Inter alia...

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Inter alia... is a legal newsletter published each quarter by AZB & Partners for a select list of clients and colleagues. Each issue aims to provide a snapshot of the recent legal developments in certain critical areas: infrastructure, foreign direct investment, securities law, exchange control regulations, corporate law, media and entertainment, intellectual property and banking. We hope you will find the content informative and useful. If you have any questions or comments, please email us at: editor.interalia@azbpartners.com or call AZB & Partners.

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Corporate & SCRA

❖ New Rules on Filing of E-Form ACTIVE Effective

❖ The Ministry of Corporate Affairs ('**MCA**') has, on May 16, 2019, introduced a new Rule 12B in the Companies (Appointment and Qualification of Directors) Rules, 2014, which provides that in case of failure by a company to file the e-Form ACTIVE in accordance with and within the time period stipulated in Rule 25A of the Companies (Incorporation) Rules, 2014, the director identification number ('**DIN**') allotted to its existing directors will be marked as 'Director of ACTIVE non-compliant company', which will be marked as 'Director of ACTIVE compliant company' only subsequent to the filing of e-form ACTIVE by such companies.

❖ New Rules on Form No. STK-2 Filing

❖ The MCA has, on May 8, 2019, amended Rule 4(1) of the Companies (Removal of Names of Companies from the Registrar of Companies) Rules 2016 ('**Removal of Name Rules**') (effective as on May 10, 2019), whereby any company which is filing Form No. STK-2 for removing its name from the register of companies, is required to have necessarily filed overdue returns in Form No. AOC-4 (financial statements) or AOC-4 XBRL, as the case may be, and Form No. MGT-7 (annual returns), upto the end of the financial year in which the company ceased to carry its business operations. Additionally, in case a company intends to file Form No. STK-2 after the Registrar of Companies ('**RoC**') has sent a notice to the company setting out his intent to remove the name of the company from the register of companies, such company must file all pending overdue returns, in the manner set out above, before filing Form No. STK-2. Further, if the RoC has already initiated action to remove the name of the company, Form No. STK – 2 cannot be filed by the company.

Foreign Exchange

❖ Revised Voluntary Retention Route for FPI investment in Debt

❖ The Reserve Bank of India ('**RBI**') has, by way of its circular dated May 24, 2019, notified a revised voluntary retention route ('**VRR**'), which was previously introduced on March 1, 2019 as a separate scheme for investments by foreign portfolio investors ('**FPIs**') in Indian debt markets.

i. RBI had earlier prescribed the following categories of investments, with a separate investment limit specified for each:
   (a) VRR-Govt.: Under this route, FPIs could subscribe to all types of Government securities available under the general investment route *viz.*, G-Secs, T-bills and SDLs; and
   (b) VRR-Corp.: Under this route, FPIs could subscribe to certain instruments available for investments by FPIs under Schedule 5 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 ('**TISPRO Regulations**') (*i.e.* commercial papers / non-convertible debentures / bonds issued by an Indian company, security receipts issued by asset reconstruction companies, etc.).

ii. A third category of investment has now been introduced, called 'VRR-Combined'. Under this, FPIs can invest in securities permissible under both VRR-Govt. and VRR-Corp. categories, which has a combined investment limit of ₹75,000 crores (approx. US$ 10.75 billion) which may be allocated by the RBI amongst the three categories, from time to time. The RBI has, as on May 24, 2019, opened up investment limits for the VRR-Combined category for an amount of approx. ₹54,600 crores (approx. US$ 7.8 billion).

iii. Earlier, the limits for investment were first offered for allotment 'on tap' between March 11, 2019 and April 30, 2019 on a 'first-come-first-served' basis. The tap has now been opened on a 'first-come-first-served' basis until the earlier of (a) the limit being fully allotted; or (b) December 31, 2019. An auction process will be implemented if there is a demand for more than 100% of the amount offered.

iv. The concerned FPI is required to invest and keep invested 75% of committed portfolio size ('**CPS**') being the amount allotted to it (on an end-of-day basis), within 3 months from the date of allotment. Under the earlier regime, the concerned FPI was required to invest 25% of the CPS within one month of allotment and the balance 50%, within 3 months of allotment.

v. While an FPI can open a separate security account for holding debt securities under this route, it is no longer mandatorily required to do so.

❖ Investment by FPIs in Municipal Bonds

❖ As a measure to broaden access to debt instruments in India for non-resident investors, RBI has, by its circular dated April 25, 2019, permitted FPIs to invest in municipal bonds (*i.e.* debt

instruments issued by municipalities constituted under Article 243Q of the Constitution of India), which investment will be reckoned within the limits applicable for FPI investments in State development loans. The Securities and Exchange Board of India ('**SEBI**') has also, by its circular dated May 8, 2019, permitted FPIs to invest in municipal bonds.

❖ Annual Return on Foreign Liabilities and Assets by Indian Companies

❖ RBI by a circular dated June 28, 2019 has introduced a web-based reporting portal, the Foreign Liabilities and Assets Information Reporting ('**FLAIR**') system, to replace the e-mail based reporting of (i) the foreign liabilities and assets ('**FLA**') of Indian companies, (ii) the foreign direct investment ('**FDI**') received by Indian companies, and (iii) the inward and outward foreign affiliate trade statistics ('**FATS**'). The FLAIR system has been brought into force with immediate effect and has been made applicable for reporting of information for the year 2018-2019. The last date for filing the FLA return through the FLAIR system for the year 2018-2019 was extended from July 15, 2019 to July 31, 2019. Non-compliance with the provisions of the circular will be treated as default under the Foreign Exchange Management Act, 1999 and the regulations made thereunder.

Capital Markets

❖ Extension of Time for Implementation of Phase I of Unified Payments Interface with ASBA

❖ By its circular dated November 1, 2018, SEBI had introduced the use of Unified Payments Interface as a payment mechanism with Application Supported by Block Amount for applications in public issues by retail individual investors through intermediaries, with effect from January 1, 2019 ('**ASBA Circular**'), the implementation of which was to be carried out in a phased manner. Now, by its circular dated April 3, 2019, SEBI has extended the timeline for implementation of Phase I until June 30, 2019, with the implementation of Phases II and III continuing unchanged from the date of completion of Phase I.

❖ Amendments to the SEBI Delisting Regulations

❖ SEBI, by its circular dated March 13, 2019, has prescribed the process and framework for promoters / acquirers to make a 'counter offer' under the SEBI (Delisting of Equity Shares) Regulations, 2009 ('**SEBI Delisting Regulations**'), in case the price discovered through reverse book-building mechanism in the SEBI Delisting Regulations is not acceptable to such promoters / acquirers.

❖ Amendment to the SEBI (Debenture Trustees) Regulations, 1993

❖ By an amendment dated May 7, 2019, SEBI has amended the SEBI (Debenture Trustee) Regulations, 1993 ('**Debenture Trustee Regulations**'), to *inter alia* increase the minimum capital adequacy requirement for a debenture trustee ('**DT**') to be registered as such with SEBI from ₹2 crores (approx. US$300,000) to ₹10 crores (approx. US$1.5 million). Debenture trustees already registered with SEBI are required to comply with this requirement within 3 years. Additionally, SEBI has clarified that the requirement to convene a meeting of all debenture holders in case of a default in payment obligation by the issuer will not apply in case of debentures issued by way of public issue.

❖ SEBI Informal Guidance in the matter of Innovative Tech Park Limited

❖ Innovative Tech Park Limited requested for informal guidance from SEBI, seeking clarification *inter alia* with respect to interpretation of Regulation 78(6) of the *erstwhile* SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('**Old ICDR Regulations**'), for the purpose of calculating the lock-in period, where convertible securities (in this case, warrants) are not listed on any recognized stock exchange. SEBI was of the view that in case of an issue of convertible securities allotted on preferential basis which are not listed on any stock exchange, the entire pre-preferential holding is required to be locked-in from the 'relevant date' upto a period of six months from the date of allotment of the securities, instead of the date of trading approval (which is relevant for listed securities only) and the relevant date in such a case would be calculated from 30 days prior to the date of the shareholders approval in accordance with Regulation 71 of the Old ICDR Regulations.

❖ Participation of Portfolio Managers in Commodity Derivatives Market in India

❖ SEBI, by its circular dated May 22, 2019 has now allowed portfolio managers to participate, on behalf of their clients, in exchange traded commodity derivatives, subject to the portfolio manager appointing a SEBI registered custodian prior to such dealing, and subject to compliance with prescribed conditions.

❖ Enhanced Disclosure Requirements for Listed Debt Securities

❖ By its circular dated May 27, 2019, SEBI has enhanced disclosure requirements in relation to listed debt securities, which include *inter alia* the following: (i) disclosure by DTs on their websites of the nature of their compensation arrangements with their clients, including the minimum fee to be charged and factors determining the same, and (ii) DTs should now display on their website, details of interest / redemption due to debenture holders, and the status of payment against issuers (including a remark in case of any delay), within specified timelines.

Further, the SEBI (Issue and Listing Debt Securities) (Amendment) Regulations, 2019, omitted the additional covenants which were required to be included as part of issue details for privately placed issues, with effect from May 7, 2019. The aforesaid circular now provides for two

new additional covenants to be included in all summary term sheets / agreements executed on or after May 7, 2019: (i) in case of default in payment of interest and/or principal redemption, additional interest of at least @ 2% per annum over the coupon rate shall be payable by the issuer for the defaulting period; and (ii) in case of delay in listing of the debt securities beyond 20 days from the deemed date of allotment, the issuer must pay penal interest of at least @ 1 % per annum over the coupon rate from the expiry of 30 days from the deemed date of allotment till the listing of such debt securities.

❖ Working Group Report on the FPI Regulations

❖ On May 24, 2019, SEBI published the report of the Working Group under the chairmanship of Harun R. Khan, constituted to review the SEBI (Foreign Portfolio Investors) Regulations, 2014 ('**FPI Regulations**'). The recommendations of the Working Group range from fast tracking the on boarding process for select Category II FPIs, removal of the opaque structure definition, separate registration for sub-funds of a fund with segregated portfolio, permitting FPIs for off-market transactions, reclassification of investment from FPI to foreign direct investment (FDI) and strengthening the offshore derivative instruments framework. We will circulate further updates if and when SEBI adopts any such recommendations of the Working Group. AZB & Partners was a member of this Working Group.

❖ SEBI Prescribes Framework for DVRs by Tech Companies

❖ By a Press Release dated June 27, 2019, SEBI approved a framework for issuance of shares with differential voting rights ('**DVRs**') by tech companies (as defined with respect to the Innovators Growth Platform), subject to various conditions including additional corporate governance standards. The key proposals approved are set out below.

i. **Issuance of shares:** A company whose shares are proposed to be listed and would have superior voting rights shares ('**SR shares**') would be permitted to make an initial public offering ('**IPO**') of only ordinary shares to be listed on the main board subject to compliance with the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ('**SEBI ICDR Regulations**') and the following conditions: (a) the issuer is a tech company,[1] (b) the holders of SR shares shall not be part of the promoter group whose collective net worth is more than ₹500 crores (approx. US$73 million),[2] (c) SR shares has been issued only to the promoters/ founders holding executive position(s) in the company, (d) issuance of SR shares have been duly authorised by a special resolution of the shareholders, (e) SR shares have been held for at least six months prior to filing of the red herring prospectus, and (f) SR shares have voting rights in the ratio of 2:1 to 10:1 compared to ordinary shares.

ii. **Listing and Lock-in:** SR shares should be listed on the stock exchanges after the IPO by the issuer company, and must be locked-in until their conversion to ordinary shares (transfer inter-se promoters, and pledge/lien on SR shares not to be permitted).

iii. **Rights:** SR shares should be treated at par with ordinary equity shares including in respect of dividend issuance, except as regards voting on resolutions. The total voting rights of SR shareholders should not exceed 74% post listing.

iv. **Enhanced Corporate Governance:** Companies with holders of SR shares will be subject to enhanced corporate governance wherein half of the board and two-third of committees (excluding the audit committee) should comprise of independent directors[3] while the audit committee must comprise of only independent directors.

v. **Coat-tail provisions:** Post-IPO, in relation to 10 specified items, the SR shares would be treated as ordinary equity shares in terms of voting rights (*i.e.*, one SR share shall have only one vote). Such items include appointment or removal of independent directors and/or auditors, related party transactions in terms of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**SEBI Listing Regulations**') involving holders of SR shares, voluntary winding up of the company.

vi. **Sunset Clauses:** SR shares would be converted into ordinary shares either with the passage of time *i.e.*, at the completion of the fifth anniversary of listing[4] or would be event based *i.e.*, on the occurrence of certain events such as demise or resignation of shareholders of SR shares, merger or acquisition, etc.

vii. **Fractional Rights Shares:** The issuance of fractional rights shares by existing listed companies must not be allowed. The need for permitting the issuance of fractional rights shares may be reviewed after gaining enough experience with the use of SR shares.

1 A company, intensive in the use of technology, information technology, intellectual property, data analytics, bio technology or nano-technology to provide products, services or business platforms with substantial value addition.

2 It may be noted that while determining the collective net worth, the investment of the SR shareholders in the issuer company would not be considered.

3 In accordance with the SEBI Listing Regulations.

4 The validity of the SR shares can be extended by five years through a resolution in which the SR shareholders would not be permitted to vote on such resolution.

SEBI has amended the SEBI Listing Regulations and the SEBI ICDR Regulations on July 29, 2019 to notify above noted provisions.

❖ SEBI, by its discussion paper published on June 10, 2019, had sought public comments on its proposal to amend the SEBI (Prohibition of Insider Trading) Regulations, 2015 to provide for an effective informant mechanism for early detection of insider trading. The proposed mechanism aims to facilitate timely reporting of instances of insider trading. The discussion paper sets out key features of the proposed mechanism, including in relation to voluntary information disclosure form, disclosure of the source of information, confidentiality of the identity of the informant, grant of a reward for the informant of upto ₹1 crore (approx. US$150,000) and protection against victimization of informants.

❖ Discussion Paper on the Proposed Insider Trading Informant Mechanism

❖ SEBI has issued a discussion paper on May 21, 2019 to seek public comments on the review of the rights issue process (last date for which has elapsed). SEBI has *inter alia* made the following proposals:

i. Reduction in the period of notice for intimation of the record date in terms of Regulation 42 of the SEBI Listing Regulations from 7 working days to 3 working days.
ii. Replacement of the requirement to publish a newspaper advertisement confirming completion of dispatch of the letter of offer with a requirement to give such intimation through the stock exchanges and email to shareholders (if available).
iii. In order to make the issue process more efficient, SEBI has recommended various changes to the process to reduce the post issue timeline to 11 days, instead of the current 13-15 days till allotment and 17 days till listing.

❖ SEBI Discussion Paper on Review of Rights Issue Process

❖ SEBI has issued a discussion paper on May 22, 2019 to seek public comments on the suggestions relating to review of conditions for buy-back of securities (last date for which has elapsed). Under the SEBI (Buy-back of Securities) Regulations, 2018, one of the main conditions for buy-back of securities is that the aggregate of secured and unsecured debts owed by the company after buy-back should not be more than twice the paid-up capital and free reserves of such a company (however, if a higher ratio is specified under the Companies Act, 2013, the higher threshold would prevail). SEBI is of the view that the financial statements considered for evaluating compliance with the aforesaid test would be considered on a conservative basis (*i.e.*, both standalone and consolidated basis).

Given that non-banking financial companies ('**NBFCs**'), housing finance companies ('**HFCs**') and infrastructure companies have higher debts because of the nature of their businesses, the primary markets advisory committee of SEBI has proposed adoption of a different approach in case of listed companies with NBFCs, HFCs and infrastructure companies as subsidiaries, the key proponents of which are: (i) the post buy-back debt to capital and free reserves ratio of 2:1 for the listed company (other than for companies for which such ratios have been notified under the Companies Act, 2013) should be considered on a consolidated basis, after excluding such subsidiaries which are regulated and have issuances with AAA ratings; and (ii) such subsidiaries should have debt to equity ratio of not more than 5:1 on standalone basis.

❖ SEBI Discussion Paper on Review of Buy-Back of Securities

Banking and Finance

❖ The Reserve Bank of India ('**RBI**') has by way of its notification dated May 29, 2019 made certain changes to the Master Direction on KYC dated February 25, 2016 ('**KYC Master Direction**'), pursuant to which all regulated entities will be allowed to carry out Aadhaar authentication / offline verification of an individual who voluntarily provides his Aadhaar number for identification purpose. Further, additional certifying authorities for verification of documents of non-resident Indians and persons of Indian origin have been specified under the KYC Master Direction. Under the KYC Master Direction the term 'regulated entities' includes all banks (i.e. scheduled commercial banks, regional rural banks, local area banks, etc. which have been licensed under Section 22 of Banking Regulation Act, 1949), all Indian financial institutions, all non-banking finance companies, all payment system providers, etc.

❖ Amendment to Master Direction on KYC

❖ RBI, by its circular dated June 3, 2019 has amended and restated the Large Exposures Framework ('**LEF**') issued in 2016, applicable to scheduled commercial banks.[5] Some of the key features of the new LEF are:

i. Infusion of Tier 1 capital after the last audited balance sheet may be taken into account for calculating 'eligible capital base' (*i.e.*, effective amount of Tier 1 capital

❖ Reserve Bank of India – Large Exposure Framework

5 A 'large exposure (**LE**)' is where the sum of all exposure values of a bank to a counterparty or a group of connected counterparties is equal to or above 10% of the bank's eligible capital base (*i.e.*, Tier 1 capital fulfilling the criteria defined in the Basel III norms as per the bank's last audited balance sheet).

fulfilling the requisite criteria under the RBI Master Circular on Basel III – Capital Regulation, dated July 1, 2015, as amended ('**Basel III norms**')). Profits accrued during the year will also be reckoned as Tier 1 capital, subject to the Basel III norms.

ii. Banks have to apply the LEF at a standalone level (including overseas operations through branches) to determine exposures to a counterparty based on its standalone capital strength and risk profile, and at a consolidated (group) level (i.e. include assets and liabilities of its subsidiaries / joint ventures / associates (including overseas operations through bank's branches) etc., except those engaged in insurance and any non-financial activities).

iii. Non-centrally cleared derivatives exposures are excluded from the purview of exposure limits till April 1, 2020. However, banks must compute these exposures and report to the RBI on quarterly basis.

iv. The LE limit for non-G-SIB to a global systemically important bank ('**G-SIB**') in India or overseas is 20% of the eligible capital base. In calculation of LE limits for G-SIBs and non-GSIBs under the LEF, Indian branches of foreign G-SIBs are not considered as G-SIBs.

v. Exposure limit of Indian branches of foreign G-SIBs on a G-SIB (including its head office) is 20% of the eligible capital base and on any other bank is 25% of the eligible capital base. Exposure limit of Indian branches of foreign non-G-SIBs on a non-G-SIB (including its head office) is 25% of the eligible capital base and on any G-SIB is 20% of the eligible capital base.

vi. If 2 or more entities cannot avail of any specific exemption under the LEF in respect of its exposures and if such entities are controlled by or are economically dependent on any entity that can avail of the exemptions in relation to exposures to the Government of India, State Governments or the RBI and if such first mentioned entities are not otherwise connected as set out in the LEF, they are not deemed to be a 'group of connected counterparties'.

vii. In addition to the criterion of control by one party over the other in order to determine if two parties were 'connected counterparties' under the LEF, the RBI has now introduced 'economic interdependence' as an alternative criteria. The criteria of 'control' and 'economic interdependence' are to both be assessed by banks from all directions to ascertain possible default of all entities concerned. Some of the factors to be considered to establish connectedness based on economic interdependence have been detailed in the circular.

viii. The LEF states that 'control' is also to be ascertained based on whether two counterparties are directly or indirectly, controlled by a third party towards which the bank may or may not have exposure, and while determining such control, banks are also required to look at clients who have common owners, shareholders or managers. Under the LEF, banks are required to frame board approved policies for determining connectedness using the criteria provided in the LEF, which policies will be subject to supervisory scrutiny.

ix. The LEF has also laid down the application of the look-through approach in cases where the bank is investing in structures (such as funds, securitizations, security receipts, real estate investment trusts, etc.) that themselves have exposures to assets underlying the structures.

x. If a bank's exposure amount in an underlying asset is equal to or greater than 0.25% of its eligible capital base, the counterparty corresponding to such underlying asset must be identified and such exposure will be added to any other direct or indirect exposure to the same counterparty.

Telecommunications

❖ DoT Issues Instructions for Implementing Digital KYC Process for Issuing Mobile Connections

❖ The Department of Telecommunications ('**DoT**') has, by its circular dated April 3, 2019 ('**KYC Circular**'), amended the existing 'Alternate Digital Know Your Customer ('**KYC**') Process' applicable to issuance of new mobile connections to subscribers, thereby setting out the revised procedures and safeguards that need to be implemented for undertaking the digital KYC process. The key measures, *inter alia*, include the use of authenticated applications and controlling the access of such application, taking a live photograph of the subscriber, use of quick response code of subscriber's Aadhaar to auto-populate the required information. These measures need to be implemented within one month from the date of the KYC Circular.

❖ The Telecom Regulatory Authority of India ('**TRAI**') has, by its directions issued on April 3, 2019, partially altered TRAI direction no. 301- 14/2010-ER dated January 16, 2012 discontinuing the requirement to publish tariff information in national and vernacular language newspaper every six months given that all information regarding the telecom service providers' products is readily available on their respective websites and mobile applications.

❖ TRAI has, by its notification dated June 12, 2019, extended the timeline for implementation of the Telecommunication Mobile Number Portability (Seventh Amendment) Regulations, 2018 from June 13, 2019 to September 30, 2019. These regulations provide for the revised mobile number portability process by *inter alia* establishing a query response mechanism to enable the mobile number portability service provider to raise a query with regards to the data base of the donor operator on real time basis to obtain the response for the queries.

❖ TRAI Issues Directions on Publication of Tariffs by Telecom Service Providers

❖ TRAI amends the Telecommunication Mobile Number Portability (Seventh Amendment) Regulations, 2018

Taxation

❖ Set out below is an overview of the key proposals under the Finance Bill, 2019 ('**Finance Bill**')[6]:

❖ Finance Bill, 2019 – Key Proposals

i. Extension of the lower corporate tax rate of 25% (plus surcharge and cess) to all companies with total turnover or gross receipts not exceeding ₹400 crores (approx. US$ 58 million) in the Financial Year 2017-18.

ii. One of the conditions for a demerger to be tax neutral under the Income-tax Act, 1961 ('**ITA**') is that the assets and liabilities should be transferred at book value. Section 2(19AA) of the ITA is proposed to be amended, to provide that tax neutrality of the demerger will not be compromised, if the resulting company records the property and liabilities at a value different from the book value in compliance with the Indian Accounting Standards.

iii. Section 50CA of the ITA provides that in cases involving transfer of unquoted equity shares at a price that is less than fair market value ('**FMV**') under the prescribed rules, FMV is regarded as the sale consideration for the purpose of computing capital gains. Further, Section 56(2)(x) states that if any person receives, *inter alia*, shares in a company at a price lesser than FMV, the variance will be subject to tax in the hands of such recipient. The Finance Bill has recognized that determination of FMV based on the prescribed rules may result in genuine hardship in cases where the consideration is approved by certain authorities and the transferor has no control over determination thereof. To confer relief in such transactions, it is proposed to empower the Central Board of Direct Taxes ('**CBDT**') to prescribe transactions undertaken by certain classes of persons to which Sections 50CA and 56(2)(x) of the ITA will be inapplicable.

iv. Section 9 of the ITA is proposed to be amended to state that in case of receipt of money by a non-resident from a person resident in India, income for the purpose of Section 56(2)(x) of the ITA, will be deemed to accrue or arise in India. This is primarily to ensure that gifts made by residents to non-residents do not escape tax. The benefits under the relevant tax treaties, if any, will continue to apply.

v. Carry forward of losses of certain companies is restricted under the ITA, where their voting shareholding changes beyond 49%. However, this limitation does not apply to companies which are undergoing corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 ('**IBC**'). It is proposed to extend the benefit of carry forward of losses to companies (including their subsidiaries and subsidiary of each such subsidiary): (i) whose board of directors has been suspended by the National Company Law Tribunal ('**NCLT**') under Section 241 of the Companies Act, 2013 and new directors have been appointed by NCLT on the recommendation of the Central Government; and (ii) whose shareholding has changed in the previous year pursuant to a resolution plan approved by the NCLT. Further, for the purposes of computation of Minimum Alternate Tax liability of the said companies, the aggregate of brought forward losses and unabsorbed depreciation should also be allowed as deduction.

vi. The Central Government has proposed various benefits for start-ups, in addition to the existing ones:

(a) **Angel Tax Issue**:

a. Investments by Category-II AIFs should be exempted from angel tax (currently the investments by VCFs and Category I AIFs are exempt from this tax); and

6 The Finance Bill has been passed by both Houses of the Indian Parliament and has received the assent of the President of India.

b. In order to curb the practice of taking undue advantage of the benefit of exemption by eligible start-ups, upon the failure to adhere to the stipulated conditions for qualifying for angel tax exemption, any excess consideration received for issuance of shares by such entity over the FMV should be deemed to be its income for the year in which such failure took place and taxed accordingly.

(b) **Benefit of Carry forward of Losses**: The restrictions on carry forward and set off of losses by start-ups in cases of change in their shareholding should be relaxed.

(c) **Capital gains tax exemption to individuals on investment in a start-up**: The capital gains tax exemption in respect of sale of residential houses for investment in start-ups should be extended till March 31, 2021. Further, condition of minimum shareholding of 50% of share capital or voting rights in the eligible start-up by the investor should be relaxed to 25%. The restriction on transfer of new assets, being computer or computer software, should be relaxed from five years to three years.

vii. The share buy-back tax of 23.296%, currently applicable to unlisted companies only, is proposed to be extended to listed companies on or after July 5, 2019.

viii. Adverse tax consequences for default in withholding tax on payments made to non-residents to not apply where such non-resident payee: (i) files a return of income under the ITA; (ii) discloses the taxable sums in computing its income; and (iii) pays tax thereon and the payer furnishes a chartered accountant's certificate to that effect. This provision already existed in the context of payments made to Indian residents.

ix. While no change in income tax slabs has been envisaged, it is proposed to impose income tax surcharge on individuals, and certain other unincorporated persons. The current highest effective rate is 35.88%. As per the revised surcharge, the effective tax rates will be as under (subject to relief in marginal cases):

(a) Where income of individual exceeds ₹1 crore (approx. US$ 150,000), but does not exceed ₹2 crores (approx. US$ 300,000), surcharge is 15%, the effective rate being 35.88%. This rate is unchanged.

(b) Where income of individual exceeds ₹2 crores (approx. US$ 300,000) but does not exceed ₹5 crores (approx. US$ 730,000), surcharge is 25%, the effective rate being 39%.

(c) Where income of individual exceeds ₹5 crores (approx. US$ 750,000), surcharge is 37%, the effective rate being 42.744%.

x. The safe harbour rules are proposed to be amended in respect of offshore funds having fund managers in India by relaxing the conditions relating to corpus of the fund and remuneration paid to the fund manager.

❖ Compulsory Registration with BIS for Import of Second-Hand Electronics and IT Goods

❖ The Directorate General of Foreign Trade ('**DGFT**') has, by a notification dated May 7, 2019 ('**DGFT Notification**'), amended the Foreign Trade Policy of India 2015-2020 ('**FTP**'), clarifying that registration with the Bureau of Indian Standards ('**BIS**') would be mandatory for import of goods notified under the Electronic and IT Goods (Requirement of Compulsory Registration) Order, 2012 ('**CRO**'), irrespective of whether such goods are new or second-hand (whether or not refurbished, repaired or reconditioned). It was additionally stipulated that such electronics and IT goods intended for import must comply with the labeling requirements of BIS. Any non-compliance with these conditions would require a specific exemption letter from the Ministry of Electronics and Information Technology ('**MEITY**') while importing such electronics and IT goods. Any non-fulfilment of the aforesaid conditions would render such goods "prohibited" for import, thereby requiring (i) the importer to re-export such goods; or (ii) the customs authorities to deform the goods beyond use and dispose of them as scrap under intimation to MEITY.

❖ Orissa High Court Allows Input Tax Credit on Construction Services of a Shopping Mall

❖ Under Section 17(5)(d) of the Central Goods and Services Tax Act, 2017 ('**CGST Act**') input tax credit ('**ITC**') is not allowed on goods or services received by a taxable person for construction of an immovable property (other than plant or machinery) including when such goods or services are used in the course or furtherance of a business.

However, recently, the Orissa High Court[7] has allowed ITC on inputs and input services used for construction of a shopping mall wherein such mall is intended to be let-out upon construction, on the following grounds: (i) The very purpose of the Goods and Services Tax ('**GST**') regime is to prevent cascading of taxes, which objective should not be frustrated by adopting a narrow interpretation of the aforesaid Section 17(5)(d) of the CGST Act; and (ii) the shopping mall would not be used for personal business, and would instead be let-out, which is an activity covered under GST.

7 **Safari Retreats Private Limited**, W.P. (C) No. 20463 of 2018.

Employment

❖ Reduction in ESI Rates

❖ The Ministry of Labour & Employment, Government of India, by a notification dated June 13, 2019, has reduced the rate of contributions payable by employers and employees under the Employees' State Insurance Act, 1948 ('**ESI Act**') with effect from July 1, 2019, with the objective of promoting ease of doing business and promoting compliance with law. The employers' contribution has been reduced from the erstwhile rate of 4.75% to 3.25% and the employees' contribution has been reduced from the erstwhile rate of 1.75% to 0.75%.

❖ The Code on Wages Bill

❖ The Union Cabinet, on July 3, 2019, approved the Code on Wages Bill, which seeks to consolidate and amend the laws relating to wages and bonus in India. Once enacted, it will replace four existing labour laws *i.e.* (i) the Payment of Wages Act, 1936, (ii) the Minimum Wages Act, 1948, (iii) the Payment of Bonus Act, 1965, and (iv) the Equal Remuneration Act, 1976. The Code on Wages Bill has been passed by the Lok Sabha on July 30, 2019.

Intellectual Property

❖ Delhi High Court awards exemplary damages to Philips for IP infringement

❖ In a precedent setting and landmark decision, the Delhi High Court on April 22, 2019 in the matter of **Koninlijke Philips N.V. *v.* Amazestore**[8], awarded damages to the tune of approx. ₹ 3.15 crores (approx. US$ 450,000) against the defendants for willful infringement and piracy of designs, copyrights and trade dress.

The plaintiffs had argued that the defendants in this matter *viz.* M/s. Badri Electro Supply and Trading Company (owner of the trademark 'NOVA') ('**Bestco**'), Nova Manufacturing Industries Limited (manufacturer of the infringing products) ('**Nova**') and Omni Exim Private Limited (importer of the infringing products) ('**Omni**') had imitated the design of its products under the Advance Beard Trimmer Series 3000 as well as copied the accompanying product literature, packaging, colour scheme and trade dress. The Court observed that: (i) the impugned products of the defendants did indeed closely resemble the aesthetics of the plaintiff's products; (ii) the defendants with *mala fide* intent had deliberately imitated the shape and configuration of the plaintiffs' products, which constituted piracy of the registered designs of the plaintiffs; (iii) the defendants had copied the product packaging, literature and trade dress of the products. In light of the above, the Court proceeded to grant the relief of permanent injunction restraining the defendants from infringing upon the registered design and copyright of the plaintiff as well as passing off and unfair competition.

Referring to the principles laid down in **Rookes v. Barnard and Cassell & Co. Limited *v.* Broome**[9], the Court held that the nature and quantum of the damages to be awarded has a direct nexus with the degree of *mala fide* conduct and that granting of exemplary damages was validated in a case where a defendant deliberately infringes upon the rights of a person, knowing that profit he will gain from the wrongful conduct will probably exceed the damages payable to the victim.

The Court went on to lay down a set of guidelines that should be followed for the purpose of granting damages in intellectual property infringement cases, which is directly linked to the degree of *mala fide* conduct.

❖ Delhi High Court grants First Ever Dynamic Injunction to Curb Online Piracy

❖ UTV Software Communications Limited & Ors., being 'owners' of cinematographic films, filed eight copyright infringement suits against 30 known websites, certain unnamed defendants, Internet Service Providers ('**ISPs**'), MEITY, and DoT for communicating their original content / cinematographic works to the public, without authorization.

At the very outset, the Delhi High Court by way of its order dated April 10, 2019 had held that online piracy ought not to be treated any differently than the infringement taking place in the physical world, especially as the Copyright Act does not make any such distinction. The Court, while analyzing the issue of rogue websites, observed that a qualitative approach should be adopted and also laid down factors to be considered before classifying a particular website as a 'rogue' website, key factors being: (i) whether the primary purpose of the website was to commit copyright infringement, (ii) whether details of the registrants were masked, (iii) whether there was 'silence or inaction' after receipt of copyright infringement notices from owners, and (iv) whether the website contains any instructions to circumvent measures that disable access to such websites. In view of the factors mentioned above, the Court found the defendant websites to be in fact 'rogue' websites.

8 **Koninlijke Philips N.V. *v.* Amazestore**, CS (COMM) 737/2016, I. A. 7469/2016, CS (COMM) 1170/2016, I.A. 2685/2017 and 16768/2018, decided on April 22, 2019.

9 **Rookes *v.* Barnard and Cassell & Co. Limited *v.* Broome**, [1964] 1 All ER 367.

The Court also considered the issue of '*hydra headed*' websites, which on being blocked, multiply and resurface as alphanumeric or mirror websites. To overcome this problem, the Court referred to a judgment of the Singapore High Court in the case of **Disney Enterprise *v.* M1 Limited**,[10] and adopted the concept of dynamic injunction under its inherent and discretionary powers available under Section 151 of the Code of Civil Procedure, 1908 ('**CPC**'), which would allow the plaintiffs to simply implead additional mirror websites to the original suit for injunction by way of an interlocutory application under the CPC, as opposed to filing a fresh suit. The plaintiffs were also directed to file an affidavit confirming that the newly impleaded website is a mirror / redirect / alphanumeric website (*i.e.*, has the same content as an injuncted rogue website) with sufficient supporting evidence.

The Court thus passed a decree of permanent injunction against the defendant websites and further directed the ISPs to block all access to the defendant websites and further directed the DoT and MEITY to explore possibilities of framing a policy which will serve to caution and warn website users of the potential copyright infringement resulting from downloading and viewing pirated content and further fine them if they violate said warnings.

The present case is significant not only as it provides a guideline for identifying rogue websites, but also as it provides a roadmap for strategies that can be implemented to (i) reduce the burden of copyright owners who are aggrieved by such 'hydra-headed' infringing websites in the short term, and (ii) discourage access and use of pirated content by website users in the long term.

❖ Bombay HC rules on Copyright Infringement by 'Over The Top' Services

❖ The Bombay High Court, by its decision passed on April 23, 2019[11] dealt with the issue of whether certain 'over the top' services provided by Wynk through its software platform amounted to copyright infringement of Tips Industries' copyrights in certain sound recordings and also whether Wynk, was entitled to invoke the provisions of statutory licensing under Section 31D of the Copyright Act, 1957 ('**Copyright Act**') for internet broadcasting. Following services were provided through the Wynk App: (a) downloading of sound recordings by users on their devices upon payment of a monthly rental fee (and retaining access to the same without an internet connection during the rental period), (b) purchase of sound recordings of Tips Industries, for a flat fee (and retaining access to the same without an internet connection, in perpetuity), and (c) on demand streaming services where sound recordings were made available over the internet, which could be accessed through any device connected to the internet on the Wynk App.

Wynk continued to make Tips Industries' sound recordings available to its users even after the authorization granted by Tips Industries for use of its sound recordings had lapsed. After analyzing Section 14(1)(e) of the Copyright Act in detail, the Bombay High Court held that Wynk's actions amounted to copyright infringement. The Court held that the outright purchase/download services provided by Wynk amounted to a sale of the sound recording and also the temporary rental option amounted to commercial rental of the sound recording, thereby infringing the exclusive rights of Tips Industries. The Court also held that Wynk's services were of a commercial nature and hence were not covered by the fair dealing exceptions. On the issue of statutory licensing, the Court held that since the right to sell and/or commercially rent sound recordings are distinct and separate rights which are different from the right to communicate the sound recording to the public, Wynk cannot exercise a statutory license right under Section 31D in relation to the download and purchase features of the services provided by them (which amount to sale and / or commercial rental). The Court clarified that the statutory license regime under the Copyright Act only applies to "broadcasting" rights that fall under the exclusive right to "communicate the work to the public".

The Court thereafter held that Wynk would not fall within the purview of broadcast organizations that are eligible to be granted a statutory license since Wynk was an internet broadcasting organization. The Court observed that the statutory licensing scheme under the Copyright Act is only applicable for radio and television broadcasting organizations. This conclusion was reached based on the language of Section 31-D of the Copyright Act read with Rule 29 of the Copyright Rules, 2013, which specifically mention only radio and television broadcasting. Further, the provisions of the Copyright Act presuppose the fixing of royalty rates by the Intellectual Property Appellate Board before a statutory license can be granted. However, the Court noted that royalties for internet broadcasting have not yet been fixed and, therefore, a statutory license could in fact not be granted to internet broadcasting organizations.

10 **Disney Enterprise *v.* M1 Limited**, (2018) SGHC 206.

11 **Tips Industries Limited *v.* Wynk Music Limited**, Notice of Motion (L) No. 197 of 2018 in Commercial Suit IP (L) No. 114 of 2018 and Notice of Motion (L) No. 198 of 2018 in Commercial Suit IP (L) No. 113 of 2018.

Information Technology

❖ RBI has released its FAQs on June 26, 2019 clarifying the scope and extent of its circular dated April 6, 2018 ('**PSA Circular**') under the Payment and Settlement Systems Act 2007 ('**PSA**') which: (i) requires system providers to store all data relating to payments systems operated by them only in India; and (ii) directs compliance within a period of six months. RBI has clarified that the PSA Circular is applicable to all authorised payment system providers under the PSA ('**PSOs**'), all banks operating in India and all services providers in the payments ecosystem who are engaged by PSOs (though the responsibility to ensure compliance will remain with the PSOs). RBI has clarified that there is no restriction on processing of payment transactions outside India, provided that the related data is stored only in India after such processing. Data that is processed abroad must be deleted from systems abroad and brought back to India within one business day or 24 hours from payment processing (whichever is earlier).

Foreign banks (and banks which have been specifically permitted to store banking data abroad) have been permitted to continue storing such data abroad, provided that: (i) in respect of domestic payment transactions, the data should be stored only in India, and (ii) in case of cross border transactions, a copy of the data relating to the domestic component of the data may also be stored abroad.

Litigation

❖ The Supreme Court of India ('**SC**') had previously, in the matter of **TRF Limited v. Energo Engineering Projects Limited**[12] ('**TRF**') held that a person, who is ineligible to be appointed as an arbitrator under Section 12(5) of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'), cannot appoint an arbitrator in his or her stead. By its decision dated April 16, 2019,[13] the SC has extended the applicability of its decision in TRF and ruled that parties may place reliance on the decision in TRF, even if such proceedings were initiated prior to the decision in TRF, but after Section 12(5) of the Arbitration Act came into force on October 23, 2015.

❖ The SC on May 9, 2019[14] has set aside an order of the Madras High Court, wherein it had been held that the transaction to purchase the properties that formed the subject-matter of the dispute was benami in nature, given that part of the sale consideration was paid by another person at the time of the purchase of the property. The SC noted that the following circumstances should be taken into consideration: (i) the source of the purchase money; (ii) the nature and possession of the property, after the purchase; (iii) the motive, if any, for giving the transaction a benami colour; (iv) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (v) the custody of the title deeds after the sale; and (vi) the conduct of the parties concerned in dealing with the property after the sale. The SC held that the burden of proving that a particular sale is benami and that the apparent purchaser is not the real owner, always rests on the person making such an assertion.

The SC, while considering whether it was open for the defendant to take the plea that the purchase made in the name of the wife or children was for their benefit, noted that under Section 3 of the Benami Transaction (Prohibition) Act, 1988 ('**BTA**'), there was a presumption that a transaction made in the name of the wife and children is for their benefit. However, by way of the Benami Amendment Act, 2016, Section 3(2) of the BTA, which provided for the said statutory presumption, was omitted. In light of the above, the SC noted that the provisions of the BTA were not applicable retrospectively and therefore, the said 2016 amendment would not apply in the present case as the sale deed was executed much prior in time.

❖ On May 8, 2019, the SC held that[15] the amendments to Section 34 of the Arbitration Act would apply to appeals filed post the 2015 amendments even if the arbitral proceedings had commenced prior to the date of the amendments *i.e.*, October 23, 2015. On this basis, the SC set aside the majority award under Section 34 of the Arbitration Act in the impugned matter. Instead of the dispute being referred afresh to arbitration, in order to do complete justice between the parties, the SC invoked its powers under Article 142 of the Constitution of India and upheld the minority award and directed the parties to execute the same.

12 (2017) 8 SCC 377.

13 **Bharat Broadband Network Limited *v.* United Telecoms Limited**, 2019 SCC Online SC 547.

14 **Mangathai Ammal *v.* Rajeswari**, 2019 SCC Online SC 717.

15 **Ssangyong Engineering & Construction Co. Limited *v.* National Highway Authority of India**, 2019 SCC Online SC 677.

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Best Indian Law Firm
International Legal Alliance Summit Awards, 2019 and 2017

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Corporate Law Firm of the Year
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Bloomberg's Global M&A, Legal Rankings H1 2019

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Thomson Reuters' Emerging Markets M&A Legal Rankings H1 2019

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M&A Announced and Completed Deals League Table by Volume
Thomson Reuters' Emerging Markets M&A Legal Rankings H1 2019

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Mergermarket's Global and Regional M&A League Tables of Legal Advisors H1 2019

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India Business Law Journal, 2018 & 2017

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ALB SE Asia Law Awards, 2018

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Asialaw Profiles, 2018

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Venture Intelligence League Tables of Legal Advisors, 2017

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Chambers Asia-Pacific Awards, 2017

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