# Inter alia...

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## In This Issue



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


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*Inter alia...*

❖ National Financial Reporting Authority

## Corporate & SCRA

❖ Pursuant to the notifications dated October 1, 2018 and October 24, 2018, the National Financial Reporting Authority ('**NFRA**') has been constituted and the Ministry of Corporate Affairs ('**MCA**') has notified the provisions under the Companies Act, 2013 ('**Companies Act**') dealing with the powers and duties of the NFRA, appeals against orders of the NFRA as well as certain procedural and compliance requirements for the NFRA. NFRA's duties include making recommendations to the Central Government on accounting and auditing policies and standards for adoption by companies and their auditors, monitoring and ensuring compliance with the aforementioned accounting and auditing standards, and overseeing the quality of services of professions associated with these. NFRA has been granted the authority, *inter alia*, to investigate matters of professional or other misconduct committed by any member or firm of chartered accountants, and to pass orders (covering both imposition of fine and debarment) in such matters. An appeal against an order of the NFRA can be preferred before the Appellate Tribunal. However, the rules in relation to this are yet to be prescribed.

Subsequently, on November 13, 2018, the MCA also notified the National Financial Reporting Authority Rules, 2018 ('**NFRA Rules**') which specify that, *inter-alia*, the following classes of companies and auditors are subject to the governance and supervision by the NFRA in relation to accounting and auditing standards and compliances:

i. Indian companies listed in India or overseas;
ii. unlisted public companies with paid up capital of ₹500 crores (approx. US$72 million) or more, or annual turnover of ₹1000 crores (approx. US$140 million) or more, or having outstanding loans, debentures and deposits (in aggregate) of ₹500 crores (approx. US$72 million) or more, in each case as of March 31 in the previous financial year;
iii. insurance companies, banking companies, electricity generating and supply companies and companies governed by a special legislation;
iv. any body corporate or person who is referred to the NFRA by the Central Government in public interest; and
v. any foreign body corporate which is a subsidiary or an associate company of an Indian company or other body corporate referred to in (i) to (iv) above, provided that the income or net worth of such foreign subsidiary or associate company exceeds 20% of the consolidated income or consolidated net worth of such Indian company or other body corporate.

All existing body corporates covered under the NFRA Rules (other than companies governed by the NFRA Rules) are required to file Form NFRA-1, setting out the particulars of their respective auditors, within 30 days from the date of deployment of Form NFRA-1.

❖ Companies (Amendment) Ordinance, 2018

❖ The Companies (Amendment) Ordinance, 2018, which was promulgated on November 2, 2018, to further amend the Companies Act to give effect to the recommendations made in the Report of the Committee to Review Offences under the Companies Act, has been re-promulgated pursuant to the Companies Amendment Ordinance, 2019 ('Ordinance') dated January 12, 2019 as the earlier ordinance would have ceased to be operational from January 21, 2019. The Ordinance will remain valid for a maximum period of six weeks from the reassembly of the Parliament, unless prior to the expiration of the six week period, the Ordinance is: (i) disapproved by both Houses of Parliament; or (ii) withdrawn; or (iii) replaced (and repealed) by a law amending the Companies Act, which is passed by both Houses of Parliament and is duly approved by the President and notified. The Companies (Amendment) Bill, 2018 has also been introduced in the Lok Sabha, whose provisions are substantially the same as the Ordinance. Some of the key changes brought about by the Ordinance pertain to:

i. **Changes to regime relating to offences and penalties:**
   - 16 offences have been re-categorised as defaults carrying civil liabilities which would be subject to an in-house adjudication framework;
   - Section 454 dealing with adjudication of penalties has been amended to ensure compliance upon default and has also provided for higher penalties in the event of repeated defaults;
   - penalties for non-compliance with certain provisions have been amended such that the maximum penalty remains unchanged, while introducing a penalty for continuing non-compliance of such provision.

ii. **De-clogging the NCLT**: Earlier, the approval of the National Company Law Tribunal ('**NCLT**') was required to approve certain actions (such as a change in the financial year). The Ordinance has now empowered Regional Directors of the Registrar of Companies to ease the NCLT's caseload.

iii. **Strengthening compliance:** Certain provisions to enhance compliance have been introduced, such as re-introduction of the declaration for commencement of business post incorporation of companies and the power of the Registrar of Companies to cause a physical verification of the registered office. This is applicable to companies incorporated after November 2, 2018.

## Foreign Exchange

❖ Foreign Exchange Management (Borrowing and Lending) Regulations, 2018

❖ By way of a notification dated December 17, 2018, the Reserve Bank of India ('**RBI**') has consolidated and streamlined provisions relating to borrowing and lending in foreign currency and Indian rupees under the Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 ('**B&L Regulations**'), pursuant to which the following regulations stand superseded: (i) Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000; (ii) Foreign Exchange Management (Borrowing and Lending in Rupees) Regulations, 2000; and (iii) Regulation 21 of Foreign (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004.

The B&L Regulations consolidate provisions in relation to: (i) borrowing and lending in foreign currency by an authorised dealer or its branch outside India and persons other than authorised dealers; and (ii) borrowing and lending in Indian rupees by an authorised dealer and persons other than authorised dealers. The B&L Regulations comprise enabling provisions and refer to the framework / guidelines / directions issued by RBI in consultation with the Government of India, in relation to external commercial borrowings, external commercial lending, start-up, trade credit and foreign currency accounts. Such framework / guidelines / directions have not yet been issued by RBI but are expected to be notified soon. Any changes to the existing regime can only be assessed post such notification.

For any transactions falling within the ambit of the B&L Regulations, proposed to be closed between December 17, 2018, and up to the date of notification of the framework / guidelines / directions to be issued by RBI, one may need to check with the relevant authorised dealer bank.

## Capital Markets

❖ SEBI Circular on Disclosure of Significant Beneficial Ownership

❖ Pursuant to the Companies (Significant Beneficial Owners) Rules, 2018 ('**SBO Rules**'), the Securities and Exchange Board of India ('**SEBI**') issued a circular dated December 7, 2018 ('**SBO Circular**') modifying disclosure requirements under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**Listing Regulations**') relating to the quarterly disclosures of shareholding patterns by listed entities. The SBO Circular requires disclosure of details pertaining to significant beneficial owners in a prescribed format, including details of the significant beneficial owner, registered owner, shares in which significant beneficial interest is held and the date of creation / acquisition of significant beneficial interest. The SBO Circular is to come into force with effect from the quarter ending on March 31, 2019.

However, the MCA issued a clarification on September 10, 2018 stating that it would be issuing an amended format for making disclosures under the SBO Rules and has granted an extension for making the filing. Consequently, if the amended SBO Rules are not issued before March 31, 2019, there is likely to be uncertainty regarding the scope and applicability of the SBO Circular.

❖ SEBI (Depositories and Participants) Regulations, 2018

❖ SEBI has, on October 3, 2018, issued the SEBI (Depositories and Participants) Regulations, 2018 ('**New DP Regulations**'), replacing the SEBI (Depositories and Participants) Regulations, 1996 ('**Old DP Regulations**') introducing amendments largely related to structuring, shareholding and governance of depositories. Some of the key aspects are set out below:

i. **Structuring:** Under the New DP Regulations, a SEBI registered depository has been permitted to carry on any other activity (whether involving the deployment of funds or otherwise), after obtaining prior SEBI approval, as against the Old DP Regulations as per which depositories were only permitted to undertake other activity which were incidental to the activity of the depository. Moreover, the New DP Regulations now expressly provide that the prior approval of SEBI shall not be required in case of treasury investments, if such investments are as per the investment policy approved by the governing board of the depository. Similar to the position under the Old DP Regulations, the New DP Regulations permit the depository to carry out an activity not incidental to its activities as a depository through the establishment of strategic business unit(s) specific to each activity as may be assigned to the depository by the Central Government or by a regulator in the financial sector (through deployment of funds or otherwise).

ii. **Shareholding:** Under the New DP Regulations, the maximum prescribed shareholding in a depository, directly or indirectly, either individually or together with persons acting in concert has been retained at 5% of its paid-up equity share capital with the newly introduced exception of both Indian and foreign stock exchanges, Indian and foreign depositories, Indian and foreign banking companies, Indian and foreign insurance companies, public financial institutions, a foreign commodity derivatives exchange and a bilateral/multilateral financial institution approved by the Central Government, which may acquire or hold up to 15% of the paid-up equity share capital of such depository. An 'applicant' who proposes to establish a depository under the New DP Regulations is now locked in for a period of five years from the date of registration and can only hold up to 15% of the share capital of the depository, whereas under the Old DP Regulations, the sponsor was required to hold at least 51% of the equity share capital.

iii. **Governance:** Under the New DP Regulations, the number of public interest directors cannot be less than the number of shareholder directors on the governing board of a depository. The requirement under the Old DP Regulations for at least one public interest director to be present in the meetings of the governing board to constitute the quorum, has been replaced with the requirement of the public interest directors not being less than the number of shareholder directors to constitute the quorum. The New DP Regulations has now specifically included the managing director in the category of shareholder directors and provide for voting on a resolution of the governing board to be valid only when the number of public interest directors that have cast their vote on such resolution is equal to or more than the number of shareholder directors who have cast their vote on such resolution, with a casting vote in favour of the chairperson of the governing board. Subject to prior approval of SEBI, the chairperson will be elected by the governing board from amongst the public interest directors. Lastly, no foreign portfolio investor ('**FPI**') will have any representation on the governing board.

❖ SEBI (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018

❖ SEBI, on October 3, 2018, issued the SEBI (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018 ('**APRI Regulations**') to provide for appointment of administrators after attachment of properties of defaulters, by SEBI authorized recovery officers, who are exercising powers under the Securities Contracts (Regulation) Act, 1956 or the Depositories Act, 1956. The APRI Regulations set out eligibility norms for appointment of administrators (including that the administrator is required to be registered as an insolvency resolution professional with the Insolvency and Bankruptcy Board of India and be empaneled by SEBI), the functions, responsibilities and powers of administrators and also deal with matters such as their terms of appointment (including remuneration), procedures for sale of properties and refund of monies.

❖ Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018

❖ SEBI, on October 3, 2018, has issued the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018 ('**New SECC Regulations**'), effectively replacing the erstwhile Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 and the circulars issued thereunder, to regulate the recognition, ownership and governance in stock exchanges and clearing corporations. Some of key features of the New SECC Regulations are:

i. For valid quorum at a meeting of the board of stock exchanges and clearing corporations, the number of 'public interest directors' should not be less than the number of 'shareholder directors' at such meeting. The managing director is to be compulsorily categorized as a shareholder director.

ii. The voting on board resolutions shall be valid only when the number of public interest directors who have cast their vote on such resolution is more than the number of shareholder directors who have cast their vote on such resolution.

iii. The directors and key management personnel should be 'fit and proper' persons at all times, as per the criteria have been specified in the regulations as well as the disqualifications in this regard.

❖ SEBI approves the Framework for Institutional Trading Platform

❖ SEBI, on October 26, 2018, had released the 'Consultation Paper to Review the Framework for Institutional Trading Platform', with the objective of proposing changes to the regulatory framework for institutional trading platform, under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ('**ICDR Regulations**'). Subsequently, at its meeting held on December 12, 2018, SEBI approved the proposals for amendments to the ICDR Regulations pertaining to the platform. The platform will be renamed the 'Innovators Growth Platform' ('**IGP**'). The key proposals approved by SEBI in relation to listing on the IGP are set out below:

i. 25% of the pre-issue capital of the issuer company should have been held for at least a period of two years by qualified institutional buyers, family trusts with a net worth exceeding INR 500 crores (approx. US$ 72 million), certain regulated entities (including Category III FPIs) and/or certain 'Accredited Investors' (who should not hold more than 10% of the pre-issue capital).

ii. The requirement that no person (individually or with persons acting in concert) should hold 25% or more of the post-issue capital of the issuer company will be removed;

iii. The minimum application size and trading lot of ₹10 lakhs (approx. US$ 14,000) will be reduced to ₹2 lakhs (approx. US$ 2,900) and in multiples thereof;

iv. The minimum reservation of allocation to any specific category of investors will be removed;

v. The minimum number of allottees will be reduced from more than 200 to 50; and

vi. The minimum net offer to the public will be required to be in compliance with the minimum public shareholding norms of SEBI and the minimum offer size to be ₹10 crores (approx. US$ 14 million).

❖ SEBI Circular on Participation of Eligible Foreign Entities in the Commodity Derivatives Market

❖ SEBI, by way of its circular dated October 9, 2018, has permitted participation of eligible foreign entities ('**EFEs**') in the commodity derivatives market in India. Prior to the issue of this circular, foreign entities were not permitted to directly participate in the Indian commodity derivatives market, even if they imported/exported various commodities from/to India. EFEs' participation has not been allowed in contracts having an underlying commodity which has been termed as a 'sensitive commodity', in terms of SEBI Circular dated July 25, 2017, on Position Limits for Agricultural Commodity Derivatives or by any other stipulation by SEBI, which are disclosed on the websites of recognized stock exchanges having commodity derivatives segment ('**CDS Exchanges**'). Key eligibility conditions have been prescribed by SEBI for participation of EFEs in commodity derivatives market in India.

The Circular also specifies certain other compliance requirements to be met by EFEs including, *inter alia,* the know your client requirements, position limits, documentation and other applicable conditions, risk management; monitoring of limits and physical exposure, etc.

❖ SEBI Circular on Fund Raising by Issuance of Debt Securities by Large Entities

❖ With the purpose of deepening the access to the bond market and with a view to operationalise the Union Budget announcement for 2018-19, SEBI issued a circular on November 26, 2018 ('**Circular**'), mandating 'Large Corporates' to meet one-fourth of their financing needs from the debt market. 'Large Corporates' refers to listed entities (except Scheduled Commercial Banks), which as on last day of the financial year ('**FY**') have:

i. specified securities / debt securities / non-convertible redeemable preference shares listed on recognised stock exchanges in terms of the Listing Regulations;

ii. an outstanding long term borrowing (with original maturity of more than one year, and excluding external commercial borrowings and inter-corporate borrowings between a parent and subsidiaries) of ₹100 crores (approximately US$ 14 million) or above; and

iii. a credit rating of "AA and above", in accordance with specified criteria.

A Large Corporate is required to raise not less than 25% of its incremental borrowings, during the FY subsequent to the FY in which it is identified as a Large Corporate, by way of the issuance of debt securities, as defined under the SEBI (Issue and Listing of Debt Securities) Regulations, 2008. For FY 2020 and FY 2021, this requirement will be required to be met on an annual basis and from FY 2022 onwards, the requirement will be required to be met over a continuous block of two years. The Circular also requires Large Corporates to make the stock exchange disclosures (certified by both the Company Secretary and Chief Financial Officer) with respect to identification as a Large Corporate and the details of the incremental borrowings made during the FY.

The Circular will become effective from April 1, 2019 (except for those entities which follow the calendar year as their financial year, in which case the Circular shall become applicable from January 1, 2020).

❖ SEBI Circular on 'Guidelines for Enhanced Disclosures by Credit Rating Agencies'

❖ SEBI, by way of a circular dated November 13, 2016, has prescribed enhanced disclosures to be made by Credit Rating Agencies ('**CRAs**') to bring about greater transparency. The disclosures, *inter alia*, include:

i. CRAs to include rationales in the 'analytical approach' and 'liquidity' sections of the press release, when the rating either relies on support from group companies/ parent company and to highlight parameters like liquid investments or cash balances access to unutilized credit lines, liquidity coverage ratio, adequacy of cash flows for servicing maturing debt obligation *etc.*;

ii. CRAs to analyze the deterioration in the liquidity conditions of the issuer and also take into account any asset-liability mismatch while monitoring repayment schedules;

iii. CRAs may treat sharp deviations in bond spreads of debt instruments *vis-à-vis* relevant benchmark yield as a 'material event';

iv. CRAs to publish information about the historical average rating transition rates across various rating categories; and

v. CRAs to bi-annually furnish data on sharp rating actions in investment grade rating category to stock exchanges and depositories for disclosure on their respective websites.

❖ Changes Introduced for Streamlining the Process of Public Issues of Equity and Convertibles

❖ SEBI, by way of its circular dated November 1, 2018, in its endeavor to provide an efficient fund-raising process, and in consultation with various stakeholder groups, has decided to introduce the Unified Payments Interface ('**UPI**')[1], as a payment mechanism supported with the Application Supported by Block Amount ('**ASBA**'), for applications in public issues through various channels. This will be done by retail investors through various kinds of intermediaries (*i.e.* syndicate members, registered stock brokers, registrar and transfer agents and depository participants). This new process is expected to improve efficiency and reduce the duration from issue closure to listing by up to three working days in a phased manner. Prior to the introduction of ASBA, this process usually took 12 working days.

For the purpose of public issues, UPI would allow the facility to block the funds at the time of the application. In order to ensure that there is parity across the various channels for the submitted application, it has been decided that the investor must only use his/her own bank account linked UPI ID to make an application in public issues. Further, merchant bankers are required to ensure appropriate disclosures with respect to UPI in offer documents and advertisements of a company undertaking a public issue.

This circular is applicable to all red herring prospectuses filed for public issues opening on or after January 1, 2019.

❖ SEBI notifies the SEBI (Settlement Proceedings) Regulations, 2018

❖ On November 30, 2018, SEBI issued the SEBI (Settlement Proceedings) Regulations, 2018 ('**New Settlement Regulations**') which are effective from January 1, 2019, on the basis of the report of the High Level Committee chaired by Justice Dave and have replaced the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014 ('**Old Settlement Regulations**'). The key changes introduced by the New Settlement Regulations are as follows:

i. Definition of 'securities laws' has been widened to include all laws administered by SEBI. The Old Settlement Regulations merely covered the SEBI Act, 1992, the Securities Contract (Regulations) Act, 1956 and the Depositories Act, 1996. Similarly, the definition of 'specified proceedings' has been expanded to include proceedings pending before any forum, and not just SEBI.

ii. The 'cooling-off' period of 24 months prescribed under the Old Settlement Regulations between the date of the last settlement order and an application for a new settlement has been done away with. Further, the restriction on applying for a settlement, if the applicant has received two settlement orders in the past 36 months, has also been removed.

iii. Under the Old Settlement Regulations, violation of laws pertaining to insider trading, communication of unpublished price sensitive information, fraudulent and unfair trade practices having market-wide impact (such as front-running, misselling to an investor, violation of internal code of conduct in insider trading), *could not* be considered for settlement, as these were considered 'serious offences'. The New Settlement Regulations remove any such restriction, subject to the qualification that SEBI *may not* consider any such specified proceeding, where the alleged default tends to have a market-wide impact, cause losses to a large number of investors or affect the integrity of the market.

iv. A person cannot apply for a settlement if he is classified as a willful defaulter, a fugitive economic offender or a person who has defaulted in payment of any fees due or penalty imposed under any securities law.

v. The New Settlement Regulations additionally grant SEBI the discretionary power to settle a proceeding confidentially, in order to benefit applicants who agree to provide '*substantial assistance in the investigation, inspection, inquiry or audit, to be initiated or ongoing, against any other person in respect of a violation of securi-*

1 UPI is an instant payment system, developed by the National Payments Corporation of India ('**NPCI**'), which enables merging several banking features and allows instant transfer of money between any two persons' bank accounts using a unique payment address.

*ties laws*'. The applicant's identity and any information, evidence or documents provided by the applicant will be kept confidential in such a case.

The New Settlement Regulations have introduced a new concept of 'settlement schemes', by way of which SEBI will specify the procedure and terms of settlement of specified proceedings under a settlement scheme for any class of persons involved in respect of any similar defaults specified. A settlement order issued under such a settlement scheme will be deemed to be a settlement order under the New Settlement Regulations.



❖ New SEBI Order in the Satyam Matter

❖ SEBI order dated November 2, 2018 ('**New Satyam Order**') modified its previous orders in the matter of *Satyam Computer Services Limited* ('**Satyam**'), in respect of B. Ramalinga Raju, B. Rama Raju, B. Suryanarayan Raju, and SRSR Holdings Private Limited (collectively, the '**Satyam Noticees**'). In the previous orders, the Satyam Noticees had been restrained from trading in the stock market for a certain period and had been directed to disgorge wrongful gains made by them, *inter alia*, by falsifying financial statements of Satyam and committing insider trading in Satyam's shares.

The key legal issue involved in the New Satyam Order was whether the benefit of 'intrinsic value' can be given to the Satyam Noticees while computing the disgorgement amount (by deducting the 'intrinsic value' of shares from the receipts from sale of such shares in order to arrive at the illegal gain). SEBI, relying on its previous decisions, held that the Satyam Noticees should not be given the benefit of discounting the intrinsic value, as it would amount to conferring undeserving benefits and may act as a moral hazard rather than as a deterrent. Therefore, only the acquisition cost and statutory dues were deducted from the sale proceeds to arise at the disgorgement amount.

SEBI also considered the point in time from which interest may be levied on the disgorgement amount. Relying on a previous decision of the Supreme Court ('**SC**') on this question, SEBI reiterated that interest could be levied right from the inception of the cause of action (*i.e.* date of commission of the fraudulent actions). However, SEBI did not interfere with its previous orders in this matter which had levied interest on the disgorgement amount from January 7, 2009, being the date on which Mr. Ramalinga Raju confessed that he had committed fraud with respect to Satyam's books of accounts.

## Banking & Finance

❖ SC upholds Ultratech's Bid for Binani Cement

❖ The SC, in its decision dated November 19, 2018, upheld the bid of UltraTech Cement ('**Ultratech**') for Binani Cement Limited ('**BCL**'). A review petition filed by Rajputana Properties Private Limited ('**RPPL**') challenging the aforesaid order of the SC, was rejected on January 8, 2019.

RPPL and Ultratech, an entity belonging to the Aditya Birla group, had both submitted bids in the corporate insolvency resolution process ('**CIRP**') of BCL under the Insolvency and Bankruptcy Code, 2016 ('**IBC**'). RPPL's bid was declared the highest bidder ('**H1**') (on the basis of the points obtained as per the evaluation criteria) while Ultratech's bid was declared the second highest ('**H2**'). Subsequently, Ultratech raised its bid amount significantly and agreed to deliver a higher payout to all financial and operational creditors. However, by this time the deadline for submission of bids, as set out in the request for resolution plan ('**RFRP**') formulated by the committee of creditors ('**CoC**'), had already lapsed. The CoC refused to entertain the bid submitted by Ultratech on the ground of late submission and approved the bid submitted by RPPL. Ultratech challenged the CoC's decision to select RPPL as the successful bidder, relying on the provision contained in the RFRP, which permitted the CoC to consider bids from any party, till such time that a resolution plan submitted for BCL was approved by the NCLT.

The National Company Appellate Tribunal ('**NCLAT**') referred to the aforementioned provision in the RFRP and approved the resolution plan submitted by Ultratech on the ground that it was offering a higher amount, thereby ensuring compliance with the primary objective of IBC, *i.e.* ensuring maximization of the value of the assets of the corporate debtor. The NCLAT also noted that the bid submitted by RPPL was discriminatory on the ground that it differentiated between financial creditors who are equally situated (*i.e.* financial creditors to whom the corporate debtor owed a debt in its capacity as the primary borrower and financial creditors to whom the corporate debtor owed a debt in its capacity as a guarantor for third party debt) and did not balance the interests of the other stakeholders, such as operational creditors. Finally, the NCLAT also observed that any resolution plan, which is shown to be discriminatory against one or other financial creditor or operational creditor, can be held to be violative of the IBC. RPPL appealed the NCLAT's decision before the SC. However, the SC refused to set aside the NCLAT's judgement, while observing that there was no infirmity in the order.

## Telecommunications

❖ DoT prescribes Minimum Requirement for Security Policy of DoT Licensees

❖ The Department of Telecommunication ('**DoT**') has, by way of notification dated September 26, 2018, issued instructions to all licensees in relation to the minimum requirements for security policy of DoT licensees. These requirements are applicable for telecom networks and systems holding customer's data including the endpoints through which such infrastructure and information is accessible.

The security policy at the minimum must include provisions in relation to, *inter alia*: (i) responsibility of the management; (ii) designation of chief security officer(s) for network security and information security; (iii) implementation of security risk management system; (iv) periodic evaluation of the information security performance and effectiveness of the security management; (v) provision of periodic training and awareness programs; (vi) ensuring adequate storage, protection and availability of the security policy, recruitment process, and employee's record including permanent and local addresses and their pre-employment references, etc. The notification clarifies that the licensees should have further provisions, in addition to the minimum requirements set out in the notification, as a part of their security policy to enhance security as deemed fit, since network security is the responsibility of the licensees. The licensees have been given a period of one year to fully implement these requirements. Further, these guidelines are subject to review after every two years or on need basis.

❖ Inclusion of the Net-Neutrality provision in License Agreements

❖ The DoT has, recently amended the terms of UL(VNO) agreement, Cellular Mobile Telephone Service license agreement and Unified Access Service license agreement to include the regulatory framework on 'Net Neutrality'. Pursuant to these amendments, the telecom licensees are not permitted to engage in discriminatory treatment of content, including any discrimination based on the sender or receiver or the user equipment. The licensees have been expressly prohibited from entering into any arrangement or agreement with any person that has the effect of discriminatory treatment of content. In the context of these restrictions, the DoT has prescribed an inclusive definition for 'content' to include all content, applications, services and any other data or end-point information that can be accessed or transmitted over the internet. Further, for the purposes of these restrictions, 'discriminatory treatment' has been defined to include blocking, degrading, slowing down or even grant of preferential speeds or treatment to any content. The amendments clarify that the aforesaid restrictions will not apply to 'specialized services' *i.e.* services other than internet access service that are optimized for specific content, protocols and user equipment wherein such optimization is necessary to meet the specific quality of service requirements.

## Media

❖ Commencement of TRAI Tariff Order, Interconnection Regulations and Quality of Service Regulations for Broadcasting and Cable Services

❖ As reported in the September 2018 issue of *Inter alia*, the validity of 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**') issued by the TRAI on March 3, 3017 had been upheld by the Madras High Court. Consequently, the Tariff Order, the Interconnection Regulations and the Telecommunication (Broadcasting and Cable) Services Standards of Quality of Service and Consumer Protection (Addressable Systems) Regulations, 2017 came into effect from July 3, 2018. Subsequently, Star India preferred an appeal before the SC against the Madras High Court judgement arguing, *inter alia*, that the Tariff Order and the Interconnection Regulations regulated the content of the transmission, which was solely within the ambit of the Copyright Act, 1956 and fell outside the jurisdiction of the TRAI. The SC, by its judgment dated October 30, 2018, upheld the jurisdiction of the TRAI to regulate the content of transmission in light of the larger public interest involved and upheld the validity of the Interconnection Regulations and the Tariff Order in their entirety.

## Taxation

❖ The Government of India had entered into a double taxation avoidance agreement ('**DTAA**') with the Hong Kong Special Administrative Region of People's Republic of China on March 19, 2018. The DTAA came into force on November 30, 2018. The CBDT has, by way of a notification dated December 21, 2018, notified all provisions of the DTAA. Prior to this notification, India did not have a DTAA with Hong Kong. The provisions of the DTAA would be applicable for the incomes derived on or after April 1, 2019 (*i.e.* FY 2019-2020).

❖ CBDT notifies India-Hong Kong DTAA

## Employment

❖ The Ministry of Women and Child Development, Government of India has, through its office memorandum dated November 2, 2018, issued the National Minimum Guidelines to Establish and Manage Crèche Facilities ('**Guidelines**') as required under the Maternity Benefit (Amendment) Act, 2017 ('**MBAA**'). The MBAA mandates employers employing 50 or more employees in an establishment to provide crèche facilities, where a woman is allowed to visit four times a day (including the interval for rest allowed to her). The Guidelines provide the age group of children for whom the crèche facility should be provided, minimum standards to set up and run crèches against key parameters such as location, timings, infrastructure, equipment, safety, health, nutrition, trained human resource and parents' engagement.

❖ National Minimum Guidelines for Crèche Facilities

❖ The Ministry of Home Affairs has issued a press release on November 14, 2018, for further liberalizing the visa regime in India during the past year, to facilitate the smooth entry, stay and movement of foreign nationals in India. Some of the key changes are:

i. Employment visas and business visas can now be extended from within India, by the Foreigners Regional Registration Offices ('**FRRO**'), for a period of up to 10 years. Previously foreign nationals had to leave the country at the end of five years and apply for a renewal from their home country.

ii. Intern visas are now available at any time during the course of study. The minimum remuneration requirement for grant of Intern Visa has now been reduced from ₹780,000 per annum to ₹360,000 per annum (subject to prescribed conditions).

iii. Two new categories of e-visas (*i.e.* e-conference and e-medical attendant) visas have been introduced and e-visas available for tourists, business, medical, conferences and medical attendants, can be availed of three times in a year (which was previously twice a year) which can be extended for 90 days by the FRRO.

❖ Liberalization of Visa Regime of India

## Intellectual Property

❖ By way of a notification dated December 3, 2018, the Ministry of Health and Family Welfare ('**MHFW**') has brought four commonly used medical devices (*i.e.* nebulizers, blood pressure monitoring devices, digital thermometers and glucometers) under the purview of 'drugs', as defined under Section 3(b)(iv) of the Drugs and Cosmetics Act, 1940 ('**DCA**'), with effect from January 1, 2020. These are an addition to the pre-existing list of 23 other medical devices, already defined as 'drugs' under the DCA.

❖ Four Medical Devices brought under Regulatory Purview

❖ In the matter of **Carlsberg Breweries *v.* Som Distilleries and Breweries**,[2] the special bench of the Delhi High Court has, in its order dated December 14, 2018, held that the joinder of two separate causes of action, one for infringement of a registered design and the other for passing-off is permissible and can be tried together in a composite suit. The plaintiffs in this suit alleged both infringement of a registered design as well as passing-off of the plaintiff's trade dress in respect of the bottle and overall get up of its 'Carlsberg' mark. The defendants, in response, raised the threshold objection that such a composite suit was not maintainable in view of the judgment of the full bench (three judges) of the Delhi High Court in the matter of **Mohan Lal *v.* Sona Paint**[3] The Single Judge hearing this matter was of the opinion that the decision in *Mohan Lal* required a second look and based on the Chief Justice's instructions, the present Special Bench (five judges) was constituted.

The majority in the *Mohan Lal* case had held that two separate suits would have to be filed

❖ Passing-off and Design Infringement can be tried together in a Composite Suit

2 CS(OS) 1485/2015.

3 Mohan Lal v. Sona Paint, 2013 (55) PTC 61 (Del) (FB).

for actions arising out of the infringement of a registered design and passing-off. The Court in the *Mohan Lal* case had however clarified that if such actions are filed at the same time, or in close proximity, they may be tried together as there may be some aspects which may be common.

The special bench of the Delhi High Court overruled the decision of the full bench of the Delhi High Court, *inter alia* on the ground that the full bench overlooked provisions of Order II Rule 3 of the Code of Civil Procedure, 1908, which permits joinder of multiple causes of action. The special bench further observed that the cause of action of passing-off and that of design infringement, in the instant case, emanated from the same transaction and therefore it was inconceivable for the cause of action to be 'split' in some manner and presented in different suits. Therefore, the Special Bench held that to avoid multiplicity of proceedings, on account of common questions of law and fact, a joinder of such causes of action would be permissible.

❖ Draft Cosmetics Rules, 2018

❖ MHFW has, on November 29, 2018, published the Draft Cosmetics Rules, 2018 under the DCA. The draft rules aim to expand the regulations surrounding import, manufacturing, labelling, and other related activities in relation to 'cosmetics' as defined in Clause (aaa) of Section 3 of the DCA. The draft rules also introduce certain stringent norms with an aim to make manufacturers and importers of cosmetics more accountable for the safety of the cosmetics sold in the country. Some of the key salient features of the draft rules pertain to quality standard, labeling, prohibited cosmetics, import registration and enforcement authorities.

## Information Technology

❖ Information Technology (Amendment) Bill, 2018

❖ The Ministry of Electronics and Information Technology has sought to amend the Information Technology Act, 2000 ('**IT Act**') by way of the Information Technology (Amendment) Bill, 2018 ('**IT Bill**'), which is expected to be introduced in the Parliament shortly. The IT Bill has been prepared in response to certain recent online phenomena such as the Blue Whale Challenge which induced several individuals (primarily children) in India and across the world to commit self-harm. It is sought to be introduced on the grounds that there exist several online games which involve violence and therefore have an undesirable effect on players and that much of the material available online denigrates the cultural values of India. The IT Bill seeks to introduce the following new provisions in the IT Act:

i. **Publishing or transmitting any material repugnant to cultural ethos**: Section 67BA is sought to be introduced which will penalise any person who publishes or transmits or causes to be published or transmitted in the electronic form, any material which 'is repugnant to well established cultural ethos'. While the IT Bill does not define 'cultural ethos', it does provide that any material shall not be deemed to be against cultural ethos merely because it goes against or contradicts an established practice or custom.

ii. **Hosting of dangerous online games**: Section 67BB is sought to be introduced which will penalise hosting any online gaming resource which induces users to commit: (a) dangerous acts harmful to themselves or others; (b) acts with cause injury to themselves or others; and (c) any illegal acts. Further, Section 79B is sought to be introduced which requires anyone that hosts online gaming resources or produces any storage media containing gaming resources to be sold offline, to ensure that: (i) the game resource is categorised for use by appropriate age groups on the basis of content of the game; and (ii) the game contains a mechanism that warns users against the repetition in real life of the dangerous acts depicted in the game (if any).

## Litigation & Arbitration

❖ SC confirms Applicability of Limitation Act to Applications made under Section 7 and 9 of IBC

❖ The SC, in its decision dated October 11, 2018, in **B. K. Educational Services Private Limited *v.* Parag Gupta and Associates**[4], addressed the issue of the applicability of the recently amended Section 238A (which came into effect on June 6, 2018) of the IBC, which deals with applicability of the Limitation Act, 1963 ('**Limitation Act**') to all applications made under the IBC. SC held that the Limitation Act applies to all applications filed under the IBC from the inception of the IBC, *i.e.* December 1, 2016 since Section 238A was a clarification of the existing position under the IBC and the law of limitation is procedural in nature and, therefore, can be applied retrospectively.

4 Civil Appeal No. 23988 of 2017.

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*Inter alia...*

❖ The SC had referred ***Union of India v. Hardy Exploration and Production***[5] to a three-judge bench of the SC to decide the basis and principles on which the 'seat' of the arbitration is to be determined when the arbitration agreement specifies the 'venue' for holding the arbitration sittings but not the 'seat'. In the present case, the law governing the substantive contract was Indian law. The law governing the arbitration proceedings was the UNCITRAL Model Law. The venue of the arbitration proceedings was Kuala Lumpur. Article 20 of the UNCITRAL Model Law provides that the parties are free to agree on the 'place' of arbitration, failing which the arbitral tribunal shall determine the place of arbitration.

❖ SC distinguishes between 'Place', 'Venue' and 'Seat' of Arbitration

The three-judge bench of the SC, in its decision dated September 25, 2018, observed that when the 'place' is specified, and no other condition is attached to it, it is equivalent to 'seat' and that finalizes the issue of jurisdiction. However, if a condition is attached to the term 'place', the attached condition has to be satisfied for the 'place' to become equivalent to 'seat'. The three-judge bench concluded that in this case neither the parties had chosen a juridical seat nor the tribunal had made an express determination of the 'seat' in the arbitral award. Therefore, the conditions attached to the term 'place' had not been satisfied. Reiterating the settled distinction between the 'juridical seat' and 'venue' of arbitration, the SC held that Kuala Lumpur could not be considered to be the 'juridical seat' merely because it was the venue and that the award was signed in Kuala Lumpur. In view of the above, the three-judge bench came to the conclusion that the courts in India have jurisdiction to hear the application for setting aside under Section 34 under the Arbitration and Conciliation Act, 1996 ('**A&C Act**').

❖ The SC in its decision dated October 3, 2018 in **Larsen and Toubro Limited *v.* Mumbai Metropolitan Region Development Authority**[6] addressed the issue of: (i) whether a consortium formed between an Indian company (*i.e.* L&T) and a foreign company (*i.e.* Scomi Engineering BHD) is a 'body corporate' or an 'association'; and (ii) whether an arbitration proceeding in which such consortium is a party, would be considered to be an International Commercial Arbitration[7] under the A&C Act. The SC held that it was not open for L&T and Scomi to act as independent entities while dealing with Mumbai Metropolitan Region Development Authority as they will have to deal with the MMRDA only as a consortium only and not as two separate entities. Thus, it was held that the consortium formed by L&T and Scomi falls within the meaning of an association under Section 2(1)(f)(iii) of the A&C Act. The SC further held that since the lead member of the consortium was L&T, a company incorporated in India, and the consortium's office was in Mumbai, the central management and control of the consortium was in India and, therefore, the matter did not qualify as an international commercial arbitration under the A&C Act.

❖ SC interprets scope of Definition of 'International Commercial Arbitration' under Arbitration and Conciliation Act

❖ The SC, in its decision dated December 10, 2018, in **Emaar MGF Land Limited *v.* Aftab Singh**[8] has held that the remedy available to a consumer under the Consumer Protection Act, 1986 ('**CPA**') is a special remedy in law. Hence, the jurisdiction of consumer courts cannot be curtailed despite the existence of an arbitration agreement between the parties to a dispute. The SC further stated that the 2015 amendment to Section 8 of the A&C Act were not to override special / additional remedies provided under different statutes, including the CPA.

❖ SC holds Jurisdiction of Consumer Courts cannot be Curtailed Despite Existence of Arbitration Agreement

❖ The SC, in its decision dated September 14, 2018, in **Zheijang Bonly Elevator Guide Rail Manufacture Co. Ltd. *v.* Jade Elevator Component**[9] has upheld the validity of optional arbitration clauses *i.e.* dispute resolution clauses which present parties with a choice to resolve disputes between them either through arbitration or through litigation in court. The SChas held that where parties have agreed to such an optional clause, and one party invokes arbitration, the dispute shall be referred to arbitration and not litigation. This decision alters the previously settled position of law that a court shall refer parties to arbitration only if there is a clear and unequivocal intention of parties to arbitrate disputes arising out of a contract.

❖ SC upholds Optional Arbitration Clause

5 Civil Appeal No. 4628 of 2018.

6 Arbitration Petition (C) No. 28 OF 2017.

7 An 'international commercial arbitration' is defined at Section 2(1)(f) of the A&C Act as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—(i) An individual who is a national of, or habitually resident in, any country other than India; or (ii) A body corporate which is incorporated in any country other than India; (iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India; (iv) the Government of a foreign country.

8 2018 SCC OnLine SC 2771.

9 2018 (9) SCC 774.

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