Inter alia…

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

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Corporate & SCRA

❖ Exemptions to Companies Established in International Finance Service Centers

❖ Public unlisted companies and private companies, which have been licensed to operate by the Reserve Bank of India ('**RBI**'), Securities and Exchange Board of India ('**SEBI**'), or the Insurance Regulatory and Development Authority of India ('**IRDAI**') from an International Financial Services Centre ('**IFSC**') located in an approved multi services Special Economic Zone ('**Specified IFSC Companies**'), have been exempted from the applicability of certain provisions of the Companies Act, 2013 ('**CA 2013**'). Pursuant to the notifications dated January 4, 2017, the MCA has granted certain general exemptions to the Specified IFSC Companies from compliance with the following provisions of CA 2013:

i. prohibition under Section 42(3) on making fresh offer for private placement of securities during pendency of allotment under an earlier;
ii. restriction under Section 54(1)(c) on issuing sweat equity shares within a period of one year from the commencement of business;
iii. requirement under Section 118(10) requiring all companies to observe secretarial standards with respect to general and board meetings;
iv. compliance with corporate social responsibility under Section 135 to not apply for a period of five years from the commencement of business;
v. restriction under Section 139(2) on the ability of a company to appoint / re-appoint statutory auditors for more than the prescribed period;
vi. director residency requirement under Section 149(3) of having at least one director who has stayed in India for a total period of not less than 182 days, to not apply for the first financial year from the date of its incorporation;
vii. prohibition on making investments through more than two layers of investment companies under Section 186(1); and
viii. directors of Specified IFSC Companies will be entitled to exercise powers either by means of resolutions passed at board meetings or through circular resolutions, including for those matters prescribed under Section 179(3).

In addition to the general exemptions, specific exemptions from applicability of the following provisions of CA 2013 have been granted to public unlisted companies located in IFSC:

i. restriction under Section 47 on the voting rights of preference shareholders, provided that the charter documents provide for it;
ii. restrictions under Section 73(2)(a) to (e) on raising public deposits from members, provided that the deposits accepted do not exceed 100% of the aggregate of the paid-up share capital and free reserves and the details of monies so accepted has been filed with the Registrar of Companies in the manner prescribed;
iii. requirement under Section 149(1) to have a woman director;
iv. requirement under Section 152(6) providing for retirement of directors of public companies by rotation;
v. requirement to appoint the audit committee, nomination and remuneration committee or stakeholders' relationship committee under Sections 177 and 178;
vi. consent of board of directors as stipulated under Section 188(1) for related party transactions;
vii. requirement under Section 196(4) to appoint a whole-time director, managing director or manager; and
viii. restriction under Section 197 on the remuneration payable to managerial personnel.

Foreign Exchange

❖ No Overseas Direct Investment in Countries Identified as Non-Cooperative Countries and Territories

❖ RBI has, by way of a notification dated January 2, 2017, amended the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 to restrict an Indian Party from making an investment in an entity set up or acquired abroad either directly or indirectly, in countries identified by the Financial Action Task Force as "non co-operative countries and territories" (or as notified by the RBI from time to time).

❖ Amendments to FEMA 20

❖ RBI has, by way of a series of notifications, amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 ('**FEMA 20**'). The key amendments pursuant to these notifications have been summarized below.

i. **Issuance of Convertible Notes by Startups:** RBI notification dated January 10, 2017 ('**January Notification**') provides for the issuance of convertible notes by

Indian startup companies[1] ('**startups**'). A 'convertible note' has been defined to mean "*an instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument*".

The newly introduced Regulation 6D of FEMA 20 sets out relevant provisions, which provide that:

(a) A person resident outside India (other than an individual who is a citizen of, or an entity registered / incorporated in, Pakistan or Bangladesh), may purchase convertible notes issued by startups for an amount of ₹2,500,000 (approximately US$ 39,000) or more in a single tranche;
(b) Startups engaged in a sector where foreign investment requires Government approval may issue convertible notes to a non-resident only with Government approval;
(c) Issue of shares against convertible notes will be as per Schedule 1 of FEMA 20;
(d) Startups issuing convertible notes to a non-resident must receive the consideration by inward remittance through banking channels or by debit to the NRE / FCNR (B) / escrow account maintained as per the Foreign Exchange Management (Deposit) Regulations, 2016 and closed upon the earlier of the requirements having been completed or within a period of six months;
(e) Non-resident Indians may acquire convertible notes on non-repatriation basis as per Schedule 4 of FEMA 20;
(f) A person resident outside India may acquire or transfer, by way of sale, convertible notes, from or to, a person resident in or outside India, provided the transfer takes place in accordance with the pricing guidelines as prescribed by RBI; and
(g) Startup issuing convertible notes are required to furnish reports as prescribed by RBI.

ii. **Foreign Investment in Infrastructure Companies:** The January Notification also amends conditions relating to foreign direct investment ('**FDI**') under Schedule 1 of FEMA 20 in commodity exchanges, which have been combined with those relating to infrastructure companies in the securities market (namely stock exchanges, commodity derivative exchanges, depositories and clearing corporations). The key revisions introduced by the January Notification are:

(a) FDI, including by foreign portfolio investors ('**FPI**'), in commodity exchanges will now be subject to guidelines prescribed by RBI in addition to those issued by the Central Government ('**GoI**') and SEBI;
(b) FDI in other infrastructure companies in securities market will now be subject to guidelines by GoI and RBI, in addition to those issued by SEBI;
(c) the earlier condition permitting FIIS / FPIS to invest in commodity exchanges or infrastructure companies only through the secondary market has been removed; and
(d) the restriction on investment by a non-resident in commodity exchanges to a maximum of 5% of its equity shares has been removed.

The Consolidated Foreign Direct Investment Policy dated June 7, 2016 ('**FDI Policy**') has also been amended, by way Press Note 1 of 2017 dated February 20, 2017, to align it with the January Notification.

iii. **FDI in LLPS**: Pursuant to notification dated March 3, 2017, RBI has amended Regulation 5(9) and Schedule 9 of FEMA 20 to further liberalize FDI in Limited Liability Partnerships ('**LLPS**'). Companies having FDI can now be converted into LLPS under the automatic route provided that the concerned company is engaged in a sector where: (a) 100% FDI is permitted under the automatic route; and (b) no FDI linked performance conditions exist. Previously, conversion of companies with foreign investment was only permitted under the approval route. The erstwhile 'Other Conditions' stipulated under Schedule 9 of FEMA 20 have been completely omitted resulting in the following key changes:

(a) Previously, the designated partner of a LLP having FDI had to satisfy the condition of being "a person resident in India". Also, a body corporate other than a company registered in India under CA 2013 was not permitted to be a designated partner of a LLP with FDI. These conditions have been removed. Conse-

1 Being a private company incorporated under CA 2013 and recognized as such as per Notification G.S.R. 180(E) dated February 17, 2016 issued by the Department of Industrial Policy and Promotion.

quently, a LLP having FDI will have to comply only with the provisions of the LLP Act, 2008 for appointment of designated partners;

(b) Earlier, designated partners were responsible for compliance with FDI conditions for LLPs and liable for all penalties imposed on a LLP for any contraventions. This condition has now been deleted from Schedule 9 but no corresponding provision has been included in the revised Schedule 9; and

(c) Express prohibition on LLPs availing External Commercial Borrowings ('**ECB**') has been removed. However, the extant ECB guidelines have not yet been amended to permit LLPs to avail ECBs. Therefore, LLPs will not be able to avail ECBs until the extant ECB guidelines are amended.

iv. **FDI in E-commerce:** The Department of Industrial Policy and Promotion had, by way of Press Note 3 of 2016 dated March 29, 2016 ('**Press Note 3**'), prescribed that no FDI is permitted in an inventory based model of e-commerce and 100% FDI under the automatic route is permitted in the marketplace model of e-commerce subject to compliance with the guidelines prescribed thereunder. A summary of the key changes introduced through Press Note 3 have been captured in the April 2016 edition of *Inter Alia*. RBI has, by way of a notification dated March 9, 2017, amended FEMA 20 in line with the changes introduced through Press Note 3. However, RBI has introduced a minor change to Press Note 3 by clarifying that the threshold of 25% of sales emanating from one vendor or their group companies will be computed based on the sale value during the relevant financial year.

Capital Markets

❖ Amendment to SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009

❖ The key amendments notified by SEBI to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('**ICDR Regulations**') on February 15, 2017 are:

i. Regulation 70 of the ICDR Regulations specifies certain instances when the provisions of the chapter relating to preferential issue do not apply. One such instance is when the preferential issue is pursuant to a scheme approved by a High Court under Sections 391 to 394 of the Companies Act, 1956 or the National Company Law Tribunal ('**NCLT**') under Sections 230 to 234 of CA 2013. The amendment clarifies that the pricing provisions for the preferential issue will apply to issuance of shares under such schemes in case the allotment of shares under such scheme is only to a select group of shareholders or to shareholders of unlisted companies.

ii. The amendment also empowers stock exchange(s) to take action against listed entities or any other person thereof contravening the provisions of the ICDR Regulations, in addition to applicable liabilities under securities laws, by way of imposition of fines, suspension of trading, freezing of promoter / promoter group holding of designated securities in coordination with depositories and/or any other action as may be specified by SEBI. Further, any failure to pay such fines within the specified time period may result in the stock exchange(s) initiating other actions in accordance with law, after giving a written notice.

❖ Amendment to the SEBI (Portfolio Managers) Regulations, 1993

❖ SEBI, by way of a notification dated January 2, 2017, has amended the SEBI (Portfolio Managers) Regulations, 1993 ('**PM Regulations**') to provide an enabling framework for registration of fund managers desirous of providing services to overseas funds. A new chapter on 'Eligible Fund Managers' has been introduced, which *inter alia* sets out the registration procedure and obligations and responsibilities of eligible fund managers. Pursuant to the amendment, SEBI has permitted existing portfolio managers as well as new applicants compliant with the requirements specified under Section 9A(4) of the Income Tax Act, 1961 ('**ITA**') to act as 'Eligible Fund Managers'. Eligible Fund Managers are exempt from certain provisions of the PM Regulations.

❖ Amendment to the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014

❖ SEBI, by way of a notification dated February 27, 2017 has amended the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014. Some key amendments are:

i. In case of delay, the applicant has to file an application for condonation of delay and the settlement fees payable by the applicant will be increased by levying simple interest at the rate of 6% p.a.;

ii. An application for default, which has been previously rejected by SEBI or withdrawn by the applicant, may be refiled and considered in exceptional circumstances (such as lapse of time since the default, weight of evidence against the applicant) and the payment of the additional fees and/or interest as recommended by the High Powered Advisory Committee;

iii. The settlement amount must be paid within 15 calendar days from the receipt of the notice of demand and such period may be extended by the panel of whole time members by an additional 15 calendar days, but no later than 90 calendar days from the date of the receipt of the demand notice. If the amount is remitted between the 30th and 90th calendar day, interest at 6% p.a. will be levied from the date of the notice till the payment of the settlement amount. Upon failure by the applicant to remit the settlement amount within such period and/or abide by the relevant undertaking and waivers, SEBI may reject the application;
iv. Except in cases specifically excluded from settlement, a settlement notice indicating the substance of charges and the probable actions may be issued in advance of the notice to show cause so as to afford an opportunity to file a settlement application within 15 calendar days from the receipt of such settlement notice. However, SEBI will have the power to modify the enforcement action to be brought against the notice and the notice will not confer any right to seek settlement or avoid any enforcement action; and
v. Applications filed voluntary or suo moto will get the benefit of a proceeding conversion factor of 0.65 as opposed to the existing 0.75.

❖ SEBI (Listing Obligations and Disclosure Requirements) Amendment Regulations, 2017

❖ SEBI, by way of a notification dated February 15, 2017, has amended the SEBI (Listing Obligations and Disclosure Requirements Regulations, 2015 ('**LODR**'). Regulation 37 of the LODR stipulates that a listed company desirous of undertaking a scheme of arrangement or involved in such scheme is required to file the draft scheme with the relevant stock exchanges and obtain a no-objection / no-observation letter from the stock exchange prior to filing such scheme under the provisions of the Companies Act, 1956 or CA 2013. Pursuant to the amendment, SEBI has provided that these provisions of Regulation 37 will not be applicable in case of a scheme, which provides solely for the merger of a wholly owned subsidiary with its holding company, provided that the draft scheme is filed with the stock exchanges for the purpose of disclosure.

❖ SEBI Permits FPIs to Invest in Unlisted Debt Securities and Securitized Debt Instruments

❖ SEBI has, by way of a notification dated February 27, 2017, amended the provisions of the SEBI (Foreign Portfolio Investors) Regulations, 2014 to permit registered FPIs to invest in (i) unlisted non-convertible debentures ('**NCDs**')/bonds issued by an Indian company subject to the guidelines issued by the Ministry of Corporate Affairs and (ii) securitized debt instruments, including certificates/instruments issued by special purpose vehicles set up for securitization of assets with banks, financial institutions or non-banking financial companies ('**NBFCs**') as originators, and certain listed securitized debt instruments. Additionally, SEBI has specified by its circular dated February 28, 2017, that investment by FPIs in unlisted corporate debt securities in the form of NCDs/bonds will be subject to minimum residual maturity of three years along with an end use-restriction on investments in 'real estate business', capital market and purchase of land. SEBI has also clarified that investment by FPIs in securitized debt instruments will not be subject to the minimum three-year residual maturity requirement. SEBI has also specified that investments in unlisted corporate debt securities and securitized debt instruments will be permitted up to an aggregate of ₹35,000 crores (approximately US$ 5.4 billion) within the existing investment limits prescribed for corporate debt from time to time (presently, ₹244,323 crores (approximately US$ 38 billion)).

RBI had earlier, by way of a notification dated October 24, 2016, introduced corresponding amendments to FEMA 20 and prescribed similar conditions for such investments by an FPI by way of a circular dated November 17, 2016. A summary of these RBI notifications has been captured in our April 2017 edition of *Inter Alia*.

Further, SEBI has also amended the definition of 'offshore derivative instrument' to permit FPIs to issue instruments with the underlying being unlisted debt securities or securitized debt instruments held by such FPI.

❖ SEBI Revises Regulatory Framework on Schemes of Arrangement

❖ SEBI has issued a circular dated March 10, 2017, as amended by circular dated March 23, 2017, ('**Scheme Circulars**') which replaces the circular dated November 30, 2015 issued by SEBI in relation to the regulatory framework on schemes of arrangement, amalgamation and capital reduction involving listed companies ('**2015 Circular**'). Some of the key changes brought about by the Scheme Circulars are:

i. The Scheme Circulars will now not apply to schemes that solely provide for merger of a wholly owned subsidiary with the parent company. However, such draft schemes will have to be filed with the stock exchanges by way of disclosures and the stock exchanges are required to publish the scheme documents on their websites.
ii. The pricing related provisions of Chapter VII of the ICDR Regulations will be followed in case of issuance of shares to a select group of shareholders or shareholders of unlisted companies pursuant to such schemes. The 'relevant date' for

the purpose of computing pricing will be the date of board meeting in which the scheme is approved.

iii. The circumstances under which the approval of majority of public shareholders of the listed entity will be required have been expanded to include the following:
   (a) where a scheme involving merger of an unlisted company results in reduction in the voting share of pre-scheme public shareholders of the listed entity in the transferee/ resulting company by more than 5% of the total capital of merged entity; and
   (b) where the scheme involves transfer of whole or substantially the whole of the undertaking[2] of the listed entity and the consideration for such transfer is not in the form of listed equity shares.

iv. Listed entity is not required to provide the option of voting by postal ballot and is only required to provide shareholders with the option of e-voting.

v. Schemes of arrangement between listed and unlisted entities will be subject to the following conditions:
   (a) Percentage shareholding of pre-scheme public shareholders of the listed entity and of the qualified institutional buyers of the unlisted entity in the post scheme shareholding pattern of the resulting company must not be less than 25%;
   (b) Listed entity must disclose the material information pertaining to the unlisted entity(ies) involved in the scheme in the format specified for abridged prospectus as provided in Part D of Schedule VIII of the ICDR Regulations, as part of the explanatory statement sent to the shareholders while seeking approval of the scheme. Such disclosures are required to be certified by a SEBI registered merchant banker, and are also required to be uploaded on the stock exchange(s) website(s); and
   (c) Unlisted entities are permitted to merge with a listed entity only if the listed entity is listed on a stock exchange having nationwide trading terminals;

vi. In case of schemes involving the demerger of a division of a listed entity into an unlisted entity and the subsequent listing of the unlisted entity, specific conditions for seeking relaxation of the strict enforcement with respect to listing prescribed by the Securities Contracts (Regulation) Rules, 1957 have been modified as follows:
   (a) Conditions specified for lock-in of the pre-scheme share capital of the unlisted entity seeking listing are not applicable where the post scheme shareholding pattern of the unlisted entity is exactly same as the shareholding pattern of the listed entity; and
   (b) Pre-scheme share capital of the unlisted entity seeking listing held by non-promoters shall be locked-in for a period of one year from the date of listing of the shares of the unlisted entity, instead of the three years prescribed earlier;

vii. Subsequent to filing the draft scheme with SEBI, no changes to the draft scheme are permitted except with SEBI's written consent. However, this requirement is not applicable for changes mandated by other regulators, authorities or by the NCLT; and

viii. The listed entity must pay a fee to SEBI in an amount of 0.1% of the paid-up share capital of the listed / transferee / resulting company, whichever is higher, post sanction of the scheme, subject to a cap of ₹5,00,000 (approximately US$ 7,800).

The provisions of the Scheme Circulars are not applicable to schemes already submitted to the stock exchanges, which will continue to be governed by the 2015 Circular.

Taxation

❖ Finance Act, 2017

❖ Some of the key amendments introduced to the ITA by Finance Act, 2017 are:

i. Conversion of preference shares into equity shares will not be regarded as transfer and will be exempt from capital gains tax. Further, cost of acquisition and period of holding of the preference shares will be attributable to the equity share received upon conversion;

ii. Exemption from long term capital gains arising from transfer of equity share of a company that are chargeable to Securities Transaction Tax ('STT') will be available

2 The expression has been defined under Section 180(1)(a)(i) of CA 2013 to mean 20% or more of value of the company in terms of consolidated net worth or consolidated total income during previous financial year.

only if the acquisition of such shares was also subject to STT. Further, to protect some of the genuine transactions (e.g. acquisition pursuant to IPO, FPO, bonus or rights issue by a listed company, by non-resident as per the FDI Policy etc.), the GoI will notify transfers to which the proposed condition of chargeability of STT on acquisition will not apply;

iii. If consideration for transfer of unlisted shares is less than fair market value ('**FMV**') determined as per the prescribed manner, such FMV will be deemed to be the full value of consideration for the purposes of computing capital gains;

iv. Indirect transfer provisions will not be applicable to investments held by a non-resident, directly or indirectly, in FIIs/ Category-I or Category II FPIs;

v. Domestic transfer pricing provisions will now be applicable only in cases where one of the related party to the transaction is availing tax holidays; and

vi. The scope of applicable tax on any deemed gift has been widened by extending its applicability to all 'persons' and extending the scope of properties to all 'properties', except contribution of money or assets by an individual to a trust created solely for benefit of relative of the contributor.

❖ Lok Sabha, on March 29, 2017, passed four GST bills, (i) the Central Goods and Services Tax Bill, 2017; (ii) the Integrated Goods and Services Tax Bill, 2017; (iii) the Union Territory Goods and Services Tax Bill, 2017; and (iv) the Goods and Services Tax (Compensation to States) Bill, 2017. The bills will be placed in the Rajya Sabha for consideration. The State Goods and Service Tax Bill will also be presented in the respective State legislative assemblies. GoI, on April 1, 2017, also released eight GST Rules (Composition Rules, Valuation Rules, Transition Rules, ITC Rules, Revised Invoice Rules, Revised Payment Rules, Revised Refund Rules, Revised Registration Rules and Revised Return Rules) for inviting comments from the stakeholders.

❖ GST Bills Passed in the Lok Sabha

Insurance

❖ IRDAI had previously issued certain clarifications in respect of the IRDAI (Payment of Commission or Remuneration or Reward to Insurance Agents and Insurance Intermediaries) Regulations, 2016 ('**Reward Regulations**'). A plain reading of Regulation 5(f) of the Reward Regulations appeared to suggest that insurers are restricted from paying commission or remuneration that is higher than the lowest of commission levels prescribed / approved under the following: (a) the Reward Regulations; or (b) the IRDAI (Linked Insurance Products) Regulations, 2013; or (c) the IRDAI (Non Linked Insurance Products) Regulations, 2013; or (d) the Guidelines on Product Filing Procedures for General Insurance Products, as applicable to general insurers. IRDAI has now clarified that the maximum rate of commission or remuneration payable by an insurer must not exceed the lower of either: (i) the maximum specified in the Reward Regulations, or (ii) any other rate of commission or remuneration approved by IRDAI under any other regulations or guidelines.

❖ IRDAI Issues Clarifications on Remuneration Regulations Pertaining to Insurance Agents / Intermediaries

Media & Telecommunications

❖ The Telecom Regulatory Authority of India ('**TRAI**') has on March 3, 2017, issued two sets of regulations governing, *inter alia*, the pricing of television channels by broadcasters and distributors, namely the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 ('**Tariff Order**') and the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 ('**Interconnection Regulations**'), which repeal certain related regulations applicable to pricing and addressable systems.

The Tariff Order and the Interconnection Regulations specify the framework for tariffs to be charged by broadcasters and distributors and also govern the arrangements between various service providers engaged in broadcasting services, and *inter alia*:

(i) provide that broadcasters are required to declare a monthly maximum retail price for *a-la-carte* channels; (ii) prescribe the amounts distributors may charge for channels as the capacity fee per network; (iii) manner in which charges may be levied by broadcasters and distributors for channel bouquets; and (iv) manner in which discounts and carriage fees may be applied by broadcasters and distributors.

Star India and Vijay Television have filed a writ petition in the Madras High Court ('**Ma-**

❖ TRAI Tariff Order and Interconnection Regulations for Broadcasting and Cable Services dras HC') challenging TRAI's authority to regulate pricing of content on television channels. During the pendency of these proceedings, the Supreme Court ('SC') has granted TRAI leave to notify regulations (including the Tariff Order and Interconnection Regulations), while observing that the new cause of action arising from the notification of the regulations may be taken up with the Madras HC.

❖ TRAI Regulations on Standard of Quality of Service and Consumer Protection for Broadcasting and Cable Services

❖ TRAI has issued the Telecommunication (Broadcasting and Cable) Standards of Quality of Services and Consumer Protection (Addressable Systems) Regulations, 2017 ('**QoS Regulations**') on March 3, 2017, which repeals the Direct to Home Broadcasting Services (Standards of Quality and Redressal of Grievances) Regulations 2007, the Standards of Quality of Service (Digital Addressable Cable TV Systems) Regulations, 2012 and the Consumer Complaint Redressal (Digital Addressable Cable TV Systems) Regulations, 2012. The objective of the QoS Regulations is to provide a common framework for quality of service standards across different platforms by *inter alia* prescribing requirements in connection with mandatory offering of *a-la-carte* channels and bouquets, maintenance of distributor websites and connection suspension rights for customers.

❖ Revised Guidelines for Registration of Infrastructure Provider – I

❖ On January 13, 2017, the Department of Telecom ('**DoT**') issued revised guidelines for registration of Infrastructure Provider – I[3] ('**IP-I**') to incorporate the relevant provisions of the FDI Policy. 100% FDI is permitted in an IP-I, with 49% FDI permitted under the automatic route. The guidelines clarify that both direct and indirect foreign investment in the IP-I entity will be taken into account for computing FDI.

❖ Consultation Paper on Net Neutrality

❖ In furtherance of a pre-consultation paper, TRAI has released a 'Consultation Paper on Net Neutrality' on January 4, 2017 to address issues such as what will be the core principles of net neutrality in the Indian context, permissible exceptions to net neutrality considering the business practices proposed by certain telecom service providers ('**TSPs**'), the policy and regulatory approach to deal with issues relating to net neutrality, necessary precautions for maintaining customer privacy and preserving national security, *etc*.

❖ Recommendations on Spectrum Usage Charges and Presumptive Adjusted Gross Revenue

❖ On March 7, 2017, TRAI had issued recommendations on Spectrum Usage Charges ('**SUC**') as a percentage of adjusted gross revenue based on the amount of spectrum held by internet service providers ('**ISPs**') and commercial very small aperture terminal operators. TRAI has recommended to DoT that the existing regime be continued with respect to the spectrum assignment on administrative basis to ISP licensees in the specified bands, and the existing formula for charging SUC and payment of such charges on an annual basis by ISP licensees.

Further, TRAI has recommended to DoT that arrangements be made to accept online payment of financial levies /dues such as SUC and other fees payable by the ISP licensees for obtaining license/ approval/ clearance from DoT, set up a comprehensive and integrated on-line system as a single window clearance for issuance for approval and other permissions to the ISP licensees.

❖ Extension of Time for Obtaining the Telecom Testing and Security Certification

❖ By way of a notification dated April 6, 2017, DoT has extended the time for obtaining the Telecom Testing and Security Certification ('**TTSC**') from an agency / lab within India to April 1, 2018. The requirement in respect of telecom licenses for International Long Distance and National Long Distance is for TSPs to obtain the TTSC in respect of network elements before the induction of such elements into their respective telecom networks. TSPs are required to obtain such TTSC from authorised and certified agencies / laboratories within India.

Information Technology

❖ Right to be Forgotten

❖ The High Court of Karnataka ('**Karnataka HC**') passed an Order, on January 23, 2017 in the case of **Vasunathan *v.* The Registrar General, High Court of Karnataka and Ors.**[4], regarding the rule of 'Right to be forgotten'. In the instant matter, a writ petition was filed before the Karnataka HC seeking masking of the name of the petitioner's daughter from all court records (including the cause title), which contained details of a previous marriage of the petitioner's daughter that had been annulled, as well as court records of orders that had been passed in criminal proceedings filed by his daughter's former husband. The masking was sought to protect her reputation in society and her relationship with her current husband.

The Court held that the Registry will endeavour to ensure that the petitioner's daughter's name was not reflected in any internet search in the public domain including any search within the order or in the body of the order apart from the cause title. This would be in line with the

3 Infrastructure providers who provide dark fiber, right of way, duct space and towers.
4 Writ Petition 62038 of 2016 (GM-RES), order dated January 23, 2017

trend in many foreign jurisdictions where the principle of 'Right to be forgotten' is followed in sensitive cases involving women in general, and cases involving rape or affecting the modesty and reputation of the person concerned. The Court further held that where the website of the Karnataka HC is concerned, no steps need to be taken to anonymize the petitioner's daughter's name and accordingly, any certified true copy of the relevant order of the Karnataka HC will reflect the name of the petitioner's daughter.

Employment

❖ Maternity Benefits (Amendment) Act, 2017

❖ By way of a notification dated March 31, 2017 and a corrigendum dated April 3, 2017 issued by the Ministry of Labour and Employment ('**Ministry**'), the provisions of the Maternity Benefit (Amendment) Act, 2017 ('**Maternity Amendment Act**'), except Section 4(1) relating to provision of crèche facilities, were brought into force on April 1, 2017. The Maternity Amendment Act increases paid maternity leave from 12 weeks to 26 weeks, provided that women having two or more surviving children will be entitled to 12 weeks' maternity leave. The Maternity Amendment Act also provides for paid leave of 12 weeks for commissioning mothers (in case of surrogacy) and adopting mothers who legally adopt a child below the age of three months. The Maternity Amendment Act also envisages a 'work from home' option for women after the period of maternity leave depending on the nature of work and on certain mutually agreed terms and conditions between the employer and the woman.

The provisions pertaining to crèche facilities under Section 4(1) will be brought into force on July 1, 2017. The Maternity Amendment Act mandates employers employing 50 or more employees in an establishment to provide crèche facilities where women are allowed to visit four times in a day.

❖ Ease of Compliance to Maintain Registers under Various Labour Laws Rules, 2017

❖ The Ministry has notified the 'Ease of Compliance to Maintain Registers under various Labour Laws Rules, 2017' ('**Rules**') by a notification dated February 21, 2017 to facilitate ease of compliance and maintenance of combined registers electronically or otherwise, as required, under certain specified labour laws. The Rules provide for combined registers to be maintained under: (a) Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Central Rules, 1998; (b) Contract Labour (Regulation and Abolition) Central Rules, 1971; (c) Equal Remuneration Rules, 1976; (d) Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Central Rules, 1980; (e) Mines Rules, 1955; (f) Minimum Wages (Central) Rules, 1950; (g) Payment of Wages (Air Transport Services) Rules, 1968, (h) Payment of Wages (Mines) Rules, 1956, (i) Payment of Wages (Railway) Rules, 1938 (j) Sales Promotion Employees (Conditions of Service) Rules, 1976; and (k) Working Journalists (Conditions of Service) and Miscellaneous Provisions Rules, 1957. Where registers are being maintained in an electronic form, the layout and presentation of the registers may be adjusted without changing the integrity, serial number and contents of the columns in the register.

Intellectual Property

❖ Trade Marks Rules, 2017

❖ Some of the key changes introduced by the Trademark Rules, 2017 ('**TM Rules 2017**'), which have come into force on March 6, 2017 and replace the erstwhile Trademark Rules, 2002 ('**TM Rules 2002**'), are as follows:

i. For the first time, a mechanism has been introduced enabling brand owners to file an application with the Registrar for determination of a trademark as 'well-known';
ii. TM Rules 2017 specifically provide for the registration of a sound mark;
iii. Definition of 'opposition' has been amended to include opposition not only in relation to a pending trademark application, but also opposition to alteration of a registered trademark and opposition to the grant of protection to an international registration designating India;
iv. Where use of a trademark is claimed prior to the date of application, the applicant is required to file an affidavit testifying such use along with supporting documents;
v. Official fees for trademark registration have been increased substantially; however, concessions have been provided to small enterprises, startups and individuals, and to e-filings;

vi. Expedited processing of a trademark application has been provided for, including examination and other proceedings such as processing responses to the examination report, show cause/hearings, publications, and oppositions;
vii. Video conferencing is provided for, to enable hearings and email has been permitted as a means for service of documents ;
viii. The number of adjournments that a party can ask for has been limited to a maximum of two and the adjournment period has also been limited to a maximum of 30 days; and
ix. New provisions have been included for trademark registration through the Madrid Protocol in relation to the Madrid Agreement Concerning the International Registration of Marks.

❖ Medical Devices Rules, 2017

❖ Some of the salient features of the Medical Devices Rules, 2017 ('**MD Rules**') notified by the Ministry of Health and Family Welfare ('**MHFW**') on January 31, 2017, which will come into force from January 1, 2018, are set out below:

i. **Definition of Medical Device:** The term 'medical device' has been defined to mean: "*(a) substances used for in vitro diagnosis and surgical dressings, surgical bandages, surgical staples, surgical sutures, ligatures, blood and blood component collection bag with or without anticoagulant covered under sub-clause (i) of clause (b) of Section 3 of the Drugs and Cosmetics Act, 1940 ('DCA'); (b) substances including mechanical contraceptives (condoms, intrauterine devices, tubal rings), disinfectants and insecticides notified under sub-clause (ii) of clause (b) of Section 3 of the DCA; and (c) devices notified from time to time by the Central Government under sub-clause (iv) of clause (b) of Section 3 of the DCA*";
ii. **Classification of medical devices:** The MD Rules provide for a risk based classification: (a) low risk as Class A; (b) low moderate risk as Class B; (c) moderate high risk as Class C; and (d) high risk as Class D;
iii. **Conformance to the Bureau of Indian Standards or MHFW standards:** Where no relevant standards have been laid down, such device should conform to the standards laid down by the International Organisation for Standardisation or the International Electro Technical Commission, or as per any other pharmacopoeial standards. In the absence of the above standards, the device should conform to the validated manufacturer's standards;
iv. **Licensing Mechanism:** Licenses for manufacture for sale or for distribution of devices falling under Classes A and B will be granted by the State Licensing Authority, whereas, those falling under Classes C and D and import licenses all classes of medical devices will be granted by the Central Licensing Authority;
v. **Term of Licenses:** Any new licenses obtained under the MD Rules, whether for manufacture or import, will be valid in perpetuity, unless cancelled or surrendered and provided requisite license retention fees are paid; and
vi. **Shelf Life:** This will be determined keeping in view the technical parameters and will ordinarily not exceed 60 months from date of manufacture. The MD Rules also contain restrictions on the import of certain medical devices depending on their respective shelf life claim and the percentage of residual shelf-life as on the date of import.

❖ Coronary Stents Brought under Price Control

❖ On February 13, 2017, the National Pharmaceuticals Pricing Authority ('**NPPA**'), Ministry of Chemicals and Fertilizers ('**MoCF**') published an order fixing the ceiling prices of coronary stents, by way of a Gazette Notification., pursuant to which the price of bare metal stents has been capped at ₹7,260 (approximately US$ 110) per unit and the price of drug eluting stents ('**DES**') (including metallic DES and Bioresorbable Vascular Scaffold / Biodegradable stents) has been capped at ₹29,600 (approximately US$ 450) per unit, exclusive of value added tax. This has primarily been done by the NPPA as it found that huge and unethical mark-ups were being charged throughout the supply chain of coronary stents resulting in irrational, exorbitant and unaffordable prices of coronary stents in India. Earlier, by way of a notification dated July 19, 2016, the Ministry of Health & Family Welfare had added 'coronary stents' to the National List of Essential Medicines, 2015 and subsequently the MoCF, by notification dated December 21, 2016, had amended Schedule I of the Drug Price Control Order, 2013 ('**DPCO 2013**') such that 'coronary stents' were classified as 'scheduled formulations' under the provisions of the DPCO, 2013.

By an Office Memorandum dated February 20, 2017, the NPPA, MoCF has also fixed a trade margin of 8% on coronary stents, which will apply across the trade channels *viz.* from manufacturer/importer to the end consumer and will include hospital handling fees. The NPPA has also clarified that the 8% trade margin has been built into the ceiling price of coronary stents.

❖ Issue on Appointment of ex-Government Employees as Arbitrators in Disputes Arising out of a Contract with the Government

❖ By its judgment passed on February 10, 2017, SC has held in **Voestalpine Schienen GmbH *v.* Delhi Metro Rail Corporation Ltd.**,[5] that ex-Government employees could be appointed as arbitrators, under the amended Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'), in disputes arising out of a Government contract, and that such appointment does not run foul of the conflict of interest guidelines listed in the Seventh Schedule of the Arbitration Act.

Facts of the case

Under the contract awarded to Voestalpine Schienen GmbH ('**Voestalpine**'), Voestalpine was required to nominate an arbitrator from a panel of arbitrators selected by Delhi Metro Rail Corporation Ltd. ('**DMRC**'). After disputes arose, DMRC furnished the names of five arbitrators, who were retired engineers of various Government departments or public sector undertakings ('**PSUs**'), including the Indian Railways. Voestalpine challenged the selection of the panel of arbitrators on the basis that the DMRC nomination was disqualified by Section 12 of the Arbitration Act, read with Entry 1 of the Seventh Schedule of the Arbitration Act, which prohibits a person from acting as an arbitrator if he is/has been an employee, consultant or advisor with one of the parties to the arbitration.

Decision of the SC

SC held that the selection of retired engineers of Government departments or PSUs did not violate Section 12(5) of the Arbitration Act simply because the person (sought to be appointed as an arbitrator) is a retired officer of a Government or other statutory corporation or PSUs. If such person had no connection with the DMRC, then that person would not be treated as ineligible under Section 12(5) of the Arbitration Act. The judgment effectively rejects the proposition that all Government entities and PSUs are to be seen as one composite entity for purposes of conflict of interest in choice of arbitrators. Therefore, in disputes arising out of Government contracts, private parties will not be entitled to object to the process of nomination of arbitrators by the Government entity, so long as such nominees are not/were not directly employed with the particular Government entity that is party to the relevant dispute.

❖ Claim of Damages for Breach of Contract under Section 73 of the Contract Act, 1872 by a non-resident does not violate the RBI guidelines

❖ On February 9, 2017, in the case of **Shakti Nath and Ors *v.* Alpha Tiger Cyprus Investments**[6], the Delhi High Court ('**Delhi HC**'), while deciding a challenge to an arbitral award involving enforcement of put option rights, held that awarding damages to a non-resident investor does not amount to an indirect enforcement of an optionality clause under a contract.

Facts

Two foreign entities ('**Respondents**') had entered into *inter alia* a shareholders' agreement ('**SHA**') with certain resident entities ('**Petitioners**') to invest in an Indian company in the real estate sector. The SHA provided for a 'put option right' in favour of the Respondents, entitling the Respondents, upon non-fulfilment of certain conditions by the Petitioner, to require the Petitioners to acquire the Respondents' shares at a price '*equal to the Investors' Capital plus a post tax IRR of 19% on the Investors' Capital*'. The arbitral tribunal, appointed upon occurrence of certain disputes, awarded damages to the Respondents on finding that the Petitioners had breached their obligations under the SHA.

The issue before the Delhi HC was whether awarding damages to the Respondents would amount to an enforcement of their put option right, thereby violating the guidelines set out in the RBI Circular dated July 15, 2014 ('**RBI Circular**'). The RBI Circular states that a transfer of shares between a resident and a non-resident is required to be undertaken at a price computed in accordance with internationally accepted methodology, with the underlying principle being that a non-resident investor cannot be guaranteed an assured return on its exit price.

Decision

The Delhi HC held that the Respondents had a choice between enforcement of the put option and claiming damages for breach of the SHA. Given that the Respondents chose to make a claim for damages for breach of contract under Section 73 of the Contract Act, 1872, the question of violation of the RBI Circular did not arise.

It is pertinent to note that the judgment reflects the pro-arbitration stance of Indian Courts, and indicates a liberal approach towards enforcement of awards arising out of obligations under optionality contracts.

5 2017 SCC OnLine SC 172.

6 Judgment dated February 9, 2017, in OMP (Comm) 154/2016. (Delhi High Court)

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Bloomberg's Global M&A, Legal rankings, Q1, 2017

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for India in the M&A Rankings by Deal Count and Deal Value
Mergermarket's Global and Regional M&A League Tables of Legal Advisors, Q1, 2017

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for the Indian M&A Announced League Table by Deal Completed by Value and Volume
Ranked No. 1
for the Indian M&A Announced League Table by Deal Announced by Value
Thomson Reuters' Emerging Markets M&A Legal rankings Q1, 2017

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Ranked No. 1
for PE and M&A Rankings by Deal Count and Deal Value
Venture Intelligence League Tables of Legal Advisors, Q1, 2017

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India Business Law Journal, 2016 and 2015

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Best National Corporate Law Firm | Best Overall National Law Firm of the Year
Legal Era Awards, 2016

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M&A Law Firm of the Year
Private Equity Law Firm of the Year | Overall Law Firm of the Year
Deal Makers – Global Awards, 2016

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M&A Law Firm of the Year
Arbitration Law Firm of the Year | Commercial Dispute Resolution Law Firm of the Year
Competition Law Firm of the Year
Corporate INTL, 2016

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Bloomberg's Global M&A, Legal rankings Full Year, 2016

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Thomson Reuters' Emerging Markets M&A Legal rankings Full Year, 2016

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Ranked No. 1
for the PE Announced League Table by Deal Count
Venture Intelligence, 2016