

22nd – 24th February, 2019

MOOT PROPOSITION

1. Avalon is a republic with 29 states and is one of the fastest emerging economies in the world. The laws of Avalon are in *pari materia* with the laws of India, with the limited exceptions created in this Proposition. Avalon Courts often refer to decisions of Courts, Tribunals, and Commissions in India which have high persuasive value in Avalon.
2. In 1991, the Government of Avalon opened up its market and in order to address any emergent issues, Avalon enacted its competition law in 2002, the Avalon Competition Act, 2002 (hereinafter referred to as the “**Competition Act**”). However, due to various policy considerations and judicial challenges, the Competition Act was brought into force in phases, with the first tranche of substantive provisions coming into force on 20 May, 2009. The Competition Act replaced the Avalon Monopolies and Restrictive Trade Practices Act, 1969.
3. The Competition Commission of Avalon (hereinafter referred to as “**CCA**”) regards the decisions of the Competition Commission of India as well as other decisions of the Indian Courts on the Indian Competition Act, 2002, as having high persuasive value. The CCA also gives due regard to the competition regulators of the European Union and the United States, and relies on precedents from these jurisdictions as well.
4. In the years 2014 – 2015, with the change in Government in Avalon, there was a significant push for economic reforms. As part of a series of economic and financial reforms, the Government of Avalon introduced the Avalon Insolvency and Bankruptcy Code (hereinafter referred to as “**AIBC**”). The stated purpose of AIBC was time-bound resolution of credit woes of financial institutions and at the same time, operationalization of the stalled assets in the market.
5. The Government also laid heavy emphasis on environmental regulations and made stricter norms for industries based on forest assets. The new Environment Policy of Avalon was initially enacted for a period of 5 years and was to be reviewed thereafter. The Environment Policy entailed heavier regulation of consumption of forest wealth and increased duties with a view to divert attention to alternatives. This had a direct effect on industries dependent on forest assets including paper and wooden furniture and saw a dip in their profits. Since the enactment of the Environment Policy, Avalon has seen a steady increase in imports of paper, which currently account for about 20 percent of the total consumption of paper in Avalon.
6. Shadowfax Industries (hereinafter referred to as “**Shadowfax**”) is a leading printing and publishing house in Avalon. Shadowfax is credited with revolutionizing the printing

22nd – 24th February, 2019

industry in Avalon by continuously evolving techniques that are cost efficient and innovative. In 2011, with a view to integrate its operations, Shadowfax ventured into paper manufacturing and with the help of investments from a consortium of private equity funds, raised its production capacity to 14,000 MTPA (metric tonnes per annum) in just two years, which was second only to Gollum Paper Mills' (hereinafter referred to as "**Gollum**") total capacity of 24,000 MTPA. Shadowfax also started supplying paper to other printing houses and newspaper companies. However, in 2014, the paper production unit of Shadowfax went through an insolvency process and was acquired by Bain Industries (hereinafter referred to as "**Bain**"). This acquisition proved to be a game changer for Bain, which upgraded its paper production capacity to 18,000 MTPA as a result of the acquisition. Shadowfax attempted to get a preferred buyer treatment in return for some investment in Bain but could not reach an agreement.

7. Shadowfax started procuring paper for its printing business from other suppliers in the market, including Gollum. In November 2017, Shadowfax placed an order for about 4000 MTs (metric tonnes) of a special quality glazed paper to be supplied in 4 tranches over the course of six months. Shadowfax had won a contract for Ostrich Publications' global assignments.
8. Gollum supplied the first tranche of 1000 MTs of glazed paper in 15 days. Thereafter, through its letter dated 9 December, 2017, Gollum informed Shadowfax that there has been a breakdown in the machinery at one of their plants which could cause some delay in subsequent supplies. However, they were willing to divert supplies from their other production facilities to meet Shadowfax's order, but that would entail an increased price, amounting to 1.5 times the price originally agreed upon.
9. Shadowfax and Gollum had a series of correspondence to negotiate the supply terms. However, since Shadowfax couldn't get Gollum to reduce the price, they agreed to pay the 1.5 times price for the second tranche of supply. In the meantime, Shadowfax also imported some quantity of glazed paper from China to meet the demands of Ostrich Publications.
10. Shadowfax filed an Information before the CCA alleging abuse of dominant position by Gollum for demanding exorbitant prices. Shadowfax further alleged that Gollum had refused to supply paper to Shadowfax, which amounted to a violation of Section 3 of the Competition Act. Shadowfax, by way of a Supplementary Information, submitted to the CCA that Ostrich Publications had terminated its contract with Shadowfax on account of delayed supplies and sub-standard quality. Ostrich also invoked the arbitration proceedings

22nd – 24th February, 2019

against Shadowfax for violation of contractual terms and instituted claims for damages. The CCA found that there was a *prima facie* case of contravention of the Competition Act, and directed the Director General (hereinafter referred to as “DG”) to investigate the matter.

11. The DG in its investigation, found that there was a long breakdown in one of the units of Gollum that resulted in huge losses to it. In its response to the DG, Gollum submitted that continued breakdown of machinery in one of its major production facility and inability to pay its creditors resulted in Gollum being listed as a defaulter. Gollum also provided freight charges between its production units and the printing sites of Shadowfax. The DG’s investigation revealed that the price variation was not significant on account of freight charges. Further, the DG found that while the unit of Gollum that had broken down was the only one with the capacity to produce the special quality of glazed paper required by Shadowfax, Gollum could have easily started production of this special quality glazed paper at any of its other units at a minimal additional cost.
12. The DG also found that the agreement between Shadowfax and Gollum contained a price variation clause and one of the conditions of price variation was ‘*unforeseen circumstances*’ (defined in the contract as ‘*circumstances which either party could not prevent with all reasonable care and diligence*’). Shadowfax submitted to the DG that they had agreed to the terms of the agreement as they were in dire need of glazed paper which could have only been supplied by Gollum. The DG had also reached out to various third parties for responses and found that Shadowfax had reached out for price quotations to at least three other small paper mills. Frodo Paper Mills, in their price quotation, had assured that they will be able to develop the capacity to meet Shadowfax’s requirement and would meet the demand through imports, if required.
13. The DG in its report, held Gollum to be dominant in the market for glazed paper in Avalon, and found them to be liable for charging exorbitant prices. The CCA sent the final report of the DG to all the parties and invited them for an oral hearing. The CCA, after hearing the parties, agreed with the DG and found that Gollum had abused its dominant position by charging exorbitant prices. The CCA rejected Gollum’s contention that during the relevant period, it had to lose out on several orders and was facing action in damages suits in various Courts in Avalon. The CCA held Gollum to be in contravention of Section 3 and 4 of the Competition Act and also imposed a penalty amounting to 6 percent of Gollum’s average turnover for the preceding three years.

22nd – 24th February, 2019

14. Eventually, insolvency process had to commence for Gollum, and Bain got interested in acquiring the assets owned by Gollum. Bain presented its resolution plan for acquisition of the assets of Gollum before the Committee of Creditors (hereinafter referred to as “COC”) of Gollum, constituted as per the AIBC. As part of the insolvency process, a third party study commissioned by the Resolution Professional of Gollum found that Gollum would have to close its operations and exit the market in the next four to five years if its current loans and liabilities were not resolved or restructured. Since the resolution plan contemplated acquisition of assets constituting a combination under the Competition Act, the COC directed that as per AIBC, Bain had to obtain approval of the CCA prior to approval by the COC and therefore, deferred the approval of the resolution plan till Bain had obtained CCA’s approval. Bain filed a notice under Section 6 of the Competition Act before the CCA for seeking approval of their proposed acquisition of Gollum. Shadowfax made submissions to the CCA during the pendency of the merger review process, opposing the proposed acquisition and submitted that if allowed, the combined entity of Bain and Gollum would become super dominant in the market. However, the CCA proceeded to approve the combination unconditionally.
15. Gollum filed an appeal before the Appellate Tribunal (hereinafter referred to as “ACLAT”) against the order of the CCA penalizing it for abuse of dominance. Shadowfax filed an appeal before the ACLAT against the CCA’s order approving the acquisition of Gollum by Bain, stating it to be anti-competitive. Since there was substantial overlap between the two appeals and keeping in mind the commonality of the parties, the ACLAT decided to club the two appeals and has listed both for final hearing on maintainability as well as merits.

NOTE:

1. CCA is a necessary party in all the Appeals filed before the ACLAT.
2. For the purposes of this Proposition, the Counsel for Gollum will also argue for Bain.
3. Counsels representing both sides are encouraged to explore additional arguments in addition to the issues that have been specifically identified in the Proposition.