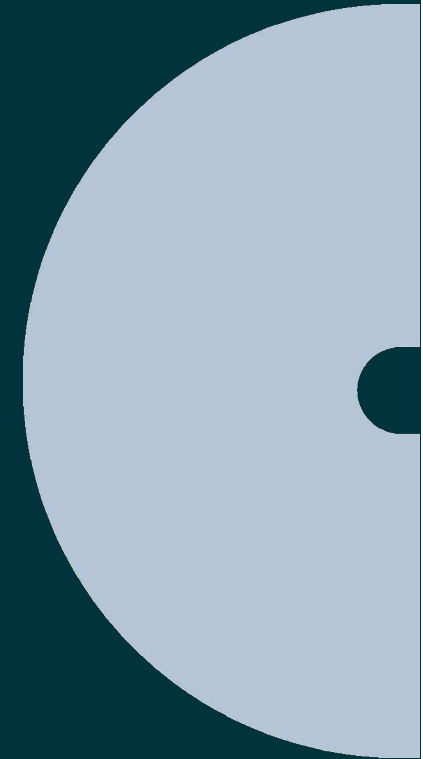
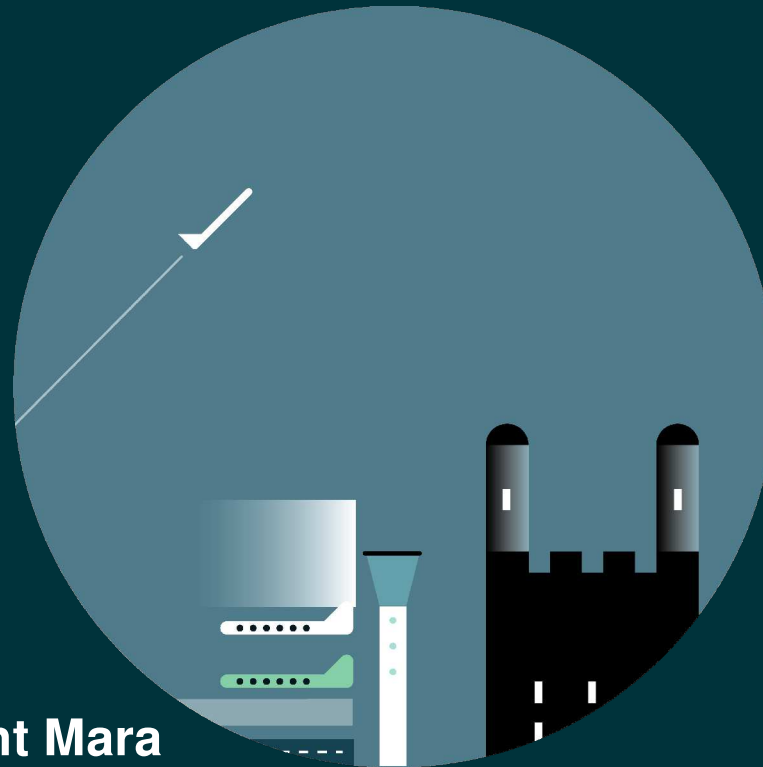


Update India – Legal issues for German companies



Ulrich Bäumer/ Prashant Mara

29 March 2011, Duesseldorf

Some interesting developments in Indian commercial law

Competition Commission of India (CCI) gets teeth

- Government of India passed the Competition Act, 2002. The CCI is now fully functional.
 - The provisions of the Competition Act relating to anti-competitive agreements and abuse of dominant position were notified in 2009.
 - The investigative powers and the procedure for investigation of violations under the law were also notified in 2009.
 - While vertical business collaborations are in principle allowed horizontal mergers and acquisitions are being looked upon critically. Thresholds for acquisitions and mergers have been defined over which the CCI's permission/ intimation is necessary.
 - CCI has also been given powers to impose penalties on companies violating the law. These penalties may be in the form of fines and/or imprisonment.
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Intellectual Property Issues

- Recent judgement of Intellectual Property Appellate Board (IPAB) on revocation of patents of Enercon GmbH created a furore in Germany.
- 12 out of 19 patents were revoked in India as "obvious" and "not novel".
- German media claims IPAB revoked patents with reasoning-"national interest". No such reference in the judgment of the IPAB.

Intellectual Property Issues (CONTD)

Our analysis

- The judgement of IPAB does not refer to "national interest" as a reason for revocation.
- Interpretation of what is "obvious" and "not novel" depends on each jurisdiction and the IPAB has its own interpretation in this case.
- The grounds for revocation are valid without commenting on the merits of the revocation

Joint Ventures and Intellectual Property

Further analysis

- Active protection of intellectual property especially in joint ventures is highly important
- In almost all joint venture (**JV**) disputes the technology licensor/holder is advised to first bring an injunction against the licensee from using its technology
- Approaching the Company Law Board (**CLB**) results in a warning to the opposite party giving rise to counter-attacks.
- Any adjudication under the CLB or application for winding up takes a number of years to get decided and invariably, during the process, the shareholding value of the company becomes nil

Joint Ventures

Exiting a JV – a successful example

- German company without warning obtains an injunction against the Indian partner prohibiting use of its technology
- The company simultaneously sends a termination notices of JV thereby crippling the operations of the JV company
- The Indian company is forced to negotiate with the German company in order to regain access to the technology
- German company makes the Indian partner buy its shares in the JV company as a condition to license its technology as a third party
- German company exits JV + retains Indian party as a customer

Corruption and Bribery

Corruption and bribery-Investigations in India

- Intense media pressure on the government in corruption cases.
 - Public procurement projects have resulted in a number of prosecutions such as the Commonwealth Games and Telecom spectrum allocation.
 - Bribery is a punishable offence under Indian laws. It is punishable with imprisonment and fines. Now enforcement has become more stringent with Ministers, CEOs and MDs being named in the police complaints and having to spend time in jail.
 - Commercial impact of bribery is huge. For example no payments to any service providers have been made for CWG contracts. Similarly, telecom licenses granted under the 2G/3G tenders are under review.
 - Once under investigation, all companies associated with the investigation may be blacklisted and barred from doing business in India (especially in relation to any government contracts).
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Arbitration

One of the main controversies of arbitration in India has been over the application of Part I of the Indian Arbitration Act in respect of international commercial arbitrations where the seat is not in India.

- Part I of the Arbitration Act applies to domestic arbitrations
- Unless specifically excluded in the arbitration agreement, Part I also applies when the seat of arbitration is outside India
- The general provisions of Part I of the Arbitration Act set forth certain grounds on which arbitration awards may be challenged, including a violation of Indian public policy.
- Under Part I the parties can at any time before the enforcement of the award approach the court for grant of interim reliefs

Arbitration- Our Analysis

- Unless specifically excluded, a losing party can challenge "foreign awards" (i.e., awards in arbitrations outside India) before Indian courts on the grounds that they violate Indian statutory provisions and are contrary to Indian public policy [*Bhatia International vs. Bulk Trading S.A. & Anr*] [*Venture Global Engineering v. Satyam Computer Services Ltd.*]
 - Anything that is against any Indian law is deemed to be opposed to Indian public policy [*ONGC vs Saw Pipes*]. The interpretation of "public policy" introduces limitless judicial review of Indian arbitral awards
 - It is open to the court to consider whether the award is against the specific terms of contract and, if so, interfere with it on the grounds that it is patently illegal and opposed to the public policy of India [*Delhi Development Authority v. R. S. Sharma*].
 - The decision has resulted in an increase in challenges to foreign arbitral awards in India
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Contact



Ulrich Bäumer
Partner / Rechtsanwalt
IT

T +49 (0)221 5108 4168

M +44 (0)221 5108 4169

ulrich.baeumer@osborneclarke.de



Prashant Mara
Co-Head India Group
IT

T +49 (0)221 5108 4168

M +44 (0)221 5108 4169

prashant.mara@osborneclarke.com