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Delhi High Court: vacancies at Intellectual Property Appellate Board should not affect its functioning

India - [Khaitan & Co](#)

- **The Delhi High Court has issued directions to facilitate the immediate functioning of the IPAB**
- **The positions for technical members for patents, trademarks and copyrights are currently vacant**
- **The court held that IPAB's chairman and the technical member for plant varieties are competent to hear urgent matters until the vacancies are filled**

In [Mylan Laboratories Limited v Union of India](#) (WP (C) 5571/2019 & CM Application 24540/2019 & 26833/2019), the Delhi High Court has held that technical member vacancies at the Intellectual Property Appellate Board (IPAB) should not affect hearings before the board.

Background

Mylan Laboratories Limited filed a writ petition after the Indian Patent Office dismissed its pre-grant opposition. Mylan had initially filed an appeal, along with a stay application, before the IPAB; however, as the IPAB was not functional due to lack of Coram - in particular, due to a vacancy for a technical member - Mylan filed the writ petition to seek urgent relief.

During the hearing, the court noted the lack of functioning of the IPAB and directed the deputy registrar of the IPAB to submit a status report in relation to the vacancies for technical members, who form the IPAB Coram. The court also appointed an *amicus curiae* in the matter, who submitted that the failure to fill the vacancies had crippled the functioning of the IPAB.

Decision

After hearing the parties, the court observed as follows:

The court is pained to note that no technical member (copyright) has been appointed [to] date. The post of technical member (patents) [has been] lying vacant since 4 May 2016, whereas the post of technical member (trademarks) [has been] lying vacant since 5 December 2018. IPAB has only one technical member relating to plant varieties protection.

About 3,935 cases are pending adjudication before IPAB across all its benches and cases relating to trademarks, copyrights and patents are not being taken up as there is no technical member relating to these particular specialties. The term of a patent is only 20 years and, in many cases, due to lack of Coram, the patents have expired, and the matters have become infructuous and the rights of parties have been severely prejudiced. ... [The] statute is silent on the procedure to be followed and adopted when there is a vacancy for a technical member, or a technical member is there but cannot participate. ... The legislative intent is of the continuity of IPAB and not its cessation because of a vacancy in its technical membership.

The court concluded, among other things, that the chairman of the IPAB and the technical member for plant varieties protection are competent to hear urgent matters until the vacancies for other technical members are filled, and that the orders passed cannot be deemed invalid on the ground of lack of Coram. The court also passed other directions to ensure continuity in the functioning of the IPAB.

Comment

The IPAB was established, among other things, as an appellate forum to hear appeals filed against the decisions of the IP offices in India. Initially, only trademark and geographical indications cases were heard by the IPAB. However, patents, plant varieties and copyright cases were subsequently included. The IPAB also hears cancellation and revocation matters, especially for trademarks, patents and copyrights. Prior to the establishment of the IPAB, the courts acted as the appellate forum. However, the objectives behind the establishment of the IPAB have not been achieved for various reasons (in addition to the vacancy issue), including the following:

- additional responsibilities have been included, with the recent addition of certain copyright cases;
- the IPAB functions as a circuit bench travelling to designated locations (without multiple permanent locations functioning simultaneously);
- the High Court still remains the next appellate authority after the IPAB (thereby adding another layer);
- there is limited manpower to handle such volume of cases;
- technical objections may be raised by the IPAB before the matter is put on record, leading to procedural delays; and
- recent jurisprudence requires additional procedures.

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