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This issue covers the following topics:

India

Proposed Amendments to the Competition Act, 2002

2022 年 8 月 5 日、インド議会に競争法改正案が提出された。同改正法案は、過去 10 年間のインド市場の著しい成長と企業活動のパラダイムシフトを背景に、2002 年に制定された競争法の実体的・手続的な規定を改正するものである。最終的な改正法は今後の国会での審議次第であるが、現時点の改正案における主要な改正点について紹介する。

Background

The Competition (Amendment) Bill, 2022 (the "**Amendment Bill**") was introduced in the Parliament of India on August 5, 2022[1]. The Amendment Bill seeks to carry out certain changes to the substantive and procedural provisions of the Competition Act, 2002 ("**Competition Act**") owing to "a significant growth of Indian markets and a paradigm shift in the way businesses operate, in the last decade"[2]. In view of the economic development, emergence of various business models and the experience gained out of the functioning of the Competition Commission of India ("**CCI**"), the Government of India constituted the Competition Law Review Committee, to examine and suggest modifications to the Competition Act. After review of the recommendations proposed by the Committee, public consultations and with a view to provide regulatory certainty and trust-based business environment, the Government of India has tabled the Amendment Bill before the Parliament.

We have summarized key features of the Amendment Bill below.

Combinations based on Transaction Value

Currently transactions involving parties with: (i) cumulative assets of more than INR 10 billion, or (ii) cumulative turnover of more than INR 30 billion, require the prior approval of the CCI, unless any of the exemptions apply. The Amendment Bill seeks to include combinations wherein the value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds INR 20 billion, as a reportable transaction, requiring the prior approval of the CCI, subject to the condition that the party in question has substantial business operations in India.

The Amendment Bill, however, does not define "substantial business operations in India" and it is up to the CCI to provide clarification. Further, the "value of transaction" will include every valuable consideration (direct, indirect

1 Full text of the Amendment Bill can be found at http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185_2022_LS_Eng.pdf
2 Statement of objects and reasons of the Competition (Amendment) Bill, 2022.

or deferred) for any acquisition, merger or amalgamation. The introduction of the transaction value threshold will allow the CCI to review a number of additional transactions which may otherwise fall below the current prescribed asset/turnover thresholds.

Approval Timelines

The current provision under the Competition Act states that a combination will be effective only after the CCI issues an order in this regard, or after 210 days have passed since the date the notice of the combination was submitted to the CCI. The Amendment Bill proposes to reduce the review timeline from 210 days to 150 days. In case the party to the combination requests for additional time to furnish relevant information or remove defects to the notice of combination filed, the CCI may grant additional time which shall not be more than 30 days. The Amendment Bill also proposes that the CCI is required to form its preliminary view on a transaction within 20 calendar days (current timeline provides for 30 working days) failing which, the combination will be deemed approved.

Definition of Control

The Competition Act defines control as 'control over the affairs or management by one or more enterprises over another enterprise or group' for the purpose of classification of combinations. The Amendment Bill seeks to modify the definition of control and introduce a lower threshold of "control", consistent with the CCI's interpretation of control in past decisions, and define it as 'the ability to exercise material influence over the management, affairs, or strategic commercial decisions'. However, the Amendment Bill does not expand on the term "material influence" and absent such clarification, the term will need to be interpreted from case to case, unless the CCI issues any clear guidance in this regard.

Increased Penalty in Certain Events

The Competition Act imposes certain penalties in the event any party to a combination either: (i) makes a materially false statement, or a makes a knowingly false statement; and (ii) omits or fails to state any material particular, which such party knows to be material. As per the current provision of the Competition Act, the penalty payable by such party is determined by the CCI but shall not be less than INR 5 million but may extend to INR 10 million, however now the Amendment Bill proposes to increase the upper threshold of the penalty to INR 50 million.

Further, under the current regime, a failure to notify the CCI of the combination may result in the CCI imposing a penalty of up to 1% of the assets or turnover (whichever is higher) of the combination. The Amendment Bill modifies this provision of law, and now any party to a combination who fails make the requisite notification to the CCI or submit the relevant information in response to an inquiry into the combination initiated by the CCI may be liable to pay a penalty of up to 1% of the total turnover, assets, or transaction value of such a combination, whichever is higher.

Exemption from the standstill requirement

The Amendment Bill proposes to include a new provision that exempts stock market purchases from the Competition Act's standstill obligations. It seeks to exempt implementation of an open offer or an acquisition of shares or securities convertible into other securities from various sellers, through a series of transactions on a regulated stock exchange, if: (a) the notice of the acquisition is filed with the CCI as required under the Competition Act; and (b) the acquirer does not exercise any ownership or beneficial rights or interest in such shares or convertible securities including voting rights and receipt of dividends or any other distributions ("Exemption Conditions"). The exemption would enable the relevant parties from consuming time-sensitive stock market acquisitions without having to wait for the CCI approval. However, the acquirer will need to adhere to the Exemption Conditions until receiving approval from the CCI.

Settlements and Commitments

The Amendment Bill proposes a new settlement and commitment mechanism for cases involving anti-competitive vertical agreements and abuse of dominance. The settlement and commitment process will not be applicable for cartel cases. In effect a settlement can be offered after the investigation report has been issued by the Office of the Director General (the DG) and before the CCI passes its final order in the matter. The Bill also permits parties

to propose a voluntary commitment after the CCI forms a prima facie opinion on the matter but before the DG issues its investigation report. The final order adopting the commitment or settlement would not be subject to any appeal. Currently, the Competition Act does not contain any such provisions and the introduction of the settlement and commitments provisions will enable CCI to expedite the enforcement process and complete investigations sooner.

Leniency

The Amendment Bill proposes the introduction of *leniency plus*, which allows the CCI to grant additional leniency in penalty in a situation where a party being investigated for collusive conduct makes a true and vital disclosure of another undisclosed cartel.

Conclusion

Overall, the amendments to the Competition Act are a positive step towards meeting the needs of the new age market. To fully comprehend what this means for India's merger-control regime, one will need to wait for the approval of the Amendment Bill by the Parliament and the CCI regulations ensuing from it.

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Thailand

Bill to Promote Small-sized Breweries and Distilleries (Thailand)

タイのアルコール飲料市場、とりわけビール市場は、参入障壁が高く、大手による寡占が続いてきた。かかる現状を踏まえ、中小の酒造事業者の参入を容易にし、競争を促進するため、本年６月８日、酒類製造免許の要件の緩和を可能とする物品税法の改正案が、下院において原則承認された。

Background

In 2022, the revenue from the alcoholic beverage market in Thailand was worth USD 22,880 million approximately[1]. Despite this, the market for alcoholic beverage in Thailand is dominated by a few players especially in the Thai beer market of which 93% market share belongs to duopolists[2]. The rationale behind this market domination may be attributed to the qualifications to be met by the alcoholic beverage producers regarding the financial strength and technology on production which is of high standard and cost-intensive, making it economically difficult for new players, especially small and medium-sized breweries and distilleries to enter into the market.

However, on 8 June 2022, the House of Representatives has in principle approved the Draft of Excise Tax Act B.E… **("Bill")**, introducing possibility to relax the eligibility and criteria for liquor production permit. This will grant small breweries and distilleries the ability to start their business in Thailand and encourage competition in the Thai alcoholic beverage market.

Comparison between the Current Regulations and the Proposed Amendment

Basically, to produce alcoholic beverage in Thailand, producers are required to have a liquor production permit granted by the Excise Department. Presently, the eligibility and criteria of permit holders are stipulated in Section 153 of Excise Tax Act of 2017 **("Excise Act")** and Ministerial Regulation concerning Liquor Production Permission of 2017 dated 12 September 2017 **("Ministerial Regulation")**.

However, if the Bill passes every stage of scrutiny in the Parliament, Section 153 of the Excise Act may be amended as follows:

Excise Tax Act of 2017	Draft of Excise Tax Act of…
Section 153. Any person who wishes to produce liquor or possesses a distiller to produce liquor shall acquire a permit from Director General and shall comply with criteria, procedures, and conditions stipulated by Director General. Application and granting of permit in paragraph one shall comply with criteria, procedures, and conditions stipulated in a ministerial regulation.	**Section 153.** Any person who wishes to produce liquor **for commercial purposes** shall acquire a permit from Director General and shall comply with criteria, procedures, and conditions stipulated by Director General. Application and granting of permit in paragraph one shall comply with criteria, procedures, and conditions stipulated in a ministerial regulation. **Criteria, procedures, and conditions in paragraph two shall not stipulate qualifications of an applicant related to production capacity, machine's horsepower, number of employees, and type of person eligible to apply for the permit. For an applicant who is a company established under Thai law, minimum registered capital shall not be stipulated except stipulating Thai shareholder ratio.**

If the Bill becomes effective, the following criteria and conditions for production of alcoholic beverages for

[1] https://www.statista.com/outlook/cmo/alcoholic-drinks/thailand
[2] https://www.krungsri.com/th/research/industry/industry-outlook/Food-Beverage/Beverage/IO/io-beverage-2022

commercial purpose as stipulated under the Ministerial Regulation may be removed:

- The permitted applicant must be a company with minimum registered capital of THB 10,000,000[3];
- The minimum production capacity for beer must be 10,000,000 liters per year[4]. However, if the beer will be produced and sold on-site, the minimum production capacity must be 100,000 to 1,000,000 million liters per year[5];
- The minimum production capacity for whisky, brandy, and gin must be 30,000 liters per day[6]; and
- Factory for producing fermented liquor (except beer) or distilled liquor in the local community must use machinery with combined horsepower less than 5 and employ employees less than 7 persons[7].

Status of the Bill and Possible Development

The Bill was accepted in principle by the House of Representatives on 8 June 2022. Presently, the Bill is under the consideration of the special committee and will be re-submitted to the House of Representatives for a resolution. If the House of Representatives accepts the Bill, it will be sent to the Senate for a resolution, processed for the Royal signature and finally published in the Government Gazette for enforcement.

Conclusion

The development of the Bill aims to lower threshold for applying for a liquor production permit. It is expected to be a first step to end a liquor production oligopoly in Thailand and open an opportunity for new breweries and distilleries to compete in the Thai alcoholic beverage market. We advise the current alcoholic beverage producers and investors to follow this development due to the impact it may have on this industry in the future.

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[3] Clause 2(1)(a) of the Ministerial Regulation
[4] Clause 4(1)(b) of the Ministerial Regulation
[5] Clause 4(1)(a) of the Ministerial Regulation
[6] Clause 4(2) of the Ministerial Regulation
[7] Clause 4(5)(a) of the Ministerial Regulation

Singapore

New Court of Appeal Decision on Setting Aside Arbitral Award

2022 年 7 月 18 日、シンガポール控訴裁判所は、ICC 裁定を無効とする当事者からの申立に対して、損害賠償に関する裁定が自然的正義（natural justice）に反するとして一部無効とする判断を下した。本判決では、「no evidence rule」や「fair hearing rule」の適用の有無についても言及されており、重要な法的論点が複数含まれている判決であることから本稿で紹介する。

Background

In a recent decision dated 18 July 2022, the Singapore Court of Appeal considered an application to set aside an ICC award. The Court of Appeal partially set aside the award, finding that the tribunal's order on damages was issued in breach of natural justice.

The case, *CEF and another v CEH* [2022] SGCA 54 ("***CEF v CEH***") is notable for the many issues canvassed on grounds for setting aside an arbitral award under the International Arbitration Act ("**IAA**"). This note sets out a summary of select key determinations by the Court of Appeal, including apparent novel issues such as the alleged impossibility or unworkability of a tribunal's order and the "no evidence rule".

Summary

In *CEF v CEH*, the arbitration in question arose out of a dispute over the construction of a steel plant. The appellants were contracted to design and build a steel plant for the respondent. The plant construction ran into delays and the completed plant never met its production target. The appellants and respondent each commenced arbitrations against the other. In October 2016, the two arbitrations were consolidated into a single arbitration upon the parties' consent ("**the Arbitration**"). The Arbitration was conducted under the ICC Rules and seated in Singapore.

A three-member arbitral tribunal ("**the Tribunal**") issued an award in November 2019 ("**the Award**"). By a majority, the Tribunal found that the respondent had been induced to enter into the contract by the appellants' misrepresentations, and that the respondent was thus entitled to rescission.

The Tribunal granted various orders in the respondent's favour. The appellants were dissatisfied with the result in the arbitration and applied to the Singapore High Court to set aside the award.

The set aside application focused on three orders issued by the Tribunal, namely:

(a) that the appellants pay the respondent a specified sum, that was derived from the contract price less further specified sums to account for (i) two loans the first appellant had previously extended to the respondent and (ii) the respondent's use of the plant and the diminution in the value of the plant ("**Repayment Order**");

(b) that the respondent was to "transfer the title to the Plant, including the additional equipment installed" to the appellants in return for payment under the Repayment Order ("**Transfer Order**"); and

(c) the appellant pay a specified as damages under the Misrepresentation Act of Singapore ("**Damages Order**"). The sum awarded represented 25% of the damages it had sought.

The High Court dismissed the set application in entirety. On appeal, the Court of Appeal set aside the Damages Order and upheld the remainder of the Award.

Key determinations

The appellant raised many issues and arguments in support of its challenges against the Tribunal's three orders. The following is a summary of the Court of Appeal's key determinations on grounds that justify setting aside an award under the IAA.

Impossibility/unworkability of an order

The appellants argued that the Transfer Order should be set aside under Article 34(2)(a)(iv) of the Model Law, on the basis that it is impossible or unworkable. However, the appellants were unable to present any authority for the argument that impossibility or unworkability is grounds to warrant setting aside an award.

In any event, the Court of Appeal found that the terms of the Transfer Order were not impossible or unworkable. The Court noted that, among others, the respondent is able to effect the removal of the plant from the site and transfer title to the disassembled components to the appellants, who could then take possession. Another factor was that there was no evidence before the Court to show that it was impossible to disassemble the plant without destroying it or rendering its components worthless.

"No evidence rule"

The appellants argued that the Repayment Order should be set aside under Article 34(2)(a)(ii) of the Model Law and/or section 24(b) of the IAA on the basis that it was issued in breach of the "no evidence rule".

The "no evidence rule" has been applied in neighbouring common law jurisdictions Australia and New Zealand. In the present context, the effect of the "rule", if applied, is that arbitral awards containing findings of fact made with no evidential basis can be set aside for breach of natural justice.

The Court of Appeal held that the "no evidence rule" should not be adopted as part of Singapore law. The Court reasoned that doing so would be contrary to the judicial policy of minimal curial intervention in arbitration proceedings, which is well established in Singapore. In effect, the "no evidence rule" would amount to an invitation to the courts to re-examine the merits of a tribunal's findings of fact. The Court held that this is impermissible, as setting aside applications are not an avenue for appeals against an arbitral award.

Fair hearing rule

The appellants argued that the Damages Order should be set aside on the basis that it was issued in breach of natural justice. Specifically, the appellants submitted that there was a breach of the fair hearing rule in the Tribunal's award of damages.

The appellants pointed to the Tribunal having rejected and/or found the respondent's evidence in support of its damages claim to be deficient. Nonetheless, the Tribunal went on to adopt a "flexible approach" by which it awarded the respondent 25% of its claimed quantum of damages.

The Court of Appeal allowed the appeal in relation to the Damages Order. The Court affirmed its earlier decision in *BZM and another v BZV* [2022], where it was held that to comply with the fair hearing rule, the tribunal's chain of reasoning must be (i) one which the parties had reasonable notice that the tribunal could adopt and (ii) one which has a sufficient nexus to the parties' arguments. The party applying to set aside an award will need to establish that a reasonable litigant in its shoes could not have foreseen the possibility of the reasoning of the type in the award.

The Court of Appeal considered the relevant parts of the Tribunal's reasoning on damages and found that there had been a breach of the fair hearing rule. The Court noted that the Tribunal had reached an express finding that the respondent failed to produce the relevant supporting documents or explain how the existing documents substantiated its damages claim. In the Court's view, both parties would have expected that the Tribunal would award only such damages that the respondent could prove. Given the Tribunal's finding on the deficiencies in the respondent's evidence, the parties would have expected the Tribunal to dismiss the damages claim in entirety.

The Court further found that the Tribunal's adoption of the "flexible approach" had no connection to the issue of what the appropriate award of damages should be. Once the Tribunal found that the respondent had not proved its loss, the only appropriate order was to award 0% of the claim. In other words, the "flexible approach" to damages did not allow the Tribunal to award a figure at random.

Inadequate reasons for the Tribunal's decision

The appellants argued that the Award does not contain sufficient reasons for the Tribunal's decision on key issues,

and the Award should therefore be set aside under section 24(b) of the IAA, Article 34(2)(a)(ii) and/or Article 34(2)(a)(iv) of the Model Law.

The Court of Appeal noted that both Article 31(2) of the Model Law and Article 31(2) of the ICC Rules provide that "[t]he award shall state the reasons upon which it is based". As to the content of this requirement, the Court affirmed the general principle that whether an arbitral tribunal's decision is sufficiently reasoned is a matter of degree and must be considered in the circumstances of each case. In addition, even if no reasons were given in an award, this does not necessarily result in the award being set aside for breach of natural justice.

In any event, the Court considered that the Award, considered in whole, did provide sufficient reasons to inform the parties of the bases on which the Tribunal had reached its decision on the essential issues in dispute.

Conclusion

The Court of Appeal decision in *CEF v CEH* is an important addition to the body of Singapore case law on set-aside applications. It affirms the principle of minimal curial intervention in arbitration proceedings, which is well established in Singapore judicial policy.

The case is also an important illustration of the relatively narrow circumstances that would constitute a breach of natural justice. Going forward, parties may expect to see arbitral tribunals taking greater caution to satisfy the requirements of the fair hearing rule. This involves ensuring that the parties are heard on the issues in dispute and that the chain of reasoning set out in the award is sufficiently connected to the parties' arguments, rather than one that a reasonable litigant could not have foreseen.

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