

## MOOT PROBLEM

1. In January 2009, the Forward Markets Commission (the “FMC”) had granted approval to the Bharat Commodity Exchange (the “BCX”), a national level multi-commodity derivative exchange which was recognised by the Central Government, for providing a platform to trade forward contracts in goods notified under Section 15 of the Forward Contracts Regulation Act, 1952 (the “FCRA”).
2. Before BCX could announce the launch of forward contracts in electricity, the Electricity Exchange of India Limited (the “EXIL”), an electronic system based spot exchange providing spot trading in electricity and regulated by the Central Electricity Regulatory Commission (the “CERC”), on April 29, 2009, petitioned to CERC that the launch of trading in forward contracts in electricity on the platform of BCX should be halted because such contracts were within the exclusive jurisdiction of CERC. EXIL further contended before CERC that the Electricity Act, 2003 is a special Act and that any activity that involves dealing in trading of and/or delivery of electricity falls within the exclusive jurisdiction of CERC under the Electricity Act, 2003. FMC and BCX were included as respondents.
3. FMC objected to its inclusion as a respondent and explained to CERC that under FCRA, the FMC alone has jurisdiction to regulate forward contracts in electricity. FMC submitted before CERC that forward contracts in electricity comes under the exclusive purview of FCRA and this does not take away the jurisdiction of the CERC in respect of regulating spot trading in electricity. Besides, it was pointed out to CERC that it cannot be a judge in its own cause and therefore, cannot decide a dispute concerning two different regulators under two different central Acts under two different Ministries. BCX also filed an Interlocutory Application (the “IA”) before CERC praying for deciding the question of jurisdiction of the CERC in respect of forward contracts in electricity before deciding the petition on merits.
4. However, disregarding the objections of the respondents, CERC went ahead with the hearing of the parties and pronounced its order on August 13, 2009, on merits

disposing of the petition and IA. The operative part of the order stated that –

- a. *FMC exercises jurisdiction over the forward contracts in electricity in accordance with the provisions of FCRA and the same cannot be said to be inconsistent with those of the Electricity Act, 2003, since the two statutes operate in independent fields.*
  - b. *Regulatory oversight to promote development of the market in power is vested with CERC. Therefore, the orders and guidelines issued by CERC and the regulations framed thereunder shall be binding on all concerned.*
  - c. *Exchanges approved by CERC need not approach FMC for any approval for the reasons that the contracts traded or to be traded are outside the scope of FCRA.*
  - d. *BCX and other commodity exchanges which permitted trading of forward contracts in electricity by FMC at their platform, shall be governed by the orders, guidelines, regulations and other prescriptions of CERC since they are not inconsistent with the provisions of FCRA.*
5. FMC filed a Writ Petition on September 18, 2009 before the Hon'ble Bombay High Court challenging the order of CERC dated August 13, 2009, bringing within its jurisdiction forward contracts in electricity and prayed *inter alia* that the order of CERC should be quashed.
6. While the Writ Petition was pending before the Hon'ble High Court of Bombay, CERC gave permission to EXIL on October 21, 2009, for organising month-ahead contracts in electricity which are essentially forward contracts in the nature of Non-Transferable Specific Delivery (the “NTSD”) contracts. Vide letter dated November 11, 2009, FMC brought to the attention of CERC that EXIL is neither registered with FMC as required under Section 14A of FCRA nor was recognition granted by the Central Government under Section 6 of FCRA, and alleged that the month-ahead contracts in electricity traded on EXIL is in violation of the provisions of FCRA and subject to the penal provisions contained therein.

7. Meanwhile, BCX approached CERC for a review of the August 13, 2009, order passed by CERC in view of the several anomalies in the order including non-adjudication on the alleged preliminary objection on jurisdiction. The petition was disposed of on January 19, 2010, by a review order which made extensive changes in the earlier order of August 13, 2009, ostensibly to correct the errors apparent from the record but virtually rewriting it and claiming that CERC would have exclusive regulatory oversight in respect of forward contracts in electricity.
8. Shortly after the flip-flop order in the review petition, CERC followed up the earlier trading permissions with a set of regulations framed under Section 178 of Electricity Act, 2003. The Power Market Regulations, 2010, (the “**Regulation**”) defined Power Exchanges, Other Exchanges, Derivatives Contracts etc. and assumed jurisdiction to regulate these Exchanges and Contracts. It further sought to widen its regulatory scope upon commodity derivative exchanges, such as BCX. The Regulation was notified on January 20, 2010. Through the Regulations, CERC sought to extend its regulatory jurisdiction to inter-state trading in derivative contracts in electricity, which includes forward contracts, futures contracts and options. The Regulations framed by CERC also sought to confer authority upon itself to defer the introduction of trading in forward contracts to a future date.
9. The FMC filed Chamber Summons before the Hon’ble High Court of Bombay on February 2, 2010, to bring on record these various intervening developments, namely the permissions granted by CERC to electricity exchanges to launch month-ahead forward contracts, and the notification of Regulations.
10. The Hon’ble High Court of Bombay, vide judgment dated December 31, 2010, while observing that neither FMC nor CERC has exclusive jurisdiction to deal with the futures contract in electricity independently unless proper enactment is made by the parliament, passed the following order –
  - a. *The Regulations are declared inoperative hereinafter, so far as the futures/forward contracts in electricity are concerned.*

- b. *The orders dated August 13, 2009, and January 19, 2010, passed by CERC are quashed and set aside as regards reasoning and directions with regard to futures/ forward contract in electricity.*
- c. *Neither FMC nor CERC has sole and exclusive jurisdiction to regulate and control forward trading/ futures contract in electricity.*
- d. *The Central Government may decide the issue related to jurisdiction by amending appropriate legislation.*
11. Aggrieved by the order of the Hon'ble High Court of Bombay, all the parties concerned, viz. FMC and CERC filed separate Special Leave Petitions before the Hon'ble Supreme Court of India within the statutory time limit, against the order of the Hon'ble Bombay High Court. The matter is pending before the Hon'ble Supreme Court.
12. While the issue related to jurisdiction on derivative contracts in electricity was pending before the Hon'ble Supreme Court of India, FMC received a letter dated July 17, 2013 from the Indian Investors Association (the "IIA") demanding FMC to take action against EXIL. IIA stated that a huge payment default had occurred on the platform of EXIL to the tune of Rs. 2100 crore, as a result of which 900 investors have lost their hard earned money. A copy of the letter was also sent to the Ministry of Finance (the "MoF"). FMC, upon receiving instructions from MoF, appointed M/s Roths India LLP (the "RIL") on January 13, 2014, for carrying out forensic audit of EXIL. On September 19, 2014, RIL submitted its report to FMC and its finding sent shock waves across the financial sector in India. RIL *inter alia* found that the EXIL platform was being used to run a financing business, the entities trading on the EXIL platform were not limited to the authorised grid connected entities and the registered members/ brokers of EXIL were trading on the EXIL platform without actual delivery of electricity. RIL noticed that "paired contracts" were being entered into and fixed returns were guaranteed on investing in certain products in the guise of month-ahead contracts in electricity. RIL also noticed that few members/ brokers of EXIL had made representations to lure innocent investors by promising a fixed return on investments while also declaring that actual delivery of electricity is not necessary.



13. FMC received another letter dated December 15, 2014 from IIA referring to the findings of RIL that 99% of all the transactions being entered on EXIL platform in the year 2012-2013 and 2013-2014 were “paired contracts”, and that EXIL acted in collusion with the members/ brokers of EXIL to dupe investors. IIA again demanded FMC to take action against EXIL and its promoters and directors. FMC forwarded the complaint along with the findings of the RIL to the Economic Offence Wing (the “EOW”), Mumbai Police on December 19, 2014, for taking appropriate action under the relevant laws.
14. EOW took cognizance of the complaint forwarded by FMC, investigated the EXIL scam and forwarded their interim report dated April 14, 2015 to SEBI, particularly with respect to the role played by commodity brokers in the matter. EOW took cognizance of criminality under provisions of the Indian Penal Code and Maharashtra Protection of Interests of Depositors (in Financial Establishments) Act, 1999 (the “MPID Act”). However, as far as the violation of the Code of Conduct or licensing terms was concerned, the intervention of FMC was sought. As per the EOW Report, there were 200 entities operating as a member/ broker at EXIL, which were also found to be registered with the recognised associations and were regulated under FCRA. These entities were found to bring in investors to invest in “paired contracts”, promising them assured returns. The investors got about 20-25% per annum for investing in the said contracts. The members/ brokers of EXIL got brokerage from the clients/ investors on the EXIL platform, and those brokers who had their NBFCs arms, got additional revenue by financing investors for investing in EXIL. EOW also mentioned that the members/ brokers had made false and misleading representations, offered inducement, financing, and deliberately made wrongful assertions purely to get brokerage and facilitate EXIL in generating higher volumes. Simultaneously, the Serious Fraud Investigation Office (the “SFIO”) also initiated investigation into the EXIL scam upon receiving instructions from MoF in June 2015.
15. On September 29, 2015, FMC got merged with SEBI. The merger of FMC with SEBI was aimed at streamlining the regulations and curb wild speculations in the commodities market, while facilitating further growth. Accordingly, FCRA was

repealed by the Finance Act, 2015, and certain provisions of SEBI Act, Securities Contracts (Regulation) Act, 1956 (the “SCRA”) and regulations made thereunder were amended *inter alia* to enable functioning of the commodities derivatives exchanges and its brokers under SEBI norms, and integrate commodities derivatives and securities trading in an orderly manner.

16. Pursuant to the merger of erstwhile FMC with SEBI on September 29, 2015, the brokers operating in the commodity space were given time of three months to seek registration from SEBI. All the 200 brokers whose names appeared in the EOW Report also applied to SEBI for registration. During the pendency of the application for registration of the aforesaid brokers, SEBI received a letter from IIA dated October 1, 2015, enclosing copies of the previous letters sent to the erstwhile FMC, demanding SEBI to take stringent action against the brokers whose names have appeared in the EOW Report and RIL Report.
17. By December 2015, SEBI had granted registration certificate to the commodity brokers who had applied to SEBI for registration, except for 10 brokers against whom EOW had already initiated criminal proceedings. The applications for registration of those 10 brokers were kept in abeyance.
18. In January 2016, SEBI appointed a Designated Authority to initiate enquiry proceedings against the 10 brokers under the SEBI Act and regulations made thereunder. The Show Cause Notice (the “SCN”) dated April 11, 2016 was issued to 10 brokers for ascertaining their fit and proper criteria under SEBI (Intermediaries) Regulations, 2008 and SEBI (Brokers and Stock Brokers Regulations), 1992. This was done in order to determine whether they should be allowed to operate in the securities market. While the enquiry proceedings were in progress, SEBI received findings of SFIO on May 24, 2017 (the “SFIO Report”), wherein all the 200 brokers who had applied to SEBI for registration were found to be actively involved in the financial transactions in the guise of month ahead contracts on the platform of EXIL. On June 15, 2017, SEBI issued SCNs to the remaining 190 entities. Further, on January 25, 2018, SEBI filed a criminal complaint under erstwhile FCRA to the

EOW, Mumbai for taking appropriate action under relevant laws against all the entities involved in the EXIL scam.

19. While the aforesaid proceedings initiated by SEBI were pending at different stages, the Association of Commodity Brokers (the “ACB”) vide letter dated July 5, 2017, requested SEBI to expedite action against the perpetrators of EXIL. ACB *inter alia* stated that EXIL, its promoters, and its directors had adopted various tactics such as media publications, etc. to avoid their liability and diverting the attention of enforcement and regulatory authorities away from them towards the 200 members/ brokers. ACB further stated that the action initiated by SEBI against 200 members/ brokers is unjust and tantamount to regulatory uncertainty. SEBI responded to the aforesaid letter on July 28, 2017, stating that the action initiated by SEBI is in accordance with the provisions of FCRA, SEBI Act, and the regulations made thereunder.

20. In mid of October 2017, aggrieved by the response of SEBI, ACB filed a Writ Petition before the Hon’ble High Court of Bombay against SEBI. In addition to the issues raised in the letter dated July 5, 2017, ACB submitted that the 200 brokers against whom proceedings have been initiated by SEBI have various subsidiaries in different segments, which together constitute 30% of the Indian stock broking business and that any order passed against them would affect the economy of India. The primary contention raised by ACB was that all proceedings initiated by SEBI are *ultra vires* as they do not have jurisdiction over the spot market and spot exchanges such as EXIL. ACB further submitted that other enforcement agencies have already initiated action against EXIL and their promoters under IPC and MPID Act, hence appropriate action has been initiated against the perpetrators of EXIL scam. Any further action against the 200 members/ brokers by SEBI would create regulatory uncertainty.

21. EXIL also filed a Writ Petition against SEBI in November 2017, before the Hon’ble High Court of Bombay, submitting that the action initiated by SEBI by invoking FCRA and filing criminal complaint against EXIL and its promoters is *ultra vires*,

since SEBI has no jurisdiction over spot transactions in electricity.

22. The aforesaid two Writ Petitions were clubbed together as they pertained to the jurisdiction of SEBI on the EXIL scam and entities involved in the scam. Hon'ble High Court of Bombay, vide order dated December 31, 2018, passed an order in favour of SEBI *inter alia* finding that the actions initiated by SEBI are within the regulatory purview of SEBI.
23. Aggrieved by the order of the Hon'ble High Court of Bombay, ACB and EXIL separately approached the Hon'ble Supreme Court of India. Since the issues involved in the two appeals relates to the jurisdiction of SEBI on the EXIL scam and entities involved in the scam, the Hon'ble Supreme Court of India has decided to hear them together. Further, the case pending before the Hon'ble Supreme Court relating to the jurisdiction of CERC and/or SEBI on the electricity products i.e. on derivative contracts in electricity, was also clubbed with the aforesaid appeals.
24. Following matters are clubbed together by the Hon'ble Supreme Court –
- CERC vs. SEBI
  - SEBI vs. CERC
  - EXIL vs. SEBI
  - ACB vs. SEBI

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