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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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MUMBAI: AZB House | Peninsula Corporate Park | Ganpatrao Kadam Marg | Lower Parel | Mumbai 400013 | India | TEL +91 22 4072 9999 | FAX +91 22 66396888 | E-MAIL mumbai@azbpartners.com

MUMBAI: Sakhar Bhavan | 4th Floor | Nariman Point | Mumbai 400021 | India | TEL +91 22 4910 0600 | FAX +91 22 49100699 | E-MAIL disputeresolution.mumbai@azbpartners.com

DELHI: AZB House | Plot No. A8 | Sector 4 | Noida 201301 | National Capital Region Delhi | India | TEL +91 120 4179999 | FAX +91 120 4179900 | E-MAIL delhi@azbpartners.com

GURGAON: Unitech Cyber Park | 602 Tower-B | 6th floor | Sector 39 | Gurgaon 122001 | National Capital Region Delhi | India | TEL +91 124 4841300 | FAX +91 124 4841319 | E-MAIL gurgaon@azbpartners.com

BANGALORE: Embassy Icon | 7th Floor | Infantry Road | Bangalore 560 001 | India | TEL +91 80 42400500 | FAX +91 80 22213947 | E-MAIL bangalore@azbpartners.com

PUNE: Onyx Towers | 1101-B | 11th floor | North Main Road | Koregaon Park | Pune 411001 | India | TEL +91 20 67256666 | FAX +91 20 67256600 | E-MAIL pune@azbpartners.com



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Inter alia...

- ❖ Introduction of Companies (Creation and Maintenance of Databank of Independent Directors) Rules, 2019

- ❖ Amendment to Threshold Limits for Related Party Transactions by a Public Company Amended

- ❖ MCA Amends the Companies (Accounts) Rules, 2014

- ❖ Ministry of Finance Notifies the Foreign Exchange Management (Non-debt Instrument) Rules

- ❖ Expansion of Scope of Special Non-Resident Rupee Account

Corporate & SCRA

❖ Pursuant to the Companies (Creation and Maintenance of Databank of Independent Directors) Rules, 2019 (**'Independent Director Rules'**) notified on October 22, 2019, the Indian Institute of Corporate Affairs (**'Institute'**) is required to create and maintain an online databank of independent directors currently serving on the board of companies as well as other persons willing and eligible to be appointed as independent directors and provide it to companies required to appoint independent directors under the Companies Act, 2013 (**'Companies Act'**). The databank will *inter alia* contain information on such person's qualifications, experience and expertise, occupation, pending criminal proceedings under Section 164(1)(d) of the Companies Act, list of directorships / designated partner positions etc. Additionally, prior to inclusion in the databank, the Institute should conduct an online proficiency self-assessment test of such persons on companies law, securities law, basic accounting and other relevant topics.

❖ The Ministry of Corporate Affairs (**'MCA'**) has, by way of a notification dated November 18, 2019, amended the Companies (Meetings of Board and its Powers) Rules, 2014 (**'Board Meeting Rules'**) for revising the threshold limits for entering into related party transactions by a public company, beyond which such transactions will require shareholder approval.¹ The existing and revised thresholds for related party transactions mentioned in Rule 15 of the Board Meeting Rules are as under:

| RULE OF THE BOARD MEETING RULES | PRESCRIBED TRANSACTIONS | EARLIER THRESHOLDS | REVISED THRESHOLDS |
|---------------------------------|--|---|---|
| 15(3)(a)(i) | Sale, purchase or supply of any goods or material (directly or through an agent) | 10% or more of the turnover of the company or ₹100 Crore (approx. US\$ 14 million), whichever is lower | 10% or more of the turnover of the company |
| 15(3)(a)(ii) | Selling or disposing or buying property of any kind (directly or through an agent) | 10% or more of net worth of the company or ₹100 Crore (approx. US\$ 14 million), whichever is lower | 10% or more of the net worth of the company |
| 15(3)(a)(iii) | Leasing of property of any kind | 10% or more of the net worth of the company or 10% or more of turnover of the company or ₹100 Crore (approx. US\$ 14 million), whichever is lower | 10% or more of turnover of the company |
| 15(3)(a)(iv) | Availing or rendering of any services (directly or through an agent) | 10% or more of turnover of the company or ₹50 Crore (approx. US\$ 7 million), whichever is lower | 10% or more of turnover of the company |

❖ MCA has, by way of a notification dated October 22, 2019, amended Rule 8 of the Companies (Accounts) Rules, 2014 (**'Accounts Rules'**) which prescribes certain matters to be included in the board report. Pursuant to the amendment, the board report is additionally required to include a statement regarding its opinion with regard to integrity, expertise, experience and proficiency (to be ascertained from the online proficiency self-assessment test conducted by the Institute) of the independent directors appointed during the year.

Foreign Exchange

❖ The Ministry of Finance by way of its notification dated October 17, 2019 issued the Foreign Exchange Management (Non-debt Instrument) Rules, 2019 (**'NDI Rules'**) in supersession of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 (FEMA 20R) and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018. The key features of the NDI Rules are being reported separately by way of a client alert.

❖ In terms of the Master Circular on Deposits and Accounts dated January 1, 2016 (as amended), any person resident outside India having business interests in India is permitted to open a Special Non-Resident Rupee Account (**'SNRR Account'**) with an authorized dealer for the purpose of effecting *bona fide* transactions in Rupees. The Reserve Bank of India (**'RBI'**) on November 22, 2019 has expanded the scope of SNRR Account by *inter-alia* permitting persons resident outside India to open such accounts for: (i) external commercial borrowings in Rupees; (ii)

¹ Additionally, please note that Companies (Appointment and Managerial Personnel) Rules, 2014 have recently been amended by way of an MCA notification dated January 3, 2020. Every listed company, public company or private company having a paid up share capital of ₹10,00,00,000 (approx. US\$ 1.4 million) or more is required to have a whole time company secretary. Previously, the monetary threshold was ₹5,00,00,000 (approx. US\$ 700,000).

trade credits in Rupees; (iii) trade (export/ import) invoicing in Rupees; and (iv) business related transactions outside International Financial Service Centre ('IFSC') by IFSC units at the Gujarat International Finance Tec-City (GIFT-City), such as administrative expenses, sale of scrap, government incentives, etc.



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Capital Markets

❖ On September 23, 2019, the Securities and Exchange Board of India ('SEBI') notified amendments to the SEBI (Credit Rating Agencies) Regulations, 1999 ('**CRA Regulations**'). Previously, clients were required to "agree to" (i) periodic review of the rating by the credit rating agency ('CRA') during the tenure of the rated instrument, (ii) cooperate with the CRA to enable it to maintain a true and accurate rating, (iii) disclose prescribed information in the offer document, and (iv) obtain rating for issue of debt securities per the relevant regulations. Post the amendment, clients have to compulsorily undertake the above and provide explicit consent to the CRA for obtaining details related to their (i) existing and/or future borrowings of any nature, (ii) repayments and delays/ defaults, if any, of any nature in servicing of the borrowing either from the lender or any other statutory / non-statutory organization maintaining any such information, to enable the CRA to have timely information and consider impact of such information on ratings assigned by it. By way of a circular dated November 4, 2019, SEBI has imposed additional governance norms for CRAS.

❖ SEBI had, through circular dated November 1, 2018, introduced the use of Unified Payments Interface ('UPI') as a payment mechanism with Application Supported by Blocked Amount ('ASBA') for applications in public issues by retail individual investors ('RII') through intermediaries with effect from January 1, 2019 (which is being implemented in a phased manner). Thereafter, Phase II was implemented with effect from July 1, 2019, where, for applications by RII through intermediaries, the process of physical movement of forms from intermediaries to Self-Certified Syndicate Banks for blocking of funds was discontinued and only the UPI mechanism with existing timeline of T+6 days (where T is the issue closing date) was mandated for a period of 3 months or floating of 5 main board public issues, whichever is later. SEBI has now, through its circular dated November 8, 2019, extended the timeline for implementation of Phase II till March 31, 2020 and has revised the timelines for existing T+6 environments.

❖ Previously, listed banks were required to make disclosures of divergences in asset classification and provisioning beyond specified thresholds, as part of the annual financial statements. By way of circular dated October 31, 2019, SEBI has now mandated that such disclosures be made not later than 24 hours of receipt of the RBI final risk assessment report, if (i) the additional provisioning for non-performing assets ('NPA') assessed by RBI exceeds 10% of the reported profit before provisions and contingencies for the reference period, and/or (ii) the additional gross NPAs identified by RBI exceed 15% of the published incremental gross NPAs for the reference period.

❖ On November 4, 2019, SEBI issued 'Frequently Asked Questions' on the SEBI (Prohibition of Insider Trading) Regulations, 2015 ('**PIT Regulations**'), which clarify the following:

- i. Trading window and pre-clearance requirements do not apply to exercise of employee stock options issued under SEBI (Share Based Employee Benefits) Regulations, 2014, but apply to sale of shares acquired upon exercise of the employee stock options;
- ii. Employees of listed companies, including foreign nationals, who are designated persons under the code of conduct and the PIT Regulations are required to comply with the code of conduct in respect of trading in American Depository Receipts and Global Depository Receipts;
- iii. In their structured digital database, listed companies should maintain the names and permanent account numbers of the fiduciaries and intermediaries with whom they have shared unpublished price sensitive information ('**UPSI**') and such fiduciaries and intermediaries should, at their end, maintain details of the persons (within their system) having access to UPSI;
- iv. All information required to be collected from designated persons should be collected till such persons are employed with the company. For a period of 1 year thereafter, efforts should be made to maintain updated address and contact details of such persons and such data should be preserved for a period of 5 years.

❖ Amendment to SEBI Credit Rating Agencies Regulations

❖ Process of Public Issue of Equity Shares and Convertibles-Extension of Time for Phase II of UPI with ASBA

❖ Disclosures of Divergences in Asset Classification by Listed Banks

❖ SEBI Issues New FAQs on Insider Trading Regulations



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❖ Decisions Approved by SEBI in its Board Meeting

❖ Disclosures by Listed Entities of Default on Loans and Unlisted Debt Securities

❖ SEBI (Issue of Capital and Disclosure Requirements) (Sixth Amendment) Regulations, 2019

❖ Measures to strengthen the conduct of Investment Advisers

❖ Management and advisory services by AMCs to Foreign Portfolio Investors

❖ SEBI, in its board meeting held on November 20, 2019, *inter alia* approved that the SEBI (Portfolio Managers) Regulations, 2019 replace the SEBI (Portfolio Managers) Regulations, 1993 pursuant to comments received through a consultative paper, from the public and the working group constituted to review the extant regulations. The key amendments proposed by the new regulations are: (a) minimum requirement of employing at least one person with defined eligibility criteria, in addition to a principal officer and compliance officer, by the portfolio manager, (b) enhancement of net-worth requirement of portfolio managers from ₹2 crores (approx. US\$280,000) to ₹5 crores (approx. US\$700,000); (c) minimum investment by clients of portfolio managers to be increased from ₹25 lakhs (approx. US\$35,000) to ₹50 lakhs (approx. US\$70,000), (d) investment by discretionary portfolio managers in only listed securities, money market instruments, units of mutual funds and such other securities/instruments as specified by SEBI; (e) investment by non-discretionary / advisory portfolio managers of not more than 25% of their assets under management in unlisted securities; and (f) restriction on off-market transfers from/to clients' accounts with certain exceptions to facilitate operational convenience.

❖ SEBI, by way of circular dated November 21, 2019, has prescribed additional disclosure requirements for listed entities that have listed equity or convertible securities, non-convertible debentures or non-convertible redeemable preference shares ('NCRPS'), in relation to any default in payment of interest or instalment obligations on loans (including revolving facilities like cash credit) from banks or financial institutions and unlisted debt securities. Such listed entities are, with effect from January 1, 2020, required to make disclosures to the stock exchange for any such default that continues beyond 30 days within 24 hours from the 30th day, and in case of unlisted debt securities within 24 hours from the occurrence of the default.

❖ The key amendments notified by SEBI on December 26, 2019 to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 are as follows:

- i. **Disclosure:** The process of credit of rights entitlements in the demat account and renunciation are required to be disclosed in the letter of offer and abridged letter of offer.
- ii. **ASBA:** SEBI has made ASBA facility mandatory for applying for a rights issue. However, it is clarified that for applying for any reserved portion outside the issue period, payment through any other electronic banking mode is permissible. Consequently, SEBI has clarified that payment of balance money in calls, outside the issue period, can be made through electronic banking modes.
- iii. **Credit of rights entitlements and allotment:** SEBI has mandated that the allotment of securities should be in dematerialised form only and the rights entitlements are required to be credited to the demat account of the shareholders, before the issue opening date.
- iv. **Withdrawal of application for subscription:** SEBI has clarified that no withdrawal of application for subscription in the rights issue is permissible after the issue closing date.

❖ With a view to strengthen the conduct of investment advisers ('IAS') governed by the SEBI (Investment Advisers) Regulations, 2013 ('IA Regulations'), SEBI has, by way of a circular dated December 27, 2019, issued the following measures to be complied with by IAS with effect from January 1, 2020: (i) IAS are now prohibited from providing a free trial for any of their products/ services to prospective clients without considering the risk profile of such clients, (ii) IAS can provide investment advice only after completing the risk profile of the client and obtaining consent of the client on completed risk profile, (iii) IAS cannot accept part payments for any product/ service. Further, IAS are now required to accept fees strictly through banking channels only, and not by way of cash deposits, and (iv) IAS are required to display status of complaints on their website/ mobile apps.

❖ The SEBI (Mutual Fund) Regulations, 1996 *inter alia* permit AMCs to provide management and advisory services to certain categories of foreign portfolio investors ('FPI'). By way of circular dated December 16, 2019, SEBI has now, with immediate effect, specified the following categories of FPIs for the purposes of this regulation: (i) Government and Government related investors such as central banks, sovereign wealth funds, international or multilateral organizations or agencies including entities controlled or at least 75% directly or indirectly owned by such Government and Government related investor(s), (ii) appropriately regulated entities such as pension funds, insurance or reinsurance entities, banks and mutual funds, and (iii) appropriately regulated FPIs wherein entities specified under (i) or (ii) above hold more than 50% of the shares/ units. Further, for existing agreements entered into by AMCs to provide management and advisory services to FPIs not falling within the above specified categories, SEBI has clarified that such AMCs may continue to provide such services for the period mentioned in the agreement or December 15, 2020, whichever is earlier.



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❖ SEBI has, by way of circular dated December 24, 2019, introduced a Stewardship Code ('Code') to be followed by all mutual funds and all categories of alternative investment funds, in relation to their investment in listed equities, with effect from April 1, 2020. The Code lays out the following key principles that are required to be followed by the institutional investors: (i) formulation of a comprehensive policy on the discharge of their stewardship responsibilities, which should be publicly disclosed, and periodically reviewed and updated; (ii) formulation of a clear policy on conflict management in connection with fulfilling their stewardship responsibilities, which should be publicly disclosed, (iii) monitoring of investee companies, (iv) formulation of clear policies on intervention in their investee companies as well as for collaboration with other institutional investors where required, to preserve the interests of the ultimate investors, which should be disclosed, (v) formulation of a clear policy on voting and disclosure of voting activity, and (vi) periodic reporting on their stewardship activities.

❖ The key conditions prescribed by SEBI, by way of circular dated November 27, 2019, under the guidelines for preferential issue and institutional placement of units of Real Estate Investment Trusts ('REITs') and Infrastructure Investment Trusts ('InvITs'), are as follows:

- i. No promoter, partner or director of the sponsor(s) or investment manager or trustee of the REIT or InvIT should have been declared as a fugitive economic offender.
- ii. New units can be issued to a maximum of 200 investors in a financial year, excluding institutional investors.
- iii. While seeking unitholder approval for preferential issue of units, the explanatory statement should disclose the identity of the natural persons who are the ultimate beneficial owners of the units proposed to be allotted and/or who ultimately control the proposed allottees. However, if there is any listed company, mutual fund, scheduled commercial bank, insurance company registered with the Insurance Regulatory and Development Authority of India in the change of ownership of the proposed allottee, no further disclosure will be necessary.
- iv. Under preferential issue of units, the units allotted to sponsor(s) of the REIT / InvIT has to be locked-in for 3 years, and the units allotted to persons other than the sponsor(s) has to be locked-in for 1 year from the date of trading approval for such units. The entire pre-preferential issue unitholding of the allottees has to be locked-in from the relevant date up to a period of 6 months from the date of trading approval. Under institutional placement of units, the units allotted are locked-in for a period of 1 year from the date of allotment, except on a recognised stock exchange.

❖ Introduction of a Stewardship Code for Institutional Investors

❖ Guidelines for Preferential Issue / Institutional Placement of Listed Units of REITs / InvITs

Banking and Finance

❖ Previously, banks were only expressly permitted to participate / invest in units issued by InvITs, subject to certain conditions prescribed by RBI. By way of notification dated October 14, 2019 titled 'Lending by banks to InvITs' ('InvITsNotification'), the RBI has now permitted banks to provide credit facilities to InvITs, subject to the following key conditions:

- i. Banks may lend only to those InvITs where none of the underlying special purpose vehicles, which have existing bank loans is facing 'financial difficulty'².
- ii. While banks are permitted to lend to InvITs for acquisition of shares in other entities, such credit facilities are required to be in compliance with paragraph 2.3.7.4 (iv) of the RBI Master Circular dated July 1, 2015 on 'Loans and Advances – Statutory & Other Restrictions', which sets out the limited circumstances under which banks may lend to promoters for this purpose.

As per the InvITs Notification, banks will be required to put in place a board-approved policy on exposures to InvITs to *inter-alia* cover the appraisal mechanism, conditions for sanction, internal limits and monitoring mechanism for lending to InvITs. Adherence to these conditions will be subject to a half-yearly review conducted by a bank's audit committee.

❖ RBI has, by way of circular dated December 6, 2019, stipulated that asset reconstruction companies ('ARCs') cannot acquire financial assets from the following, on a bilateral basis, irrespective of the consideration: (i) a bank/financial institution which is the sponsor of the ARC, (ii) a bank/financial institution which is either a lender to the ARC or a subscriber to the fund, if any, raised by the ARC for its operations, or (iii) an entity in the group to which the ARC belongs. However, ARCs are permitted to participate in auctions for financial assets which are conducted in a transparent manner, on arm's length basis and where the prices are determined by market forces.

❖ Lending by Banks to InvITs

❖ Acquisition by Asset Reconstruction Companies from Sponsors and Lenders

² As defined under the RBI circular dated June 7, 2019 on 'Prudential Framework for Resolution of Stressed Assets'



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Inter alia...

❖ Withdrawal of Exemptions
Granted to Housing Finance
Institutions

❖ sc holds that Equitable
Treatment to be accorded to
a Creditor during IBC Process
is dependent on the Class to
which the Creditor belongs

❖ High Court entitled to
Entertain a Writ Petition
under Articles 226/ 227 of the
Constitution of India against
Orders passed by an NCLT for
Public Law Matters

❖ sc Rules on Applicability of
the Overriding Effect of IBC
on Third Party Assets

❖ RBI, by way of circular dated November 11, 2019, withdrew the exemptions available to housing finance institutions, as defined under Section 2(d) of the National Housing Bank Act, 1987 ('HFIS'), from the provisions of Chapter IIIB of Reserve Bank of India Act, 1934 ('RBI Act'). Chapter IIIB of the RBI Act deals with provisions setting out requirements relating to non-banking institutions receiving deposits and financial institutions such as maintenance of percentage of assets, creation of reserve fund etc. However, note that the exemption from Section 45-IA (Requirement of registration and net owned fund) of RBI Act is still applicable to HFIS. It has further been stipulated that the notification withdrawing the exemption under Section 45-NC (Power of bank to exempt) of the RBI Act will be issued separately.

❖ The key decisions and observations made by sc, in **Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta**³ on various issues under the Insolvency and Bankruptcy Code, 2016 ('IBC')⁴ are: (i) Equitable treatment has to be given to all the creditors who are similarly situated. However, all classes cannot be treated equally as the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the IBC – to resolve stressed assets; (ii) With respect to the recently introduced requirement for resolution plans under the amendments passed in August, 2019 i.e., 'fair and equitable treatment', sc held that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of; (iii) The Committee of Creditors ('CoC') has the freedom to distribute and classify amounts to secured creditors on the basis of the value of their security. The CoC is allowed to appoint sub-committees to act on its behalf for certain administrative purposes, but such acts need to be ratified by the CoC. The NCLT or the NCLAT should not interfere with the decision of the CoC as long as the IBC provisions have been complied with; (iv) Profits of the corporate debtor during corporate insolvency resolution process ('CIRP') are not to be utilized for payment of debts of any creditor. All claims must be submitted to and decided by the Resolution Professional to ensure that a prospective resolution applicant knows exactly what has to be paid in order to take over the Corporate Debtor on a 'fresh slate'; (v) The National Company Law Tribunal ('NCLT') or the National Company Law Appellate Tribunal ('NCLAT') may, in certain exceptional circumstances, extend the CIRP period and grace period beyond 330 days and 90 days respectively; and (vi) The impugned NCLAT decision in this matter that a guarantor would be relieved from any payment, once the debt payable by the corporate debtor is cleared in view of the approval of the resolution plan, has been set aside by the sc as it is contrary to Section 31(1) of the IBC (approval of resolution plan by NCLT). Thus, an approved resolution plan is binding on all stakeholders, including guarantors.

❖ sc in **M/s Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors.**⁵ dealt with the issue of whether High Courts ought to interfere under Articles 226/227 of the Constitution of India, with an order passed by the NCLT, Chennai Bench, in a proceeding under the IBC, ignoring the availability of a statutory remedy of appeal to the NCLAT and if so, under what circumstances.

sc held that Section 60(5) of the IBC, which confers upon the NCLT jurisdiction to decide any question of law or fact that arises out of or in relation to insolvency resolution, is broadly worded. However, any decision that is taken by the Government or statutory authority dealing with matters that fall within the realm of public law cannot be brought within the scope of Section 60(5) of the IBC. In the present case, the NCLT entertained an application against the Government of Karnataka for a direction to execute supplemental lease deeds for the extension of the mining lease, and therefore, the High Court of Karnataka was justified in entertaining the writ petition.

❖ In **Municipal Corporation of Greater Mumbai v. Abhilash Lal & Ors.**⁶, the Supreme Court ('sc') was considering the challenge of the Municipal Corporation of Greater Mumbai ('MCGM') to a resolution plan approved for Sevenhills Healthcare Private Limited ('Corporate Debtor'). The resolution plan contained proposals which envisioned the creation of security over MCGM's properties, which had been leased to the Corporate Debtor.

sc held, *inter alia*, that in the absence of approval being taken in terms of sections 92 and 92A of the Mumbai Municipal Corporation Act, 1888 (which prescribes the method for dealing with MCGM's properties through lease or by way of creation of any other interest), the objections by MCGM could not have been overridden to enable the creation of a fresh interest in respect of MCGM's properties and lands. sc concluded that Section 238 of the IBC (as per which the provisions of the IBC override other laws in effect or instruments having effect by virtue of any

3 Civil Appeal No. 8766-67 of 2019

4 Please see our separate client alerts reporting various developments pertaining to IBC from time to time.

5 Civil Appeal No. 9170 of 2019

6 2019 SCC OnLine SC 1479

such law) cannot be read to override MCGM's right and public duty to control and regulate how its properties are dealt with and that Section 238 could be of relevance when the properties and assets are of a debtor, and not a third party such as MCGM is involved.



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Insurance

❖ The Department of Financial Services has, by way of a notification dated September 2, 2019, issued certain amendments to the Indian Insurance Companies (Foreign Investment) Rules, 2015, permitting 100% foreign investment under the automatic route in insurance intermediaries (such as third party administrators, web aggregators, insurance brokers, etc.), subject to verification by the Insurance Regulatory and Development Authority of India ('IRDAI') and compliance with pricing guidelines prescribed by RBI. On October 30, 2019, the IRDAI amended various regulations applicable to insurance intermediaries by notifying the IRDAI (Insurance Intermediaries) (Amendment) Regulations, 2019 ('**Intermediaries Amendment Regulations**') to *inter-alia* introduce the requirement of an undertaking to be furnished by intermediaries incorporated as a company under the Companies Act and where a majority of the shareholding is held by foreign shareholders, to the effect that:

- i. the chairman of the board or the managing director/ chief executive officer/ principal officer of the insurance intermediary is a resident Indian citizen;
- ii. the insurance intermediary must take prior permission of the IRDAI for repatriating dividend;
- iii. the insurance intermediary will not make payments (other than dividend) to related parties, taken in the aggregate, beyond 10% of the total expenses in a given financial year; and
- iv. a majority of directors and key management persons will be resident Indian citizens.

In view of the above, IRDAI issued an additional circular on November 19, 2019 whereby the guidelines dated November 20, 2015 on 'Indian owned and controlled' for insurance intermediaries have been withdrawn. Notifications under exchange control regulations to operationalize 100% foreign equity investment in insurance intermediaries are yet to be notified.

❖ IRDAI (Insurance Intermediaries) (Amendment) Regulations, 2019

Telecommunications

❖ TRAI has, by way of press release dated October 21, 2019, released recommendations on 'Review of Terms and Conditions for registration of Other Service Providers ('OSPs') with the Department of Telecommunications ('DoT') ('**Recommendations**'). The salient features of the Recommendations *inter alia* include (i) clarity in the definition of OSFs, wherein only voice based, outsourced OSFs are required to register with the DoT as per existing process and data/ internet based OSFs are required to only provide intimation to the DoT, (ii) provision of services for captive purposes, i.e., captive contact centres are excluded from the scope of OSFs and are required to furnish only intimation to the DoT, (iii) multiple OSF centres of single company within one license service area can be registered as single OSF, (iv) the complete process of registration and intimation is required to be conducted through online portal of the DoT and in a time bound manner, (v) the requirement of agreement and bank guarantee for sharing of infrastructure between domestic and international OSFs of the same company has been removed; and (vi) internet obtained at one OSF centre can be shared with other OSF centres of the same company, provided the internet service provider has geographical jurisdiction.

❖ In its judgment dated October 24, 2019 in **Union of India v. Association of Unified Telecom Service Providers of India etc.**⁷, SC has set aside the decision of the Telecom Dispute Settlement Appellate Tribunal dated April 23, 2015 which had given its interpretation to the terms 'gross revenue' and 'adjusted gross revenue' as defined under the Unified Access Service License ('UASL'). While doing so, the SC allowed the appeals filed by the DoT and set aside the cross appeals filed by the Telecom Service Providers ('TSPs'). The TSPs were found to be in default in payment of license fee as demanded by the DoT, in terms of the UASL, and SC held that interest and penalty had been rightly levied upon the TSPs over and above the license fee that was charged. The TSPs have been granted 3 months' time from October 24, 2019 to deposit the amounts due to the DoT.

❖ TRAI Recommendations on 'Review of Terms and Conditions for registration of Other Service Providers'

❖ SC judgment in the matter of **Union of India v. Association of Unified Telecom Service Providers of India**

⁷ Union of India v. Association of Unified Telecom Service Providers of India, Civil Appeal Nos. 6328-6399 of 2015 (SC)



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Inter alia...

❖ Taxation Laws (Amendment) Act, 2019

❖ SC Allows Delayed Filing of Revised Return pursuant to NCLT Approved Amalgamation

❖ Guidelines on Compensation of Whole-Time Directors / CEO /Material Risk Takers and Control Function Staff

Taxation

❖ The Indian Finance Minister had introduced the Taxation Laws (Amendment) Ordinance, 2019 ('**Ordinance**') in September 2019 introducing sweeping amendments to the Income-tax Act, 1961 ('**IT Act**')⁸. Government has now introduced the Taxation Laws (Amendment) Act ('**Amendment Act**') making certain changes to the Ordinance as described below-

- i. The Ordinance introduced an optional regime providing for reduced corporate tax rate of 25.17% (from 35.94%) for all Indian companies (as long as no tax exemptions/ holidays/ deductions are availed, even if available, such as those available to special economic zone (SEZ) units or provision of additional depreciation, or those under Section 35AD, Chapter VI-A etc.). Further, such company would not be entitled to set off of any brought forward loss attributable to such tax incentives or deductions. The Amendment Act additionally stipulates that: (i) a company would not be entitled to set off of any unabsorbed depreciation attributable to such tax incentives or deductions, and (ii) the restriction on set off of tax losses and depreciation must include losses and depreciation acquired by the company from a transferor entity under a tax neutral merger or demerger.
- ii. The Ordinance had introduced an optional regime providing for reduced corporate tax rate of 17.16% (from 35.94%) for all new-Indian manufacturing companies set up and registered on or after October 1, 2019 and commencing manufacturing on or before March 31, 2023 (provided they do not avail of any tax deductions/ exemptions/ holidays), subject to fulfillment of prescribed conditions. The Amendment Act has provided that the benefit of this tax rate will not be available to the following businesses: (a) development of computer software in any form or in any media; (b) mining; (c) conversion of marble blocks or similar items into slabs, (d) bottling of gas into cylinder; (e) printing of books or production of cinematograph film, or (e) any other notified business.
- iii. The companies opting for the above referred regimes were also provided an exemption from minimum alternate tax ('**MAT**'). For all other Indian companies not opting for the above regimes, Ordinance had reduced the effective MAT rate from 21.55% to 17.47%. The Amendment Act has now clarified that such reduced MAT rate will apply with effect from April 1, 2019. The Amendment Act has clarified that the brought forward MAT credit will not be available to an Indian company exercising the option to avail the reduced corporate tax rate of 25.17%.

❖ In **Dalmia Power Ltd. v. ACIT**⁹, SC has permitted filing of revised returns of income beyond the prescribed time allowed under the IT Act. In this case, the relevant schemes of arrangement incorporated provisions for filing the revised returns beyond the prescribed time limit since the schemes were to come into force retrospectively from the appointed date. These schemes had been sanctioned by the NCLT and had not been objected to by the Income Tax Department ('**Revenue**'). On these facts, SC noted that it was impossible for the companies to have filed the revised returns of income before the applicable due date since the NCLT had passed the last orders granting approval and sanction of the schemes only after such due date. Further, since the predecessor companies/transferor companies had been succeeded by the transferee companies who had taken over their business along with all assets, liabilities, profits and losses etc., it was incumbent upon the Revenue to assess the total income of the successor in respect of the previous assessment year after the date of succession. Accordingly, SC had directed the Revenue to assess the income of the transferee companies after taking into account the revised returns filed after amalgamation of the companies.

Employment

❖ By way of circular dated November 4, 2019, RBI has replaced the existing guidelines and issued revised guidelines on 'Compensation of Whole-Time Directors /Chief Executive Officers / Material Risk Takers and Control Function Staff' applicable to all private sector banks (including local area banks, small finance banks and payments banks) and foreign banks operating in India and for pay cycles with effect from April 1, 2020. The following key changes have been proposed under the new guidelines: (i) at least 50% of the compensation has to be variable, (ii) inclusion

⁸ Please refer AZB – Special Inter Alia Edition dated September 21, 2019

⁹ [2019] 112 taxmann.com 252 (SC)

of share-linked instruments such as employee stock options as a component of variable pay, (iii) capping of variable pay component at 300% of the fixed pay component, (iv) a minimum of 50% of the variable pay if the variable pay is up to 200% of the fixed pay, or 67% if the variable pay is more than 200% of the fixed pay, is to be paid *via* non-cash component, (v) for senior executives, a compulsory deferral mechanism for variable pay, regardless of the quantum of variable pay, has been introduced, (vi) mandatory imposition of claw-back arrangements in case of deferred compensation, and (vii) qualitative and quantitative criteria for identification of material risk takers. Banks are also now mandated to make disclosures on remuneration of the specified officers on an annual basis at the minimum, forming part of their annual financial statements.

❖ The key features of the Transgender Persons (Protection of Rights) Act, 2019 ('TPA') released by the Ministry of Law and Justice are as follows:

- i. **Prohibition of Discrimination:** A transgender person cannot be discriminated *inter alia* in educational institutions, unfair treatment in relation to employment or termination of employment, healthcare services, any other privilege or opportunity in relation to access and enjoyment of goods, services and facilities, and there cannot be unfair treatment pertaining to right to movement, hold public or private office, etc.
- ii. **Recognition of Identity:** A transgender person will have the right to be recognized and has a right to self-perceived gender identity.
- iii. **Formulation of Welfare Schemes & Programmes:** TPA provides for formulation of welfare schemes to protect rights of the transgender persons and programmes which are transgender sensitive, non-stigmatizing and non-discriminatory in nature, and also promotes and protects the rights of the transgender people to participate in cultural and recreational activities.
- iv. **Constitution of National Council:** National Council is to be set up which will *inter-alia* advise the Central Government on formulation, monitoring and evaluation of policies and programmes, reviewing and coordinating activities, redressal of grievances, etc. for transgender persons.
- v. **Offences and Penalties:** Contravention of the TPA provisions will have penal and monetary implications with up to 2 years of imprisonment and with a fine.

While the TPA has received Presidential assent, it is yet to come into force.

❖ The Industrial Relations Code Bill, 2019 ('IRCB'), which has been introduced in the Lok Sabha on November 28, 2019, intends to merge 3 Central labour statutes (*viz.* the Industrial Disputes Act, 1947, the Trade Unions Act, 1926 and the Industrial Employment (Standing Orders) Act, 1946) into a single code. Some of the key features of the IRCB pertain to fixed-term employment, revised definitions of 'retrenchment', 'strike' and 'workers', negotiating union / negotiating council, a worker re-skilling fund for training of retrenched employees, enhancement of certain penalties, compounding of offences, and setting up of a two-member tribunal.

❖ In an effort to simplify and consolidate labour laws, the Government of India is in the process of consolidating several central labour laws into four codes. The Code on Social Security, 2019 ('Code') is the last of such codes to be introduced in the Parliament. The Code, which has been introduced in the Lok Sabha on December 11, 2019, intends to consolidate central labour laws relating to employee social security and benefits, including the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the Employees' State Insurance Act, 1948, and the Payment of Gratuity Act, 1972.



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❖ Transgender Persons (Protection of Rights) Act, 2019

❖ Industrial Relations Code Bill, 2019

❖ Code on Social Security, 2019

Intellectual Property

❖ For the purpose of expediting the Indian patent prosecution timelines, Rule 24 C of the Patents Amendment Rules, 2003, which provided for expedited examination of patent applications, was amended by the Patents Amendment Rules, 2019 which were notified by the Ministry of Commerce & Industry on September 17, 2019 ('Patents Amendment Rules'). Under the Patents Amendment Rules, the facility for availing expedited examination was extended to all those applicants who are eligible under an arrangement for processing a patent application pursuant to an agreement between the Indian Patent Office ('IPO') and a foreign patent office.

However, it was only on November 20, 2019, that the Union Cabinet approved the proposal for adoption of Patent Prosecution Highway programme ('PPHP') between the IPO and various other foreign patent offices. Pursuant thereto, the PPHP between IPO and the Japan Patent Office ('JPO') executed on November 21, 2019 is the first such pilot programme which will be valid for an initial period of 3 years.

❖ India Implements its First Ever Patent Prosecution Highway Programme



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- ❖ Delhi High Court Issues a Global Injunction Order Against Intermediary Platforms

The PPHF intends to reduce prosecution timelines, enable faster disposal of patent applications, improve the quality of search and examination of the patent applications at the IPO and also provide an opportunity for Indian inventors to get accelerated examination of their patent applications in Japan.

❖ The Delhi High Court, by its order dated October 23, 2019 in the matter **Swami Ramdev v. Facebook Inc.**¹⁰, has ruled that Indian Courts are permitted to issue global injunctions (i.e. global takedown orders) in relation to defamatory content being uploaded from India on platforms such as Facebook, Google, Twitter etc. (**'Platforms'**). The plaintiffs filed the suit contending that the defendant Platforms were allegedly responsible for displaying defamatory content in relation to the plaintiff (i.e. Swami Ramdev). The defamatory content consisted of videos and comments based on a (now banned) book titled 'Godman to Tycoon – The Untold Story of Baba Ramdev'.

The Delhi High Court held: (i) Under Section 75 of the Information Technology Act (**'IT Act'**), the Courts were permitted to exercise extra-territorial jurisdiction and therefore, empowered to issue a global injunction against the Platforms; (ii) Geo-blocking would only amount to partial removal of data, and a global injunction would be more appropriate; (iii) The term 'computer resource' is defined 'as a computer, computer system or a computer network' and not merely restricted to a single computer; rather it encompasses within itself a computer network and such computer network could be a global computer network. Accordingly, as long as the uploading of the information / content took place from India, or the information / data was located on a computer resource in India, the courts would have the jurisdiction to pass global injunctions; (iv) The Platforms were not exempt as intermediaries under Section 79 of the IT Act as they did not exercise adequate due-diligence, as defamation was not included as a ground as part of their policies, which was required under Rule 3 of the Intermediaries Guidelines; and (v) The Platforms were directed to take down content which was uploaded from IP addresses within India, and as far as the URLs were uploaded from outside India, they were directed to block access and disable them from being viewed in the Indian domain.

Facebook has appealed against this order of the Delhi High Court¹¹ to a Division Bench of the Delhi High Court, which has been admitted. However, no stay has been granted on the order passed by the Delhi High Court.

- ❖ New Ethics Committee to Review Biomedical and Health Research in India

❖ On March 19, 2019, the Ministry of Health & Family Welfare (**'MoHFW'**), pursuant to Sections 12 and 33 of the Drugs and Cosmetics Act, 1940 (**'DCA'**) notified the New Drugs and Clinical Trials Rules, 2019 (**'NDCTR'**). Chapter IV of the NDCTR, which deals with regulations governing 'biomedical and health research' came into force only on September 16, 2019 i.e., 180 days after publication of notification in the Official Gazette.

Before the implementation of the NDCTR, the Central Drugs Standard Control Organization (**'CDSCO'**) regulated the research and clinical trials relating to 'new drugs' and required such clinical trials to be monitored/reviewed by an independent Ethics Committee (**'EC'**) registered with the CDSCO. However, there was no law in India regulating non-drug related research. Any non-drug research on human subjects was only required to be in compliance with The National Ethical Guidelines for Biomedical and Health Research (**'NEGBHR'**).

The NDCTR now provides for establishment of a new EC, specifically for 'biomedical and health related research' which has to be constituted as per the NEGBHR. Rule 15 of the NDCTR also requires any institution or organizations which conducts 'biomedical and health research'¹² to have an EC review and oversee the conduct of such research. Given the broad definition of the term 'biomedical and health research', all individuals, organizations, companies and institutions, conducting either academic or commercial research, provided such research falls within the scope of the definition, will likely be impacted and will have to get a duly registered EC to oversee conduct of such research and may have to submit research results to such an EC. The regulations in relation to 'biomedical and health research' have been promulgated by the MoHFW with to improve the quality of health related research in the country and safeguard rights of human participants in such research studies.

¹⁰ *Swami Ramdev v. Facebook Inc.*, 263 (2019) DLT 689.

¹¹ FAO (OS) 212/2019 and CM APPL. 47224/2019.

¹² Defined under Rule 2(1)(h) of the NDCTR as: "research including studies on basic, applied and operational research or clinical research, designed primarily to increase scientific knowledge about diseases and conditions (physical or socio-behavioral); their detection and cause; and evolving strategies for health promotion, prevention, or amelioration of disease and rehabilitation but does not include clinical trial as defined in clause (j)".



❖ The sc in **Hindustan Construction Company Limited v. Union of India**¹³ struck down Section 87 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act'), which was recently introduced by the Arbitration and Conciliation (Amendment) Act, 2019 ('2019 Amendment'), as being manifestly arbitrary and violative of Article 14 of the Constitution of India. Section 87 stated that the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 ('2015 Amendment') would apply only to arbitral proceedings commenced on or after the commencement date of the 2015 Amendment, i.e. October 23, 2015, and to Court proceedings arising out of or in relation to such arbitral proceedings.

sc held that Section 87 was contrary to the earlier decision of the sc in **BCCI v. Kochi Cricket Private Limited**¹⁴, resulting in the provision of automatic stay on the award not being applicable to arbitral awards challenged post October 23, 2015, and was therefore contrary to public interest, arbitrary and unconstitutional as it revives a regime that caused delay in the disposal of arbitral proceedings. The sc held that the 'retrospective resurrection' of an automatic stay not only turns the clock backwards but is contrary to the object of the Arbitration Act and the 2015 Amendment, and also results in payments already made under the amended Section 36 to award-holders in a situation of no-stay or conditional-stay now being reversed. Consequently, the sc's ruling in **BCCI v. Kochi Cricket Private Limited** will continue to hold force including in so far as an arbitral award challenged under Section 34 of the Arbitration Act would not be subject to an automatic stay. A separate application for such a stay shall be required and the Court may grant a conditional stay.

Further, the sc rejected the challenge to the IBC and *inter alia*, held that the term 'corporate person' in Section 3(7) of the IBC cannot include a statutory body like National Highway Authority of India.

❖ Under Section 34(3) of the Arbitration and Conciliation Act, 1996, an award has to be challenged within three months from the date of the award, with a 30-day grace period where the Court may condone the delay, but not thereafter. In **Oriental Insurance Co. Ltd. v. M/s Tejparas Associates & Exports Pvt. Ltd.**¹⁵, the appellant had filed a petition against an arbitral award before a court not having jurisdiction. sc held that the time spent before a wrong forum can be excluded when the application is re-presented before the court having jurisdiction, only if the proceeding was *bona fide* in the court without jurisdiction.

❖ sc in **Mitra Guha Builders (India) Company v. Oil and Natural Gas Corporation Limited**¹⁶ upheld the decision of the Division Bench of the Delhi High Court, that an arbitrator ought not to have dealt with and passed an award on an issue which forms an 'excepted matter' and is excluded from the scope of the arbitration. The parties had consciously provided that the decision of the 'Superintending Engineer' shall be final with respect to an issue. Therefore, an arbitrator could not call into question the correctness of such decision and a remedy in such an 'excepted matter', if any, would be available only in the ordinary course of law.

❖ A three-judge bench of the sc in **BGS SGS SOMA JV. v. NHPC Ltd.**¹⁷ held that the selection of a seat for an arbitration proceeding is tantamount to conferring exclusive jurisdiction to the courts of the place at which such seat is located.

sc overruled the judgment passed by its three-judge-bench in **Union of India v. Hardy Exploration and Production (India) Inc.**¹⁸ to the extent that it failed to apply the tests for determination of the seat of arbitration, which had been upheld by its five-judge-bench in **Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service, Inc.**¹⁹. The test provides that in the absence of an express provision for an alternative place as the seat of arbitration proceedings and a supranational body of rules governing the arbitration, the stated venue of the arbitration would be the juridical seat of the arbitration proceeding. The sc elaborated that this intent can also be additionally inferred from the language of the arbitration agreement.

❖ sc Strikes Down Section 87 of the Arbitration and Conciliation Act, 1996

❖ sc rules on Exclusion of Time spent before a Court not having Jurisdiction for determining the Period for challenging an Arbitral Award

❖ sc holds that Matters Specifically 'Excepted' by Parties to Contract are not Arbitrable

❖ Venue of Arbitration would be Deemed to be its Seat if not Expressly Designated

13 2019 SCC OnLine SC 1520

14 (2018) 6 SCC 287

15 (2019) 9 SCC 435

16 Civil Appeal No. 5511-12 of 2012

17 Civil Appeal No. 9307 of 2019 arising out of SLP (Civil) No. 25618 of 2018

18 (2018) 7 SCC 374.

19 (2012) 9 SCC 552



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