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When Intenrational Arbitration Collides With National Law A critique of the foundation laid by the Delhi High Court in the case of NTT DoCoMo Inc. vs. Tata Sons Limited

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Abstract

The decision of the Delhi High Court (DHC) in the matter of DoCoMo Inc vs Tata Sons Limited and the settlement thereof in the year 2017 has attracted significant attention from all stakeholders. The case involves an analysis of the foreign direct investment policy and the regime regarding foreign investments in India and exits of foreign investors from companies in India. The dispute involves an interplay of interpretation of contracts and the role of the Reserve Bank of India (RBI). While the Foreign Exchange Management Act, 1999 (FEMA) does not permit "assured returns" to an overseas investor when such investor desires to monetise its Indian investments through sale to a resident Indian investor, it appears that the arbitral tribunal, and the DHC took a favoured view when it came to NTT DoCoMo Inc. The decision of the DHC, upholding the foreign arbitral award for a contract that was in obvious violation of FEMA was quite startling. Unfortunately, this rationale was also the basis on which Supreme Court arrived at its views in the matter of Vijay Karia & Others vs PrysimanCavi E Sistemi SLR & Others, which further compounds this issue. The Apex Court accepted the view of DHC in the NTT Docomo case, and held that infractions of FEMA do not result in a "breach of public policy of India". This paper aims to analyse and critique the decisions taken in these disputes. Besides legality, these two cases also raise serious concerns regarding the quality of corporate governance of companies and the professional ethics of legal advisory services, which has been discussed further in this paper. In the authors view, RBI, as a custodian of the foreign currency reserves and implementer of FEMA, is best placed to interpret the regulations and operational guidelines issued under FEMA. The decision in these two cases, where the parties have used the international arbitration clause to bye-pass the laws of India, has now provided a template for parties to enter into contracts with a deliberate intention to bypass the provisions of the law.The paper tries to elucidate how these cases have set an incorrect precedent as regards assured returns in India.

Keywords: International arbitration, Tata - NTT Docomo Dispute, pricing guidelines, assured returns, foreign direct investment policy

Section I – The Agreement, and the Dispute

In the landmark case of NTT DoCoMo Inc vs Tata Sons Limited[1] in 2017, the DHC took a startling view that an arbitral award permitting an action that may not be in complete compliance with the provisions of the FEMA, is not in violation of the "public policy" of India, and can be enforced. The dispute involved an interpretation of the contractual provisions relating to the exercise of a put option, its interplay with the FEMA (and the rules issued there under), and the views of the arbitral tribunal (and subsequently, the DHC). While issuing an award in favour of NTT DoCoMo Inc. ("DoCoMo"), the arbitral tribunal held that:

"It was common ground between the Parties that performance of Tata's obligations under the first part of Clause 5.7.2 was the subject of a general permission in two respects. First, a non-resident purchaser was always able to buy the Sale Shares at the Sale Price, in accordance with Regulation 9(2)(i) of FEMA 20. Second, a purchaser resident in India, including Tata, was always able to buy the Sale Shares at their fair market value, determined in accordance

[1][2017] MANU/DE/1164/2017.

with the pricing guidelines in force from time to time, in accordance with Regulation 10B(2) of FEMA 20….. The impediment to performance was therefore factual rather than legal. The only reason these two methods of performance were not available to Tata after delivery of the Trigger Notice in 2014 was that the market value of the Sale Shares had fallen, so that no non-resident buyer was willing to pay the Sale Price; and the fair market value was a fraction of the Sale Price."[2]

Therefore, the arbitral tribunal took the view (which view was upheld by the DHC), that Tata Sons Limited's inability to buy the shares held by DoCoMo was not due to a legal restriction, but factual and practical considerations. The author humbly disagrees – the extant foreign direct investment policy clearly restricted exits on an "assured returns" basis, and the purchase of the shares of DoCoMo at 50% of the purchase price would run afoul of this restriction. The rationale behind this decision, and an analysis of the same, is set forth in Sections I to IV of this paper.

The principles followed by the arbitral tribunal (and consequently, the DHC) in this case were also subscribed to by the Supreme Court in the case of Vijay Karia & Others vs Prysiman Cavi E Sistemi SLR & Others[3]. Today, several agreements contain similar exit provisions in favour of non-resident investors, relying heavily on the precedent set forth by these 2 cases. The clauses are drafted so as to state that the resident Indian partner would find a potential investor to provide an exit to the non-resident investor at a pre-agreed price; and upon failure of the resident to do so; the resident would be obligated to purchase the shares at fair market value. The difference between the pre-agreed price and fair value would be paid off as compensation by resident partner to non-resident exiting investor for failure to fulfill the contractual obligations of finding a potential buyer at valuation that was pre-agreed. In the authors view, this clever and cheeky way to achieve indirectly what cannot be achieved directly – an assured exit at an assured price to the non-resident investor. Through this paper, the author raises several points demonstrating how the view taken by the DHC and the Supreme Court is incorrect and has the potential of being misused. Paragraphs 1 to 7 of this Section I will give a brief background of the dispute, the arguments raised, and the rationale behind the award. Further, Sections II to V contain an in-depth analysis of the decision, including an analysis of the corporate governance and legal issues involved. The conclusions of the author are set forth in Section VI of this paper.

1. Where it all began

Tata Teleservices Limited ("**TTSL**"), a company promoted by Tata Sons Limited ("**Tata Sons**"), is an Indian company engaged in the business of telecommunication and broadband services. In 2009, DoCoMo, a Japanese corporation, agreed to subscribe to 26% of the equity share capital of TTSL, at an aggregate consideration of approximately USD 2.5 billion. Pursuant to this investment, Tata Sons and DoCoMo executed a shareholders' agreement dated 25 March 2009, to record the rights inter-se as shareholders of TTSL ("**SHA**"). The SHA was governed under the laws of India, and any disputes arising therefrom were subject to arbitration under the rules of the London Centre of International Arbitration ("**LCIA**").

Please note that given the sensitive nature of the business involved, the telecom sector in India is heavily regulated. Foreign Direct Investment Policy ("**FDI Policy"**) formulated by Government of India issued through Ministry of Commerce and Industry does not permit investment in the telecom sector beyond 49% without prior approval of the Government of India. The FDI Policy also contains certain performance linked conditions, which are specific to the sector in which the investment is made.

2. The Dispute

The SHA contained certain pre-defined performance milestones to be met by TTSL in the manner prescribed therein ("Key Performance Indicators"). Failure to meet

[2] Paragraphs 138 and 139, Final Award of the Arbitral Tribunal dated 22 June 2016 <https://jusmundi.com/fr/document/decision/en-ntt-docomo-inc-vs-tata-sons-limited-final-award-dated-22-june-2016-wednesday-22nd-june-2016> Last accessed 23 October 2020

[3][2020] AIR 2020 SC 1807.

these Key Performance Indicators would attract Clause 5.7 of the SHA, which read as follows:

"If TTSL failed to satisfy certain 'Second Key Performance Indicators' stipulated in the SHA, Tata would be obligated to find a buyer or buyers for Docomo's shares in TTSL at the higher of (a) the fair value of those shares as of 31st March 2014, or (b) 50% of the price at which Docomo purchased its shares (the 'Sale Price')."

Further, the SHA also provided that the shares held by DoCoMo could be purchased by Tata Sons itself, or Tata Sons could arrange for these shares to be bought by a third party at a price prescribed in the SHA (per the pre-arranged pricing formula). In essence, DoCoMo viewed and created Clause 5.7 as an insurance to minimise its potential loss of investment in the event TTSL failed to perform satisfactorily[4].

TTSL could not reach the expected business volumes and performance parameters (KPIs) due to challenging and extremely competitive market conditions. Accordingly, on 7 July 2014, DoCoMo served a notice to Tata Sons, requesting Tata Sons that it should meet its obligations under SHA wherein it was required to identify a potential buyer for the stake held by DoCoMo. As per the conditions laid down in the SHA, the permissible timeline would have lapsed on December 3, 2014. Tata Sons could not identify an incoming investor within this timeframe to buy out DoCoMO stake which led to a commercial dispute between Tata Sons & DoCoMo.[5].

3. The Pricing Guidelines Conundrum

Under the FDI Policy, any acquisition/subscription of shares of an Indian company by a non-resident cannot take place below the fair market value of the equity shares, as determined by a chartered accountant, cost accountant or merchant banker. Similarly, in case a non-resident wishes to sell the shares held by it in an Indian company to a resident, the value of such shares cannot exceed the fair market value of such shares, as on the date of sale. These pricing conditions are collectively referred to as the "Pricing Guidelines".

Further, it is essential to note that the FDI Policy does not permit non-resident investors to exit its investment in India, i.e., sell the shares of an Indian company at a price that provides an assured return. This means that the divestment price cannot be pre-arranged. Accordingly, any exit by the foreign investor must be at fair market value (or higher) as determined by a chartered accountant, cost accountant or merchant banker at the time of

[4]Gist of Paragraph 10, Final Award of the LCIA dated 22 June 2016.

[5] Timelines, key features of the SHA leading to subsequent dispute are as under

a. Tata and DoCoMo entered into a joint venture to form a company called Tata Teleservices Limited (**TTSL**).
b. The Shareholder Agreement (**SHA**) dt 25/3/2009 provided for rights and obligations of shareholders i.e. Tata, DoCoMo and certain performance indicators for TTSL.
c. Clause 5.7 of the SHA stipulated that if TTSL failed to satisfy certain Second Key Performance Indicators, Tata would be obligated to find a buyer or buyers for DoCoMo's shares in TTSL at the Sale Price i.e., the higher of (a) the fair value of those shares as of 31st March 2014, or (b) 50% of the price at which DoCoMo purchased its shares. This provided an exit route to DoCoMo from the unlisted entity TTSL if TTSL failed to achieve key performance milestones.
d. As TTSL failed to meet its obligations under the Second Key Performance Indicator, actions as envisaged under clause 5.7 of SHA were triggered.
e. On 7th July 2014, a sale notice was issued by DoCoMo to Tata and TTSL, calling upon Tata to find a buyer or buyers to acquire the Sale Shares in terms of Clause 5.7.2, during the Sale Period.
f. Tata could not buy the shares or find a buyer at the rates as per the pricing formula since the same would have been ion violation of provisions of FEMA (*discussed later in the article*).
g. The resultant dispute – remaining unresolved despite intervention of the senior most executives from Tata and DoCoMo - was referred by DoCoMo to arbitration by London Court of International Arbitration (LCIA)

exit, and must be in strict compliance with the Pricing Guidelines. Therefore, the exit price for an investment cannot be pre-arranged / fixed or contracted ab-initio while making the investment since that would fall under the scope of an "assured return".

Citing these provisions, Tata Sons refused to comply with the obligations of Clause 5.7.2, stating that the purchase of the shared held by TTSL in DoCoMo at the Sale Price would run afoul of the Pricing Guidelines, and consequently, the FEMA. Further, Tata Sons stated that such sale would require special approval of the RBI, since the sale would be in violation of the provisions prohibiting an assured return. In the authors view, the SHA had, from the get-go, included a clause that could potentially be deemed to be in conflict with the provisions of the FEMA (since it laid down a pre-agreed price for the sale of DoCoMo's shares). It is also imperative to note that TTSL had run-up substantial losses, due to which fair value of its equity was well below the pre-agreed price. Accordingly, it was also difficult to find a third-party buyer to purchase DoCoMo's TTSL shares.

In furtherance to the sale notice issued by DoCoMo, Tata Sons approached the RBI, seeking their approval to execute this transaction. RBI refused to grant this approval, citing the provisions set forth above. Stymied with this refusal of RBI, Tata Sons could not buy DoCoMo's shares as per the SHA requirements.

Aggrieved at the refusal by Tata Sons to meet its obligations under SHA, DoCoMo referred the dispute to LCIA to enforce its put option[6]. The LCIA issued an award in favour of DoCoMo, forcing Tata Sons to pay USD 1.21 Billion to DoCoMo as damages for "breach of contract". The award was challenged by Tata Sons in DHC under the provisions of Section 48 of the Arbitration & Conciliation Act, 1996 ("Arbitration Act"). The decision of the DHC has been explained further in this paper.

4. Arguments raised before the Arbitral Tribunal ("AT")

The fundamental cause of the dispute was the inability of Tata Sons to buy DoCoMo's shares in TTSL within the contours of contractual agreement documented in the SHA. The issues and defences raised by Tata Sons and DoCoMo before the AT were more or less identical, but seeking different results – Tata Sons seeking to pay only as per the valuation models permitted under FEMA, whereas DoCoMo wanted the pay-out as per the SHA. Further, DoCoMo also demanded damages on account of breach of contract by Tata Sons. A brief description of the issues raised by each party before the AT is listed below:

Issues Raised by Tata[7]

Some of the key arguments and objections communicated by Tata Sons were as follows:

(i) Whether the purchase of the shares from DoCoMo at the pre-agreed Sale Price, which was higher than the fair value, would require case specific prior approval from the RBI?

(ii) Does the SHA cast an "absolute" obligation on Tata Sons to purchase the shares?

(iii) What is the consequence in law, and under the SHA, if RBI refuses to grant special permission to purchase the shares of DoCoMo?

(iv) Does the failure of Tata Sons in acquiring shares as per the SHA constituted a breach of the SHA, whether directly or obliquely?

(v) Is the payment above the Pricing Guidelinesprohibited, and if yes, would it be permissible to make payment of the differential amount indirectly in form of award for payment of damages or for restitution?

(vi) Is it permissible for DoCoMo to demand exit at of 50% of value of investment made by it?

[6] A "*Put Option*" is a contract that gives the owner of the contract a right, but imposes no obligation, to sell to another person (the put option seller or writer) a specified amount of an underlying security, at a pre-determined price, on a pre-detrained date or on occurrence of a pre-specified event. A close analogy will be an insurance contract.

[7] Refer *Supra* 1, Paragraph 8 for details. The points documented here are a gist of the same.

Issues raised by DoCoMo[8]:

Some of the key issues submitted by DoCoMo were as follows:

(i) Has Tata Sons performed its contractual commitments as laid down vide Clause 5.7 of the SHA. This would also necessitate detailing what the obligations were for Tata Sons.

(ii) Can the plea of illegality under the Indian laws negate the obligations cast on Tata Sons pursuant to Clause 5.7 of the SHA?

(iii) Was an alternate option or route; legally unimpeded, be used by Tata Sons to meet its commitments under the SHA?

(iv) Did the buyout transaction need RBI's approval:

a) for consummating the transfer of shares of TTSLheldby DoCoMo to a third party, at the Sale Price?

b) to permit the payment by Tata Sons in form of an indemnity?

c) to effect for a sale of the shares held by DoCoMo to one or more of overseas associates / affiliates of Tata?

(v) Irrespective of whether the RBI approval was required or not;for Tata Sons to buy the shares at the agreed Sale Price, or to compensate DoCoMo up to the Sale Pricewhere the shares were sold to a third party as per pricing guidelines; was it a failure of Tata Sons to perform making them liable under the SHA?

(vi) "Can Tata Sons rely upon the defence of illegality as set forth under Clause 2.2 of the SHA"[9]?

(vii) Is DoCoMo entitled to damages and if yes, what form and quantum will it be?

5. Award of the AT[10]

While considering the arguments raised by Tata Sons and DoCoMo, the AT granted an award in favour of DoCoMo, directing Tata Sons to pay USD 1.21 Billion to DoCoMo as damages for "breach of contract". Some of the points raised by the AT in coming to this conclusion are listed below:

(i) Clause 5.7.2 of the SHA was to assure DoCoMo that it would be able to exit at least at a level or above 50% of its investment value, i.e., the price paid by DoCoMo to subscribe to the shares of TTSL. This was not disputed by Tata Sons in the dispute. Further, the view of the AT was that Clause 5.7.2 of the SHA was drafted in the way that it was because "the Parties knew that exchange control regulations and other considerations might prevent performance under a simple put (option)"[11]

(ii) Tata Sons was obligated to identify and find a buyer to acquire DoCoMo stake, subject to DoCoMo receiving the Sale Price for the shares. This was an absolute obligation imposed on Tata Sons, and was not restricted or circumscribed in any manner.

(iii) The AT was of the view that the parties had provided for alternative methods of performance of this obligation, i.e., exit of DoCoMo, as there

[8] *Supra* 1, Paragraph 9 for details. The points documented here are a gist of the same.

[9] Clause 2.2.2 of the SHA prohibited the parties from acting in violation of any applicable law. It read as under:
"2.2.2 The Parties have agreed that the provisions of this Agreement shall be subject to the provisions of the License Agreements, and in the event of any inconsistency between the provisions of this Agreement and the License Agreements, the provisions of the License Agreements shall prevail. Further, no Party shall take any action or have any right that would violate applicable Law or cause a loss of any License Agreement. Each provision of this Agreement shall be interpreted so as not to cause such violation of Law or loss of any License Agreement, and in the event of such violation or potential loss the Parties shall use good faith efforts to agree on an alternative structure that will afford the Parties the substantial benefits intended by such provision."

[10] *Supra* 1. This is the gist of the decision of the arbitral tribunal that has been quoted verbatim in Para 11 of the judgement of the Delhi High Court.

[11] Word *"option"* in *italics* added by author for providing clarity.

could be legal hurdles on performance at the time of exit. For example, Tata Sons may not find a willing buyer for unlisted shares at the Sale Price, knowing full well that unlisted shares are illiquid and as substantial a holding as 26% stake in such an instrument makes it even more difficult to exit. Identification of potential buyers may also be impeded due to extant licensing regime for telecommunications business. or there might be a requirement for special permission from RBI. The parties to the SHA would have known and meant that Tata Sons could use such options only if it was possible for them to deliver on these commitments. Therefore, alternatives were provided with knowledge that such an obligation may not be able to be performed.

(iv) The background to the SHA clearly establishes that both parties recognised that the FDI Policy would have a bearing on ability of Tata Sons to meet its obligations. The parties could have agreed that Tata Sons would be required to meet its obligations under Clause 5.7.2, subject to receipt of necessary regulatory approvals. Such clauses were incorporated at other places in the SHA but both parties decided not to include such a provision under the clause 5.7.2. Therefore, it is unlikely that the parties intended the obligation of Clause 5.7.2 to be discharged, as an Indian buyer would not be permitted to pay the Sale Price. Therefore, there was no basis for inserting such a provision. Further, the SHA provided for certain alternatives for the purchase of the shares as well. Since Tata Sons was unable to fulfil any such alternatives, it has committed a breach of contract.

6. Challenge before DHC

Aggrieved by the order of the AT, Tata Sons raised its objections with DHC to enforcement of the award. Later, both the parties came together to file a joint application with DHC documenting consent terms agreed between them. In terms of consent terms, Tata Sons expressed its willingness to abide by the award and make good the amount decided by the AT. RBI had made an effort to implead itself in the dispute, since the dispute pertained to foreign exchange laws and FDI, and since RBI is the regulator and implementer of FEMA. Further, RBI also objected to the arbitral award as the award directed Tata Sons to take an action which was in direct conflict with FEMA. While the DHC heard these arguments, it refused to allow RBI to become a party to the case.

In a surprising turn of events, DHC gave a decision in favour of DoCoMo, upholding the arbitral award, overlooking / overriding the objections of RBI as regards the violation of the provisions of the FEMA.

The DHC, while upholding the validity of the award, based its decision on the following[12]:

(i) Both parties - Tata Sons and DoCoMo – agreed that the SHA intended that investment made by DoCoMo was safeguarded and that in event of loss, extent of loss was restricted to 50% of the investment made by DoCoMo

(ii) After raising the initial objections, RBI too appears to have veered around the view that the relevant clause provided a downside protection but not necessarily an assured return on investments. (explained below).

(iii) Clause 5.7.2 of the SHA contained a contractual arrangement wherein Tata Sons promised to identify a potential investor who would buy out DoCoMo's. This was always permissible and could be complied with within the boundaries laid down by general permissions of

[12]*Supra* 1, Paragraph 58.

RBI under FEMA 20[13]. This would not run afoul of the Pricing Guidelines, since it was only a contractual promise to find a buyer, which had not been complied with.

(iv) Section 56 of the ICA provides that an agreement to do an impossible act is void. Contrarily, performance of obligations under Clause 5.7.2 of the SHA was not impossible of being performed. Tata Sons could identify a non-resident buyer and thereby would have met their obligations lawfully. This is so as the pricing guidelines do not apply to a transaction between two non-resident investors. As an alternate option, there could have been a resident buyer who could only purchase these shares at fair market value. This would have necessitated Tata Sons making payment of the differential amount to DoCoMo. FEMA and its various attendant regulations do not provide a shield against failure to perform contractual obligations. Alternate options and ways were available to Tata Sons, using which it could have met its obligations under SHA. Hence, no provisions of FEMA are breached while issuing an award of damages for breach of Clause 5.7.2.

(v) It is thus established that failure of Tata Sons to find any buyer (including a non-resident buyer) amounted to a breach of contractual obligations and this entitles DoCoMo to damages.

Therefore, the final decision of the DHC was based on the following ideas:

(i) "SHA cannot be said to be void or opposed to any Indian law including the FEMA, much less the ICA.[14]

(ii) FEMA contains no absolute prohibition on contractual obligations. It envisages grant of special permission by RBI.[15]

(iii) The AT rightly held that Clause 5.7.2 of the SHA was legally capable of performance without the special permission of RBI, using the general permission under sub-regulation 9(2) of FEMA 20.

(iv) As far as the award itself is concerned, the interpretation placed by the AT on the clauses of the SHA was consistent with the intention of the contracting parties and not opposed to any provision of Indian law.[16]

(v) There is nothing in the SHA as interpreted by the award that renders it void or voidable under the ICA or opposed to either the public policy of India or the fundamental policy of Indian law.[17]

(vi) The AT's interpretations of the various provisions of the FEMA and the regulations there under have also not been shown to be improbable or perverse.

(vii) Violation of FEMA is compoundable offence and RBI could take such a step to rectify the flaw in the agreement.

(viii) What was invested by DoCoMo was US $ 2.5 billion and what it will receive in terms of the award is only 50% of that amount. Therefore, no ground under Section 48 of the Arbitration and Conciliation Act, 1996 is attracted to deny

[13] FEMA 20 refers to the Foreign Exchange Management (Transfer or Issue of Security to a Person Resident Outside India) Regulations, 2000

[14] *Supra* 1, Paragraph 60.

[15] *Supra* 1, Paragraph 53 and 54.

[16] *Supra* 1, Paragraph 61.

[17] *Supra* 1, Paragraph 60.

the enforcement of the award."

7. Extraneous factors at play

While the DHC took the view that the obligations under Clause 5.7.2 were in fact, contractual obligations that were in compliance with the provisions of the FEMA, it is possible that that this decision was also influenced, in some way, by the growing strategic relationship between India and Japan. At the time, the Indo-Japanese relationship covering FDI flows, and diplomatic and strategic relationships between India and Japan were casting its long shadow on the subjects. India had received and was anticipated to receive significant foreign investment from Japan. This issue had also been raised through diplomatic channels with Government of India for an amicable resolution.

It is instructive to note that even the regulators were conscious of this macro trans-national relationship envisaged through the SHA, and this was shaping their views post the decision of the AT. In this regard, a few of the paragraphs of judgement [18] citing the RBI correspondence are instructive. The paragraphs below record the decision of the then Deputy Governor, Mr. H R Khan, mentioned as DG (HRK) in the paragraph below:

> "I would take a different view. The assured return applies where the overseas investor gets his entire principal PLUS a certain return. Here both the parties agreed to protect the downside loss at 50% of the invested value. This is according to me a fair agreement/contract and we should facilitate honouring this commitment. We may approve. DG (HRK)"

This noting was made in response to the views of the then Executive Director Mr. G Padmanabhan mentioned as ED (GP) in the paragraph below:

> "Although strictly as far as wordings of the regulation this may not be allowed. From the point of view of equity & the intention behind the regulation (that there would be no assured return) the foreign investor has a merit in this claim. The larger issue of fair commitment to reasonable contracts in relation to FDI inflows also have to be kept in view. Our strategic relationship with Japan has also become very significant in relation to FDI inflows. In the circumstances, we may propose to accept the plea of the foreign investors & in future, in all such cases similar principle could be applied. ED (GP) GM FED GM (HSM)"

It is thus obvious from the above paragraphs that the regulatory thought process was affected by the extra-legal factors even though the constraints of regulations were identified by the then ED. Accordingly, while the AT and DHC did raise some cogent points with respect to the interpretation and Clause 5.7.2 and its interplay with the Pricing Guidelines and the FDI Policy, it could also be said that the influx of foreign investment coming in from Japan played its part in the view adopted by the DHC.

[18] Para 44 *Supra* 1

Section II – Analysis of the Case

The case, findings of AT and the decision of DHC have been assessed from different vantage points as under:

1. Obligations cast on investor and investee in cases of FDI under provisions of FEMA;
2. Validity of the contracts within the meaning of ICA;
3. International arbitration and its impact on domestic laws;
4. Basic law doctrine envisaged in Arbitration Act;
5. Implications of this judgement on dispute resolution for cases of FDI;
6. Issues of corporate governance and ethics; and
7. Professional ethics of the legal advisors.

These are critical areas for analysis as India remains a capital scarce country, and FDI is a potent engine of economic growth. India has remained one of the more favoured destinations for FDI. It is hence imperative that the country have a stable and predictable exchange control regime that sends our clear signals to the investors, existing and potential. A thorough analysis is much needed for benefit of all stakeholders viz. investors, investees, legal advisors, bankers involved in implementation of the FEMA.

The SHA, decision of the AT and the court rulings need incisive analysis for the impact these findings have had. A rhetorical response can be summarised in a single sentence –AT and court got it all wrong. They stuck to the technical wordings and missed the aim of the law in its entirety. An analysis of the judgement may lead to a conclusion that while put option clauses in a SHA guaranteeing a positive return to a non-resident equity investor are specifically banned, a safety net can be structured that provides a protection against loss of capital. If this interpretation were to hold, then in the event of a loss making enterprise, the foreign equity investors can be provided an option to sell their stake at valuations that exit at a price which is above the fair market value arrived at as per the Pricing Guidelines. Such exits can be so designed wherein Indian partner commits to identify a potential investor. Such an investor will buy out existing investor at the pre-decided rates well above the fair market value of such shares. In the event of failure to find such an investor, the local partner can buy the stake of overseas investor as per the Pricing Guidelines methodology. The difference between the fair market value and agreed price will then be paid as damages by the Indian partner since it has failed to meet its contractual obligations of finding an independent third party buyer. According to the author, this was not the intention of the legislator while prohibiting assured returns and defeats the purpose of the law.

1. Obligations of investor and investee under FEMA - was investment by DoCoMo an equity investment in TTSL?

According to the author, the whole dispute seems to have overlooked the very obvious and fundamental question – was DoCoMo an equity investor or a debt provider?

Any investment in equity by its very nature is exposed to price risk. The principle amount invested is always at risk of loss. The investor is willing to take this risk in anticipation of profit generation capacity of the enterprise. A profitable and successful enterprise will on its own lead to enhancement in value of equity investment. The upside potential to the equity investment comes at a cost of risk of 100% loss of investment.

An equity investor hopes for investment and business plans to work out as thought through. If the investee company performs well, the investor receives significant rewards through profits. If it does not, its capital is lost in varying amounts, including 100% of amount invested. The world of limited liability corporations is replete with skeletons of failed enterprises and jilted shareholders. [19] Therefore, the author is of the view that an equity investors investment is subject to any risks in loss of value, which need not be legislated for in the agreements.

[19]A. Goldgar *Tulipmania:Money, Honor, and Knowledge in the Dutch Golden Age* (1st ed Chicago, University of Chicago Press 2008); M. Odekon*Booms and Busts: AnEncyclopaedia of Economic History from the First Stock Market Crash of 1792 to the Current Global Economic Crisis* (Routledge 2017); R. Dale *The First Crash: Lessons from the South Sea Bubble* (Princeton University Press 2004).

A creditor, on the other hand, wants return of capital and some interest on monies lent. Therefore, from a creditors standpoint, steady cash flows have significant importance. Having said that, try placing the motivation of DoCoMo against the fundamental definition of equity vs debt. In the authors view, this distinction was not made clear with respect to the investment made by DoComMo - and it could be argued that this was a debt investment disguised as an equity.

This argument is strengthened by the fact that DoCoMo was unwilling to accept a downside risk of losing 100% of amount invested, but also wanted the upside of equity. Having its cake and eating it too!

Paraphrasing the words of James P Carse[20] (1986) DoCoMo wanted to play an infinite game with rules of a finite game.

2. **Validity of the contract - Is SHA a legitimate document?**

The decision of AT and the DHC was premised on the view that the SHA was a legitimate document. There are enough evidences and findings within the decision of AT and the DHC that leads one to conclude that the validity of the SHA is questionable in itself. This premise itself is found to be without foundation and the edifice of the judgement collapses.

The suspect legality of the SHA has been identified by the AT in its award, as is the inability of Tata Sons to perform under the contract.[21] The fact that the SHA had clearly legislated various alternatives to provide an exit to DoCoMo, and laid down alternate methods to achieve the assured repayment to DoCoMo is a clear indication that the parties has consciously created a structure to circumvent the express provisions of FEMA regulations and directions issued thereunder.

The AT has held that the “object of Clause 5.7.2 was to guarantee DoCoMo an exit at a minimum of 50% of the subscription price. This was not seriously challenged by Tata Sons at the time of the dispute.” However, Clause 5.7.2, as per the AT, Clause 5.7.2 was “drafted in the way that it was because "the Parties knew that exchange control regulations and other considerations might prevent performance under a simple put.”[22] This is recognition that both parties knew at the time of execution of the SHA that the exercise of the put (option) by DoCoMo was not possible under the law as prevailed then.[23]

The European put option i.e. a right to sell a security at a fixed rate on a fixed date, is not permitted to a foreign investor even as on the date of this critique.

AT has clearly recognised that “The parties provided for alternative methods of performance because they knew there might be restrictions on performance; or there might be a requirement for special permission from RBI.”[24] Thus, the parties knew from the beginning, that the performance of the option is not possible without special permission of RBI.

Further, as noted at Sec I paragraph 5(iii) earlier, AT findings underscore the fact that

[20] J.Carse, *Finite And Infinite Games* (Free Press 2011).

[21] Its intriguing that despite having identified the clauses that were created to circumvent the provisions of FEMA, AT still found the SHA enforceable and court accepted the same.

[22] Paragraph 108, Final Award of the Arbitral Tribunal dated 22 June 2016 <https://jusmundi.com/fr/document/decision/en-ntt-docomo-inc-vs-tata-sons-limited-final-award-dated-22-june-2016-wednesday-22nd-june-2016> Last accessed 23 October 2020

[23] FDI guidelines till date do not permit a non-resident investor to have a put option on equity investments. Even the partial liberalisation introduced by RBI vide its circular A.P. (DIR Series) Circular No. 86 dt 9/1/2014 states “*On a review, it has now been decided that optionality clauses may henceforth be allowed in equity shares and compulsorily and mandatorily convertible preference shares/debentures to be issued to a person resident outside India under the Foreign Direct Investment (FDI) Scheme. The optionality clause will oblige the buy-back of securities from the investor at the price prevailing/value determined at the time of exercise of the optionality so as to enable the investor to exit without any assured return”*

[24] *Supra* 1, Paragraph 11(iii). These have also been mentioned at item 2(c) above.

both parties knew at the time of signing the SHA that Tata will not be able to pay the amount as provisions of FEMA prevented such assured payment. Tata clearly knew that it needed prior RBI approval for the same.

Given the above, it is quite apparent that the parties knew of the potential breaches and infractions of FEMA. In this regard, it will also help to review the provisions of Master Circular – Foreign Investment in India (MC-FDI)[25] issued by the RBI on 1/7/2008. This MC FDI is a set of operative guidelines related to FDI issued to AD banks in particular and general public at large, to govern all aspects of existing and proposed FDIs between 1/7/2008 -30/6/2009. Annex 3 to MC FDI deals with transfer of shares/convertible debentures, by way of sale from a person resident outside India to a person resident in India. Para 2.3.(b)(ii)(C) of the Annex 3 states:

> "where the shares are not listed on any stock exchange, [the sale shall occur] at a price which is lower of the two independent valuations of shares, one by statutory auditors of the company and the other by a Chartered Accountant or by a Merchant Banker in Category 1 registered with Securities and Exchange Board of India."

Put simply, if a non-resident person wants to sell shares in an unlisted company to a person resident in India, the fair market value of these securities will need to evaluated at the time of such sale. After such computation by the statutory auditors and a chartered accountant/merchant banker, the lower of these 2 valuation is what can be paid to non-resident seller. Having laid down the provisions of the law, and given the poor performance of TTSL at the time of DoCoMo's exit, it is crystal clear that DoCoMo could not get a valuation for its stake higher than the fair valuation arrived at by independent valuers, which was substantially below the pre-agreed price. Any agreement that indicated a potential sale price other than the fair value clause is therefore, a nullity.

AT also had an interesting argument[26]on the issue regarding whether the SHA violated the provisions of the FEMA or not. The AT states as follows:

> "The performance of TTSL's obligation under Clause 5.7.2 was subject to a general permission from the Reserve Bank of India (RBI) in two respects. First, a non-resident purchaser was always able to buy the same share at the sale price in accordance with Regulation 9(2)(i) of FEMA 20; second, a purchaser resident in India including Tata was also able to buy the Sale Shares at their fair market value, determined in accordance with the pricing guidelines in force from time to time, in accordance with Regulation 10(B)(2) of FEMA 20."

The first contention latches on the FEMA provisions that a sale between 2 non–residents is not affected by the Pricing Guidelines. However, it also obliquely suggests that Tata Sons should have arranged for purchase of these shares by a non-resident buyer, who would have bought the DoCoMo stake at the price agreed in the SHA. Please note that the fair market value of the TTSL shares was below the price set out in the SHA. Assuming that Tata Sons had found a non-resident buyer to purchase the shares of DoCoMo at the pre-agreed price, the motivation of such a buyer to acquire an asset at a substantially inflated price remains unclear. This goes against the very grain of economic rationale.

3. Does the SHA stand scrutiny under ICA?

While analysing this issue, the AT and DHC both recognised that the SHA did indeed carry clauses that may not be enforceable in view of provisions of FEMA. The author holds the view that while reviewing the underlying contract and its aims, a very narrow focussed

[25] Master Circular on Foreign Investment in India, https://www.rbi.org.in/Scripts/BS_ViewMasCirculardetails.aspx?id=4312, accessed on 6/10/2020.

[26] *Supra* 1, Paragraph 12(i).

technical view was taken by the AT. In this regard, the author would like to explain the principles set forth in the ICA, as set forth below.

Section 23 of the ICA deals with lawful consideration and objects of a contract. Under section 23, any contract where the consideration or object is unlawful is void.

A contract, its consideration and object are considered to be lawful unless:

(i) it is forbidden by law; or
(ii) it is of such a nature that, if permitted, it would defeat the provisions of any law; or
(iii) it is fraudulent; or
(iv) it involves or implies, injury to the person or property of another; or
(v) the Court regards it as immoral; or
(vi) it is opposed to public policy.

Focussing our attention on the SHA in this case, violation of the clause (ii) i.e. "its objects are such that if permitted would defeat the provisions of any law" could not be starker. It is therefore clear that the alternative methods of performance were deliberatively provided to evade the restrictions imposed by FEMA.

4. Basic law doctrine under Arbitration Act - Enforceability of the International Award

Under section 48 of the Arbitration Act, an Indian court can refuse to enforce a foreign arbitral award if such award falls within the scope of the specific grounds listed therein.

One such ground is if the award violates the "public policy of India". In the famous Renusagar[27] case, the Supreme Court had held that enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to:

(i) the fundamental policy of India; or
(ii) the interest of India; or
(iii) justice or morality.

In a subsequent case, Shri Lal Mahal Ltd. v. Progetto Grano Spa[28] ("**Lal Mahal**"), the Supreme Court laid down the golden rules and set the bar to decide the situations when a foreign award mayt be denied enforcement in India under the purview of Sec 48(2) of Arbitration Act. The decision put the three tests to refuse enforcement of a foreign award when such an award militates against

(i) fundamental policy of Indian law; or

(ii**) the interests of India;** or
(iii) justice or morality

An award being contrary to interest of India is one of the grounds for rejection of the award. It is therefore a logical conclusion that making a payment in scarce foreign currency under a contract that has prima facie breached FEMA makes such an award contrary to interest of India.

5. Commercial and regulatory aspects of award

While confirming that Clause 5.7.2 of the SHA was not in violation of the FEMA, the AT stated that Tata Sons had other alternatives to enforce the exit of DoCoMo, including finding a third party non-resident buyer for the shares. However, these shares were valued at a price much below the price agreed in the SHA. Accordingly, it beats common sense to assume that an unconnected person would buy an asset at prices substantially higher than the intrinsic value. This becomes all the more significant since India has stringent exchange control rules and any outward flow of foreign exchange needs to meet detailed regulatory requirements, supported by documentary evidence. Short of creating fictitious documents to support this exchange outflow, Tata Sons could not have made a remittance to recompense the proxy investor.

The only way these shares could be sold to another non-resident investor, would be if an overseas associate of Tata Sons had purchased the shares of DoCoMo.[29] This was an issue

[27] *Renusagar Power Plant Co. Ltd. v. General Electric Co*. (1994) Supp (1) SCC 644.

[28] *Shri Lal Mahal Ltd. v. ProgettoGrano Spa*(2014) 2 SCC 433

[29] Tata is a large conglomerate, has various companies in India and multitude of overseas subsidiaries.

raised by DoCoMo to AT as well[30]. It is certainly within realm of arguments that with multitude of overseas subsidiaries within Tata conglomerate, any overseas entity could buy these shares. However, this would be in violation of the FDI Policy. Any FDI can only be made by a person not resident in India. The FEMA defines "persons resident in India[31]" as "an office, branch or agency outside India owned or controlled by a person resident in India". Thus, an overseas subsidiary, controlled by owned and / or persons in India will fall within purview of this definition. Therefore, an overseas affiliate of Tata Sons would be regarded as a "person resident in India" and would therefore not be able to hold the shares as a "non-resident investor".

At an operational level these decisions create a major headache for the commercial banks who act AD Banks to the transactions. AD Banks are obliged to adhere to the guidelines issued by RBI and follow the same in letter and spirit. Till date, there has been no modification of the guidelines post the decision of the DHC in the DoCoMo case. Thus an AD Bank can very well refuse to handle the transaction which has clauses similar to the ones seen in case of Tata Sons.

6. Inferences

It can be safely inferred from the foregoing that:

a) Nature of investment (i.e., whether it as debt or equity) made by DoCoMo was suspect from the get go. It is easily distilled that DoCoMo had made a debt investment disguised as equity.
b) Both parties entered into SHA knowing full well that the commitments made run afoul of provisions of FEMA and thus could not be complied with. If they were convinced that these commitments are enforceable, there was no need for Tata Sons to approach RBI for approval to complete the exercise of the sale option.
c) SHA had created alternate means of achieving the ends that were not otherwise permissible under FEMA.
d) Parties approached arbitration and court with unclean hands.
e) Any suggestion that Tata Sons could have an overseas affiliate buy the shares of DoCoMo is an invitation to commit further violation of law since commercially this was not feasible.

The author holds that these issues indicate that the SHA was in violation of FEMA, and accordingly, in violation of Section 23 of ICA. The decision of AT awarding damages for breach of performance contract which were equal to the sale consideration, stymies and defeats the provision of FEMA. This decision militates against the legal maxim "If the thing stipulated for is in itself contrary to law, the action by which the execution of the illegal act is stipulated must be held as intrinsically null: pactis privatorum juri publico non derogatur".

Justice would have been served well if the profound words Chief Justice Wilmot were remembered. "No polluted hand shall touch the pure fountains of justice. ….. The manner of the transaction was to gild over and conceal the truth; and whenever Courts of law see such attempts made to conceal such wicked deeds they will brush away the cobweb, varnish and show the transactions in their true light."[32]

[30] Refer para 3.2(e)(iii) Section I.
[31] Foreign Exchange Management Act 1999, s 2(*v*)(iv).
[32] *Collins v. Blantern* (1767) 1 Smith LC 369

Section III – Implications for Other Similar Instances

As a connected subject, the case of Vijay Karia & Others vs Prysiman Cavi E Sistemi SLR & Others[33]is worth analysing with respect to the above.

A brief summary of the facts are as follows:

(i) Prysiman had acquired majority stake in an Indian company that was promoted by Mr Vijay Karia.
(ii) The share purchase agreement had certain clauses which when triggered provided for transfer of shares from parties resident in India to parties resident outside India. These transfers on triggering of such events had to take place at a price at a discount to the fair price as per pricing guidelines. Agreement also provided for international arbitration to settle the disputes.
(iii) There were disputes between the parties and matter was referred to LCIA.
(iv) Indian party challenged the transfer of shares at a discount citing provisions of FEMA. Nevertheless, the arbitral award was in favour of Prysiman, the non-resident party.
(v) Enforcement of the award was challenged in India in terms of section 48 of the Arbitration Act.
(vi) Supreme Court upheld the award and permitted transfer of shares to non-resident party at a discount. The shares were transferred at a lower valuation than is permitted under FEMA.

Sum and substance of judgement delivered by the apex court is that a violation of FEMA does not vitiate the underlying contract. The court held that “if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of Reserve Bank of India can be obtained post-facto if such violation can be condoned.” The rules relating to compounding impose financial penalties on the violators as a deterrent. This power to impose penalty; and not incarcerate the violators as was the law under FERA, 1973; is not a power to condone or approve the violations. It begs explanation how the apex court has interpreted this power of RBI as power to condone.[34]

Further, the court held that “a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian Law.”

FEMA does not provide for rectification of breach, it empowers RBI to imposes penalty on violators. An analogy of a tax payer who has delayed in filing its income tax return will help. Under Income Tax Act, 1961, such delayed filings attract penalty and fines. Will the payment of such amounts be considered as an approval by Income Tax Authorities for delay or will it be considered a penalty for breach of provisions of law? Would it have **rectified** the breach of law? Such provisions for imposition of penalty for breach of legal provisions exist in almost all laws in India. Will payment of penalty upon breach of any of these laws be considered as an approval of such illegal acts upon payment of penalty?

Role of the RBI

The Supreme Court held that “even assuming that Rule 21 of the Non-Debt Instrument Rules requires that the shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign award directs that such shares be sold at a sum less than the market value, Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the discounted value, or may choose to condone such breach.”

Resident shareholders had raised the issue that shares cannot be sold to a non-resident investor below the market price. Following the observations of the court, if RBI instructs that shares be sold only at market value as per the

[33] [2020] AIR 2020 SC 1807

[34] Administrative process for considering such breaches and violations of FEMA have been detailed in the *Master Direction- Compounding of Contraventions under FEMA, 1999* issued by RBI on 1/1/2016, consolidating the procedures in a single document. Powers to compound the offences is vested in RBI vide section 15 of FEMA which empowers the RBI to compound any contravention as defined under section 13 of the FEMA.

rules, how would the award be enforced? The refusal to grant permission by RBI to sell shares at less than the fair value renders the court decision infructuous. The observations of court are thus incongruous with the final decision.

This is the core conflict between the powers of RBI as regulator and enforceability of an award that is premised on the violation of the underlying law. Further, even if RBI were to refuse permission to transfer shares at a discounted price, inability to enforce the foreign award because of FEMA violation does not arise, as the award does not become void on that count.

As highlighted above, the execution and enforcement of award is contingent upon RBI agreeing to grant approval. It is within the powers of RBI to deny approval as the nub of the conflict, the edifice of the underlying contract, itself is executed in violation of extant rules. This case once again showed that the contract ab initio was in violation of FEMA. The usual trick of recourse to international arbitration at LCIA was played. Arbitration award was upheld by apex court even though the underlying contract was in violation of FEMA.

Thus the decision in case of Tata - NTT DoCoMo has set a wrong precedent, and has provided an opportunity to enter into cross border transactions which would not be permissible under FEMA, thereby diluting the powers of RBI.

Section IV - Doctrine of Fundamental Policy of Indian Law

1. What is meant by Fundamental Law in context of International Arbitration

In both these cases, the foreign award was upheld on the premise that a violation of a FEMA regulation or rule does not violate the fundamental policy of Indian law. Bar for such breach was set up in the matter of Renusagar[35]wherein apex court held that "The fundamental policy of Indian law must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised."

Referring favourably at para 82, court referred to the DHC decision in Cruz City[36] wherein DHC held that "One of the principal objective of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise."

Incidentally, the 2015 amendment to Arbitration Act, amending Section 34 has embedded the same public policy provision of Section 48 with respect to an arbitration seated in India. As court noted in this case "So far as "the public policy of India" ground is concerned, both Sections 34 and 48 are now identical, so that in an international commercial arbitration conducted in India, the ground of challenge relating to "public policy of India" would be the same as the ground of resisting enforcement of a foreign award in India."

This raises two core issues with respect to:

1. What defines or what is the core values of a member states national policy ?
2. Can a private contract override the laws of a member state?

Let's address the first hurdle. In the matter of Cruz City[37], DHC had opined that "The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental legislative policy, **not a provision of any enactment**." (emphasis added)

Courts have held that a law that is foundational to manage the foreign currency reserves and flows is not fundamental to preserving India's sovereign assets in shape of foreign currency and economic stability. Every law, every legal provision is critical to further the sovereign duties, obligations and public interest in its sphere. FEMA is fundamental to managing foreign currency management, Public Debt Act is fundamental to managing the public finances of Centre and the States, OECD Principles for Enhancing Integrity in Public Procurement read with Prevention of Corruption Act is fundamental in suppressing and eradicating corrupt practices from public procurement process. Can it be said that violation or breach of provisions of these laws / regulations / rules does not affect public policy? Will courts uphold a contract in blatant violation of any of our myriad laws simply because the contract is made subject to international arbitration?

If yes, then is it incorrect to infer that save for fundamental rights covered under Articles 12 to 35, every other law, enactment or constitutional provision can be made subject to arbitration under New York convention, overriding the sovereign powers of the state?

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[35] *Renusagar Power Plant Co. Ltd. v. General Electric Co*. (1994) Supp (1) SCC 644.

[36] *Cruz City 1 Mauritius Holdings v. Unitech Limited* (2017) 239 DLT 649.

[37] *Ibid.*

Section V – Corporate Governance & Professional Ethics

1. Corporate Governance Compromised

The peripheral issue connected with these cases is one of corporate governance. In both these cases, the agreements were executed in full knowledge of the fact that these are in violation of extant guidelines. Unlike in Vijay Karia, the SHAin the DoCoMo case clearly created a secondary channel for payments that were otherwise not permissible under FEMA. These patent breaches were identified by the arbitration tribunal as also the courts.

While the cases have been resolved and beneficiaries paid off, mockery has been made of the sovereign laws by these private contracts. While the court decision has upheld the enforceability of the contract, the cloud of illegality remains. It is also strange to see that neither the companies concerned, nor the people who facilitated such illegal contracts have been held accountable.

Directors of a company are accountable to the shareholders. Albeit day to day operations are delegated to executive management, board cannot escape its accountability for illegal acts done by the employees. This is the fiduciary duty that directors owe to the stakeholders.

The Tata Sons – NTT DoCoMo issue unraveled in a board room coup leading to ouster of the Chairman Mr. Cyrus Mistry. There is enough media evidence to suggest that Tata Sons under his leadership had refused to recognize the secondary route for making the payment[38]. It is also evident that this strident legal view of Mr. Mistry collided with the views of erstwhile management that was led by Mr. Ratan Tata that had executed the contract with NTT-DoCoMo.

As discussed in Section II above, if Tata Sons were absolutely convinced of their stance and legality of their contract, there was no reason for them to approach RBI for approval or contest the payment in arbitration. This itself indicates that either they knew that the contract was not kosher or alternately, they wished to avoid making payments which they had agreed for.

Incidentally, these are not the only instance in recent past where corporates or financial institutions have taken positions / decisions which are in direct conflict with provisions of FEMA.

A recent instance of dispute between Altico Capital and HDFC Bank is case in point. HDFC Bank was ordered by RBI to reverse the controversial action taken by them in appropriating a INR 210 Crores held in trust with HDFC Bank by Altico Capital.[39] This was a rare occasion that pitted State Bank of India Chairman Mr. Rajnish Kumar against Mr. Aditya Puri, CEO of HDFC Bank in a rather acrimonious public spat.[40]

It will be apt to recall the words of Prof A C Fernando[41] on business ethics “Although laws and ethics are closely related, they are not the same; ethical principles tend to be broader than legal principles”.

[38] A.Srivas ‘How The Docomo Affair Widened The Bitter Rift Between Ratan Tata And Cyrus Mistry (The Wire, 2020) <https://thewire.in/business/now-know-tata-docomo-mistry-affair> Accessed 16 October 2020. See also ‘Cyrus Mistry and Tatas spar over DoCoMo case, Mistry says Ratan Tata was always kept in loop’ (Economic Times, 2020) https://economictimes.indiatimes.com/news/company/corporate-trends/cyrus-mistry-and-tatas-spar-over-docomo-case-mistry-says-ratan-tata-was-always-kept-in-loop/articleshow/55185615.cms?from=mdr Accessed 16 October 2020.

[39] S. Ghosh’RBI Asks HDFC Bank To Pay Back ₹210 Cr In Altico Case (LiveMint 2020). <https://www.livemint.com/industry/banking/rbi-directs-hdfc-bank-to-return-rs-210-crore-to-mashreq-bank-in-altico-capital-case-11594993747625.html> Accessed 16 October 2020].
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[40] *Altico Crisis: HDFC Bank's Aditya Puri Defends En-Cashing Fixed Deposit - Times Of India* (The Times of India 2019) <https://timesofindia.indiatimes.com/business/india-business/altico-crisis-hdfc-banks-aditya-puri-defends-en-cashing-fixed-deposit/articleshow/71376222.cms>[Accessed 16 October 2020.

[41] A. Fernando *Corporate Governance* (New Delhi Pearson Education India 2012) pp 452.

2. Professional Ethics of Legal Fraternity

The second issue that rears an ugly challenge is regards the ethics and professional conduct by the legal fraternity, at a time when transaction is being undertaken. In both the cases discussed, we have seen that the disputes had gone through arbitration process and then the judicial challenges. Success in courts has certainly been a vindication for the lawyers who drafted these agreements. But the cookie could as well have crumbled the other way. In Vijay Karia case, the elaborate acrobatic exercise to distinguish between an act of smuggling under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and violation of FEMA is quite evident.[42]

All the parties involved in these transactions had access to best legal assistance in India and overseas. That they still chose to skate on thin ice, incorporating clauses that were in violation of law leaves much to ponder about. A decision that would have gone against the beneficiaries would have dented the image of expertise and professionalism of these law firms in general and specific lawyers who handled the transaction in particular.

Coming to the specifics, in case of Tata Sons – NTT DoCoMo, award could as well have gone against NTT DoCoMo resulting in a loss of over US Dollar 1.2 Billion (approximately INR 9,000 Crores), there would have been a rash of personal liability suits against NTT-DoCoMo Inc. and its directors. Debate on Tata Sons allowed to make payment of this amount has been muted, plausibly because Tata Sons is a public company and secondly, the high reputation for ethical standards enjoyed by Tata group in public perception. However, that still does not address the compromises made on professional ethics and standards of corporate governance.

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[42]*Supra* 1, Paragraph 84. See also, *Dropti Devi v. Union of India*(2012) 7 SCC 499.

Section VI - Conclusions

Had it not been for the international arbitration clause and seat of arbitration outside India, the contracts under dispute would have been consigned to dustbin at the very first instance. The arbitration awards would have been otherwise and contracts rendered null and void. The contracts executed by the parties were prima facie in violation of provisions of FEMA. These contracts could only be made enforceable by taking recourse to Arbitration Act. In the authors view, these two cases have established a principle that national law can be brazenly violated if a clause of international arbitration is slipped in. And hence the title of this article.

These two cases have sounded the death knell for the supervisory powers enjoyed by RBI in implementing FEMA. Decision of RBI in the matter of Tata Sons – DoCoMo case was also swayed by the Indo-Japan diplomatic issues as is amply evident from the judgement wherein correspondence between RBI and Government of India has been quoted extensively. RBI despite having denied the permission initially, was seen making a case to Government of India to provide special approval to Tata Sons to make the remittance. India was at that time looking forward to substantial FDI from Japan. This anticipation had its bearing on decision making. Whether a specific case with its own diplomatic imperatives can become a benchmark for a general law or regulatory policy is moot. The Tata Sons case became the foundation on which another case of Vijay Karia was decided, once again giving primacy to the arbitral award over the patent illegality.

International agreements and conventions undermining the domestic laws is the leitmotif of this article. The New York Convention evolved to bring about consistency in decision making and enforceability of awards related to commercial disputes settled in international arbitration. That these arbitral awards or conventions can enforce private contracts overriding the laws of the member states is a disturbing thought. While Section 34 and Section 48 of Arbitration Act have both been synchronised so far as challenge on grounds of public policy is concerned, this is certainly discriminatory against those who adhere to the law – in letter and spirit. The crucial words "fundamental policy of national law" needs elaboration and deliberation. Mere pedantic adherence to these words is a lethal axe aimed at hacking away the national laws. Execution of such marquee contracts needs to adhere to higher standards of business ethics.

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