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● RoFR RIGHTS & WRONGS

Getting RoFR right

Even if the Kerala government was required to participate in the auction, the stipulation that the state's bid had to be 'within 10% below the range of highest bid' was against the spirit of RoFR. There should have been a right-to-match, as there is in the IPL

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IF ONLY THE Government of Kerala (GoK) or Kerala State Industrial Development Corporation (KSIDC) had paid attention to the auction process in Indian Premier League (IPL), the controversy over the state government not winning the contract for managing Thiruvananthapuram International Airport could have been avoided. The GoK could have agreed to participate in an auction, but should not have agreed to the proviso that it will be eligible for the right of first refusal (RoFR) only if its bid is within 10% of the winning bid.

Civil aviation minister Hardeep Puri tweeted, "If Kerala Govt is against privatisation, then why did it participate in the bidding process? State Govt was given a fair chance & Right of First Refusal (RoFR) if their bid was within 10% below the range of highest bid. However, they bid 19.64 % below." The point is not whether the Kerala government is pro- or anti-privatisation. The point is that Kerala should have bargained to have the option of matching the winning bid. The price of a commodity is discovered via the bids submitted by other participants, and the entity with RoFR can essentially sit out of the bidding process. What Kerala agreed to was not a standard RoFR since it not only had to participate but also had to be within 10% of the winning bid to be eligible for matching the winning bid.

A good example of RoFR is the Right-to-Match (RTM) card which was introduced in the Indian Premier League (IPL) 2018 auction. The RTM was introduced to help a team reacquire a player who had played for the said team in the last season. Consider the case of Shikar Dhawan. He had played for Hyderabad Sunrisers the earlier year. Kings XI Punjab placed the winning bid of ₹5.2 crore for Dhawan. At that point, Hyderabad Sunrisers used their RTM and ensured that Dhawan continued to play for them. In the 2018 IPL auction, Mumbai Indians, Chennai Super Kings, Rajasthan Royals all used RTM to retain Kerion Pollard, Faf Du Plessis and Ajinkya Rahane, respectively. A total of 19 players were bought by different franchises using RTM. None of them had to bid for these players in order to be eligible to use their RTM card.

But then, the Supreme Court of India had ruled participation in the tender as a necessary condition for exercising RoFR. The case was in the context of an unfinished road project unlike the contract for airport in Kerala. Even if the state government is required to participate in the auction, the stipulation that the state's bid had to be 'within 10% below the range of highest bid' is against the spirit of RoFR. The objective of the auction is to facilitate price discovery. Adani Enterprises offered per passenger fee of ₹168 while KSIDC and GMR Airport offered ₹135 and ₹63 per passenger, respectively. At this point, the logic behind IPL auction process should take over: KSIDC will have the RTM the offer made by Adani Enterprises. If the state government believes that the winning bid of ₹168 is a viable one, then it should match the offer rather than litigate. Otherwise, it should simply walk away.

Courtesy the IPL, cricket aficionados today are conversant with intricacies of an auction process. If only Kerala had understood certain aspects of IPL auction, they might have had a better chance of being selected as the concessionaire for operations, management and development of Thiruvananthapuram airport.

Another lesson from IPL is that teams fight tooth and nail to retain the players they see value and have invested in. Since the Kerala government has given land for the airport, it should have gone to the court to ensure that its interests are not compromised. One might argue that the compensation for this is separate from that of the passenger fee, and the two issues should not be mixed up. But then, is the fact that the winning bid is higher by nearly 20% attributable to the land provided by the state government?

Recent developments suggest that the issue of RoFR has not been thought through despite instances of it being used as a policy tool to promote Make-in-India. A case in point is the 2019 guidelines of the shipping ministry that gave priority in chartering to Made-in-India ships. But, the notification was contested and later withdrawn. Readers might recall another case from recent times that hogged the headlines, *Indian Hotels Company Ltd vs New Delhi Municipal Council*. The case pertained to the renewal of the lease for Taj Mahal hotel located in south Delhi.

There appears to be a temptation to tinker with RoFR depending on the specifics of the case. Instead, we need to allow auction theory to provide us guidance rather than go by intuition or gut instinct. First, economic theory would allay fears that, with an RoFR, other parties might not bid. This is why we gave the example of RTM card used in IPL auction. Second, if a tender stipulates requiring a minimum number of bidders, the entity with RoFR should ideally not be considered as a part of the process of price discovery. Third, RoFR is not a negotiated settlement as the auction process helps set the price. But there are still some questions where there are no clear-cut answers. In the auction, Adani Enterprises or any other entity only had to outbid KSIDC by 10%, the pre-specified bid-difference clause. Would entities bid differently depending on whether there is a bid-difference clause or not? Does the size of the bid-difference clause matter? In instances like the *Indian Hotels* case where the incumbent had a perceived advantage over any new entrant, how should RoFR be structured? If the government is planning to use RoFR as a policy instrument, we need a larger and informed discussion on the issue.

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● LAND ACQUISITION

Refine process to unclog courts

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Executive discretion and inadequate compensation have led to litigation clogging the courts

THE DEBATE OVER the recent Karnataka Land Reforms (Amendment) Ordinance has brought into focus the contestations over land in rural India. Conflicts over land form a large proportion of civil litigation in India. DAKSH's *Access to Justice* 2017 survey showed 29.3% of civil disputes concerned land and property. Apart from disputes between private parties over inheritance, encroachment and eviction, there is widespread litigation over the compulsory acquisition of land by the state.

DAKSH conducted a study of land acquisition litigation in six districts and the High Courts of two states, Maharashtra and Karnataka between 2008 and 2018 to understand the nature and causes of such litigation. These cases relate both to the Land Acquisition Act, 1894 ('1894 Act') before 2013, and the new Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ('2013 Act').

In Maharashtra's Amravati, Beed and Raigad districts, land acquisition cases on average remained pending between 1,516 days and 2,462 days. In Amravati and Beed, execution cases in land acquisition took inordinately long to get disposed. Execution cases here usually are for payment of the compensation amount. These delays in execution indicate serious flaws in the administration of the process, especially the payment of compensation by the state. If the state takes 1,424 days to merely pay money to a person whose land has been acquired, it points to a severe lack of planning in the executive processes.

In Bengaluru Rural, Mysuru and Kalaburagi in Karnataka, land acquisition cases remained pending between 729 days and 4,038 days. In Mysuru and Kalaburagi, the large volume of appeal cases before the district courts indicates a general proclivity to appeal in the expectation of higher compensation or perception of not having been treated fairly. This tendency to appeal persists despite the prospect of the case remaining pending for years, indicating that the perceived benefits of a favourable order from the appellate court far outweigh the litigants' transaction costs in terms of time, effort and money.

Cases involving a challenge to compensation constituted 52.9% and 51% of the land acquisition litigation before the Bombay and Karnataka High Courts, respectively. Among such cases, reference courts (district courts hearing appeals from the decision of the land acquisition officer) have almost always enhanced compensation owed to landowners. Despite the increase in compensation by the reference courts, people still approached High Courts, seeking a further increase in compensation. The Bombay High Court enhanced compensation in 46.8% of the cases and the Karnataka High Court did so in 41%. It would be fair to conclude that inadequate compensation, coupled with a trend of courts increasing compensation, incentivised landowners to litigate.

The other major reason for litigation at the high court level is procedural irregularities. The most common procedural irregularities alleged were related to the preliminary notification of acquisition, declaration of public purpose and invocation of the urgency provision. These echo one of the major criticisms of the Land Acquisition Act 1894, of unbridled executive discretion. This kind of discretion led to a lot of room for arbitrary actions, various interpretations of statutory provisions and hence created fertile ground for litigation.

The 2013 Land Acquisition Act has reduced executive discretion to determine compensation and has delineated the ambit of 'urgency' and 'public purpose'. However, the new provisions relating to compensation, social impact assessment, rehabilitation and resettlement still leave scope for executive discretion and hence the possibility of protracted litigation.

State governments need to create guidelines and set up protocols that narrow the scope of executive discretion and hence create more equitable outcomes for all parties concerned. It would be useful to have nodal officers at the department-level to avoid and contain litigation.

The 2013 Act has also ousted the jurisdiction of district courts over land acquisition, and references from Collectors' awards now lie with an authority to be created under the Act. However, several states are yet to establish these authorities seven years after these were mandated. It is imperative that state governments issue guidelines on implementation and establish these authorities. Any changes in land laws will fall short on expectations unless the basic infrastructure for dispute prevention and resolution is in place.

GST IMBROGLIO

It takes two to tango!

The Centre and the states need to sort out the compensation issue amicably

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Views are personal

THE RECENTLY-CONCLUDED 41st GST Council meeting was keenly followed by all stakeholders in the Indian economy.

The biggest takeaway for Trade and Industry was that there was no discussion, and hence no decision on either increasing the existing GST rates or enhancing the ambit of the levy of GST Compensation Cess in view of the huge shortfall in the GST revenues expected in FY21.

The Centre cleared its position on the liability to pay compensation to the state governments. With the two options given to the states to choose from, it sent a strong signal to the states that the Centre is unwilling to foot the bill, though willing to facilitate borrowing by the states. So much for co-operative federalism!

After three years of implementation, in hindsight, it now appears that agreeing to compensate the states for any GST revenue shortfall, that too at a 14% compounded growth rate for five years, was a tall order.

With no linkage to GDP growth rate during the same period, and with petroleum products, electricity, alcohol (fully) and real estate (partially) kept out of GST, it was a recipe for disaster. The economy was doing good in 2015 and 2016, and hence, there was a tinge of optimism in the blanket 14% annual increase in revenue for computaion of compensation to all states.

At the time, there were many states whose revenues from those taxes subsumed under the GST were hardly growing in single-digits. A 14%-guaranteed increase in revenues, that too at a compounded rate for five years, was like a windfall for these states, which never objected then. Why would they?

In fact, it would have made these states very complacent in all matters relating to GST, including its implementation, once they got this assurance from the Centre. The Centre perhaps should have adopted a differential approach, depending on pre-GST tax revenues of the states, and devised a band of compensation slabs.

It is now amply clear that the Indian economy started to face headwinds in FY17 (the year in which DeMo happened). FY16 was used as the base year for calculation of GST shortfall, not FY17, the year immediately preceding the GST implementation year.

The GDP growth rate was around 8.2% in FY16, by far the highest in the last five years or so. It slid to 7.1% in 2017. By FY19, it was 6.1%, and it is estimated that the growth rate will be around 4.2% in FY20. Taking FY16 as the base year for calculating the compensation for GST losses has proven to be an additional burden.

As if this was not enough, Covid-19 hit the economy hard, starting mid-March 2020. The pandemic necessitated lockdowns globally. But, India went into a complete lockdown that was announced without giving any time to Trade and Industry to plan activities that could have facilitated smooth operations.

In India, the consumption of those goods and services that were either exempted from GST (essentials) or were outside the GST ambit was at a peak during the lockdown period. No doubt, the Centre and the states got their respective share in revenues either in the form of excise duty or state VAT or state electricity duty from consumption of these products/services.

However, had these been included in the GST ambit, the compensation amount may have been far less. For this purpose alone, these ought to have been included in the GST ambit, *ab initio*.

The Centre has estimated that the share of states in the shortfall in GST collections for FY 21 would be in the range of ₹3 lakh crore, of which around ₹65,000 crore would be funded through the GST compensation cess that will be collected during FY21.

This leaves a shortfall of ₹2,35,000 crore, of which the Centre has attributed ₹97,000 crore on account of GST roll-out and the balance of ₹1,38,000 crore to the Covid-19 pandemic.

Without going into number crunching, the discussions/reactions from the states on the two options proposed by the Centre are being played out in full public glare.

We already have a few states that have voiced their rejection of the two options, and the list is increasing. Surprisingly, the chief minister of a large state has gone on record to suggest that a review of the GST implemented be undertaken and be compared with the erstwhile indirect tax regime!

All in all, it seems that the argument between the Centre and the states is going to spillover from the aegis of the GST Council; it is headed for a long battle where the judiciary may also get involved at some point in time unless the Centre and the states patiently thresh out the problem at hand and arrive at an amicable solution.

The last thing that Trade and Industry wants in these testing times is discord between the Centre and states on fiscal matters. After all, it takes two to tango!