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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...

❖ Commencement of Certain Sections of Companies (Amendment) Act, 2020

❖ Fast Track Merger Process for Start-up and Small Companies

❖ Time Period for which Rights Issue is required to Remain Open

❖ Extension of Time Period to Conduct Annual General Meetings through Audio Visual Means

❖ Minimum Remuneration Payable to Independent and Non-Executive Directors

❖ Additional Disclosure Requirements in Financial Statements of Companies

Corporate & SCRA

❖ The Ministry of Corporate Affairs ('MCA'), has on January 22, 2021, notified 14 sections of the Companies (Amendment) Act, 2020, as well as one section of the Companies (Amendment) Act, 2019 (collectively 'CAA'). The key provisions notified under the CAA, include:

- i. amendment to the definition of a 'listed company' to exclude certain classes of companies. Please refer to our Client Alert dated February 22, 2021, in this regard, accessible [here](#);
- ii. amendments to the corporate social responsibility obligations of companies. Please refer to our Client Alert dated March 23, 2021, in this regard, accessible [here](#);
- iii. empowering the Central Government to require certain classes of unlisted companies to prepare and file periodical financial results with the Registrar of Companies. Please refer to our Client Alert dated October 8, 2020, in this regard, accessible [here](#);
- iv. reduction of penalties applicable to one person companies, small companies, start-up companies and producer companies (or any of their officers in default or any other person in respect of such companies);
- v. exempting officers/employees from imprisonment for wrongful possession or withholding of a dwelling unit of a company in certain circumstances; and
- vi. introduction of a cure period of 30 days from the date of issue of notice by the adjudicating officer, for delayed filing of annual return or financial statements of a company.

❖ The MCA has by its Notification dated February 1, 2021, amended the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, to enable a fast track merger for start-up companies. In this regard, a private company will be considered a 'start-up company' if: (i) upto a period of 10 years from its incorporation, the turnover of such company for any of the financial years has not exceeded ₹ 100 crores (approx. US\$ 13.27 million); and (ii) the company is working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation. In case a private company is formed by splitting up or reconstruction of an existing business, it will not be considered a 'startup'.

❖ The MCA has, by its Notification dated February 11, 2021, amended the Companies (Share Capital and Debentures) Rules, 2016, effective April 1 2021, reducing the minimum period for which a rights issue has to be kept open from 15 to seven days.

❖ In light of the ongoing pandemic, the MCA had issued various circulars in 2020 permitting companies to hold general meetings through video conferencing or other audio visual means, and laying down the operational procedures and safeguards in this regard (please refer to our Client Alert dated May 15, 2020, accessible [here](#)). The MCA has, on January 13, 2021, issued a Circular permitting Annual General Meetings ('AGMs') which were due to be held in the year 2020, or become due in the year 2021, to be conducted on or before December 31, 2021 through video conferencing or other audio visual means, in accordance with the procedures specified in the previous circulars. However, the Circular clarifies that no extension is granted for holding AGMs, and companies which have not adhered to the relevant timelines will remain subject to legal action under the Companies Act, 2013 ('Companies Act').

❖ The MCA by its Notification dated March 18, 2021 has amended Schedule V of the Companies Act, introducing separate limits to annual remuneration payable to non-executive directors, including independent directors, in case of loss or inadequate profits of the company. These limits depend on the effective capital of the company, e.g. where the effective capital is negative or less than ₹ 5 crores, the limit of yearly remuneration payable should not exceed ₹ 12 lakhs to each such director.

❖ The MCA, has, by way of Notification dated March 24, 2021 and effective from April 1, 2021, introduced and amended various disclosures required to be made in the financial statements of a company, several of which were introduced under the Companies (Auditor's Report) Order, 2020. Certain key disclosure requirements pursuant to the amendment are listed below:

- (i) details of the immovable property where title deeds are not held in the name of the company;
- (ii) specified details in relation to corporate social responsibility obligations/activities of the company;
- (iii) disclosure of the declaration of the company as willful defaulter by any bank or financial institution or other lender;
- (iv) disclosure of certain financial ratios;
- (v) details of utilisation of borrowed funds and share premium;
- (vi) details of investment/trading in any cryptocurrency/virtual currency; and
- (vii) details of any transaction not recorded in the books of accounts of the company that have been surrendered or disclosed as income during the year, in any tax assessments under the Income Tax Act, 1961, unless immunity is granted in any scheme, and related details.

❖ The MCA has, by way of Notification dated March 24, 2021, amended the Companies (Accounts) Rules, 2014, effective from April 1, 2022. Going forward, companies must only use accounting software which record audit trails of each transaction (which cannot be disabled) and create an edit log of each change made in the books of account along with the date of such change, in order to prepare their books.

Further, every listed company and unlisted public company having a paid up share capital of ₹ 25 crores must include in their Board's Report, the following particulars:

- i. details of any application made or any proceedings pending under the Insolvency and Bankruptcy Code, 2016 ('IBC') during the year along with their status as at the end of the financial year; and
- ii. details of the difference between the valuation of the company done at the time of a one time settlement and while taking loan from banks or financial institutions, along with the reasons thereof.

Foreign Exchange

❖ On February 1, 2021, the Finance Minister of India presented the Union Budget for the Financial Year 2021-22 ('Budget'), as part of which an increase in the foreign investment limit for Indian insurance companies was proposed, from 49% to 74%, and it was indicated that foreign control may be permitted subject to certain safeguards, including: (i) majority of directors and key management personnel of the insurance company to be resident Indians; (ii) at least 50% of the directors on the board of the insurance company to be independent directors; and (iii) specified percentage of profits to be retained as general reserves.

To give effect to the abovementioned increase, amendments have been carried out to the Insurance Act, 1938 ('Insurance Act') pursuant to the Insurance (Amendment) Act, 2021, which came into effect on April 1, 2021, by virtue of which, increase in foreign investment limits in an Indian insurance company from 49% to 74% has been permitted. However, the conditionalities for this and the manner of such increase are yet to be finalised by relevant regulatory authorities, including the Government of India and the Insurance Regulatory and Development Authority. Amendments will need to be carried out to: (i) the rules, regulations, guidelines and circulars prescribed under the Insurance Act; and (ii) the existing Indian foreign exchange laws, including the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 and the Consolidated FDI Policy Circular of 2020, to operationalize this increase.

❖ The Reserve Bank of India ('RBI') has, by its Circular dated February 16, 2021, permitted resident individuals to make remittances under the liberalised remittance scheme ('LRS') to International Financial Services Centres ('IFSCs') set up under the Special Economic Zone Act, 2005, subject to: (i) the remittance being made only for investments in securities issued by entities resident in IFSCs; and (ii) a non-interest bearing foreign currency account ('FCA') being opened in IFSCs for making investments under LRS. Funds lying idle in the FCA for a period of 15 days must be repatriated to domestic ₹ account of the investor; and (iii) FCAs in IFSCs cannot be used to settle any domestic transactions with other residents.

❖ As per the RBI Circular on Investment by Foreign Portfolio Investors in Debt – Review ('FPI Directions'), investments by Foreign Portfolio Investors ('FPIs') in corporate bonds, under the general investment route, are subject to various restrictions, including minimal residual maturity of one year and 50% limit on investments by an FPI and any related FPIs.

However, investments by FPIs in debt instruments issued by entities under corporate insolvency resolution process as per the resolution plan approved by the National Company Law Tribunal under the IBC are exempt from the aforesaid restrictions. By way of Circular dated February 26, 2021, the RBI has now extended this exemption to FPI investments in defaulted bonds, i.e., non-convertible debentures or bonds which are under default, either fully or partly, in terms of repayment of principal on maturity or principal instalment in the case of amortising bond.

Capital Markets

❖ The Securities and Exchange Board of India ('SEBI') on January 8, 2021 has introduced certain amendments to Part A, Schedule III of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('Listing Regulations'), pursuant to which, SEBI has introduced



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❖ Requirement of Audit Trail in Accounting Software & Additional Particulars in Board's Report

❖ Increase in Foreign Investment Limits for Indian Insurance Companies from 49% to 74%

❖ RBI Extends LRS Guidelines to Include Investments by Resident Individuals in IFSCs

❖ RBI Relaxes Norms for Investment by FPIs in Defaulted Bonds

❖ SEBI Amends Listing Regulations



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certain additional disclosure events in relation to the corporate insolvency resolution process ('CIRP') of a listed corporate debtor under the IBC, without any application of the guidelines for materiality. These include: (i) specific features and details of the resolution plan as approved by the adjudicating authority under the IBC, not involving commercial secrets, including pre and post net-worth of the company, details of the assets of the company post CIRP, details of funds infused in the company, and creditors paid-off; (ii) proposed steps to be taken by the incoming investor/acquirer for achieving the minimum public shareholding ('MPS'); (iii) quarterly disclosure of the status of achieving the MPS; and (iv) details of the delisting plans, if any, approved in the resolution plan.

❖ SEBI Amends AIF Regulations

❖ SEBI on January 8, 2021 amended the SEBI (Alternative Investment Funds) Regulations, 2012 ('AIF Regulations') for providing certain relaxations to the provisions requiring the investment committee to be equally responsible as the manager for investment decisions, and for the investment committee and the manager to jointly and severally ensure that the investments are in compliance with the AIF Regulations, fund documents and other applicable law. Pursuant to the amendment, these provisions are not applicable to an alternative investment fund ('AIF') in which each investor other than the manager, sponsor, employees or directors of the AIF or employees or directors of the manager, has committed to invest not less than ₹70 crores (approx. US\$ 9.28 million) and has furnished a waiver to the AIF in respect of compliance with these provisions. SEBI has also prescribed the format for the aforesaid waiver through its Circular dated January 8, 2021.

❖ SEBI Revises Disclosure Formats under the Prohibition of Insider Trading Regulations

❖ SEBI had, on January 21, 2019, amended the SEBI (Prohibition of Insider Trading) Regulations, 2015 ('PIT Regulations') to introduce the definition of 'promoter group' and to include 'members of promoter group' within the purview of the disclosure obligations prescribed under Regulation 7 of the PIT Regulations (which *inter alia* prescribes disclosures upon trading in listed securities by the promoter group and designated persons). In order to align the prescribed formats for such disclosures with the aforesaid amendment, SEBI has, by a Circular dated February 9, 2021, updated the formats for disclosures under the PIT Regulations.

❖ SEBI Revises Monthly Reporting Formats for Portfolio Managers

❖ SEBI on January 8, 2021 issued a Circular regarding a change in the format of the monthly reporting filed by the portfolio managers in order to broaden the scope of information obtained in such reporting. The Circular contains the following key observations and directions: (i) the portfolio managers would now have to specify the types of services offered—discretionary, non-discretionary and advisory service; (ii) the portfolio managers would have to make disclosures regarding funds inflow/outflow under the data for discretionary and non-discretionary services carried out by them; and (iii) the provisions of this Circular will be applicable for monthly reports submitted from January 2021 onwards.

❖ Code of Conduct and Institutional Mechanism for Prevention of Fraud and Market Abuse

❖ By its Circular dated March 3, 2021, SEBI has decided that the requirements contained in the PIT Regulations relating to code of conduct ('Code') and institutional mechanism for prevention of fraud and market abuse ('Institutional Mechanism') will be applicable to stock exchanges, clearing corporations and depositories (collectively, Market Infrastructure Institutions or 'MIIs'). Accordingly, MIIs will be required to undertake the following with immediate effect:

- i. formulate a Code to regulate, monitor and report trading by their designated persons and immediate relative of designated persons towards achieving compliance with the PIT Regulations, by adopting the minimum standards set out in Schedule C to the PIT Regulations (in addition to Schedule B in case the MII is a listed entity and already within the purview of the PIT Regulations). The Managing Director (MD)/ Chief Executive Officer (CEO) of the MII will be obligated to frame such Code and the board of directors of the relevant MII may ensure compliance by the MD/ CEO in this regard;
- ii. identify and designate a compliance officer to administer the Code, and in consultation with such compliance officer, the board of directors of the MIIs must specify the designated persons to be covered by the Code on the basis of their role and function in the organisation and the access that such role and function would provide to unpublished price sensitive information in addition to seniority and professional designation and will include the position/ designation as specified in Regulation 9(4) of the PIT Regulations;
- iii. put in place an Institutional Mechanism covering the following: (a) adequate and effective system of internal controls to ensure compliance with the regulations and circulars issued by SEBI from time to time to prevent fraud or market abuse by the MII or its designated persons and immediate relatives of designated persons; (b) review of compliance with this Circular by the regulatory oversight committee at least once in a financial year; (c) formulation of written policies and procedures for inquiry in case of suspected fraud or market abuse which ensure maximum

fairness and transparency; (d) inquiry by the MII upon becoming aware of any illegal or unethical practices or transactions of suspected fraud or market abuse and prompt intimation thereof to its board of directors; (e) effective whistle blower policy to enable stakeholders, including employees to freely communicate their concerns about illegal or unethical practices and report instances of fraud or market abuse or any suspicion of fraud or market abuse; and

- iv. take necessary steps to put in place systems for implementation of this Circular, including necessary amendments to the relevant bye-laws, rules and regulations for the implementation of the above and disseminate the same on their website and communicate to SEBI the status of implementation through their monthly development report.

❖ SEBI in its Circular dated August 2, 2011 addressed to stock exchanges / depositories and intermediaries had specified the procedure for seeking prior approval of SEBI for change in control of certain SEBI intermediaries such as stock brokers, merchant bankers, debenture trustees, registrar to an issue and share transfer agents, underwriters, depository participants, bankers to an issue and credit rating agencies. SEBI has pursuant to its Circular dated March 25, 2021, clarified the following in respect of transfer of shareholding among immediate relatives and transmission of shareholding:

- i. Transfer of shareholding to “immediate relatives” as defined under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 or by way of transmission to any person will not be construed as change of control;
- ii. Transfer or bequeathing of the business/ capital by way of transmission by a proprietary firm type intermediary to any other person would amount to change of control requiring the transferee to obtain prior approval of SEBI along with fresh registration in the name of such legal heir/ transferee; and
- iii. Inter-se transfer of ownership interest in an intermediary which is a partnership firm with more than two partners will not be construed as a change in control. However, induction of a new partner would be considered as a change of control requiring fresh registration and prior approval of SEBI. Further, bequeathing of partnership to legal heir(s) by way of transmission will not be considered as change in control.

The Circular also clarifies that incoming entities/ shareholder becoming part of controlling interest in the intermediary pursuant to transfer of shares from immediate relative/ transmission of shares (immediate relative or not) are not required to satisfy the ‘fit and proper person’ criteria stipulated in Schedule II of the SEBI (Intermediaries) Regulations, 2008.

❖ SEBI issued a Circular dated March 16, 2021 on streamlining the process of initial public offer (‘IPOs’) with Unified Payment Interface (‘UPI’) in application supported by blocked amount and redressal of investor grievances. Under the new norms, lead managers and self-certified syndicate banks (‘SCSBs’) are required to compensate IPO applicants for lapses by paying ₹ 100 (approx. US\$ 1.3) per day or 15% per annum interest of application amount (whichever is higher) for specified defaults. Further, lead managers are required to ensure that the payment of processing fee or sellings commission to the intermediaries be released only after ascertaining that there are no pending complaints pertaining to block/ unblock of UPI bids, receiving the confirmation on completion of unblocks from sponsor banks or SCSBs. Additionally, to ensure timely information to investors, SCSBs are required to send SMS alerts to mandate block and unblock of UPI bids, containing the details as set out in the Circular. The Circular will come into force for IPOs opening on and after May 1, 2021.

❖ SEBI issued a Circular dated March 31, 2021, on reduction in unblocking or refund of application money. While, at present, in case of non receipt of minimum subscription, the issuer is mandated to refund all the application money within 15 days from the closure of the issue; SEBI has now reduced the timelines for refund of the moneys to the investors in the above mentioned events from 15 days to four days.

❖ In order to permit merchant bankers and stock brokers to carry out underwriting activities, SEBI has amended the SEBI (Merchant Bankers) Regulations, 1993 and SEBI (Stock Brokers) Regulations, 1992 to incorporate provisions related to net-worth, maintenance of records and other compliances for underwriting activities. In view of this, SEBI has repealed the existing regulations on underwriting activities.



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Inter alia...

❖ Prior Approval from SEBI for Change in Control

❖ SEBI Streamlines IPO Process and Redressal of Investor Grievances

❖ SEBI Circular on Reduction in Unblocking/ Refund of Application Money

❖ Repeal of the SEBI (Underwriters) Regulations, 1993



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Banking and Finance

❖ Large Exposures Framework – Exemptions

❖ A bank's exposures to its counterparties may result in concentration of its assets to a single counterparty or a group of connected counterparties. In order to address this concentration risk, the RBI, suitably adopting the supervisory guidance of the Basel Committee on Banking Supervision on large exposures and the principles contained in their publications on the Core Principles for Effective Banking Supervision of October 2006 (since revised in September 2012) and the standards on 'Supervisory framework for measuring and controlling large exposures' of April 2014 in the Indian context, issued instructions on banks' large exposures, called the 'Large Exposures Framework'. The RBI on February 24, 2021 introduced another exemption to the Large Exposures Framework, viz. exposures to foreign sovereigns or their central banks that are:

- i. subject to a 0% risk weight under Table 2 of paragraph 5.3.1 of the Master Circular – Basel III Capital Regulations dated July 1, 2015, as modified by way of Circular dated October 8, 2015; and
- ii. denominated in the domestic currency of that sovereign and met out of resources of the same currency.

Please refer to our previous updates circulated in July 2019 [here](#) and September 2019 [here](#) in relation to the Large Exposures Framework issued by the RBI.

❖ FAQs on Compliance Functions in Banks and Role of Chief Compliance Officer

❖ The RBI, on September 11, 2020, notified guidelines ('**Compliance Guidelines**') requiring banks to tighten compliance functions with a view to bring uniformity in the approach followed by banks and to align the supervisory expectations on Chief Compliance Officers ('CCO') with best practices. The RBI, on February 2, 2021, issued frequently asked questions ('**FAQs**') on the Compliance Guidelines clarifying, amongst others, the following:

- i. **Expectations from various Departments / Functions of Banks:** The RBI reiterated that compliance is a shared responsibility of the business units of the banks and the compliance function, although different groups / departments in the banks are responsible for complying with different statutory requirements. While the concerned departments of the banks would be held responsible for their respective areas, each staff member and the compliance function should ensure adherence to applicable statutory provisions. Where there are serious gaps in such compliances, the compliance function should take necessary action to correct the compliance culture; and
- ii. **Experience:** The RBI clarified that the intent behind the requirement of the CCO having overall experience of at least 15 years in the banking and financial services out of which 5 years is required to be in audit/compliance functions in the Compliance Guidelines was that the identified CCO should be a well experienced official who can discharge the mandated functions independently and effectively. The RBI also clarified that if a regional / zonal / business head has the requisite experience on the control functions of the business lines for five years or more, such person would be eligible for the post of CCO.

❖ Non-Banking Finance Company – Housing Finance Company (Reserve Bank) Directions, 2021 – Salient Features

❖ With a view to consolidate the existing regulatory framework applicable to housing finance companies ('HFCs'), the RBI, on February 17, 2021, issued the Non-Banking Finance Company–Housing Finance Company (Reserve Bank) Directions, 2021 ('**HFC Master Direction**').

HFCs were previously regulated by the National Housing Board ('NHB'). Subsequently, in August 2019, the National Housing Banking Act, 1987 ('**NHB Act**') was amended pursuant to the Finance Act, 2019, transferring regulatory authority from the NHB to the RBI, primarily to ensure regulatory parity with non-banking financial companies ('NBFCs'). Thereafter, the RBI, on October 22, 2020, issued a regulatory framework for HFCs ('**RBI HFC Regulations 2020**'), treating HFCs as a separate category of NBFCs. While the RBI HFC Regulations 2020 covered all major provisions pertaining to HFCs, certain aspects continued to be governed by the NHB and exemptions available to HFCs in respect of Section 45-IA (*Requirement of registration and net owned funds*), Section 45-IB (*Maintenance of percentage of assets*) and 45-IC (*Reserve fund*) of the Reserve Bank of India Act, 1934 continued to apply.

With the HFC Master Direction coming into force with immediate effect, the corresponding guidelines issued by the NHB as well as the RBI HFC Regulations 2020 now stand repealed. Applicable to every HFC registered under Section 29A of the NHB Act (other than Chapter XII of the HFC Master Direction, which specifically applies to auditors of HFCs), the HFC Master Direction neither imposes new requirements nor amends any existing regulations.

❖ Government Notifies Ordinance for Prepackaged Insolvency Resolution

❖ Please follow the link [here](#) and [here](#) for more details in this regard.

❖ The Mines and Minerals (Development and Regulation) Amendment Act, 2021 ('**MMDR 2021 Amendment**'), which amends the Mines and Minerals (Development and Regulation) Act, 1957 ('**MMDR Act**'), has been notified and made effective on March 28, 2021. The MMDR Act is the principal legislation in relation to, *inter alia*, grant and regulation of mineral concessions. Some of the key features of the MMDR 2021 Amendment are as follows:

- i. **Sale of Minerals by Captive Mines:** For all minerals other than atomic minerals, the MMDR 2021 Amendment permits (where mineral is used for captive purpose) a lessee to sell up to 50% of the total mineral produced in a year, after meeting the captive requirement, in such manner as may be prescribed by the Central Government and on payment of specified additional amount;
- ii. **Removal of End-Use Restrictions:** The MMDR Act provided that the Central Government may, in respect of certain minerals, reserve any particular mine for a particular end-use. This reservation of mine on the basis of end-use has been done away with;
- iii. **Transfer Charges:** The MMDR Act provided that only such non-auction mining leases could be transferred which were 100% captive – i.e., non-auction non-captive mines (including mines which were less than 100% captive) could not be transferred. The MMDR 2021 Amendment does away with this restriction. Accordingly, all non-auction mining leases can be transferred with the consent of the State Government, and in accordance with the applicable rules and regulations. Also, no transfer charges will be payable for any such transfers;
- iv. **Existing Concession Holder Rights:** When the MMDR Act was amended in 2015 to introduce the auction regime, the preferential right of such persons who had carried out reconnaissance or prospecting to obtain a prospecting license or mining lease, respectively, were saved/ preserved. The MMDR 2021 Amendment takes away such preferential right – accordingly, all pending cases for grant of mineral concessions on preferential (which were saved till now) will become infructuous;
- v. **Transfers of Statutory Clearances:** For minerals other than hydrocarbon energy minerals and atomic minerals, the MMDR Act provides that the successful bidder (selected through auction) of expiring mining leases will have the benefit of using the permits and consents granted to the previous lessee, for a period of two years within which the successful bidder has to apply and obtain new permits and consents. The aforesaid two year period limitation has been removed by the MMDR 2021 Amendment and so such bidder will have the benefit of the relevant permits and consents till they expire or are cancelled; and
- vi. **Lapsing of Mining Lease:** As per the MMDR Act, a mining lease lapses where the holder of such mining lease fails to undertake mining operations for a period of two years after the date of executing the lease, or having commenced mining operations, has discontinued the same for a period of two years. Certain exceptions and waiver related provisions were available in this regard in the MMDR Act.

The MMDR 2021 Amendment now provides that the State Government may, on an application made by the lease holder before it lapses and on being satisfied that it will not be possible for the lease holder to undertake production and dispatch/ continue such production and dispatch for reasons beyond his control, pass an order, within a period of three months from the date of receipt of such application, to extend the two year period for production and dispatch by a further period not exceeding one year. Such extension will not be granted more than once during the entire period of lease. The words "mining operations" have been replaced with "production and dispatch", which is a small but important change.

Telecommunications

❖ The Department of Telecommunications ('**DoT**') by a Notification dated March 10, 2021 amended the 'Unified License Agreement' and the 'Unified License (Virtual Network Operator) Agreement' by including a clause pursuant to which the National Cyber Security Coordinator ('**Designated Authority**') has the right to impose conditions for procurement of telecom equipment on the grounds of defence of India, or matters, directly or indirectly, related to national security. Further, the Designated Authority: (i) is required to notify the category of equipment for which such security requirements related to trusted sources are applicable; (ii) is required



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❖ Government Notifies Mines and Minerals (Development and Regulation) Amendment Act, 2021

❖ DoT Amends the Unified License Agreement, for Procurement of Telecommunication Equipment



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to notify the trusted sources along with the associated telecommunication equipment (**'Trusted Products'**); and (iii) may also notify a list of designated sources from whom no procurement can be done. With effect from June 15, 2021, the relevant licensee is required to: (i) only connect **'Trusted Products'** (i.e., the telecommunication equipment to be notified by the Designated Authority) in its network; and (ii) seek permission from the Designated Authority for upgradation of existing network utilising the telecom equipment not designated as **'Trusted Products'**. However, these directions will not affect ongoing annual maintenance contracts or updates to existing equipment already inducted in the network as on date of effect. Similar amendments have been made by the DoT separately to: (i) the Internet Service Provider (ISP) License; (ii) the National Long Distance (NLD) License; (iii) the International Long Distance (ILD) License; and (iv) the Public Mobile Radio Truncating Service (PMRTS) License.

Taxation

❖ Indirect Tax Amendments Introduced by the Finance Act

❖ The legislative amendments introduced to the indirect tax laws in the Budget by way of Finance Bill, 2021 (**'Finance Bill'**) have taken effect from April 1, 2021 with the Finance Bill having received Presidential assent and, accordingly, having been made into the Finance Act, 2021 (**'Finance Act'**). The key legislative amendments to indirect taxes are summarized below:

- i. Anti-dumping duties (**'ADD'**) and Countervailing duties (**'CVD'**) are some of the measures available to a country to protect its domestic industry from the unfair trade practice of dumping (i.e., selling of products at the country of dumping at prices lower than that at the country of origin/ other markets). Such duties are charged over and above customs duties so as to remove the impact of dumping and create a level playing field for the domestic industry. However, such duties may be nullified if the exporters reduce the prices of goods by the amount of ADD/ CVD. If such reduction is without any valid reason, the practice is called absorption.

The Finance Act has introduced anti-absorption provisions for the first time in the Indian legislative framework. With regard to ADD investigations, the Finance Act has introduced a new sub-section (1B) to Section 9A of the Customs Tariff Act, 1975 (**'CTA'**); whereas in respect of CVD investigations, the Finance Act has introduced a new sub-section (1B) to Section 9 of the CTA. Both the provisions provide that if the Central Government is of the opinion (upon such enquiry as may be necessary) that absorption of ADD and/ or CVD has taken place so as to render such duties ineffective, it may modify such duties to counter the effect of such absorption;

- ii. The Finance Act has amended Section 25 of the Customs Act, 1962 (**'Customs Act'**) to prescribe that all conditional exemptions provided under the Customs Act, unless otherwise specified or varied or rescinded, will be valid till March 31 falling immediately two years from the date of introduction of such exemption. All existing conditional exemptions will be valid till March 31, 2023, if not specifically extended / rescinded earlier; and
- iii. The Finance Act has introduced a new section 28BB to the Customs Act prescribing a two-year time limit (further extendable by one year by the Commissioner of Customs), for completion of any proceedings under the Customs Act which would culminate in issuance of a show cause notice.

❖ Key Direct Tax Measures under the Finance Act

❖ The key direct tax amendments made by the Finance Act are as under:

- i. Profits arising from the receipt of capital asset by partner on dissolution or reconstitution of firm have been made taxable in the hands of the firm. In such cases, the fair market value of the capital asset will be the full value of consideration for computing taxes;
- ii. The term "liable to tax" with respect to a person and a country has been defined to mean that there is an income tax liability on such person under the laws of that country and would also include such person who has subsequently been exempted from such liability under the law of that country;
- iii. The definition of **'slump sale'** has been expanded to include the transfer of an undertaking **'by any means'** including transfer for non-cash consideration e.g. slump exchange. It has also been provided that the fair market value of the undertaking calculated in the prescribed manner will be treated as full value of consideration for tax computation purposes. It has also been clarified that the value of capital asset being goodwill, which has not been acquired by the taxpayer by purchase from previous owner, will be taken as nil while computing net worth;
- iv. **'Goodwill'** has been excluded from the definition of **'block of assets'** and, conse-



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- quently, no depreciation will be allowable on the same. In this regard consequential amendments have been made for computation of written down value of block of assets which include goodwill;
- v. The application of the equalization levy has been expanded as follows:
- ‘online sale of goods’ and ‘online provision of services’ has been defined to include broad categories of e-commerce related activities such as acceptance of offer for sale, placing the purchase order, acceptance of the purchase order, payment of consideration or supply of goods or provision of services, partly or wholly. The broad language is likely to create ambiguity in relation to the applicability of the provision;
 - It has been clarified that consideration received or receivable from e-commerce supply or services will include:
 - a. consideration for sale of goods irrespective of whether the e-commerce operator owns the goods but will exclude consideration for sale of goods which are owned by an Indian resident or by a permanent establishment (‘PE’) of a non-resident if sale of such goods is effectively connected with such PE; and
 - b. consideration for provision of services irrespective of whether such service is provided or facilitated by the e-commerce operator but will exclude consideration for provision of services which are provided by an Indian resident or by a PE of a non-resident if such provision of services is effectively connected with such PE.
 - It has also been clarified that the consideration received or receivable which is taxable as ‘royalty or fees for technical services’ will not be subject to equalisation levy.
- vi. Further incentives have been granted to units based out of IFSCs or GIFT city:
- Income earned by a non-resident by way of royalty on account of a lease of an aircraft paid by a unit of an IFSC and in respect of interest income arising to a non-resident on account of leasing of aircraft to a unit of an IFSC has been exempted from tax; and
 - Capital gains arising on relocation of a foreign fund to India have been exempted from tax subject to certain conditions.
- vii. Withholding tax liability on dividend received by a foreign institutional investor will be computed after granting benefit under the respective tax treaty wherever applicable;
- viii. The eligibility criteria for claiming tax exemptions by Sovereign Wealth Fund (‘SWF’) and Pension Fund (‘PF’) has been relaxed with relaxation in following key conditions:
- Requirement of 100% investment in eligible infrastructure company conditions by Category I and II AIFs has been relaxed and now such Category I and II AIFs can invest up to 50% in non-eligible investments;
 - Category-I or Category-II AIF can now invest in an Infrastructure Investment Trust (InvIT);
 - Investment through holding company has been allowed subject to satisfaction of prescribed conditions;
 - Investment in NBFC-IDF/IFC (non-banking finance company-infrastructure debt fund/Infrastructure finance company) has been allowed subject to satisfaction of prescribed conditions; and
 - Under the existing regime, SWF/PFs are not permitted to undertake any commercial activity. This condition has been substituted for condition that “SWF/PFs will not participate in day to day operation of investee”. It has also been clarified that appointing director and executive director for monitoring the investment would not amount to participation in day to day operation.
- ix. No requirement to withhold tax on dividend payments, if such dividend is paid to a business trust being an infrastructure investment trust or a real estate investment trust by a special purpose vehicle held by such business trust.

Information Technology

❖ The Government has notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (‘OTT Rules’) to regulate intermediaries, over-the-top content players, and digital news media organisations in light of concerns regarding the publishing of objectionable content on such platforms. The OTT Rules were issued under the Information Technology Act, 2000 (‘IT Act’) and supersede the Information Technology (Intermediaries Guidelines) Rules, 2011 (‘Prior Rules’) which previously regulated intermediaries in India.

❖ Introduction of New OTT Rules



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While the Prior Rules prescribed due diligence requirements for an intermediary to avail safe harbor provisions under the IT Act, the OTT Rules impose additional obligations on intermediaries (including social media intermediaries and significant social media intermediaries), to (i) implement a grievance redressal mechanism; (ii) periodically inform users of any changes to its privacy policy and terms of use; (iii) retain records of users for 180 days (as opposed to 90 days under the Prior Rules); (iv) provide information to Government agencies within 72 hours in cases where such assistance is sought; and (v) take measures to remove or disable access to content prohibited under the OTT Rules within 24 hours from the receipt of a complaint.

Further, significant social media intermediaries are required to appoint a (i) chief compliance officer; (ii) nodal contact person; and (iii) grievance officer for undertaking functions specified under the OTT Rules. A significant social media intermediary providing primarily messaging services will also be required to enable the identification of the first originator of the information on its computer resource, if required by a Court.

The OTT Rules also regulate digital media and prescribe a code of ethics along with classification standards to be followed by the publishers of news, current affairs and online curated content.

Further, the OTT Rules prescribe a three-tier structure which includes: (i) self regulation by the intermediary / publisher; (ii) regulation by a self-regulating body of the publishers; and (iii) regulation by an inter-departmental committee to exercise oversight, hear and examine grievances.

However, the OTT Rules do not clearly set out the consequences of failure in case of non-compliance with the provisions applicable to digital media.

The Delhi High Court has recently issued notice in a petition filed by a digital news portal challenging the OTT Rules. Further, the Supreme Court has observed that the OTT Rules are mere guidelines and do not provide for a satisfactory mechanism for prosecution.

Litigation & Arbitration

❖ SC on Constitutional Validity of IBC Amendment Act, 2020

❖ The Supreme Court in **Manish Kumar v. Union of India**¹, while upholding the constitutional validity of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 ('Amendment Act'), which amended Sections 7, 11 and 32A of the IBC, held as follows:

- i. Section 7: The Amendment Act requires that at least 100 real estate allottees or 10% of the total number of allottees (whichever is less) file an insolvency petition in relation to a real estate project, for it to be maintainable. The Court held that this additional threshold cannot be considered discriminatory, as it serves to prevent frivolous or avoidable filings. Further, such allottees, while being treated as financial creditors also have the right to file an insolvency petition under Section 7 of the IBC;
- ii. Section 11: The Amendment Act inserted an explanation clarifying that a corporate debtor may initiate corporate insolvency resolution process against another corporate debtor. This explanation being a clarificatory amendment was held to be retrospective in nature; and
- iii. Section 32A: The Amendment Act provided that no action will be taken against the properties of the corporate debtor if, pursuant to a change in the control of the entity, the new management were not involved in the default in any manner. The Court held that the extinguishment of the criminal liability is important for the new management to start afresh. However, a person who committed or abetted the commission of the offence is not discharged of liability.

❖ SC Gives Retrospective Effect to Bar under Section 10A of IBC

❖ Section 10A of the IBC was introduced during the outbreak of the Covid-19 pandemic, to provide relief from insolvency proceedings on defaults occurring on or after March 25, 2020 i.e. the date on which the nationwide lockdown was announced. The Supreme Court in **Ramesh Kymal v. Siemens Gamesa Renewable Power Private Limited**², held that relief under Section 10A will be available to an application filed prior to the date of introduction of Section 10A to the IBC, so long as such application is in respect of a default which occurred on or after March 25, 2020.

❖ SC holds Moratorium under IBC Bars Parallel Proceedings under Section 138 of the Negotiable Instruments Act, 1881

❖ The Supreme Court in **P. Mohanraj v. Shah Brothers**³, held that proceedings under Section 138 of the Negotiable Instruments Act, 1881 for dishonor of cheque cannot continue against a corporate debtor when an order of moratorium has been passed under Section 14 of the IBC. It was clarified that such bar will apply only to the corporate debtor and not to natural persons responsible for its management.

¹ Manish Kumar v. Union of India, 2021 SCC OnLine SC 30.

² Ramesh Kymal v. Siemens Gamesa Renewable Power Pvt. Ltd., 2021 SCC OnLine SC 72.

³ P. Mohanraj v. Shah Brothers, 2021 SCC Online SC 152.



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❖ The Supreme Court in **A. Navinchandra Steels Private Limited v. SREI Equipment Finance Limited & Others**⁴, has held that IBC proceedings are independent proceedings, unaffected by winding-up proceedings. Winding-up petition cannot trump any subsequent attempt at revival of the company through the IBC process. Where there is a possibility of revival of the company, every effort should be made to resuscitate it, in larger public interest.

❖ The Supreme Court in the case of **Phoenix Arc Pvt. Ltd. v. Ketulbhai Ramubhai Patel**⁵, has held that if an entity has merely offered security by pledging shares, without undertaking to discharge the liability of the borrower, then the creditor will not qualify as a 'financial creditor' under the IBC.

❖ The Supreme Court in **Asha John Divianathan v. Vikram Malhotra & Others**⁶, has held that a gift deed which lacked the mandatory permission of the RBI under Section 31 of the Foreign Exchange Regulation Act, 1973 was unenforceable. It was held that where penalty is imposed by statute for the purpose of preventing an act from being done on the grounds of public policy; such prohibited act would be treated as void if done, even if the penalty was unenforceable. It was further clarified that this decision does not apply to transactions which have already become final and that they need not be reopened or disturbed in any manner.

❖ The Supreme Court in **Bharat Sanchar Nigam Ltd. v. Nortel Networks India Private Limited**⁷ held that in the absence of a statutory provision prescribing a time period for filing an application for appointment of an arbitrator, the residual provision of the Limitation Act, i.e. Section 137 will apply. Pursuant to Section 137, the period of limitation to file an application for appointment of arbitrator will be three years from the date of refusal to appoint the arbitrator or the expiry of 30 days from the date of such request, whichever is earlier. The Court further held that in rare and exceptional cases, where the claims are *ex facie* time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.

❖ sc on Maintainability of Insolvency Proceedings

❖ sc holds a Pledge Absent any Undertaking to Discharge Liability is not a 'Financial Debt'

❖ sc Holds Contract is Void if Prohibited by Statute under a Penalty

❖ sc on Limitation on Applications for Appointment of Arbitrator

4 A. Navinchandra Steels Private Limited v. SREI Equipment Finance Limited & Ors., Civil Appeal Nos. 4230-4234 of 2020.

5 Phoenix Arc Pvt. Ltd. v. Ketulbhai Ramubhai Patel, 2021 SCC OnLine SC 54.

6 Asha John Divianathan v. Vikram Malhotra & Ors., Civil Appeal No. 9546 of 2010.

7 Bharat Sanchar Nigam Ltd. v. Nortel Networks India Pvt. Ltd., 2021 SCC Online SC 207.



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India National Law Firm of the Year
Chambers Asia-Pacific Awards, 2021

'Outstanding Firm' for
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Corporate/M&A; Dispute Resolution, Private Equity and Real Estate
Asialaw Profiles, 2021

'Band 1 Firm' for
Capital Markets, Competition/Antitrust, Corporate/M&A,
Dispute Resolution and International & Cross-Border Capabilities
Chambers Global Awards, 2021

'Band 1 Firm' for
Competition/Antitrust, Corporate/M&A, Dispute Resolution,
Private Equity, Real Estate and Restructuring & Insolvency
Chambers Asia-Pacific Awards, 2021

'Tier 1 Firm' for
Banking, Capital Markets, M&A, Private Equity and Restructuring & Insolvency
IFLR1000, 2021

'Tier 1 Firm' for
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Dispute Resolution (Litigation), Dispute Resolution (Arbitration), Investment Funds,
Private Client Practice, Private Equity and Investment Funds, Real Estate,
Restructuring & Insolvency, Tax and White-Collar Crime
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Ranked No.1
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Ranked No.2
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Best Overall Law Firm of the Year
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Corporate Law Firm of the Year
Chambers Forum India Awards, 2019

Ranked No.1
RSG Top 50 Indian Law Firms Ranking, 2019
RSG Top 40 Indian Law Firms Ranking, 2017

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