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Can Non-signatories be Made Parties in Arbitration?

Group of Companies Doctrine Affirmed by the Indian Supreme Court

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Main stories

Welcome to this issue of ***Insight***.

In the lead article of this issue of ***Insight***, we have considered the landmark judgment of the Supreme Court of India in *Cox and Kings v. SAP India*, upholding the Group of Companies doctrine to bind non-signatories to arbitration agreements. The recognition of this doctrine is in line with international arbitration standards and aligns with the overarching goal of fostering a pro-arbitration environment in India.

Apart from the above, this issue covers the key notifications and orders issued by the Ministry of Corporate Affairs (**MCA**) in relation to the Companies Act, 2013, as well as circulars and notifications issued by the Reserve Bank of India (**RBI**) and the Securities and Exchange Board of India (**SEBI**) for the period under review.

Any feedback and suggestions would be valuable in our pursuit to constantly improve ***Insight*** and ensure its continued success among readers. Please feel free to send them to cam.publications@cyrilshroff.com.

Regards,

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Can Non-signatories be Made Parties in Arbitration? Group of Companies Doctrine Affirmed by the Indian Supreme Court

- By Gauhar Mirza and Hiral Gupta

Introduction

The longstanding debate in India over the binding of non-signatories to arbitration agreements ended with the Supreme Court's judgment in *Cox and Kings Ltd. v. SAP India Pvt. Ltd. Arbitration Petition (Civil) No. 38 of 2020*[1] (**Cox and Kings**). Divergent views in India and internationally on the principles of party autonomy and privity of contracts that suggest that an arbitration agreement can bind only those parties that had given explicit consent had deepened the argument over the years.

On December 6, 2023, a five-judge constitutional bench of the Supreme Court in its judgment on **Cox and Kings** upheld the Group of Companies Doctrine (**GOC Doctrine**) and confirmed that companies outside of an arbitration agreement could be made parties to arbitration proceedings. Reaffirming the validity and applicability of the GOC Doctrine, the Supreme Court judgement aligned the Indian position with that of international arbitration standards.

Background of the Doctrine

The ICC tribunal first formulated the GOC Doctrine in the context of a corporate structure in *Dow Chemicals Company v. Isover Saint Gobain*.[2] The tribunal held that an arbitration agreement can bind a non-signatory affiliate of a signatory party under certain conditions, including (a) a direct relationship between the signatory and the non-signatory; (b) a direct commonality of the subject-matter; (c) a composite nature of the transaction; (d) involvement of the non-signatory in the negotiation, performance, or termination of the contract; and (e) the existence of a tight group structure or a "single economic unit/reality."

In India, the Supreme Court in *Sukanya Holdings v. Jayesh H. Pandya*[3] (**Sukanya Holdings**) – the case that first dealt with the GOC Doctrine – stated that non-signatories could not be included within the same arbitral proceedings and causes of action could not be bifurcated in arbitration. Subsequently, in *Chloro Controls India v. Severn Trent Water Purification Inc.*[4] (**Chloro Controls**), while dealing with a case of international arbitration under Section 45 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**), the Supreme Court held that in exceptional circumstances, a non-signatory or third party could be subjected to arbitration without its prior consent. The Court observed that the expression "person claiming through or under" in Section 45 could be liberally interpreted in exceptional cases. In doing so, the Supreme Court adopted the GOC Doctrine to refer the non-signatories to arbitration.

In *Chloro Controls*, the Supreme Court mandated the following conditions:

a. Non-signatories must have a direct relation with the signatories to the agreement.

b. There must be direct commonality on the subject matter.

c. The arbitration agreement between parties must be a composite transaction.

It also concluded that the finding of *Sukanya Holdings* was restricted to the arbitration conducted under Part I of the Arbitration and Conciliation Act, 1996 (**Act**).

The Court expanded its *Chloro Controls* position in *Cheran Properties v. Kasturi and Sons*[5] and *Reckitt Benckiser (India) (P) v. Reynders Label Printing (India)*[6] to affirm that the GOC Doctrine was for circumstances that indicated the mutual intent of the parties to bind both the signatories and non-signatories. Post the 2015 amendment of Section 8 of the Act, the Court in *Ameet Lalchand Shah v. Rishab Enterprises*[7] extended the principles expounded in *Chloro Controls* to an application under Section 8 of the Act, i.e., in respect of Indian seated arbitrations. Subsequently, in *Mahanagar Telephone Nigam Ltd. v. Canara Bank,*[8] the Court affirmed that the GOC Doctrine could also apply

[1] *Cox and Kings Ltd. v. SAP India Private Ltd. Arbitration Petition (Civil) No. 38 of 2020 (Judgment dated 6 December 2023); 2023 SCC OnLine SC 1634*
[2] *Dow Chemical Company & Ors. v. Isover Saint Gobain, (1984) ICC Case No. 4131, IX Y.B. Comm. Arb. 131*
[3] *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya (2023) 5 SCC 531*
[4] *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641*
[5] *Cheran Properties Ltd v. Kasturi and Sons Ltd., (2018) 16 SCC 413*
[6] *Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd., (2019) 7 SCC 62*
[7] *Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678*
[8] *Mahanagar Telephone Nigam Ltd. v. Canara Bank, (2020) 12 SCC 767*

to a tight group structure that constituted a single economic unit or reality.

In *ONGC Ltd. v. Discovery Enterprises (P) Ltd.* (**Discovery Enterprises**),[9] the Supreme Court established a set of factors to consider when determining if an arbitration agreement would bind a non-signatory party within a group of companies.

Factual Matrix of the Case

Not long after *Discovery Enterprises*, a three-judge bench of the Supreme Court in *Cox and Kings Ltd. v. SAP India Pvt. Ltd.*[10] had to consider the validity of several of its previous rulings. The subject matter of the dispute in *Cox and Kings* was the arbitration agreement–containing software license contract between SAP India Private Limited and Cox and Kings. Cox and Kings initiated arbitration proceedings against SAP India Pvt. Ltd. and SAP SE GmbH, the parent company of SAP India Pvt. Ltd., which was not a signatory to this specific contract. As the SAP entities failed to appoint an arbitrator, Cox and Kings applied to the Court under Section 11 of the Arbitration Act for the appointment of arbitrator on their behalf. Relying on the GOC Doctrine as laid down in the *Chloro Controls* judgement, Cox and Kings argued that the arbitration agreement was also binding on the non-signatory parent company, SAP SE GmbH. In May 2022, the three-judge bench referred the question of the Doctrine's continued application to a larger bench.

Consent-Based Doctrine: Is a Written Contract Required?

The Court affirmed that the person's or entity's signature to the agreement was the most clear and profound expression of consent to submit to an arbitral tribunal's jurisdiction. However, the Court observed that the requirements mandated in Section 7 of the Arbitration Act regarding a written arbitration agreement does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties. The Court found that the circumstances under Section 7 were pitched towards determining the "mutual intention of the parties" to be bound by an arbitration agreement. Hence, the Supreme Court held that all parties need not necessarily sign a written contract embodying the terms of the agreement.

The Court noted that this was more about identifying the real or "veritable" parties to the dispute than about extending an arbitration agreement to third parties – for instance, the non-signatory parties' conduct could indicate their consent to be bound by the arbitration agreement. By ruling the Doctrine as analogous to other consent-based doctrines (e.g., agency, assignment, assumption, and guarantee) to the extent that they are applied as a means to identify the parties' common intention to bind a non-signatory to an arbitration agreement, the Court established that the Doctrine was not incompatible to the notion of "party consent."

Distinct from Non-Consensual Doctrines

Distinguishing between the "alter ego" doctrine and the GOC Doctrine, the Court noted that the alter ego doctrine disregarded a corporation's separate legal identity, but the GOC Doctrine did not disrupt the legal personality of the entities involved. Instead, it was a means to ascertain the parties' (signatories and non-signatories) true intention to the arbitration agreement and could be applied without piercing the corporate veil. The Court enunciated that the underlying basis for the application of the GOC Doctrine rests on maintaining the corporate separateness of the group of companies while determining the common intention of the parties to bind non-signatories to the arbitration agreement. Noting that the "single economic entity" principle could not be the sole basis to invoke the GOC Doctrine, the Court affirmed that the courts or tribunals would have to consider all the cumulative factors as laid down in *Discovery Enterprises*.

Legal Basis of the Doctrine: 'Party' V. 'Person Claiming Through and Under'

While affirming the line of judgments that held that the GOC Doctrine can be enforced and is founded from settled legal principles, the Supreme Court held as erroneous the reasoning in *Chloro Controls* to the extent that it relied on "claiming through or under" in Section 8 of the Arbitration Act to include the Doctrine.

The Court noted that the definition of "party" under Section 2(1)(h) read with Section 7 of the Arbitration Act included the signatory and non-signatory parties and distinguished "party" from "persons claiming through or under a party" to the arbitration agreement. Therefore, departing from the principles elaborated in *Chloro Controls*, the Court observed that the persons claiming through or under could only assert a right in a derivative capacity. The parties making claims through or under had no independent right to stand as parties to an arbitration agreement and were only the successors to the signatory parties' interest. Moreover, merely a commercial or legal connection was not sufficient for a non-signatory to claim through or under a signatory party. Therefore, the Constitution Bench held that the GOC doctrine had an independent existence

[9] *ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42*
[10] *Cox and Kings Ltd v. SAP India Pvt Ltd., (2022) 8 SCC 1*

as a principle of law, stemming from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act.

Goc – A Fact-Based Doctrine: Application of Kompetenz-Kompetenz

The Supreme Court's five-judge bench emphasised the importance of focusing on complex commercial transactions to ascertain the relationships within a corporate group and identify the true intent of the parties to the agreement and the non-signatory concerned with the performance of the agreement. Such exercise has to be done or undertaken by the arbitral tribunal with caution by giving appropriate hearing to the non-signatory party to be impleaded in the arbitral proceedings. The Court highlighted that the referral court should leave it to the arbitral tribunal to decide the question of impleading a non-signatory, on the basis of the factual evidence and the application of legal doctrines. This also gives effect to the all-important doctrine of *Kompetenz-Kompetenz* leaving the issue of determination of true intent of the parties to be decided by the arbitral tribunal. Section 16 of the Arbitration Act grants the arbitral tribunal competence to decide on its own jurisdiction, which would also include within its ambit the competence to decide whether to include a non-signatory as a party to that arbitration.

The Supreme Court held that to apply the GOC Doctrine, the Courts would have to consider all the cumulative factors as laid down in *Discovery Enterprises*: (a) mutual intent of parties, (b) relationship of a non-signatory to a signatory, (c) commonality of the subject matter, (d) composite nature of the transaction, and (e) performance of the contract.

Conclusion

Post *Chloro Controls*, the courts have been liberal enough to induct a non-signatory to the arbitration agreement. However, after analyzing the entire gamut of case laws and the position of law in different jurisdictions, including in countries such as Switzerland, United Kingdom, Singapore, and Australia, the Supreme Court held that in the Indian arbitration scenario, a position needs to be maintained on where the GOC Doctrine needs to be applied within the confines specified by the court in this judgement.

By specifying certain parameters, the Court made a formula to apply the GOC Doctrine, which should pave the road for greater consistency in arbitral jurisprudence in India. The judgment makes it clear that it is a very fact-specific doctrine and that the courts or tribunals cannot just read the conclusions that the Hon'ble Judges have very succinctly made, instead they would have scrutinize every aspect and make a fact-specific analysis of the scenario to decide if a non-signatory can be a party or not.

In essence, the Supreme Court has placed the conduct and the intention of signatories and non-signatories on a pedestal. This approach also aligns with the goal of fostering a pro-arbitration environment. However, it is to be seen how the doctrine works out in subsequent cases to determine whether it lands on the pro-arbitration side of the see-saw.

Further material on the GOC Doctrine can be found in our blog titled *Can Directors Be Made Parties to Arbitration Proceedings Following the Underlying Rationale of Group of Companies Doctrine? Delhi High Court Explains.*

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1. ***Amendment to Companies (Prospectus and Allotment of Securities) Rules, 2015***

   The MCA has introduced the Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023 (**PAS Amendment Rules**). Following are the key changes introduced by the PAS Amendment Rules:

   - **Share warrants:**

     i. Public companies that issued share warrants before the commencement of the Companies Act, 2013, and did not convert them into shares, will require the bearers of such warrants to surrender them to the company and get the shares dematerialised within six months of the commencement of the PAS Amendment Rules.

     ii. If the bearer of such share warrant does not surrender the warrants within the timeline discussed earlier, the company shall convert them into a dematerialised form and transfer them to the Investor Education and Protection Fund.

     iii. Companies are also required to inform the Registrar of Companies about the details of such share warrants within three months of the commencement of the PAS Amendment Rules.

   - **Issue of securities in dematerialised form:**

     i Every private company, other than a small company, is required to issue securities only in dematerialised form and facilitate dematerialisation of all its securities, in accordance with the Depositories Act, 1996, and the regulations thereunder.

     ii. Such dematerialisation must be completed within 18 months of the closure of the financial year ended on or after March 31, 2023, provided that is not a small company as per the audited financial statements for such a financial year.

     iii. Every holder of securities of such a company who intends to transfer or subscribe to the securities of such a company on or after the date on which the company is required to comply with the rule shall ensure that such securities are dematerialised before the transfer.

     iv. Every private company (not being a small company) making any offer for issue of any securities or buyback of securities or issue of bonus shares or rights offer, after the date when it is required to comply with this rule, shall ensure that before making such offer, entire holding of securities of its promoters, directors, key managerial personnel has been dematerialised.

     v. Rules 9A(4)-9A(10) of the PAS Rules shall apply, *mutatis mutandis*, to such dematerialisation.

     vi. These provisions do not apply to a Government company.

   (MCA Notification G.S.R. 802(E). dated October 27, 2023.)

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SECURITIES LAW UPDATES

A. Circulars

1. ***Limited relaxation from compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR Regulations)***

   - SEBI, in its circular dated October 6, 2023, relaxed the requirements of Regulation 58(1)(b) of the LODR Regulations, which requires a listed entity to send a hard copy of the statement containing the salient features of all the documents, as specified in Section 136 of Companies Act, 2013, and rules made thereunder, to holders of non-convertible securities who have not so registered.
   - SEBI, in its circular no. SEBI/HO/CFD/CMD1/CIR/P/2020/79 dated May 12, 2020, relaxed the provisions pursuant to relaxations by the MCA *vide* circular dated May 5, 2020.
   - The MCA, *vide* circular dated September 25, 2023, has further extended the relaxation for dispatching of physical copies of the financial statements (including other documents required to be attached therewith) up to September 30, 2024. Accordingly, SEBI has decided to relax the requirements of Regulation 58(1)(b) of the LODR Regulations, up to September 30, 2024, with immediate effect.

   (Circular No. SEBI/HO/DDHS/P/CIR/2023/0164 dated October 6, 2023)

2. ***Relaxation from compliance with certain provisions of the LODR Regulations***

   - SEBI, in its circular dated October 7, 2023, in furtherance of the SEBI master circular dated July 11, 2023, and in accordance with MCA general circular no. 09/2023 dated September 25, 2023, relaxed the requirements of Regulation 36(1)(b) and Regulation 44(4) of the LODR Regulations till September 30, 2024.
   - As per Regulation 36(1)(b) of the SEBI LODR, listed entities must dispatch a hard copy of the statement containing the salient features of all the documents as prescribed under Section 136 of the Companies Act, 2013, or the rules made thereunder to shareholders who have not registered their email address with the listed entity or depository. In this regard, these listed entities were provided relaxation; however, the listed entities need to send a hard copy of their full annual reports to shareholders who have requested the same.
   - Further, the listed entities need not send proxy forms as required under Regulation 44(4) of the SEBI LODR regarding general meetings held electronically.

   (Circular No. SEBI/HO/DDHS/P/CIR/2023/0164 dated October 7, 2023)

3. ***Revision in manner of achieving minimum public unitholding requirement – Infrastructure Investment Trusts (InvITs)***

   SEBI, in its circular dated June 27, 2023, prescribed methods to achieve minimum public unitholding requirements for InvITs. Subsequently, the said circular was consolidated into the Master Circular for InvITs dated July 06, 2023 (**Master Circular**), as Chapter 21. Subsequently, in a circular dated October 31, 2023, SEBI introduced the following additional methods for privately placed InvITs to achieve minimum public unitholding requirements subject to certain conditions:

- Issuance of units by way of a preferential allotment;
- Sale of units held by sponsor(s) / investment manager / project manager and their associates/related parties in the open market;
- Sale of units held by the sponsor(s) / investment manager / project manager and their associates / related parties up to a maximum of 5 per cent of the paid-up unit capital of the InvIT during a financial year.

(SEBI Circular No. SEBI/HO/DDHS-POD-2/P/CIR/2023/174 dated October 31, 2023)

4. ***Procedural framework for dealing with unclaimed amounts lying with entities having listed non-convertible securities and manner of claiming such amounts by investors***

SEBI, in its circular dated November 8, 2023, has released a framework defining the procedure to be followed by listed entities for transfer of interest/dividend/redemption amounts lying unclaimed for 30 (thirty) days from the due date of interest/dividend/redemption payment to an escrow account and claim by an investor. Further, this circular also provides for a framework for the transfer of unclaimed amounts by listed entities (which are not companies) from escrow accounts to the Investor Protection and Education Fund (**IPEF**).

(SEBI Circular No. SEBI/HO/DDHS/DDHS-RAC-1/P/CIR/2023/176 dated November 8, 2023)

5. ***Procedural framework for dealing with unclaimed amounts lying with InvITs and Real Estates Investment Trusts (REITs) and manner of claiming such amounts by unitholders***

- SEBI, in its circulars dated November 8, 2023 (**Circulars**), has notified the framework and procedure to be followed by an InvIT and REIT for transfer of any amounts unclaimed or unpaid, out of distributions (unclaimed amounts) to the IPEF and manner of claiming the same by a unitholder.
- The Circulars also provide for the transfer of unclaimed amounts to an escrow account/unpaid distribution account set by the investment manager/manager on behalf of the InvIT or REIT, respectively, and the transfer of unclaimed amounts from the unpaid distribution account of the InvIT or REIT to the IPEF by the investment manager or manager, respectively. The investment manager/manager of the InvIT or REIT will formulate policies, specifying the process unitholders need to follow to claim their unclaimed amounts, and specify an internal policy laying down the process to be followed by the InvIT/REIT for verification of such claims.
- This is in furtherance to the provisions of the Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014 (**InvIT Regulations**) and the Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014 (**REIT Regulations**). SEBI has provided that any amounts unclaimed or unpaid out of distributions (unclaimed amounts) were to be transferred to the IPEF. Amendments were also made to the SEBI (Investor Protection and Education Fund) Regulations, 2009.

(SEBI Circular No. SEBI/HO/DDHS-RAC-1/P/CIR/2023/178 dated November 8, 2023 and SEBI Circular No. SEBI/HO/DDHS-RAC-1/P/CIR/2023/177 dated November 8, 2023)

6. ***Simplified norms for processing investor's service requests by registrars to an issue and share transfer agents (RTAs) and norms for furnishing PAN, KYC details and nomination***

- SEBI simplified the norms for processing investors' service requests by RTAs and those for furnishing PAN, KYC details, and nomination vide its circular dated March 16, 2023 (**March 16 Circular**). The March 16 Circular was rescinded by the SEBI Master Circular for RTAs bearing reference number SEBI/HO/MIRSD/POD-1/P/CIR/2023/70 dated May 17, 2023 (**May 17 Circular**). Para 19.2 of the May 17 Circular relates to simplification of norms for investors' service requests and norms for furnishing PAN, KYC details and nomination.
- In reference to Para 19.2 of the May 17 Circular, SEBI received the following representations and feedback from various investors and registrars' association of India:
  i. Challenges faced on account of freezing of folios and
  ii. Referral of folios to the administering authority under the Benami Transactions (Prohibitions) Act, 1988, and/or Prevention of Money Laundering Act, 2002 (**Administering Authority**).
- Owing to the highlighted issues, SEBI issued the circular dated November 17, 2023, amending Para 19.2 of the May 17 circular to delete the term *"freezing/frozen"* and did away with the requirement of referral of folios by RTAs/listed company to the Administering Authority.

(SEBI Circular No. SEBI/HO/MIRSD/POD-1/P/CIR/2023/181 dated November 17, 2023)

7. ***Extension of timelines for implementation of provisions of SEBI Circular dated September 20, 2023, on redressal of investor grievances through SEBI Complaint Redressal (SCORES) Platform and linking it to Online Dispute Resolution Platform***

   - SEBI, *vide* its circular dated December 1, 2023, extended from December 4, 2023, to April 1, 2024, the timeline to (i) apply for SCORES authentication and/or for Application Programming Interface (API) integration with SCORES by the designated bodies (including but not limited to stock exchanges, AIBI, and AMFI) (**Designated Bodies**); and (ii) implement provisions relating to the work flow of processing of investor grievances by entities and framework for monitoring and handling of investor complaints by the Designated Bodies.
   - The entities will continue to submit the Action Taken Report (**ATRs**) on SCORES within 21 days from the date of receipt of the complaint, as per the SEBI circular bearing reference number SEBI/ HO/ OIAE/ IGRD/ CIR/P/2023/ 156 dated September 20, 2023 (**September 20 Circular**).
   - Further, the September 20 Circular will rescind the Master Circular on the SCORES platform bearing the reference number SEBI/HO/OIAE/IGRD/P/CIR/2022/0150 dated November 7, 2022, with effect from April 1, 2024.

   (SEBI Circular No. SEBI/HO/OIAE/IGRD/CIR/P/2023/183 dated December 1, 2023)

8. ***Revised framework for computation of Net Distributable Cash Flow (NDCF) by InvITs and REITs***

   - Regulation 18(6) of the InvIT Regulations and the REIT Regulations require that the NDCF of an InvIT or REIT be computed at the level of the InvITs or REITs as well as at the holding company SPV level. The minimum distribution made shall be 90 per cent of the NDFC at both the levels. To promote ease of doing business, SEBI, in its circulars dated December 6, 2023, notified a standard framework for the calculation of available NDCF by InvITs and REITs.
   - The revised framework will be applicable with effect from April 01, 2024, and will supersede the earlier indicative framework set out in the Master Circular for Infrastructure Investment Trusts dated July 6, 2023, and the Master Circular for Real Estate Investment Trusts dated July 6, 2023.

   (SEBI Circular No. SEBI/HO/DDHS/DDHS-PoD-/P/CIR/2023/184 dated December 6,2023 and SEBI Circular No. SEBI/HO/DDHS/DDHS-PoD-/P/CIR/2023/185 dated December 6, 2023)

9. ***Amendment to SEBI circular on online resolution of disputes in the Indian securities market***

   SEBI had, pursuant to its circular no. SEBI/HO/OIAE/OIAE_IAD-1/P/CIR/2023/131 dated July 31, 2023, provided guidelines for online dispute resolution (**ODR**) in the Indian securities market and established a dispute resolution portal for online conciliation and arbitration (**ODR Portal**). Pursuant to feedback received, SEBI by way of this circular dated December 20, 2023 (**Circular**), made the following key modifications to the original ODR mechanism:

   - **Independent institutions:** Disputes between institutional or corporate clients and specified intermediaries / regulated entities could be resolved, at the option of the clients, through *inter alia* an independent institutional mediation, conciliation, or online arbitration institution in India. The "conciliation" should be "independent institutional conciliation," and the online arbitration institution should be "independent arbitration institution" in India. The Circular also provided that the seat and venue of mediation, conciliation, or arbitration be in India and be conducted online.
   - **Registration:** The Circular requires entities (issuers proposing to be listed or intermediaries) that obtain registration from SEBI after the date of implementation of the Circular to enrol in the ODR Portal immediately upon grant of registration or listing, as applicable.
   - **Applicability:** The Circular clarifies that in addition to instances provided in the Circular, a grievance may also not be redressed through the ODR Portal if it is against the Government of India, President of India, or any state government or governor. Further, the Circular provided that claims or disputes be initiated through the ODR

Portal, unless they are non-arbitrable in terms of Indian law (including when a moratorium under the Insolvency and Bankruptcy Code, 2016, is in operation or a liquidation or winding process has been commenced) or if they have been filed against the Government of India, President of India, or any state government or governor.

- **Deposit by Market Participants:** In case an investor or client initiates an online arbitration against a market participant, the market participant is required to make a deposit of 100 per cent of the admissible claim value with the relevant market infrastructure institution and pay the fees for online arbitration within 10 days of initiation of such online arbitration. A market participant wishing to pursue online arbitration is required to intimate the ODR institution within 10 days of the conclusion of the conciliation process and, within five days of such intimation, deposit 100 per cent of the admissible claim value with the relevant market infrastructure institution as well as the fees payable for online arbitration.
- **Fees:** Pursuant to the Circular, the fees for an arbitration process involving a claim above INR 50 lakhs was revised to between INR 50 lakhs and INR 1 crore shall include an arbitrator's fee of INR 1,20,000 and ODR institution fees of INR 15,000. Further, for claims above INR 1 crore, ad valorem fees at 1 per cent of the claim value or INR 1,20,000, whichever is more, shall be the arbitrator's fee and INR 35,000 shall be the ODR institution's fees.
- **Expanding the Scope of the ODR Mechanism:** The Circular expanded the scope of specified intermediaries and regulated entities against whom investors could invoke the ODR process. This now includes bankers to an issue, self-certified syndicate banks, merchant bankers, commodities clearing corporations (for any disputes on account on warehouse service providers or vault service providers), online bond platforms, and online bond platform providers. Further, the Circular expanded the scope of specified intermediaries and regulated entities against whom investors or clients may invoke the ODR process at their option to include commodities clearing corporations (for any disputes on account on warehouse service providers or vault service providers and depositors or ginners) and ESG ratings providers and their clients.

(SEBI Circular No. SEBI/HO/OIAE/OIAE_IAD-3/P/CIR/2023/191 dated December 20, 2023)

B. Amendments

1. *Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Fourth Amendment) Regulations, 2023*

- SEBI, in its notification dated September 19, 2023, amended the LODR Regulations, to introduce a new regulation 62A, which among other things, mandates an entity having listed non-convertible debt securities to list all of its non-convertible debt securities, proposed to be issued by it on or after January 1, 2024, on the stock exchange(s).
- Further, a listed entity, which has issued outstanding unlisted non-convertible debt securities on or before December 31, 2023, may list such securities on the stock exchange(s). Additionally, a listed entity proposing to list its non-convertible debt securities on the stock exchange(s) on or after January 1, 2024, shall be required to list all its outstanding unlisted non-convertible debt securities previously issued on or after January 1, 2024, on the stock exchange(s) within three (3) months from the date of the listing of the non-convertible debt securities proposed to be listed.
- Regulation 62A (4) also mentions the type of debt securities not required to be listed by a listed entity. Amongst other requirements, a listed entity proposing to issue securities under Regulation 62A(4) shall be required to disclose to the stock exchanges on which its non-convertible debt securities are listed, all the key terms of such securities, including embedded options, security offered, interest rates, charges, commissions, premium (by any name called), period of maturity and such other details as may be required to be disclosed by SEBI from time to time.

(Notification No. SEBI/LAD-NRO/GN/2023/151 dated September 19, 2023)

2. *Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2023*

SEBI has, *vide* notification dated October 9, 2023, amended the LODR Regulations to omit the timelines for verification of market rumours by the top 100 listed entities by market capitalisation and thereafter by the top 250 listed entities by market capitalisation. The effective date for the aforesaid verification requirement would be specified by the SEBI. Through a circular, SEBI has now fixed the new effective dates of implementation of the proviso to regulation 30(11) of the

LODR Regulations for top 100 listed entities by market capitalisation, as June 1, 2024 and for top 250 listed entities by market capitalisation, as December 1, 2024. This extension has been provided cconsidering the fact that the industry standards are under finalisation and certain amendments to LODR Regulations are required for implementation of the provision.

(Notification No. SEBI/LAD-NRO/GN/2023/155 dated October 9, 2023 and SEBI Circular No. SEBI/HO/CFD/CFD-PoD-2/P/CIR/2024/7 dated January 25, 2024)

3. ***Securities and Exchange Board of India (Infrastructure Investment Trusts) (Third Amendment) Regulations, 2023 (InvIT Amendment Regulations)***

Regulation 18(6)(e) of the InvIT Regulations requires that any unpaid or unclaimed distribution be transferred to the IPEF. The InvIT Amendment Regulations have clarified that such amounts transferred to the IPEF shall (i) not bear any interest and (ii) may be claimed by the investors in the manner as may be specified by SEBI.

(Notification No. SEBI/LAD-NRO/GN/2023/159 dated October 20, 2023)

4. ***Securities and Exchange Board of India (Real Estate Investment Trusts) (Third Amendment) Regulations, 2023 (REIT Amendment Regulations)***

Regulation 18(6)(f) of the REIT Regulations requires that any unpaid or unclaimed distribution be transferred to the IPEF. The REIT Amendment Regulations clarified that such amounts transferred to the IPEF shall (i) not bear any interest and (ii) may be claimed by the investors in the manner as may be specified by SEBI.

(Notification No. SEBI/LAD-NRO/GN/2023/160 dated October 20, 2023)

5. ***Securities and Exchange Board of India) (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2023***

SEBI, in its notification dated October 20, 2023, amended the LODR Regulations to improve the investor protection framework. Some of the key amendments are as follows:

- A new proviso stipulates that the amount transferred to the Investor Protection and Education Fund will not bear any interest.
- A new sub-regulation outlines the procedure for claiming unclaimed amounts transferred to the IPEF, which states that the unclaimed amount may be claimed in such manner as may be specified by the SEBI.

(Notification No. SEBI/LAD-NRO/GN/2023/158 dated October 20, 2023)

6. ***Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Seventh Amendment) Regulations, 2023***

SEBI, in its notification dated December 21, 2023, amended the LODR Regulations to modify the audit requirements applicable to social enterprises under the LODR Regulations. Pursuant to the amendment, a social impact assessment firm employing social impact assessor(s) would audit the annual impact report of a social enterprise.

(Notification No. SEBI/LAD-NRO/GN/2023/161 dated December 21, 2023

7. ***Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2023***

SEBI has, *vide* notification dated December 21, 2023, amended the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (**SEBI ICDR Regulations**) to modify disclosure and compliance requirements applicable to social enterprises and social stock exchanges under the SEBI ICDR Regulations. The key amendments were as follows:

- **Introduction of impact assessors and impact assessment:** The requirement of "social auditors" and "social audit firms" has been replaced with "social impact assessors" and "social impact assessment firms," respectively.
- **Access to social stock exchanges:** Access to social stock exchanges has been expanded to include retail investors as well, in addition to institutional and non-institutional investors.
- **Removal of certain conditions applicable to the issuance of zero coupon zero principal instruments by not-for-profit organisations:** The conditions applicable to issuance of zero coupon zero principal instruments by not-for-profit organisations, included minimum issue size, minimum application size and minimum subscriptions, have been omitted, and would instead be governed by any specifications to be made by SEBI in this regard.

(Notification No. SEBI/LAD-NRO/GN/2023/162 dated December 21, 2023)

C. Informal Guidance

1. ***Informal Guidance regarding interpretation of Regulation 3(2) and 3(3) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011***

   - An informal guidance was sought from SEBI on whether a proposed transaction of acquisition of shares by conversion of all pending warrants would trigger the open-offer obligation under Regulation 3(3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**Takeover Code**), pursuant to an increase in the individual shareholding of two promoters, even though the aggregate shareholding of the promoter / promoter group would not exceed the 5 per cent threshold under Regulation 3(2) of the Takeover Code.
   - Kreon Financial Services Limited (a listed entity) (**Company**) issued warrants on preferential basis to Mr. Jaijash Tatia, Ms. Henna Jain (together **Promoters**) and other investors, which were convertible into equity shares. Upon a partial conversion of warrants in FY 2023, the total promoter and promoter group shareholding / voting rights increased from 49.01 percent to 50.60 percent.
   - Based on the proposed allotment of the remaining warrants in FY 2024, the total promoter and promoter group shareholding/voting rights would increase from 50.60 per cent to 55.59 per cent. Further, the said acquisition will not result in any change in management or control of the Company. However, the increase in individual shareholding/ voting rights of the Promoters in FY 2024 will be beyond the 5 per cent threshold.
   - In its response, SEBI clarified that since the individual shareholding of the Promoters are below 25 per cent, the open offer obligation would not be triggered for them under Regulations 3(2) and 3(3) of the Takeover Code.

   (SEBI Informal Guidance No. SEBI/HO/CFD/PoD-2/OW/P/2023/29370/1 dated July 21, 2023, made public on October 25, 2023)

2. ***Informal Guidance regarding applicability of contra trade restriction under the PIT Regulations***

   - Rama Mines (Mauritius) Limited (**RMML**) and Australian Indian Resources Limited, Australia (**AIRL**) are the promoters of Deccan Gold Mines Limited (**DGML**). Yandal Investments Pty. Ltd. (**YIPL**) holds 48.98 per cent shares of RMML and 22.45 per cent of AIRL. Halcyon Investments Limited (**HIL**) holds 24.75 per cent of RMML and 30.88 per cent of AIRL. AIRL was allotted shares of DGML on March 2, 2023, which was subject to lock-in for a period of 18 months. RMML proposes to sell equity shares of DGML in the open market (stock exchange platform). In this regard, RMML has sought guidance on whether the provision of contra trades applies to trades made by an individual promoter or whether the entire category of promoter and promoter group is considered for the same.
   - As per Regulation 9 of the SEBI PIT Regulations and Clauses 3 and 10 of Schedule B of the SEBI PIT Regulations, provision of contra trade restrictions may apply to trades made by the promoter individually.
   - Against this backdrop, SEBI stated in its informal guidance that RMML and AIRL are both the promoters of DGML and both have common promoter shareholders

(i.e., HIL and YIPL) with majority shareholding in RMML and AIRL. Hence, since RMML and AIRL are being controlled by the same corporates, provision on contra trade will apply to RMML and AIRL jointly, i.e., if AIRL has purchased the shares of DGML, then restriction on contra trades would apply to AIRL and RMML.

(SEBI Informal Guidance No. SEBI/HO/ISD/ISD-PoD-2/P/OW/2023/0000029686/1 dated July 25, 2023, made public on October 25, 2023)

3. ***Informal Guidance on provisions of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2021***

- An informal guidance was sought from SEBI by Arihant Capital Markets Ltd. (**Applicant**) from SEBI in respect of Regulation 14 and Regulation 26(4) of the SEBI (Delisting of Equity Shares) Regulations, 2021 (**SEBI Delisting Regulations**).
- Marvel Vinyl Ltd. (**Company**) was delisted from BSE Limited with effect from September 15, 2022, pursuant to a delisting offer made by Sauve Enterprises Private Limited (**Acquirer**), for which the Applicant acted as the manager. In this regard, SEBI mandated certain additional requirements for compliance, extending the period for public shareholders who could not participate in the delisting offer to tender their equity shares for two (2) years from the date of delisting of equity shares. Therefore, the exit offer commenced from September 15, 2022, and the two-year mandated period would end on September 14, 2024.
- The Company now proposes to transfer its textile business to a newly incorporated company through a Scheme of Demerger (**Scheme**) to be filed with jurisdictional NCLTs. As a part of the Scheme, all shares held by the public shareholders in the Company would be cancelled and extinguished, and the Company intends to provide an exit option to the public shareholders by implementing a capital reduction for consideration.
- Accordingly, the Applicant sought guidance on whether the Company, instead of the Acquirer, can make the payment to the public shareholders, and if so, whether such a payment can be made through the capital reduction prior to the expiry of the two-year exit offer period mandated by SEBI.
- SEBI stated in the guidance that under Regulation 14 of the SEBI Delisting Regulations, the obligation to make payment in respect of the shares acquired in the delisting offer is on the acquirer alone. Therefore, the obligation to pay the remaining public shareholders is on the Acquirer and the requirement of exit offer period of two years would remain applicable.

(SEBI Informal Guidance No. SEBI/HO/CFD/PoD/OW/P/2023/40409 dated September 27, 2023, published on December 27, 2023)

4. ***Informal Guidance on disclosure of arbitration proceedings under Regulation 30 of LODR***

- Pursuant to the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2023, certain amendments were made to Regulation 30 and Schedule III of the LODR Regulations. Further, SEBI issued a circular titled *"Disclosure of material events/ information by listed entities under Regulation 30 and 30A of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015"* on July 13, 2023 (**SEBI Circular**).
- In this regard, the Company has sought guidance with respect to (a) whether details of arbitral proceedings of pending arbitration matters or arbitral awards can be disclosed to SEBI under Point No. 8 of Para B of Part A of Schedule III of the LODR Regulations, as it may contravene Section 42A of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**); and (b) whether "*cumulative basis*" as referred to in the SEBI Circular suggests that (i) in case of multiple litigations/cases with the same party, whether the claims by/against the said party in all such multiple litigations/ cases are to be taken together for arriving at the cumulative figure (deciding materiality), and (ii) in any single litigation/case, whether the claim by the listed entity and counter-claim against the listed entity needs to be added together to arrive at the cumulative figure (deciding materiality).
- Against this backdrop, SEBI stated in its informal guidance that (a) details of arbitral proceedings or arbitral awards can be made to the extent it is permissible under the Arbitration Act, including disclosure of the fact of initiation of the proceedings, the amount of claim involved, the court orders in relation to arbitration proceedings, etc.; and (b) the cumulative figure is to be arrived at by taking together the claims by/against a party in all ongoing litigations or disputes with the same party. However, claim by the listed party and counter-claim against the listed entity in any single

litigation/ case may not be added together or set-off for the purpose of arriving at the aforesaid cumulative figure.

(SEBI Informal Guidance No. SEBI/HO/CFD/CFD-PoD-2/P/OW/2023/40986 dated October 4, 2023)

5. ***Informal Guidance on lock-in requirements under ICDR on warrants issued by a listed company***

- The proviso to Regulation 167(2) of the SEBI ICDR Regulations provides that specified securities allotted on a preferential basis to persons other than the promoter and promoter group, and the equity shares allotted pursuant to exercise of options attached to warrants issued on a preferential basis to such persons would be locked in for a period of one year if such securities are not listed on stock exchanges. Further, Regulation 168(2) of the SEBI ICDR Regulations provides that the specified securities allotted on a preferential basis would not be transferable by the allottees until the trading approval is granted for such securities by all the recognised stock exchanges where the equity shares of the issuer are listed.
- Against this backdrop, SEBI stated in its informal guidance that specified securities, which include warrants, cannot be transferred until the trading approval is granted for such securities by all the recognised stock exchanges where the securities of an entity are listed.

(SEBI Informal Guidance No. CFD/PoD/OW/2023/45315/1 dated November 10, 2023)

6. ***Informal guidance on applicability of materiality thresholds under LODR applicable to a company pursuant to a demerger***

- Regulation 30(4)(I) of the LODR Regulations provides for criteria for determination of materiality of events/ information, under which the quantitative criteria is lower of the following:
  i. 2 per cent of turnover, as per the last audited consolidated finalised statements of the listed entity;
  ii. 2 per cent of net worth, as per the last audited consolidated financial statements of the listed entity; or
  iii. 5 per cent of the average of absolute value of profit or loss after tax, as per the last three audited consolidated financial statements of the listed entity.
- On the other hand, Annexure IV of SEBI circular dated July 13, 2023, on disclosure of material events/information of listed entities under Regulations 30 and 30A of LODR Regulations (**SEBI Circular**) provides that for a listed entity without a track record of three years of financials, say, in case of a demerged entity, the average may be taken for the period/number of years as may be available.
- In the present case, a composite scheme of arrangement (**Scheme**) was entered into between Aquaignis Technologies Private Limited, Euro Forbes Financial Services Limited, erstwhile Eureka Forbes Limited (**EFL**), Forbes and Company Limited (**FCL**), and Forbes Enviro Solutions Limited (**FESL**) and their respective shareholders with the effective date being February 1, 2022. Pursuant to the Scheme, the main business of

erstwhile EFL merged into FESL, which led to the Company, and which continued as a going concern. The Company is listed on BSE since March 16, 2022. Given that the erstwhile EFL merged into FESL, the previous year's number shown in Company's annual report for FY 2021–22 relate to FESL, which has relatively lower values under the profit or loss after tax criteria. Hence, due to the Scheme, it was leading to an extremely low materiality threshold for the Company.

- In this regard, the Company sought guidance with respect to the materiality threshold, which would be applicable to the Company and whether the threshold could be considered on the basis of revenue criteria and not profit after tax criteria.
- Against this backdrop, SEBI stated that the main business of erstwhile EFL was vested into FESL, whose name was changed to EFL, which got listed on BSE, However, FESL, now EFL, was in existence prior to merger and had a track record of three years. Hence, the Company is required to consider financials for the last three years for the criteria based on profit of loss after tax and the relaxation provided by the Circular may not be applicable to the Company. Accordingly, the materiality threshold to the Company for current financial year would be lower than the following:

  i. 2 per cent of turnover, as per audited consolidated financial statements of the Company for FY 2022-23;

  ii. 2 per cent of net worth, as per audited consolidated financial statements of the Company for FY 2022-23;or

  iii. 5 per cent of average of absolute value of profit or loss after tax, as per the audited consolidated financial statements of the Company for FY 2020-21, FY 2021-22 and FY 2022-23.

(SEBI Informal Guidance No. SEBI/HO/CFD/CFD-PoD-2/OW/P/2023/46659 dated November 23, 2023)

D. Consultation Papers

1. ***SEBI issues consultation paper on providing flexibility in provisions relating to trading plans under the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 (SEBI PIT Regulations)***

By way of consultation paper dated November 24, 2023 (**Consultation Paper**), SEBI had invited comments from the public on the recommendations made by a working group (**Working Group**) to review provisions relating to "trading plans" under the SEBI PIT Regulations in their report dated September 15, 2023. "Trading plans" refer to the mechanism by which persons perpetually in possession of unpublished price sensitive information (**UPSI**) may trade in securities in a compliant manner. The key amendments proposed by the Working Group to SEBI include the following:

- **Cool-off Period:** Reduction of the cool-off period between disclosure of the trading plan and implementation of the trading plan from six months to four months.
- **Minimum Coverage Period:** Reduction of the minimum coverage period for execution of trading plans from 12 months to two months.
- **Black-out Period:** Deletion of the requirement to observe a black-out period to provide flexibility to insiders to execute trades through trading plans. The Working Group noted that any concern in relation to the insider taking advantage of UPSI in their possession would be addressed by the requirement of a cool-off period and the public disclosure of the trading plan.
- **Price Limits:** Stipulation of upper and lower price limits for buy and sell trades, respectively, during formulation of a trading plans. Such price limits would be within 20 per cent of the closing price on the date of submission of the trading plan. If the price of the security at the time of execution were outside these price limits, the trade would not be executed. If the insider does not stipulate any price limits, then they would be required to undertake the trade irrespective of the prevailing price.
- **Contra-Trade Restrictions:** Contra-trade restrictions, which were previously not applicable to trades executed under a trading plan, are now proposed to be made applicable to such trades.
- **Disclosure of Trading Plan:** Introduction of a deadline of two days after the approval of the trading plan for the compliance officer to notify the trading plan to the stock exchanges where the securities are listed.
- **Disclosure of Personal Details of Insiders:** The Working Group considered alternative approaches to protecting the privacy of insiders at the time of disclosure of trading plans to the stock exchanges. These alternatives included (i) masking personal details (such as name, designation and PAN) of insiders in the trading plan, (ii) continuing with the existing disclosure of personal details (such as name, designation and PAN) of insiders, or (iii) making a confidential filing to the stock exchanges (with personal details) and a separate filing for the public (without personal details).

(Consultation paper on Providing flexibility in provisions relating to trading plans under the SEBI (Prohibition of Insider Trading) Regulations, 2015 dated November 24, 2023)

2. ***Consultation Paper on Amendments to Securities and Exchange Board of India Regulations on verification of market rumours***

By way of a consultation paper dated December 28, 2023, (**Market Rumour Consultation Paper**), SEBI has invited comments from the public on a proposal to amend SEBI Regulations with respect to verification of market rumours. The key aspects of the proposals are:

- Regulation 30(11) of the LODR Regulations requires certain listed entities *(the top 100 listed entities from February 01, 2024, and the top 250 listed entities from August 01, 2024)* to verify, confirm, or deny market rumours reported in the mainstream media pertaining to material events or information, within 24 hours of such reporting in the mainstream media. However, to facilitate the ease of doing business and to avoid false market sentiment or impact on the securities of listed entities, SEBI has proposed the material price movement framework as an alternative. According to this, the rumour verification requirement shall be applicable only if there is a material price movement in the securities of the listed entity. The parameters of the material price movement framework are as follows:
  i. For securities under a high price range, even a small percentage variation in the price would lead to a higher price variation in absolute terms, and therefore, differential percentage variation standards should be considered depending on the price range of the security.
  ii. Additionally, in order to factor in market dynamics, the price variation in the securities of the listed entity is proposed to be linked to movement in the Nifty50/Sensex (benchmark index).
  iii. Though the price variations could occur due to various factors, under the proposed framework, such material price movement would be attributable only to the rumour.
  iv. The timeline for verifying the rumour shall be within 24 hours of the material price movement, as opposed to within 24 hours of reporting in the mainstream media.
- As per the current SEBI Regulations, pricing of transactions relating to the securities of a listed entity are required to be based upon the market price of securities being traded on the stock exchanges. However, considering the susceptibility of market prices to such rumours, SEBI has proposed that an unaffected price should be considered when the listed entity confirms the market rumour due to material price movement. The key proposals in this regard are as follows:
  i. It is proposed that such an unaffected price be applicable for 60 days from the date of confirmation for such rumour till the 'relevant date' under the existing SEBI regulations (such as public announcement, board approval etc. as the case may be), and in case of a competitive bidding process for a potential M&A deal where the sole bidder has not been identified, such unaffected price should be applicable for 180 days from the date of confirmation of the market rumour till the 'relevant date' under the existing SEBI regulations.
  ii. In this regard, SEBI has noted 2 frameworks for considering the unaffected price. Under Framework A, the date immediately preceding the date of confirmation of the rumour shall be the relevant date for determining the 'unaffected price', and the look-back period for calculating the volume-weighted average price (**VWAP**) shall be the date preceding the new relevant date.
  iii. Under Framework B, the price variation due to the rumour and its confirmation may be excluded from the calculation of the VWAP, by attributing the daily variation in weighted average price from the date of material price variation till the end of the next trading day after the confirmation of the rumour, to such rumour and confirmation.
- There may be instances where the rumour may pertain to the promoters/ directors/ KMP of the listed entity, for which the entity may need to seek information in order to comply with Regulation 30(11) of the LODR Regulations. Therefore, SEBI has proposed to cast an obligation upon such persons to provide adequate, accurate, and timely response to queries raised by the listed entity.
- A rumour may not always result in material price movement in the scrips of the listed entity. Where such information is classified as UPSI by the entity but neither confirmed, denied, nor clarified, it is proposed that such media reports may not later be claimed to be generally available information by the insider.

(Consultation Paper on Amendments to SEBI Regulations with respect to Verification of Market Rumours dated December 28, 2023)

E. Board Meetings

1. ***SEBI Board Meeting on November 25, 2023***

SEBI, in its board meeting approved, *inter alia*, the following:

- **Facilitation of Small & Medium REITs (SM REITs) – Amendments to REIT Regulations for creation of a new regulatory framework:** SEBI approved amendments to REIT Regulations in order to create a regulatory framework for facilitation of SM REITs, with an asset value of at least INR 50 crore vis-a-vis minimum asset value of INR 500 crores for existing REITs. SM REITs would have the ability to create separate scheme(s) for owning real estate assets through special purpose vehicle(s) constituted as companies. The regulatory framework would provide the structure of SM REITs, migration of existing structures meeting certain specified criteria, obligations of the investment manager including net worth, experience and minimum unitholding requirement, investment conditions, minimum subscription, distribution norms, valuation of assets, etc.

- **Flexibility in the framework for social stock exchange (SSE):** To provide impetus to fund raising by not for profit organisations (**NPOs**) on the SSE, SEBI has approved: (i) reduction in the minimum issue size in case of public issuance of zero coupon zero principal instruments (**ZCZP**) from INR 1 crore to INR 50 lakhs; (ii) reduction in the minimum application size in case of public issuance of ZCZP from INR 2 lakhs to INR 10,000; (iii) changing the nomenclature of "social auditor" with "social impact assessor"; (iv) permitting NPOs to disclose past social impact report in the fund raising document as per their existing practice subject to disclosure of certain key parameters; and (v) permitting entities registered under section 10(23C) and 10(46) of the Income Tax Act, 1961 to raise funds through issuance and listing of ZCZP on the SSE.

- **Introduction of regulatory framework for index providers:** SEBI has approved a regulatory framework for registration of index providers, which license "significant indices" that would be notified by SEBI. The regulatory framework would be in accordance with IOSCO Principles for Financial Benchmarks would only be applicable to 'significant indices'.

- **Amendment to the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, to facilitate ease of compliance and strengthen protection of interest of investors in alternative investment funds (AIFs):** In order to facilitate ease of compliance and to strengthen investor protection in AIFs, SEBI approved, *inter alia*, the following proposals:

  i. Any fresh investment made by an AIF, beyond September 2024, would be required to be held in dematerialised form, with exemptions for certain existing investments made by AIFs. Additionally, exemptions have been included for investments held by certain specified schemes of AIFs.

  ii. The mandate for appointment of custodian, currently applicable to schemes of Category III AIFs and to schemes of Category I and II AIFs with corpus of more than INR 500 crore, would be extended to all AIFs.

  iii. AIFs would be allowed to appoint a custodian who is an associate of manager or sponsor of the AIF, subject to conditions similar to those prescribed under the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996, for permitting related party of a sponsor of a mutual fund to act as its custodian.

(SEBI Press Release No. 27/2023 dated November 25, 2023)

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FOREIGN EXCHANGE AND RBI UPDATES

1. ***Master Direction – RBI (Non-Banking Financial Company – Scale Based Regulation) Directions, 2023 (SBR Master Direction)***

   The RBI consolidated and amended the guidelines applicable to NBFCs through the SBR Master Direction to provide a streamlined regulatory framework for Non-Banking Financial Companies (**NBFCs**) and prevent their affairs from being conducted in a manner detrimental to the interest of investors and depositors. This supersedes the NBFC-Non-Systemically Important Non-Deposit taking (Reserve Bank) Directions and NBFC-Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016. RBI has followed a streamlined approach by consolidating all the NBFCs, except the expressly exempt ones, that would be governed by this Master Direction. Under the SBR Master Direction, the earlier classification of NBFCs based on asset size (i.e., systemically important and non-systemically important NBFCs) is brought to an end, while the classification of NBFCs based on: (a) acceptance of public deposits (i.e., deposit-taking and non-deposit taking); and (b) specialisation (factoring business, housing finance, microfinance, account aggregation, etc.) continues to be in force.

   (RBI Notification No. RBI/DoR/2023-24/106 DoR.FIN.REC.No.45/03.10.119/2023-24 dated October 10, 2023)

2. ***Foreign Exchange Management (Debt Instruments) (Second Amendment) Regulations, 2023***

   The Reserve Bank has amended certain parts of Schedule I of the Foreign Exchange Management (Debt Instruments) Regulations, 2019, which pertains to the purchase and sale of debt instruments by residents outside India. The key amendments are as follows:

   - Through the newly inserted sub-paragraph E to paragraph 1 of Schedule I, RBI has permitted persons resident outside India maintaining a rupee account in terms of Regulation 7(1) of the Foreign Exchange Management (Deposit) Regulations, 2016 to purchase and sell dated Government Securities/treasury bills.
   - As regards the mode of payment, the newly added para 2(4) states that consideration payable to such persons should come out of funds held in the rupee account.
   - Further, paragraph 4(2A) has been inserted, which provides that the sale/maturity proceeds (net of taxes) of such instruments held by such non-residents would be credited to their rupee account.

   (RBI Notification No. FEMA.396(2)/2023-RB. dated October 20, 2023)

3. ***Appointment of Whole-Time Directors at Private Sector Banks and Wholly-Owned Subsidiaries of Foreign Banks***

   - In order to address the need for an effective senior management team in banks to navigate through their challenges, the RBI has issued this circular. The circular applies to all private sector banks and wholly owned subsidiaries of foreign banks (excluding payments banks and local area banks), and requires the presence of at least two whole-time directors, including the MD & CEO, on their Boards.
   - Banks which do not currently meet this minimum requirement are required to submit proposals for appointment of whole-time directors under Section 35B(1)(b) of the Banking Regulation Act, 1949 (**Act**), within four (4) months of the date of issuance of the circular.
   - However, if the bank does not have an enabling provision for the appointment of whole-time directors in their

Articles of Association, they may seek for approvals under Section 35B(1)(a) of the Act so as to be able to comply with this circular.

(RBI Notification No. RBI/2023-24/70 DOR.HGG. GOV.REC.46/29.67.001/2023-24 dated October 25, 2023)

4. ***Regulation of Payment Aggregator – Cross Border (PA - Cross Border)***

The Department of Payment and Settlement Systems of the RBI issued the Circular on Regulation of Payment Aggregator – Cross Border, on October 31, 2023, bringing all entities facilitating online cross-border payments for import and export of goods/ services, under RBI's direct regulation, with such entities being termed as payment aggregators - cross-border. To know about the circular, please read our client alert article titled Cross-Border Payment Aggregator - New Licensing Regime of RBI.

(RBI Notification No. RBI/2023-24/80 dated October 31, 2023)

5. ***Investments in Alternative Investment Funds (AIFs)***

- In exercise of its power under the Banking Regulation Act, 1949, the RBI has imposed restrictions on Regulated Entities (**REs**) investments in AIFs. REs will not be able to make investments in any AIFs scheme that has downstream investments either directly or indirectly in a debtor company of the RE.
- Accordingly, if an AIF scheme, in which RE is already an investor, makes a downstream investment in any such debtor company, then the RE would liquidate its investment in the scheme within 30 days from the date of such downstream investment by the AIF.
- However, in case the REs are not able to liquidate their investments within the prescribed time limit, they would make 100 percent provision on such investments. Additionally, investment by REs in the subordinated units of any AIF scheme with a "priority distribution model" would be subject to full deduction from RE's capital funds.
- These changes have been introduced to address concerns relating to possible evergreening through this route of investment.

(RBI Notification No. RBI/2023-24/90 dated December 19, 2023)

6. ***Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023***

The RBI notified the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023 (**Regulations**), on December 21, 2023, which regulates the receipt of payment from a person resident outside India. The Regulations state that any person residing in India cannot make or receive payments from any person residing outside India unless permitted by RBI, allowed by the Foreign Exchange Management Act, 1999 (**Act**) or allowed by the rules or directions issued under the Act. Unless otherwise provided, any such receipt and payment would be made only through an Authorised Bank or Authorised Person in the following manner:

- For trade transactions (i.e. receipt/payment for export to or import) with:
  i. Nepal and Bhutan – In Indian Rupees provided that in case of exports from India where the Nepal Rashtra Bank has permitted the importer in Nepal to make payment in foreign currency; such receipts towards the amount of the export may be in foreign currency.
  ii. Member countries of Asian Clearing Union (**ACU**), other than Nepal and Bhutan – In Indian Rupees, provided in exports from India where the Nepal Rashtra Bank has permitted the importer in Nepal to make payment in foreign currency, such receipts towards the amount of the export may be in foreign currency.
  iii. Countries other than member countries of the ACU – In Indian Rupees or in any foreign currency.
- For transactions other than trade transactions with:
  i. Nepal and Bhutan – In Indian Rupees provided that in case of overseas investment in Bhutan, payment could also be made in foreign currency.
  ii. Other Countries – In Indian Rupees or any foreign currency.
- Payment and receipt in India for any current account transaction, other than a trade transaction may be made only in Indian Rupees.

(RBI Notification No. FEMA 14(R)/2023-RB dated December 21, 2023)

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