AU COURANT

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RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

IN THIS ISSUE

PREFACE

It gives us immense joy to share with our readers, the August edition of our monthly newsletter, "Au Courant".

In this edition, the current on-goings in various fields of law have been analyzed succinctly in the 'Highlights' section to provide readers with some food for thought. This includes brief comments on the landmark judgments of *Union of India and Anr. v M/s Ganpati Dealcoms Pvt. Ltd.* and *Sundaresh Bhatt v Central Board of Indirect Taxes and Customs*, along with a short synopsis of the guidelines for overseas investments by Alternative Investment Funds (AIFs)/ Venture Capital Funds (VCFs).

Major happenings in various fields of law such as alternate dispute resolution, business and finance, competition law, insolvency, intellectual property rights law, mergers and acquisitions, securities law and TMT Law have been recorded in the 'News Updates' segment to keep the readers abreast of latest legal developments.

Further, the 'Recent on the Blog' section provides the readers with a quick guide to the latest pieces published on the blog.

Lastly, the section 'Call for Comments' encourages readers to express their views and concerns on the measures under development and provide critical suggestions on issues that may have a bearing on financial and mercantile laws. In this Edition, the two Call for Comments invited by the Reserve Bank of India on the discussion paper on charges levied on digital payments, and the Consultation Paper introduced by TRAI on leveraging Artificial Intelligence and Big Data in telecommunications sector.

We hope that this Edition of the Au Courant finds you well and is once again an enjoyable and illuminating read for you!

HIGHLIGHTS

THE BENAMI TRANSACTION (PROHIBITION) AMENDMENT ACT OF 2016 WILL APPLY PROSPECTIVELY AND NOT RETROSPECTIVELY: APEX COURT

The Apex Court of India, on August 23, 2022, has ruled that the Benami Transaction (Prohibition) Amendment Act of 2016 will take effect prospectively, protecting perceived offenders from the mandatory three-year jail term and shielding Benami properties acquired between 1988, when the original law was passed, and 2016, when the amended law became effective. In the landmark judgement of *Union of India & Anr. v. M/s Ganpati Dealcom Pvt. Ltd.*, the Apex Court declared "*unconstitutional the and manifestly arbitrary*" amendments introduced in the Benami law in 2016, which apply retrospectively on the grounds mentioned above.

The 2016 Amendment Act imposed substantive provisions rather than just procedural provisions. Because it is punitive in character, the in rem forfeiture provision under Section 5 of the Benami Act, as amended in 2016, can only be applied prospectively. For transactions completed before the 2016 Act, i.e., October 25, 2016, concerned authorities cannot initiate or continue criminal prosecution or confiscation proceedings. All of these prosecutions or confiscation proceedings shall be quashed as a result of the aforementioned declaration. Section 3 (2) mandates a punishment of three years imprisonment for those who have entered into Benami transactions between September 5, 1988, and October 25, 2016. That is, a person can be sent behind bars for a Benami transaction entered into 28 years before the Section even came into existence.

Chief Justice Ramana, who authored the 96-page judgment, held that the provision violated Article 20(1) of the Constitution. Article 20(1) mandates that no person should be convicted of an offence that was not in force "*at the time of the commission of the act charged as an offence*". Section 5 of the 2016 Amendment Act stated that "*any property which is the subject matter of a Benami transaction shall be liable to be confiscated by the Central Government.*" The court held that this provision cannot be applied retrospectively. Chief Justice Ramana dismissed the government's version that forfeiture, acquisition, and confiscation of property under the 2016 Act was not in the nature of prosecution and cannot be restricted under Article 20.

HIGHLIGHTS

The court also noted that the Act also granted extensive powers of discovery, inspection, compelling attendance, and compelling production of documents to officials. It also empowered authorities to seek the assistance of police officers, customs officers, income tax officers, etc., for furnishing information. The Court, hence, declared Section 3(2) of the unamended 1988 Act as unconstitutional for being manifestly arbitrary and in rem forfeiture provision under Section 5 of the unamended Act of 1988, prior to the 2016 Amendment Act, as unconstitutional for being manifestly arbitrary. The Court directed the authorities not to initiate or continue criminal prosecution or confiscation proceedings for transactions entered into prior to the coming into force of the 2016 Act, viz., 25-10-2016. As a consequence of the above declaration, all such prosecutions or confiscation proceedings shall stand quashed. **Read More**

-By Raghav Sehgal, Copy Editor

HIGHLIGHTS

SUPREME COURT HOLDS : INSOLVENCY & BANKRUPTCY CODE TO PREVAIL OVER CUSTOMS ACT

Recently, a bench comprising of previous CJI Justice N.V. Ramana observed that once the moratorium as per Insolvency & Bankruptcy Code (IBC) is declared, the Custom Authorities' powers are restricted to only the scope of determining the proportion of duties. The Authority cannot initiate any recovery proceedings. This in hindsight limits the jurisdiction of the Customs Authorities.

This was observed in a case between the liquidator of ABG Shipyard and the Central Board of Indirect Taxes and Customs, where the Apex Court was taking into consideration an appeal against a NCLAT order that stated that goods present in the bonded warehouses would not be considered as the Debtor's assets owing to the fact that they were not claimed by the Debtor post import and the bills of the entry were not cleared either.

In Consequence, the Supreme Court ruled that the Insolvency and Bankruptcy Code would take precedence over the Customs Act, to the degree that once a moratorium is levied on creditor's recovery action, the Customs Authority only has confined jurisdiction to evaluate or determine the magnitude of customs duty as well as other levies. The rationale behind this was expanded upon by the Supreme Court in the judgment. According to the Court's judgement, the Customs Authority lacks the ability to commence recovery of dues by sale or confiscation, as specified by the Customs Act. Post assessment, the Customs Authority is expected to submit its claims with respect to operational debt with terms to the procedure so laid down. This has to be followed with strict compliance to the mentioned time periods under the Insolvency and Bankruptcy Code.

The Supreme Court's judgment clarifies that the tax authorities must implement IBC processes to collect any dues whenever lenders and resolution professionals assess the viability of a strategy to rescue the company from any financial distress. This also brought about a concluding answer to the question as to when in a conflict which act prevails over the other and as per the judgment the Insolvency and Bankruptcy Code is to prevail over the Customs Act. The case discussed is Sundaresh Bhatt, Liquidator of *ABG Shipyard v. Central Board of Indirect Taxes and Customs.* **Read More**

-By Shereen Moza, Associate Editor

HIGHLIGHTS

SEBI UPDATES FRAMEWORK FOR OVERSEAS INVESTMENTS BY ALTERNATIVE INVESTMENT FUNDS AND VENTURE CAPITAL FUNDS

In its circular titled "Guidelines for Overseas Investment by Alternative Investment Funds (AIFs)/ Venture Capital Funds (VCFs)" dated August 17, 2022, the Securities and Exchange Board of India (SEBI) updated the regulatory framework that applies to Alternative Investment Funds and Venture Capital Funds looking to make portfolio investments in offshore companies. AIFs and VCFs are currently allowed to invest their portfolios in the stock and equity-linked securities of overseas venture capital firms, but they must first obtain SEBI clearance for each investment. AIFs and VCFs are given this clearance by SEBI on a first-come, first-served basis, subject to a total cap of USD 1,500 million.

SEBI has prescribed an application format and has also provided declarations and undertakings required to be submitted by the AIFs/VCFs to get its approval for making offshore investments. In furtherance of the same, it has taken steps to further liberalize the regime of overseas investments. Earlier, it was mandatory for the AIFs/VCFs to invest in companies with an Indian connection however this condition is now removed by SEBI. This is a positive decision by SEBI as it will allow domestic funds to research investments in foreign firms that have operations outside of India. There is a possibility for this liberalization to satiate the growing demand from Indian investors looking for ways to make portfolio investments abroad. This recently liberalized system will provide investors with an option to the somewhat less flexible Liberalized Remittance Scheme approach.

Another welcome change by SEBI is that it will now permit AIFs and VCFs to reinvest sale revenues up to the original investment level made in the aforementioned overseas investee company. All AIFs and VCFs may reinvest such sale profits (to the extent of investments), subject to the restrictions of the fund agreements and applicable SEBI laws. This implies that, in the event of reinvestment, AIFs and VCFs will no longer need to seek new SEBI permission before acquiring a stake in a new portfolio firm.

HIGHLIGHTS

The circular brings several welcome steps for the facilitation of liberalization. The new regulations provide family offices, high net worth individuals, and institutional investors with new opportunities to invest in offshore portfolio companies. In that regard, the SEBI Circular gives Indian funds a competitive edge on the international market, supporting the expansion of the Indian AIF sector.

The option to reinvest sale proceeds (up to the original investment amount) without requiring further SEBI clearance is another welcome move. However, no relief has been given to AIFs or VCFs that would need to acquire shares of a different foreign corporation through a swap transaction, a merger or amalgamation, or other corporate reorganization at the portfolio level. The Reserve Bank of India and SEBI have not raised the present industry-wide limit of USD 1,500 million for AIFs/VCFs to make overseas portfolio investments, despite widespread anticipation. **Read More**

By Vanshika Samir, Associate Editor

NEWS UPDATES

ARBITRATION

1. CARLSBERG WINS ARBITRATION CASE BROUGHT BY VENTURE PARTNER IN INDIA

Danish brewing major Carlsberg has received a favourable order from an arbitral tribunal in Singapore against CSAPL Holdings Pte Ltd (CSAPLH), its partner in the company operating businesses in India and Nepal. The Singapore-based tribunal has issued a liability award and did not consent to CSAPLH's allegation relating to governance and breach of the shareholder's agreement concerning Carlsberg South Asia Pte Ltd (CSAPL). CSAPL is the holding company for the Carlsberg's businesses in India and Nepal. In CSAPL, 33.3 per cent shares are owned by CSAPLH which is under the control of Singapore resident C P Khetan, and the remaining 67 per cent by Carlsberg. According to Carlsberg, at the request of CSAPLH, the disagreements were referred to arbitration in Singapore. The arbitration order is not public. The two sides have been embroiled in a row since 2019 over how Carlsberg India has conducted internal inquiries into its business practices. **Read more**

2. HIGH COURT SETS ASIDE ARBITRAL AWARD OF RS. 15,000CR. BY INTERNATIONAL CHAMBER OF COMMERCE

The Delhi High Court has set aside an arbitral award directing ISRO's Antrix Corporation to pay damages of USD 562.2 million with interest to Devas for "unlawfully" terminating a deal in 2011, saying the award suffered from "patent illegalities and fraud", and was in conflict with the public policy of India. The petition was filed by Antrix under the Arbitration and Conciliation Act seeking setting aside of the arbitral award passed on September 14, 2005, by the Arbitral Tribunal constituted by the International Chamber of Commerce which had allowed the claim of Devas Multimedia Private Limited. Antrix had sought winding up of Devas before the National Company Law Tribunal (NCLT) alleging that Devas was formed for a fraudulent and unlawful purpose and its affairs had been conducted in a fraudulent manner. The NCLT had allowed the winding up of Devas which was then challenged by the company and Devas Employees Mauritius Pvt. Ltd. before the National Company Law Appellate Tribunal (NCLAT). **Read more**

3. SC RULES: ARBITRATORS CAN'T UNILATERALLY FIX FEES WITHOUT CONSENT OF PARTIES

In a notable ruling, the Supreme Court has held that Arbitrators do not have the power to unilaterally fix their fees without due consultation with the parties. The judgement reserved by a Division Bench ruled that unilateral determination of fees violates party autonomy and the doctrine of '*arbitrators cannot be judges of their own private claims regarding the remuneration against parties*'. The judgement came in the petition filed by ONGC in which the Public Sector Undertaking raised the greivance regarding arbitrators unilaterally increasing the fees amid the course of hearings. Attorney General for India KK Venugopal, appearing for the ONGC, argued that PSUs are bound by audits and thereby are not in a position to meet such unilateral fee hikes demanded by the arbitrators while private claimants might be willing to do so which puts PSUs at a disadvantage.
Read more

4. KARNATAKA HC: A STATEMENT IS SUFFICIENT FOR THE PURPOSE OF INVOKING THE ARBITRAL CLAUSE IN THE AGREEMENT BETWEEN THE PARTIES

The Division Bench of Karnataka HC while disposing off the Civil Miscellaneous Petition filed by the petitioner to appoint an Arbitrator, has held that only a statement is sufficient for the purpose of invocation of Arbitral Clause in an Agreement and what a party is required to do is only to refer the matter to the said institution and for the institution to appoint an arbitrator. The petitioner and respondent had entered into a '*Interior Architectural Services*' agreement that was governed by an arbitration clause. The division bench of Karnataka HC held that; with regard to first issue, even if one of the partners is an architect registered with the Council of Architecture, the said Council would have jurisdiction to appoint an arbitrator. Thereby, HC directed the Council for Architecture to consider the request of the petitioner in the light of the above observations. **Read more**

By Aditya Jain, Junior Editor

NEWS UPDATES
COMPETITION LAW

1. CHINA'S ANTI-MONOPOLY LAW AMENDMENT

First introduced in 2008, China's Anti-Monopoly Law was amended for the first time in June. The latest amendment incorporates a number of new features, including a so-called "*stop-the-clock*" mechanism for merger review, a safe harbour for certain vertical agreements, and rules targeting platform economy companies. The new version of the law came into force on August 1. One of the biggest changes is that failure-to-file and gun-jumping fines will be up to 10 times higher than they used to be, and may now reach 10% of an infringer's group-wide turnover in the preceding year. But if there are anti-competitive violations, the fine will increase to up to 10% of the firm's turnover in the previous year. One of the positive effects of the amendment is the introduction of a stop-the-clock mechanism to replace the practice of pulling and refiling in complicated cases. Over the past two years, China has made no secret of its intention to tackle local tech giants. As it expands existing platform guidelines, the Anti-Monopoly Law amendment will further regulate platform-specific conduct on top of the general prohibition clause. **Read More**

2. HOLCIM UNITS, OTHER INDIAN CEMENT FIRMS FIXED PRICES: CCI REPORT

Swiss giant Holcim's India units and more than a dozen other cement manufacturers colluded to raise prices and restrict supplies for years, which included regularly inspecting one another to ensure there was no breach of the agreements, according to a federal antitrust probe. The investigations arm of the Competition Commission of India (CCI) has held top leadership - CEOs or Managing Directors - of Holcim units ACC and Ambuja, market leader UltraTech and 17 other firms such as Shree Cement and Dalmia Cement liable for antitrust violations.

Potentially, the cement giants could be fined millions of dollars. Together, the 20 companies control more than three-quarters of the over 500 million tonne installed cement capacity in India, the world's second-largest producer after China. Cement production is a lucrative business in India's booming economy, with high demand especially from rural housing and infrastructure firms. Cement companies have been accused of price-fixing for over a decade.

In 2016, the CCI imposed a $800 million fine on 10 companies for fixing prices, including the Holcim units and UltraTech, but the decision has been challenged since then at the Supreme Court. **Read More**

3. US CREDIT CARD COMPETITION ACT, 2022

For more than a decade, two major card companies, Visa and Mastercard, have set not only their access fees – the costs associated with a credit or debit card payment routed through their network – but the interchange fees that merchants pay to the issuers of the credit and debit cards with which Americans transact. Under that current framework, almost twice a year, these two card companies have instituted rate changes that almost always lead to increased costs for merchants. The Credit Card Competition Act of 2022, a bipartisan bill, seeks to curb those rate increases. If the bill passes, Visa and Mastercard would not be able to process each other's transactions, and the debit networks they own – Visa's Interlink and Mastercard's Maestro – would not be able to be the second network. The measure would apply only to banks with $100 billion or more in assets and would not affect local community banks or small credit unions. According to payments consulting firm CMSPI, retailers and their customers could ultimately save $11 billion a year or more by adding competition to the processing of credit card transactions. **Read More**

By Shashwat Sharma, Junior Editor

INSOLVENCY LAW

1. INSOLVENCY PROCESS INITIATED AGAINST FUTURE RETAIL LTD. UNDER IBC BY NCLT

The Mumbai Bench of the National Company Law Tribunal (NCLT) has admitted Bank of India's petition under Section 7 of the Insolvency and Bankruptcy Code (IBC) to start proceedings against Future Retail and appointed an interim resolution professional (IRP) in the matter. It also dismissed the intervention application of e-commerce giant Amazon, which was opposed to Future's deal with Reliance Retail. The Group in 2020 had decided to go for a jumble sale of its unlisted and listed companies to Reliance Retail for about Rs 25,000 crore to repay its ballooning debt. However, Amazon, which had in 2019 acquired 49 per cent in Future Coupons, a company that owns 10 per cent in Future Retail, accused Future Group of breach of contract. Generally, a petition moved under Section 7 of the IBC should be admitted by the adjudicating authority within 14 days. However, the tribunal took more than three months to do it due to the intervention application by Amazon.

Read more

2. NON-ISSUANCE OF COMPLETION CERTIFICATE AMOUNTS TO PRE EXISTING DISPUTE: NCLAT NEW DELHI

The National Company Law Appellate Tribunal while dismissing an appeal field by the Operational Creditor against the rejected Section 9 petition held that the non-issuance of the completion certificate amounts to a pre-existing dispute between the parties. It was contended on behalf of the Operational Creditor that it has provided various services to the Respondent such as trenching, ducting, etc and an amount of INR 8.29 Crores is due and payable by the Respondent to the Appellant. On the contrary, it was contended on behalf of the Respondent company that no amount is due and payable by the Respondent and furthermore, the Respondent issued the notice invoking arbitration before the receipt of the demand notice. After hearing the parties, the NCLT dismissed the Section 9 petition on the ground that the Respondent has invoked arbitration and thus there is a pre-existing dispute.

Read more

3. ONLY CREDITORS WHO TRIGGERED INSOLVENCY RESOLUTION PROCESS CAN BE IMPLEADED AS A PARTY: NCLAT CHENNAI

The National Company Law Appellate Tribunal ("NCLAT"), Chennai Bench comprising of Justice M. Venugopal (Judicial Member) and Mr. Naresh Salecha (Technical Member), while adjudicating an application filed in *V. Venkata Sivakumar v. IDBI Bank Ltd.*, has held that the Insolvency and Bankruptcy Code, 2016 ("IBC") has no provision to implead creditors other than the ones which triggered the insolvency resolution process. The Bench observed that no provision in the IBC enables the creditors, other than those who triggered the Insolvency Resolution Process, to be impleaded as Parties. A party can only be impleaded if it is a necessary party, which means that a person is very much necessary to the constitution of Suit or Appeal in a given proceeding before a Court of Law, Tribunal or Authority. The Bench observed that a person cannot be coerced to get included a person as Party against whom he does not want to contest, unless it is a compulsion of Law. **Read more**

By Aditya Jain , Junior Editor

NEWS UPDATES

INTELLECTUAL PROPERTY RIGHTS

1. DELHI HIGH COURT DISMISSES SUN PHARMA'S TRADEMARK INFRINGEMENT CASE AGAINST HETERO'S BREAST CANCER DRUG

The Delhi High Court recently rejected an appeal by Sun Pharma claiming that Hetero Healthcare's drug used for the treatment of advanced breast cancer had infringed its trademark (*Sun Pharmaceutical Laboratories Ltd v. Hetero Healthcare Ltd & Anr*). The Commercial Court had held that it was apparent that the mark adopted by Sun was nothing but the first six letters of the ingredient, 'Letrozole', which is the international non-proprietary name (INN) of a salt. The Court was hearing Sun's challenged to a Commercial Court order dated April 29, 2022 which had dismissed its application for a temporary injunction against Hetero. Sun claimed that due to the superior quality and high efficacy of its product, sales increased to ₹8.34 crores in the year 2016-17. It also claimed that it had incurred huge expenses towards the publicity of its product 'LETROZ', an acquired immense reputation and goodwill in the said trademark. Finally, the Court reiterated the well-settled principle that an appellate court ought not to interfere with the discretion of a trial court only because a different view is possible. The appeal was thus dismissed. **Read More**

2. *ROYAL STAG V. ROYAL CHAMP* : TRADEMARK INFRINGEMENT CASE

Justice Navin Chawla permanently restrained Gwalior Distilleries Private Limited, engaged in sale of Royal Champ whiskey observing that the impugned label was a "colourable and slavish imitation" of ROYAL STAG label. The Court also said that the same amounted to copyright infringement under Section 51 read with Section 55 of the Copyright Act. It was the plaintiff's case that ROYAL STAG whiskey is manufactured and marketed by Seagram's brand since the year 1995. It was added that registration for the trade mark ROYAL STAG was obtained internationally as well as in India. The plaintiffs claimed that the defendant was manufacturing, bottling and selling whiskey bearing the trademark ROYAL CHAMP and under a deceptively-similar label to that of ROYAL STAG label.

It was also argued that the defendant was also found to be using bottles embossed with the SEAGRAM Marks. Noting that the plaintiffs were the registered proprietors of the marks ROYAL STAG and SEAGRAM, the Court observed that the defendant was using the mark ROYAL CHAMP along with the logo which was deceptively similar to the SEAGRAM Marks. The court observed that in the present case that the goods of the plaintiffs and defendant are identical, that is whiskey. The mark of the defendant is deceptively similar to that of the plaintiffs. The test to be applied for judging the claim of infringement and passing off is of an unwary consumer with average intelligence and imperfect recollection. **Read More**

3. MODERNA SUES PFIZER, BIONTECH OVER ALLEGED MRNA PATENT INFRINGEMENT

Moderna sued Pfizer and its German partner BioNTech on Friday for patent infringement in the development of the first COVID-19 vaccine approved in the United States, alleging they copied technology that Moderna developed years before the pandemic. The lawsuit, which seeks undetermined monetary damages, was filed in U.S. District Court in Massachusetts. The suit also would be filed also in the Regional Court of Duesseldorf in Germany. Moderna filed these lawsuits to protect the innovative mRNA technology platform that we pioneered, invested billions of dollars in creating, and patented during the decade preceding the COVID-19 pandemic. Moderna's COVID vaccine - its lone commercial product - has brought in $10.4 billion in revenue this year while Pfizer's vaccine brought in about $22 billion. BioNTech called the lawsuit "unfortunate" and declared its work was original. A long legal dispute is expected between the two firms and loss of value in capital markets. Pfizer shares were down 2% while Moderna was off 3.3%. BioNTech's American shares were down 3% after its German stock closed 1.6% lower. **Read More**

By Shashwat Sharma, Junior Editor

NEWS UPDATES

SECURITIES RIGHTS

1. SAT STAYS SEBI PENALTY ON PGIM AMC IN INTER-SCHEME TRANSFERS

The Securities Appellate Tribunal (SAT) has stayed the penalty imposed by SEBI on PGIM Asset Management Company in a case pertaining to flouting of mutual funds norms. The operation of the impugned order has been stayed subject to the deposit of 50 percent of the amount of penalty imposed within four weeks. According to SEBI, PGIM AMC had not adhered to the provisions of the mutual fund regulations while executing inter-scheme transfers (IST) between open and close-ended schemes of PGIM MF. While executing ISTs, certain low-quality securities were transferred from close-ended schemes to open-ended schemes. The swap was done to thwart or arrest the potential redemption pressure. The asset management company, however, approached the SAT against the SEBI order which gave it interim relief and has listed the matter for final disposal on November 1.
Read More

2. SEBI CIRCULAR FOR DEBENTURE TRUSTEES HAS RETROACTIVE APPLICATION: SUPREME COURT

The Supreme Court has permitted the retroactive application of SEBI Circular on standardization of procedure to be followed by Debenture Trustees in case of default by issuers of listed debt securities. The instant case was a challenge to a Bombay High Court judgment whereby it had opined that a meeting of debenture holders must take place. The Reliance Commercial Finance Ltd. and the resolution applicant were in agreement to make payment to the debenture holders 5 percent of the total sum as an additional settlement. The Apex Court said that the SEBI circular was issued partly in exercise of the power derived from the 1993 regulations. It was also noted that "*provisions*" in Clause 59 of the 1993 Regulations must include the SEBI circular which would have retroactive application. The interpretation by the Bombay High Court was overturned and the appeal was allowed. **Read More**

3. CHERRY PICKING BY SEBI DEROGATES TRIAL, SAYS SC, ASKS IT TO PROVIDE DOCUMENTS TO RELIANCE INDUSTRIES

The Supreme Court, in the case of *Reliance Industries Limited v. Securities and Exchange Board of India & Ors.* has held that SEBI cannot claim privilege over certain parts of the documents and at the same time, agreeing to disclose some parts. Such selective disclosure cannot be countenanced in law as it clearly amounts to cherry picking. The instant case related to a complaint was filed by one Shri S. Gurumurthy, with the SEBI against Reliance Industries Ltd. (RIL), its associate companies and its directors, alleging that they fraudulently allotted 12 crore equity shares of RIL to entities purportedly connected with the promoters of RIL, which were funded by RIL and other group companies in 1994. It was alleged that the company and its directors were in violation of Section 77 of the Companies Act, 1956. **Read More**

4. SEBI EASES NORMS ON AIF, VCF INVESTMENTS IN OVERSEAS FIRMS

The Securities Exchange Board of India (SEBI) has now allowed Alternate Investment Funds (AIFs) and Venture Capital Funds (VCFs) to invest in overseas companies without having any Indian connection. Earlier, it was mandated that AIFs and VCFs raising funds in India should invest in only those companies globally that have an Indian connection, or at least a back office in the country. However, still, no such investment can be made in companies based in jurisdictions identified by Financial Action Task Force (FATF) as those having Anti-Money Laundering (AML) or Combating the Financing of Terrorism (CFT) deficiencies. Moreover, AIFs or VCFs will be allowed to invest only in that overseas investee company, which is incorporated in a country whose securities market regulator is a signatory to the International Organization of Securities Commission's (IOSCO) Multilateral Memorandum of Understanding (MoU) or a signatory to the bilateral MoU with SEBI. Also, transfer or sale of investment in overseas companies can only be made to the entities eligible as per existing guidelines under India’s Foreign Exchange Management Act (FEMA) 1999. SEBI has asked all AIFs and VCFs to make disclosure in specified format of all overseas investments sold/divested by them till date, within 30 days. **Read More**

By Tarpan Soni, Junior Editor

NEWS UPDATES

BANKING & FINANCE

1. WRIT COURT CANNOT EXAMINE TRANSACTIONS BETWEEN BANK & BORROWER AS THEY ARE ESSENTIALLY CONTRACTUAL IN NATURE: KARNATAKA HIGH COURT

The Karnataka High Court has said that writ courts neither have means nor the expertise to re-evaluate the "*prudential decisions*" of the Banks that are made in the ordinary course of their commercial transactions with accumulated wisdom in the trade. The HC dismissed a petition filed by M/S Nitesh Residency Hotels Pvt Ltd challenging recall of all credit facilities extended to it by the Yes Bank. It held that the bank being a private lending agency apparently does not fit into the term '*other authorities*' within the meaning of Article 12 of the Constitution. The Court concurred that merely because a bank's business is regulated by the RBI norms does not ipso facto establish a pervasive control by the RBI or the Central Government. The court further observed that the response of the Bank to arguably detrimental acts of its borrower, made in the course of its commercial dealings cannot be approximated to an order of a statutory authority, justifying the invocation of remedy at the hands of Writ Court. **Read More**

2. RBI REVAMPS THE RULES ON OVERSEAS DIRECT INVESTMENT

On August 22, 2022, the Government of India through the Ministry of Finance and in consultation with the Reserve Bank of India ("RBI") notified the Foreign Exchange Management (Overseas Investment) Rules, 2022 ("OI Rules"), Foreign Exchange Management (Overseas Investment) Regulations, 2022 ("OI Regulations") and the Foreign Exchange Management (Overseas Investment) Directions, 2022 ("OI Directions"). The revised regulatory framework for overseas investment provides for simplification of the existing framework for overseas investment and has been aligned with the current business and economic dynamics.

The amendment guides where investment by a person resident in India in the equity capital of a foreign entity is classified as ODI (Overseas Direct Investment), such investment will continue to be treated as ODI even if the investment falls to a level below 10% of the paid-up equity capital or such person loses control in the foreign entity. Further, any Indian resident who has acquired and continues to hold equity capital of any foreign entity can invest in the equity capital issued by such entity as a rights issue. **Read More**

3. RBI RELEASES NEW NORMS FOR DIGITAL LENDING IN INDIA

The Reserve Bank of India (RBI) has instituted a framework to regulate digital lending. Its new regulations are based on recommendations from a working group set up in January 2021 on '*Digital lending including lending through online platforms and mobile apps*' (WGDL). RBI has categorised digital lenders into three groups: Entities which are regulated by the RBI and are allowed to carry out lending business. Entities that are authorized to carry out lending as per other statutory or regulatory provisions but are not regulated by the RBI. Entities lending outside the purview of any statutory or regulatory provisions. As per the new framework, loan disbursals and repayments are to be executed between the bank accounts of the borrower and the entity. No automatic increase in credit limit can be made without the explicit consent of the borrower. Further, data collected by digital lending apps must be need-based, with the borrower's prior consent, and can be audited if required. The borrower can now complain to the Integrated Ombudsman Scheme of the RBI if their grievance is not resolved by the bank within 30 days. **Read More**

By Tarpan Soni, Junior Editor

NEWS UPDATES

TMT LAWS

1. NO APPROVAL FROM AUTHORITIES REQUIRED FOR LAYING TELECOM INFRA ON PRIVATE PROPERTIES: GOVERNMENT

Telecom companies will not require any approval from authorities for laying cables or installing mobile towers or poles over private properties, according to new Right of Way Rules notified by the government recently. The government also notified rules for using electric poles, foot over bridges etc for installation of small mobile radio antennas or laying overhead telecom cables along with charges to ease roll out of telecom networks specially 5G services. However, the telecom companies will need to submit an intimation, in writing, to the appropriate authority, prior to the establishment of a mobile tower or pole over a private building or structure, according to the Indian Telegraph Right of Way (Amendment) Rules, 2022. In their intimation to government authorities, telecom companies will need to submit details of the building or structure, where the establishment of a mobile tower or pole is proposed, and a copy of certification by a structural engineer, authorised by the appropriate authority, attesting to the structural safety of the building or structure, where the mobile tower or pole is proposed to be established. **Read More**

2. TDSAT TO CONDUCT HEARING AT SIX MORE CITIES INCLUDING MUMBAI, KOLKATA AND CHENNAI

Telecom and broadcasting sector tribunal TDSAT will now conduct its hearing at six additional cities apart from Delhi, a government notification said. The new cities, where the Telecom Disputes Settlement & Appellate Tribunal (TDSAT) would conduct its sittings are Mumbai, Pune, Chennai, Cuttack, Kolkata, Amritsar and Indore. This would be in addition to holding sittings of TDSAT at New Delhi. The decision was taken by the government in consultation with the chairperson of TDSAT with regard to the urgency, nature and in the interest of justice in the matters. The sitting would be for a period of two years from the date of publication. The TDSAT bench comprises chairman and two members. **Read More**

3. TRAI, DOT TUSSLE OVER LICENCE TO ACCESS NETWORK PROVIDERS

The Telecom Regulatory Authority of India (TRAI) has shot back at the government for rejecting its recommendation on the creation of a separate category of licence for providing network services on a wholesale basis, and reiterated its views. TRAI said a separate licence for access network providers (ANPs) could attract investment and strengthen the service delivery segment. "*With the deployment of 5G technology at the cusp, there will be different use cases covering almost all the economic verticals,*" Trai said in its back reference to the Department of Telecommunications (DoT). The regulator in August 2021 had recommended "enabling unbundling of different layers through differential licensing" through the creation of ANPs. The DoT had not accepted the proposal as it felt there may not be a market demand for a separate ANP licence. The department said it was examining another set of TRAI recommendations on enhancing the scope of infrastructure provider category-1 registration, which have facets similar to ANPs. **Read More**

By Tarpan Soni, Junior Editor

NEWS UPDATES

MERGERS AND ACQUISITIONS

1. NORTONLIFELOCK-AVAST MERGER TO CREATE ONE OF THE LARGEST CYBERSECURITY COMPANIES

Competition and Market's Authority of UK has approved the $8.1 billion merger between cybersecurity powerhouses Norton and Avast. The deal was announced in August 2021, but awaited approval and is now expected to be complete by the end of September 2022. Norton provided cyber safety solutions for consumers including cloud backup, secure VPN, password manager, parent control, threat protection etc. Avast's antivirus productions include web shields, ransomware and firewall modules. With the combination of Norton and Avast, the company's market share will increase to 42.62% based on security software market share calculations. The combined company business would have over 500 million users with a broad and complementary portfolio. The deal amongst the two protection corporates will benefit the company with total revenue reaching $ 4 billion in 2023, with Avast representing 25% of the company's total revenues. The only problem pertaining to the merger was various regulatory approvals that have now been cleared. Thus, clearing the way forward for the companies to mutually benefit from the deal. **Read More**

2. CCI APPROVES MERGER OF HDFC BANK AND HDFC LTD

Fair Trade regulator, Competition Commission of India (CCI) has approved the merger proposal of HDFC Bank and its parent HDFC Ltd. The proposed combination envisages the merger of HDFC Investments and HDFC Holdings in the first step and subsequently, the merger of HDFC Ltd into HDFC Banks. In April this year, HDFC announced that it will merge with HDFC Bank, but the deal required regulatory approvals to keep a check on unfair business practices in the marketplace. The proposed merger has received no objection from the Reserve Bank of India, the stock exchanges and SEBI. The merger became possible because of higher regulatory standards for non-banking financial companies and a reduction in statutory liquidity ratio rates. Another benefit to the combined corporate will be consumer base of each other. As most of the customers of one company don't avail the services of other. Thus providing a breakthrough to upscale the market opportunities for both the corporates. **Read More**

3. MAERSK COMPLETES ACQUISITION OF LF LOGISTICS FOR $3.6BN

Danish Carrier, AP Moller Maersk announced the completion of its acquisition of LF Logistics, a Hong Kong based contract logistics company with premium compatibilities with Omni channel fulfilment services. LF Logistics will be rebranded to Maersk in the official document released by Maersk. Maersk in Asia has historically been primarily focused on ocean transportation out of Asia and related logistics services. With the addition of LF Logistics, Maersk gains unique and best in class capabilities to servicing the important and fast-growing consumer markets in Asia. The value of the transaction is $3.6 billion including lease liabilities. Additionally, an ear-out with total value of $160 million related to future financial performances has been agreed as part of the transaction. **Read More**

4. GALAXY DIGITAL PULLS PLUG ON $1.2 BILLION BITGO ACQUISITION

Galaxy Digital, the crypto investment firm run by billionaire Mike Novogratz has announced it would terminate its proposed deal with crypto custodian BitGo. According to Galaxy the firm has exercised its right to terminate the previously announced acquisition agreement following BitGo's failure to deliver its audited financial statements for 2021 that comply with the requirements of the agreement. Galaxy remains positioned for success and to take advantage of strategic opportunities to grow in a sustainable manner. Galaxy first disclosed its intention to acquire Bitgo in a $1.2 billion deal in May last year. Were the deal to have successfully closed, it would have become one of the biggest in the crypto industry, bringing Galaxy about 400 new global clients and allowing the firm to expand geographically. Although the 2022 bear market has taken its toll, Galaxy also reported that by the end of June it held $1.5 billion in liquidity, mostly in cash. The firm also said it is working on the planned launch of Galaxy One Prime, a new product offering for institutional investors that will combine trading, lending, and derivatives services.
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By Shashwat Sharma, Junior Editor

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This post is authored by Punit Sanwal, fourth-year student of B.B. A. LL.B. (Hons.), at Gujarat National Law University.

1. DISSECTING THE 'GROUP OF COMPANIES' DOCTRINE UNDER ARBITRATION LAW VIS-À-VIS THE COX & KINGS CASE

1.INTRODUCTION

Recently, a three-judge bench of the Supreme Court ("SC") in ***Cox & Kings Ltd. v. SAP India Pvt. Ltd.*** ("*Cox & Kings Case*") cast its doubts on the legal correctness of the '*Group of Companies*' doctrine under the Arbitration Law and said that there is a clear need for a relook at the doctrine. The Group of Companies doctrine allows the joinder of a non-signatory party to an arbitration agreement. This doctrine emerged from the International Chamber of Commerce case of ***Dow Chemicals Company v. Isover Saint Gobain*** ("*Dow Chemical's Case*"). It was held in this case that a company which is non-signatory to an arbitration agreement could become bound by it if a mutual intention can be made out amongst all the parties to the arbitration agreement. However, a condition was laid down according to which such parties should belong to a group that is closely related and forms a 'single economic reality'.

In India, this doctrine was first recognized by the SC in the case of ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.*** ("*Chloro Controls Case*") wherein the court applied this doctrine to bind certain group companies of the signatory company and forced them to participate in the arbitration proceedings even when they were not a signatory to the arbitration agreement. Arbitration as a concept is based on the principles of party autonomy and the express consent of the parties. However, the court in Chloro Controls Case looked for subjective intention of the non-signatory parties by looking at their prior conduct instead of considering the fact that such parties are clearly not a signatory to the arbitration agreement.

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It is strictly based on the premise that two parties mutually and voluntarily agree to resolve their dispute via arbitration by providing their express consent. **Section 7(3) of the Arbitration and Conciliation Act, 1996 ("*Arbitration Act*")** clearly mentions that an arbitration agreement should be in writing implying that two parties who are willing to arbitrate their disputes should reduce such an intention in writing for a valid arbitration agreement. Thus, such a doctrine goes manifestly against the foundational principles of arbitration. The SC has thus cast its doubt on the legal validity of this principle. This article analyses how the scope of the Group of Companies doctrine has been expanding in the past few years and how it is undeniably against the fundamental principles of arbitration in light of the recent SC judgment in the Cox and Kings Case.

2. UNDERLYING STATUTORY BACKING

Various questions referred to the larger bench in the Cox and Kings Case were regarding the interpretation of **Section 8 of the Arbitration Act** and whether it can be interpreted in a way that the Group of Companies doctrine is read into this provision. Section 8 puts a limitation on the intervention of the judiciary in cases where a valid arbitration agreement exists. This Section was amended in the aftermath of the Chloro Controls Case wherein the SC recognized the legal validity of the Group of Companies doctrine for the first time. By this amendment, the Legislature extended the scope of reference of parties to an arbitration by **adding the phrase** '***any person claiming through or under them'*** thereby effectively allowing non-signatories to become a part of the arbitration agreement. This was evident in the case of ***Ameet Lalchand Shah v. Rishab Enterprises*** wherein the SC placed reliance on this amended provision to extend the arbitration agreement to parties who were non-signatories.

However, it is important to point out that even though the legislature amended Section 8 they did not amend Section **2(1)(h) of the Arbitration Act** which defines the term '*party*'. This definition has no mention of a person claiming through or under him and defines party as 'a party to an arbitration agreement'. This essentially means that even though the court can refer a party to arbitration under Section 8, such a party would not have any remedy which might otherwise be available to a signatory party. The **Law Commission of India in its 246th report** had recommended a similar amendment in Section 2(1)(h) as well, so as to enable a non-signatory to exercise remedies which might be available to a signatory party. However, the legislature chose not to change the definition of '*party*' under the Act. The SC noted in the Cox and Kings Case that this omission will be significant in determining the validity of the Group of Companies doctrine.

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3. FLAWS IN THE GROUP OF COMPANIES DOCTRINE

The first and the foremost argument against the Group of Companies doctrine is that from **Article 7 of the UNCITRAL Model Law** and **Article II of the New York Convention, 1958**, it is very clear that parties who intend to arbitrate any matter should reduce such an intention in writing for a valid arbitration agreement. Moreover, **Section 7 of the Arbitration Act** clearly states that for an arbitration agreement to be valid, it should be in writing. Further, in ***Delhi Iron & Steel Ltd. v. UPSEB***, the Delhi High Court held that an intention to arbitration is only discernible if the arbitration agreement expressly manifests in the underlying contract. The Group of Companies doctrine is completely in contravention to this provision as most of the non-signatories who are forcefully made a party to the arbitration had not reduced any such intention in writing.

The Group of Companies doctrine also undermines one of the foundational principles of arbitration which is '*party autonomy*'. Most of the times when these commercial contracts and the arbitration agreements are entered into, the corporate entities signing the contracts are consciously chosen to not include other group companies/entities. When any of the group companies are roped into arbitration without their consent, it is patently against the principle of party autonomy. It also takes away the benefit of having separate corporate entities which are incorporated for such purposes. This was also mentioned by the SC in the Cox and Kings Case wherein it was stated that the broad-based understanding of this doctrine created in the Chloro Controls Case clearly goes against the principles of distinct legal entities and party autonomy itself.

The courts have applied the Group of Companies doctrine on the basis of the existence of a '*tight group structure*' or a '*single economic reality*' as in the case of ***Mahanagar Telephone Nigam Limited v. Canara Bank*** and also the Chloro Controls Case. This means that the Group of Companies doctrine could be invoked in order to bind a non-signatory affiliate company or a third party to arbitration if they have a direct relationship with the signatory party. Courts can also bind them to an arbitration if the transaction between them and the signatory party is of a composite nature. A **composite transaction** means a transaction which is undertaken to achieve a common object and is so interlinked in nature that its performance may not be feasible without the performance of the supplementary agreements. However, the court in Cox and Kings Case casted its doubts on the legal correctness of this concept by stating that this position laid down by the court in Chloro Controls Case was based more on economics and convenience rather than law.

4. SUGGESTION WHILE RECONSIDERING THIS DOCTRINE

Since the recognition of the Group of Companies doctrine in the Chloro Controls Case, the scope of this doctrine has been continuously expanding with each judgment of the SC. The court in ***Cheran Properties Ltd. v. Kasturi and Sons Ltd.*** widened the scope to the extent of enforcing an arbitration award against a non-signatory party. Recently, the SC in the case of ***ONGC Ltd. v. M/s Discovery Enterprises Pvt. Ltd***. upheld the Group of Companies doctrine and said that the Group of Companies doctrine is deeply rooted in the Indian jurisprudential context. However, after the Cox and Kings Case, the SC has a great opportunity and it is suggested that the SC should finally settle the law by narrowing down the scope of this doctrine so as to uphold the foundational principles of arbitration.

It might be true that non-signatories can be included in arbitration by the phrase ‘claiming through or under’ mentioned in Section 8. However, it is suggested that this should be done only on the basis of the existence of a sufficient legal and contractual relationship between the signatories and the non-signatories. It is necessary that the SC limits the scope of this phrase because the words of this phrase convey a derivative element. It means that when a non-signatory is being included in an arbitration, it should be first established that the right is derived contractually from the signatory. For example, non-signatories could be included in arbitration after establishing legal relationships with the signatories like agency, assignment, or sub-contracts. This will not be against the principles of party autonomy and mutual consent but based on a contractual relationship. It is also recommended that the legislature amends the definition of the term party under Section 2(1)(h) to bring it in harmony with Section 8 of the Arbitration Act.

5. CONCLUSION

Since its recognition in the Chloro Controls Case, the ambit of the Group of Companies doctrine has been continuously widening. Therefore, it is important that the SC restricts the broad-based understanding of this doctrine and apply it only in cases where a contractually derivative relationship exists and avoid including any other non-signatory parties in an arbitration. This doctrine goes directly against various long standing legal principles such as party autonomy and separate legal personalities of companies. It also goes against the abundant jurisprudence emphasizing on the importance of mutual consent in an arbitration. Therefore, the referral bench while answering the questions raised in the Cox and Kings Case should see to it that the scope of this doctrine is properly defined on the basis of law and not on ‘*economics-driven logic*’.

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This post is authored by Priyanshi Jain and Simran Lunagariya, fifth-year students of B.Com. LL.B. (Hons.), at Institute of Law, Nirma University..

2. **SECTION 140A OF THE SECURITIES ACT: INVESTORS' PROTECTION RUNNING ROUGHSHOD OVER UNDERWRITERS'**

1.INTRODUCTION

The market dynamics for Special Purpose Acquisition Companies (SPACs) have drastically changed, ranging from **638 in 2021** to **57 in 2022** so far. Amidst the plunging SPACs, the Securities Commission Exchange (SEC) has come up with new rules. These rules were called for in the backdrop of recent trends such as the drastic wave of SPAC Litigation as seen in **Momentus Suit.**

More often than not, there are inconsistent disclosures at the time of SPAC and de – SPAC. Private investment in public equity (PIPE) investors get to know the information which the investing public is not able to access. Pursuant to this, the PIPE investors sway the information for their own good. The celebrity endorsement in the SPAC Initial Public Offering (IPO) has significantly contributed to upending the votes of the investors before the proper disclosures are filed. Additionally, there is no alignment between gatekeepers' obligations and investors' incentives. Hence, in the whole SPAC process, the investors are not offered the same rights which they get while going for a traditional IPO.

Therefore, in order to protect the investors, the SEC follows a three-pronged approach, i.e., firstly, hints toward information asymmetries. Secondly, catch hold of fraudulent practices, and lastly, pacify the conflicts. That said, the **proposed rules** are an extension of such approaches, Section 140a of the Securities Act provides the much-needed investor protection but at the cost of extending the liability of the underwriters.

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Through this blog, the authors juxtapose the declining investors' interest and increasing gatekeepers' obligation. To begin with, the authors will analyze Section 140a and then subsequently state a few recommendations which could be adopted.

2. A PRIMIERE ON SECTION 140a

The SPACs bloom is getting deflated as the regulator is increasing the scrutiny. Recently, SEC has sent **letters** to many issuers requesting them to disclose information related to their SPAC dealings and how the underwriters are managing the deal. These letters may be an antecedent to the formal investigation, which had been seen in the case of **Lordstown Motors**. There have been various **instances** wherein the SEC has cited its fears on account of celebrity endorsements in SPACs, lack of proper disclosures in dealings, and insider trading. Therefore, the proposed rule Section 140a gives power to the regulator to scrutinize the deals but on account of the increased liability of the underwriters. Hence, the authors will analyze whether the proposed rule has failed to walk the talk or not.

The Proposed Rule, Section 140a, imposes the liability on underwriters, which is not only limited to SPAC IPO but extends to de – SPAC as well. The pushback for this move was to motivate the underwriters to act judiciously in the whole SPAC process, but to the contrary, the **underwriters have withdrawn**, citing the fear of such an overtly dictating regime. The issues which are associated with the proposed rules are as follows;

Firstly, **Section 2(a)(11)** of the Securities Act, 1933 coins the term "underwriters". It refers to 'any person who offers to sell the securities on behalf of the issuer or undertakes any such similar activities', the definition though widely worded, does not aim to extend to de – SPAC activities wherein traditional underwriters have no role to play. SPAC IPO, as well as de – SPAC, cannot be collated with each other as the stages of transactions involved are way too different. For instance, the target company in de – SPAC process is not identified at the initial phase of SPAC IPO. Therefore, the proposed rules are overriding the statutory contextual meaning.

Secondly, **Section 11** of the Act gives the right to an investor to impose liability on the underwriters. It states that if in any registration statement, a material statement is omitted or untruly depicted, then the underwriter will be exposed to civil liability. The provision is overarching to ensure all the compliances in the best possible manner. Having stated that, if as per the proposed rules, the underwriters in a SPAC IPO would be certified as an underwriter in the de – SPAC process, then the liability surmounted in Section 11 may be extended to de – SPAC underwriters. Strict liability will be imposed on all such underwriters if they qualify to be an underwriter in the de – SPAC process, wherein the role of underwriters may or may not come into the picture.

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Thirdly, the de-SPAC transactions, in particular, raise the issue of who will be held liable for the total amount of securities supplied if the SEC's new criteria are enacted. The broad interpretation of some parties as underwriters, even if they do not engage in actual underwriting activity while disregarding certain other parties whose actions seem to be more closely related to actual underwriting is concerning. This is since these regulations do not explain the scope of an underwriter's obligation, broker-dealers, investment banks, and asset managers' risk.

Hence, in a nutshell, the proposed rules go beyond what is stated in the Act. Aristotle's principle of like should be treated alike does not hold true in this scenario since the protection of investors may be ensured but not even the minutest regard, if any, is given to the underwriters. As a result, the fate of the underwriters in the whole SPAC process is riddled with ambiguity.

3. RECOMMENDATIONS:

To address the debacle created by the new rule under section 140a, the following approach can serve as the rescuer:

1. Investment banks are susceptible to increased legal risks as a consequence of this proposed accountability rule. The regulatory threat has led to the cancellation of a $1.7 billion SPAC acquisition by **Sports Ventures Acquisition Corp.** and Sports Ventures Acquisition Corp. Furthermore, **Goldman Sachs Group Inc.** decided to restrict its involvement in SPACs. There are now 590 US-listed SPACs looking for a buyer. Investment banks would be unable to advice on de-SPAC transactions, perhaps effectively closing the market. Over and above that, depending on the specifics of the situation, the **proposal might extend responsibility to financial advisors or third-party investors** that participated in SPAC acquisitions. Precisely, the latest rule is unclear about the demarcation of the liabilities of underwriters and other intermediaries. As a result, investing in SPAC transactions becomes riskier than investing in standard IPOs.

An unprecedented havoc is created by the definition of an "*underwriter*" because the person who does not perform traditional underwriting activity is included in the definition of an underwriter, but those who do take part in such activity are excluded. Underwriter performs various tasks, including capital markets advisor, private placement agent, and M&A financial advisor. This means that when it comes to the responsibility of underwriters such as investment banks, the liability should be restricted to those who can carry out the requisite due diligence/underwriting in reality. Rather than other activities, they do throughout the SPAC and de-SPAC transactions. Also, for a SPAC IPO underwriter to be regarded as an underwriter in the de-SPAC transaction, the regulation should specify the kind and degree of engagement required. Lastly, other intermediaries like asset managers and brokers shall be assured of no subsequent penalties concerning de-SPAC by limiting the liability to an entity that traditionally performs the role of an underwriter.

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2. Disclosures and liabilities related to underwriter responsibilities should align with those in a traditional IPO, such as excluding from the **Merger Registration Statement and merger-related disclosures** like the background of the merger and projections. Also, there should be some way to clarify what distribution means in the context of an underwriter's role.

3. It is possible that the guidelines might have **unforeseen repercussions in future merger deals involving public operating companies**, such as SPACs. **The proposed guidelines ignore the fundamental distinctions between a SPAC and de-SPAC**. Furthermore, as per the definition of securities in Section 5, the **securities are limited to only a particular kind of transaction and cannot be extended to other types of transactions**. Therefore, the liability of an underwriter in the SPAC shall not be extended to de-SPAC activities. The role of an underwriter in de-SPAC activities is entirely different from that of SPAC. In the de-SPAC, underwriters will also have to do due diligence for the target company with whom the current company will get merged. **While the mindset of the SEC has been to treat them like transactions alike**, they should not merge SPAC and de-SPAC because they form to be two different transactions. It's unknown when the underwriters' obligations will kick in. At the very least, a trigger limit should be established to mark the beginning of the underwriter's liability.

4. In order to catch hold of the information asymmetry concerning to SPAC transactions and subsequent de-SPAC activities. The securities regulator shall work on creating external mechanisms like special corporate rating requirements for SPAC and de-SPAC deals. Corporate rating for these transactions would increase credibility and provide authentic information to investors. This would help in avoiding strict liability on the underwriters and increase the confidence of investors too.

5. In Singapore, **Rule 625 of SGX rules** mandates that SPACs disclose information on the issuer's organization and underlying risk concerns, as well as its business plan, takeover terms, and any possible conflicts of interest. By taking a hard position on SPACs, **Hong Kong** is hoping to safeguard investors and prevent lower-quality firms from becoming listed through the back door. These countries have also considered a strong stance for investor protection in SPAC regulations however, they have not imposed any personal liability on the underwriters. Hence, SEC's stance on the underwriter's liability should be diluted.

4. CONCLUSION:

Although safeguarding underwriters is a national priority, protecting investors is a worldwide imperative. Investors' economic rights are often jeopardized when security concerns are ignored totally. **Even though many Asian and Chinese investors** are eager to get their hands on SPACs, the rising dangers connected with so many companies operating on a blank check in the USA have prevented some of them from doing so. Having said that, the SEC's nascent SPAC regulations are placing an excessive burden on underwriters, which will have a detrimental impact on the market performance.

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It is incumbent on the regulator to find a balance in enforcing regulations on SPAC and de-SPAC operations while also holding underwriters accountable. The SPAC ecosystem in the United States serves as an exemplar for other countries. Essentially, in order to safeguard investors, underwriters should not be overburdened.

CALL FOR COMMENTS

RBI SEEKS PUBLIC COMMENTS ON CHARGES LEVIED ON DIGITAL PAYMENTS

The Reserve Bank of India (RBI) has released a discussion paper on all charges levied on various payment systems, such as NEFT (National Electronic Funds Transfer), RTGS (Real Time Gross Settlement), UPI (Unified Payment Interface), IMPS (Immediate Payment Service) , and credit and debit cards. The RBI has asked all payment system stakeholders to submit feedback on whether it should introduce charges on UPI or whether it should be market determined. Comments have also been sought on regulations over interchange fees on debit cards and credit cards and whether it should review the policy of not levying charges on members for RTGS and NEFT transactions. Currently, RBI does not charge member banks for using the RTGS and NEFT infrastructure. Though in turn, banks levy some charges on customers for operational usage. RBI has also asked payment system participants to share their views on whether it should regulate charges for IMPS transactions or fix a ceiling on these charges. Further views have also been sought on whether it should regulate Merchant Discount Rate (MDR) for prepaid instruments (PPI) transactions or whether the charges structure for merchant payments done using PPIs be akin to that of debit cards. Comments may be sent by mail to dpssfeedback@rbi.org.in by October 3, 2022. Read More

CALL FOR COMMENTS

CALL FOR COMMENTS BY TRAI ON CONSULTATION PAPER: LEVERAGING ARTIFICIAL INTELLIGENCE AND BIG DATA IN TELECOMMUNICATION SECTOR

Telecom regulator TRAI floated a consultation paper to seek public views on the adoption of artificial intelligence and big data to improve telecom services and enhance network securities and efficiencies. The Telecom Regulatory Authority of India (TRAI) in its consultation paper on "Leveraging artificial intelligence and Big Data in the telecommunication sector" has sought views on sectors where existing and future capabilities of the telecom networks can be used to leverage AI (artificial intelligence) and BD (big data). The consultation paper follows a reference to the regulator from the Department of Telecom in June 2019 in which the department has sought recommendation from TRAI on leveraging AI and BD in a synchronised and effective manner to enhance the overall quality of service, spectrum management, network security and reliability. The regulator has sought opinion on risks in the adoption of AI and BD, such as unethical use, bias in data and algorithms, privacy, model instability, regulatory and legal non-compliance, as well as ways and mechanisms to mitigate risks.
TRAI has fixed September 16 as the last date for comment on the paper and September 30 for counter comments. **Consultation Paper**

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