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Article

Satellite Communications Policy in India – Time to revisit and revise

By **Nikhil Singal**

Recently, the Indian Space Research Organization, popularly known as ISRO, launched a PSLV C-23 rocket carrying a French Earth Observation Satellite along with four other satellites belonging to Germany, Canada and Singapore. After the launch, the Indian Prime Minister congratulated the Department of Space, and mentioned that India's space programme is the perfect example of "Scale, Speed, and Skill". He also mentioned that space technology has a critical role to play in realizing the vision of a "Digital India". Following on these lines, the Finance Minister in his first Annual Budget Speech on July 10, 2014 stated that "there are several major space missions planned for 2014-2015". While these are all very noble ideas which envision a better and modern India, there are nevertheless many legal and administrative impediments which deter the actualization of this vision.

SATCOM Policy and Norms

In 1997, the Department of Space, in partnership with the Department of Telecommunication and the Department of Science and Technology, framed the Satellite Communication Policy, 1997 (SATCOM Policy). Considering the expanse and future possibilities of satellite communication for a developing superpower like India, one would have expected this policy to be a voluminous document enlisting guidelines for advancement of satellite, telecommunication, broadcasting, meteorological, exploration and other services in India. Instead, what the government framed was a 2-pager, 5-pointer, abundantly raw and broad policy. Surprisingly, till date, this is the only policy which governs satellite communication in India! The emphasis of the policy was on:

- Developing satellite communication, launch vehicles and ground equipment industry in India;
- Making available and developing further the infrastructure built through the government operated Indian National Satellite System (INSAT);
- Encouraging private sector investment in space industry; and
- Allowing, to a (very) limited extent, use of foreign satellites for services in India.

Realizing the insufficiency of the policy, the Government in 2000 framed 'Norms' for implementation of this policy. These norms elaborated the scope of the policy, while emphasizing on the use and development of the INSAT network and preferential treatment to Indian satellites. Various sub-committees were created (many of them still dormant) to sanction the use of Indian satellites by private players based on available "capacity and capability" of transponders and INSAT network. Use of discretion was definitely the undertone implied in such sanction! While these norms dealt with promotion of telecommunication, broadcasting, and meteorological services in India to some extent, the government barely hinted at establishing mechanisms for coordination with other satellite systems around the world and at establishing and promoting private global satellite communication systems (like SES, INMARSAT, INTELSAT, etc.)

These norms classified satellite communication services in two broad categories of domestic and international. However, what actually constituted "domestic" and "international" was left open to interpretation of the service providers, which is surprising especially because the government should have foreseen the use of complex technical apparatus which would be used for communication in the times to come. Further, while preference was given to Indian satellites for such forms of communication, the norms severely limited (rightly or wrongly) the use of "foreign satellites" for domestic communication, and completely lacked norms for the use of such foreign satellites for international communication.

The administrative hotchpotch

What adds to the trouble of having a skeletal policy is the administrative rigmarole which the service providers have to deal with. For the purposes of satellite communications, the Department of Space (DoS) works in collaboration with other Ministries and Departments like the Department of Telecommunication (DoT), the Ministry of Information and Broadcasting and Department of Science and Technology, to name a few. In addition to this, the DoS has working arms like ISRO and Antrix Corporation, which manage the launching capabilities, transponder capacities, contractual arrangements, etc., of DoS. Apart from this, there is the Wireless Planning and Coordination (WPC) wing of the DoT which manages wireless communication and frequency spectrum. The Telecom Regulatory Authority of India (TRAI) with its various Acts, Rules, Regulations and Directions, also play an important part in the entire administration. In addition to all this, India has also ratified the Outer Space Treaty of the UN as well as the GATS Agreement (containing the Annex on Telecommunications), thereby requiring adherence to specific obligations under it. Further, as a member of the International Telecommunication Union (ITU), India, and the service providers operating from India, are required to make various filings in the ITU for allocation of orbital slots and radio spectrums.

If a service provider does not get jumbled with these administrative procedures, there is then the requirement of obtaining various licenses to operate and provide specified services, which is in addition to the process of bidding for spectrum allocation. Therefore, merely getting a license under the Unified Access Services (UAS) license agreement is not enough. The service provider needs, *inter alia*, to run to different administrative bodies and get relevant frequency allocations, orbital slots, approvals from TRAI, as well as ensure that nothing goes wrong! To add to all this, there are further regulatory hurdles under the Foreign Direct Investment (FDI) Policy and the SATCOM Norms if the service provider's Indian entity has foreign equity infusion.

Time to revisit and revise

Having analyzed the legal and administrative policy framework governing satellite communications in India, it is evident that a major overhaul is required to achieve the dream of a "Digital India". The intention of the government may have been lauded back in 1997 and 2000, though now, it seems rather archaic and restrictive of quintessential aspects of satellite communication. The rate of technological development is dynamic, and considering the fact the only policy which governs satellite communications in India was framed in 1997, it is imperative that the policies also adapt to changing times. Further complications, which are added by the administrative jumble, should also be streamlined and eased. When these policies are being revised, the evolving demands of the Indian and international market should also be kept in mind.

Today there are many more private players in the market who want to avail the benefits of satellite communication for their businesses, and not all of them can afford to go through the administrative hassles or use private global satellite communication systems. Consider private players like DTH service providers or internet service providers or even more complex arrangements used by e-commerce and social networking sites; all these players will benefit from fairer and more transparent procedures and policies. Emphasis should also be given for facilitating easier ingress for international players engaged in international communication, with less restrictive policies on use of foreign satellites. Understandably, there are security concerns which the government needs to factor in such policies as also the fact that development and improvement of domestic satellite systems is of paramount importance. Nevertheless, the government can adopt a balanced approach with adequate checks and balances, and with more transparent and up-to-date policies.

[The author is a Principal Associate, Corporate Practice, Lakshmikumaran & Sridharan, New Delhi]

Notifications & Circulars

Related party transactions - Section 188 of Companies Act clarified: Prohibition of any related party from voting in any special resolution of the company to approve any contract or arrangement (as specified in Section 188 of the Companies Act, 2013) is applicable only to the contract or arrangement for which the special resolution is being passed. MCA General Circular No. 30/2014, dated 17-7-2014 issued for this purpose clarifies that the term 'related party' has to be construed with reference only to the contract or arrangement for which the said special resolution is being passed. It has also been clarified that transactions arising out of compromises, arrangements and amalgamations dealt with under other specific provisions will not attract the requirements of said provisions. Contracts entered into before the commencement of said provisions will also not require fresh approval unless any modification is made therein on/after 1-4-2014.

Resident Director – Requirement clarified: Residency requirement of at least one director, as per Section 149(3) of the Companies Act, 2013, is to be reckoned from date of effect of said provision. Ministry of Corporate Affairs General Circular No. 25/2014, dated 26-6-2014 issued in this regard, hence holds that the director(s) would need to be resident in India during calendar year 2014, for more than

136 days. It has also been clarified that while companies incorporated between 1st April, 2014 and 30th September, 2014, should have a resident director either at the incorporation stage itself or within six months of their incorporation, companies incorporated after 30th September, 2014, would be required to have resident director from the date of incorporation itself.

Overseas direct investment limit restored: In a positive move for the Indian corporates going global, Reserve Bank of India has restored the earlier (prior to August 2013) limit for Overseas Direct Investment (ODI) by an Indian corporate. According to A.P. (DIR Series) Circular No. 1, dated 3-7-2014, the said limit has been restored to 400% of the net worth of the company as per the last audited balance sheet of the Indian entity, under the automatic route. Last year through A.P. (DIR Series) Circular No. 23, dated 14-8-2013 the Reserve Bank of India had reduced the ODI limit for Indian entity from 400% to 100% of the net worth. However, any financial commitment exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the RBI even when the total financial commitment of the Indian party is within the eligible limit under the automatic route.

Share transfers and issuance of duplicate share certificates - Rules clarified: Share transfer forms executed before April 1, 2014 will have to be accepted by the company if it is submitted within the period prescribed in the Companies Act, 1956. However, if the same is not submitted within the prescribed period, the company may satisfy itself as to the reason for the delay and may reject the submission by conveying reasons for non-acceptance in writing within the prescribed period as provided in Section 56(4)(c) of the Companies Act, 2013. It may be noted that from 1-4-2014 new Securities Transfer Form has been prescribed. General Circular No. 19/2014, dated 12-6-2014 issued for this purpose also clarifies that a committee of directors has the power to issue duplicate share certificates under Rule 6(2)(a) of the Companies (Share Capital and Debentures) Rules, 2014 subject to any regulations imposed by the Board in this regard.

Voting through electronic means (E-voting) clarified: Provisions relating to voting through electronic means i.e. e-voting as contained in Section 108 of the Companies Act, 2013 read with Rule 20 of the Companies (Management and Administration) Rules, 2014, have been made not mandatory till 31st of December, 2014. Ministry of Corporate Affairs General Circular No. 20/2014, dated 17-6-2014, also clarifies that,

- Voting by show of hands will not be allowed in case of e-voting.
- A person who has voted by e-voting will not be barred from participating physically in the general meeting. However, he will not be allowed to vote in the meeting again.
- Transactions of certain items which can only be done through postal ballot cannot be considered at a general meeting where e-voting facility is available.
- Provisions related to demand for poll will not be relevant for companies covered under said provisions.

- A shareholder who is not able to participate in the general meeting personally nor is able to vote using electronic means cannot use the option of voting by postal ballot.
- Since voting through electronic means would be on the basis of proportion of share in the paid up capital or one share-one vote, the Chairperson of the meeting shall regulate the meeting accordingly.
- Whole of the procedure specified in Rule 20 of the Companies (Management and Administration) Rules, 2014 [voting through electronic means in general meetings] would be applicable on a company which opts or decides to give its shareholders the e-voting facility.

Companies (Cost Records and Audit) Rules, 2014 notified: Ministry of Corporate Affairs has notified Companies (Cost Records and Audit) Rules, 2014 under sub-sections (1) and (2) of Section 469 and Section 148 of the Companies Act, 2013. These new rules supersede eight sets of rules notified under the erstwhile Companies Act, 1956 and specify four classes of companies which shall be required to maintain cost records and who will be subject to cost audit. Notification in this regard has been issued on 30-6-2014 which is the last date for filing application for appointment of cost auditor under the earlier rules.

Delivery Instruction Slip (DIS) - Issuance and Processing: Guidelines to strengthen the supervisory and monitoring role of the depositories and their participants with respect to issuance and processing of Delivery Instruction Slips (DIS), as given in Circular No. CIR/MRD/DP/01/2014, dated 7-1-2014 will be effective from 1-10-2014. SEBI Circular No. CIR/MRD/DP/ 22 /2014, dated 4-7-2014 also clarifies that Depository Participants (DPs) shall not accept old DIS for execution from a Beneficial Owner (BO) who has been issued new DIS. A period of one month is to be provided for receipt of DIS by the BOs. Further, DPs may accept old DIS during this period and while issuing new DIS they shall intimate the BO that the old DIS cannot be used. The depositories shall ensure implementation of the above within the stipulated timelines. Other provisions of the earlier circular would remain unchanged.

Import of rough, cut and polished diamonds – Time limit for clean credit: Reserve Bank of India has allowed 'clean credit' (credit given by a foreign supplier to its Indian customer, without any Letter of Credit/Letter of Undertaking/Fixed Deposits) for import of rough, cut and polished diamonds, for a period not exceeding 180 days from the date of shipment of the goods. A.P. (DIR Series) Circular No. 2, dated 7-7-2014 has been issued in this regard.

Ratio Decidendi

Arbitration outside India – Applicability of Arbitration Act, 1996 – Specific exclusion of Indian laws: The Supreme Court of India has overruled the Delhi High Court judgment wherein the latter was of the view that laws of the state including India cannot be altogether ignored even if there is a choice of law in agreement to arbitrate when it comes to question of arbitrability *[Please see Corporate Amicus – April 2013 issue for Delhi HC Order]*. The Apex Court in this regard observed that since the decision in the case of *Balco* was made prospective, decision in the case of *Bhatia International* would apply and hence it has to be seen whether there is intention of the parties to exclude provisions of Arbitration Act or not. Provision in the contract that Permanent Court of Arbitration at Hague can be approached for the appointment of the arbitrator, in case of default by any of the parties, was found to indicate that applicability of Arbitration Act, 1996 was excluded by the parties by consensus. Further it was noted that Article 33.12 of the contract specifically provided that the arbitration agreement contained in therein shall be governed by the laws of England and hence applicability of Arbitration Act, 1996 was ruled out by a conscious decision and agreement of the parties. It was hence held that Delhi High Court had no jurisdiction to entertain the petition under Article 34 of the Arbitration Act, 1996.

Union of India's contention that that the law of the contract is also the law of the arbitration agreement was rejected by the court observing that provision for arbitration is a deliberate election of remedy other than usual remedy of a civil suit and India, which is also the signatory to the York Convention, has taken into account the UNCITRAL Model Laws and the UNCITRAL Rules, while enacting the Arbitration Act, 1996. Principle of severability of the arbitration agreement from the substantive contract, as recognized by Section 16 of the Indian Arbitration Act, 1996 was also noted in this regard. Supreme Court's earlier judgment in the case of *Venture Global* was distinguished by the court observing that there was no danger of violation of any statutory provisions in the present case because appellants had nowhere claimed to be exempted from the laws of India. Judgment in the case of *Videocon Industries* was relied on by the court. [*Reliance Industries Limited* v. *Union of India* – Supreme Court of India Judgment dated 28-5-2014 in Civil Appeal No. 5765 of 2014]

SEBI imposes penalty on HR Head for non-disclosure of share trading: Securities and Exchange Board of India (SEBI) has imposed penalty on Head of the HR department for non-disclosure of her share trading, under SEBI (Prohibition of Insider Trading) Regulations, 1992. SEBI in this regard rejected the submission that the person concerned, who had traded in shares, was not an 'officer' of the company. The provisions provide for disclosure of interest or holding by directors and officers and substantial shareholders in a listed company. Noticee was found to be an 'officer' of the company as she held a higher position capable of giving directions to her subordinates and had admitted that persons internally given the nomenclature of manager are subordinate to her in hierarchy. Quantum of penalty was however considerably reduced considering non-computability of unfair advantage to noticee or loss to investors and that the violation was non-repetitive in nature. [*Chandana Gosh in matter of ITC Ltd.* – SEBI Adjudication Order No. EAD-2/DSR/PU/145/2014, dated 7-7-2014]

'Fit and proper person' to acquire shares of securities exchanges: Person declared to be not a fit and proper person to acquire or hold shares of exchanges in the commodity market, by an order of Forward Market Commission, can be said to be not a fit and proper person to acquire or hold shares of exchanges in the securities market under Regulation 20(1)(b)(v) of Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 (SECC Regulations). Securities Appellate Tribunal, in its majority order in this regard, noted that both markets, i.e. the commodity exchanges and the stock exchanges which are both part of wider financial market, demand high integrity of persons manning the respective exchanges as also shareholders of those exchanges and that the expression 'having bearing on the securities market', in the said regulation, refers to an order passed by any other regulator who regulates trades 'similar' to the trades regulated by SEBI. Insignificant quantum of share holding in exchanges was further found not relevant in this case by the SAT which also held that even if the appellant is entitled to retain 2% shares of Multi Commodity Exchange, he cannot hold any shares of the relevant entities on being declared as not fit and proper to hold shares of the exchanges in the securities market.

The SAT also held that since substantive provision contained in the SEBI Act permits filing of an appeal, the appeal is maintainable against the order passed by SEBI under SECC Regulations even if as per Regulation 20 of the said provisions, the decision of SEBI is final. [*Financial Technologies (India) Ltd.* v. *SEBI* – SAT Order dated 9-7-2014 in Appeal No.130 of 2014]

Competition law – Relevant market and locus standi for moving CCI:

Competition Appellate Tribunal (COMPAT) has held that there cannot be a restrictive 'relevant market' on the basis of a singular feature in the impugned goods (car in this case). The decision of the Competition Commission of India (CCI) which found the relevant market to be market for luxury cars sold in India, was hence upheld by the COMPAT rejecting the plea of the informant to consider market for cars which run on the basis of 'run flat tyre technology' only. The informant was aggrieved because the car was not provided with the usual spare tyre by the manufacturer on the ground that it can run on flat tyre for some distance. CCI's Order on absence of dominance of particular brand of luxury cars was also upheld by the Tribunal after taking note of data on sales.

It was also held that legal machinery under the CCI cannot be moved by a person who has no concern whatsoever with the subject. It was observed in this regard that the informant, who is a director in the company which purchased the car, has no *locus standi,* being not concerned in any manner with the purchase or ownership of the car, and hence the CCI should have rejected the information on the basis of lack of *locus standi.* [*International Cylinder Pvt. Ltd.* v. *Competition Commission of India* – COMPAT Order dated 4-7-2014 in Appeal No. 21/2012]