



amarchand mangaldas
advocates & solicitors

THE THIRD NLU ANTI-TRUST LAW MOOT COURT COMPETITION, 2012

National Law University, Jodhpur

*In association with
Competition Commission of India
and
Amarchand & Mangaldas & Suresh A. Shroff & Co.*

Knowledge Partner



PROPOSITION

In the Competition Appellate Tribunal of Bohemia,
at Riverdale

Appeal No. 1/2012

National Widget Company Limited	...Appellant
v.	
Rocky Widget Makers Limited	...Respondent No. 1
Competition Commission of Bohemia	...Respondent No. 2

Clubbed With

Appeal No. 2/2012

Rocky Widget Makers Limited	...Appellant
v.	
National Widget Company Limited	...Respondent No. 1
Washout Limited	...Respondent No. 2
Competition Commission of Bohemia	...Respondent No. 3

Clubbed With

Appeal No. 3/2012

Rocky Widget Makers Limited	...Appellant
v.	
National Widget Company Limited	...Respondent No. 1
Competition Commission of Bohemia	...Respondent No. 2

Clubbed With

Compensation Application No. 1/2012

Rocky Widget Makers Limited	...Applicant
v.	
National Widget Company Limited	...Respondent No. 1
Competition Commission of Bohemia	...Respondent No. 2

1. Bohemia is a republic in South Asia. 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.

2. The Competition Act has provisions that deal with anti-competitive agreements and abuse of a dominant position. These were brought into force with effect from 20 May 2009. The provisions relating to mandatory notification of “combinations” (also known across the world as the merger control provisions), along with implementing regulations, were brought into force with effect from 1 June 2011.

3. Washout Limited (“**WL**”), a company incorporated in Bohemia, is, *inter alia*, a manufacturer of industrial strength filters, purifiers and washers. There are a number of filter manufacturers and the filters can be used for a variety of purposes. Manufacturers can easily switch from producing one type of filter to another depending on the buyer’s requirement. However, the users of particular filters usually cannot easily switch to using a different filter. The underlying technology for these filters requires specialised R&D and is capital intensive. Market shares in the market for the supply of filters are not stable and WL’s shares have ranged from 25-45% over the past 5 years. WL is the largest supplier of the “widget filter”, a special filter used by widget manufacturers. WL produces widget filters in only 2 factories, a factory in Mound and a second factory in Zen.

4. WL supplies widget filters to National Widget Company Limited (“**NWC**”), a company that manufactures widgets. As a result of the manufacturing process, the widgets are coated with PPG which needs to be cleaned before the widgets are sold onward. NWC uses the filters for this cleaning process. NWC sells the cleaned widgets to its distributors Alpha, Beta, Gamma and Theta. The distributors sell the widgets on to retailers who supply to the final consumers.

5. The Competition Commission of Bohemia (the “**CCB**”) has, in a previous decision that is otherwise irrelevant to the present matter, found that NWC is a dominant company as it has a long history in manufacturing widgets and has achieved large economies of scale, and has a market share of 87.5%. Rocky Widget Makers Limited (“**RWM**”) is the only other manufacturer of widgets and has approximately 12.5% market share.

6. NWC and WL signed an exclusive supply agreement for the supply of filters in 2007. The agreement mandated that WL will only supply widget filters to NWC, and that NWC will buy all the widget filters that WL can produce before procuring widget filters from any other source. The price for these widget filters is determined based on a price variation clause that was incorporated in the agreement. The agreement is for 6 years and is renewable at the end of 3 years. However, both parties have an option to terminate the contract at any point without cause, giving the other party three months’ notice.

7. As stated earlier, NWC sells widgets to its distributors Alpha, Beta, Gamma and Theta. Alpha is the largest of the distributors and purchases 50 million widgets every year. Beta purchases 15 million widgets, Gamma 10 million widgets and Theta 5 million widgets. It costs NWC BR800 to produce one widget, on average. However, NWC’s average variable cost is BR750 per widget, as this industry has low fixed costs. The list price for NWC and RWM widgets are both 1000. RWM’s costs are however higher than NWC’s (its average total cost is approximately BR850 and its average variable cost is BR790). RWM has long term agreements to supply half of Beta, Gamma and Theta’s requirement. As RWM can only supply 12.5% of the market, which is 10 million widgets, Alpha must buy at least 40 million widgets from NWC every year. NWC has a discount policy in place which caters to the unique needs of its distributors. Since 2010, NWC has the following preferential rate agreement with Alpha:

- If Alpha buys 40 million widgets from NWC, NWC will sell them @ BR1000 per widget.
- For every additional widget Alpha buys from NWC, over the original 40 million widgets, NWC will apply its preferential rates and supply the additional widgets @ BR500 per widget.
- If Alpha buys its entire requirement of widgets from NWC, NWC will give Alpha an additional discount of 15% on the price for the entire 50 million widgets [the price is BR1000 for the first 40 million widgets and BR 500 for the remaining 10 million widgets]

8. Similarly, NWC has developed a preferential discount scheme with Beta, Gamma and Theta depending on their requirements. An e-mail from the CEO of NWC to the CEO of Beta states that the rationale for NWC offering these discounts is that it wants that “[Beta] need not look any further than NWC to meet all your widget needs.” Similar e-mails to the CEOs of Alpha, Gamma and Theta were also discovered. Another e-mail from the CEO of NWC to a marketing manager within NWC also states,

“Alpha and Beta are important customers from a long term point of view. It is crucial that they understand that an agreement with NWC is a valuable long term proposition, because they are a value proposition for us in the long term. I trust that you will give these accounts the importance due to them.”

9. RWM does not have the economies of scale enjoyed by NWC but is willing to invest money into increasing its capacity. As a promotional tool, RWM has offered Alpha 10 million widgets for free, to show Alpha that its products are better and more reliable than NWC’s. However, Alpha has rejected this offer.

10. The widget industry is a regulated industry in Bohemia, with various decisions about the market being made by the Widget and Blodget Regulatory Board (the “**WBRB**”), set up under the WBRB Act, 2000. Section 11 of the WBRB Act has the following clause:

11. Functions of the Board:-

The Board shall-

(a) protect the interest of consumers by fostering fair trade and competition amongst the entities;

11. RWM files a suit before the WBRB claiming that NWC’s discount scheme amounts to predatory pricing and that, given the WBRB’s mandate to ensure that competition in the marketplace is not harmed, the WBRB must look into the matter. NWC has taken an argument on jurisdiction in this case, arguing that the appropriate authority to adjudicate this issue is the CCB. The WBRB has decided to hear the issue on merits, passing an order stating that it has jurisdiction and so it would like to hear the matter on merits.

12. RWM then files an ‘Information’ against NWC before the CCB, alleging that its discount scheme is an abuse of dominance, as it is predatory pricing and as it leads to a denial of market access for RWM. For strategic reasons, RWM files a separate ‘Information’ against NWC and WL, alleging that their exclusive supply arrangement has an appreciable adverse effect on competition in the relevant market in Bohemia.

13. At the CCB, NWC takes the reverse jurisdictional argument, claiming that the WBRB has jurisdiction, and has asserted jurisdiction. It also states that the matter is *sub judice* before the WBRB and, therefore, RWM cannot agitate it before the CCB. Additionally, it states that RWM is constrained by the doctrine of election to choose between the two fora, and cannot file complaints at both fora. The CCB decides that, since it is the only authority vested with the power to investigate infringements of the Competition Act, it has jurisdiction over the matter. The CCB also finds that there is a *prima facie* case of infringement of the Competition Act in both the cases filed by RWM, and it sends both matters to the Director General’s office (the “**DG’s Office**”) for investigation.

14. The CCB, as a practical matter, deals with the two cases together, but they are not officially clubbed at any point. In fact, NWC files an application with the CCB for clubbing the matters, but the same is rejected as RWM objected to the clubbing of the two cases.

15. While the matter was with the DG's Office, NWC conducted an internal review of all its processes and decided to streamline its production chain, to help combat the effects of the financial crisis. For that, NWC decided to acquire the filter business of WL so that it could eliminate the double margin and possibly make the filter business more efficient. WL's filter business is not housed in a separate legal entity and, therefore, the transaction would be completed by way of a slump sale. It is proposed that NWC will purchase WL's widget filter division (i.e. the two factories along with land, employees, machinery, contracts, liabilities, etc.) through its wholly owned subsidiary SPV Limited. After the acquisition, NWC proposes to merge SPV Limited into itself.

16. The filter business of WL has assets in Bohemia of BR1485 crores, and an annual turnover in Bohemia of BR700 crores, according to WL's latest annual reports. The same reports also state that WL as a whole has assets in Bohemia of BR2300 crores and an annual turnover in Bohemia of BR 1900 crores. NWC's latest annual reports state that it has assets in Bohemia of BR4000 crores and an annual turnover in Bohemia of BR24000 crores. Neither company has any assets or businesses abroad.

17. NWC is advised by its lawyers, Lex Fori and Partners, that the transaction is not notifiable to the CCB under the newly enforced merger control regime. Therefore, NWC executes the slump sale and then merges SPV Limited into itself.

18. The CCB is informed about this transaction from certain unnamed sources, and asks NWC to show cause as to why it should not be penalised for failing to notify the CCB of these transactions. NWC presents legal arguments as to why the transactions were not notifiable. However, the CCB is not convinced, and it orders NWC to file a notification form for both the slump sale as well as the ensuing merger.

19. The CCB, after perusing through the notification forms, passes an order allowing the transactions. It says that neither the slump sale nor the ensuing merger caused an appreciable adverse effect on competition, as the slump sale was in favour of a party that was already the sole beneficiary of the products of that business, and the ensuing merger did not lead to a change in control.

20. In the meanwhile, the DG's Office submits its reports (the "**DG's Reports**") on the alleged infringements of Sections 3 and 4 of the Competition Act to the CCB. The DG's Reports conclude that there is an abuse of dominance in the relevant market for sale of widgets, and that there is an anti-competitive agreement in the market for widget filters.

21. The CCB then heard all parties on the merits of both cases. NWC re-raised several jurisdictional arguments regarding the investigation into the agreement between WL and NWC, but the CCB rejected them all. The CCB concluded that there was an abuse of dominance as NWC had violated Section 4(2)(a) read with Section 4(1) and 4(2)(c) read with Section 4(1) of the Competition Act, and also imposed a fine on NWC of 7% of its total turnover. The order of the CCB provided no explanation for how this amount was arrived at, though it is believed that the CCB may have taken guidance from recent decisions in India.

22. The CCB also found that there was no anti-competitive agreement between NWC and WL primarily because the agreement was terminable on three months' notice for no cause, providing some respite to WL.

23. NWC appealed against the order finding an abuse of dominance (Appeal No. 1/2012). RWM appealed against the order finding no anti-competitive agreement (Appeal No. 2/2012). RWM, also appealed against the order allowing the slump sale, stating that, as a competitor of NWC, it was an aggrieved party (Appeal No.

3/2012). RWM also filed a compensation claim based on the finding of abuse of dominance (Compensation Application No. 1/2012).

24. These three appeals and one compensation claim were listed before the Competition Appellate Tribunal (the “COMPAT”), which decided to hear all the matters together, after giving all parties adequate time to file their written submissions.

25. WL and NWC raised a preliminary objection to Appeal No. 3/2012 filed by RWM against the order allowing the combination, stating that RWM has no *locus standi* to appeal the matter. They also stated in their reply to the appeal that the CCB had no jurisdiction over the matter in the first place, as the transaction was exempt.

26. The CCB, as is customary in such cases, was made a party to each of the appeals filed before the COMPAT. However, the CCB filed a reply stating that it did not wish to participate in the matter, and that it was represented only through its orders. Similarly, WL has declined to participate in proceedings, as it believes that its interests are adequately represented by NWC and because its widget filter division has merged into NWC, making the agreement redundant.

27. The COMPAT has clubbed all four matters and will hear both sides together. The COMPAT has asked that briefs for both sides address the issues on all four matters together.

Note: The laws of Bohemia are in *pari materia* 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.

The Competition Commission of Bohemia 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 Competition Commission of Bohemia also regards the competition regulators of the European Union and the United States highly, and relies on precedent from these jurisdictions as well.

Counsel representing both sides, viz., National Widget Company Limited and Rocky Widget Makers Limited, 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. Counsel for both sides are encouraged to explore additional arguments related to jurisdiction as well as merits.