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THE FIFTH NLU ANTI-TRUST LAW MOOT COURT COMPETITION, 2014

National Law University, Jodhpur

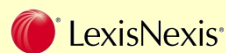
In association with

Amarchand & Mangaldas & Suresh A. Shroff & Co.

and

Competition Commission of India

KNOWLEDGE PARTNER



PROPOSITION

**IN THE SUPREME COURT OF BOHEMIA,
AT RIVERDALE**

APPEAL NO. 1/2014

IRONDELL INDUSTRIES PRIVATE LIMITED	V.	...APPELLANT
COMPETITION COMMISSION OF BOHEMIA		...RESPONDENT NO. 1
LENNOX & COMPANY		...RESPONDENT NO. 2 (<i>PRO FORMA</i>)
SPYKER INDUSTRIES PRIVATE LIMITED		...RESPONDENT NO. 3 (<i>PRO FORMA</i>)
ACME INDUSTRIES PRIVATE LIMITED		...RESPONDENT NO. 4 (<i>PRO FORMA</i>)

CLUBBED WITH

APPEAL NO. 2/2014

IRONDELL INDUSTRIES PRIVATE LIMITED	V.	...APPELLANT
COMPETITION COMMISSION OF BOHEMIA		...RESPONDENT NO. 1
HESKETH PRIVATE LIMITED		...RESPONDENT NO. 2

CLUBBED WITH

SLP(C) NO. 101/2014

COMPETITION COMMISSION OF BOHEMIA	V.	...PETITIONER
IRONDELL INDUSTRIES PRIVATE LIMITED		...RESPONDENT NO. 1
LENNOX & COMPANY		...RESPONDENT NO. 2 (<i>PRO FORMA</i>)
SPYKER INDUSTRIES PRIVATE LIMITED		...RESPONDENT NO. 3 (<i>PRO FORMA</i>)
ACME INDUSTRIES PRIVATE LIMITED		...RESPONDENT NO. 4 (<i>PRO FORMA</i>)

CLUBBED WITH

SLP(C) NO. 102/2014

IRONDELL INDUSTRIES PRIVATE
LIMITED

...PETITIONER

V.

COMPETITION COMMISSION OF
BOHEMIA

...RESPONDENT NO. 1

LENNOX & COMPANY

...RESPONDENT NO. 2 (*PRO FORMA*)

SPYKER INDUSTRIES PRIVATE
LIMITED

...RESPONDENT NO. 3 (*PRO FORMA*)

ACME INDUSTRIES PRIVATE LIMITED

...RESPONDENT NO. 4 (*PRO FORMA*)

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1. Bohemia is a small republic in South Asia and has four states—Talbot, Newport, Fairpond and Brooklake. It is one of the most rapidly emerging markets in the world. The laws of Bohemia are *in parimateria* with the laws of India, with the limited exceptions created in this problem. Bohemian courts often refer to decisions of courts, tribunals, and commissions in India, and these have high persuasive value in Bohemia.
 2. Bohemia enacted its competition law, the Bohemian Competition Act (the ***Competition Act***), in 2002. However, due to resistance from business and industrial houses in Bohemia, the Competition Act was only brought into force in a phased manner, with the last provisions coming into force in June, 2011.
 3. The Competition Commission of Bohemia (the ***CCB***) treats decisions of the Competition Commission of India as well as other decisions of Indian courts on the Indian Competition Act, 2002, as having high persuasive value. The CCB also regards the competition regulators of the European Union and the United States highly, and relies on precedent from these jurisdictions as well.
 4. Irondell Industries Private Limited (***Irondell***) is a prominent industrial conglomerate engaged in a variety of manufacturing businesses, including the manufacture of computer peripherals, telephone instruments and electrical appliances. Irondell is also a manufacturer and supplier of all stationery products including printing papers and other office supplies such as pens, pencils, rulers, erasers, etc. Lennox & Company (***Lennox***), Spyker Industries Private Limited (***Spyker***), and Acme Industries Private Limited (***Acme***) are the other three manufacturers and suppliers of stationery in Bohemia. All the four players are present and active across Bohemia.
 5. Irondell has its stationery manufacturing unit situated in the state of Talbot. Lennox has its production unit located in the state of Newport while Spyker's manufacturing unit is located in the state of Fairpond. Acme has no production units in Bohemia and procures all its supplies from its production unit located in the neighbouring country of Linden.

6. While all the four stationery manufacturers and suppliers operate in Bohemia, publicly available data suggests that Irondell's shares in the supply of stationery in the state of Talbot has increased rapidly since the month of April 2013. The collective market share of the other three companies in the state of Talbot this financial year has fallen to twenty one percent. All the stationery manufacturers and suppliers operate in the market through a channel of distributors who in turn supply stationery to the concerned organisation.
7. Veritas Ink Private Limited (**Veritas**) is the Bohemian unit of the global stationery giant Veritas, Inc. based in the United States of America. Veritas Inc. deals with all kinds of office stationery and high end stationery products such as ornamental pens. Veritas' business in Bohemia is limited to making inks and refills for fountain pens. One of Veritas' large competitors in Bohemia is Hesketh Private Limited (**Hesketh**), the fountain pen ink and refills for pens producing unit of Hesketh Holdings AG, located in the Netherlands. Hesketh's Bohemian operations are primarily based in Talbot and it is the preferred supplier for Spyker and Lennox. Veritas currently satisfies most of the requirement of inks and refills for fountain pens for Irondell.
8. Hesketh approached Irondell with a proposal to supply ink and refills for fountain pens for Irondell products. Irondell replied, stating that it was not interested as it already received supplies from Veritas at competitive rates. When Hesketh offered a further discount, Irondell still refused, saying that it had an existing 5 year contract with Veritas, and did not wish to switch suppliers.
9. Feeling aggrieved by the actions of Irondell, Hesketh filed an Information under Section 19(1)(a) of the Competition Act before the CCB alleging abuse of dominance by Irondell in privileging Veritas over the other players in the relevant market, and denying Hesketh access to the market. The CCB found that there was a *prima facie* case of violation of Section 4 of the Competition Act, and directed the Director General (**DG**) to investigate into the matter.
10. The DG sought information and explanations from Irondell, Hesketh, Veritas and their competitors regarding the allegation of abuse of dominance. During the course of the investigation, the DG discovered that the Government of the State of Talbot had invited tenders for the supplies of all the stationery to all the Government Offices and organisations in Talbot in the month of March 2013. On the basis of the lowest price quotation, Irondell was awarded the tender for which supplies were to commence from April 2013. This tender was for all supplies from 2013 to 2018. This explained Irondell's increased market share from April 2013 onwards.
11. The investigation also revealed that similar tenders for supplies of stationery to Government Offices were invited by the states of Newport, Fairpond and Brooklake in the month of March 2013. The tenders in these states were awarded to Lennox, Spyker and Acme respectively. The DG found that the following prices were quoted by the stationery manufacturers and suppliers for each year of the state government tenders:

	Talbot	Newport	Fairpond	Brooklake
Irondell	15 crores	30 crores	22 crores	24 crores
Lennox	22 crores	12 crores	40 crores	30 crores
Spyker	35 crores	23 crores	15 crores	40 crores
Acme	35 crores	25 crores	30 crores	20 crores

12. The DG looked at this information as an indicator of collusion among competitors and included the other three stationery manufacturers in the ambit of its investigation. The DG's investigation suggested that these quotes could not have been as a result of a difference in costs due to transportation, as the price differences were significant. The DG also discovered that sales by these companies to other purchasers in the same state were at lower prices. However, the DG found no evidence of a conversation between management at the four companies, or correspondence in relation to this tender.
13. Based on the data available, the DG in its report recorded a finding that the four players had contravened Section 3(3) of the Competition Act.
14. On the question of abuse of dominance by IrondeLL, the DG returned with a finding that, while IrondeLL might be the current biggest manufacturer and supplier of stationery in the state of Talbot, it was not a dominant player in the relevant market. Further, there was no evidence to suggest an abuse of dominance on part of IrondeLL as the DG found merit in the cost efficiencies described by IrondeLL.
15. During the course of the investigation it was also revealed that, in 2012, IrondeLL had acquired a Mauritian Company called Whitecliff Investments Private Limited (*Whitecliff*). In August 2013, Whitecliff sought to acquire certain subsidiaries and divisions of Veritas, Inc., including Veritas. A binding acquisition agreement was signed in this regard on 16 August 2013. The DG recorded these observations in its report that was submitted to the CCB. Further, IrondeLL's in house legal counsel as well as its external Mauritian attorneys had provided opinions on e-mail stating that a notification to the CCB may be required. However, none was filed by IrondeLL.
16. The DG thus submitted its report to the CCB recommending that the four companies were in violation of Section 3(3) of the Competition Act. It also recommended that there was no violation of Section 4 of the Competition Act.
17. The CCB, after hearing all the parties in the matter, agreed with the recommendation of the DG regarding the violation of Section 3(3) of the Competition Act and passed an order under Section 27(b) of the Competition Act on 15 September 2013 and imposed a penalty on all the contravening parties at the rate of three per cent of the average of the turnover for the three preceding financial years. The penalty on IrondeLL came out to be around INR 15 Crores while the penalty on all the other three manufacturers came out to be around INR 3 Crores collectively. The CCB also rejected the request of the parties to hold a separate hearing on the quantum of penalties.
18. On the question of abuse of dominance by IrondeLL, the CCB disagreed with the findings of the DG that there was no evidence to suggest an abuse of dominance by IrondeLL in the relevant market. It held that the length of the agreement with Veritas suggested that there was a denial of market access, in violation of Section 4(2)(c) of the Competition Act. The CCB imposed a fine on IrondeLL of 25 crores, which was five percent of the average of IrondeLL's turnover for the three preceding financial years.
19. Feeling aggrieved by the decision of the CCB, IrondeLL approached the Competition Appellate Tribunal (*COMPAT*) in appeal, asking the COMPAT to overturn the decision of the CCB dated 15 September 2013. IrondeLL argued, *inter alia*, that the DG could not have inquired into the case of violation of Section 3 of the Competition Act as it was only directed by the CCB to investigate into the allegation of abuse of dominance.

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20. Along with its substantive arguments on both Section 3(3) and Section 4 of the Competition Act, IrondeLL also raised arguments on the correctness of the methodology of imposing fines by the CCB, insofar as it took into account IrondeLL's entire turnover, as opposed to the turnover from its stationery business while determining the amount of penalty. IrondeLL's revenues from its stationery business were very small when compared to the total turnover of IrondeLL from all its businesses. Hesketh did not appear before the COMPAT in this case.
21. Simultaneously, based on the observation of the DG regarding the acquisition by Whitecliff, the CCB issued a notice to IrondeLL and Whitecliff asking them to show cause as to why they should not be penalized for failing to notify the transaction and seek approval from the CCB for the same. IrondeLL presented legal arguments on behalf of itself and Whitecliff on why the transaction did not require notification to the CCB as (a) it took place entirely outside Bohemia with an insignificant local nexus to and effect on markets in Bohemia, and (b) the assets and turnover of the units, divisions and subsidiaries of Veritas being acquired by Whitecliff did not meet the prescribed financial thresholds under the Competition Act. IrondeLL also stated that the e-mail opinions provided by its in-house legal counsel as well as its external Mauritian attorneys were not admissible as they were protected by legal privilege.
22. However, the CCB passed an order on 1 October 2013 directing IrondeLL to file a notification for the combination, and imposing a penalty of INR 10 Crores for failing to notify the transaction in the first place as the parties to the combination meet the thresholds relating to assets/turnover prescribed in the Competition Act. The CCB observed that the penalty was higher because IrondeLL had been informed of the possibility of requiring a notification. The CCB also observed that the e-mail opinions were discoverable under Bohemian law.
23. IrondeLL also filed a separate Appeal before the COMPAT against the Order of the CCB dated 1 October 2013 imposing a penalty on IrondeLL for failure to notify the transaction to the CCB. It reiterated its claim regarding the admissibility of the e-mail advice.
24. IrondeLL filed a notification (Combination No. 52/2013), without prejudice to its rights to appeal the order imposing a penalty. The CCB, by its Order dated 20 October 2013, cleared the combination stating that the transaction did not have an appreciable adverse effect on competition in India.
25. The COMPAT decided to hear all the Appeals together and heard the parties on their grievances. By way of a common Order in the matter, the COMPAT returned with the following findings:
- a. There is no merit in the plea raised by the stationery manufacturers that the DG could not look into the issue of violation of Section 3 of the Competition Act;
 - b. The CCB was correct in holding the stationery manufacturers guilty of contravention of Section 3(3) of the Competition Act;
 - c. IrondeLL was abusing its dominant position in the relevant market in so far as it refused to deal with Hesketh for supply of fountain pen ink and refills for pens;
 - d. The e-mail advice was not protected by privilege under Bohemian law;
 - e. In light of the facts and circumstances of the case, the penalty imposed by the CCB for failure to notify the combination is correct and adequate; and
 - f. After a careful examination of the mitigating factors involved in the case, the penalty imposed on the stationery manufacturers under Section 27(b) is reduced to half of that imposed by the CCB. The metric employed by the CCB (the use of total turnover) was upheld.

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26. Feeling aggrieved by the decision of the COMPAT, Irondell approached the High Court of Riverdale on the issue of the DG exceeding its jurisdiction. The High Court of Riverdale passed an order accepting the plea of the stationery manufacturers that the DG cannot conduct an investigation into an issue in case of a limited direction of the CCB to conduct an inquiry pertaining to a particular violation. However, the High Court opined that the information revealed during the course of an investigation can be used to initiate a fresh inquiry into the allegation.
 27. During the pendency of the matter before the High Court, Irondell filed an Appeal against the decision of the COMPAT before the Supreme Court of Bohemia challenging its findings on all counts.
 28. The CCB filed a Special Leave Petition (**SLP**) before the Supreme Court of Bohemia against the order of the High Court invalidating its order insofar as it found the stationery manufacturers guilty of violating Section 3(3) of the Competition Act. Simultaneously, Irondell filed an SLP against the order of the High Court allowing the information to be used as part of a fresh investigation.
 29. The Supreme Court admitted the SLPs as well as the civil appeals, and directed that all the related matters be listed for final hearings together.
 30. The Supreme Court will now listen to all the arguments including relating to the powers of the DG, imposition on penalties along with the substantive issues involved in the case.

NOTE:

Lawyers representing both sides are required to address the arguments that are specifically mentioned in the Proposition. They are, however, free to make any other arguments that they deem fit. Lawyers for both sides are encouraged to explore additional arguments related to jurisdiction as well as merits.

As is customary in Bohemia, all the members of an alleged cartel are made *pro-forma* respondents in appeals against the decision of the CCB or the COMPAT. Irondell has made the other cartel members also parties. Counsel for the Respondents represent only the CCB and, therefore, will not press arguments on behalf of the *pro-forma* respondents.