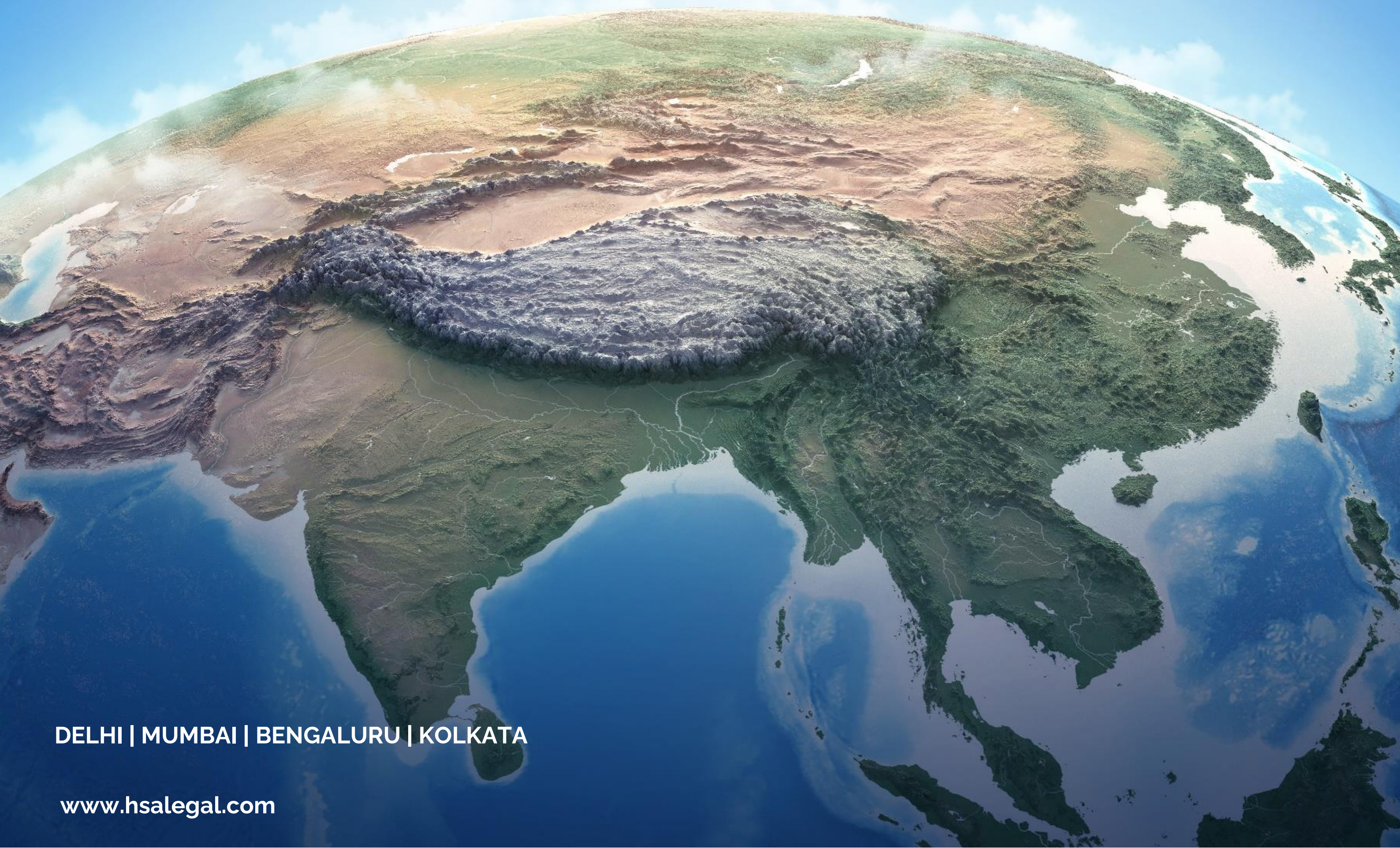
India Update

Volume 3 | 2021

Quarterly newsletter analyzing the legal, regulatory and policy developments in India



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INVESTMENT AND DEAL ACTIVITY ANALYSIS

▪ DEAL ACTIVITY | Q2 OF FY 2021-22

USD **49** Billion | **840** Deals JAN-SEP 2021

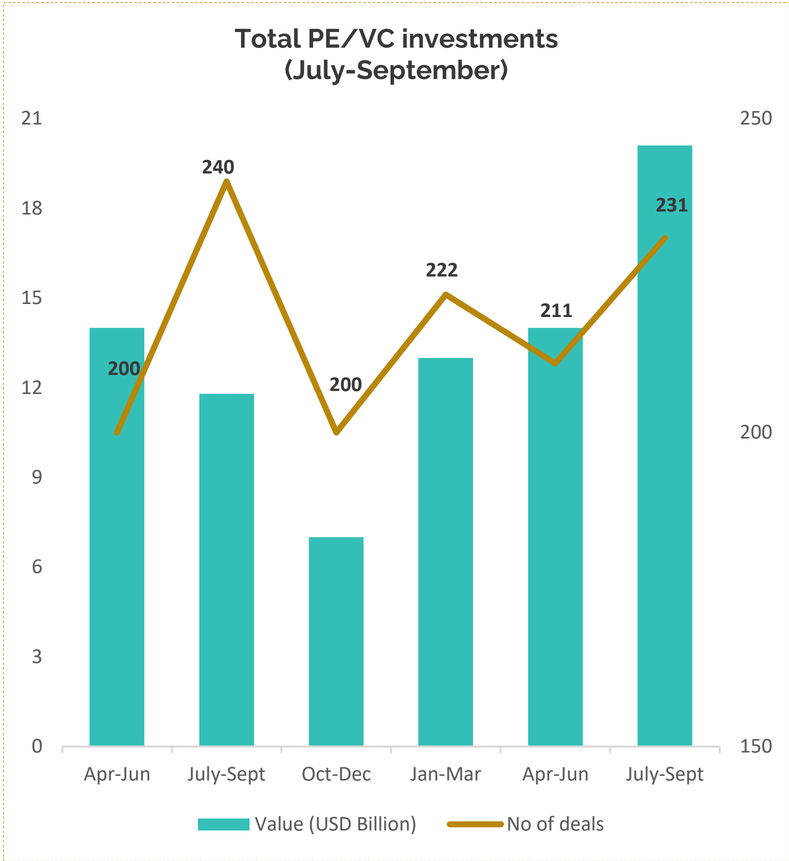
USD **20.1** Billion | **368** Deals Q2 2021

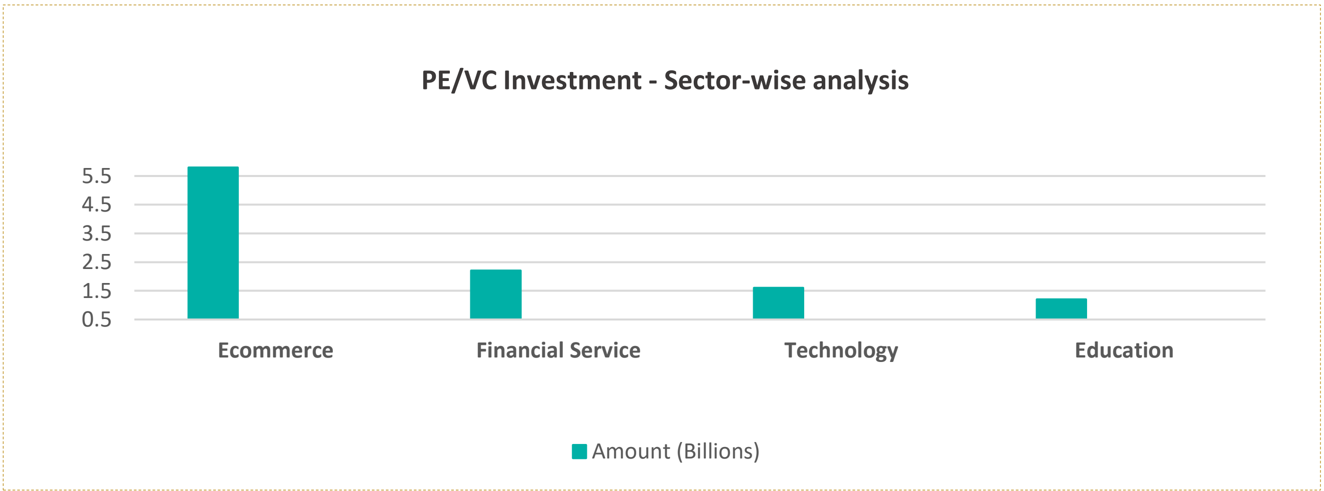
USD **14.9** Billion | **211** Deals Q2 2020

USD **3.7** Billion | **September** Highest FPI Inflow of 2021

40 | **Megadeals** (USD 100 million +)

AUG 2021 | **Standout Month** Deal Value - USD 10.7 billion





▪ EXISTS | Q2 OF FY 2021-22

USD **3.7** Billion | **Strategic Sale** 13 Deals

USD **2.3** Billion | **Secondary Sale** 6 Deals

USD **2.6** Billion | **IPO Route**

SECURITIES AND EXCHANGE BOARD OF INDIA – KEY UPDATES

- **Tightened norms on independent directors**
- **Guidelines on valuation of securities with multiple put options**
- **Amendment to AIF regulations**
- **Tweaks to mutual funds compensation**
- **Relaxation to superior voting rights**

TIGHTENED NORMS ON INDEPENDENT DIRECTORS

On June 29, 2021, Securities Exchange Board of India (**SEBI**) made several crucial decisions regarding independent directors on boards of listed companies.

An independent director being a non-executive director aids the company in revamping the governance standards and corporate credibility. The concept of independent directors was added in The Companies Act, 2013 (**Act**) after the need was felt of having an autonomous voice to speak on behalf of minority shareholders. Section 149 of the Act (to be read along with Rule 4 and Rule 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014), showcases the provisions for appointment of directors, including the code of conduct to be adhered by them. The provision of the Act mandates the requirement of one-third of the total directors to be independent in all the listed public companies.

A consultation paper (Consultation Paper on Review of Regulatory Provisions related to Independent Directors) was released by SEBI on March 1, 2021 to review the provisions with respect to the independent directors. Considering the same, major amendments have been done in the rules governing the appointment, removal, re-appointment, resignation of the independent directors.

Key amendment announced by SEBI

- **Appointment of directors:** Applicable for all entities, a special resolution with 75% of votes in support must be passed for the appointment, reappointment, and removal of the independent directors. Furthermore, instead of the existing requirement of a majority, there will be a Nomination Committee and a Remuneration Committee having 2/3rd independent directors. The selection of the candidate as an independent director will be done by this committee only, which shall also disclose the skillset of the candidate, thereby justifying the selection.
- **Cooling-off period:** Key managerial personnel and their relatives or the promoter group's employees will have to necessarily undergo a three-year cooling off period before getting appointed as an independent director. Similarly, an independent director transitioning into a full-time director in the same company/subsidiary/any company that belongs to the promoter group, will have to observe a cooling period of one year.
- **Resignation of independent directors:** If an independent director resigns from the board, the company must disclose the complete resignation letter, including a list of his/her present membership and directorship in the board committees.
- **Audit Committee:** The Audit Committee should have 2/3rd members as independent directors. It is further stipulated that approval regarding every related party transaction must be given by the independent directors on the Audit Committee.

Independent directors play a crucial role in taking an unambiguous and independent stand to check and balance the minority shareholders and thereby reduce the exposure of unwanted risks. The regulator has defined the role and responsibilities of an independent director quite elaborately, including the requirement that the person, apart from receiving director's remuneration should not have any pecuniary or financial relations of any kind with the company for two preceding financial years. The changes, which will be applicable from January 1, 2022 will certainly boost the independence of independent directors and ensure transparency on a more holistic level. The changes shall.

GUIDELINES ON VALUATION OF SECURITIES WITH MULTIPLE PUT OPTIONS

On July 9, 2021 SEBI announced a new set of regulations for valuation of securities with multiple put options, held by mutual funds. The circular will come into effect from October 1, 2021.

Salient aspects

- **Valuation of securities:** In respect of valuation of securities with multiple put options present *ab initio,* wherein put option is factored into valuation of the security by the valuation agency, the following will be decided based on the recommendation of Mutual Fund Advisory Committee:
  - If the put option is not exercised by a Mutual Fund, while exercising the put option would have been in favor of the scheme, a justification for not exercising the put option shall be provided by the Mutual Fund to the Valuation Agencies, Board of AMC and Trustees on or before the last date of the notice period.
  - The Valuation Agencies shall not consider the remaining put options for the purpose of valuation of the security.
- **Yield of valuation:** The put option shall be considered as 'in favor of the scheme' if the yield of the valuation price, ignoring the put option under evaluation, is more than the contractual yield/coupon rate by 30 basis points.
- **Protection of investor interest:** This Circular is issued in exercise of powers conferred under Section 11 (**1**) of the Securities and Exchange Board of India Act, 1992 read with the provisions of Regulation 77 of SEBI (Mutual Funds) Regulations, 1996, to protect

the interest of investors in securities and to promote the development of the securities market.

These amendments, effective from June 18, 2021 have been hailed as a progressive change in recognizing the expanding scale of companies in India. The newly updated norms will prove significantly beneficial in allowing companies with substantial market capitalizations to successfully conduct IPOs and fulfill MPO requirements without the burden of making a huge offer for newly listed companies.

AMENDMENT TO AIF REGULATIONS

On August 3, 2021 SEBI declared amendments for Alternative Investment Fund (**AIFs**) in the form of the SEBI Alternative Investment Funds (**Third Amendment**) Regulations, 2021 (**AIF Amendment Regulations**), pursuant to suggestions received from several stakeholder groups including AIFs (domestic and global) and regulatory bodies. The changes are meant to ease compliance for AIFs, provide investment flexibility and streamline regulatory processes. This is likely to go a long way in bringing India at par with the global finance and securities market.

Key aspects

- The term 'Accredited Investor' (**AI**) was not previously defined. The current amendment has created a framework for certain investors to be identified as AI. An AI denotes a person who is granted a certificate of accreditation by an accreditation agency who, is an individual, Hindu Undivided Family, Family Trust, or a sole proprietor.
- Flexibility for IMs to take investment decisions, which were restricted or limited to various extents.
- In May 2021, the SEBI AIF Second Amendment Regulations was notified, which focused on determining the scope of the term 'start - up' by providing a comprehensive definition. It defined a code of conduct which laid down principles on accountability of AIFs and allowing AIFs to invest in units of other AIFs - subject to fulfilment of certain requisites and expanding the scope of 'Venture Capital Undertaking' through removal of its negative list.
- AIFs can now issue partly paid - up units to investors to represent the portion of committed capital invested.
- AIFs will have to file private placement memorandum with SEBI through registered merchant bankers.

As per SEBI data, AIFs saw commitments worth INR 82,228 crores in FY21 from Institutions, family offices and high net-worth individuals. On August 13, 2021 SEBI announced further amendments (**Fourth Amendment**) focusing on 'Debt Funds which invest primarily in debts securities of listed and unlisted investee companies.'

RELAXATION TO SUPERIOR VOTING RIGHTS

In 2019, SEBI had introduced the concept of Superior Voting Rights (**SR**) framework. In a move that is likely to further aid the listing of startups in India, SEBI on September 29, 2021 revised certain regulations pertaining to superior voting rights shareholders in companies.

The current framework allows issuance of superior voting rights shares to promoters or founders holding an executive position in the company desirous of listing on the Main Board. However, a sub-section of the framework was being seen as restrictive and onerous to comply with for founders who had diluted their holding but held superior voting rights shares.

Under the current framework, a superior voting rights shareholder could not be part of the promoter group at the time of listing if the collective net worth of the promoter group exceeded INR 500 crores. SEBI eased this restriction by mandating that the superior voting rights shareholder's net worth should not exceed INR 1,000 crores at the time of the proposed listing of the company.

The minimum gap between issuance of superior voting rights shares and filing of Red Herring Prospectus has also been reduced to three months from the existing requirement of six months.

In July this year, SEBI had sought market feedback on the existing framework for SR rights in order to provide flexibility to startup founders seeking to list publicly. The framework allows founders to retain more votes in the company even after the public listing and allows them to protect their SR shares for up to five years after listing.

TWEAKS TO MUTUAL FUNDS COMPENSATION

SEBI has recently modified the circular that mandated paying a fifth of compensation to key employees of asset management companies (**AMCs**) in the form of mutual fund (**MF**) units, ahead of its implementation date on October 1, 2021. The regulator said 'junior employees' below 35 years would have to invest only 10% of their compensation in MF units of the fund house in the first year, and 15% in the second year from October 1, 2022 as against 20% for the other employees. However, CEO, Head of Department and Fund Managers, even if below 35 years of age, will not get this benefit.

Key changes

- The term 'key employees' changed to 'designated employees'
- Initial investment threshold 10% for those below 35 years
- Investment in units of the scheme shall be made on the day of payment of salary
- Superannuation benefits and gratuity paid at the time of death/retirement, shall not be included in the CTC
- The value of interest on loan availed of by the designated employees against the units from the AMC will not be included in the CTC
- Existing investments allowed to set off against fresh investments. In the case of liquid schemes, the units

would get redeemed on expiry of the mandatory three-year lock-in period. While in open-ended schemes, employees can redeem their units in open-ended schemes twice in a financial year after the expiry of the mandatory lock-in period.

- The investment will be 'growth' of the MF schemes, and where this option is not available, they will invest in 'reinvestment of income distribution cum capital withdrawal option.

RESERVE BANK OF INDIA – KEY UPDATES

- **Master directions on prepaid payment instruments**
- **Framework for outsourcing of payment and settlement - related activities**
- **Top banks to create market for secondary loans**
- **Modifications to current norms on round tripping**

MASTER DIRECTIONS ON PREPAID PAYMENT INSTRUMENTS

The Reserve Bank of India (RBI) has issued the Reserve Bank of India Master Directions on Prepaid Payment Instruments, 2021 (MD-PPIs, 2021) on August 27, 2021. PPIs themselves are the instruments that facilitate the purchase of goods and services, the conduct of financial services, enable remittance facilities, etc., against the value stored therein.

The MD-PPIs, 2021 have made it mandatory that no entity can set up and operate payment systems for PPIs without prior authorization of RBI, and are only allowed to issue PPIs, after obtaining the required authorization from the RBI under the Payment and Settlement Systems Act, 2007 by applying to the Department of Payment and Settlement Systems (DPSS) along with a 'No Objection Certificate' from their regulatory department, within 30 days of obtaining such authorization. The provisions of MD-PPIs are applicable to all the Prepaid Payment Instruments (PPIs) Issuers and System Participants.

Key changes

- **The new classification categories of PPIs**
  - The new classification of PPIs is under two types viz. (i) Small PPIs and (ii) Full-KYC PPIs.
  - '**Small PPIs**' are the instruments issued by the banks after receiving minimum details of the PPI holder, to be utilized only for the purchase of goods and services with a group of pre-identified merchants. As per the new directions, Small PPIs can hold cash up to INR 10,000 per month, and not exceeding INR 1.2 lakh in a year. Funds transfer or cash withdrawal from Small PPIs is not permitted.
  - '**Full-KYC PPIs**' are instruments that are not restricted to an identified group of merchants and require the 'Know-Your-Client' (**KYC**) process of PPI holders to be diligently processed. It also supports fund transfers and cash withdrawals.
  - An added feature of the Video-based Customer Identification Process can be used to open full-KYC PPIs as well as to convert Small PPIs into full-KYC PPIs, thus facilitating the process.
- **Interoperability**
  - Through MD-PPI, 2021 interoperability has been made mandatory for all the Full-KYC PPIs, interoperability on the acceptance, and QR Codes in all modes by March 31, 2022.
  - An exception is created for PPIs issued in Mass Transit Systems (**MTS**) and gift PPI issuers have an option to offer interoperability.
  - It is also now mandatory for a PPI issuer to adhere to all the requirements of card networks and 'Unified Payment Interface' (**UPI**) including membership type and criteria, merchant on-boarding, adherence to various standards, rules, and regulations applicable to the specific payment system such as technical requirements, certifications and audit requirements, governance, etc.
  - Added safety and security measures are taken up for achieving interoperability through card networks.
- **Security features**
  - Vide the MD-PPI, 2021, RBI has introduced added security measures to ensure the safety of PPI holders. PPI issuers must disclose all the important terms and conditions to the PPI holders including details about of on the charges concerned.
  - It has made a two-factor authentication compulsory for all the PPI transactions, except for gift PPIs and PPIs used in MTS.
  - Transaction alerts have been mandated for both online and offline transactions.
  - The RBI also requires PPI issuers to comply with its circulars on enhancing the security of card transactions, enhancing public awareness in the face of increasing fraud, and e-mandates for recurring card transactions.
  - PPI issuers shall also provide a cap on the number of transactions and transaction value for different types of transactions. However, the same cap can be allowed to change, with additional authentication and validation.
  - A mechanism for monitoring, handling and follow-up of cyber security incidents, and cyber security breaches is required to be established and shall report to DPSS for such incidents.

The changes made in the regulatory framework for the PPIs have created a level playing field for banks and non-banks. The RBI seeks to mitigate risks with its focus on fintech solutions for the present digital economy.

The RBI has also ensured security measures involving a two-factor authentication system and message alerts, along with a grievance redressal framework to bring transparency and awareness amongst the PPI users.

FRAMEWORK FOR OUTSOURCING OF PAYMENT AND SETTLEMENT - RELATED ACTIVITIES

On August 3, 2021 RBI issued the 'Framework for outsourcing of payment and settlement - related activities by Payment System Operators' (**Framework**). The non - bank Payment System Operators (**PSOs**) mainly outsource their payment and settlement related activities to several other entities. This Framework has been issued to enable the effective management of certain attendant risks in such outsourcing. The Framework has been issued under Section 10(2) read with Section 18 of the Payment and Settlement Systems Act, 2007 (**Act**). PSOs shall ensure that their outsourcing arrangements, including the existing ones, follow the Framework by March 31, 2022.

Application

- PSOs
- Non - bank PSOs
- System providers located in India or elsewhere. A system provider means a person who operates an authorised payment system
- Token requestors in tokenization services by card networks
- Third - party service providers of unified payments interfaces

Outsourcing of core management functions

The Framework bars PSOs from outsourcing their fundamental management responsibilities, such as risk management, internal audit, compliance, and decision - making processes including assessing KYC norms compliance. These restrictions are in accordance with the current regulations governing banks and non - bank financial companies (**NBFCs**). The circular clarifies that 'core management functions' should include, but not be limited to the following:

- Management of payment system operations
- Transaction management
- Management of customer data

Customer rights and data protection

PSOs must take steps to make sure that outsourcing does not damage any rights of customers or participants of the payment system. PSOs are also in charge of dealing with complaints, particularly those involving third - party service providers. On the customers' grievance redressal services being outsourced, they should be able to directly register any grievances with a PSO's nodal officers. PSOs must ensure that customers are aware of this option, such as through advertisements, and should present the details regarding their nodal officers on their websites and mobile applications.

Conclusion

As a welcome regulatory measure, the Framework lays importance on protecting customer rights and data by instituting norms on the usage of customer information by third - party service providers. Framework may increase compliance costs for PSOs, yet it will be instrumental in restricting data leaks attributed to mere regulatory loopholes.

TOP BANKS TO CREATE MARKET FOR SECONDARY LOANS

On August 11, 2021, 10 major banks came together to set up a secondary loan market association (**SLMA**) for promoting growth of secondary market for loans in India. Recommended by RBI's task force on the development of secondary market for corporate loans, SLMA is a self- regulatory body consisting of members namely Kotak Mahindra Bank, Deutsche Bank, Bank of Baroda, Punjab National Bank, Axis Bank, HDFC Bank, Canara Bank and Standard Chartered Bank. According to SLMA's memorandum, it will facilitate, promote, and set up an online system for the standardization and simplification of primary loan documentation and other trading mechanisms.

Advantages of secondary loan market

- An active secondary market for loans in India will offer benefits to various stakeholders by way of capital optimization, liquidity management, risk management, exposure re - balancing and efficient price discovery mechanism
- Smaller banks are constrained from participating in large and creditworthy lending exposures at the time of origination, the secondary market can enable them to participate in such exposures at a later stage and the constraints faced under the Large Exposure Framework will be a thing of the past
- A vibrant secondary market creates an ecosystem of market intermediaries

MODIFICATIONS TO CURRENT NORMS ON ROUND TRIPPING

Some of the largest Indian companies, start-ups and multinationals with an India presence have put their outbound investment, fundraising, and restructuring plans on hold as the RBI looks to introduce fresh regulations around 'round tripping.' Round tripping refers to money that leaves the country though various channels and makes its way back into the country often as foreign investment. This mostly involves black money and is allegedly used for stock price manipulation.

RBI aims to tweak the existing regulations and has come up with draft rules around round tripping. With a view to liberalize regulatory framework and promote ease of doing business, it has been decided to rationalize the existing provisions governing overseas investment. According to the draft rule, any entity making an any investment outside India, in turn, invests in India will be treated as round - tripping if the purpose is to escape tax. This is as the same rationale used by the tax department under General Anti Avoidance Rule. Three significant changes stand out in the rules proposed by the regulator are as follows:

- **Threshold for Overseas Direct Investment (ODI):** The new definition of ODI as proposed by the regulator are as follows:

- Acquisition of equity capital of unlisted foreign entity, subscription to the Memorandum of Association of the foreign entity
- Investment in 10% more of the paid-up capital of a listed foreign entity
- Acquisition of direct or indirect control in the foreign entity
- Foreign Entity will be defined as-
  - An entity which is incorporated and registered outside India
  - An unincorporated entity which is engaged in a strategic sector

- **Treatment of step-down subsidiaries:** In case where such a foreign entity having ODI and control by an Indian entity having ODI and control by an Indian entity sets up a subsidiary, then it will become a step-down subsidiary. The Indian entity and its promoters can provide corporate, personal, performance, bank guarantee on behalf of both foreign entity and step-down subsidiary within the overall limit of the financial commitment according to the Foreign Exchange Management Act.
- **Plugging the gift gap:** Further, the draft rules have put a cap on acquiring foreign securities by way of a gift. The draft rules propose to allow transfer by way of gift only from relatives subject to limitations as prescribed by the RBI.

TRADING IN US STOCKS: NSE IFSC TO BREAK A NEW PATH

On August 9, 2021 NSE International Financial Services Centre (**NSE IFSC**) announced that it is now possible for Indian investors to trade in select US stocks. NSE IFSC, a wholly owned subsidiary of the National Stock Exchange of India Ltd (**NSE**), proposed to make the offering in the form of unsponsored depository receipts. These receipts are issued without approval of the issuer of underlying permissible securities. They simplify investment as rupee is not required to be converted to dollar.

Salient aspects

- **Liberalised Remittance Scheme (LRS):** Indian retail investors will now be allowed to freely transact under the LRS as directed by RBI. Each financial year, LRS permits certain current or capital account transaction up to USD 250,000. This scheme excludes corporates, partnership firms, HUF, and trusts.
- **Regulatory Sandbox:** The International Financial Services Centres Authority (**IFSCA**), a unified regulator promoting ease of doing business in IFSC, will facilitate the trading, clearing, settlement and holding of US stocks under the Regulatory Sandbox, wherein certain regulatory relaxations may be permitted for testing of new products or services and containing their risks. Regulatory Sandbox refers to this live testing of new products or services in a controlled/test regulatory environment.

Operational details

- You can trade through NSE IFSC platform
- Once you have zeroed on an international brokerage account, you can register online by filling basic information
- When your account is ready, you can start adding funds, which you will later invest in US stocks
- Before you start trading, please ensure that documentation concerning LRS has been considered
- Exchange rates are crucial especially when you are planning to invest in US stocks. Ask your brokerage firm if it has a tie - up with any bank and could help you secure a low rate. If not, then you can ask your bank to directly transfer money to your brokerage account
- Depository Receipts will be held by the investors in their own Demat accounts opened in the GIFT City, which will also entitle them to receive corporate action benefits pertaining to the underlying stock

Key takeaways

The model offered by NSE IFSC provides an additional investment opportunity to the Indian investors. The ever - increasing connectivity of the global financial markets makes this move a step further towards portfolio diversification for Indian investors, in an environment where companies predominantly aim at diversification of fund-raising operations.

COMPANIES (INCORPORATION) FIFTH AMENDMENT RULES, 2021

MCA on July 22, 2021 notified the Companies (Incorporation) Fifth Amendment Rules, 2021 to further amend the Companies (Incorporation) Rules, 2014. As per the amendment, if a company fails to change its name or new name in accordance with the direction issued under Section 16(1) of the Companies Act, 2013 within a period of three months from the date of issue of such direction, the letters 'ORDNC' (**Order of Regional Director Not Complied**), the year of passing of the direction, the serial number and the existing Corporate Identity Number of the company shall become the new name of the company without any further act or deed by the company, and the Registrar shall accordingly make entry of the new name in the Register of Companies and issue a fresh Certificate of Incorporation in Form No. INC-11C.

MEDIMA LLC V. BALASORE ALLOYS LTD

AP/267/2021

Section 9 of the Arbitration and Conciliation Act will apply to foreign arbitrations unless the intention to exclude it is crystal clear in the arbitration agreement

Background facts

- An Award was granted in favor of Medima LLC (**Petitioner**) by the ICC in proceedings governed by British law with the seat of arbitration in London, UK. Subsequently, to protect the outstanding amount payable by Balasore Alloys Ltd (**Respondent**) under the said Award, the Petitioner filed a post-award application under Section 9 of the Arbitration and Conciliation Act, 1996 (**Act**) in the Calcutta High Court (**HC**).
- However, the Respondent called into question the maintainability of the application on the following grounds:
  - That as per the arbitration agreement between the parties, Section 9 of the Act was excluded.
  - Section 9 of the Act does not allow the grant of any form of interim relief in post-award scheme passed in a foreign arbitration.

Issues at hand?

- Whether the arbitration agreement in the present case, providing for the substantive, curial as well as the law governing the arbitration agreement to be governed by British law, can be seen as 'an agreement to the contrary' under the proviso to Section 2(2) of the Act?
- Whether Section 9 of the Act can be made applicable to a foreign award made under the Rules of the International Chamber of Commerce in arbitration proceedings governed by British law with the seat of arbitration in London?

Decision of the Court

- At the outset, the HC discussed the 246th Report of the Law Commission which recommended a wider scope of Indian jurisdiction relating to arbitration seat outside India and, consequently, the successful insertion of proviso to Section 2 by the Amendment Act of 2016. HC referred to the decision of the Supreme Court (**SC**) in *PASL Wind Solutions v. GE Power Conversion India*[1] wherein the proviso to Section 2(2) was analyzed to be relevant for interim orders in a foreign-seated arbitration where the assets were located in India.
- HC also perused *Heligo Charters Pvt Ltd v Aircon Feibars*[2], *Big Charter Pvt Ltd v. Ezen Aviation Pty Ltd*[3] & *Raffles Design International v Educomp Professional Education*[4] wherein the need to obtain interim relief under Section 9 was acknowledged. HC advanced that to prove that the agreement between the parties lies within the purview of 'an agreement to the contrary' under the proviso to Section 2(2) of the Act, the opponent party must prove the prima facie intention to

  not subject the arbitration agreement to the application of Section 9 of the Act.
- HC further clarified that the absence of the word 'express' in the proviso cannot be interpreted so as to include an implied agreement within its boundaries and, therefore, the agreement must transparently express terms that the parties intend to exclude the operation of Section 9 from the purview of the said arbitration agreement. Therefore, HC answered the first issue in negative and in favor of the Petitioner.
- With regards to the second issue, the HC highlighted the language of proviso '... and an arbitral award made or to be made ...' in Section 2(2) and arrived at the conclusion that Section 9 would apply in a post-award scenario when the seat of arbitration is outside India. Furthermore, the Court advanced that an award-holder of an arbitration which took place outside India would be left hopeless if interim measures are not granted in relation to the assets of the award-debtor which are located in India. HC cited *Bhatia International v. Bulk Trading S.A*[5] wherein the SC referred to Article 23.2 of the ICC Rules which were then in force and held that Section 9 would be applicable to International Commercial Arbitrations which take place outside India.
- Additionally, the HC applied the rule of harmonious construction after taking in account SC's decision in *J.K. Cotton Spinning and Weaving Mills Co Ltd v. State of Uttar Pradesh*[6] and submitted that the last intention of the legislature in the present case would be to empower the courts to pass interim measures in a foreign seated arbitration post-award. In the light of the above, HC answered the second issue in affirmative.

Our view

HC's decision that Section 9 of the Act will apply to foreign arbitration unless the intention to exclude it is crystal clear in the arbitration agreement is noteworthy, as it captures the essence of the legislative intent of implementation of the arbitration and aligns with the position of law previously laid down by SC in *PASL Wind Solutions*. HC's decision remarkably erases all the ambiguity pertaining to the absence of the word 'express' in the proviso to Section 2(2) of the Act and clarifies the position of law with respect to the remedy available in India to the award-holder in a foreign seated arbitration.

[1] 2021 SCC Online SC 331
[2] 2018 SCC Online Bom 1388
[3] 2020 SCC Online Del 1713
[4] 2016 SCC Online Del 5521
[5] (2002) 4 SCC 105
[6] AIR 1961 SC 1170

MANUFACTURING PUSH BY GOVERNMENT OF INDIA THROUGH PLI SCHEMES

- White goods
- Auto sector
- National single window system for ease of investors

WHITE GOODS

Government issued a corrigendum in relation to the PLI Scheme for white goods. The Department for Promotion of Industry and Internal Trade (**DPIIT**) offered specific relaxations as part of its revised guidelines to turn India into an integral part of the global supply chain initiative. Incentives worth INR 6283 crores will be provided over 5 years for manufacturing of white goods.

Modifications underline the following

- The scheme will offer an incentive of 4 - 6% on incremental sales of goods manufactured in India to companies engaged in manufacturing of ACs and LED Lights.
- Inclusion of more LED components such as resistors, fusers, LED transformers, among others, in the target segments and eligible products.
- Pre-qualification criteria can be met based on audited financials for 2020 - 21. However, for applicants meeting the pre-qualification criteria, the computation of net incremental sale of eligible product shall be done based on net sales turnover of eligible products in the base year of FY21, whichever is higher.
- If a company availing benefits under scheme, fails to meet the committed investment and exits midway, it will have to refund the incentives taken including the interest. Additionally, the bank guarantee will also be invoked.

AUTO SECTOR

The government approved a Production Linked Scheme (**PLI**) on September 15, 2021 for the auto and the drone industry with a corpus INR 26,058 crores for improving India's manufacturing capabilities. Incentives will be provided over a period of 5 years.

Key aspects of this scheme

- Scheme components
  - **Champion OEM Incentive Scheme:** The Champion OEM Incentive Scheme is a 'Sales Value Linked' scheme, applicable on Battery Electric Vehicles and Hydrogen Fuel Cell Vehicles of all segments
  - **The Component Champion Incentive Scheme:** It is a 'Sales Value Linked' scheme, applicable on Advanced Automotive Technology components of vehicles, Completely Knocked Down/Semi Knocked Down kits, Vehicle aggregates of 2-Wheelers, 3-Wheelers, passenger vehicles, commercial vehicles, and tractors
- Eligibility
  - Existing automotive companies
  - New investors who are currently not in automobile
  - Auto component manufacturing business
- Impact
  - This PLI Scheme for auto sector is projected to bring fresh investments of over INR 42,500 crores, with incremental production of over INR 2.3 lakh crores and additional employment for over 7.5 lakh people
  - The scheme for drone sector is intended to attract fresh investments of over INR 5,000 crores over 3 years, with increase in eligible sales of INR 1,500 crores and additional employment of about 10,000 jobs

NATIONAL SINGLE WINDOW SYSTEM FOR EASE OF INVESTORS

- Commerce minister launched a National Single Window System (**NSWS**) that will help domestic and global investors in getting regulatory approvals through the online portal, which currently hosts 18 central departments and 9 states. The investors can access all solutions at one click of the mouse through end-to-end facilitation. This would bring transparency, accountability and responsiveness in the ecosystem and all information will be available on a single dashboard.
- The portal will provide investors services such as Know-Your-Approval (**KYA**), common registration, state registration, document repository, and e-communication. KYA service is an intelligent information wizard that generates approvals required by any business to commence operations. It does so by asking the investor a series of dynamic questions about their planned business activities and identifies the applicable approvals basis the responses provided.
- The single window system will usher in freedom from running to government offices for approvals and registrations and provide ease of doing business. It will provide strength to schemes such as Make in India, Startup India, and Production-linked Incentive (**PLI**) scheme.

E-RUPI: A NEW DIGITAL PAYMENT SOLUTION

- Prime Minister Narendra Modi on August 2, 2021 launched E-RUPI, a digital payment system for India. The system is developed by National Payments Corporation of India (**NPCI**) in collaboration with the

Department of Financial services, Ministry of Health & Family Welfare and National Health Authority. NPCI is the brains behind the Unified Payments Interface (**UPI**) which was launched in 2016 and has since gained significant traction in India's digital payment ecosystem – the platform crossed 3 billion transactions mark recently with transactions worth INR 6.06 lakh crores in July 2021.

- E-RUPI is a person and purpose specific voucher-based system, wherein the transaction will be done electronically directly to the beneficiary's mobile phone number. The platform does not require the beneficiary to have a bank account. Since it is purpose specific, it ensures that the QR code or the SMS-based e-voucher will be used for that purpose only. This will ensure a leak-proof transfer of money and incentives without the interference of the middleman, thereby minimizing transaction costs traditionally associated with such transfers.
- Currently, the E-RUPI platform has partnered with two banks - Punjab National Bank and Bank of Baroda. There are 11 banks enlisted with the NPCI and more client banks will be added to the platform to gain access to the E-RUPI features.
- This platform is expected to play a pivotal role in strengthening the Direct Bank Transfer (**DBT**) scheme announced by Ministry of Finance in 2013 with the aim of brining transparency in the distribution of welfare funds and benefits from the Central government. In the first iteration, E-RUPI will be extensively used in the healthcare welfare for the purpose of providing drugs and nutritional support under the women and child welfare schemes, TB eradication programs, amongst others.

GEMINI BAY TRANSCRIPTION PVT LTD V. INTEGRATED SALES SERVICE LTD & ANR

Civil Appeal Nos. 8343-8344 of 2018

Award debtors cannot evade the enforcement of foreign awards under Section 48 of the Arbitration Act

Background facts

- An award was granted in favor of Integrated Sales Services Ltd (**Respondent**) and damages amounting to USD 690 million were jointly payable by the opposite parties who were non-signatories to the arbitration agreement. The proceedings were governed by Delaware law with the seat of arbitration in Kansas City, Missouri, USA.
- Subsequently, the Respondent filed an application for enforcement of the award under Section 48 of the Arbitration and Conciliation Act, 1996 before the Bombay High Court., which held that the foreign award was not enforceable against the non-signatories to the arbitration agreement. On appeal, the Division Bench reversed the judgement. Consequently, Gemini Bay Transcription Pvt Ltd (Petitioners) approached the Supreme Court (**SC**) resisting the enforcement of the foreign award. The grounds relied upon by the Petitioners were:
  - Under Section 47(1)(c) and Section 44, the burden of proving that the foreign award is enforceable is on the award-holder. In the case of non-signatory to the arbitration agreement, such a burden can only be discharged if evidence is advanced which would independently establish that the non-signatory party is covered by the foreign award. Since the Respondents did not do so in the present case, the award was unenforceable.
  - The award could not be enforced because non-signatories to an arbitration agreement would be covered under sub-clauses (a) and (c) of Section 48(1).
  - The ground of 'natural justice' under Section 48(1)(c) for refusal to enforce the award would be attracted since the award lacked reasons. Hence, the award suffered from perversity.
  - Commission of tort is outside the scope of contractual disputes and, as the cause of action in the present case arose in tort, the award cannot be enforced.
  - Under Section 46, the foreign award is binding only on the people between whom it is made and not the ones who may claim under the parties.
  - Damages were awarded but the actual loss was not proved.

Issues at hand?

- Whether under Section 47(1)(c) the burden to prove that the foreign award is enforceable is on the award-holder or such burden can be discharged only if the award-holder leads evidence to prove that a non-signatory can be bound by a foreign award?
- Whether non-signatory to an arbitration agreement is covered by sub-clause (a) as well as sub-clause (c) of Section 48(1) of the Act?
- Whether perfunctory reasoning can be a ground for refusal for enforcement of foreign awards under Section 48(1)(b)?
- Whether commission of tort is outside the scope of arbitration agreement?
- Whether under Section 46 the foreign award will be binding only on the persons between whom it was made?
- Whether under Section 48 a foreign award can be resisted on the ground that the award was contrary to the substantive law governing the arbitration proceedings?

Decision of the Court

- SC observed that Section 47(1) is procedural in nature. The objective of the provision is to ensure that the award in question is indeed a foreign award and that it is enforceable against the persons bound by the award. Sub-clause (c) of the said section only stipulates evidence to prove that the award is indeed a foreign award. It would be applicable to adduce evidence to prove that the arbitration agreement is a New York Convention agreement. It does not require substantive evidence to establish that the non-signatories to an arbitration agreement can be bound by the foreign award. Hence, the first ground relied upon by the Petitioners was held to be outside the scope of Section 47(1)(c).

- Interpreting Section 48(1) – specifically sub-clauses (a) and (c) – SC observed that the literal construction of both the sub-clauses clearly indicates that their scope is restrictive, which does not allow for expansive interpretation. Section 48(1)(a) is about parties to the agreement being under some incapacity, or the agreement being invalid under the law to which the parties have subjected it. Hence, non-signatories cannot be included within Section 48(1)(a) as it would be contrary to the literal construction of the provision.
- Similarly, with respect to Section 48(1)(c), SC observed that the sub-clause only relates to disputes that could be argued to be outside the ambit of the arbitration agreement between the parties. It does not relate to whether a 'person' who is a non-signatory to the arbitration agreement can be bound by the same.
- SC observed that Section 48(1)(b) is highly specific as it does not deal with lack of reasons by the arbitrator. Under the said provision, the enforcement of foreign award can only be refused on the ground of natural justice pertaining to the issue of notice of appointment of the arbitrator or of the tribunal proceedings, or that a party could not present its side before the tribunal. Relying on *Vijay Karia v. Prysmian Cavi E Sistemi SRL*[7], SC held that Section 48(1)(b) cannot be interpreted expansively and must be interpreted in the context of the provision. The narrow construction of the said provision would indicate that the ground of natural justice can only be raised in case of fair hearing not given by the arbitrator.
- On the ground of perversity, the SC relied on *Ssangyong Engg & Construction Co Ltd v. NHAI*[8] (**Ssangyong Engg case**) and held that after the 2015 Amendment to the Act, perversity as a ground to set aside an award in an international commercial arbitration no longer exists. The ground of 'public policy of India' to set aside the foreign award under Section 34 does not include within its ambit the ground of perversity. Since Section 48 is a pari materia provision, perversity as a ground is not available under Part II as well.
- With respect to the issue of commission of tort being outside the scope of arbitration agreements, SC observed that under Section 44 tort claims may be adjudicated by the arbitrator provided they arose in relation to the agreement. Relying on *Renusagar Power Co Ltd v. General Electric Co*[9], SC observed that the only issue that must be determined is if it is a tortious claim, whether it arose out of the contract in question. Thus, this argument was rejected.
- SC rejected the argument of the Petitioners that a comparison between Section 35 and 46 indicates that the power of the enforcement under Section 46 was limited to only the parties who are bound by the foreign award and not the persons claiming under them. It was held that unlike Section 35, which speaks about 'persons' in the context of the award being binding on the 'parties' and 'persons claiming under them', Section 46 only speaks about 'persons'. The usage of this term in Section 46 indicates that the provision is not restrictive and, hence, non-signatories to the arbitration agreement will be covered under it.
- SC disagreed with the Division Bench's approach that the foreign award would have to be upheld because the Delaware law was followed to apply the Alter Ego Doctrine correctly. Section 48 does not provide grounds for refusing the enforcement of the foreign award simply based on the foreign being contrary to the substantive law agreed between the parties. Under the pari materia provision of Section 34, an award cannot be set aside on the ground that the substantive law of that country was infracted. The award can be interfered with only if it was held to be contrary to the public policy of India.
- SC held that such a ground was not provided under exceptions contained in Section 48(1). The Petitioners had relied on the Delhi High Court judgement of *Agritrade International Pvt Ltd v. National Agricultural Coop Mktg Federation of India Ltd*[10]. Distinguishing the facts in the present case, it was held that actual loss can be said to have been occasioned on the Respondent. Further, in Ssangyong Engg case, it was held that only in rare and exceptional cases involving miscarriage of justice that would shock the conscience of the Court such a plea could be entertained. Since it did not happen in this case, the contention was rejected.

Our view

SC's decision reinforces the pro-enforcement stance of the Indian judiciary. The decision emphasizes that the scope for expansive interpretation of Section 48, allowing the award-debtors to evade the enforcement of foreign awards, is little. By clarifying the contours of Part II of the Act in the context of non-signatories to the arbitration agreement, the Court has left no room for ambiguity in the provisions. While the position of non-signatories to the arbitration agreement in the Indian arbitration regime is settled now, the decision has left some reasons to be concerned about the lack of recourse available to non-signatories.

[7] (2020) 11 SCC 1
[8] 2019 SCC OnLine SC 677
[9] (1984) 4 SCC 679
[10] 2012 SCC OnLine Del 896

HOT TOPIC | SPACs IN THE INDIAN CONTEXT

- Regulatory and statutory amendments in India to make SPAC effective
- Existing legal framework for companies in India which would primarily impact SPACs
- Options for Indian companies to enter into business combinations with SPACs

REGULATORY AND STATUTORY AMENDMENTS IN INDIA TO MAKE SPAC EFFECTIVE

Although Special Purpose Acquisition Companies (**SPACs**) have been active for decades, the year 2021 has witnessed a considerable rise in SPAC activities, with nearly USD 128 billion raised from 447 SPACs in the United States of America (**the United States**) till the month of September, compared to approximately USD 83 billion raised from 248 SPACS in the year 2020 and 13 billion raised from 59 SPACs in the year 2019[11], thereby indicating a significant increase in the value and volume of transactions.

SPACs are referred to as 'blank check' entities because they go public for fundraising and listing even before the acquisition target is identified. They are essentially shell companies, having no underlying business except for the sole purpose of raising public funds through an IPO and thereafter acquiring an unidentified target company out of these funds, within a stipulated timeframe. Due to the complexities surrounding the conventional IPO procedure, many companies are now opting for this alternative fast-track route for listing their shares.

Despite the notification on July 16, 2021 of the IFSCA (Issuance and Listing of Securities) Regulations, 2021, which seeks to establish an ecosystem for listing of SPACs on the stock exchanges in the International Financial Services Centre, there are numerous legal and regulatory hurdles to the establishment of SPACS in India. As a result, Indian companies are looking for options to go public via SPACs listed overseas, especially in the United States.

In India, where emerging companies require appropriate funding, there are no precise and detailed regulations in place concerning SPAC's, barring the IFSCA (Issuance and Listing of Securities) Regulations, 2021 (IFSCA Regulation), as discussed below, where too the existing laws require amendments. Nevertheless, Indian Companies have opted this route in the past. To quote a few examples, way back in 2016, Yatra Online Inc. was acquired by Terrapin 3 Acquisition Corp via reverse merger and the deal valued one of the top three OTAs at USD 218 Million in India. Likewise, Videocon DTH was listed on the NASDAQ through a reverse merger with Silver Eagle Acquisition Corp with a deal value of around USD 375 Million.

Although SEBI seeks to examine the feasibility of SPACs in India and has formed an expert group to examine the same in March 2021, it is yet to draft a specific framework for regulating these entities. The International Financial Services Centre Authority (**IFSCA**) had released the IFSCA Regulations specifying the regulatory provisions on the issuance and listing of securities on the IFSC's recognized stock exchanges.

[11] https://www.spacresearch.com/

In September 2020, the Indian Government approved the direct listing of Indian companies on overseas stock exchanges. Further, Section 23 of the Indian Companies Act, 2013 (**Companies Act**), had been amended[12] to create an enabling provision for such listing in certain permitted jurisdictions. This release facilitates issuer's access to global capital. Robust valuation and excess SPAC vehicles do indicate an upward graph of De-SPACs in India but, the regulatory and tax challenges create a hurdle.

EXISTING LEGAL FRAMEWORK FOR COMPANIES IN INDIA WHICH WOULD PRIMARILY IMPACT SPACs

- **Companies Act, 2013:** As per Section 248 of the Companies Act, the Registrar of Companies (**RoC**) has the power to remove a company's name from the register of companies if it has 'failed to commence its business within one year of its incorporation.'

  In case of SPACs, the typical acquisition timeline is around 18 months or more. This clause in the Act presents a major hurdle for SPAC implementation in India. Therefore, either fresh provisions may be inserted, or existing provisions may be tweaked to enable SPAC employment in the country.

  In the recent years, MCA has removed the names of several companies from the official records following the 'Special Drive for identification and strike off Shell Companies' where more than 3.82 lakh companies were struck off the RoCs in the past three years for failing to submit their annual returns for two years or more. The current mindset of the regulators must be changed to accommodate SPAC transactions as the acquisition timeline for SPAC transaction is more than 18 months during which time the company remains a shell company.
- **SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018:** According to Regulation 6(1) of the ICDR Regulations 2018, a company should have had minimum INR 3 crores net tangible assets for the preceding three years, and an average operating profit of at least INR 15 crores during the preceding three years and a net worth of at least INR 1 crore in each of the preceding three years to be eligible to proceed with an IPO.

  Nonetheless, SPACs are fundamentally shell companies till the De-SPAC process is completed and this provision is unquestionably a stumbling block for these blank check companies to being floated on any recognized Stock Exchange and necessitates amendment clause for SPAC entities alone.
- **Stamp Duty:** The legislation regarding Stamp Duty levy in cases of mergers is not uniform in India and the payment of Stamp Duty varies from one jurisdiction to another. The Apex Court has reiterated the same in the Hindustan Lever case by holding that a scheme effecting mergers is an instrument and the order of a court or tribunal sanctioning the merger is subject to stamp duty levy[13]. A typical De-SPAC process from the Indian laws standpoint is a reverse merger, subject to high Stamp Duty levy which makes the business combination unappealing in the current scenario.
- **Exchange control concerns:** During the De-SPAC process, the investors and shareholders of the target entities receive shares of the combined SPAC entity. Under the Foreign Exchange Management Act, 1999 and its subsequent rules, the resident individuals and shareholders are allowed to remit freely up to USD 250,000 per financial year. Based on forex reserves and macro-economic parameters, RBI varies the aforesaid limit from time to time. In essence, the RBI necessitates that the fair market value of the shares falls within the limits prescribed under the Liberalized Scheme. This cap on the shareholders acquisition of shares might be an obstacle in a scenario where the fair market acquisition of a De-SPAC is likely to exceed the RBI limit. Therefore, it is crucial to either widen the prevailing threshold or exempt these transactions from Liberalized Remittance Scheme.

The objectives of SPACs are to de-risk and shorten the IPO process, overcome the legal impediments, and realize the immense potential of start-ups by raising funds and generating liquidity. In this regard, the IFSCA has released a draft framework to enable listing of SPACs on the IFSCs recognized stock exchanges. While these regulations are indeed a step forward, they lack a concrete regulatory structure and limiting SPACs listings to IFSCs will deter the pace of SPAC growth in India. Thus, it is germane to revise the existing statutory framework to accommodate SPAC mergers or draft a separate framework, specifically for SPAC.

OPTIONS FOR INDIAN COMPANIES TO ENTER INTO BUSINESS COMBINATIONS WITH SPACS

Typically, business combination options for Indian companies can take the form of merger/reverse merger as well as inbound merger.

Merger/reverse merger

- Cross border mergers require prior approval of the Reserve Bank of India (**RBI**), the approval of three-fourth of the members and creditors of the merging companies, and the sanction of the National Company Law Tribunal (**NCLT**). However, RBI approval will be a 'deemed approval' if such a transaction is undertaken in accordance with the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 (**Cross Border Regulations**). This reduces the time taken and resources utilized in clearing regulatory hurdles for effectuating the transaction.
- Companies must also adhere to the requirements, (including the valuation and pricing guideline requirements) set forth in the Foreign Exchange

12 https://www.mca.gov.in/Ministry/pdf/AmendmentAct_29092020.pdf

13 *Hindustan Lever & Anr v. State of Maharashtra & Anr*; (2004) 9 SCC 438.

Management (Transfer or issue of any Foreign Security) Regulations, 2004 (**ODI Regulations**) and Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (**Non-Debt Rules**).

- Compliance with the ODI Regulations and Liberalized Remittance Scheme (**LRS**) is required for investment in shares by resident shareholders of Indian companies, and thus, prior permission of RBI may be required under the regulations framed under the Foreign Exchange Management Act, 1999 (**FEMA**).
- Such transactions are deemed to have RBI approval if, amongst other conditions, the fair market value of the securities acquired by a resident individual shareholder of the Indian company in the foreign company is within the limits prescribed under the LRS. At present, the maximum amount stipulated under the LRS is USD 250,000 per financial year. It may therefore be easier for Indian companies having a foreign holding company located in a merger friendly jurisdiction to route the de-SPAC transaction through the foreign holding company.
- It may however be kept in mind that if the foreign holding company has resident individual shareholder(s) in India, he/they may need to seek regulatory approval for investment in shares.
- A significant risk in the Indian context is the possibility of a grievance application being filed before the NCLT by an aggrieved party or by a dissenting shareholder, resulting in delay in the completion of the transaction. Given that sponsors of a SPAC based out of the United States have around 2 years to complete the business combination, it becomes critical to evaluate and address these risks and ensure the transaction is completed within the stipulated time-period, failing which the SPAC will have to be dissolved, and shareholders will be returned their money.
- An additional roadblock to a de-SPAC transaction is the perception of government agencies surrounding shell companies. Many companies have in the past misused the concept of reverse mergers by using shell companies to launder money, using their promoters to divert funds from unlisted to listed entities and evading tax.[14] SPACs must be defined and distinguished from shell companies and misconceptions about SPACs being used as money laundering vehicles need to be corrected.
- A reverse merger between a private company and a SPAC enables the transfer of ownership of a clean shell with no previous history, operations or any potential liabilities associated with past operations. The SPAC sponsors retain control in the combined entity, unlike reverse mergers where the surviving management and board of directors of the combined entity are that of the acquired operations company.

Inbound merger

- An inbound merger is one where the resultant company is an Indian company. Any office of the merged entity outside India is deemed to be a branch office or office outside of India of such merged entity and the transactions conducted by the merged entity with such branch or office will be in accordance with the Foreign Exchange Management (Foreign Currency Account by a person resident in India) Regulations, 2015 (**Current Account Regulations**).
- The Current Account Regulations permit an Indian party to open and maintain a foreign currency account abroad and to make remittances to such account for purposes of its branch abroad, subject to the provisions of Current Account Regulations.
- The Cross Border Regulations provide for a 2-years window from the date of sanction of merger by NCLT for ensuring that the guarantees and outstanding borrowings of the foreign company are recorded in the books of the merged entity. The merged company may acquire and hold any asset outside India which an Indian company is permitted to acquire under FEMA and will have to sell off any assets or security outside India and extinguish any liability outside India that are not permitted to be acquired.
- Additionally, no remittance towards repayment of such liability is permitted from India within 2 years. SPAC financial statements are very short with no historical financial results to be disclosed, no assets to be described (other than cash) or any significant liability since SPAC does not have an operational business. Therefore, the process of merger becomes feasible to be completed within 2 years' time frame.

CONCLUSION

When looked from the perspective of a de-SPAC transaction, an inbound merger appears to present few regulatory hurdles, as there is no requirement for transfer of any assets or liabilities to the resultant Indian company, as the SPAC company has no assets (other than money) and a few liabilities. A merger of an Indian company through foreign holding company in a merger friendly jurisdiction, such as ReNew India's merger with RMG II via ReNew Global, is also a viable option, as the non-resident shareholders of the foreign holding company will not be subject to LRS compliances or any stringent regulatory guidelines. The other options, being outbound mergers and share swap arrangements will be discussed in the next part.

[14] https://blog.ipleaders.in/shell-companies-in-corporate-restructuring/

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