Inter alia...

AZB & PARTNERS
ADVOCATES & SOLICITORS

JANUARY 2017 • STRICTLY FOR PRIVATE CIRCULATION

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.

AZB & PARTNERS
ADVOCATES & SOLICITORS

MUMBAI: AZB House | Peninsula Corporate Park | Ganpatrao Kadam Marg | Lower Parel | Mumbai 400013 | India | TEL +91 22 66396880 | FAX +91 22 66396888 | E-MAIL mumbai@azbpartners.com

MUMBAI: Sakhar Bhavan | 4th Floor | Nariman Point | Mumbai 400021 | India | TEL +91 22 66396880 | FAX +91 22 49100699 | E-MAIL disputeresolution.mumbai@azbpartners.com

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

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

BANGALORE: Embassy Icon | 7th floor | Infantry Road | Bangalore 560001 | India | TEL +91 80 42400500 | FAX +91 80 22213947 | E-MAIL bangalore@azbpartners.com

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

AZB & PARTNERS
ADVOCATES & SOLICITORS

Inter alia…

❖ Removal of Names of Companies from the Register of Companies

Corporate & SCRA

❖ On December 26, 2016, the Ministry of Corporate Affairs ('**MCA**') notified Sections 248 to 252 of the Companies Act, 2013 ('**CA 2013**'), which deal with removal of / striking the companies off the Register of Companies ('**Register**'). Section 248 of the CA 2013 empowers the Registrar of Companies ('**ROC**') to remove the name of any company from the Register, if it has reasonable cause to believe that: (i) the company has failed to commence its business within one year of its incorporation; or (ii) the company is not carrying on any business or operations for a period of two preceding financial years. Additionally, Section 248 also permits a company, after extinguishment of its liabilities, to make a voluntary application for removal of its name from the Register for any of the grounds mentioned above. In furtherance of Section 248, the MCA has, on December 26, 2016, notified the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 ('**Removal of Companies Rules**'), in place of the Guidelines for Fast Track Exit Mode for Defunct Companies issued under Section 560 of the Companies Act, 1956 ('**CA 1956**').

The significant changes introduced under Sections 248 to 252 of the CA 2013 and the Removal of Companies Rules are set out below:

i. Under the current regime, a 'defunct company' may apply for striking-off of its name from the Register if it has failed to commence business within a two year period from its incorporation or has ceased carrying on business for a period of one year or more. The earlier requirements under Section 560 of the CA 1956 for a defunct company to apply for striking-off of its name from the Register on having no assets and not commencing business or ceasing to carry on business for a period of one year appear to have been deleted under the CA 2013. However, there is some lack of clarity on this issue and we are awaiting the final forms in this regard;

ii. Pursuant to Section 248 of the CA 2013, a company is required to pass a special resolution or obtain consent of 75% members in terms of its paid-up share capital in order to make an application for striking-off of its name from the Register (such approval was not required under the CA 1956);

iii. Section 249 of the CA 2013 has introduced certain restrictions on companies from applying for removal (even if they fulfill the conditions under Section 248), if during the previous three months the company has undertaken certain actions, such as, disposal for value, of property or rights immediately before cessation of trade, and if such company has made an application to the National Company Law Tribunal ('NCLT') for the sanctioning of a compromise or arrangement and the matter has not been finally concluded, or is being wound-up, whether voluntarily or by the NCLT;

iv. In addition to listed companies, 'not-for-profit' companies, companies that have accepted deposits, etc., the ROC is now not permitted to exercise its removal powers in case of, companies whose application for compounding is pending for offences by the company / officers in default, and companies having charges that are pending satisfaction; and

v. The CA 2013 has clarified that upon passing of the removal order, the company would cease to operate except for the purpose of realizing amounts due to it and for the discharge of its liabilities or obligations. Further, the CA 2013 grants persons aggrieved by the ROC removal order, a period of three years for filing an appeal before the NCLT for restoration of the company name.

Foreign Exchange

❖ Amendments to Schedule 5 of FEMA 20: Investment in Corporate Debt Securities

❖ The Reserve Bank of India ('**RBI**') has, by way of a notification dated October 24, 2016, amended Schedule 5 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 ('**FEMA 20**') to permit registered Foreign Institutional Investors and Foreign Portfolio Investors ('**FPIs**') to invest in unlisted non-convertible debentures ('**NCDs**')/bonds issued by an Indian company and 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 any listed securitized debt instruments. Additionally, by its circular dated November 17, 2016, the RBI has specified that unlisted corporate debt securities in the form of NCDs/bonds issued by Indian companies would 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. The RBI has also specified that such investments in unlisted corporate debt securities and securitized debt instruments will be permitted up to an aggregate of ₹35,000 crores (approximately US$ 5 billion) within the existing investment limits prescribed for corporate bonds from time to time (presently, ₹2,44,323 crore (approximately US$ 35 billion)).

The Securities and Exchange Board of India ('**SEBI**') in its board meeting dated November 23, 2016 ('**SEBI Board Meeting**') approved corresponding amendments to the SEBI (Foreign Portfolio Investors) Regulations, 2014, which are yet to be notified by SEBI.

Capital Markets

❖ Corporate Governance Issues in Compensation Agreements

❖ SEBI, in a consultation paper released by it on October 4, 2016, had noted the practice followed by private equity firms ('**PE Firms**') of entering into side agreements with senior management personnel and/or key managerial persons ('**KMP**') of listed companies (in which such PE Firms are shareholders). While SEBI acknowledged that it is not unusual for PE Firms to incentivize the promoters/ KMPs, it also raised concerns on potential unfair practices being resorted to by the promoters/ KMPs if such agreements were not approved by the board of directors and shareholders of such companies. Pursuant to the decisions of SEBI in the SEBI Board Meeting, the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**Listing Regulations**') have been amended with effect from January 4, 2017. The key amendments are as follows:

i. Restriction on all employees of listed companies (including KMPs, directors or promoters) from entering into an agreement with any shareholder or third party in relation to compensation or profit sharing regarding dealings of securities in such listed entity without the prior approval of the board of directors and public shareholders of the company by way of an ordinary resolution;
ii. All such agreements entered into during the previous three years (including those that have expired) are to be disclosed to the stock exchanges for public dissemination;
iii. Approval of the relevant company's board of directors and its public shareholders is to be sought for all such subsisting agreements in the forthcoming board meeting and general meeting, respectively; and
iv. Interested persons involved in such transactions, i.e., persons who are directly or indirectly interested in the agreement or the proposed agreement, are not permitted to vote in such board / shareholder meetings to be held as per iii above.

❖ Amendment to SEBI (Alternative Investment Funds) Regulations, 2012

❖ Pursuant to the decision taken in the SEBI Board Meeting, the SEBI (Alternative Investment Funds) Regulations, 2012 have been amended with effect from January 4, 2017 as follows:

i. The upper limit of angel investors in a scheme has been increased from 49 to 200;
ii. Angel funds are permitted to invest in start-ups incorporated within five years from incorporation, which has been increased from the earlier limit of three years;
iii. The requirements of minimum investment amount by an angel fund in any venture capital undertaking has been reduced from ₹50,00,000 (approximately US$ 75,000) to ₹25,00,000 (approximately US$ 37,500), and the lock-in period of these investments has been reduced from three years to one year; and
iv. Angel funds will now be permitted to invest in securities of foreign companies, subject to the guidelines and conditions issued by the RBI and SEBI.

❖ Consultation Paper on Amendments/Clarifications to the Investment Adviser Regulations

❖ On October 7, 2016, SEBI released a 'Consultation Paper on Amendments / Clarifications to the SEBI (Investment Advisers) Regulations, 2013', with the objective of specifying uniform standards for all intermediaries providing investment advisory services, regardless of whether it is their primary activity or not. The key changes proposed to the SEBI (Investment Advisers) Regulations, 2013 ('**IA Regulations**') are as follows:

i. Limitation of Exemptions: The extant regime exempts from registration certain persons who provide incidental investment advice to their clients, such as portfolio managers, chartered accountants, etc. SEBI has proposed that certain exemptions be removed, as set out below:
   (a) Mutual fund distributors who: (A) engage in providing incidental or basic investment advisory services on mutual fund products; or (B) want to shift from a commission-based model to an advisory fee-based model, be required to obtain registration; and
   (b) other classes of intermediaries who provide incidental investment advice, be

limited to those persons who provide advice under other regulations specified by SEBI (for example, merchant bankers and portfolio managers);

ii. Investment Advice through Subsidiaries: Investment advisory services, which are currently provided through a separate division or department of banks, NBFCs and body corporates, should be provided exclusively through a separate subsidiary, and that a three year period be provided to comply with this provision;

iii. Definition of 'Investment Products': SEBI has proposed to define 'investment products' as all financial instruments that are regulated by any financial sector regulator in India, other than provision of advice exclusively on non-securities market that is regulated by a sectoral regulator;

iv. Advice through Electronic / Broadcasting Media: SEBI has now proposed to clarify that investment advice in any electronic or broadcasting or telecommunications medium, which is widely available to the public should comply with the provisions of Regulation 21 of SEBI (Research Analysts) Regulations, 2014 ('RA Regulations'), which deals with recommendations in public media. Further, any such advice provided after getting clients enrolled, subscribed or registered on a public media platform will be considered as providing investment advisory services;

v. Provision of Trading Tips or Recommendations: SEBI has proposed that no person will be allowed to provide trading tips or specific stock recommendations to the general public via SMS, email, telephone calls or social networking media, unless such person is either registered under the IA Regulations or specifically exempt from registration;

vi. Prohibition on Betting: SEBI has also proposed to prohibit any scheme, competition, game or league on securities or related to the securities market; and

vii. Clarification on the Roles of Research Analysts and Investment Advisors: SEBI has proposed certain clarifications to distinguish the role of research analysts and investment advisers, with the key distinction being that research analysts should provide the research report to all classes of clients at the same time, whereas investment advisers aid their clients in making an informed decision on whether the recommendations given in the research report are suitable for his/her risk profile. Making recommendations (to buy / sell /hold) with regard to a security, by providing an entire report, would be governed by the provisions of the RA Regulations.

❖ Review of the Requirement of PAN Card to Open Accounts for Foreign Portfolio Investors

❖ To ease the process of verification of the permanent account number ('**PAN**') of FPIS, SEBI by way of its notification dated November 17, 2016, decided that intermediaries may verify the PAN of FPIS online, using the website authorized by the Income Tax Department at the time of account opening for FPIS. Subsequently, a FPI would have a period of 60 days from the earlier of date of (i) the account opening, or (ii) remittance of funds out of India, to provide a copy of its PAN card to the intermediaries.

❖ Amendment to SEBI (Real Estate Investment Trusts) Regulations, 2014 and SEBI (Infrastructure Investment Trusts) Regulations, 2014

❖ Pursuant to the meeting of the SEBI board held on September 23, 2016, SEBI has amended the SEBI (Real Estate Investment Trusts) Regulations, 2014 and the SEBI (Infrastructure Investment Trusts) Regulations, 2014. Some of the key amendments include:

i. The minimum holding of the mandatory sponsor in the infrastructure investment trust ('InvIT') has been reduced from 25% to 15%;

ii. The existing limit of three sponsors has been removed from both regulations;

iii. The permissible investment limit for investment by real estate investment trusts ('REIT') in 'under construction' assets has been increased from 10% to 20%; and

iv. InvITs and REITs are allowed to invest in a two-level SPV holding structure, through a holding company.

❖ Informal Guidance on Interpretation of the ICDR Regulations

❖ A promoter of KJMC Financial Services Limited ('**KJMC**') transferred equity shares of KJMC by way of gift to his wife ('**Transfer**'), which: (i) did not result in a change in the promoter shareholding; (ii) was without any consideration between immediate relatives; and (iii) complied with reporting requirements under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and SEBI (Prohibition of Insider Trading) Regulations, 2015. KJMC has, by way of an interpretative letter, sought certain clarifications in relation to Regulation 72(2) of the SEBI (Issue of Capital and Disclosure Requirements), 2009 ('**ICDR Regulations**'), which prohibits making a preferential issue to any person, including the promoter and promoter group, who have sold equity shares of such issuer during the six months preceding the relevant date. KJMC contended that the Transfer did not amount to a 'sale' under Section 4 of the Sale of Goods Act, 1930, which mandated that any sale or purchase should be done in lieu of a monetary consideration and therefore Regulation 72(2) of the ICDR Regulations will not be applicable. SEBI did not agree with KJMC's analysis and referred to its Informal Guidance in the matter of Strides Arcolab Limited, where it was clarified that 'any person' would include persons who had made inter-se transfers within the promoter group. SEBI clarified that the primary intention of Regulation 72 was not with respect to consideration but with respect to 'change in ownership of equity shares', and consequently the inter-se transfer by way of gift would be considered a 'sale' as per Regulation 72(2) and the promoter(s) and promoter group ineligible for allotment of specified securities on a preferential basis.

❖ Informal Guidance on Interpretation of the Listing Regulations

❖ Alembic Pharmaceuticals Limited ('**Alembic**'), by way of an interpretative letter, sought dispensation for seeking its shareholders' approval to effect a reclassification of certain members forming part of its promoter group, and therefore, sought to approach the stock exchanges concerned directly as per the provisions of Regulations 31(A)(2) and 31(A)(3) of the Listing Regulations. The rationale mentioned by Alembic for such re-classification was that the concerned members were not connected directly or indirectly with the activities of Alembic, nor did they exercise control over its affairs or have any special rights through formal or informal arrangements or were privy to any price sensitive information, and these members had expressed their desire for reclassification of their shareholding from promoter group to public category.

SEBI granted the aforesaid dispensation to Alembic without providing specific reasons for the same.

Banking and Finance

❖ Demonetisation: Withdrawal of Legal Tender of Bank Notes of Denominations 500 and 1000

❖ In order to contain the rising incidence of fake notes and black money, the scheme to declare the old currency notes in the denominations of ₹500 and ₹1000 invalid as legal tender, was introduced by the Government of India ('**GoI**'). In this regard, the Ministry of Finance issued a notification dated November 8, 2016, declaring that the bank notes of existing series of denomination of the value of ₹500 and ₹1000 ('**Bank Notes**') will cease to be legal tender on and from November 9, 2016. The Bank Notes were allowed to be: (i) exchanged for value at RBI Offices till December 30, 2016 and till November 25, 2016 at bank branches/Post Offices, and (ii) deposited at any of the bank branches of commercial banks/Regional Rural Banks/Co-operative banks (only Urban Co-operative Banks and State Co-operative Banks) or at any Head Post Office or Sub-Post Office during the period from November 10, 2016 to December 30, 2016.

❖ Revisions to the Schemes for Stressed Assets Introduced by the RBI

❖ The RBI had launched several schemes over the past few years to strengthen the lenders' ability to deal with stressed assets, including the scheme for 'Flexible Structuring of Project Loans' ('**5-25 Scheme**'), the 'Strategic Debt Restructuring Scheme' ('**SDR Scheme**'), and the 'Scheme for Sustainable Structuring of Stressed Assets' (being the scheme permitting extension of date of commencement of commercial operations ('**DCCO**') of a project without change in asset classification). By way of a circular dated November 10, 2016, the RBI has introduced certain amendments to these schemes for harmonizing the asset classification benefits and prescribing provisioning and prudential norms applicable to banks on implementation. A few notable changes include the following:

i. The 5-25 Scheme, which was available to lenders of long term project loans to infrastructure and core industries, has now been extended to new project loans in all sectors and to existing project loans in which the aggregate exposure of all institutional lenders exceeds ₹250 crores (approximately US$ 36.89 million) in all sectors. Banks may also apply such flexible structuring to funded exposures to construction companies, provided that the revised amortisation schedule of such funded exposure will be restricted upto the DCCO of the underlying projects and in case of existing exposures, the aggregate exposure of all institutional lenders exceeds ₹250 crores (approximately US$ 36.89 million).

ii. In the SDR Scheme, the benefits of asset classification have been subjected to the condition that the new promoter should have acquired at least 26% of the paid up equity capital of the borrower and should have become the single largest shareholder and acquire 'control' of the borrower.

iii. The RBI had issued a circular on September 24, 2015 ('SDR Circular'), providing certain asset classification benefits to lenders upon the lenders effecting a change in control of the borrower outside the SDR Scheme. In the event that a change in ownership of the borrower is effected outside of the SDR Scheme and the lenders propose to avail the asset classification benefits offered by the RBI under the SDR Circular, an over-all stand-still period of 18 months will apply, from the date on which the majority of the lenders of the joint lenders' forum (comprising a minimum of 75% of creditors by value and 50% of creditors by number) resolve to effect a change in ownership of the borrower, during which, the lenders are required to complete the process of change in ownership. Additionally, such change in ownership is required to be undertaken within 12 months from the date of the borrower/existing promoter and the new promoter entering into a binding agreement. The circular also clarifies that other instructions as applicable to the SDR Scheme will also apply to cases where banks decide to change ownership of borrowing entities (outside the SDR Scheme).

iv. In respect of the scheme for deferment of DCCO of project loans (and consequential shift in repayment schedule) without triggering a downgrade of the asset, the RBI has stated that a project with multiple independent units may be deemed to have commenced commercial operations from the date on which the independent units representing 50% (or higher) of the originally envisaged capacity have commenced commercial operations at the final output as originally envisaged, subject to the following conditions: (a) the units representing the remaining 50% (or lower) of the originally envisaged capacity will commence commercial operations within a maximum period of one year of the deemed DCCO; (b) commercial viability of the project is reassessed beyond doubt; and (c) capitalisation of interest obligation in respect of the project debt attributable to the units of the plant that have commenced commercial operations has ceased and revenue expenditure is booked under revenue account. However, if the remaining units do not commence commercial operations within the stipulated time, the account will attract asset classification norms and accordingly be treated as non-performing assets upon expiry of the one year period set out above. Guidelines relating to project loans that are applicable after the DCCO of a project, including the 5-25 Scheme, will not be applicable to project loans attributable to units that have not commenced commercial operations.

❖ Changes and Clarifications on External Commercial Borrowing

i. **Clarification on Hedging:** The RBI, on November 7, 2016, clarified that: (a) in cases where hedging for external commercial borrowings ('ECB') is mandatory, the ECB borrower will be required to cover principal as well as interest of the ECB through financial hedges from the start of each such exposure; (b) the financial hedges should be for a minimum tenor of one year with a periodic rollover and the exposure on account of ECB should not be unhedged; and (c) any natural hedging in lieu of financial hedging, will be considered only to the extent of offsetting projected cash flows/ revenues in matching currency, net of all other projected outflows.

ii. **Extension and Conversion:** The RBI has, pursuant to its circular dated October 20, 2016, allowed AD Category – I banks to, subject to other conditions:
   (a) approve requests from borrowers for changes in repayment schedule of an ECB prior to its maturity, provided the average maturity and all-in-cost are in conformity with applicable norms, and subject to there being: (A) no additional cost incurred; (B) lender's consent for such changes; and (C) satisfaction of reporting requirements; and
   (b) approve cases of conversion of matured but unpaid ECB into equity.

iii. **ECBs for Startups:** The RBI has, pursuant to its circular dated October 27, 2016, permitted all startups recognized by the GoI to access borrowings in the form of loans or non-convertible, optionally convertible or partially convertible preference shares under the ECB framework up to a limit of US$ 3 million (approximately ₹20.33 crores). The minimum average maturity period of such borrowing is three years for end use in relation to expenditure in connection with the business of the borrower.

Insurance

❖ IRDAI Notifies Regulations Pertaining to Payment of Commission to Insurance Agents/ Intermediaries

❖ Pursuant to the Insurance Laws (Amendment) Act, 2015, Section 40A of the Insurance Act, 1938 (pertaining to commission payable by insurance companies to intermediaries) was deleted, and the manner of regulating such commissions (and levels thereof) was delegated to the Insurance Regulatory and Development Authority of India ('IRDAI'). Accordingly, the IRDAI notified the IRDAI (Payment of Commission or Remuneration or Reward to Insurance Agents and Insurance Intermediaries) Regulations, 2016 ('**Reward Regulations**'), which will come into force on April 1, 2017. Some of the salient features of the Reward Regulations are as follows:

i. Every insurer is required to adopt a board approved policy for payment of commission, remuneration or reward to agents and intermediaries;

ii. The maximum commission or remuneration payable for various insurance products has been prescribed;
iii. Insurers appear to be 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. However, the relevant language of the Reward Regulations is not clear in this respect;
iv. Reward in life insurance and general insurance has been permitted to be paid over and above commission/ remuneration based on objective criteria approved by the board. Such reward (a) for life insurance, cannot be more than 20% of the first year commission or remuneration paid and is to be calculated on an overall basis without linkage to each policy solicited; and (b) for general insurance, cannot be more than 30% of commission or remuneration paid and is to be calculated separately for health insurance and other than health insurance without linkage to each policy solicited; and
v. No reward is due or payable to intermediaries whose revenue from activities other than insurance intermediation is more than 50% of their total revenue.

Media & Telecommunications

❖ Guidelines for TSPs in the Process of Tariff Recharges/ Payments through Third Party Apps/ Websites

❖ On October 14, 2016, Telecom Regulatory Authority of India ('**TRAI**') issued the Guidelines for Telecom Service Providers ('**TSPs**') who provide access or internet services, directing them to ensure transparency, uniformity and protection to their subscribers in matters of tariff recharges/ payments of bills through third party applications/ websites appointed by the TSPs ('**Channel Partners**') or sub-Channel Partners appointed by such Channel Partners on their behalf ('**Sub–Channel Partners**'). These guidelines require the TSPs to ensure the following:

i. All product features, tariff, and benefits available on the relevant TSP's website should also be displayed on the website of the Channel Partner/ Sub-Channel Partner. A new feature can be launched only once it has been duly updated on the website of the Channel Partner/ Sub-Channel Partner;
ii. The TSP should ensure that all service conditions of the TSP's license, as contained in the agreement between TSP and the Channel Partner, should be incorporated in the agreement between Channel Partner and Sub–Channel Partner; and
iii. Any new tariff product or any change in an existing tariff product can be implemented only at midnight (between 00:00 and 02:00 hours), on the date of launch/ date of change of the tariff product. Further, TSPs continue to be wholly responsible for compliance with the conditions of its license as the Channel Partners and Sub–Channel Partners are unlicensed entities.

❖ Directions to TSPs for Delivering Broadband Services in a Transparent Manner

❖ In supersession of the earlier directions issued on July 27, 2012 relating to provisioning of broadband services, the TRAI has, on October 31, 2016, issued directions to TSPs (providing broadband (wire – line or wireless) services) for delivering broadband services in a transparent manner by providing adequate information to broadband consumers. TSPs have been directed to provide on their website, and also in all advertisements published through any media, information (as prescribed under the directions) with respect to all broadband tariff plans offered under the fair usage policy for fixed and mobile broadband service, respectively. The information to be disclosed includes data usage limit with specified speed, speed of broadband connection up to the specified data usage limit; speed of broadband connection beyond data usage limit, *etc.* This information is also required to be provided to all new and existing subscribers of the TSPs on their registered email address or mobile number, as specified by the subscriber.

Further, TSPs must ensure that the download speed of broadband service provided to the fixed broadband subscriber is not reduced below the minimum download speed prescribed by Department of Telecommunications ('**DoT**') in any fair usage broadband tariff plan, after expiry of a consumer's assigned data quota. TSPs should also provide an alert to the subscribers through SMS on their registered mobile number or e-mail, each time when the data usage reaches 50%, 90% and 100% of data usage limit under a consumer's plan and maintain a portal/ website for the subscriber to access such usage information at any point of time.

❖ Amendment to Mobile Banking (Quality of Service) Regulations, 2012

❖ The Mobile Banking (Quality of Service) Regulations, 2012 ('**Mobile Banking Regulations**') mandate every TSP to facilitate banks and its agents to use SMS, unstructured supplementary service data ('**USSD**') and interactive voice response to provide banking services to its customers and deliver such messages within the time frame prescribed under the Mobile Banking Regulations. By way of this amendment dated November 22, 2016, TRAI has enlarged the scope of the Mobile Banking Regulations by permitting TSPs to also facilitate entities authorised by the RBI for delivery and banking services, to provide USSD based banking and payment services to its customers.

❖ Clarification Regarding the Scope of Permitted Activities by an Infrastructure Provider–I

❖ On November 28, 2016, the DoT issued a clarification stating that Infrastructure Provider–I ('**IP-I**') providers are not permitted to own and share active telecom infrastructure elements (such as antenna, feeder cable, node B, radio access network and transmission systems), and can only install such elements on behalf of telecom licensees. IP-I providers, who have invested in creation of active network infrastructure, have been granted a period of six months from the date of the clarification to either obtain a telecom license and move all such operations involving active network elements under the license for carrying on operations of such infrastructure, or transfer such network elements to a holder of a valid telecom license.

Taxation

❖ Protocol to India-Singapore Double Taxation Avoidance Agreement

❖ Pursuant to the protocol signed between GoI and the Government of Singapore on December 30, 2016 amending the Indo-Singapore Double Taxation Avoidance Agreement ('**Indo-Singapore DTAA**'):

i. Capital gains tax exemption available to Singapore residents under the Indo-Singapore DTAA has been withdrawn with respect to shares in Indian resident companies that are acquired on or after April 1, 2017. The withdrawal of exemption is in a phased manner as explained below:
   (a) **Capital gains arising on or after April 1, 2017 till March 31, 2019 ('Transition Period')**: Capital gains arising during the Transition Period will be taxed at 50% of the applicable Indian domestic tax rate, subject to fulfillment of the clause on Limitation of Benefits.
   (b) **Capital gains arising on or after April 1, 2019**: Capital gains arising after the Transition Period will be taxed in India as per India's full domestic tax rate.

ii. Capital gains arising to Singapore tax residents with respect to shares of Indian tax resident companies, which have been acquired up to March 31, 2017, will only be taxable in Singapore even if the gain arises on or after April 1, 2017, subject to fulfillment of 'limitation of benefits' clause.

iii. Capital gains arising to Singapore tax residents with respect to securities (other than shares of Indian tax resident companies), e.g. instruments like CCDs and shares of offshore entities, whenever acquired, will continue to be exempt from capital gains tax in India.

It may be further noted that while the Indo-Mauritius Double Taxation Avoidance Agreement (as amended), the withholding tax rate on interest payments made to a Mauritian tax resident will be 7.5% with respect to interest arising on or after April 1, 2017, there is no change on withholding tax rate on interest payments the India-Singapore DTAA, *i.e.*, interest payments to a Singapore tax resident continue to be subject to withholding tax at the rate of 15% in case of loan given by non-banking entities.

❖ New Indo-Cyprus Double Taxation Avoidance Agreement

❖ GoI and the Government of Cyprus have signed the New India-Cyprus Double Taxation Avoidance Agreement on November 18, 2016, which, *inter alia*, provides for source based taxation of capital gains arising from alienation of shares of companies that are tax residents of India. However, a grandfathering clause has been provided for investments made prior to April 1, 2017, in respect of which capital gains would be taxed in the country of which the said taxpayer is a resident. Further, the notification[1] declaring Cyprus as a Notified Jurisdictional Area under section 94A of the Income-tax Act, 1961, has been rescinded with retrospective effect.[2]

1 Notification No.86/2013 [F.NO.504/05/2003-FTD-I]/SO 3307 (E); dated November 01, 2013.

2 Notification No.114/2016 [F.NO.500/02/2015-FT & TR- III]/SO 4033 (E); dated December 14, 2016 as amended by Notification No.119/2016 [F.NO.500/02/2015-FT & TR- III]/SO 4082 (E); dated December 16, 2016.

Real Estate

❖ The Maharashtra Land Revenue Code, 1966 ('**MLRC**') has been amended on August 22, 2016 with retrospective effect from August 15, 1967, *i.e.*, the date on which the MLRC came into force. Pursuant to the amendment, all leases granted by the State Government or the Collector in respect of any land or foreshore vested in the State Government, which have been in existence on or before August 15, 1967 or were granted thereafter, will, notwithstanding the terms and conditions of such leases, be also subject to the following terms:

i. the leasehold rights in such land may be further assigned or transferred only with the prior permission of the Collector on payment of such premium on account of unearned income and transfer fees; and

ii. in the event of contravention of the above condition, the lessee / transferor of such leasehold rights will be subject to pay penalty in addition to such premium and transfer fees at rates to be specified by the Government.

❖ The Maharashtra Land Revenue Code, 1966

❖ Pursuant to the Real Estate (Regulation and Development) Act, 2016 ('**RERA**'), the State Government of Maharashtra published the draft of the Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2016 (the '**Draft Rules**') to invite comments from the general public. The Draft Rules and the comments will be taken into consideration by the Maharashtra Government on or after December 23, 2016. The Draft Rules provide for registration fees payable by the promoters for registration of their projects as well as the fee payable by real estate agents who are also required to be registered under the RERA. While the Draft Rules continue to provide for the retention of 70% of the amounts realized from allottees in relation to a specific project in a separate bank account, it has provided further detail and clarity as to what constitutes construction costs and land costs for a particular project and the amounts that may be withdrawn by the promoter at various stages of construction. The Draft Rules have clarified that the construction costs would include the principal sums and interest, paid or payable to any financial institutions including scheduled banks or NBFCs *etc.*, or money-lenders for the relevant project. Mr. Gautam Chatterjee, IAS, Officer on Special Duty to the Chief Minister, has been appointed as the special officer under the RERA for the State of Maharashtra pursuant to the Government Resolution dated December 26, 2016.

❖ Draft Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2016

Employment

❖ Pursuant to Notification no. G.S.R. 1166(E) issued by the Ministry of Labour and Employment, the wage ceiling for coverage of an employee under the Employees' State Insurance Act, 1948 has been increased from ₹15,000 (approx. US$ 200) to ₹21,000 (approx. US$ 300). Accordingly, with effect from January 1, 2017, all factories or establishments, to which the Employees' State Insurance Act, 1948 applies, will now be required to procure insurance for employees earning ₹21,000 (approx. US$ 300) or less.

❖ Increase in Wage Ceiling Coverage of an Employee under the Employees' State Insurance Act, 1948

❖ Every employer is required to submit a declaration to the Regional Provident Fund Commissioner in respect of membership of its employees, who were required or entitled to become members of the Employees' Provident Fund for the period beginning from April 1, 2009 and ending on December 31, 2016, but were not enrolled. Within 15 days, the employer is required to remit the employer's and the employee's contribution deducted from the employee's wages along with damages payable at the rate of Rs. 1 per annum and the applicable interest. The Ministry of Labour and Employment has issued a notification dated December 30, 2016, notifying the Employees' Enrolment Campaign, 2017 ('**Amnesty Scheme**') with effect from January 01, 2017 and expiring on March 31, 2017, for waiving the employee's contribution for the aforementioned period if the same has not been recovered from the employee's wages. This Amnesty Scheme also applies in respect of the Employees' Provident Fund Scheme, 1952, the Employees' Pension Fund Scheme, 1995 and the Employees' Deposit Linked Insurance Scheme, 1976.

❖ Amnesty Scheme under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952

❖ The Rights of Persons with Disabilities Act, 2016 ('**PWD Act**'), which replaces the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, has been notified on December 28, 2016, with the objective of preventing deprivation of personal liberty only on grounds of disability. In addition to widening the definition of 'establishment' to include private establishments (such as company, firm, co-operative society *etc.*), the PWD Act mandates every establishment to notify an equal opportunity policy detailing measures proposed to be taken relating to skill development and employment of persons with disabilities.

❖ Rights of Persons with Disabilities Act, 2016

❖ The Contract Labour (Regulation and Abolition) (Karnataka) (Amendment) Rules, 2016

The equal opportunity policy is to be registered with the Chief Commissioner or the State Commissioner, as the case maybe. The statute further stipulates that no person will be deprived of promotion merely on grounds of disability.

❖ By way of notification no. LD 267 LET 2016 dated December 19, 2016, the Government of Karnataka has amended the Contract Labour (Regulation and Abolition) (Karnataka) Rules, 1974 to remove the restriction on female contract labourers from being employed before 6:00 A.M. or after 7:00 P.M. in the State of Karnataka, subject to the fulfilment of, *inter alia*, the following conditions: (i) provision of free transport facilities with adequate security; (ii) posting of adequate number of security guards; (iii) provision of sufficient rest rooms with adequate water supply separately for female employees; (iv) cost of crèche facilities obtained by the woman to be borne by the establishment; and (v) pre-employment screening of the employer's drivers. Breach of any of these conditions will attract the withdrawal of the license issued to the contractor, under the Contract Labour (Regulation and Abolition) Act, 1970. This notification will become effective from the date of its publication in the Official Gazette.

Intellectual Property

❖ Delhi High Court on Permissibility of Photocopying of Text Books for Preparing Course Packs

❖ A Division Bench ('DB') of the Delhi High Court, by its judgement dated December 9, 2016 in the case of **Chancellor, Masters & Scholars of the University of Oxford & Ors *v.* Rameshwari Photocopy Services and Ors**[3], disposed the appeal filed by the publishers against the order passed by the Single Judge on September 16, 2016.[4] The DB held that photocopying of copyrighted materials for preparing course packs would be a permissible activity and would not constitute infringement so long as such copying was for purposes of educational instruction. The DB reaffirmed the following findings of the Single Judge on substantive points of law: (i) utilisation of the copyrighted work would constitute fair use to the extent justified for the purpose of education, irrespective of the quantity of reproduction; (ii) "course of instruction" under Section 52(1)(i) of the Copyright Act, 1957 was not limited to a lecture in a class room and extends to various acts of imparting instruction; (iii) reproduction of works under Section 52(1)(i) can be made by an intermediary, *i.e.*, a photocopier, and need not be limited only to reproduction by a teacher / pupil; (iv) course packs will not adversely impact the market of the publishers since students are not potential customers; and (v) distribution of course packs would not amount to "publication" as the element of profit was missing in such publication.

The DB, however, partially overturned the judgment of the Single Judge and remitted the matter to the trial court for a fact specific determination of whether: (i) inclusion of the copyrighted works in the course packs was justified by the purpose for which course packs are prepared, *i.e.* for instructional use; and (ii) whether photocopying of entire textbooks (copied back to back) would be a permissible activity. This issue arose from the findings of the local Commissioner's report highlighting that apart from the course packs that contained excerpts of various textbooks, eight books had been photocopied back to back.

In light of the legal determination above, the DB refused to grant the publishers an interim injunction. However, the photocopying agency was called upon to maintain records of the course packs photocopied by it and supplied to the students and also file a statement to this effect with the trial court every six months till the trial is completed.

3 Chancellor, Masters & Scholars of the University of Oxford & Ors *v.* Rameshwari Photocopy Services and Ors., RFA(OS) 81/2016, Delhi High Court.

4 The Chancellor, Masters & Scholars of the University of Oxford & Ors *v.* Rameshwari Photocopy Services and Ors., CS(OS) 2439/2012, Delhi High Court (Judgement dated September 16, 2016).

❖ Mere Allegations of Fraud Simplicitor Will Not Render a Dispute Non-Arbitrable

❖ In a recent decision passed by the Supreme Court ('**sc**') on October 4, 2016 in the case of **A. Ayyasamy *v.* A Parmasivam,**[5] it was held that a dispute will not be rendered as non arbitrable because of mere allegations of fraud simplicitor, and distinguished it from serious fraud allegations.

Sections 34(2)(b) and 48(2) of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'), *inter alia*, provide that an arbitral award may be set aside if the Court finds that the "subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force".

While the Arbitration Act does not specify the kinds of cases that are not arbitrable, in a number of its previous judgments, the sc has specified examples of certain kinds of disputes that are not arbitrable. In **Booz Allen and Hamilton Inc. *v.* sbi Home Finance Limited and Others,**[6] the sc held that the following matters were not arbitrable: (i) disputes relating to rights and liabilities that give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes.

The sc in the present judgement, clarified that a mere allegation of fraud simplicitor may not constitute grounds to nullify the effect of the arbitration agreement between the parties, and listed examples of serious allegations of fraud that would render a dispute non arbitrable, such as: (i) serious allegations of forgery or fabrication of documents in support of the plea of fraud; (ii) where fraud is alleged against the arbitration provision itself; and (iii) where the fraud is of such a nature that it permeates the entire contract, including the agreement to arbitrate, *i.e.*, where fraud goes to the validity of the contract itself – either the entire contract that contains the arbitration clause or the validity of the arbitration clause itself.

The sc held that it is only in cases where there would be a serious issue of fraud involving criminal wrongdoing that the exception to arbitrability carved out in **N. Radhakrishnan *v.* Maestro Engineers**[7] would apply. In cases involving allegations of fraud simplicitor, the arbitration clause need not be avoided and that the parties can be relegated to arbitration.

❖ Dishonour of a Post-dated Cheque for Repayment of a Loan Covered by Section 138 of the Negotiable Instruments Act, 1881

❖ On September 19, 2016, the sc in **Sampelly Satyanarayana Rao *v.* Indian Renewable Energy Development Agency Limited**[8] dealt with the issue of whether the dishonor of post-dated cheques that have been described as 'security' in a loan agreement, would attract criminal liability under Section 138 of the Negotiable Instruments Act, 1881 ('**Negotiable Instruments Act**'), the penalty for which includes imprisonment for a term upto two years, or a fine, or both.

The sc held that Section 138 of the Negotiable Instruments Act applies only if, on the date of issuance of the cheque, the liability or debt exists or the amount has become legally recoverable, and not otherwise. The sc further held that the issuance of a cheque and admitted signature on such cheque creates a presumption of a legally enforceable debt in favour of the payee, and a mere statement by the accused that the cheques were issued as "security" and not as repayment, would not rebut this presumption.

In the present case, though the word "security" was used, the cheques were towards repayment of installments, which became due under the relevant agreement immediately upon advancement of the loan. Therefore, the dishonor of cheque was for an existing liability and covered under Section 138 of the Negotiable Instruments Act.

5 A. Ayyasamy *v.* A Parmasivam., air 2016 sc 4675.
6 Booz Allen and Hamilton Inc. *v.* sbi Home Finance Limited and Others, 2011 5 scc 532.
7 N. Radhakrishnan *v.* Maestro Engineers, 2010 1 scc 72.
8 Sampelly Satyanarayana Rao *v.* Indian Renewable Energy Development Agency Limited, (2016) 10 scc 458.

AZB & PARTNERS
ADVOCATES & SOLICITORS

❖

Best Overall Law Firm of the Year
India Business Law Journal, 2015 and 2016

❖

Law Firm of the Year
VC Circle, 2016

❖

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

❖

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

❖

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

❖

Ranked No. 1
for the M&A Announced League Table by Deal Count
Bloomberg's Global M&A, Legal rankings Full Year, 2016

❖

Ranked No. 1
for the Indian M&A Announced League Table by Deal Completed
Ranked No. 1
for the Indian M&A Announced League Table by Deal Announced
Thomson Reuters' Emerging Markets M&A Legal rankings Full Year, 2016

❖

Ranked No. 1
for the M&A Announced League Table by Deal Count
Venture Intelligence, January to April 2016

❖

Law Firm of the Year
Firm of the Year for categories of Banking & Finance, Capital Markets,
Competition & Antitrust, Mergers & Acquisitions, Private Equity & Venture Capital,
Restructuring & Insolvency and Structured Finance & Securitization
India Business Law Journal, 2015

❖

Ranked No.1
by Deal Count and Deal Value for the Indian M&A Announced Deals League Table
Thomson Reuters' Emerging Markets – M&A Review, 2015

❖

Ranked No.1
by Deal Count and Deal Value for India League Tables
Mergermarket's Global & Regional M&A League Tables of Legal Advisors, 2015

❖

Ranked No.1
in APAC ex Japan Mid-Market by Deal Count (up to US$ 500m) and
Ranked No.1
in APAC ex Japan Mid-Market by Deal Count (up to US$ 250m)
Bloomberg's Global M&A Mid-Market M&A Ranking, 2015