M&A Lab

Apollo's Bumpy Ride in Pursuit of Cooper

Deal Dissected

May 2014

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Apollo's Bumpy Ride in Pursuit of Cooper

"On June 12, 2013, Apollo Tyres Limited ("**Apollo**"), an Indian company listed on the Bombay Stock Exchange and the National Stock Exchange, and Cooper Tire and Rubber Company ("**Cooper**"), a U.S company listed on the New York Stock Exchange, jointly released a media statement announcing the acquisition of Cooper by Apollo ("the **Deal**"). The Deal valued at about US$ 2.5 billion, would have created a combined entity that would, rank seventh in tyre manufacturing in the world, with US$ 6.6 billion of aggregate sales in 2012.

However, this historic acquisition had run into rough weather at every turn. Issues due to valuation concerns raised by Apollo prompted Cooper to approach the Delaware Chancery Courts to force Apollo to expedite the Deal. Cooper was unsuccessful at both the Chancery Court, as well as on appeal to the Delaware Supreme Court. The Deal was finally called off by Cooper on December 30, 2013."

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I. Prologue

On June 12, 2013, Apollo Tyres Limited (**"Apollo"**), an Indian company listed on the Bombay Stock Exchange (**"BSE"**) and the National Stock Exchange (**"NSE"**), and Cooper Tire and Rubber Company (**"Cooper"**), a U.S company listed on the New York Stock Exchange (**"NYSE"**), jointly released a media statement announcing the acquisition of Cooper by Apollo (**the "Deal"**).[1] The Deal valued at about US$ 2.5 billion,[2] would have create a combined entity that would rank seventh in tire manufacturing in the world, with US$ 6.6 billion of aggregate sales in 2012.[3] The bold move by Apollo led to worries that the Indian company had overreached itself by acquiring the much larger Cooper, the primary concern of Apollo's investors being that the transaction was entirely debt-funded in giving all-cash, 40% premium on Cooper's 30-day volume-weighted average stock price.[4] This was reflected in the stock price of Apollo which tumbled about 28.8% from Rs. 92 on June 12, 2013 to Rs. 65.50 on July 12, 2013.[5]

In a letter from Apollo dated June 12, 2013 to the BSE, it is stated that the *"strategic combination will bring together two companies with highly complementary brands, geographic presence and technological expertise to create a global leader in tire manufacturing and distribution."*[6] Apollo has a strong focus on premium products including high-performance tires and has manufacturing units in India, the Netherlands and South Africa. Cooper, on the other hand, is a value-focused brand which has market presence in primarily North America, Europe and China. In addition, both Apollo and Cooper own brands which specialize in truck-, bus-, racing, motorcycle and off-road tires. The key commercial intent behind the proposed acquisition appears to have been the harnessing of the wide-ranging product categories and distribution expertise of Apollo and Cooper in diverse geographies to one combined corporate entity as a de-risk strategy.

From US$ 29.88 billion in the first half (**"H1"**) of 2011, the M&A deal value in India had declined to US$ 22.79 billion in H1 2012, and by a further 39% to US$ 13.92 billion in H1 2013.[7] There have been only four billion-dollar cross-border deals in H1 2013 – Apollo's acquisition of Cooper, the acquisition of Videocon Mozambique Rovuma 1 Limited by ONGC Videsh Limited and Oil India Limited, Qatar Endowment Fund's investment in Bharti Airtel and Mylan Inc's acquisition of Agila Specialties.[8] The Deal promised to reinvigorate the sluggish Indian mergers and acquisitions scenario, if consummated.

However, the Deal faced challenges from various quarters, including a U.S arbitrator blocking the sale of two of Cooper's U.S plants until a collective bargaining agreement was entered into between Apollo and members of the plants' union.[9] To compound the issue, the workers at Cooper's Chinese joint venture facility went on strike, locking out Cooper's managers and withholding financial information in relation to the joint venture from Cooper in response to what they perceived as excessive debt load on the target company.[10] As a result, Apollo sought a discount of US$ 2.5 per share on its initial offer.[11] Cooper responded by launching a lawsuit, accusing Apollo of suffering "buyer's remorse" and asking the Delaware Chancery Court to force Apollo to expedite the consummation of the Deal.[12] The action was ultimately unsuccessful and Cooper appealed to the Delaware Supreme Court to reverse the order.[13] The Delaware Supreme Court dismissed

1. http://coopertire.com/News/Corporate-News-Releases/APOLLO-TYRES-TO-ACQUIRE-COOPER-TIRE---RUBBER-COMPA.aspx
2. Prior instances include Tata Motors Limited's US$ 2.3 billion acquisition of UK-based Jaguar Land Rover in 2008 and Bharti Airtel's US$ 9 billion acquisition of the African operations of Kuwait's Zain in 2010.
3. http://coopertire.com/News/Corporate-News-Releases/APOLLO-TYRES-TO-ACQUIRE-COOPER-TIRE---RUBBER-COMPA.aspx
4. Apollo Tyres To Acquire Cooper Tire & Rubber Company, 12 June 2013, A Press Release by Apollo Tyres. http://www.apollotyres.com/india/media/pressrelease.aspx
5. http://www.bseindia.com/stock-share-price/apollo-tyres-ltd/apollotyre/500877/#
6. Available at http://www.bseindia.com/corporates/anndet_new.aspx?newsid=9f6bc188-f714-4710-aa50-e2f82ae2a74f
7. http://economictimes.indiatimes.com/news/news-by-company/corporate-trends/ma-deal-activity-down-39-per-cent-to-13-9-billion-in-h1-2013/articleshow/21142130.cms
8. Ibid
9. http://www.business-standard.com/article/companies/arbitrator-delays-sale-of-2-cooper-tire-plants-to-ollo-113091600354_1.html
10. http://articles.economictimes.indiatimes.com/2013-08-01/news/40963309_1_cooper-tire-rubber-company-vredestein-apollo-tyres
11. http://www.business-standard.com/article/companies/apollo-cooper-deal-may-skid-on-valuation-issue-113100700910_1.html
12. http://www.ft.com/cms/s/0/6db8434e-48b1-11e3-8237-00144feabdc0.html
13. http://www.business-standard.com/article/companies/cooper-may-try-to-save-apollo-deal-at-dec-19-court-hearing-113111600092_1.html

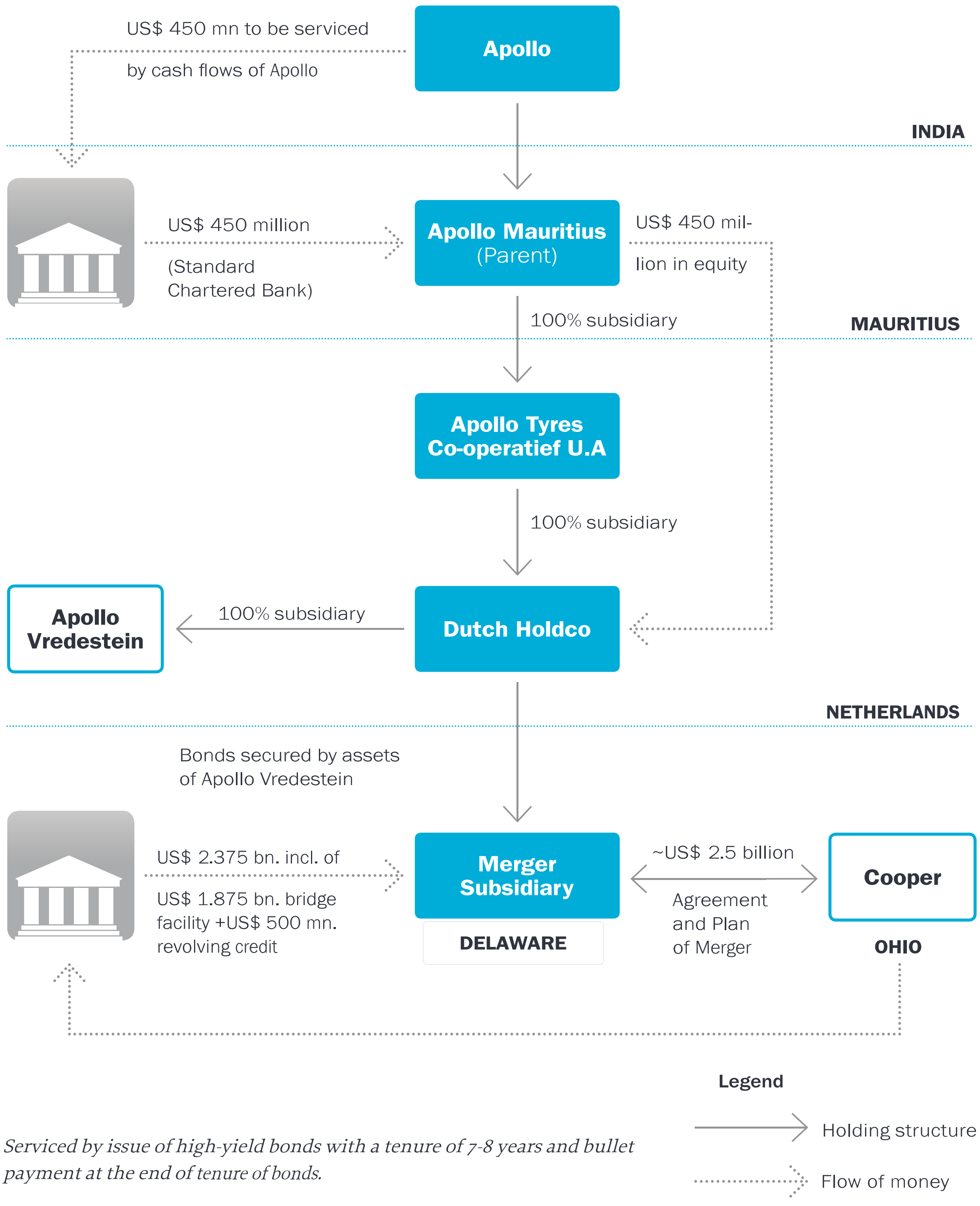
Cooper's appeal. On December 30, 2013, Cooper announced the termination of the merger agreement with Apollo's subsidiaries.[14] Apollo has stated that it will pursue legal remedies for Cooper's detrimental conduct.[15] Cooper, while denying any liability on its part for payment of the US$ 50 million termination fees to Apollo, has maintained that it would pursue the US$ 112.5 million reverse termination fee as contemplated under the merger agreement from Apollo for not completing the Deal.[16]

This M&A Lab dissects the legal, regulatory, tax and commercial considerations behind proposed the Deal based on information available in the public domain.

14. http://www.business-standard.com/article/companies/cooper-terminates-apollo-merger-pact-113123000713_1.html
15. http://www.financialexpress.com/news/apollo-tyres-to-take-cooper-tire-to-court-after-us-co-ends-2.5-bn-deal/1213379/0
16. http://articles.economictimes.indiatimes.com/2013-12-31/news/45712101_1_apollo-tyres-cooper-tire-rubber-roy-armes

1. Executive Summary

I. Deal Structure[17]



Serviced by issue of high-yield bonds with a tenure of 7-8 years and bullet payment at the end of tenure of bonds.

17. http://www.apollotyres.com/india/downloads/transcripts/analyst-conference-call-june-2013.pdf. See also, http://www.apollotyres.com/india/investors-annualReports.aspx

II. Parties Involved

A. Apollo

Apollo was incorporated in 1972 with its registered office in Kerala, India, whereas the corporate headquarters is in Gurgaon, India. Apollo is engaged in the manufacture of automobile tires, tubes and tire retreading compound. Apollo currently has four tire manufacturing plants in India – two in Kerala, one in Gujarat and one in Tamilnadu.[18]

When Apollo was established, it was a single brand enterprise. In recent years, it has expanded its footprint across the globe and several brands were added to its portfolio. In 2006, Apollo acquired Dunlop Tyres International Pty in South Africa and Zimbabwe, which has since been renamed as Apollo Tyres South Africa Pty. This acquisition accorded Apollo rights to the Dunlop name in 32 African countries. Another success story of Apollo is its 2009 acquisition of the Dutch tire manufacturer Vredestein Banden B.V. from its bankrupt parent company and returning it to profitability, thereby marking the entry of Apollo into Europe.[19]

Apollo has nine manufacturing facilities spread across Asia, Europe and Africa, with exports to over 118 countries. Its key brands include Apollo, Dunlop (brand rights for 32 African countries), Vredestein, Kaizen, Maloya and Regal.[20] These brands collectively comprise tires across various categories - passenger car, sports utility vehicle, light truck, truck-, bus-, agricultural, industrial, bicycle and off-highway tires.[21]

B. Cooper

Cooper has a long history dating back to 1914. John F. Schaefer and Claude E. Hart acquired the M and M Manufacturing Company which produced tire patches, tire cement and tire repair kits. They later acquired the Giant Tire & Rubber Company, a tire rebuilding business. The business was moved to Findlay, Ohio, where it currently resides. The firm changed its name to Cooper Tire & Rubber Company in 1946 and was listed on the NYSE in 1960.

Cooper focuses on replacement tires for passenger cars and has, through various strategic acquisitions such as the acquisition of Avon Tyres Limited, based in Melksham, England in 1997 and the acquisition of Mickey Thompson Performance Tires & Wheels in 2003, expanded its portfolio to high-performance and ultra-high performance tires. In 2003, Cooper entered into a joint venture with Kenda Rubber Industrial Company Limited for construction of a plant outside Shanghai, China to produce radial passenger car and light truck tires. In 2011, Cooper acquired Kenda's stake in the joint venture, and renamed the venture as Cooper Kunshan Tire.[22] In 2005, Cooper acquired 51% stake in China's third largest tire manufacturer Cooper Chengshan (Shandong) Passenger Tire Company Ltd. and Cooper Chengshan (Shandong) Truck Tire Company Ltd.[23] Cooper currently holds a 65% stake in Cooper Chengshan while the remaining 35% is held by China's Chengshan Group.[24] In 2012, Cooper acquired the assets of an existing tire plant in Krusevac, Serbia, to complement its well-established European operations and for supply of tires to the European and Russian markets.[25]

Cooper has a major presence in North America, Europe and China with 65 manufacturing, sales, distribution, technical and design facilities globally.[26] Associated brands of Cooper include Cooper, Mastercraft, Starfire, Chengshan, Roadmaster and Avon.[27]

C. Apollo (Mauritius) Holdings Pvt. Ltd

Apollo (Mauritius) Holdings Pvt. Ltd (**"Apollo Mauritius"**) was incorporated under the laws of Mauritius in 2006. Apollo owns 100% of the share capital of Apollo Mauritius.[28]

18. http://www.apollotyres.com/india/aboutus-presence.aspx
19. http://articles.economictimes.indiatimes.com/2009-05-19/news/28460988_1_vredestein-banden-apollo-tyres-tyre-maker
20. http://www.apollotyres.com/india/aboutus-brands.aspx
21. http://www.apollotyres.com/india/aboutus-overview.aspx
22. http://www.tirebusiness.com/article/20110303/NEWS/303039999
23. http://coopertire.com/About-Us/History.aspx
24. http://www.tirereview.com/Article/116503/strike_over_apollo_acquisition_persists_at_cooper_chengshan.aspx
25. http://coopertire.com/About-Us/History.aspx
26. Ibid.
27. Annual Report 2012-13, available at http://www.apollotyres.com/india/investors-annualReports.aspx
28. Ibid

D. Apollo Tyres B.V.

Apollo Tyres B.V. (**"Dutch Holdco"**) is a 100% owned and controlled subsidiary of Apollo Tyres Co-operatief U.A. which in turn is a 100% subsidiary of Apollo Mauritius.[29] Apollo Acquisition Corporation is a wholly-owned step subsidiary of Apollo through the Dutch Holdco in the U.S.

E. Apollo Acquisition Corporation

Apollo Acquisition Corporation (**"Merger Subsidiary"**) was organized under the laws of the Delaware[30] in 2006. Out of the total financing for the Deal, US$ 2.375 billion, representing about 85% of the debt was to be raised at the Merger Subsidiary.

III. Terms of the Transaction

Apollo Mauritius, Dutch Holdco and Merger Subsidiary (collectively referred to as the **"Acquirers"**), entered into an agreement and plan of merger dated June 12, 2013 with Cooper (**"Agreement"**) for the acquisition of Cooper by means of a merger of the Merger Subsidiary with Cooper (**"Merger"**).[31] As a result of the Merger, the separate corporate existence of the Merger Subsidiary shall cease and Cooper was to continue as the surviving corporation. Apollo Mauritius is a direct subsidiary of Apollo. The Dutch Holdco is a wholly owned subsidiary of Apollo Mauritius and owns the entire issued and outstanding share capital of Apollo Vredestein B.V. (**"Apollo Vredestein"**) and of the Merger Subsidiary.

The Agreement contemplated the conversion of each issued and outstanding share of Cooper's common stock, other than shares owned by Apollo Mauritius or its wholly owned subsidiaries and any shares of Cooper held in the treasury of the company into the right to receive a merger consideration of US$ 35 in cash, without interest (**"Merger Consideration"**) payable to the holder of such share.

Why was the merger being effected through a reverse triangular merger between the Dutch Holdco, Merger Subsidiary and Cooper?

The merger of the Merger Subsidiary with Cooper by means of a reverse triangular merger may have important tax consequences, subject to certain conditions under §368 of the Internal Revenue Code. The provisions of §368 of Internal Revenue Code contain specific definitional requirements that categorize certain transactions as tax-free reorganizations. For a reverse triangular merger to be treated as a tax-free reorganization, at least 80 per cent of the merger consideration shall be payable in voting common or preferred stock of the acquirer.[32]

In addition, in a reverse triangular merger since the target corporation survives post-merger, there are no hassles of transfer of assets of the target company to the acquirer, as in the case of a forward triangular merger.

A. Conditions

The Agreement laid down specific conditions for each party's obligation to put effect to the Deal, including:

i. Obtaining of approval of Cooper's stockholders;

ii. Obtaining of all governmental approvals, *inter alia,* expiry or termination of the review period applicable to the consummation of the Merger under the Hart-Scott-Rodino Act; and

iii. There shall have been no injunctions or restraints imposed by any law or order entered, enacted, promulgated, enforced or issued by any governmental entity restraining or prohibiting the consummation of the Merger.

B. Termination

The Agreement specified termination rights for each of the parties. The Agreement may have

29. Annual Report 2012-13, available at http://www.apollotyres.com/india/investors-annualReports.aspx

30. The Form 8-K filing of Cooper mentions that Apollo Acquisition Corp is an entity organized under the laws of Delaware. However, SEC filings of Apollo Acquisition Corp shows that the company was incorporated in the Cayman Islands in 2006 with the objective of acquiring, or merging with, an operating business. Further, the 8-K filing says that Apollo Acquisition Corp is a wholly owned subsidiary of Dutch Holdco but on March 20, 2013 there was a transfer of 781250 shares, representing a 78.2% stake of Apollo Acquisition Corp to Hybrid Kinetic Automotive Holdings, LLC a Delaware LLC. The relevant filing can be accessed here: http://www.sec.gov/Archives/edgar/data/1505367/000114420413019083/v340067_sc13d.htm

31. This form of acquisition where an acquirer creates a subsidiary which acquires shares of the target company, and the subsidiary subsequently merges with the target company, with the target company continuing as the surviving corporation is known as a reverse triangular merger. Reverse triangular mergers have various tax and commercial benefits which are discussed below

32. http://www.law.cornell.edu/uscode/text/26/368

been terminated by the mutual written consent of each of the Acquirers and Cooper.

The Agreement may have been terminated by either party if:

i. the Merger had not been consummated on or before December 31, 2013 (**"Outside Date"**). This right shall not have been available to any party that had materially breached any provision of the Agreement, or in case the Acquirers had breached the provisions of the financing documents, where such breach had been the cause of the failure to consummate the Merger;

ii. any final and non-appealable order had been issued in an appropriate jurisdiction restraining or prohibiting consummation of the Merger; or

iii. if the stockholder approval had not been obtained due to failure to obtain the required vote of the holders of shares at the special meeting of Cooper's stockholders for the purpose of considering and taking action upon the adoption of the Agreement (**"Special Meeting"**).

The Agreement may also be terminated by Cooper if:

i. prior to stockholder approval to this Agreement, Cooper entered into a definitive agreement for an alternative transaction involving terms superior to the terms under the Agreement, provided that Cooper was not in breach of its no-solicitation obligations under the Agreement;

ii. there had been a breach of any covenants or in the event of any of the representations or warranties given by the Acquirers fails to be true and such breach or failure had not been cured within the earlier of the Outside Date or 30 days following written notice to Acquirers;

iii. the Acquirers fail to consummate the Merger within three business days after the delivery of notice by Cooper to the Acquirers confirming the satisfaction of all the conditions precedent and Cooper stood ready, willing and able to consummate the Merger through the end of the three business day period.

The Agreement may be terminated by the Acquirers if:

i. prior to the Special Meeting, the board of directors of Cooper shall have adopted or recommended to its stockholders, a takeover proposal, other than the Merger or failed to approve the Agreement within three business days of any written request from Apollo.

ii. there had been a breach of any covenants or in the event of any of the representations or warranties given by Cooper fails to be true and such breach or failure was not cured within the earlier of the Outside Date or 30 days following written notice to Cooper.

C. Termination Fees

The Agreement provided for payment of a termination fee of US$ 50 million to be paid by Cooper to Apollo Mauritius:

i. if the Agreement is terminated by the Acquirers, if prior to the Special Meeting, Cooper's board of directors:

   a. make any "Company Adverse Recommendation Change" which includes changing, qualifying, withholding, withdrawing or modifying, or publicly proposing to change, qualify, withhold, withdraw or modify, in a manner adverse to the Acquirers, the recommendation to Cooper's stockholders that they adopt the Agreement and adopting, approving or recommending, or publicly proposing to approve or recommend to stockholders of Cooper a takeover proposal; or

   b. fails to approve the Agreement and the Merger within three business days after receipt of written request to do so from Apollo Mauritius;

ii. if the Agreement is terminated by either Cooper or the Acquirers, due to the Merger having not been consummated by the Outside Date or if the approval of Cooper's stockholders to the Merger has not been obtained at the Special Meeting and at any time on or prior to the first anniversary of such termination, Cooper or any of its subsidiaries consummates a transaction contemplated by a takeover proposal made by any person prior to the termination;

iii. if the Agreement is terminated by Cooper, in the event of Cooper entering into a definitive agreement for an alternative transaction, offering terms superior to the terms offered under the Agreement.

Under the Agreement, Apollo Mauritius would be required to pay to Cooper a reverse termination fee of US$ 112.5 million if Cooper has terminated the Agreement due to the Acquirers having failed to consummate the Merger within three business days after the delivery of notice by Cooper to the Acquirers confirming the satisfaction of all the conditions precedent and Cooper stood ready, willing and able to consummate the Merger through the end of the three business day period. This reverse termination fee is secured by a letter of credit issued by Standard Chartered Bank to Cooper.[33]

Treatment of termination fees in India

Termination fee is a pre-determined amount to be paid by the target company to the acquirer in case of default in completing the deal. The question of enforceability of termination fees in the Indian context looms large as termination fee clauses become increasingly common in M&A transactions.

The Contract Act, 1872 (**"Contract Act"**) governs the law of contracts in India. Section 74 of the Contract Act stipulates that in cases of breach of contract, where a sum is named or penalty is stipulated, the party complaining of breach is entitled to a reasonable amount not exceeding the stipulated amount or penalty irrespective of whether actual loss or damage is proven. Section 74 provides for both liquidated damages and penalty provisions in case of a breach of a contract. Though the parties may have used the terms damages or penalty, the expression used is not conclusive and whether a stipulated sum is a penalty or liquidated damages would depend on the facts of the case. However, in essence, any amount which is extravagantly and excessively high, greater than the possible amount of liquidated damages that could be foreseen at the time of drafting the contract is taken to be a penalty clause rather than a clause for liquidated damages (*Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co Ltd, [1915] AC 79*).

On the other hand however, if the stipulated amount

is a genuine pre-estimate of damages, the sum would be taken to be liquidated damages. Such an amount cannot be excessive or unconscionable (*Subir Ghosh v. Indian Iron & Steel Co* (1976) 1 CALLT 346 (HC)).

The language used in Section 74 clearly gives the court wide discretion in determining what is reasonable compensation, however, such compensation may not exceed the amount stipulated in the contract. Therefore, by mention of the word "reasonable", the courts are required to exercise diligence and caution in exercising such powers. In *Harbans Lal v. Daulat Ram* (2007) ILR 1 Delhi 706, the Delhi High Court held that whether or not the amount stipulated in the contract to be payable by the breaching party to the aggrieved party is reasonable shall depend on the facts and circumstances of each case. Among other things, what may be important to note by the court in determining reasonable compensation shall be the nature of the contract, the amount stipulated in the contract being proportionate to the value of the transaction and the circumstances under which the breach was committed. The Supreme Court in *ONGC v. SAW* Pipes (2003) 5 SCC 705 has laid down the following detailed guidelines for arriving at a reasonable compensation for the purposes of Sections 73 and 74 of the Contract Act:

i. Terms of the contract have to be taken into consideration to ascertain whether the party claiming damages is entitled to the same;

ii. If the terms of the contract are clear and unambiguous, unless it is held that such amount is unreasonable or is by way of penalty, the breaching party is required to pay such stipulated amount;

iii. The court is competent to award reasonable compensation even when no actual damage is proved;

iv. When it is impossible for the court to determine compensation arising from breach, the court can award the amount stipulated in the contract provided it is not unreasonable or not by way of penalty and if it is a genuine pre-estimate of reasonable compensation.

Though the requirement of the Section is that compensation has to be granted irrespective of whether there is proof of damage, it has been held in *State of Kerala v. United Shippers and Dredgers Ltd. (AIR 1982 Ker 281)* that some legal injury or damage caused has to be shown before making such a claim. An analysis of Section 74 of the Contract Act indicates that recourse to the section can be taken to enforce termination fee clauses in M&A transactions. Whether this would amount to liquidated damages or penalty would depend on the wording and import of the clause. Generally, if the termination fees stipulated under a contract for a M&A transaction are exorbitant and aimed to prevent deals with rival competitors and hence may be taken as a penalty clause and enforced accordingly.

Another aspect to be considered in the context of cross-border M&A transactions is whether the termination fees arising from foreign jurisdictions are permitted to be remitted to India. Under the provisions of the Foreign Exchange Management Act, 1999 (**"FEMA"**), remittance of termination fees

33. http://secfilings.nyse.com/filing.php?doc=1&attach=ON&ipage=8982047&rid=23

shall be classified as a current account transaction. The position under FEMA is that unless a transaction is specifically allowed, it is prohibited. The Foreign Exchange Management (Current Account Transactions) Rules, 2000 does not permit remittance of liquidated damages/ penalties. Hence, even though termination fees may be enforced in India, the Indian party may not be permitted under FEMA to remit such amounts received to India.

D. Others

Post the Merger, Cooper would have continued to recognize the labor unions and honor the terms of collective bargaining agreements currently in effect, and maintain compensation and benefit levels for non-union employees. After the closing of the Deal, Cooper would have become a privately held company and its shares shall no longer have been traded on the NYSE. Cooper was expected to be led by members of its existing management team and Cooper was also expected to continue operations out of its existing facilities around the world.[34]

IV. Brief Snapshot of the Transaction

Acquirers	Apollo Mauritius, Dutch Holdco and Merger Subsidiary.[35]
Seller	Cooper
Acquisition	Acquisition by means of merger between Cooper and Merger Subsidiary.
Mode of acquisition	▪ Agreement and Plan of Merger entered into between Apollo Mauritius, Dutch Holdco, Merger Subsidiary and Cooper for the merger of the Merger Subsidiary with and into Cooper, with Cooper to continue as the surviving corporation post-Merger, as an indirect, wholly owned subsidiary of Apollo. ▪ Each share of Cooper's common stock issued and outstanding immediately prior to the effective time of the Merger was to be converted into the right to receive US$ 35 in cash, without interest. ▪ Each option to purchase shares of Cooper's common stock was to be converted into a right to receive a cash payment equal to the product of the number of shares of Cooper's common stock subject to such option and the difference between Merger Consideration and the applicable exercise price of the option. ▪ Each outstanding performance share unit was to be converted at the effective time of the Merger into a right to receive a cash payment equal to the Merger Consideration multiplied by the number of shares of Cooper's common stock earned in accordance with the terms of the award agreement for such award. ▪ Each outstanding time vesting restricted share unit was to be converted at the effective time of the Merger into a right to receive a cash payment equal to the product of the number of shares of Cooper's common stock underlying the restricted share unit and the Merger Consideration.[36]
Acquisition Price	US$ 35 per share
Total Consideration	~US$ 2.5 billion[37]

34. http://coopertire.com/News/Corporate-News-Releases/APOLLO-TYRES-TO-ACQUIRE-COOPER-TIRE---RUBBER-COMPA.aspx
35. http://secfilings.nyse.com/filing.php?doc=1&attach=ON&ipage=8982047&rid=23
36. Ibid
37. Ibid

Mode of Funding	▪ The Deal was completely debt-financed. ▪ Standard Chartered Bank was the sole provider of Deal financing of US$ 450 million at the Apollo Mauritius level.[38] This debt is to be serviced from the cash flows of Apollo.[39] ▪ The US$ 450 million funding at Apollo Mauritius level would have been transferred via equity route to the Dutch Holdco. ▪ Morgan Stanley Senior Funding, Inc., Deutsche Bank Securities Inc., Standard Chartered Bank and Goldman Sachs Bank USA were joint lead arrangers who had agreed to provide committed funding of US$ 2.375 billion to the Merger Subsidiary. This consisted of a US$ 1.875 billion bridge facility and a US$ 500 million revolving credit facility.[40] ▪ The bridge loan was to be refinanced by the issue of high-yield junk bonds to the tune of US$ 1.9 billion which shall have been raised jointly by Cooper and Apollo Vredestein with a tenure of 7 to 8 years. These bonds were proposed to have coupon in the range of 6.75% to 9.5%. Cooper would have also taken an additional asset-based loan of US$ 200 million at the closing of the Deal.[41] Bonds would have had a first charge on all fixed assets of operations and second charge on current assets of Apollo Vredestein. ▪ Bullet repayment on the bonds of US$ 1.9 billion would have been at the end of the tenure of the bonds.

38. Ibid
39. http://articles.economictimes.indiatimes.com/2013-07-10/news/40492564_1_cooper-tire-sunam-sarkar-apollo-tyres
40. Ibid
41. http://online.wsj.com/article/SB10001424127887323734304578544902316843468.html, http://www.bloomberg.com/news/2013-06-13/junk-bonds-set-to-strain-apollo-after-u-s-deal-corporate-india.html

2. Choice of Jurisdiction and Entities

I. Why was Mauritius used as a Jurisdiction for Setting up of the Parent Company?

Historically, Mauritius has been the geography of choice for Indian outward investment into African jurisdictions. Mauritius enjoys an extensive double taxation treaty network with various countries in Africa, Asia, the Middle East and Europe. These treaties confer tax benefits to residents of the countries which are party to such double taxation treaties with Mauritius. For example, in terms of the double taxation treaty between India and Mauritius, capital gains arising from sale of shares may be taxable only in the jurisdiction in which the shareholder is resident and not in the jurisdiction where the jurisdiction where the shares are sold.[42] This implies that capital gains arising out of sale of shares in an Indian company by a resident of Mauritius may be taxed in Mauritius and not in India. Since there is no capital gains tax in Mauritius, the capital gains escape taxation in both India and Mauritius.

II. Why was the Merger Subsidiary held by the Dutch Holdco and not directly by Apollo Mauritius?

Whilst Mauritius has an extensive treaty network with various countries in Asia, the Middle East, Europe and Africa, it has not entered into a double taxation treaty with the U.S, and hence, no tax benefits are available to residents of Mauritius entering into transactions directly with residents of the U.S. However, there are various benefits under the Dutch domestic tax laws and the double taxation treaty between the U.S and the Netherlands which can be taken advantage of in structuring transactions between residents of the U.S and the Netherlands.

A. Benefits under the Dutch Domestic Tax Law

In the Netherlands, corporate income tax is charged on the worldwide profits of resident companies. The dividends paid by a subsidiary to a Dutch parent company are also subject to corporate income tax. However, when a Dutch holding company comes within the purview of the participation exemption rules, all income received from the subsidiary whether by way of dividends from a subsidiary or capital gains on the sale of shares of a subsidiary is exempt from corporate income tax if the following conditions are met[43]:

- the Dutch holding company must hold at least 5% of the subsidiary's shares (a trading company that owns shares in another corporate entity is deemed a holding company for purposes of the participation exemption);
- shares must be held since the beginning of the fiscal year but not as current assets;
- the parent company must be involved in the management of the subsidiary.

Under the participation exemption rules, all capital gains on the sale of shares of a subsidiary are exempt from corporate income tax in the Netherlands irrespective of whether the subsidiary is resident or non-resident.[44] The "participation" in the foreign subsidiary must be held for a business-related purpose and not merely as portfolio investment. In this respect, if the Dutch parent company has a director on the board, or is actively engaged in the supervision of the subsidiary, then the company will qualify for participation exemption, provided the foreign subsidiary is not directly or indirectly merely an investment company. If the Merger had been successfully consummated, the participation of the Dutch Holdco in the surviving corporation in the U.S shall have been for a business-related purpose, hence qualifying the Dutch Holdco for the benefits under the participation exemption.

B. Benefits under the U.S-Netherlands Double Taxation Treaty

Article 10 of the U.S-Netherlands double taxation treaty provides that dividends paid by a company which is a resident of one of the states to a resident of the other state may be taxed in that other state. Further, Article 14 of the treaty provides that capital gains derived by a resident of one of the states from the sale of shares or other comparable corporate

42. http://law.incometaxindia.gov.in/DIT/File_opener.aspx?fn=http://law.incometaxindia.gov.in/Directtaxlaws/cbdt/dta/A1_Mauritius.htm

43. http://www.ocra.com/solutions/eu_holding/Netherlands.asp#

44. Ibid

rights in a company that is a resident of the other state may be taxed in that other state. Thus, dividends payable by the Merger Subsidiary to the Dutch Holdco or capital gains accruing to the Dutch Holdco as a result of sale of shares of the Merger Subsidiary may be taxed only in the Netherlands.[45] These provisions read with the participation exemption rules of the Dutch domestic tax law, may ensure that dividends or capital gains arising from sale of shares of the Merger Subsidiary are exempt from taxation altogether.

III. Why was the Dutch Holdco Held Through a Dutch Cooperative?

A Dutch cooperative ("**Coop**") is a special form of association with separate legal personality and its legal existence is separate from that of its members. The Coop may hold legal title to assets in its own name. Provided that the letters "U.A." are added to the name of the Coop (*uitsluiting aansprakelijkheid*, exclusion of liability), a member of a Coop has in principle no liability or obligation with respect to debts or obligations of the Coop in addition to the amount of any agreed equity contribution. A Coop's mandatory framework is not extensive and does not include the same rigid capital protection provisions that apply to, for example, a Dutch BV. Therefore there is quite some flexibility in tailoring the articles of association of a Coop. A Coop is incorporated by execution of a notarial deed and must have at least two members.

There are several key Dutch tax features which encourage the use of a Coop as an investment fund vehicle[46]:

- Dividends received from and capital gains realized upon a sale of shares in a subsidiary should be exempt from Dutch corporate income tax under the participation exemption;
- The Coop is not required to withhold Dutch dividend tax of 15%, as opposed to a Dutch limited company (N.V/ B.V) as a Coop does not fall under the scope of the Dutch Dividend Withholding Tax Act.[47]

Even if the members of the Coop are located in a non-tax treaty country, no Dutch dividend withholding tax will be levied. The absence of a levy of dividend withholding tax makes the Coop a logical choice as a (top) holding company.

IV. Why was the Merger Subsidiary not Directly Held Through Apollo?

In addition to the tax benefits set out below, the major intention of Apollo in not creating a holding structure with Apollo directly holding the Merger Subsidiary may have been to ring-fence itself from the liabilities of Cooper after the Merger. In the structure, there were several steps between Apollo and Cooper which may have sufficiently shielded Apollo from any liabilities of the surviving corporation after the Merger. Further, a direct holding would have necessitated taking the entire loan amount at the Apollo level, the remittance of which may require regulatory approvals. Further, there are restrictions from the Reserve Bank of India on lending by banks for acquisition funding. In addition, interest rates for rupee lending are much higher than for dollar lending. Availing of the entire loan amount at the Apollo level, would also adversely affect the debt-equity ratio of Apollo and hamper its ability to avail of further loans for business purposes.

V. Why was the US$ 450 Million Debt Taken at the Apollo Mauritius Level and not at the Merger Subsidiary Level?

The US$ 450 million debt at the Apollo Mauritius level was to be serviced by the cash flows of Apollo.[48] Apollo Mauritius being a directly held subsidiary of Apollo, the servicing of the debt would have been at a single step from the parent entity servicing the loan and not at multiple steps. Further the lender at the Mauritius level could have insisted on some equity contribution from Apollo before they could lend to the Merger Subsidiary. The loan at the Mauritius level could have been taken to achieve such equity portion of funding.

45. http://www.irs.gov/pub/irs-trty/nether.pdf
46. Annual Report 2012-13, available at http://www.apollotyres.com/india/investors-annualReports.aspx
47. http://www.pwc.com/en_ca/ca/in-print/publications/dutch-coop-primer-2010-01-en.pdf
48. http://articles.economictimes.indiatimes.com/2013-07-10/news/40492564_1_cooper-tire-sunam-sarkar-apollo-tyres

VI. Why was the US$ 2.3 Billion Bridge Loan Taken at the Merger Subsidiary Level?

Apollo's rationale behind taking the US$ 2.3 billion bridge loan may have been to shield itself from liability. The loan is backed by assets of Apollo Vredestein and Cooper. Further, upon Merger, the debt would have been transferred to Cooper and Cooper could have taken benefit of interest deduction and offset it against its taxable revenues. However, this led to many roadblocks in the form of labor opposition to the Deal at the Chinese joint venture facility of Cooper, over concerns that the merged entity is being saddled with debt which may be difficult to pay off.[49]

49. http://www.indianexpress.com/news/us-delays-cooper-tire-sale-to-onkar-kanwars-apollo-tyres/1169893/

3. Commercial and Financial Considerations

I. Commercial Considerations

A. What are the Reasons Behind Apollo's Acquisition of Cooper?

i. Market Penetration

It can be perceived from the acquisition behavior of Apollo that the key consideration in acquiring tire manufacturers in various geographies, is risk diversification. The Indian automobile industry had been experiencing a prolonged slump, with automobile sales falling for the eighth consecutive month in June 2013.[50] In Europe, Apollo's second largest market, automobile sales have beeb at a 20-year low.[51] The Deal had been entered into with the intention to offset slow automobile demand in India as well as Europe amid weak economic expansion.[52]

On the other hand, in the US, automobiles sales have been witnessing a boom, projected to reach pre-recession levels of 16 million units a year.[53] In China as well, automobile production and sales are experiencing a huge boost in 2013.[54] The Deal would have granted Apollo access to these markets where Cooper has an established manufacturing presence and distribution network. Post the Deal, India would have accounted for about 22% of Apollo's sales, compared to 65% at present, decreasing Apollo's reliance on a single market for cash flows.[55]

ii. Higher Margins Through Alteration of Sales Mix

The Deal would have tilted the sales mix towards replacement tires. This held two advantages for Apollo firstly, Apollo is reasonably shielded from the cyclical nature of new vehicle sales, and secondly, replacement tire sales bear higher margins for tire manufacturers.[56]

iii. Improved Distribution Network and Economies of Scale

The Deal did also bear mutual advantages for the parties in terms of new sales opportunities and economies of scale. Apollo could have utilized Cooper's extensive distribution network in China and North America and assist Cooper's entry into India through its own sales and distribution network in India.

The resulting corporation of the Deal would have been the seventh ranked tire manufacturer in the world and have a presence across four continents. The Deal would have accorded enhanced bargaining power with raw material suppliers with Cooper's manufacturing presence in China, which as a hub of low-cost manufacturing and by virtue of its proximity to rubber-producing South-East Asian countries, would have brought down manufacturing costs for Apollo.[57] The resulting optimization of technology and research and development spending and integration of the European distribution network would have been advantageous to Apollo and Cooper in the long run.

iv. Long-term Growth Objectives

Apollo had set itself a roadmap for growth to become one of the top ten tire manufacturers globally by generating sales of US$ 6 billion by 2016.[58] If the Deal was consummated, Apollo would have achieved the target three years ahead of schedule.

Further, in the current market scenario, the costs of organic growth may be perceived to be unjustified by most companies looking to expand into new markets and inorganic growth by mergers with or acquisitions of already established players lead to better yields on investment in the longer run.

50. http://economictimes.indiatimes.com/news/news-by-industry/auto/automobiles/will-take-up-stimulus-package-for-auto-industry-with-pm-praful-patel/articleshow/21143429.cms
51. http://in.reuters.com/article/2013/06/12/us-cooper-apollo-takeover-idUSBRE95B0H820130612
52. http://www.bloomberg.com/news/2013-06-12/apollo-tyres-to-purchase-cooper-tire-rubber-for-2-5-billion.html
53. http://www.reuters.com/article/2013/07/19/autos-july-forecast-idUSL1N0FP0ON20130719
54. http://www.caam.org.cn/english/newslist/a101-1.html
55. http://www.bloomberg.com/news/2013-06-13/junk-bonds-set-to-strain-apollo-after-u-s-deal-corporate-india.html
56. http://www.thehindubusinessline.com/companies/apollo-tyres-cooper-buy-complements-vredestein/article4807595.ece
57. Ibid.
58. http://articles.economictimes.indiatimes.com/2012-12-02/news/35546833_1_neeraj-kanwar-tyre-makers-apollo-tyres-vice-chairman

B. What are the Key Challenges Faced by Apollo in Entering the Deal?

i. Investor Concerns about Debt Level

The highly leveraged acquisition of Apollo had raised the eyebrows of many institutional investors in Apollo, which include ICICI Prudential-Life, Franklin Templeton, Skagen Kon-Tiki Verdipapirfond and CLSA Mauritius.[59] Institutional investors believed that Apollo is overpaying for synergies that would have been difficult to achieve as margins of tire companies depend on highly volatile rubber prices. While rubber prices were on the lower side, there is a probability that they may rise in the future, thus reducing profit margins to a large extent.[60] The projected cost synergies from the Deal may not have been attainable, given the heavy dependence on raw materials in the cost of production. The investor concern was also reflected in the capital markets – the stock price of Apollo collapsed from a high of Rs. 102.45 per share to Rs. 54.60 on June 21, 2013, the lowest in a decade.

ii. Cost of Funds

As mentioned earlier, part of the financing is through a bridge facility of US$ 1.875 billion. A bridge loan is a short-term debttaken to meet an immediate financial requirement until permanent financing is arranged for. Such bridge loans are typically undertaken at higher interest rates than long term debt.

Further, the refinancing of the bridge loan by issue of high-yield junk bonds could have greatly increased the cost of funds for the Deal. The cost of such funds could have risen, placing strain on the balance sheet of the merged company.[61]

iii. Issues of Resource and Operations Integration

Post-acquisition, integration of operations can be a challenge for any acquirer. As may have been expected, Apollo had been facing resistance to the Deal from some quarters – the trade union representing workers of Cooper Chengshan, a joint-venture between Cooper and the Chengshan Group in China have declared a strike in opposition to the Deal. The perceived reasons for the union's opposition to the Deal included *"the risk of what is deemed to be excessive debt, which would make the factory financially vulnerable to potential market decline; cultural differences between Chinese and Indian businesses, which are seen as a step too far following the "huge price" of adjustment to the American style of management; and thirdly Apollo has been warned that "ignoring the concerns of the union the parties were breaking Chinese law."*[62]

Assuming the Deal was successfully consummated, integration of workforces spanning various geographies would have been the biggest challenge facing Apollo. This may have been a greater challenge compared to other acquisitions of comparable deal value like Tata's acquisition of Jaguar-Land Rover, where the manufacturing facilities and workforce were located primarily in the United Kingdom.

C. What is the Rationale for the Dutch Holdco Already Holding Apollo Vredestein to Acquire Cooper?

The rationale behind creating the Dutch Holdco holding both Apollo Vredestein and Cooper would have been for the purpose of efficient structuring of debt and to facilitate operational continuity. The structure of Apollo down from India was Apollo Mauritius on to Dutch Holdco and Apollo Vredestein. Europe appears to have been a point of geographic overlap between Cooper and Apollo Vredestein and hence, Cooper had been made part of the group which is raising the bonds.

II. Financial Considerations

Apollo signed an agreement to acquire Cooper for a cash consideration of ~ US$ 2.5 billion, or US$ 35 per share. At US$ 2.5 billion, it was more than the US$ 2.3 billion which Tata Motors paid while acquiring Jaguar-Land Rover in 2008. The Deal would have created the world's seventh ranked tire company with a footprint in the U.S., China, Europe and India.

Cooper had a turnover of US$ 4.2 billion in 2012. Apollo by itself is a much smaller company; however the combined entity had US$ 6.6 billion in aggregate sales in 2012. The Merger Consideration of US$ 35 per share, is a 40% premium over the 30-day volume-weighted average on the NYSE. Cooper's shares would have been delisted from the NYSE after the closing of the Deal.[63] The transaction

59. http://articles.economictimes.indiatimes.com/2013-07-10/news/40492564_1_cooper-tire-sunam-sarkar-apollo-tyres

60. Ibid

61. http://www.livemint.com/Specials/3Ejv10qrOKkH4vfK259VTJ/LEADER-IN-THE-SPOT-LIGHT-ONKAR-S-KANWAR.html

62. http://www.tyrepress.com/News/business_area/25/28329.html

63. http://knowledgetoday.wharton.upenn.edu/2013/06/apollo-cooper-merger-reignites-debate-over-mas-true-benefits

was expected to deliver value creation benefits of approximately US$ 80-120 million per year at the Earnings Before Interest, Tax, Depreciation and Amortization level.[64]

A. What should be the Key Concern in Relation to the Deal Value?

The price of a share of Apollo's stock plunged 25 percent to US$ 1.17 (Rupees 68.55) in trading the day after it announced its intention to buy Cooper. That was a 52-week low, according to Indian brokerages.[65] The key concern was regarding the amount of debt the combined entity would have to carry and the potential impact of the debt load on Apollo's ability to invest and take advantage of other market opportunities.

The debt from the Indian arm would have been partly offset by the recent sale of the South African business to Sumitomo Rubber Industries in a deal valued at US$ 60 million.[66] The Acquirers after the transaction would have issued junk bonds to fund part of the US$ 2.5 billion purchase, prompting analysts to warn that the debt will strain the tire maker's finances. Apollo opted to fund the Deal through junk bonds instead of bank loans because bonds are "covenant light", which means that Cooper would have to undertake fewer covenants in case of issue of junk bonds than if it avails of a bank loan. Apollo Vredestein and Cooper would have together raised about US$ 2.1 billion through the bond issue, while Apollo Mauritius will separately borrow US$ 450 million and would have been used the money to buy into Cooper's equity.[67] Assuming a 9% coupon on the bonds, the annual coupon payable on the bonds would have been about US$ 180 million against an EBITDA of US$ 80-120 million, which could be a strain on the resources of the combined entity, unless the synergies proposed to be achieved through the Deal are attained rapidly.

B. Was the Share Price of US$ 35 per Share Justified?

Apollo had agreed to pay to the shareholders of Cooper, a hefty premium of 40% over the market price for each share. There is a preponderance of opinion that such a high premium for this particular Deal was unreasonably overpriced given the various market indicia of Cooper and the global economic conditions. The performance of Cooper stock in the past, it is said, did not justify the high premium being paid for it by Apollo. For instance, even after the surges in trades, the stock of Cooper traded at a price-to-earnings ratio of 8 times while most of its peers across various geographical regions traded at 12 times or more. While this was good news for Apollo in terms of the consideration to be paid, the ability of the combined entity to leverage the synergies and increase the enterprise value was something which remained to be seen.

However Apollo justified this share valuation based on various factors such as the assets owned by Cooper. The entire business of Cooper offered to Apollo, entry into two large markets Apollo was absent in – North America and China – the two largest markets apart from Europe. China is a growing market with good margins, while the U.S is a market with relatively stable margins. Consequent to this acquisition, Apollo would have control of Cooper's manufacturing facilities in the U.S., Mexico, Serbia and China. The Deal offered to Apollo, a combination of large market access, a well-established brand and cost-competitive plants, especially in Serbia.[68] The Merger Consideration took into account the debt of Cooper – out of the US$ 2.5 billion, US$ 2.3 billion is the value paid for ~63 million outstanding shares of Cooper while the remainder was towards the net debt of Cooper which comes to ~US$ 200 million. Apart from the obvious financial gain, Apollo was engaging in a transformation in becoming a diversified company that can withstand the shocks of demand through robust presence in major economies of the world.

64. http://coopertire.com/News/Corporate-News-Releases/APOLLO-TYRES-TO-ACQUIRE-COOPER-TIRE---RUBBER-COMPA.aspx
65. http://www.tirebusiness.com/article/20130624/ISSUE/306249992/apollo-buying-cooper
66. http://www.indianexpress.com/news/no-debt-overloading-of-india-ops-for-cooper-acquisition-apollo-tyres/1129098/
67. http://www.bloomberg.com/news/2013-06-13/junk-bonds-set-to-strain-apollo-after-u-s-deal-corporate-india.html
68. http://www.apollotyres.com/india/downloads/transcripts/analyst-conference-call-june-2013.pdf

4. Legal, Regulatory and Tax Implications

I. Regulatory Roadblocks Employment Approval

The debt load on the surviving corporation after the Merger had caused concerns among the workers of a joint venture factory of Cooper and China's Chengshan Group that the Merger will put their jobs at risk. Cooper experienced a work stoppage as a result of its workers going on strike[69] Further opposition was faced from Chengshan Group, Cooper's Chinese joint venture partner which sought a direction from a local court to dissolve the joint venture.[70] Although the workers returned to the factory on August 17, 2013, they boycotted Cooper-branded products and stated that they will only produce Chengshan-branded tires.

At the time of announcement of the Deal, Cooper had announced that it shall honor the terms of collective bargaining agreements negotiated with its labor unions after the Merger. In September, a U.S arbitrator ruled against Cooper's sale of two of its factories in Findlay, Ohio and Texarkana, Arkansas to Apollo until a collective bargaining agreement is reached between Apollo and members of the plants' unions.[71] The dispute arose as a result of the United Steelworkers ("**USW**") arguing that the terms of the Agreement, which covers about 2,500 USW members will be violated without Apollo entering into a new collective bargaining agreement with the workers of the abovementioned plants.[72] Apollo had stated that it will be working with Cooper and USW to resolve worker's concerns.[73]

II. Lawsuit by Cooper

In light of the unresolved labor disputes at the Cooper Chengshan facility and the U.S plants, Apollo had sought a reduction in the Merger Consideration of US$ 35 per share, saying that it may not be feasible for Apollo and its lenders to accept the Deal on the initially agreed pricing terms[74] This prompted Cooper to file a suit against the Acquirers in the Delaware Chancery Court for expeditious closing of the Deal.[75] Apollo sought for the dismissal of the suit, contending that Cooper has been unable for a matter of months to access basic financial material in relation to the joint venture about a significant portion of its business[76] and that Cooper was unable to deliver all the assets that are part of the Deal.[77]

The judge presiding over the case dismissed Apollo's request for dismissing Cooper's suit saying, "There's a need to develop the facts, and lawyers should prepare for trial if they can't settle the case."[78] This paved the way for the trial in November 2013, wherein the Delaware Chancery Court rejected Cooper's claim for specific performance. This prompted Cooper to appeal to the Delaware Supreme Court to seek specific performance of the terms of the Agreement by Apollo.[79] The Delaware Supreme Court dismissed Cooper's appeal on December 16, 2013.[80]

On October 30, 2013, a few days before the scheduled date of commencement of the trial, Cooper announced that it had reached a tentative settlement agreement with the unions representing Cooper's employees at Findlay and Texarkana plants.[81] While details regarding the terms of the tentative agreements were not disclosed, pending review and ratification by both Apollo and the union membership, a filing of Cooper with the Securities and Exchange Commission reveals that Cooper had entered into a waiver agreement with the unions, which *inter alia* provides that the tentative labor agreements reached with the unions would satisfy the arbitrator's ruling if the Merger closes on or before November 18, 2013, even if the agreements have not been ratified by the union

69. http://articles.economictimes.indiatimes.com/2013-08-01/news/40963309_1_cooper-tire-rubber-company-vredestein-apollo-tyres
70. http://www.ft.com/cms/s/0/71d5853c-08c8-11e3-ad07-00144feabdc0.html
71. http://www.business-standard.com/article/companies/arbitrator-delays-sale-of-2-cooper-tire-plants-to-apollo-113091600354_1.html
72. Ibid
73. Ibid
74. http://in.reuters.com/article/2013/10/15/copper-apollo-tyre-idINDEE99E0AL20131015
75. http://www.bloomberg.com/news/2013-10-18/cooper-tire-witness-list-shows-strategy-for-apollo-trial.html
76. http://www.bloomberg.com/news/2013-10-21/apollo-tyres-asks-judge-to-dismiss-cooper-takeover-suit.html
77. http://online.wsj.com/news/articles/SB10001424052702304441404579121261730483326
78. http://www.livemint.com/Companies/xrK4XrSZplwxtrXJrM5r9O/Apollo-Tyres-loses-court-bid-for-Cooper-Tire-case-dismissal.html
79. http://www.livemint.com/Companies/rkI6Y18IPuNDjnDFUTETNI/Cooper-asks-court-to-rule-on-Apollo-Tyres-buyout-by-31-Dec.html
80. Ibid.
81. http://www.thehindu.com/business/Industry/cooper-inks-tentative-pact-with-union-awaits-apollo-response/article5313905.ece

membership by that time.[82] However, Apollo had been less than welcoming to this development calling this move by Cooper a "last-minute hijack of this expedited litigation and insertion of an entirely new set of issues."[83]

III. Anti-Trust Approvals

A. Hart-Scott-Rodino Antitrust Improvements Act, 1976

Also known as the "HSR Act" or "HSR", the Hart-Scott-Rodino Antitrust Improvements Act was first passed into law in 1976. The law generally establishes the requirements for filing notifications with the Federal Trade Commission and the Assistant Attorney General at the time of combination/ mergers between two corporate entities. The key provisions of the HSR Act are as follows:

There are three parts to test the proposing transactions for filing under HSR Act[84], and all three parts need to be concurrently fulfilled in order to file under the HSR:

i. Commercial Test	Where the Target or Buyer is engaged in U.S. commerce.	
	Old Threshold	New Threshold (with effect from February 11, 2013)
ii. Size of Transaction Test	any transaction with a deal value above US$ 68.2 million.[85]	any transaction with a deal value above US$ 70.9 million.[86]
iii. Size of Parties Test	(A) the bigger party in the transaction has annual sales or total assets greater than US$ 136.4 million or (B) the smaller party in the transaction has annual sales or total assets greater than US$ 13.6 million.[87]	(A) the bigger party in the transaction has annual sales or total assets greater than US$ 141.8 million or (B) the smaller party in the transaction has annual sales or total assets greater than US$ 14.2 million.[88]
The size of Parties Test would be inapplicable in case of transactions over US$ 283.6 million and will require filing/ reporting under the HSR Act.[89]		

Transactions that may require filings under the HSR Act include:

- Mergers or acquisitions of companies into an existing company;
- Contribution of assets or voting securities into a newly formed corporation;
- Contributions of assets or voting shares to a newly formed partnership or limited liability company (**"LLC"**);
- Transfer of a partnership or LLC interest;
- Secondary acquisitions (acquisition of shares held by a target);
- Distributions of assets or voting shares;
- Recapitalizations or reorganizations where an investor increases its ownership interest; or
- Entering an exclusive franchise or license agreement.[90]

The Deal qualified to come under the purview of the HSR Act. There is a 30-day mandatory review period after filing before consummation. On August 2, 2013, Apollo and Cooper announced the expiration of the HSR Act review period for the Merger on July 26, 2013 with no action by the Federal Trade Commission or the Department of State.[91]

82. Ibid
83. http://www.reuters.com/article/2013/11/01/us-cooper-apollo-labor-idUSBRE9A00Z120131101
84. http://www.mondaq.com/unitedstates/x/217092/Antitrust+Competition/2013+Revised+Higher+HartScottRodino+Act+Thresholds
85. http://www.cooley.com/revised-2013-hart-scott-rodino-antitrust-thresholds-effective-feb-11-2013
86. Ibid
87. Ibid
88. Ibid
89. Ibid
90. http://www.crossbordermanagement.com/en/guides/mergers-a-acquisitions-in-the-us/laws-a-regulations/hart-scott-rodino-act.
91. http://coopertire.com/News/Corporate-News-Releases/APOLLO-AND-COOPER-ANNOUNCE-EXPIRATION-OF-HART-SCOT.aspx

B. Anti-trust Approvals in Other Jurisdictions

No anti-trust approvals were needed to be taken in China as Apollo does not have a presence in China.[92] In Germany, anti-trust approvals would have to be taken, but no significant challenges were posed in this respect as the combined entity would have been a minority market player in Germany, with Apollo's market share in Germany being in the low single digits.[93] Cooper too had a small market share in Europe. There may be some African countries where anti-trust approvals may have been needed to be taken. However, the thresholds for obtaining regulatory approvals are very low in such countries.

IV. Delaware General Corporation Law

Title 8, Chapter 1, Subchapter IX of the Delaware General Corporation Law (**"DGCL"**) deals with "Merger, Consolidation or Conversion". § 252 states that any one or more corporations existing under the laws of Delaware may merge or consolidate with one or more corporations organized under the laws of any jurisdiction other than the U.S. if the laws under which the foreign corporation or corporations are organized permit such corporation to merge or consolidate with a corporation of another jurisdiction.

DGCL is applicable to the deal since the Merger Subsidiary is organized under the laws of the State of Delaware.

All the constituent corporations shall enter into an agreement of merger or consolidation and the agreement is to be adopted, approved, certified, executed and acknowledged by each of the constituent corporations in accordance with the laws under which it is formed, and, in the case of a Delaware corporation, in the same manner as is provided in § 251 of Title 8. In case the corporation surviving or resulting from the merger or consolidation is governed by the laws of any state or jurisdiction other than Delaware, it shall agree that it may be served with process in Delaware in any proceeding for enforcement of any obligation of any constituent corporation of Delaware, as well as for enforcement of any obligation of the surviving or resulting corporation arising from the merger or consolidation, including any suit or other proceeding to enforce the right of any stockholders as determined in appraisal proceedings pursuant to § 262 of the DGCL.[94]

The deal would also have be subject to the Securities Act of 1933 to deregister Cooper's securities that are registered under the Securities Act as well as the rules and regulations of the NYSE for the purpose of delisting of the securities of Cooper. Any filings, permits, clearances, authorizations, consents, orders and approvals as may be required under Sections 13 and 16 of the Securities Exchange Act, 1934 would have to be obtained by Cooper for the successful consummation of the Deal.

V. Exchange Control Regulations

The US$ 450 million loan at the Apollo Mauritius level was guaranteed by Apollo. The provisions of the Master Circular on Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad (**"ODI Regulations"**) permit an Indian company to undertake, in all its JVs and WOS put together, a total financial commitment which shall not exceed 400% of the net worth of the Indian company as on the date of its last audited balance sheet, under the automatic route. For the purpose of determining "total financial commitment" within the limit of 400% of the Indian company's net worth, the ODI Regulations include, *inter alia*, 100% of the amount of the guarantee issued by the Indian company. If an Indian company proposes to directly invest more than 400% of its net worth in an offshore JV or WOS, the Reserve Bank of India (**"RBI"**) may consider such proposal under the approval route. On August 14, 2013, the RBI issued a circular, by which it reduced the limit for overseas direct investment from 400% of the net worth of the Indian company to 100% of its net worth, as on the date of its last audited balance sheet.[95] The circular provides that the provisions of the circular would apply to all overseas direct investment proposals on a prospective basis but would not apply to the existing JV/ WOS under the previous regulations. The RBI had by way of its circular dated September 4, 2013, clarified that in case of an already contracted/ committed financial commitment for

92. http://www.apollotyres.com/india/downloads/transcripts/analyst-conference-call-june-2013.pdf
93. Ibid
94. http://delcode.delaware.gov/title8/c001/sc09/index.shtml
95. The said circular can be accessed here: http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=8305&Mode=0

and existing JV/ WOS, the earlier limit of 400%, under the automatic route would apply. Since the Agreement was entered into prior to the date of the RBI circular dated August 14, 2013, the 400% limit under the ODI Regulations would have applied to the Deal.

From the current structure of Apollo, we can understand that Apollo has made investments in a number of wholly owned subsidiaries in Mauritius, South Africa, Netherlands, etc. For the purpose of calculation of the 400% investment limit, the aggregate investment of Apollo in all these entities must have been taken into account.

5. Epilogue

On the back of debt concerns and the premium paid to the shareholders of Cooper, the shares of Apollo plunged more than 36% in the first two weeks of announcing the deal on June 12, 2013. However, this seemed to be but a minor fallout of the mega-acquisition to-be by the Indian entity. Given Apollo's history of acquisitions, involving Dunlop and Apollo Vredestein, and its acquisition of rubber plantations across the globe to offset the volatility in rubber prices, Apollo seemed to be pursuing a highly strategic plan to emerge as one of the global leaders in tire manufacturing. However, the various labor and legal roadblocks faced by the Deal have ultimately led to the collapse of this historic acquisition. The acrimony between the parties persists, as Cooper intends to pursue legal remedies for recovery of the US$ 112.5 million termination fee and other possible damages from Apollo, while Apollo is seeking legal remedies for Cooper's detrimental conduct.

As you would be aware, we have been providing regular information on latest legal developments. M&A Lab is our initiative to provide you knowledge based analysis and more insight on latest M&A deals. You can direct your views / comments / suggestions on our initiative to

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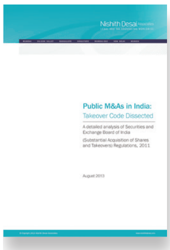
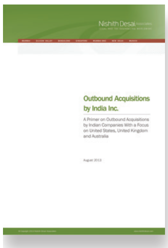


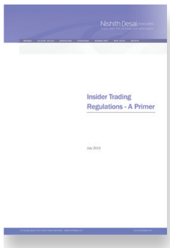
Takeover Code Dissected

August 2013



Outbound acquisitions by India Inc

August 2013



Insider Trading Regulations

July 2013

Mergers & Acquisitions in India

July 2013

Warburg-future capital deal dissected

January 2013

Cairn-Vedanta deal dissected

January 2012

Patni plays to iGate's tunes

January 2012

Fund structuring and operations

March-2014

Doing Business in India

May 2014

NDA Insights

TITLE	TYPE	DATE
File Foreign Application Prosecution History With Indian Patent Office	IP Lab	02 April 2013
Warburg - Future Capital - Deal Dissected	M&A Lab	01 January 2013
Public M&A's in India: Takeover Code Dissected	M&A Lab	August 2013
Copyright Amendment Bill 2012 receives Indian Parliament's assent	IP Lab	September 2013
Real Financing - Onshore and Offshore Debt Funding Realty in India	Realty Check	01 May 2012
Pharma Patent Case Study	IP Lab	21 March 2012
Patni plays to iGate's tunes	M&A Lab	04 January 2012
Vedanta Acquires Control Over Cairn India	M&A Lab	03 January 2012
Corporate Citizenry in the face of Corruption	Yes, Governance Matters!	15 September 2011
Funding Real Estate Projects - Exit Challenges	Realty Check	28 April 2011
Real Estate in India - A Practical Insight	Realty Check	22 March 2011
Hero to ride without its 'Pillion Rider'	M&A Lab	15 March 2011
Piramal - Abbott Deal: The Great Indian Pharma Story	M&A Lab	05 August 2010
Bharti connects with Zain after two missed calls with MTN	M&A Lab	05 June 2009
The Battle For Fame - Part I	M&A Lab	01 April 2010
Great Offshore Takeover Saga - Bharati Shipyard v/s ABG Shipyard	M&A Lab	16 December 2009
Second missed call: Bharti Airtel fails to reconnect with MTN	M&A Lab	09 October 2009

Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our *"Hotlines".* These *Hotlines* provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our *NDA Insights* dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with a much needed comparative base for rule making. Our *ThinkTank* discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports. Please feel free to contact us at
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