

VOLUME 6 | MAY 2021

# GNOSIS

*Victoriam Legalis - Advocates & Solicitors | Newsletter*



## *In this Month's Issue:*

<b>Media &amp; Entertainment</b>	<b>1</b>
<b>Technology &amp; E-Commerce</b>	<b>2</b>
<b>Fashion &amp; Sports Law</b>	<b>3</b>
<b>Corporate &amp; Commercial Law</b>	<b>4</b>
<b>Hospitality &amp; Real Estate</b>	<b>5</b>
<b>Litigation &amp; Dispute Resolution</b>	<b>6</b>
<b>Start-Up Advisory &amp; Consultancy</b>	<b>8</b>
<b>Crypto Regulations in India</b>	<b>9</b>
<b>Get in Touch</b>	<b>17</b>

We here, at Victoriam Legalis, believe in continuous learning and growth, and agree that one way to do the same is to keep up with the developments and changes taking place around us.

We live in an Information Age, and while there is no dearth of knowledge and information, we, through this newsletter, hope to give you a consolidated account of relevant updates and developments.

In light of the same, we present to you the first issue of our newsletter, which we hope, you find beneficial!

Happy Reading!



# Media and Entertainment

## 1. Compulsory License for COVID Drug Baricitinib sought by Natco Pharma

Indian generic drug manufacturer Natco Pharma Limited has filed an application for compulsory license to produce the COVID drug Baricitinib under Section 92 of the Patents Act, 1970 seeking the said license to produce the said drug at an affordable rate.

## 2. Tata Sons Pvt. Ltd. v. Dinesh Kumar: Delhi HC passes ex parte injunction restraining defendant's use of the well known mark TATA and TATA formative marks.

In a trademark infringement case, filed by proprietors of the well known mark TATA, against defendants' allegedly obtaining trademark registration in for the mark TATA BYE BYE and using the said mark for tyre repair patches for two and three wheelers, and thereby, infringing the plaintiff's trademark, the Hon'ble Delhi High Court granted an ex parte injunction restraining the defendants from manufacturing, selling, offering for sale, supplying, advertising, directly or indirectly dealing in any business unauthorizedly using the plaintiff's well known mark, TATA and TATA formative marks.

## 3. IPRS launches "IPRS for Fair Music" campaign on World Intellectual Property Day

Aimed at developing and promoting an equitable foundation for the music ecosystem in India, on 26th April 2021, i.e. the World IP Day, IPRS launched a week long program known as IPRS for Fair Music campaign. The campaign included several activities including a panel discussion, virtual knowledge sessions, felicitation of fair music partners to be organized to attain the above-noted objective of this event.

## 4. Report published by IMI (Indian Music Industry) claims loss of revenue due to policy gaps, potential to rival Europe's music industry in 10 years time

As per IMI's report, the Indian recorded music industry is losing revenue of around INR 2000 Cr – 3000 Cr due to policy gaps, lacunae in rules and regulations and other factors. The said report also claims that the Indian recorded music industry has the potential to rival the European Music Industry within 10 years' time.

## 5. US Puts India On Priority Watch List for Intellectual Property Protection

The United States has placed India and eight other countries on the Priority Watch List for IP protection and enforcement. The other countries that have been put on the list are Argentina, Chile, China, Indonesia, Russia, Saudi Arabia, Ukraine and Venezuela. In its "Special 301 Report" on the adequacy and effectiveness of US trading partners' protection and enforcement of intellectual property rights, these countries will be the subject of intense bilateral engagement during the coming year.





# Technology and E-Commerce Updates

## 1. WhatsApp Privacy Policy update violates Indian IT Laws: Centre tells Delhi High Court

The Centre told the Delhi High Court that it views the new privacy policy of WhatsApp as a violation of the Indian Information Technology (IT) law and rules, and sought directions to the social media platform to make it clear whether it was conforming to the same. The platform said there was no universal or uniform time limit after which it will start to delete accounts as each user would be dealt with it on case-to-case basis. The bench had issued notice to the Centre, Facebook and WhatsApp and sought their stand on one of the pleas by a lawyer who has claimed that the new policy violates users' right to privacy under the Constitution.

## 2. Twitter Blue paid subscription may launch for \$2.99 with 'Undo Tweet' feature

Twitter Blue may soon roll out as a paid subscription for the microblogging site with exclusive features such as "undo tweet". The paid service may also get a new "Collections" section that will allow users to save and organise their tweets. Twitter in February announced a "Super Follows" feature that will allow creators to charge their followers for exclusive content. Features includes the ability to undo a tweet for a short period of time after posting it to avoid mistakes. The time intervals for undoing tweets could be customisable and could be set according to a user's preference. Users may also be able to select where they'd want to apply the 'undo tweet' feature, with options including tweets, replies, tweetstorms, and quote tweets. The second paid feature is likely to be called 'Collections' that could allow users to save their favourite tweets and organise them in different sections.

## 3. RBI Guideline: Amazon cancels one-month Prime subscription in India, and discontinues free trial

Amazon will no longer offer monthly Prime membership in India, and the company has also stopped offering its free trial for Prime. The Amazon Prime subscription amount used to begin at Rs. 129 per month, but this starting pack has been removed by the company, after a new guideline from the Reserve Bank of India. The new rules ask for the implementation of an additional factor of authentication (AFA) for processing recurring online transactions. This would make monthly recharges cumbersome, and instead Amazon has simply removed the one-month option. RBI issued the framework to deploy AFA for recurring transactions worth up to Rs. 2,000 in 2019. It, however, extended that rule to transactions of up to a limit of Rs. 5,000 per transaction.

## 4. Clubhouse android beta to launch in India

Clubhouse announced its Android app beta rollout timeline for several countries including India. The app, that has been available on iOS for over a year, has been in beta testing on Android since early May but in the US only. Clubhouse started beta testing its Android app in the US in the first week of May with limited number of testers. About a week later, a public beta of the Android app was launched in the country. Now, the developers have shared through a tweet that the app is coming to the rest of the world with exact timelines for countries including Brazil, India, Japan, Nigeria, and Russia.





# Fashion & Sports Law Updates

## 1. Goat to rebrand and Goat Group to take trademarks

Goat has been making its name as a leader in “luxury investment pieces made from the finest cashmere, silk and wool. Now, after two decades in business, it is rebranding. Brand will change its name comes on the heels of the settlement of a years-long legal battle that Goat initiated against 1661, Inc., the parent company of Goat Group, the swiftly growing sneaker and fashion marketplace. The trademark infringement and breach of contract case got its start in December 2019 when Goat filed suit against 1661, Inc., arguing that the similarly-named resale upstart was willfully disregarding its well-established intellectual property rights, namely, its rights in the “Goat” trademark in the U.S., which Goat asserted that it has consistently used since 2003 and has “spent a substantial amount of time, money, and resources advertising its apparel under” that name. In accordance with the parties’ agreement, Goat has until November 2021 to formally complete the rebrand

## 2. Adidas launches Reebok Auction

Adidas has launched the sale of its Reebok brand in an auction which risks being affected by a political row over possible forced labour in China's western Xinjiang region. Adidas bought the U.S. fitness label for \$3.8 billion in 2006 to help compete with arch-rival Nike, but its sluggish performance led to repeated calls from investors to dispose of the brand, which is now expected to fetch only around 1 billion euros.

## 3. Monster Energy and Dorna Sports extend sponsorship agreement

Dorna Sports announces an extension to its partnership with Monster Energy, with a new multi-year agreement confirming the future of the longstanding collaboration. Monster will therefore continue to be a title sponsor of two Grands Prix, as well as enjoy a continued presence at a number of other Grands Prix. Monster will take top billing at two Grands Prix in 2021: The Grand Premier Monster Energy de Catalunya and the Monster Energy British Grand Prix. The iconic M first took centre stage at the French Grand Prix at Le Mans in 2010.

## 4. Chess focused sports agency launched

World Chess, the company behind the game-changing rise in the popularity of chess, launches a chess-focused sports marketing agency. It’s the world’s first sports agency focussed exclusively on chess. The agency, Chess and Company, represents top chess talents and events, and aims to help brands across transport, technology, retail, hospitality and luxury sectors, to connect with chess in a way that has a long-lasting effect on the sport and to bring 600 million chess players closer to the brand’s offerings.





# Corporate & Commercial Law Updates

## **1. SEBI notifies further amendments: SEBI (Alternative Investment Funds) (Second Amendment) Regulations 2021**

The Securities and Exchange Board of India has notified the Securities and Exchange Board has notified SEBI (Alternative Investment Funds) (Second Amendment) Regulations 2021 to further amend the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012. The amendments include several changes in Regulation 15 stipulating various categories of Alternative Investment Funds.

## **2. Circular on Business Responsibility and Sustainability Reporting issued by SEBI**

In a bid to bring sustainability reporting at par with financial reporting, Business Responsibility and Sustainability Report is a notable development over the previously existing Business Responsibility Reporting. As per the Circular issued by SEBI on May 10, 2021, gender and social diversity; disclosures on Social Impact Assessment, Rehabilitation and Resettlement, Corporate Social Responsibility and consumer complaints in terms of data privacy would be few aspects to be covered in the Business Responsibility and Sustainability Reporting.

## **3. IFSCA issues guidelines for issuance of Certificate of Deposit**

The International Financial Services Centres Authority (IFSCA) has issued guidelines for negotiable instruments issued in dematerialized form or as Usance Promissory Note against funds deposited at a Business Unit for a specified time period. These instruments are called Certificates of Deposit. Inter alia, these guidelines specify that minimum amount of a Certificate of Deposit shall be USD 2500 or equivalent in any convertible foreign currency.

## **4. Crypto exchanges want SEBI or a new entity as regulator, not RBI**

Cryptocurrency exchanges have communicated to the government that market regulator Securities and Exchange Board of India is more suited to regulate the space than the Reserve Bank of India. Exchanges reasoned that cryptocurrency assets, such as Bitcoin and Ethereum, are closer to commodities than currencies. The exchanges also proposed a new entity to regulate cryptocurrencies. The exchanges also proposed a new a entity to regulate cryptocurrencies.





## Hospitality & Real Estate

### **1. Builders seek loan restructuring and other forms of aid from RBI in wake of the COVID 19 crisis**

The Confederation of Real Estate Developers' Association of India (CREDAI), the apex body for private real estate developers in India, has urged that measures related to loan restructuring; applicability of interest moratorium and additional liquidity are required to offset the effects of the second wave of the COVID 19 pandemic on large businesses and labour-intensive sectors like real estate.

### **2. Federation of Associations in Indian Tourism and Hospitality (FAITH) recommends moratorium on interest to make it possible for tourism, travel and hospitality entities to generate cash flow**

Federation of Associations in Indian Tourism and Hospitality (FAITH), the policy federation of all national associations representing the complete tourism, travel and hospitality industry of India has submitted its suggestions to the Finance Ministry, the RBI and Tourism Ministry which include, inter alia, recommendations on calculation of outstanding dues, moratorium on interest and other measures to enable tourism, travel & hospitality entities to generate cash flows.

### **3. Karnataka High Court orders authorities to conduct surprise visits at hotels and other complexes to ensure compliance**

In wake of the ongoing surge in the COVID 19 pandemic crisis, the Hon'ble Karnataka High Court, directed the State Government of Karnataka and Bruhat Bengaluru Mahanagara Palike to conduct surprise visits and ensure that hotels, restaurants, apartment complexes etc. are compliant with the COVID related guidelines, rules and regulations.

### **4. FHRAI – Federation of Hotel and Restaurant Associations of India has requested State Chief Ministers to provide facilitative environment for survival and revival of hospitality Sector**

In wake of rising COVID 19 cases and restrictions issued by several States, the FHRAI has pleaded the state heads for relaxations or waiver of statutory payments such as electricity charges, property taxes, excise license fees in order for the hospitality sector's survival and revival to be facilitated amidst the ongoing crisis.

### **5. Maharashtra Tourism opens “Industry Status” Applications for non-classified hotels**

The Government of Maharashtra has recently announced criteria for levying of taxes and charges at industrial rates for non-classified hotels. The application process related to the same is also now open on the official website of Maharashtra Tourism. The Industrial Concessions specified as per the criteria shall be applicable from the date of registration certificate of the applicant hotel being issued.





## Litigation & Dispute Resolution

### **1. Madras HC judge seeks session with a psychologist to understand same-sex relationships**

Madras High Court Justice N Anand Venkatesh in a case pertaining to the same-sex couple said he has decided to undergo an educational session on same-sex orientation and relationship with Vidhya Dinakaran, a city-based psychologist while hearing the petition. The Hon'ble Justice further observed that the words in the judgement should come from the heart and not from the head and the same shall only possible with the proper understanding of the subject.

### **2. No Aadhaar, no vaccine? Bombay HC asks govt to clarify the stand.**

The Bombay High Court bench comprising of Chief Justice Dipankar Datta and Justice GS Kulkarni in a plea has directed the Centre and Maharashtra Government to furnish clarification on making Aadhar card mandatory for getting Covid 19 vaccine. The Hon'ble Court observed that State Government should develop an alternate system for vaccination of citizens, especially the prisoners who may not have Aadhaar card.

### **3. Supreme Court restores order extending limitation; period from 14.03.2021 excluded from computing limitation period until further orders**

The Supreme Court bench comprising of Chief Justice of India NV Ramana, Justices Surya Kant and AS Bopanna has passed an order in suo moto case for the extension of the limitation period under the Limitation Act for filing of cases before various Courts and Tribunals in view of the hardship faced by litigants amidst the second wave of Covid 19 pandemic in the country. The limitation period shall be in effect from 14/03/2021 until further orders.

### **4. President Ram Nath Kovind clears the appointment of Justice NV Ramana as the next Chief Justice of India**

Justice N.V. Ramana is all set to take charge as 48th Chief Justice of India on April 24 and is due to retire on August 26, 2022. Justice Ramana was elevated as the Chief Justice of Delhi High Court on September 2, 2013, and later as a judge of the Supreme Court on February 17.

### **5. Online dispute resolution to decentralise justice delivery system, says Justice Chandrachud**

Justice Chandrachud of Supreme Court of India at the launch of the Niti Ayog Online Dispute Resolution Handbook observed that the Online Dispute Resolution process has the potential to decentralized and democratize the justice delivery system for citizens. Amitabh Kant CEO of Niti Ayog said that ODR uses the technology to proactively access efficient and affordable justice delivery

### **6. When Parties Change 'Venue of Arbitration' By Mutual Agreement, Changed Venue Becomes 'Seat of Arbitration': Supreme Court**

In the case of M/s Inox Renewables Ltd v Jayesh Electricals Ltd. – Civil Appeal 1556 of 2021, the Supreme Court held that a change of venue of arbitration by mutual consent of the parties amounts to a change of the seat of arbitration. The Hon'ble Court observed that the change of venue of arbitration from Jaipur to Ahmedabad shall divest court in Rajasthan of exclusive jurisdiction over the present dispute.



## **7. Indian Parties Can Choose A Foreign Seat for Arbitration: Supreme Court**

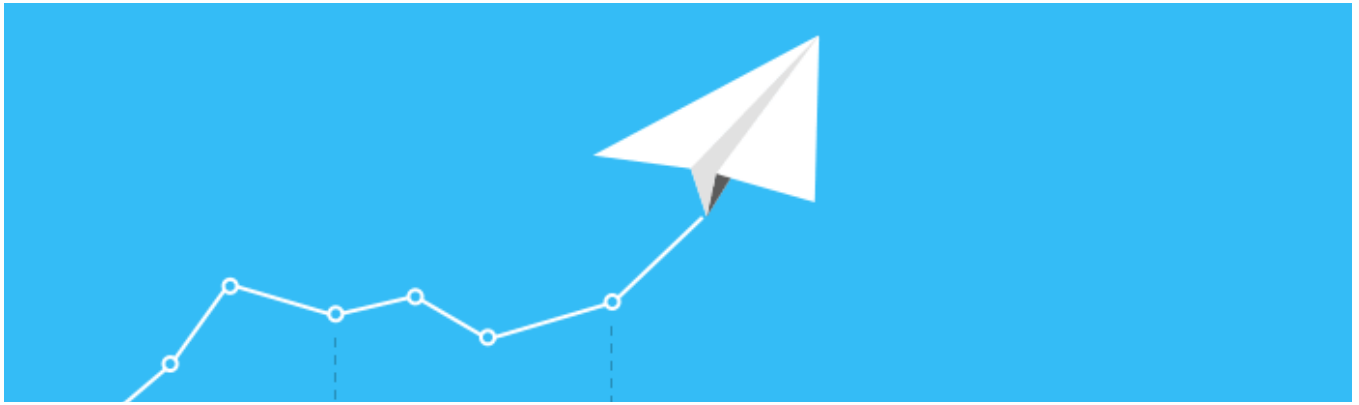
The Supreme Court comprising of Justice B.R. Gavai Justice Hrishikesh Roy & Justice Rohinton Fali Nariman in the case of PASL Wind Solutions Private Limited Vs. GE Power Conversion India Private Limited – Civil Appeal 1647 of 2021 held that parties to the contract who are Indian nationals or Companies incorporated in India can choose a forum for arbitration outside India. The Hon'ble Court observed that section 28 (1) does not make any reference to arbitration being conducted between two Indian parties in a country other than India.

## **8. Deutsche Telekom petitions US court to enforce a \$1.2 billion arbitration award against Antrix**

Deutsche Telekom has moved the US Supreme Court praying for the execution of a 1.2 Billion Dollar compensation award against Antrix Corporation, the commercial wing India's space agency for breach of satellite contract with Devas Multimedia. German Telecom company being the strategic stakeholders of Devas Multimedia argued that India being the signatory to New York Convention, cannot claim immunity in the US Court and further contending that India has not preferred an appeal against the final award passed by ICC within the limitation period stipulated under the Swiss law.







## Start-Up Advisory & Consultancy

### **1. Funding alert: CoinSwitch Kuber raises \$25M from Tiger Global at over \$500M valuation**

Startup CoinSwitch is a cryptocurrency investment/trading platform, has raised 25 million dollars of funding in a Series B round from Tiger Global Management. Earlier in January, the startup had raised 15 million dollars in series A funding from Ribbit Capital, Paradigm, Sequoia Capital India. The startup shall be using the fund for enhancing technology as well as boosting its product and security capabilities. The startup founded in 2017 by Ashish Singhal, Govind Soni and Vimal Sagar Tiwari launched its cryptocurrency investment and trading platform in June 2020. The platform has now around 4.5 million user clocking 5\$ billion transactions in volume in March 2021.

### **2. Startup India seed fund scheme to support domestic entrepreneurs, their business ideas**

The Government of India announced the Startup India seed fund scheme for supporting domestic entrepreneurs in their initial stage. Under the scheme corpus of Rs, 945 Crore shall be disbursed over to eligible applicants over the next 4 years. The government has appointed an Expert Advisory Committee for overall execution and monitoring of the scheme.

### **3. Ola Electric announces launch of EV hypercharger network; to build 100,000 stations in 5 years**

Ola co-founder and group CEO Bhavesh Agrawal made an announcement of Ola Electric's Hypercharger Network in a virtual press conference. Ola Electric is aiming to create the world's largest 2 wheeler electric charging network by building 100,000 charging points across 400 cities in five years. The CEO in the statement stated the fully automated Ola electric factory has the capacity to manufacture 10 million electric 2 wheelers by the June of 2022.

### **4. Earth Day 2021: Ratan Tata recognises sustainable innovations by young innovators**

On the occasion of Earth Day, Tata Chairman, Ratan Tata took to Instagram to appreciate the effort taken by the young entrepreneurs and innovator who have undertaken efforts to protect and conserve the planet with conviction. Mr Tata also shared the innovative steps taken by various organization and individuals in the conservation of the environment.





# Crypto Regulations in India

- Adesh Agarkar

The usage of blockchain was first envisaged in the year 1995 but due to lack of infrastructure and the high cost of a personalized computer, the idea could not be realized towards its full potentials. In the year 2008, a person by the name of Satoshi Nakamoto published a white paper<sup>1</sup> describing a system for peer-to-peer electronic cash payments, using a public decentralized ledger known as a blockchain and cryptography as a source of trust to verify transactions. The paper proposed to introduce trust by way of blockchain which shall act as a shared database without the need of central intermediaries, distributed across a vast peer to peer network ensuring validation of transaction by the unique algorithm in the blockchain which prevents the members from rigging the system. Blockchain technology which is still in the nascent stage is being widely accepted by a large number of corporations, individuals irrespective of geographical boundaries around the world. There is no central authority over virtual currencies, either within and across jurisdictions and the complexity of underlying technology is such that state authorities/regulators are yet to come out with a clear position on various issues. This article attempts to discuss and raise awareness amongst the viewers of rapidly evolving blockchain technology and unresolved regulatory issues concerning India.

## **NEED OF A REGULATORY APPROACH**

Crypto-currency is an ecosystem at large that includes miners, nodes, traders, crypto-currency exchanges, hash power rental companies, utility companies that issue tokens and the casual consumer/customer who invests in

bitcoins and various other Altcoins. Cryptocurrency needs regulatory safeguards that financial institutions and markets have to regulate the space in which they function and proper security infrastructure to gain the confidence of the investors. The Crypto space if left unchecked will lead to manipulation and volatility which in turn could pose risk to the health and stability of developing economies.

## **THE BEGINNING OF CRYPTO REGULATIONS IN INDIA**

After the publication of the bitcoin white paper in 2009, the cryptocurrency started making its presence felt in every major country. Regulatory authorities of various countries including India issued a notification<sup>2</sup> in 2013 warning investor of the risk of trading digital currencies. The notification stated that there is no central authority to govern or validate the transactions and that the crypto exchanges being based in various countries there are no cross-border regulations to govern such entities. Thereafter in the year 2017, the Ministry of Finance issued a statement stating that cryptocurrencies pose a heightened risk of an investment bubble of the type seen in Ponzi schemes. That in the light of the previous circulars issued regarding the risk associated with dealing cryptocurrencies, RBI issued a fresh circular in the year 2018 banning the trade of cryptocurrencies/digital assets/virtual currencies and further it was decided that entities regulated by RBI shall not deal and provide any services related to

<sup>1</sup>Bitcoin: A Peer-to-Peer Electronic Cash System - Satoshi Nakamoto

<sup>2</sup>[https://www.rbi.org.in/Scripts/BS\\_PressReleaseDisplay.aspx?prid=30247](https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=30247)



cryptocurrencies with immediate effect<sup>3</sup>. The said circular was challenged by way of a writ petition<sup>4</sup> before the Supreme Court of India by the Internet and Mobile Association of India (IAMAI). The Supreme Court in said writ petition held that all those who carry out the crypto-asset business activity (other than those who do so as a hobby without any expectation of profit) are entitled to the right under Article 19(1) (g) in respect of such activity. The decision enshrined the fundamental right of an individual to participate in technological and mathematical innovations acknowledge by leading institutions and corporations.

The IMAI Judgment created a positive atmosphere in the crypto community and the need was felt to initiate dialogue with the Indian policymakers and regulators for creating a crypto regulatory framework in India<sup>5</sup>. The laws/regulation/circulars referred to in this article are all of the general application and have been discussed here as we interpret them in the context of virtual currency since there is no specific legislation regulating the virtual currency in India.

### ***THE AMBIT AND APPLICABILITY OF THE EXISTING INDIAN LAWS FOR REGULATION OF CRYPTOCURRENCIES IN INDIA***

#### **A. Securities And Investment Laws And Prospective Scope Of Virtual Currencies (VC) as Securities**

The use of Virtual Currency (VC) has fuelled various debates within the regulatory community and to that effect, various surveys were conducted to study the facets of blockchain technology and VC attached to it. The surveys suggested various changes in existent regulatory structures to encompass the virtual currencies in the said framework. In permissionless ledgers (public Blockchains like Bitcoin or Ethereum) a need for an incentive mechanism is felt to guarantee that block validators do their job according to the predefined rules<sup>6</sup>. This has given rise to different classes of cryptocurrencies and accordingly, the application of law shall be different for each class. As the law currently stands, there is no clear definition of virtual currencies, crypto assets or cryptocurrencies in India.

As far as the definition of security defined in the Securities Contracts (Regulation) Act, 1956 (SCRA)<sup>7</sup>, virtual currencies do not fall within the enumerated items of the definition as the items under the definition derive their value from an underlying asset. However, virtual currencies like Bitcoin and Ether do not have underlying assets. Rather, the value is determined purely based on demand and supply. Further, virtual currencies such as Bitcoin often do not have an identifiable issuer, unlike the items in the definition of a security under Indian law.<sup>8</sup> Though some categories like an offering of tokenized share, debt securities, funds to the community at large for raising capital can be considered as securities under section 2 (h) of SCRA. The token offering in the crypto space is generally equated with the initial public offering of securities as offering their products and services, usually related to the cryptocurrency and blockchain space. There is no exhaustive definition of coin offering but efforts are being made to distinguish them from other forms of digital assets.

**The Swiss Financial Market Supervisory Authority, FINMA**, released guidelines to support the issuance of ICO and said will base its assessment on the underlying economic purpose of an ICO<sup>9</sup>. FINMA is of the view that a holistic approach should be adopted and assessment should be on a case to case basis. It further stated that -

**“Financial market laws and regulations are not applicable to all ICOs. Depending on the manner in which ICOs are designed, they may not in all cases be subject to regulatory requirements. Circumstances must be considered on a case-by-case basis. As set out in FINMA Guidance 04/2017, there are several areas in which ICOs are potentially impacted by financial market regulation”.**

FINMA classification of ICOs is widely adopted and cited in various reports though the actual usage is yet to be implemented in the legislation all over the world. In the Indian context the NITI Ayog, an advisory body under the Government of India, has released a comprehensive report<sup>10</sup> on the usage of blockchain technology in India but the report does not talk about the regulatory measure to be adopted by the Indian legislature.

<sup>3</sup><https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI15465B741A10B0E45E896C62A9C83AB938F.PDF>

<sup>4</sup> Internet and Mobile Association of India Vs Reserve Bank of India, 2020 SC Online SC 275

<sup>5</sup><https://www.moneycontrol.com/news/business/personal-finance/sc-verdict-on-cryptocurrencies-what-it-means-for-investors-5070381.html>

<sup>6</sup><https://blockchainhub.net/tokens/>

<sup>7</sup> Securities Contracts (Regulation) Act, 1956 (SCRA) – section 2(h)

<sup>8</sup> The Virtual Currency Regulation Review - India, Chapter 13.

<sup>9</sup><https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/>

<sup>10</sup>NitiAyog Report - Blockchain: The India Strategy – Part 1



It is pertinent to note that countries like Australia, the United Kingdom, the United States of America etc have amended their existing laws to bring different classes of crypto-assets into the purview of their legislation. The India Government should also adopt the legislative approach taken by countries around the world. Retrospective/prospective amendments should be carried out in Penal Code, Evidence Act, Stock Brokers and Sub – Brokers Regulation -1992, Consumer Protect Act, Foreign Exchange Management Act etc. The recent amendment to Company Rules and Regulation Schedule 7<sup>11</sup> stating that Indian companies dealing with digital currencies shall make a disclosure about the transactions in relevant format with the Registrar of Companies. Amidst the rising uncertainty in the crypto space in India, it has fuelled the debate about the blanket ban on the trading of cryptocurrencies in India and contrary to the RBI circulars and speculations; the Current Finance Minister in her interview to India Today Conclave<sup>12</sup> has assured about the Government's holistic approach taken while drafting the crypto regulations and stated that:

***“From our side, we are very clear that we are not shutting all options. We will allow certain windows for people to do experiments on blockchain, bitcoins or cryptocurrency,”***

Ripple lab Inc, an American Fintech company that has developed the Ripple payment protocol and exchange network, was faced by a lawsuit initiated by the Security and Exchange Commission (SEC), the USA for allegedly financing the blockchain company by raising capital through unregistered digital asset security offering between the period of 2013 to 2020<sup>13</sup>. The Ripple case as it is known in the crypto space shall be a precedent for the crypto regulation for digital coin offering.

## **B. Money Laundering Laws and Money Transmission Requirements**

The (Indian) Prevention of Money Laundering Act, 2002 ("PMLA") sets out the legislative framework for the prosecution of the offence of 'money

laundering in India. The PMLA criminalizes 'money laundering' and allows for the provisional attachment leading up to the confiscation of the 'proceeds of crime'. Section 2 (u) of the Act defines proceeds of crime as ***“proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property.”***

The application of PMLA to cryptocurrencies transition is a grey area but as per the recent Supreme Court Judgment in IAMA<sup>14</sup> holding the RBI circular unconstitutional, there have been rare instances where Indian citizens were indulging in unlawful activities related to digital assets for making illegal transfer USDT<sup>15</sup> to unknown shell companies incorporated in China.<sup>16</sup> It is important to note that currently at this point there are no known Your Client (KYC) and Anti Money Laundering (AML)/Counter-Terrorism Financing (CTF) mechanism in place for prohibiting illegal activities in relation to crypto trading in India. Several Crypto Currency exchanges have collectively reached out to Finance Minister Nirmala Sitharaman and the Central Bank proposing a solution-based approach for regulation of crypto trading. Sathvik Vishwanath, co-founder and CEO of Unocoin, the oldest crypto exchange in India. Stated that:

“The industry as a whole has begun self-regulation and implementing KYC procedures to prohibit illicit activities,” Vishwanath said. “We have created a unified procedure that gets followed among the exchanges so that when we try to represent as an association in front of the ministry, we will have a concrete method which could add to our credibility<sup>17</sup>”

**RBI vide its Master Direction Know Your Customer (KYC) Directions, 2016** states that “In terms of the provisions of Prevention of Money-Laundering Act, 2002 and the Prevention of Money-Laundering (Maintenance of Records) Rules, 2005, as amended from time to time by the Government of India as notified by the Government of India, Regulated Entities (REs) are required to follow

<sup>14</sup>See *Supra* note 4

<sup>15</sup>White Paper - Tether: Fiat currencies on the Bitcoin blockchain

<sup>16</sup><https://www.businesstoday.in/current/economy-politics/rs-1100-crore-hawala-scam-and-a-cryptocurrency-trader-chinese-firms/story/424675.html>

<sup>17</sup>[https://economictimes.indiatimes.com/tech/technology/latest-outreach-by-crypto-exchanges-addresses-governments-concerns/articleshow/81739103.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/tech/technology/latest-outreach-by-crypto-exchanges-addresses-governments-concerns/articleshow/81739103.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>11</sup>Amendment to Schedule III of the Company Act. Government of India Ministry Of Corporate Affairs Notification New Delhi, 24th March, 2021

<sup>12</sup><https://www.indiatoday.in/business/story/not-shutting-all-options-on-cryptocurrency-says-finance-minister-nirmala-sitharaman-at-india-today-conclave-1779328-2021-03-15>

<sup>13</sup><https://www.sec.gov/news/press-release/2020-338>



certain customer identification procedures while undertaking a transaction either by establishing an account-based relationship or otherwise and monitor their transactions”. Chapter IV of the PMLA (Obligations of Banking Companies, Financial Institutions and Intermediaries) makes it compulsory for the institutions mentioned under the said chapter, to maintain a record of the transaction with its Clients with the procedure and manner as may be specified by the Reserve Bank of India. In the light of these relevant provisions under PMLA, it is unclear whether the regulatory authority established under the act has jurisdiction to govern the entities in dealing with cryptocurrency exchanges and there shall be difficulty in framing charges under the Act against the accused person. India being the signatory of Foreign Account Tax Compliant Act (‘FATCA’)<sup>18</sup> and Common Reporting Standards (‘CRS’),<sup>19</sup> norms which obligate reporting financial institutions (‘RFI’)<sup>19</sup> which obligates financial institutions on reporting of information regarding offshore tax invasion. (However, the framework under FATCA and RFI has not yet specified crypto exchanges as recognized institutions. In view of the uncertainty looming in the Indian regulatory space, several countries have introduced legislation to establish a regulatory framework. Australia’s Australian Investment and Security Commission (AISC) hold the view that Australian legislative obligations and requirements are technology-neutral. AISC states that: **“Our regulatory regime is principles-based and operates in a technology-neutral way”**.<sup>20</sup> Similarly, in view of the growing significance of FinTech innovations and their interactions with the financial sector as well as the financial sector entities RBI has also taken a similar approach towards maintaining a technologically neutral approach while dealing with technological advances in the report of the Inter-Regulatory Working Group on FinTech and Digital Banking<sup>21</sup> in February 2018 suggested that:

**“6.1.11 It is possible, however, to outline a number of general regulatory principles. The first should be to maintain a neutral stance with regard to technological advances. Regulations should foster healthy competition between players, regardless of whether they offer conventional approaches or use new technological solutions. We need to avoid putting unnecessary obstacles to growth for new entrants”**.

The Government Of India Ministry of Finance (Department Of Revenue) formulated rules<sup>22</sup> for maintenance of records and procedure and manner for maintaining records and verification of records of the clients of the Banking companies. The Virtual currency blockchain does create a technology to enable the transfer of value from person to person and hence enables payment to be effected between parties. Taking into consideration this argument, many virtual currency blockchains may amount to payment systems, requiring the entities commencing or operating them to obtain authorisation under the PSS Act<sup>23</sup>, therefore the RBI shall make it mandatory for cryptocurrencies exchanges and virtual currency blockchain entities to seek authorization for commencement of crypto payment system.

## C. Taxation And Cryptocurrency

### 1. Direct Tax

Taxation in India is governed by Income Tax Act 1961. Under the Act, Indian residents are subject to tax on the wealth generated worldwide and Non resident are taxed on the income generated in India only.

The ITA stipulate Income Tax (Direct Tax) and Good and Service Tax. In term of cryptocurrency trading, the issue `whether the income from the digital currencies is treated as capital gains or profit and gain of business or profession?

The nature of the transaction ~~nature~~ and parties to the transaction would decide if it may be taxable under the Income Tax Act, 1961, or Central Goods and Services Tax Act, 2017, and other laws.

<sup>18</sup> The Income Tax Act, 1961, Section 285BA (India is a joining party to a currently 100-member states strong Multilateral Competent Authority Agreement)

<sup>19</sup> The Income Tax Rules, 1962, Rule 114F(7) (Reporting Financial Institution)

<sup>20</sup> **An Australian regulator’s view on financial technology - A speech by ASIC Commissioner Cathie Armour at the China Financial Summit 2019, 22<sup>nd</sup> China Beijing International High-Tech Expo, Beijing, 23 October 2019.**

<sup>21</sup> <https://m.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=892>

<sup>22</sup> DNBS(PD). CC 68 /03.10.042/2005-06 - Prevention of Money Laundering Act, 2002 - Obligations of NBFCs in terms of Rules notified thereunder

<sup>23</sup> <https://thelawreviews.co.uk/title/the-virtual-currency-regulation-review/india>



As Ministry of Finance under circulars expressly stated the Cryptocurrencies are not legal tender. Considering the view adopted by various Countries cryptocurrencies as goods/property, then clearly it would be either covered within the charging provision of 'Profit and Gains from Business and Profession'<sup>24</sup> or 'Income from Capital Gains'<sup>25</sup>, depending upon its use for business/profession or not. It would not be out of place to state that any profits or gains arising from the transfer of a capital asset effected in the previous year will be chargeable to income-tax under the head 'Capital Gains' unless expressly exempted.

Sec 2(14) of the IT Act defines a capital asset as "property of any kind held by the assessee whether or not connected with his business or profession". The term "property" is a term of the widest import and subject to any limitation which the context may require, it signifies every possible interest which a person can clearly hold and enjoy<sup>26</sup>, therefore, any gains arising out of the transfer of cryptocurrency must be considered as capital gains if they are held for investment.

## 2. **Indirect Tax**

The applicability of GST on a virtual currency depends on whether the virtual currency may be considered as 'goods'. As mentioned in Section I, there is no law that expressly classifies virtual currencies as goods. Although the Supreme Court in the *IAMAI* case<sup>27</sup> considered whether virtual currencies can be categorized as money or goods (or commodities)<sup>28</sup> Further, the Tariff Schedule for Goods currently contains no specific category for virtual currencies but it does contain a residuary category of goods. Virtual currencies may therefore fall within the residuary category.<sup>29</sup>

In the case of *Tata Consultancy Services v. State of Andhra Pradesh*,<sup>30</sup> the Supreme Court Constitution Bench considered whether certain Software fall within the meaning of goods under Goods and Service Tax? The Supreme Court observed that the term 'goods' has been defined in the Act as also in

Clause (12) of Article 366 of the Constitution to include all type of tangible and intangible goods, articles therefore the transaction sale of computer software is clearly a sale of 'goods'.

While the judgment was not in the context of a cryptocurrency or the definition of goods under FEMA it provides useful interpretational guidance for the classification of cryptocurrencies on case to case basis.

## D. Cross Border Regulation

Under the Foreign Exchange and Management Act 1999, if a person residing in India for more than 182 days in the preceding financial year enters into a transaction with a person resident outside India, it will be considered as export and import and accordingly, the provisions of FEMA can be applied to the cryptocurrency transaction. The transactions mentioned above can be classified as capital and current account transactions in which a person can be permitted to send money outside India.

**Capital Account Transaction -sec 2(e) of FEMA** as a transaction that alters the assets or liabilities outside India of persons resident in India or assets or liabilities in India of persons resident outside of India. Capital Account transaction includes a list of transactions stipulated under section 6 (3) of FEMA.

In case of purchase of cryptocurrency by the buyer from a seller resident outside India, the currency gets transferred into the wallet of the buyer and the buyer will have exclusive rights over such currency. In such a case, the situs i.e. the location of assets (i.e. cryptocurrency) for legal purposes, will be India. Therefore, the purchase of cryptocurrency does not alter the assets or liabilities outside India of the buyer and accordingly, the transaction of the buyer residing in India do not come under the capital transaction.

Similarly, an Indian seller sells cryptocurrency to the buyer resident outside India, then the seller shall have no right over the assets therefore the transactions of the seller residing in India do not come under the capital transaction.

**Current Account -Section 2(j)**<sup>31</sup> - "current account transaction" means "a transaction other than a capital account transaction. A current transaction

<sup>24</sup> Section 28 of Income Tax Act 1961

<sup>25</sup> Sec 45(1) the Income Tax Act, 1961

<sup>26</sup> Ahmed G.H. Ariff v. CWT [1970] 76 ITR 471 (SC).

<sup>27</sup> See Supra note 4

<sup>28</sup> <https://thelawreviews.co.uk/title/the-virtual-currency-regulation-review/india>

<sup>29</sup> See Supra note 28

<sup>30</sup> *Tata Consultancy Services v. State of Andhra Pradesh* - 2004 (178) E.L.T. 22 (S.C.)

<sup>31</sup> Current Account -Section 2(j) of Foreign Exchange and Management Act 1999



includes remittance, payment due in connection with foreign trade, etc.

The following transaction can be considered as current account transactions –

- Purchase of Cryptocurrency from a person resident outside India through foreign exchanges on payment in fiat currencies such as USD to a person resident outside India.
- Payments by Cryptocurrency to a seller resident outside India for purchasing goods or procuring services from buyer resident outside India.
- Payment by Cryptocurrency to a person resident outside India in consideration of acquiring other cryptocurrencies from a person resident outside India.

Application of section 2 (m) of FEMA and Cryptocurrency

As per Section 2 (m)<sup>32</sup>“foreign currency” means any currency other than Indian currency.

The term ‘currency’ generally means the recognized legal tender of a particular country. Thus, ‘foreign currency’ refers to a currency accepted legally as a unit of account of some other country. Consequently, if the cryptocurrencies are legally recognised as currency by another country, they would fall within the purview of section 2(m). The inclusion of cryptocurrency in FEMA widely depends upon the nature of the blockchain, its usage.

## E. Multilateral Agreement And Cryptocurrency

The seamless transfer of information is critically important as it is inexorably linked to the growth and success of the global economy. To function in the international marketplace, businesses need reliable, continuous access to data, wherever they are located. Routine business activities, such as providing goods and services to customers, managing a global workforce, and maintaining supply chains, require the transfer of data among corporate locations and to service providers, customers, and others situated around the world<sup>33</sup>. There is where multilateral agreement between the sovereign countries comes into play. As part of the Comprehensive Strategic

Partnership between India and Australia, Prime Ministers Morrison and Modi decided to re-engage on a bilateral Comprehensive Economic Cooperation Agreement (CECA)<sup>34</sup> elevating previous commitments between the 2 countries by signing 7 new agreements. Similarly, Australia’s Australian Securities and Investments Commission(ASIC) has engaged with regulators overseas to deepen its understanding of innovation in financial services, including in relation to cryptocurrencies. ASIC and the United Kingdom’s Financial Conduct Authority have signed an Enhanced Cooperation Agreement, which allows the two regulators to, amongst other things, information-share, refer innovative businesses to each regulator’s respective regulatory sandbox, and conduct joint policy work.

## ***THE RECENT APPROACH TAKEN BY THE GOI AND THE AMBIGUITY SURROUNDING IT***

### **Sandbox -RBI’s Report of the Working Group on FinTech and Digital Banking**<sup>35</sup>

#### **6.1.16 Realignment of regulatory approach**

Financial innovation has become a focal point for a lot of attention, and some jurisdictions have decided to take a more active approach in facilitating this innovation. While there are no programmes specifically promoting research and investment in cryptocurrency, RBI has established a report designed to assist fintech businesses more broadly in understanding their obligations under Indian laws.

- An appropriate framework may be introduced for “Regulatory Sandbox/innovation hub” within a well-defined space and duration where financial sector regulators will provide the requisite regulatory support, so as to increase efficiency, manage risks and create new opportunities for consumers, for the Indian context, similar to other regulatory jurisdictions.
- In view of IDRBT’s unique positioning as an RBI established institute, and as indicated by some of its activities, it is felt that IDRBT is well placed to act as a regulatory sandbox in collaboration with RBI for

<sup>32</sup>Foreign Currency - section 2 (m) of Foreign Exchange and Management Act 1999

<sup>33</sup> Introduction - Business Without Borders: The Importance of Cross-Border Data Transfers to Global Prosperity – US Chamber of Commerce Hunton and Willians

<sup>34</sup><https://www.dfat.gov.au/trade/agreements/negotiations/aifta/Pages/australia-india-comprehensive-economic-cooperation-agreement>

<sup>35</sup>Report of the Working Group on FinTech and Digital Banking - **6.1.16 Realignment of regulatory approach**



enabling innovators to experiment with their solutions for eventual adoption. The Institute may continue to interact with RBI, banks, solution providers regarding testing of new products and services and over a period of time upgrade its infrastructure and skillsets to provide a full-fledged regulatory sandbox environment.

Sandbox implementation will enable the RBI to make scale models that could predict the effect of cryptocurrencies on macroeconomic stability, anti-money laundering and capital account convertibility in a controlled environment similar to other regulatory jurisdictions. This will help the RBI in the implementation of blockchain on a larger scale. That RBI vide its circular<sup>36</sup> dated has specifically excluded services related to cryptocurrency, initial coin offering from the testing under the sandbox project. It's important to note that the circular excluding cryptocurrency-related services under the testing and sandbox initiative has created uncertainty in the crypto space. The circular which was issued prior to IMAI Supreme Judgment, the RBI has not yet published any fresh directive to that effect.

## LOOKING AHEAD

In India, financial literacy is the lowest amongst its peers as per the report conducted by the Global Financial Literacy Excellence Center<sup>37</sup>, though India's banked population has doubled from 40% in 2011 to 80 % in 2017 due to the efforts taken by the Government of India. Yet the majority of the population lacks access to basic credit facilities, macro-finance, insurance as the traditional financial system is facing the problem of regulatory compliances, increase in inflation, large government deficit etc. Blockchain technology since its inception is evolving at a rapid pace making the core concept of decentralization a revolution in the financial sector which could provide an unparalleled solution due to their universal access, low transaction costs, and secured infrastructure. In the words of NitiAyog<sup>38</sup> ***“Blockchain’ has emerged to become a potentially transformative force in multiple aspects of government and private sector operations. Its potential has been recognized globally, with a variety of international organizations and technology companies highlighting the benefits of its application in reducing costs of***

***operation and compliance, as well as in improving efficiencies”.***

The growth of cryptocurrencies as a seamless alternative to the traditional financial system makes it evident that the current legal framework is not enough to accommodate the constantly changing technology thereby making it more vulnerable to money laundering, terrorist financing and offshore tax-havens. There is a need for a holistic approach to be taken on a case to case basis instead of imposing an outright ban on cryptocurrency which will result in stunting the growth of Indian Financial Markets.

In comparison to India, the majority of the jurisdictions all over the world have carried out an amendment to the existing legislation to encompass cryptocurrencies thereby regulating the transactions and preventing possible tax invasions, terror funding and other unintended purposes. There is a need for a holistic approach to be taken on a case to case basis and instead of outright banning cryptocurrency which will result in stunting the growth of Indian Financial Markets and would result in failure to take advantage of new financial technology.

State-funded research project and implementation of blockchain project in the sandbox environment has yielded positive result in forming solution based opinions for implementing the blockchain technology on a larger scale. If regulated, digital currency offers a great promise of its ability to reach people and businesses in remote and marginalized regions. Taking into consideration the pilot projects undertaken by various countries, the assessment indicated that the implementation of digital currency has significantly reached the unbanked population in the remotest area. Similarly, a pilot project was conducted in Ghana wherein the Bank of Ghana noted the benefits of financial inclusion by the adoption of blockchain and cryptocurrency due to its reach to a large percentage of the unbanked population.<sup>39</sup> In the Indian context, if we see the statistics in respect of smartphone users, it is estimated that around 966 million<sup>40</sup> users will have smart-phones by the end of 2023. This would be a huge milestone in achieving access to technology and the scale of infrastructure required to implement future technologies for the betterment of the society. Taking into consideration the flawless implementation of Unified Payment Interface (UPI) and its large scale adoption

<sup>36</sup>Enabling Framework for Regulatory Sandbox – 6.3 Exclusion from Sandbox Testing

<sup>37</sup>Financial Literacy Around the World

<sup>38</sup> Blockchain – The India Strategy – Introduction

<sup>40</sup><https://gadgets.ndtv.com/telecom/news/indian-will-have-over-900-million-internet-users-by-2023-cisco-report-claims-2182566>





during the demonetization by the GOI in 2016 has simplified the online payment system with instant authentication and immediate money transfer without the need to enter bank details for every transaction. The adoption and regulation of the crypto space and its integration with the mainstream payment network would help businesses and individuals alike to access the capital with more ease.

It is inevitable that regulation will happen whether we want it or not. The only way forward is to make a collective effort for the regularization of cryptocurrency which shall be productive and beneficial to all parties and stakeholders. The regularization of crypto space in future could be the potential standard procedure for calculating the credit score or can be used for verifying savings and financials of individuals if they are incentivized to use the cryptocurrency through a regulated channel along with a host of other benefits. The aim of introducing regulations in the crypto space would be to insulate the investors from outside manipulation and its associated volatility thereby creating an environment where retail investors,

institutional investors have the confidence of adopting the technology and are able to invest in it without any fear. Regularization of cryptocurrencies and adoption of blockchain technology would lead to its healthy interaction with businesses and investors alike without fear.

Crypto space requires legislative experiments with a positive outlook on part of the Indian Government to deal with its dynamic nature and to further address the ever-increasing vast expanse of technology which is updating everyday to fully tap the potential of cryptocurrencies and the underlying blockchain technology. dynamic, interactive legislation with a prescient vision would help blockchain technology and cryptocurrencies grow and evolve into indispensable parts of all of our lives. Nevertheless, given what the future holds for cryptocurrency and blockchain technology and having regard to the positive approach indicated by the GOI, there is no better time than now to establish a clear set of rules and regulations both in relation to regulatory aspects to ensure their stability and security of the nation's financial health.



VICTORIAM LEGALIS  
ADVOCATES & SOLICITORS

## Get in Touch

We hope you enjoyed reading the newsletter, and we would love to hear your thoughts on what you want to be covered in our next edition!

You can get in touch here:

**Corporate Office:**

1085, Hotel Sahara Star,  
Opposite Domestic Airport,  
Vile Parle East,  
Mumbai - 400099,  
Maharashtra, India

**Litigation Office:**

DBS Heritage House,  
Prescott Road,  
Opposite Cathedral School,  
Fort, Mumbai - 400001,  
Maharashtra, India

Phone: 022 - 40779254

Email: [info@victoriamlegalis.com](mailto:info@victoriamlegalis.com)