutch or German, (depending on the historical imperial power that colonized a developing country) continue to dominate the legal language of banking in the developing countries. In short, there is a huge creative area of language in banking waiting as a market ready for being tapped as part of economic development. But international and domestic banking legal systems do not yet see this huge market which like all other markets can be created, nurtured and promoted by its legal recognition.

But apart from the language and writing disabilities, the illiterate majority faces two other obstacles in getting its legal due. The first of these is information about what banks are supposed to do for them. Fifty five years after independence India has enacted the Right to Information Act. This still requires the applicant to know what to seek, where to seek it and how to seek it. Given the absence of a legal duty on banks to inform the illiterates, this knowledge is almost an impossibility, moreso in developing countries which do not have such an Act even. Hence economic development in terms of its own efficiency mandates an international movement for the illiterates' right to be informed with illiteracy being defined as a non-native language and writing disability. When the native languages press and electronic media, in terms of circulation and viewer ship, far outstrip the colonial language media, banking cannot continue to be an island of the colonial language only.

The second obstacle is that legal assistance in banking for the majority illiterates. State run legal aid, even where it exists in the developing countries, puts forth the same barriers of language, writing and information as the banking sector in these countries. The central banks of international finance and the domestic central banks of the developing countries do not so far have any programme in place of effective and efficient legal aid in the banking for the majority illiterates. Hence though democracy depends on this majority as does the developing countries development, yet bankers do little to facilitate the majority illiterates in banking. The legal definition of public interest in the area of banking needs new content to liberate banking into new markets relevant to the developing countries populations.

This issue of FM reflects India's vibrant democracy of watchdog courts even on politics at the highest level of Governors of States, the political movements of beliefs practices and power as also the continuing push to put into place a new framework of laws to meet the demands of the international investment environment . It is rounded off by an informative and analytical article on the French copyright law in terms of the European Union directive and places in India to which one can travel to beat the steadily rising heat. India is in the midst of a major debate on energy security with its new agreement on nuclear supplies with the Unites States which awaits the nod of its Senate. Summer fruits, herbal drinks and delightfully coloured ethnic clothes are out in the markets. Happy reading and travel.

_KM

Clippings

The stock markets have registered the Sensex closing well above the 11,000-mark, yet another record. In the first three months of this year alone, domestic mutual funds have raised Rs 17,250 crore through their equity fund offerings.

Prime Minister Manmohan Singh has asked the finance ministry and RBI to work out a roadmap for the full convertibility of the rupee to attract more investments into the country.

The central public sector units (CPSUs) have lined up investment plans worth Rs 1,42,000 crore for the financial year 2006-07, contributing a large pool of the resources, as much as 47 per cent, from the internal accruals.

India's foreign exchange reserves are set to touch the $150-billion mark in 2005-06.

According to a UN report, India should be able to sustain its last three years' GDP growth rate of more than 8 per cent going forward over 2006-08.

Corporate

RBI eases overseas investment norms

Indian corporates will now find it much more easier to provide guarantee for their overseas investment or to disinvest from their foreign venture. The Reserve Bank of India has issued a notification liberalising the procedure for overseas investment. As per the new norms, corporates can offer any form of guarantee for their overseas investment under the automatic route, provided all financial commitments are within 200 per cent of their net worth and the guarantee amount is specified upfront. Accordingly, companies can offer corporate, personal, primary or collateral guarantees. Guarantees by wholly-owned subsidiaries (WOS), sister concerns, joint ventures (JVs) or associates of a company will also be permitted. At present, only the promoter company is permitted to offer guarantees on behalf of its wholly-owned subsidiaries or joint ventures under the automatic route. Personal, collateral and third party guarantees require prior approval of the RBI on a case-by-case basis. Guarantees issued by banks in India in favour of subsidiaries or joint ventures abroad will be outside this ceiling and subject to prudential norms issued by the RBI. The RBI has also permitted Indian companies to disinvest without its approval where the JV or WOS are listed on the overseas stock exchange, the Indian promoter company is listed in India and has a net worth of not less than Rs 100 crore, the Indian promoter is an unlisted company and the investment in overseas venture does not exceed $10 million. In order to allow recognised exporters with a proven track record and a consistently high export performance to enjoy the benefits of globalisation and liberalisation, the RBI has allowed proprietary and unregistered partnership firms to set up a JV or WOS outside India. Until now, only registered firms were allowed to invest in or set up JVs abroad.

MCA 21

MCA 21 is an e- Governance plan of Ministry of Company Affairs (MCA). MCA 21 was notified on 10.02.2006. Pilot launch of MCA took place on 18.02.2006, in Coimbatore and shall extend to other Registrar of Companies (ROCs) in a phased manner by April 2006.One of main objective of MCA 21 is " on line operation"anytime anywhere. The key benefits of MCA 21 are:

- **Registration and incorporation of the company.**
- **Easy mode of filing of forms, returns and other documents.**
- **Registration of charges**
- **Inspection of documents**
- **Quick investor grievance redressal.**
- **Building centralized database.**

At present filing of new e-forms are being accepted in physical manner under manual signatures. This will be accepted till 30/06/2006 and thereafter "on line" will become fully operational. Fees can be paid through various options such as credit card, internet banking, specified branches of five banks (HDFC, ICICI, PNB , SBI & Indian Bank).

Corporate identity number (CIN) is starting point for filling e-form which is displayed when the company registration number or name is entered with ROC code. Access to documents of another company is provided from "My MCA" after payment of requisite fee, during 7 days for maximum of 3 hours. Investor complaint against any company may be filed through the system after knowing CIN of the company, using this service . No digital signature is required for this purpose.

Directors Identification Number

- Every existing and prospective Director including non Indian citizens need to have DIN(Directors Identification Number).
- No company shall appoint or reappoint any Director unless Director has been allotted DIN (S.253)
- Every existing director shall make an application for DIN within a period of
  - Two months from date of commencement of MCA 21.
  - Sixty days of commencement of Companies (Amendment) Act,2006 (S.266A)

Note: Companies (Amendment) Bill, 2006 is already introduced in Rajya Sabha.

- Every Director is required to inform the company within one month of allotment of DIN (S. 266D).
- Every Company within one week of receipt will inform ROC about DIN (S.266E).
- A Director can obtain one DIN only irrespective of number of companies in which he is Director (S.266C).
- Non compliance to above will attract fine upto Rs. 5000 and Rs. 500 for every day if contravention continues. (S.266G).
- No fees is payable for DIN.

Digital Signature Certificate (DSC)

- Directors, Authorised Signatories and Professionals need to have DSC for securing on-line interactions.
- DSC is issued by 7 authorized agencies, valid for a period of one year and renewable thereafter.
- TCS- Mumbai, MTNL-New Delhi , Customs & Excise-New Delhi etc. are some of agencies.
- Applicable fee is charged by agencies for issue of DSC, which vary from agency to agency.

FBT relief to corporates

Corporates may feel the bite of the fringe benefit tax (FBT) a lot less in the coming fiscal, with the government examining a host of options, including a reduction in the base for valuation of expenses on important categories of expenses. Tour and travel (including foreign travel), sales promotion and publicity are among the expense heads where rationalisation is being considered, top government officials said. FBT is a presumptive tax where it is presumed that a portion of the expenses incurred by companies and other employers under certain heads have been spent on employees. Right now, 20-50% of such expenses are taxed at 30%. The government has a few options which could lower companies' tax liability.Travel costs constitute a large chunk of the total expenses incurred on employees. The BPO sector has been lobbying for a similar concessional tax treatment. For an employer in the hotel business, the value of fringe benefit for conveyance, travel and tour is 5% instead of 20%. Similarly for the pharma sector, the value of fringe benefits on conveyance and use of hotels is 5% instead of 20%. The effective tax rate for corporates is currently around 20% due to several exemptions. Finance minister P Chidambaram had, after the amendments to the Budget proposals, held that the FBT will raise the tax liability by a mere 1-1.5%.

Companies free to decide on board strength, remuneration soon

Companies will soon get the freedom to appoint any number of directors on their boards and to raise their remuneration without the government's approval, as it is required today. The ministry of company affairs has accepted the JJ Irani committee recommendations to concede the government's role to the board of directors in many areas where approvals are needed now, in order to cut short state interference in business. Currently, a listed company needs government approval before raising the strength of its board or its subsidiary's beyond 12. The new bill will also give the board of directors total freedom to raise the remuneration of its directors, including managing director as against the current requirement of seeking government approval beyond a limit. The committee had noted that emphasis should be more on disclosures rather than providing limits. The new bill will retain the limit of maximum directorships one can hold at 15. Also, under the new law, alternate directors will be taken into account while counting the number of directors on the board unlike the current practice. Alternate directors are appointed to represent a director who is not able to attend board meetings.

Foreign Direct Investment ("FDI")

FDI in the Up-linking of TV Channels

The Government vide Press Note 1 of 2006 series, has allowed FDI (including investment by foreign institutional investors ("**FII**")) up to 49% under the FIPB route for setting up of hardware facilities including Up-linking / HUB etc. The said Press Note also permits FDI (including FII investment) up to 26% for Up-linking a News and Current Affairs TV Channel. In the case of a Non-news & Current Affairs TV Channel , 100% FDI has been permitted for up linking the same. All of the above permissions for FDI in this sector are subject to the guidelines issued by Ministry of Information and Broadcasting, Government of India.

FDI in Retail trading

Under the existing FDI policy, FDI in retail trading was prohibited. The Government of India, Department of Industrial Policy and Promotion in a significant development, permitted vide Press Note 3 of 2006 series, FDI up to 51% in retail trading subject o the condition that the Indian company would only trade in a single brand. FDI is allowed in above-mentioned single brand retailing subject to the approval of the Foreign Investment Promotion Board ("**FIPB**"). Further, it has been stated that such single brand retailing will cover only such products, which are branded during manufacturing. Single brand retailing excludes retailing of goods of multiple brands even if the same manufacturer produces such products.

FDI in other trading activities

Under the existing policy, approval of the FIPB was required for FDI in "Cash and Carry Wholesale" and where FDI in "Export Trading" exceeded 51%. The Government vide Press Note 4 of 2006 series, permits FDI in the above two sectors up to 100% on an automatic basis.

Automatic Approvals

The Government of India has vide Press Note 4 of 2006 series has permitted FDI up to 100% on automatic basis in the following sectors:

- Development of new airports by setting up green field airport projects
- Exploration and mining of diamonds and other precious stones
- Laying of natural gas/LNG pipelines
- Market study and formulation and investment/financing in the petroleum sector
- Processing and warehousing in coffee and rubber industry. However FDI in coffee and rubber plantations continues to remain prohibited
- Power trading subject to the provisions of the Electricity Act 2003
- Investment in creation of infrastructure related to marketing in petroleum sector
- Captive mining of coal and lignite for consumption by eligible users
- Distillation and brewing of potable alcohol, industrial explosives and hazardous chemicals
- Industrial projects' located within 25 kilometers of the urban limits of 23 specified towns. However, such projects shall continue to require industrial license.

Transfer of shares by residents to non-residents

Under the existing FDI policy, transfer of shares of an Indian company by residents to non-residents could be executed under the automatic route provided:

- The activities of the Indian company fell under the automatic route for FDI and did not attract the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.
- The non resident shareholding in the Indian company after the transfer would have complied with sectoral caps as prescribed under the FDI policy
- The pricing guidelines and other requirements issued by the RBI / SEBI have been complied with.

However, the above automatic route was not available for transfer of shares of a company in the financial services sector. The Government vide Press Note 4 of 2006 series has proposed to treat this sector at par by allowing shares of companies in this sector to be transferred from residents to non residents without the approval of the FIPB.

Business to Business – E – Commerce

Under the existing FDI guidelines, FDI up to 100% was allowed in Business-to-Business E-Commerce. However, the investor was required to divest 26% of the foreign equity within 5 years of making the investment. The Government vide Press Note 4 of 2006 series, seeks to dispense with the requirement of mandatory divestment of 26% foreign equity in B2B E-Commerce.

TAXATION

IT parks to enjoy tax sops under Section 10A

The Central Board of Direct Taxes has issued directions to all its field authorities that the tax deduction available under Section 10A of the Income-tax Act would not be denied to software technology parks units on the ground that approval or registration to such units had been granted by the directors of software technology parks. In cases where assessments or re-assessments have already been completed, and claims under Section 10A disallowed on the ground that approval to the STP has not been granted by the Inter-Ministerial Standing Committee in accordance with the scheme, the CBDT has instructed that the demand be kept in abeyance until further orders. The instructions have been issued on account of a large number of units registered and approved by the directors of the software technology park claiming deduction under Section 10A. Section 10A of the Income-tax Act, 1961, provides for 100 per cent deduction for ten years, of export profits earned by units set up in a Software Technology Park. The STP scheme notified in March, 1995 by the Ministry of Commerce, requires approval of the Software Technology Park by the Inter-Ministerial Standing Committee of the Department of Electronics. The Central Board of Direct Taxes (CBDT) had received representations from its field formations questioning the STPI's status and its powers to grant tax exemptions under Section 10A of the Income tax Act.