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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Inter alia...

Corporate & SCRA

❖ Certain Relaxation to Startups for Issuing Sweat Equity and Listed Companies for Issuing Privately Placed Debentures

❖ The Ministry of Corporate Affairs ('**MCA**') has notified the Companies (Share Capital and Debentures) Amendment Rules, 2020 on June 5, 2020. The Notification *inter alia* provides the following relaxations to companies:

i. Startup companies (as defined under the relevant Government notification issued by the Department of Promotion of Industry and Internal Trade, Ministry of Commerce and Industry) may issue sweat equity shares up to 50% of their paid-up capital for a period of 10 years from the date of their incorporation or registration. Previously, this relaxation was allowed for a period of 5 years only; and

ii. Listed companies issuing privately placed debentures are no longer required to, on or before April 30 each year, invest or deposit minimum 15% of the amount of its debentures maturing during the financial year (April 1 to March 31).

❖ Companies (Appointment and Qualification of Directors) Third Amendment Rules, 2020

❖ Pursuant to Rule 6(1)(a) of the Companies (Appointment and Qualification of Directors) Rules, 2014, individuals appointed as independent directors as of October 22, 2019 are required to apply for inclusion of their names in the data bank of independent directors maintained in accordance with the Companies Act. The MCA on June 23, 2020 has increased the time period for complying with this requirement to 10 months (instead of 7 months) from October 22, 2019.

❖ New Criteria for Classification of Micro, Small and Medium Enterprises

❖ The Ministry of Micro, Small and Medium Enterprises, by way of its Notification dated June 1, 2020, has introduced new criteria for classification of micro, small and medium enterprises, under the Micro, Small and Medium Enterprises Development Act, 2006, on the basis of (a) investment by enterprises in plant and machinery or equipment; and (b) their turnover in the manner set out below. Previously, the criteria was separate for enterprises in the manufacturing sector and those in the services sector and was only on the basis of investment in plant machinery or equipment – pursuant to this amendment, the criteria for classification has been harmonized for enterprises in both these sectors. The new criteria for classification of micro, small and medium enterprises pursuant to the Notification are as follows:

i. **Micro enterprises:** investment in plant and machinery or equipment up to ₹ one crore and turnover up to ₹ five crore;

ii. **Small enterprise:** investment in plant and machinery or equipment up to ₹ 10 crore and turnover up to ₹ 50 crore; and

iii. **Medium enterprise:** investment in plant and machinery or equipment up to ₹ 50 crore and turnover up to ₹ 250 crore.

This Notification has come into effect from July 1, 2020.

❖ Other Key Developments

❖ Please refer to our Client Alerts dated April 17, 2020, May 15, 2020 and May 20, 2020 (click on blue date to access on our website) for other key Corporate updates.

Foreign Exchange

❖ Revision of FPI Investment Limits in Government Securities

❖ Reserve Bank of India ('**RBI**') has by its Circular dated April 15, 2020, revised the investment limits for foreign portfolio investors ('**FPIs**') in Government Securities ('**G-secs**') for the financial year ('**FY**') 2020-2021 as follows:

i. The limits for FPI investment in G-secs and State Development Loans ('**SDLs**') remains unchanged at 6% and 2%, respectively, of outstanding stocks of securities for 2020-21;

ii. All investments by eligible investors in the specified securities will be under the Fully Accessible Route ('**FAR**') from the effective date. Further, all existing FPI investments in specified securities will be under the FAR and the calculation of outstanding stock of G-secs and utilization levels of limits under the Medium Term Framework has accordingly been adjusted;

iii. The allocation of incremental changes in the G-sec limit (in absolute terms) over the two sub-categories – 'General' and 'Long-term' – will be retained at 50:50 for the FY 2020-21; and

iv. The entire increase in limits for State Development Loans (in absolute terms) has been added to the 'General' sub-category of SDLs.

The revised limits (in absolute terms) for corporate bonds for the FY 2020-21 are:

i. Current FPI limits: ₹ 3,17,000 crore;

ii. Revised limit for the half year April-September 2020: ₹ 4,29,244 crore; and

iii. Revised limit for the half year October 2020-March 2021: ₹ 5,41,488 crore.

❖ Relaxation of Time Limits for Debt Investments under Voluntary Retention Route by FPIs

❖ The Circular dated May 24, 2019, issued by the RBI required FPIs to invest at least 75% of their committed portfolio size ('**CPS**') under the Voluntary Retention Route (VRR) within 3 months from the date of allotment of the CPS. By way of Circular dated May 22, 2020, due to disruptions caused by the COVID-19 pandemic, the RBI has granted an *additional* period of 3 months to FPIs that were allotted investment limits between January 24, 2020 (the date of reopening of allotment of investment limits) and April 30, 2020, to invest 75% of their CPS. It is pertinent to note that for the FPIs who avail such additional time, the retention period for investments (committed by them at the time of allotment of investment limit) would be reset to commence from the date that such FPI invests 75% of its CPS.

❖ Changes in FDI Regime to Curb Opportunistic Takeovers from Neighbouring Countries

❖ The Government has issued Press Note 3 (2020 Series) dated April 17, 2020 for review of Foreign Direct Investment ('**FDI**') Policy prescribing that any foreign investment by or from an entity of any country which shares its land border with India (China, Bhutan, Nepal, Pakistan, Bangladesh and Myanmar) ('Neighbouring Country') or where the beneficial owner of an investment into India is situated in, or is a citizen of, any Neighbouring Country, can only be made with prior approval of the Government. The Press Note also states that any transfer (whether direct or indirect) of any current or future FDI in any Indian entity, which results in the beneficial ownership being transferred to any such person of a Neighbouring Country, would be subject to the approval of the Government. The corresponding amendment to the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ('**NDI Rules**') has been made on April 22, 2020, making the above noted change in FDI policy effective. Please refer to our Client Alert dated April 20, 2020 (click on blue date to access on our website) for more details.

❖ RBI's Discussion Paper on Governance in Commercial Banks

❖ RBI has on June 11, 2020 released a discussion paper on governance of private sector banks in India, which deals with overall responsibility of the board of directors, qualification and selection of board members, composition of the board of director and its committees, tenures of whole-time directors and CEOs, and various other governance related topics. RBI had invited comments from the public on this discussion paper until July 15, 2020.

❖ Other Key Developments

❖ Please refer to our Client Alert May 12, 2020 (click on blue date to access on our website) for details regarding the amendments made to the NDI Rules on April 27, 2020.

Capital Markets

❖ Mauritius Based Entities now Eligible for Registration as Category I FPI

❖ The Securities and Exchange Board of India ('**SEBI**'), has on April 7, 2020, amended the SEBI (FPI) Regulations, 2019 for expanding the scope of entities that are eligible to be Category I FPIs ('**Cat I FPIs**'). Pursuant to this amendment, entities from any country specified by the Central Government by an order or by way of an agreement or treaty with other sovereign Governments would be permitted to register as Cat I FPIs, provided that they are: (a) appropriately regulated funds; (b) unregulated funds whose investment manager is appropriately regulated and registered as a Cat I FPI and the investment manager undertakes the responsibility of all the acts of commission or omission of such unregulated fund; or (c) university related endowments of such universities that have been in existence for more than five years. Prior to this amendment, the eligible countries under this sub-category of Cat I FPIs were limited to countries that are members of Financial Action Task Force. Shortly after, the Department of Economic Affairs, Ministry of Finance, Government of India, by its Order dated April 13, 2020, has notified Mauritius as an eligible country under the provisions of the aforesaid amendment.

❖ Operational Framework for Transactions in Defaulted Debt Securities

❖ Based on representations received from market participants and investors to allow transactions in debt securities where redemption amount has not been paid on maturity/redemption date ('**Defaulted Debt Securities**'), SEBI, by its Circular dated June 23, 2020, has introduced an operational framework for transactions in Defaulted Debt Securities, which also prescribes the obligations of issuers, debenture trustees, depositories and stock exchanges while permitting such transactions.

❖ Relaxation of Time Gap between Board and Audit Committee Meetings

❖ By its Circular dated March 19, 2020, SEBI had relaxed the requirement of maximum time period of 120 days between two board meetings or two audit committee meetings of listed entities for the period between December 1, 2019 and June 30, 2020. By a Circular dated June 26, 2020, SEBI has now extended the above time period till July 31, 2020. However, the requirement to have at least four meetings in a year will continue. MCA had earlier by its Circular dated March 24, 2020 extended the requirement for mandatorily holding a board meeting within the intervals of 120 days as required under the Companies Act by 60 days until September 30, 2020, giving companies a one time relaxation of a gap of 180 days between two consecutive board meetings.

❖ Relaxations and Amendments to SEBI ICDR Regulations

❖ **Rights Issue**

In light of the COVID-19 pandemic, SEBI has, by way of its Circular dated May 6, 2020, provided certain relaxations under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ('**SEBI ICDR Regulations**') in relation to rights issues. Some of the key relaxations are as follows:

i. Failure to adhere to requirements in relation to (a) dispatch of abridged letter of offer, application form, and other issue related material through registered or speed post, and (b) publication of issue related advertisements, will not be treated as non-compliance, and the same may be dispatched or issued electronically, subject to the specified conditions; and

ii. In terms of SEBI Circular dated January 22, 2020, SEBI introduced dematerialized rights entitlements ('**RES**'). Further, physical shareholders are required to provide their demat account details to the issuer or the registrar for credit of RES. In view of the COVID-19 pandemic, in case the physical shareholders who have not been able to open a demat account or are unable to communicate their demat details to the issuer/ registrar for credit of RES within specified time, such physical shareholders may be allowed to submit their application for the rights issue, subject to the specified conditions.

Fast Track Further Public Offer

In light of the COVID – 19 pandemic, SEBI by way of Circular dated June 9, 2020 has provided temporary relaxations to the eligibility conditions for fast track further public offer ('**FPO**') prescribed under the SEBI ICDR Regulations, which is applicable to FPOs that open on or before March 31, 2021. These relaxations are not applicable on issuance of warrants. Some of the key relaxations are as follows:

i. The requirement of average market capitalisation of public shareholding of the issuer is now reduced to ₹500 crore as opposed to ₹1,000 crore;

ii. In cases where show cause notices have been issued under adjudication proceedings by SEBI against the issuer or its promoters or whole-time directors as on the reference date, such issuers will now be eligible to apply in a fast track FPO, subject to certain specified conditions;

iii. The issuer, its promoters, promoter group or the directors who have fulfilled the settlement terms or adhered to the directions of the settlement order issued by SEBI through the consent or settlement mechanism, are now eligible to participate; and

iv. If the financial statements of the issuer, as disclosed in the offer document, consist of any audit qualifications, such issuer can include the restated financial statements in the offer document, adjusting the impact of these audit qualifications. If the impact of such audit qualifications cannot be ascertained, the same will have to be disclosed appropriately in the offer document.

Qualified Institutions Placements

SEBI by way of its Notification dated June 16, 2020, has amended Regulation 172(3) of the SEBI ICDR Regulations to reduce the time period between two consecutive qualified institutions placements by listed entities from 6 months to 2 weeks.

❖ Extension of Timeline for Filings for AIFS and VCFS

❖ SEBI Circular dated March 30, 2020 extended the due dates for regulatory filings for alternative investment funds ('**AIFS**') and venture capital funds ('**VCFS**') for the period ending March 31, 2020 and April 30, 2020 by two months over and above the timelines prescribed under SEBI (Alternative Investment Funds) Regulations, 2012 ('**AIF Regulations**'). Thereafter, SEBI issued another Circular was on June 4, 2020 further extending the due date for such regulatory filings for the months ending March, April, May and June 2020, to on or before August 7, 2020.

❖ Clarifications on Audit Requirement for AIFS

❖ SEBI has, by way of its Circular dated June 12, 2020, issued certain clarifications in relation to the Circular on disclosure standards for AIFS issued by SEBI on February 5, 2020. Some of the key clarifications are:

i. timeline for compliance audit for the FY 2019-2020 has been set as December 31, 2020. Going forward, compliance audit is required to be completed within 6 months from the end of the FY and the audit report along with corrective steps is required to be submitted to the trustee of the AIF, the manager and SEBI within 6 months from the end of the FY; and

ii. audit requirement will not apply to AIFS which have not raised any funds from their investors subject to submission of certificates from chartered accountants.

❖ Amendments to the InvIT and REIT Regulations

❖ SEBI has, by way of two Circulars both dated June 16, 2020, amended the SEBI (Infrastructure Investment Trusts) Regulations, 2014 ('**InvIT Regulations**') and the SEBI (Real Estate Investment Trusts) Regulations, 2014. Some of the key amendments are as follows:

i. provisions for de-classification of the status of a sponsor of Infrastructure Invest-

ment Trusts ('**InvITs**') and Real Estate Investment Trusts ('**REITs**') have been introduced, whose units have been listed on the stock exchanges for a period of 3 years, subject to compliance with certain conditions and the approval of unit holders; and

ii. in case of change or change in control of the sponsor or the inducted sponsor of the InvIT or REIT, approval from 75% of the unit holders by value excluding the value of units held by parties related to the transaction has to be obtained. If such approval is not granted, the inducted sponsor or sponsor, as applicable have to provide the dissenting unit holders an option to exit by buying their units.

❖ SEBI Informal Guidance in the Matter of India Infrastructure Trust

❖ SEBI has, by way of an 'interpretive letter' to India Infrastructure Trust dated March 12, 2020, clarified the following with respect to certain provisions of the InvIT Regulations:

i. there is no provision under the InvIT Regulations which prevents an investment manager to manage more than one InvIT. However, a transaction between two or more InvITs with a common investment manager or sponsor will be deemed to be a related party transaction for each of the InvITs; and

ii. the prohibition under Regulation 4(2)(e)(v) of the InvIT Regulations regarding independent directors (in case of a company) or independent members of the governing board (in case of a limited liability partnership) may not be applicable in case of single entity acting as an investment manager to multiple InvITs.

❖ Amendments to KYC Guidelines to Facilitate Use of Technology

❖ By its Circular dated April 24, 2020, with a view to improve the ease of doing business in the securities market, SEBI has provided that KYC can be completed through online/ app based Know Your Client ('**KYC**'), in-person verification through video, online submission of Officially Valid Document ('**OVD**') or other documents using 'eSign'. The Circular provides detailed procedure for the same, including relating to uploading of documents, verification through one-time passwords (OTPs), and Aadhar card/ permanent account number (PAN)/ bank account verification. Any OVDs (other than Aadhar) are to be submitted using 'e-Sign' or 'Digilocker' mechanisms. SEBI registered intermediaries have also been permitted to implement their own applications for undertaking online KYC, which will facilitate taking photograph, scanning, acceptance of OVD through Digilocker, video capturing in live environment, *etc*. Intermediaries are also permitted to undertake Video in Person Verification of individual investors through their application, subject to certain conditions such as the Video in Person Verification being conducted by a specially trained authorized official with customer consent and other technical/ safety features.

❖ SEBI Guidelines on Regulatory Sandbox Framework

❖ SEBI has, by its Circular dated June 5, 2020, introduced a framework for a 'Regulatory Sandbox'. Under this framework, entities that are regulated by SEBI will be granted certain facilities and flexibilities to experiment with financial technology solutions in a live environment and on a limited set of real customers for a limited time frame. The guidelines issued by SEBI prescribe the eligibility criteria, duration for sandbox testing stage, obligations of the applicant, provisions relating to the application and approval process, evaluation criteria, submission of test related information and reports, and process for extending or exiting the sandbox as well as revocation of the approval.

❖ Other Key Developments

❖ Please refer to our Client Alerts dated April 2, 2020, May 11, 2020, May 16, 2020 and May 26, 2020 (click on blue date to access on our website) for other key updates relating to Captial Markets.

Banking and Finance

❖ Review of Timelines for Resolution of Stressed Assets

❖ The RBI had, by way of its Circular dated April 17, 2020 on 'COVID19 Regulatory Package – Review of Resolution Timelines under the Prudential Framework on Resolution of Stressed Assets' ('**Revised Framework**'), provided detailed instructions in relation to the extension of resolution timelines under the Prudential Framework on Resolution of Stressed Assets dated June 7, 2019 ('**Original Framework**'). As per the Original Framework, once a borrower is reported to be in default, lenders have a period of 30 days from the date of default ('**Review Period**'), within which they must undertake a *prima facie* review of the borrower account. Thereafter, lenders have 180 days from the end of the Review Period to implement a resolution plan in respect of entities in default.

Under the Revised Framework:

i. In respect of accounts which were within the Review Period under the Original Framework as on March 1, 2020, the period from March 1, 2020 to May 31, 2020 is excluded from the calculation of the 30-day timeline for the Review Period and therefore, the residual Review Period will resume from June 1, 2020, upon expiry of which the lenders will have the usual 180 days for resolution of the stressed asset; and

ii. In respect of accounts where the Review Period under the Original Framework was over but the 180-day resolution period had not expired as on March 1, 2020, the timeline for resolution of the stressed asset under the Original Framework is extended by 90 days from the date on which the 180-day period was originally set to expire.

The RBI has, by way of its Circular dated May 23, 2020, further extended the above period by another 3 months *i.e.* June 1, 2020 to August 31, 2020. Accordingly, in paragraph (a) above, the residual Review Period will resume from September 1, 2020 and in paragraph (b) above, the timeline for resolution will get extended by 180 days from the date on which the original 180-day period was originally set to expire.

The RBI has clarified that the requirement of making additional provisions specified in paragraph 17 of the Original Framework will be triggered as and when the extended resolution period, as stated above, expires.

❖ Banking Regulation (Amendment) Ordinance, 2020

❖ The Banking Regulation (Amendment) Ordinance, 2020 ('**BR Ordinance**') was promulgated on June 26, 2020 and seeks to amend the Banking Regulation Act, 1949 ('**BR Act**'), by *inter-alia* bringing within its ambit, various co-operative banks with the objective of protecting the interests of depositors and increasing the supervision of the RBI over co-operative banks. The BR Act will continue to exclude: (a) primary agricultural credit societies, and (b) co-operative societies whose principal business is long term financing for agricultural development, which (i) do not use the words 'bank', 'banker' or 'banking' in their name or in connection with their business; and (ii) do not act as an entity that clears cheques.

The BR Ordinance further provides that a co-operative bank may issue equity shares, preference shares, or special shares on face value or at a premium to its members or to any other person residing within its area of operation. Further, it may issue unsecured debentures or bonds or similar securities with maturity of ten or more years to such persons. Such issuances will be subject to the prior approval of the RBI, and any other conditions as may be specified by RBI. A co-operative bank cannot withdraw or reduce its share capital, except as specified by the RBI, and no person will be entitled to demand payment towards surrender of shares issued to him by a co-operative bank.

The BR Ordinance also restricts any bank, on which moratorium is imposed by the Central Government under the BR Act, from granting any loans or advances or making investments in any credit instruments during the period of such moratorium.

The RBI can now, independent of the moratorium, formulate a scheme of reconstruction or amalgamation of a banking company, if it is satisfied that such reconstruction or amalgamation is needed to secure proper management of the bank, or in the interest of depositors, general public, or the banking system.

❖ Regulation of Digitally Sourced Loans

❖ In a significant development, the RBI has, by way of its Circular dated June 24, 2020, issued instructions to all scheduled commercial banks (excluding rural regional banks) and non-banking financial companies (including housing finance companies) (collectively '**Lending Institutions**') on the application of the fair practices code and outsourcing guidelines, in letter and in spirit, to loans sourced on or recovered through digital lending platforms ('**Digital Platforms**'), whether it be the Lending Institutions' own platforms or other platforms.

The RBI further clarified that in case of outsourcing of any activity by the Lending Institutions: (i) the onus of compliance with regulatory instructions continues to rest solely on them; and (ii) they would need to meticulously follow regulatory instructions on outsourcing of financial services and information technology services. The RBI has also issued certain instructions to the Lending Institutions engaging Digital Platforms as their agents for sourcing borrowers or recovering dues.

❖ Subcommittee for Pre-pack Insolvency Resolution Process Constituted

❖ The Insolvency Law Committee has constituted a sub-committee for examining and giving its recommendations on pre-pack insolvency resolution process (including pre-requisites, appointment of insolvency officer equivalents, responsibilities of creditors, moratorium, timelines for completion of the process etc.).

The sub-committee will be chaired by Dr. M.S Sahoo, and its other members include Mr. Sunil Mehta, Mr. Akhil Gupta, Mr. U.K. Sinha, and certain nominees of the MCA and the RBI.

Mr. Bahram Vakil, one of our founding partners, is also a member of this sub-committee.

❖ Fraudulent Initiation of Insolvency Proceedings

❖ The Supreme Court in **Beacon Trusteeship Limited *v.* Earthcon Infracon Private Limited**[1] held that the NCLT has the power to inquire into the fraudulent initiation of insolvency proceedings under Section 65 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'). However, such pleas cannot be raised for the first time before appellate authorities i.e. National Company Law Appellate Tribunal ('**NCLAT**') and must be taken up before the NCLT.

❖ Mechanism under the SARFAESI Act for Debt Recovery by Co-operative Banks

❖ The Supreme Court in the five-judge constitutional bench decision of **Pandurang Ganpati Chaugule *v.* Vishwasrao Patil Murgud Sahakari Bank Limited**, has ruled that co-operative

1 Civil Appeal No. 7461 of 2019.

banks may resort to the mechanism under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('**SARFAESI Act**') for debt recovery. It further held that the SARFAESI Act governs the banking business of co-operative banks, but does not seek to regulate matters relating to the incorporation, regulation, and winding-up of co-operative banks.

❖ In **Union Bank of India *v.* Rajat Infrastructure Private Limied**[2], the Supreme Court held that the Debt Recovery Appellate Tribunal ('**DRAT**') cannot entertain an appeal without a pre-deposit being made under Section 18 of the SARFAESI Act. However, the DRAT can reduce the pre-deposit amount upto 25% from the required 50% of the total debt due from it with the DRAT.

❖ Pre-deposits for Appeals before DRAT under Section 18 of the SARFAESI Act

❖ NCLAT[3], held the following in relation to the initiation of the corporate insolvency resolution process under the IBC:

i. written acknowledgment of a financial debt by a corporate debtor prior to the expiry of limitation extends the limitation from the date of such acknowledgement;
ii. cheques issued towards part-payment of a debt after the expiry of the limitation period is not an acknowledgement of debt under Section 18 of the Limitation Act, 1963; and
iii. an offer of part-payment of a debt on the condition that the operational creditor relinquishes the remaining portion of the claim will not be considered as satisfaction of a demand notice issued by an operational creditor under Section 8 of the IBC.

❖ NCLAT's Observations under the IBC on Limitation Period on Outstanding Debt

❖ The NCLAT[4] recently held that the NCLT cannot ignore the time frame prescribed under Section 7 of the IBC to embark upon an enquiry to determine whether the applications filed under Section 7 of the IBC contained false information when the matters were at the very threshold stage.

❖ NCLT cannot Direct a Forensic Audit to Enquire into Proof of Default at the Pre-Admission Stage

Infrastructure

❖ Several relaxations have been given to various infrastructure-based sectors in India pursuant to the COVID-19 pandemic. Some of those changes are highlighted below:

❖ Relaxations Given for Infrastructure-Based Sectors

Renewable Energy

i. **Time Extension in Scheduled Commissioning Date**: The Ministry of New and Renewable Energy ('**MNRE**') though its Office Memorandum dated April 17, 2020 has decided to treat COVID-19 as a force majeure event. Renewable energy implementing agencies can grant extension of time for renewable energy projects. The extension is equivalent to the period of lockdown and additional 30 days for normalisation post lockdown; and
ii. **Force Majeure**: The MNRE has issued directions, through its Office Memorandum dated March 20, 2020, to Solar Energy Corporation of India, NTPC Limited and Chief Secretaries of power/ energy/ Renewable Energy departments of State Governments and Union Territory Governments/ administrations, to treat delay on account of disruption of the supply chains as a result of COVID-19 in other countries as a force majeure event. They may grant suitable extension of time for projects based on evidence produced by the developers in support of their claims. This was pursuant to the Ministry of Finance's Order dated February 19, 2020 holding that the disruption of supply chains as a result of spread of COVID-19 in China will be within the scope of a force majeure clause.

MNRE on May 13, 2020, pursuant to the above, provided that in public-private partnership concession contracts, an extension for a period of 3 to 6 months can be provided for completion of contractual obligations, on a case-to-case basis, which were to be fulfilled on and after February 20, 2020. It was also clarified that the invocation of such clause would be valid only if the parties to the contract were not in default as on February 19, 2020 and such invocation does not excuse any non-performance other than those related to the lockdown.

Power

i. **Relaxation on Payment Security Mechanism**: The requirement of pre-payment/ letter of credit for the entire cost of the power scheduled by the distribution company, has been reduced for the period beginning from March 24, 2020 to June 30,

2 2020 SCC OnLine SC 262.

3 Hussan Kadri v. Edelweiss Asset Reconstruction Company Limited & Another, Company Appeal (AT) (Insolvency) No. 1073 of 2019; Ritu Murli Manohar Goyal *v.* SVG Fashions Ltd. & Another, Company Appeal (AT) (Insolvency) No. 1340 of 2019 and Raj Kumar Garg & Another *v.* Health Care at Home India Private Limited & Another, Company Appeal (AT) (Insolvency) No. 39 of 2020.

4 Allahabad Bank *v.* Poonam Resorts Limited, Company Appeal (AT) (Insolvency) No. 1303 of 2019 & Allahabad Bank. *v.* Link House Industries Limited Company Appeal (AT) (Insolvency) No. 1304 of 2019.

2020. The Ministry of Power ('**MoP**') on April 6, 2020, reduced this to 50% of the cost of power. The remaining 50% is required to be paid within the time period under the Power Purchase Agreement ('**PPA**');

ii. **Reduction in Late Payment Surcharge Fee**: The MoP on April 6, 2020 has reduced the late payment surcharge fee till June 30, 2020, post which the normal PPA rates will apply; and

iii. **Advisory to Generating Companies**: The MoP on April 24, 2020 has advised the generating companies importing coal for blending purposes to replace their imports with domestic coal. Coal can be imported for blending only if the requisite quantity and quality of domestic coal is not made available.

Taxation

❖ Relaxations from Sections 56(2)(x) / 50CA of the IT Act

❖ The Income Tax Act, 1961 ('**IT Act**') contains certain deeming provisions, namely section 56(2)(x) and 50CA, whereunder, inter alia, the sale and purchase of shares for a price that is less than the fair market value could result in incremental income implications in the hands of the buyer as well as the seller. The Central Board of Direct Taxes ('**CBDT**') has prescribed transactions undertaken by certain classes of persons to which these Sections of the IT Act will not be applicable. These exemptions will be effective retrospectively from the April 1, 2020 and will be applicable for Assessment Year 2020-21 and subsequent Assessment Years:

i. Section 56(2)(x) (which applies to the acquirer) has been relaxed for, (a) receipt of *unquoted* shares of companies (including their subsidiary and subsidiary of such subsidiary) where (A) in cases of oppression and mismanagement, on an application moved by the Central Government under Section 241 of the Companies Act, the board of directors of such company has been suspended by the National Company Law Tribunal ('**NCLT**') and new directors have been appointed by the NCLT on the recommendation of the Central Government; and (B) the shares of such company and its subsidiaries and the subsidiary of such subsidiary have been received pursuant to a resolution plan approved by the NCLT; and (b) receipt of equity shares, of the reconstructed bank, received by the investor or the investor bank, as the case may be, where the equity shares have been allotted by the reconstructed bank under the Yes Bank Limited Reconstruction Scheme, 2020; and

ii. Section 50CA (which applies on the transferor) has been relaxed for transfer of *unquoted* shares of companies (including their subsidiary and subsidiary of such subsidiary) in the scenario mentioned at (i)(a) above[5].

❖ Clarification in Respect of Tax residency of Individuals

❖ The CBDT has issued a Circular[6] relaxing the tax residency rules for individuals stranded in India on account of the COVID-19 pandemic:

i. **FY 2019-20**: For determining tax residential status for FY 2019-20 in respect of an individual who came to India on a visit before March 22, 2020 and: (a) has been unable to leave India on or before March 31, 2020 or has departed on an evacuation flight on or before March 31, 2020, his/her period of stay in India from March 22, 2020 to March 31, 2020 / date of departure, will be excluded; or (b) has been quarantined in India on account of COVID-19 on or after March 1, 2020 and has departed on an evacuation flight on or before March 31, 2020 or has been unable to leave India on or before March 31, 2020, his/her period of stay from the beginning of his quarantine to March 31, 2020 / date of departure, will be excluded; and

ii. **FY 2020-21:** As the lockdown continues during FY 2020-21 and it is not yet clear as to when international flight operations would resume, a Circular excluding the period of stay of these individuals up to the date of normalisation of international flight operations, for determination of the residential status for FY 2020-21 will be issued after the normalisation.

❖ Rationalization of Safe Harbor Regime for Offshore Funds

❖ In order to facilitate location of fund managers of offshore funds in India, Section 9A of the IT Act provides a specific safe harbour regime whereby an 'eligible investment fund' will not be construed to have a business connection in India or be regarded as a tax resident in India merely because an 'eligible fund manager' undertaking fund management activities on its behalf is located in India. The availability of benefit under Section 9A is subject to the conditions prescribed therein. This Section also provides conditions for the eligibility of the fund. These conditions, *inter alia*, relate to residence of fund, corpus, size, investor broad basing, investment

5 Notification No.42 /2020/F. No.370149/143/2019-TPL, dated June 30, 2020.

6 CBDT Circular 11 of 2020 dated May 08, 2020.

diversification and payment of remuneration to fund manager. In this regard, the following developments have taken place:

i. One of the conditions for availing the benefit of Section 9A is that the remuneration paid by the fund to an eligible fund manager in respect of fund management activity undertaken on its behalf should not be less than the amount calculated in the prescribed manner. The manner for calculation of the minimum amount of remuneration that should be paid to the eligible fund manager in India by an offshore fund has now been prescribed by the CBDT[7]. The Notification also provides for a pre-approval mechanism under which a fund can seek approval at its option from the CBDT for remuneration lower than the prescribed remuneration under Rule 10VA of the Income-tax Rules, 1962; and
ii. Further, the CBDT has issued a Notification[8] suspending the conditions specified in clauses (e), (f) and (g) of Section 9A(3), which provide that (a) the fund has to have a minimum of 25 members who are, directly or indirectly, not connected persons; (b) any member of the fund along with the connected persons will not have any participation interest, directly or indirectly, in the fund exceeding 10%; and (c) the aggregate participation interest, directly or indirectly, of ten or less members along with their connected persons in the fund, will be less than 50%, in case of an investment fund set up by a Category-I FPI registered under the SEBI (FPI) Regulations, 2019. This Notification will come into force retrospectively from September 23, 2019.

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Inter alia...

❖ Clarification Issued in Respect of GST Implications on Director's Remuneration

❖ The goods and services tax ('**GST**') implications on the remuneration/ honorarium received by the directors of a company have been a topic of dispute since the implementation of GST in July 2017. In order to put a rest to the controversy, the Central Board of Indirect Taxes & Customs by a Circular dated June 10, 2020 has issued the following clarifications:

i. **Remuneration Paid to Independent Directors or Directors who are not Employees:** As per the definition of the term "independent directors" under the Companies Act read with the Companies (Share Capital and Debentures) Rules, 2014, such director should not be an employee of the company or proprietor or partner of the company, in any of the three FYs immediately preceding the FY in which he is proposed to be appointed. Accordingly, the remuneration (by whatever name called) paid to them for their services, not being in the nature of salary paid during the course of employment, would be subject to GST in the hands of the company under reverse charge basis; and
ii. **Remuneration Paid to Directors who are also Employees:** (a) part of a director's remuneration which is declared as 'salary' in the books of the company and subjected to TDS under Section 192 of the IT Act, being in the nature of salary, would not be subject to GST, and (b) part of a director's remuneration which is declared separately other than salary in the books of the company and subjected to TDS under Section 194J of the IT Act as fees for professional or technical services, not being in the nature of salary, would be subject to GST in the hands of the company under reverse charge basis.

Employment

❖ Change in the Applicability Threshold under the Contract Labour Act, 1970

❖ The Labour and Employment Department, Government of Gujarat has, by way of its Notification dated May 13, 2020, increased the applicability threshold of the Contract Labour (Regulation and Abolition) Act, 1970 ('**CLRA**') in the State of Gujarat to establishments and contractors engaging/employing 20 or more workmen, as against the earlier threshold of 10 workers.

The Labour Department, Government of Tripura, has by way of its Notification dated July 3, 2020, increased the applicability threshold of the CLRA in the State of Tripura to 50 workers, as against the earlier threshold of 20 workers. This will remain in force for a period of 1000 days subject to further order in this regard.

7 Notification No. 29/2020/ F. No. 142/15/2015-TPL dated May 27, 2020.
8 Notification No. 41/2020/F. No. 142/15/2015-TPL- Part (1), dated June 30, 2020.

Intellectual Property

❖ Kerala HC Decision on Data Privacy Concerns

❖ Recently, the Kerala High Court in **Balu Gopalakrishnan *v.* State of Kerala**[9], had an opportunity to adjudicate on issues surrounding data anonymization and transfer of sensitive health data of COVID-19 patients outside India. These proceedings were initiated by the petitioner due to concerns arising out of an agreement entered into between the State Government of Kerala ('**Kerala State**') with a US based company Sprinklr Inc. ('**Sprinklr**'), which involved sharing and transfer of Covid-19 patient data (sensitive personal information) outside India, for analytical purposes, for better handling of the pandemic.

After hearing contentions of both the sides, the Kerala High Court issued an interim Order dated April 24, 2020 mandating (i) Kerala State to anonymize all sensitive data prior to sharing it with Sprinklr; (ii) Kerala State to ensure that adequate consent in accordance with applicable law is taken from the relevant data subjects; (iii) Sprinklr to preserve confidentiality of patient data as per the terms of the contract and not to share it with any third party; and (iv) Sprinklr to return the data to Kerala State once the contract terminates; and (iv) Sprinkler to not advertise or represent to any third party that it has access to any data regarding COVID – 19 patients.

❖ Horlicks and Complan Clash Again Over Disparaging Advert

❖ The Delhi High Court, by way of an Order dated May 14, 2020, in the matter of **Horlicks Limited *v.* Zydus Wellness Products Limited**[10] restrained Zydus Wellness Products Limited ('**Zydus**') from telecasting or otherwise communicating to the public its advertisement which unfairly compared its product 'Complan' with the plaintiffs' health food drink 'Horlicks' ('**TVC**').

This parties have clashed in various suits over the years with the latest one being in the year 2017 when Horlick's Limited ('**Horlicks**') came across a print advertisement of Zydus where Zydus compared one cup of its product 'Complan' with two cups of 'Horlicks', where Horlick's application for interim injunction was finally heard and dismissed, as Zydus agreed to make various amendments to the print advertisement.

In July 2019, Horlicks became aware that Zydus had launched a TVC disparaging the 'Horlicks' product and claiming that one cup of 'Complan' has the same amount of protein as two cups of 'Horlicks'.

The Court while evaluating rival contentions reiterated the well established principle that the medium of the advertisement is important to keep in mind and that the electronic media would have a far greater impact than print media. The Court further observed that comparison based on 'serve size' is permissible and selecting parameters to compare rival products is also allowed. However, the Court was of the view that the TVC was disparaging as there was no voice over in relation to disclaimer on 'serve size' and the duration of six seconds was not sufficient for consumers to read the disclaimer. Hence, Zydus was restrained from running the TVC in its present form.

Information Technology

❖ Applications Blocked on Security Apprehensions

❖ The Government of India, through the Ministry of Electronics and Information Technology has by way of a Press Note dated June 29, 2020, blocked and disallowed access to 59 mobile applications. The Press Note has been issued pursuant to Section 69A of the Information Technology Act, 2000 read with the Information Technology (Procedure and Safeguards for Blocking of Access of Information by Public) Rules, 2009 ('**Blocking Rules**') based on apprehensions of threat to the security of data of Indian citizens. The Press Note prohibits the use of these applications through mobile and non-mobile internet enabled services on the grounds that the applications are engaged in activities which are prejudicial to sovereignty, integrity or defence of India, security of State and public order and has been issued as an emergency measure. The Blocking Rules contemplate that any emergency blocking will be examined by a committee set up under the rules which can consider the issue and recommend whether the blocking should continue.

9 WP(C)9498/2020.

10 CS (COMM) 464/2019.

❖ The Supreme Court of India in **Quippo Construction Equipment Limited *v.* Janardan Nirman Private Limited**[11] held that failure to participate in arbitral proceedings or raise objections thereto, including in relation to the place of arbitration and appointment of the arbitrator, will be considered a deemed waiver of such rights and will preclude the relevant party from raising such objections in subsequent proceedings.

❖ Waiver of the Right to Raise Objections to an Arbitral Proceeding

❖ Supreme Court of India in **Suo Moto Writ Petition Civil 3 of 2020** passed an Order dated May 6, 2020 directing that '*all periods of limitation prescribed under the Arbitration and Conciliation Act, 1996, and under Section 138 of the Negotiable Instruments Act, 1881, will be extended with effect from March 15, 2020 till further orders to be passed by this Court in the present proceedings*'. The Order further specified that if the limitation period expires post March 15, 2020, it will be extended by a period of 15 days from the date on which the nationwide lockdown is lifted in the area where the dispute lies or where the cause of action arises.

The Supreme Court by an earlier Order dated March 23, 2020 in the same matter had held that '*irrespective of the limitation period prescribed in all such proceedings, irrespective of the limitation period prescribed under the Special law or general law whether condonable or not will stand extended w.e.f. March 15 2020 till further order/s to be passed by this Court in present proceedings*'.

❖ Supreme Court Extends Limitation Prescribed under the Arbitration Act and Section 138 of the Negotiable Instruments Act

❖ In its Order dated June 19, 2020 in the matter of **S. Kasi *v.* State**[12], the Supreme Court stated that its Order dated March 23, 2020 in Suo Moto Writ petition No 3 of 2020 extending limitation during the COVID–19 lockdown was "*never meant to curtail any provision of Code of Criminal Procedure or any other statute which was enacted to protect the Personal Liberty of a person*"[13]. Therefore, the Order dated March 23, 2020 does not defeat the right of an accused to get default bail if the charge sheet was not filed within the prescribed time under the Code of Criminal Procedure, 1973.

❖ Supreme Court Clarifies Previous Order on Extension of Limitation Period Due to COVID-19

❖ In **Banyan Tree Growth Capital LLC *v.* Axiom Cordages Limited**[14], the Bombay High Court upheld the validity of a put option under both the Foreign Exchange Management Act, 1999 ('**FEMA**') and the Securities Contracts (Regulation) Act, 1956 ('**SCRA**').

The Bombay High Court has held that merely because a contract contains a put option in respect of securities, it cannot be termed '*a contract in derivatives*' (such contracts contradicting the provisions of the SCRA). A put option in itself does not provide an assured return to a foreign investor. In the present case, as the price of the put securities, at the time of the exercise of the option was less than the fair market value of such securities, the transaction was compliant with the pricing guidelines prescribed under FEMA.

AZB represented Banyan Tree in the proceedings before the Bombay High Court as well as in the arbitration proceedings before that.

❖ Bombay High Court Upholds the Validity of Option Agreements

❖ In **Rural Fairprice Wholesale Limited *v.* IDBI Trusteeship Services Limited**[15], the defaulting party sought an injunction on the ground that if the pledged shares were sold during the pandemic, irreparable loss would be caused to all stakeholders as such shares would be sold at a very low price. An *ad interim* injunction was granted by the Bombay High Court restraining IDBI Trusteeship Services Limited from selling the pledged shares, until a future date. A special leave petition challenging this Order was dismissed by the Supreme Court.

❖ Bombay HC Restrains Sale of Pledged Shares Due to COVID-19 Pandemic

❖ The Delhi High Court, in **Halliburton Offshore Services Inc. *v.* Vedanta Limited**[16], held that outbreak of the COVID-19 pandemic and consequent nation-wide lockdown, cannot by itself be used as an excuse for non-performance of a contract, where performance deadlines were prior to the occurrence of the outbreak. It was held that there has to be a 'real reason' and 'real justification' for invoking a *force majeure* clause and that the Court must *inter alia* assess (a) the conduct of the parties prior to the outbreak; (b) the deadlines imposed under the contract; and (c) the steps taken to mitigate the impact of the *force majeure* event, to determine whether the concerned party was genuinely prevented from performing its contractual obligations due to the outbreak.

❖ COVID-19 as the Basis for Invocation of a Force Majeure Clause

11 2020 SCC OnLine SC 419.
12 2020 SCC OnLine SC 529.
13 Ibid, para 18.
14 Commercial Arbitration Petitions No. 475 & 476 of 2019.
15 Interim Application No.1 of 2020 in Commercial Suit (L) 307 Of 2020
16 O.M.P (I)(COMM.) No. 88/2020.

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India Business Law Journal, 2020

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Outstanding Law Firm of the Year, India
Asialaw Profiles, 2020

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Thomson Reuters' Global and Emerging Markets M&A–Legal Rankings, H1 2020

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Mergermarket's Global and Regional M&A–League Tables of Legal Advisors, H1 2020

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