



Advani & Co.

CCI, DLF and the 600 Crore Penalty

The DLF Ruling

The recent 600 Crore penalty imposed on DLF by the Competition Commission of India has caused tremendous ripples in the real estate sector. Competition Law is one legal risk which has traditionally not been factored by the sector in devising its contracts and legal compliances.

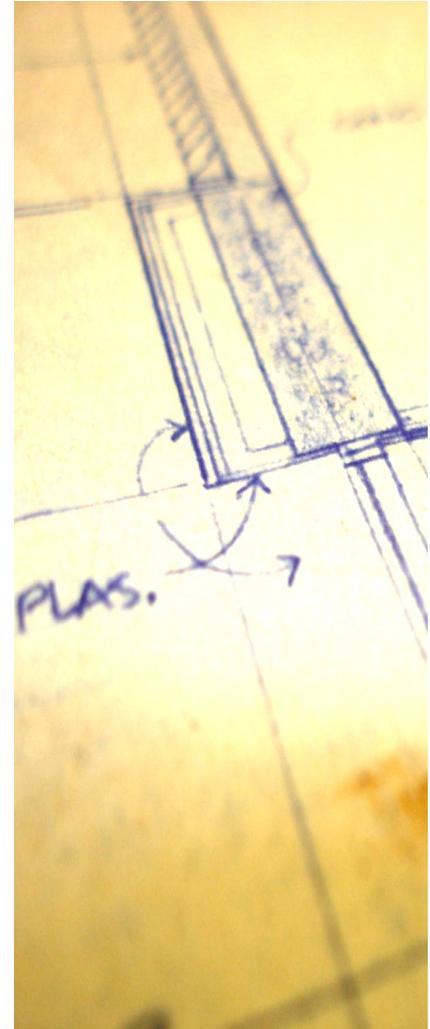
The ruling caused the DLF stocks to tumble over six per cent on bourses after the ruling. It is important to mention that the ruling was on just one project which was

undertaken by DLF in the Gurgaon market and if this position is maintained and applied for others, the impact on any real estate companies bottom-line will be massive.

In this respect it is pertinent to keep in mind that the ruling may be extended to other Real Estate firms who have dominant positions in several B Category towns which may be defined as a local market by the CCI. It is also important to note that the very basis of the ruling are the contracts

which are entered into between real estate firms and home buyers. The clauses in these agreements are standard clauses which have not been drafted keeping in mind the evolving area of competition law.

With a view to set out the law as well as the prescriptions from the DLF Judgment (*Belaire Owner's Association v. DLF Limited and Ors.*), we hope to highlight the distinct challenges which lie ahead for the real estate sector.



The Adjudicatory process of the CCI

The DLF case concerned a complaint filed by an association of purchasers of a residential development called Belvedere located in Gurgaon which was being developed by DLF.

Aggrieved by the delays caused due to the construction of additional floors as well as the conditions for forfeiture on the earnest money in cases they wanted to exit

they approached the CCI for relief.

This complaint was examined by a panel consisting of CCI members who on the making out of a prima-facia case, forwarded the complaint for further investigated by the Director General.

On this hearings were held by the DG and the CCI panel where both DLF as well as the Belve-

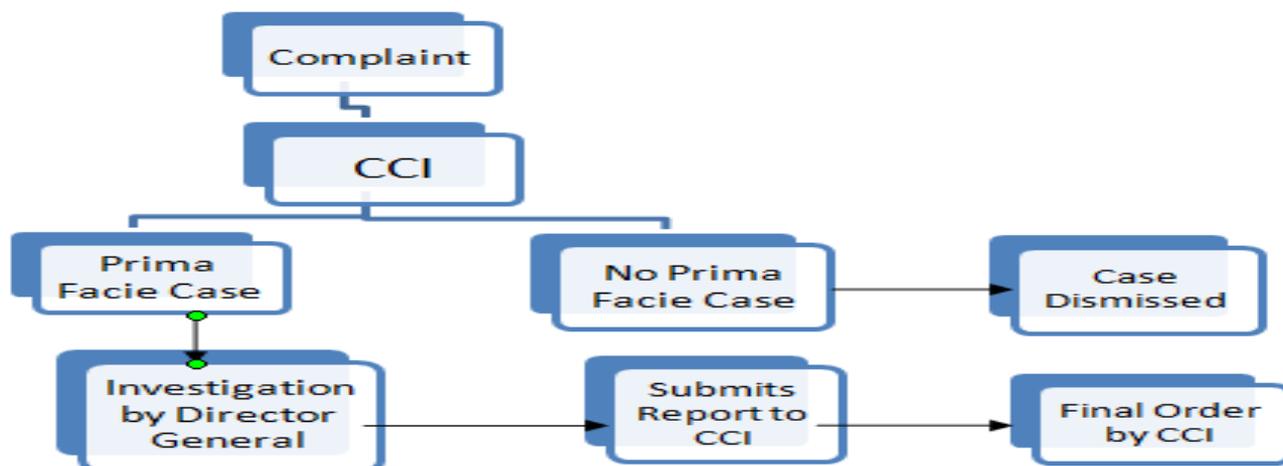
dare Owners Association lead arguments on their respective contentions.

On these arguments which were lead by both parties, as well as the findings of the Director General, the CCI panel concluded that there was an abuse of dominant position by imposition of unfair conditions in the provisional booking agreement.

contents

CCI's Structure	2
DLF's Case	2
Booking Agreement 1	3
Booking Agreement 2	3

Structure of the CCI



Issues in the DLF Case

To get to the examination of the clauses of the provisional booking agreement, the CCI has to first necessarily determine its jurisdiction.

This has two parts, the first being whether it can take action on agreements which were passed in time before the CCI came into existence. Secondly whether the company against which the complaint is filed is in a dominant position in the relevant market.

As to the first issue as to whether the CCI can investigate on agreements even prior to its existence, it is pertinent to note that the CCI is a recently established body commencing its investigations as well as adjudications only last year. In the DLF Case, the provisional booking agreement against which the home owners protested, was signed only in 2005, being much prior in time to the CCI coming into existence.

On this issue, the CCI held that it is clear that the Competition Act applies to all the existing agreements and covers those also which though entered into prior to the coming into force of section

4 but sought to be acted upon now. The ruling on this issue was hence based on the effects of the agreement rather than the date of the actual agreement itself. In addition to this, the CCI also observed, that the documents filed by the Blaire Owner’s Association showed that in some cases the agreement was entered into between DLF and the aggrieved house owners after the date of commencement of the Act.

The second controversial area in the case pertained to the actual finding of anti-competitive practices and the abuse of dominant position by DLF. While determining a dominant position in market of a player, is to effectively determine the exact market in which the player is operating. There have been cases where DLF itself was not held to be dominant, when the market was defined to be was “developing commercial space in the metropolis of Kolkata” in the CCI order in *M/s Rajarhat Welfare Association & Anr. Informants v. DLF Commercial Complexes Ltd. & Ors.* However, in the instant case, the market was defined to be “services of developer / builder in respect of high-

end residential accommodation in Gurgaon.”

The third issue was the determination of the dominance of DLF based on a number of factors including market power, market share, ability to operate independent of market forces. The CCI used the information brochure prepared by the DLF for the SEBI while coming up with its IPO. The DLF information brochure reflected the significant prowess that DLF enjoys particularly in the NCR region.

The final and the most significant issue was the determine whether the acts done by DLF amounts to an abuse of dominant position by them. The abuse was alleged to be committed by imposing unfair conditions on the buyer by the through the Provisional Booking agreement, which is signed by the buyer after having paid substantial costs, therefore, leaving no option to the buyer to object to loop-sided provisions of the agreement. The malpractices in the Agreement was present in several clauses as have been analyzed subsequently.

Problematic Clauses of the Agreement

No.	Business Objective	Clauses of the Agreement	Holding of CCI
1.	Unilateral power to change clauses as and when plans sanctioned.	"...the Company has acquired some lands..... this Agreement shall automatically stand superseded and be substituted...and shall be deemed to form a part of this Agreement."	Unilateral changes in agreement and supercession of terms by DLF without any right to the allottees.
2.	Changes can be made without consent of individual home owners.	"...the AA (Apartment Allottee) hereby agrees that it shall not be necessary on the part of the Company to seek consent of the AA for the purpose of making any changes be amended ... form time to time"	DLF's right to change the layout plan without consent of allottees.
3.	Provide flexibility to DLF to change site plans.	".... the total number of zones and their earmarked uses may be changed as per the directions of the competent authority(ies) or at the sole discretion of the Company"	Discretion of DLF to change inter se areas for different uses like residential, commercial etc. without even informing allottees.
4.	Pricing contingent on location. Money paid for this is non-refundable.	"The AA hereby agrees to pay additionally as preferential location charges... .. shall be liable to refund only the amount of preferential location charges without any interest...in the last installment as stated in schedule of payment..."	Preferential location charges paid upfront, but when the allottee does not get the location, he only gets the refund/ adjustment of amount at the time of last installment, that too without any interest.
5.	Local law compliance and the ownership interest will be determined by DLF.	"... the Company may at its sole discretion and for the purpose of complying with the provisions of Haryana Apartment Ownership Act, 1983 or any other applicable laws ..., and that the AA agrees not to raise any objections in this regard"	Proportion of land on which apartment is situated on which allottees would have ownership rights shall be decided by DLF at its sole discretion.
6.	Common lands and commercial developments will be as per DLF's sole discretion.	"...the Company has made it specifically clear to the AA... that the Company is free to deal with community buildings / sites / recreational and sporting activities ...in any manner as the Company may deem fit."	DLF continues to enjoy full rights on the community buildings / sites / recreational and sporting activities including maintenance, with the allottees having no rights in this regard.
7.	DLF may want to link the Belaire project to other developments made by it.	"It is further clarified by the Company and agreed to by the AA that the Company may at its sole discretion make The Belaire project a part of any other adjacent project .. and the AA shall not raise may objection for such formation"	DLF has sole discretion to link one project to other projects, with consequent impact on ambience and quality of living, with the allottees having no right to object.
8.	The External Development Charges are since based on a variable cost they will be decided in future.	"It is made clear by the Company and agreed by AA that the payment of External Development Charges shall always be solely to the account of AA to be borne and paid ... not be competent to challenge such action of resumption of the said apartment by the Company..."	Allottees liable to pay external development charges, without there being disclosed in advance and even if these are enhanced.
9.	To make the allottees fulfill their payment commitments the earnest money may be forfeited,	"The AA hereby authorizes the Company to forfeit out of the amounts paid/ payable by him/her, the earnest money as aforementioned together with any interest paid,in the event of the failure of the AA to perform his/ her"	Arbitrary forfeiture of amounts paid by the allottees in many situations.
10.	In case of delays beyond three years the allottee can get their money back without interest.	"...the Company shall be unable to or fails to deliver possession of the said Apartment to the AA within three years...the AA shall be entitled to give notice to the Company...in that event the Company shall be at liberty to sell and / or..."	Allottees have no exit option except when DLF fails to deliver possession within agreed time, but even in that event he gets his money refunded without interest only after sale of said apartment by DLF to someone else.

Problematic Clauses of the Agreement

No.	Business Objective	Clause in DLF's Buyer Agreement	Holding of CCI
11.	Exit from the agreement on DLF's discretion.	"The AA agrees that the Company shall be entitled to terminate this Agreement whereupon the Company's liability shall be limited to refund of the amounts paid by the AA with a simple interest ..."	DLF's exit clause gives them full discretion, including abandoning the project, without any penalty.
12.	DLF can make alterations in the Building without seeking consent of the Allottee's.	"The Company shall have right, without any approval from any AA in the said Building to make any alterations...and such additional Apartment Building(s) structures shall be the sole property of the Company .. without any interference on the part of the AA(s)"	DLF has sole authority to make additions / alterations in the buildings, with all the benefits flowing to DLF, with the allottees having no say in this regard.
13.	Project financing can be raised by DLF as per its own will.	The AA hereby authorizes and permits the Company to raise finance/ loan from any Financial Institution/ Bank .. for the purpose of the construction of the said Building/ said Complex.	Third party rights created without allottees consent, to the detriment of allottees' interests.
14.	Penalty provisions for any delays in payment.	"The Company may, at its sole option and discretion... on the condition that the AA shall pay the Company interest which shall be charged for the first ninety (90) days after the due date @ 15% per annum and for all periods of delay exceeding the first ninety (90) days after the due date an additional penal interest @3% per annum	Punitive penalty for default by allottees, insignificant penalty for DLF's default. The CCI used this as an evidence of unequal bargaining power between the parties.
15.	Reservation of rights by DLF.	The Company shall reject and refuse to execute any Apartment Buyer's Agreement wherein the Intending Allottee ...The Company reserves the right to reject to reject any Apartment Buyer's Agreement executed by any Intending Allottee .. the decision of the company shall be final and binding."	Having deposited the earnest money, the allottees options to change his choice for any reason, including not agreeing with the terms of the Agreement, stood foreclosed, even without having entered into any Agreement till that stage.

Delhi Office

268 GF Masjid Moth, Udai Park, New Delhi
110049

Tel: 011-40582732 | Fax: 011-40582745

Email: delhi@advaniandco.com

Partner Contact

Apar Gupta

apar.gupta@advaniandco.com

Mumbai Office

10, Thakur Niwas, Level 2173, Jamshedji Tata Road,
Mumbai-400020.

Tel: 00 91 22 22818380 | Fax: 00 91 2222865040

Email: mumbai@advaniandco.com

Partner Contact

Hiroo Advani

hiroo.advani@advaniandco.com

Pune Office

Metro House, Office No. 404/405, 4th Floor Man-
galdas Road, Pune

Tel: 020-2612 2940 | Fax: 020-26122948

Email: pune@advaniandco.com

Partner Contact

Aradhana Prabhakar

aradhana.prabhakar@advaniandco.com

We take great care in preparation of material which is presented here, however we cannot guarantee the accuracy of the contents due to the changing legal environment as well as the individualized nature of most legal queries and disputes. The present publication is form of discussion of current and recent legal developments in India. Here we would like to caution the reader that the contents here though informative do not constitute legal advice. Hence readers are requested to seek legal counsel for their queries and desist from relying on the information presented herein. Finally we would like to thank you for reading the our publications and in case of any questions, queries or comments kindly mail us at mumbai@advaniandco.com