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JULY 2016 • STRICTLY FOR PRIVATE CIRCULATION

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

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Corporate & SCRA

❖ Messer Holdings: Supreme Court Judgement on Enforceability of Share Transfer Restrictions

❖ In the case of **Messer Holdings Ltd. *v.* Shyam Madanmohan Ruia**[1], an appeal had been preferred before the Supreme Court ('**SC**') from a decision of the division bench of the High Court of Mumbai ('**Mumbai HC**'), which had held that share transfer restrictions as set out in an agreement between shareholders are not violative of the Companies Act, 1956 ('**CA 1956**'). The issue of enforceability of share transfer restrictions has long been vexed. It was expected, therefore, that SC would provide some clarity on this issue. However, in its judgment on April 19, 2016, SC effectively refused to answer the questions of law and further criticised the parties for unreasonably taking up the time of the court. While the Companies Act, 2013 ('**CA 13**') appears to clarify this issue under Section 58(2), there continue to remain some unanswered questions, including whether the Mumbai HC judgment would still be valid law.

❖ Constitution of NCLT

❖ On June 1, 2016, the Ministry of Corporate Affairs ('**MCA**') notified the constitution of the National Company Law Tribunal ('**NCLT**') and the National Company Law Appellate Tribunal ('**NCLAT**') with immediate effect. The rules in this regard are yet to be notified. The NCLT will initially have 11 branches – two in New Delhi (one of which will be the principal bench) and one each in Mumbai, Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad and Kolkata.

With the above notification, the erstwhile Company Law Board ('**CLB**') constituted under CA 1956 stands dissolved and all the cases pending before CLB, except for matters relating to winding up, compromise, amalgamation and capital reduction, stand immediately transferred to NCLT. The establishment of NCLT consolidates the corporate jurisdiction of the following authorities: (i) CLB; (ii) Board for Industrial and Financial Reconstruction ('**BIFR**'); (iii) Appellate Authority for Industrial and Financial Reconstruction; and (iv) jurisdiction and powers relating to winding up, restructuring and other such provisions, vested in High Courts ('**HCs**').

Matters relating to the investigation of a company's accounts, freezing of assets, class action suits, oppression and mismanagement and conversion of a public company to a private company will now be governed by the NCLT, and appeal therefrom would be before the NCLAT instead of the HCs.

❖ Amendment to the Companies (Corporate Social Responsibility Policy) Rules, 2014

❖ MCA has, by way of a notification dated May 23, 2016 ('**May 23 Notification**'), amended the Companies (Corporate Social Responsibility Policy) Rules, 2014 ('**CSR Rules**'). The CSR Rules earlier permitted corporate social responsibility ('**CSR**') activities to be undertaken through a company established under Section 8[2] or a registered trust or a registered society (each a '**Permitted Medium Entity**'), which is established by the company either by itself or along with another company, and such entities were not required to show any minimum track record. In addition, the May 23 Notification now permits a company to undertake CSR activities through a Permitted Medium Entity established by the Central or State Government or by any entity established under an Act of Parliament or a State Legislature, without having to show any minimum track record. However, if CSR activities are carried out through any other permitted entity, then the existing requirements under CA 13 continue unaltered.

❖ Amendment to the Companies (Acceptance of Deposit) Rules, 2014

❖ On June 29, 2016, the MCA has notified the Companies (Acceptance of Deposits) Amendment Rules, 2016 ('**Amended Rules**'), *inter alia,* expanding the scope of exemptions available for deposit of monies received by a company from being classified as a 'deposit' under the Companies (Acceptance of Deposit) Rules, 2014.

The Amended Rules permit companies to accept or renew deposits from members up to a maximum of 35% of the aggregate of their paid-up share capital, free reserves and securities premium account, as opposed to the earlier limit of 25%. Further, a private company can accept or renew deposits from its members up to 100% of the aggregate of its paid-up share capital, free reserves and securities premium account.

The Amended Rules have included a requirement for every eligible company to obtain a credit rating at least once every year for deposits accepted by it and disclose the deposits received from a director in its financial statements. The Amended Rules will come into force upon publication in the Official Gazette.

❖ Companies (Removal of Difficulties) Third Order, 2016

❖ Section 139 of CA 13, which deals with appointment of auditors, *inter alia*, provides that no listed company and companies falling within the prescribed class are allowed to appoint / re-appoint an individual / an audit firm, respectively, as an auditor for more than one term of five consecutive years in case of an individual and two terms of five consecutive years in any other case. As per the provisions of Section 139(1), companies are required to appoint / re-appoint auditors at annual general meetings only.

1 Messer Holdings Ltd. *v.* Shyam Madanmohan Ruia, SLP (Civil) Nos. 33429-33434 of 2010.

2 Company registered as a company with charitable objects, *etc.*

Pursuant to the Companies (Removal of Difficulties) Third Order, 2016, effective retrospectively from April 1, 2014, MCA has allowed compliance with the above requirements within a period ending no later than the date of the first annual general meeting held three years after the date of commencement of CA 13.

Foreign Exchange

❖ Reserve Bank of India ('**RBI**') has, by way of notifications dated April 28, 2016 and May 20, 2016, made the following amendments to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000:

❖ Amendments to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2016

i. The term 'startup' has been defined to mean a private limited company / limited liability partnership, incorporated within the preceding five years, with an annual turnover not exceeding ₹25 crores (approximately US$ 3.7 million) in any preceding financial year, working towards innovation, development, deployment or commercialisation of new products, processes or services driven by technology or intellectual property, provided that such entity is not formed by splitting up or reconstruction of an existing business;
ii. Schedule 6 has been amended to permit foreign venture capital investors ('**FVCI**') registered with Securities and Exchange Board of India ('**SEBI**') to invest in: (a) equity, equity-linked instruments or debt instruments issued by startups, irrespective of the sector of such startup; (b) units of a registered Category I Alternative Investment Fund ('**Cat-I AIF**') or units of a scheme or a fund set up by a Cat-I AIF; (c) equity, equity-linked instruments or debt instruments issued by an unlisted Indian company engaged in specified sectors;
iii. A new Regulation 10A has been inserted which provides for the following:
   - In case of transfer of shares between a resident and a non-resident, not exceeding 25% of the total consideration can be paid by the buyer on a deferred basis, for which an escrow arrangement may be made, for a period not exceeding 18 months from the date of the transfer agreement; and
   - Even if the total consideration has been paid, the seller may furnish an indemnity for an amount not exceeding 25% of the total consideration, for a period not exceeding 18 months from the date of payment of the full consideration.
iv. The total consideration finally paid for such shares must comply with applicable pricing guidelines.

❖ The Department of Industrial Policy and Promotion ('**DIPP**') has, by way of Press Note No. 5 dated June 24, 2016 ('**Press Note 5**'), introduced the following notable amendments to the FDI Policy:

❖ Revisions to FDI Policy

i. 100% foreign direct investment ('**FDI**') is permitted under the approval route for trading, including through e-commerce, in respect of food products manufactured or produced in India;
ii. In the defence sector, FDI beyond 49% is permitted through the approval route, where the investment results in Indian access to modern technology or for other reasons. The erstwhile condition for such FDI, requiring such investment to result in access to 'state-of-art' technology, has been dispensed with;
iii. Foreign investment in the civil aviation sector has been liberalised, whereby: (a) 100% FDI is permitted under the automatic route in brownfield and greenfield airport projects; and (b) FDI has been raised to 100% (with up to 49% under the automatic route and 100% through the automatic route for non-resident Indians ('**NRIs**')) for scheduled air transport services, domestic scheduled passenger airlines and regional air transport services. Foreign airlines continue to be allowed to invest in the capital of Indian companies operating scheduled and non-scheduled air-transport services up to 49%;
iv. FDI in brownfield pharmaceutical projects has been permitted up to 100%, with 74% under the automatic route. However, a non-compete clause is not permitted in transactions, except in certain special circumstances with the prior approval of the Foreign Investment Promotion Board;
v. Local sourcing norms have been relaxed for three years for entities engaged in single brand retail trading of products having 'state-of-art' and 'cutting edge' technology, and where local sourcing is not possible;
vi. FDI in private security agencies has been raised to 74%, with 49% permitted under automatic route. It is clarified that the terms 'private security agencies', 'private security', and 'armoured car service' will have the same meaning as ascribed to such

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terms under the Private Security Agencies (Regulation) Act, 2005. Accordingly, private security agencies would include any person (other than any governmental agency) providing private security services including training of private security guards and deployment of armoured cars;

vii. FDI in animal husbandry (including breeding of dogs), pisciculture, aquaculture and apiculture was permitted up to 100% under the automatic route under controlled conditions. The requirement of 'controlled conditions' for FDI in these activities has now been removed; and

viii. 100% FDI in broadcasting carriage services, including teleports, direct to home, cable networks, mobile TV and headend-in-the-sky broadcasting services, has been permitted under the automatic route.

❖ RBI Circular on Investment in Credit Information Companies

❖ Pursuant to the circular dated May 19, 2016 issued by RBI, all credit information companies ('**CIC**') have been directed to comply with the following:

i. Investments by any person (whether resident or otherwise), directly or indirectly, in a CIC, must not exceed 10% of the equity capital of the investee company. However, RBI may consider allowing higher FDI limits to entities with an established track record in running a credit information bureau in the following cases:
   - up to 49%, if ownership is not well diversified (*i.e.*, one or more shareholders each hold more than 10% of voting rights in the company);
   - up to 100%, if ownership is well diversified, or if their ownership is not well diversified, but at least 50% of the directors of the investee CIC are Indian nationals/ NRIs/ persons of Indian origin (out of which at least one third of the directors must be Indian nationals resident in India); and
   - The investor company should preferably be listed on a recognised stock exchange.

ii. A foreign institutional investor ('**FII**')/ foreign portfolio investor ('**FPI**') is permitted to invest in a CIC subject to certain prescribed conditions.

If the investor in a CIC is a wholly owned subsidiary (directly or indirectly) of an investment holding company, then the above conditions will be applicable to the operating group company that is engaged in the credit information business and has undertaken to provide technical know-how to the CIC in India.

❖ Disclosure of Compounding Orders Passed by RBI on RBI's Website

❖ With a view to ensure transparency and disclosure, compounding orders passed by RBI on or after June 1, 2016 will be publicly available on RBI's website (www.rbi.org.in). The RBI circular dated May 26, 2016 in relation thereto also sets out a guidance note for calculating (on an indicative basis) the amount of penalty/ fine that may be imposed on the applicant, although the actual amount may vary on a case to case basis.

❖ Foreign Exchange Management (Establishment in India of a Branch or a Liaison Office or a Project Office or any Other Place of Business) Regulations, 2016

❖ RBI has, by way of a recent notification issued the Foreign Exchange Management (Establishment in India of a Branch or a Liaison Office or a Project Office or any Other Place of Business) Regulations, 2016 ('**New Regulations**') which replace the erstwhile regulations of 2000. The key changes in the New Regulations, *inter alia,* include: (i) the term 'branch office' has been defined to mean any establishment described as such by the concerned company; (ii) cancellation of approval if no office is opened within six months of receiving the approval letter, subject to an extension of six months by the Authorised Dealer Category-I bank ('**AD Bank**') on account of reasons beyond control; (iii) citizens of certain specified countries are required to obtain registration with the relevant State police authorities in addition to the RBI approval for establishing a branch office or liaison office or project office or any other place of business; and (iv) AD Bank may permit intermittent remittances by branch office/ project offices pending winding up/ completion of the project subject to submission of specified documents.

❖ Foreign Exchange Management (Deposit) Regulations, 2016

❖ RBI has, by way of notification dated April 1, 2016, issued the Foreign Exchange Management (Deposit) Regulations, 2016, which supersede the erstwhile regulations of 2000, with the following key changes:

i. A person resident outside India having a business interest in India is permitted to open a Special Non Resident Rupee Account ('**SNRR Account**') with an AD Bank for bona fide transactions in Rupees subject to certain conditions;

ii. A shipping or airline company incorporated outside India is permitted to hold and maintain a foreign currency account with an AD Bank for meeting expenses in India. However, freight or passage fare collections in India or inward remittances through banking channels from its office outside India are the only permissible credits; and

iii. An AD Bank is permitted to allow unincorporated joint ventures between foreign and Indian entities executing a contract in India, to open and maintain a non-interest bearing foreign currency account and a SNRR Account for the purpose of undertaking transactions in the ordinary course of its business, subject to certain conditions.

❖ Foreign Investment in Units Issued by REITS, InvITs and AIFS

❖ Salient features of foreign investment permitted by RBI, pursuant to its circular dated April 21, 2016, in the units of investment vehicles for real estate and infrastructure registered with the SEBI or any other competent authority are as under:

i. A person resident outside India (including a Registered Foreign Portfolio Investor ('**RFPI**') and NRIs may invest in units of real estate investment trusts ('**REITS**');
ii. A person resident outside India who has acquired or purchased units in accordance with the regulations may sell or transfer in any manner or redeem the units as per regulations framed by SEBI or directions issued by RBI;
iii. An Alternative Investment Fund Category III with foreign investment can make portfolio investment in only those securities or instruments in which a RFPI is allowed to invest; and
iv. Foreign investment in units of REITS registered with SEBI will not be included in 'real estate business'.

❖ Revision of Sectoral Limits – ARCS

❖ DIPP has, by way of Press Note 4 dated May 6, 2016 ('**Press Note 4**'), permitted 100% FDI in asset reconstruction companies ('**ARCS**') under the automatic route, from the erstwhile 49%, subject to the following key conditions:

i. Earlier, an ARC sponsor was not allowed to hold more than 50% shareholding, including by way of FDI or by routing it through a FII/ FPI controlled by the same sponsor, in line with the existing restriction under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('**SARFAESI**'). This restriction is proposed to be done away with by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016. Therefore, Press Note 4 provides that the investment limit of a sponsor in an ARC's shareholding will be governed by SARFAESI;
ii. Permissible FII/ FPI investment in each tranche of security receipts has been increased to 100%, as opposed to the earlier 74%, subject to compliance with RBI's directions; and
iii. Foreign investment in an ARC is now subject to all provisions of SARFAESI (instead of only Section 3(3)(f)).

❖ RBI Circular on Approval Route Cases for Raising External Commercial Borrowings

❖ As a measure to expedite the process for obtaining RBI approval for raising external commercial borrowings ('**ECBS**') through the approval route, RBI has, pursuant to a circular dated June 30, 2016 ('**ECB Circular**'), directed that ECBs above certain thresholds (yet to be prescribed) will be required to be placed before an 'Empowered Committee' of RBI. RBI will take a final decision on these cases after taking into account the recommendation of the Empowered Committee. Prior to the ECB Circular, all approval route cases were required to be placed before the Empowered Committee for consideration.

Capital Markets

❖ Guidelines for Public Issue of Units of Infrastructure Investment Trusts

❖ SEBI has, on May 11, 2016, issued Guidelines for Public Issue of Units of Infrastructure Investment Trusts ('**Guidelines**'), which amend the provisions of the SEBI (Infrastructure Investment Trusts) Regulation, 2014 ('**SEBI InvIT Regulations**').

The Guidelines set out the procedure to be followed by an infrastructure investment trust ('**InvIT**') in relation to a public issue of its units, which includes the appointment of a lead merchant banker and other intermediaries, procedure for filing of offer documents with SEBI and the stock exchanges, the process of bidding and allotment. Further, the allocation in a public issue is required to be in the following proportion: (i) not more than 75% to institutional investors; and (ii) not less than 25% to other investors; provided that the investment manager has the option to allocate 60% of the portion available for allocation to institutional investors and anchor investors (which includes strategic investors), subject to certain conditions. Further, the investment manager, on behalf of the InvIT is required to deposit and keep deposited with the stock exchange(s), an amount equal to 0.5% of the amount of the units offered for subscription to the public or ₹5 crores (approximately US$ 7,45,000), whichever is lower. The price of units can be determined either: (i) by the investment manager in consultation with the lead merchant banker; or (ii) through the book building process. However, differential prices are not permitted.

❖ Amendment of Guidance Note on SEBI (Prohibition of Insider Trading) Regulations, 2015

❖ SEBI has, on April 12, 2016, amended the guidance note on SEBI (Prohibition of Insider Trading) Regulations, 2015 ('**PIT Regulations**') which was issued on August 24, 2015 to extend the exemption from 'contra trade' restrictions under the PIT Regulations to exit offers in addition to buy back offers, open offers, rights issues, follow – on public offers, bonus issues, *etc.*

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❖ Revised Formats under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

❖ The formats for disclosures prescribed by SEBI under Regulation 10(5) and 10(7) of the SEBI (Substantial Acquisition of Shares and Takeover Regulations), 2011 ('**Takeover Regulations**') require the acquirers to report compliance with Chapter V of the Takeover Regulations (dealing with disclosure of shareholding and control). The prescribed formats for acquisitions under Regulation 10(1)(a)(i), (ii), (iii), (iv) and (v), did not specify the time period to be considered while reporting compliance with respect to such disclosures. Pursuant to its circular dated May 2, 2016, SEBI has amended the format to require acquirers to provide such information for a period of three years prior to the date of acquisition.

❖ SEBI Board Meetings

❖ SEBI, in its board meeting held on May 19, 2016, approved the incorporation of the internal guidance note in the SEBI (Settlement of Administrative and Civil Proceedings) Regulations 2014 ('**Settlement Regulations**'), to clarify that only serious and substantial cases are to be taken for enforcement under Regulation 5(2)(b) of the Settlement Regulations. For this purpose, defaults which in the opinion of SEBI have a bearing on the securities market as a whole and not just the listed security and its investors may be considered to have market wide impact.

Thereafter, in its meeting held on June 17, 2016, SEBI approved the two consultation papers in relation to the changes to be made to the SEBI (Portfolio Managers) Regulations, 1993 and the SEBI InvIT Regulations.

❖ SEBI Circular on Restriction on Redemption in Mutual Funds

❖ SEBI, on May 31, 2016 issued a circular providing details of certain specified circumstances in which mutual funds/ asset management companies/ trustees could impose restrictions on redemption of units of their mutual fund schemes. SEBI has provided that the restriction on redemption cannot exceed ten working days in any 90 day period and would be applicable for redemption requests above ₹200,000 (approximately US$ 2,975). Further, specific approval of the board and trustees of an asset management company is required before imposing such restrictions and SEBI should be notified of such approval immediately.

❖ Changes in Conditions for Issuance and Transfer of Offshore Derivative Instruments

❖ SEBI has, by way of a circular dated June 10, 2016, introduced the following key changes in the conditions for issuance and transfer of Offshore Derivative Instruments ('**ODI**'), effective from July 1, 2016:

i. Beneficial owners of corporate subscribers are to be verified on a look-through basis, as per the thresholds set out in the Prevention of Money-laundering (Maintenance of Records) Rules, 2005, *i.e.*, 25% in the case of a company and 15% in case of partnership firms/ trusts/ unincorporated bodies, and Know Your Customer documentation has to be obtained from beneficial owners exceeding these thresholds. If no entity's holding is in excess of the thresholds, the ODI issuer must obtain the identity and address proof of the relevant natural person who holds the position of senior managing official of the material shareholder/ owner entity;
ii. Any transfer of ODIs, issued by or on behalf of the ODI issuer, is to be made to only persons eligible to deal in ODIs, with the prior consent of the ODI issuer (unless the transferee is pre-approved by it) and reported to SEBI on a monthly basis;
iii. ODI issuers must file suspicious transaction reports (if any) with the Indian Financial Intelligence Unit;
iv. ODI issuers must reconfirm ODI positions on a semi-annual basis, and report any deviations from the monthly reports to SEBI; and
v. ODI issuers must carry out a periodical review and evaluation of its controls, systems and procedures with respect to ODIs, and their chief executive officer must submit a certificate in this regard to SEBI annually.

Banking & Finance

❖ Guidelines for Ownership in Private Sector Banks

❖ RBI has, by the master direction dated May 12, 2016 ('**Directions**'), issued guidelines regarding ownership and voting rights in private sector banks in India. The Directions prescribe shareholding investment limits in a bank's paid-up capital by various types of shareholders as follows:

i. *Promoters* – limits will be as per the prevalent guidelines and in case of existing banks, will be in line with the earlier guidelines issued by RBI, *i.e.*, 15%;
ii. *Natural persons* and *non-financial entities* (other than promoters/ promoter group) – limit is 10%;
iii. *Financial institutions* (which are non-regulated/ non-diversified and non-listed) – limit is 15%; and
iv. *Financial institutions* (which are regulated, well diversified, and listed entities, supranational institutions or public sector undertaking or government) – limit is 40%.

In certain circumstances, higher stake or strategic investment by promoters or non-promoters through capital infusion by domestic or foreign entities/ institution, may be permitted under circumstances such as relinquishment by existing promoters, rehabilitation or restructuring of weak banks, entrenchment of existing promoters or in the interest of the bank or for consolidation in the banking sector.

Other key principles under the Directions include the following: (a) voting rights will be limited to a ceiling of 15%, regardless of the shareholding limit; (b) any acquisition of shareholding/ voting rights of 5% or more of the paid-up capital or total voting rights of the bank will be subject to prior RBI approval; and (c) no bank in India will acquire an equity stake in another bank, if it results in the investing bank holding 10% or more in the investee bank's equity capital, other than in case of exceptional circumstances such as restructuring of weak banks or in the interest of consolidation in the banking sector, *etc.*

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❖ Scheme for Sustainable Structuring of Stressed Assets

❖ RBI has, by its circular dated June 13, 2016, introduced a scheme for resolution of large accounts referred to as the 'Scheme for Sustainable Structuring of Stressed Assets', which is an optional framework and involves lenders determining the level of sustainable debt for a stressed borrower, and bifurcating the outstanding debt into sustainable debt (being a level of debt whose principal value can be serviced over the same tenor as that of the existing facilities even if future cash flows of the borrower remain at their current level and including new funding required to be sanctioned in the next six months). The remaining debt will be converted into equity or quasi-equity instruments issued to the lender (subject to the pricing guidelines and other conditions outlined in the circular).

For an account to be eligible to avail of this scheme: (i) the project must have commenced commercial operations; (ii) the aggregate exposure of all institutional lenders (including foreign currency lenders) in the account must be more than ₹500 crores (approximately US$ 73 million); and (iii) at least 50% of the current funded liabilities of the borrower should constitute 'sustainable debt'. The resolution plan will be reviewed by an overseeing committee, set up by the Indian Banks Association, in consultation with RBI and comprising eminent experts. Post-resolution, the borrower's ownership pattern may reflect a change in control of the borrower with either the lenders or a new promoter acquiring a majority stake in the company; or the existing promoters continuing to hold the majority shareholding/ controlling interest in the company, and in either case additional conditions may be imposed by the lenders on the promoters with respect to manner of dilution of shareholding, issuance of guarantee, *etc*. The resolution plan and control rights are to be structured to ensure that the promoters are not allowed to sell the shares of the borrower without the prior approval of lenders and without sharing the upside, if any, with the lenders towards loss in residual (converted) debt.

❖ Draft Guidelines for 'On Tap' Licensing of Universal Banks in the Private Sector

❖ RBI has released draft guidelines for on-tap licensing of universal banks in the private sector ('**Draft Guidelines**') on May 5, 2016 (for comments and suggestions) which will allow applications for bank licenses to be submitted to RBI at any point in time. While the Draft Guidelines follow the earlier 2013 guidelines on bank licensing in many respects, notable changes include: (i) a new category of eligible promoters being resident individuals/ professionals having ten years of experience in banking and finance; (ii) large industrial houses being barred from having a controlling interest in new banks; and (iii) relaxation of the requirement of establishing a bank through a non-operative financial holding company where the applicant is an individual or stand-alone entity not having group entities.

Insurance

❖ IRDAI Issues Guidelines for Corporate Governance for Insurers in India

❖ The Insurance Regulatory and Development Authority of India ('**IRDAI**') has issued guidelines for corporate governance for insurers in India ('**CG Guidelines**') on May 18, 2016, which are applicable from FY 2016-2017. Some salient features of the CG Guidelines are as follows: (i) the board of directors of the insurers ('**BoD**') is required to formulate a policy on related party transactions consistent with the parameters set out in the CG Guidelines; (ii) the BoD is to have a minimum of three independent directors (to be complied with within one year of the effective date of the CG Regulations). An insurer can have two independent directors for the first five years from the grant of registration; (iii) mandatory establishment of certain committees prescribed under the CG Guidelines; (iv) specific guidelines have been prescribed for the appointment and reporting of key management persons and appointment of statutory auditors; and (v) all insurers are required to report status of compliance with the CG Guidelines on an annual basis.

❖ IRDAI (Registration of Indian Insurance Companies) (Seventh Amendment) Regulations, 2016

❖ IRDAI notified the IRDAI (Registration of Indian Insurance Companies) (Seventh Amendment) Regulations, 2016 (‘**Registration Regulations**’) on February 22, 2016. The key change introduced is with respect to the manner of calculation of equity capital held by foreign investors[3] in an insurance company, which is to be calculated as an aggregate of:

i. The quantum of equity paid up capital held by foreign investors (including FVCI); and
ii. The proportion of the paid up equity capital held or controlled by such foreign investor either by itself or through its subsidiary companies in an Indian promoter/ investor of such insurance company. This does not apply to Indian promoters/ investors which are banking companies or public financial institutions.

On May 20, 2016, the IRDAI has issued an exposure draft for further amending the Registration Regulations, whereby it has been proposed that item (ii) above will not apply to an Indian promoter/ investor of a listed Indian insurance company regulated by RBI, SEBI or the National Housing Bank.

Media & Telecommunications

❖ Interconnection Agreements Between Service Providers of Signals

❖ The Telecom Regulatory Authority of India amended the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable television Systems) Regulations, 2012 on January 7, 2016 and March 15, 2016, whereby it is now obligatory for each broadcaster to enter into written interconnection agreements with all multi-system operators for retransmission of its pay channels (including where no subscription fees are payable).

❖ Supreme Court Decision in the Case of Star Sports India Private Limited v. Prasar Bharati and Ors.

❖ On May 27, 2016, SC upheld the order passed by the Delhi High Court against Star Sports India Private Limited (‘**Star Sports**’), in connection with a dispute relating to the mandatory sharing of feeds for television broadcast of sporting events of national importance on cable or direct-to-home (‘**DTH**’) networks in India.

Under Section 3 of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007, a content rights owner or holder and a television or radio broadcasting organisation (‘**Broadcaster**’) are prohibited from carrying live television broadcast of a sporting event of national importance on cable or DTH networks, unless it simultaneously shares the live broadcasting signals, without its advertisements, with Prasar Bharati to enable it to retransmit the same on its terrestrial and DTH network.

In the present case, live feeds being provided by Star Sports to Prasar Bharati contained commercial enhancements such as ‘logos’ and ‘on-screen credits’ (‘**Logos**’) inserted by the event organiser, *i.e.*, International Cricket Council (‘**ICC**’). Star Sports argued that the words ‘without its advertisements’ in Section 3, relates to advertisements inserted by the Broadcaster and not by the event organiser, and therefore the Logos inserted were not prohibited under Section 3.

The SC observed that the word ‘its’ under Section 3 relates to all three categories, *viz*: (i) content rights owner; (ii) contents holder; and (iii) television or radio broadcasting service provider. Accordingly, the SC held that Star Sports is required to remove all commercial content from the feed, even if such commercial content has been included by ICC and Star Sports does not earn any revenue from such commercial content, before sharing the feed with Prasar Bharati.

Taxation

❖ Protocol to India-Mauritius Double Taxation Avoidance Agreement Withdrawing Capital Gains Tax Exemption

❖ The Government of India (‘**GoI**’) and Government of Mauritius signed a protocol dated May 10, 2016, amending the Protocol to the India – Mauritius Double Taxation Avoidance Agreement, which, *inter alia*, provides for:

i. Withdrawal of the capital gains tax exemption available to Mauritian residents with respect to shares in Indian resident companies acquired on or after April 1, 2017 in a phased manner as follows:
   - Capital gains arising on or after April 1, 2017 till March 31, 2019 (‘**Transition Period**’) will be taxed at 50% of the applicable Indian domestic tax rate subject to fulfilment of certain conditions; and

3 ‘Foreign Investors’ has been defined under the Indian Insurance Companies (Foreign Investment) Rules, 2015 to mean all eligible non-resident entities or persons resident outside India investing in the equity shares of an Indian insurance company, as permitted under applicable foreign exchange regulations.

- Capital gains arising after the Transition Period will be taxed in India as per India's full domestic tax rate;

ii. Introduction of concepts of 'service permanent establishment', fee for technical services sourced in India and derived by Mauritian residents to be taxed at the rate of 10% on gross basis, and income in the nature of 'other income' of a Mauritian resident to be taxed as per India's domestic tax laws.

❖ Press Release on New Indo-Cyprus Double Taxation Avoidance Agreement

❖ GoI by way of a Press Release dated July 1, 2016 announced its in-principle agreement with the Government of Cyprus regarding finalisation of the New Indo-Cyprus Double Taxation Avoidance Agreement, which, *inter alia*, provides for source based taxation of capital gains with a grandfathering clause for investments made prior to April 1, 2017, in respect of which, capital gains would be taxed in the country where the taxpayer is resident. It was further agreed that India will consider rescinding the notification declaring Cyprus as a Notified Jurisdictional Area under section 94A of the Income-tax Act, 1961, with retrospective effect.

❖ Amendment of Rules for Application of General Anti Avoidance Rule

❖ The Central Board of Direct Taxes has amended Rule 10U of the Income-tax Rules, 1962 ('**Rules**') regarding application of General Anti Avoidance Rule ('**GAAR**'), whereby any income accruing or arising to, or deemed to accrue or arise to, or received or deemed to be received by, any person from transfer of investments made by such person before April 1, 2017 will be grandfathered and not be subject to GAAR (such date previously being August 30, 2010). Further, GAAR will apply to any arrangement, irrespective of the date on which it was entered, with respect to the tax benefit obtained from such arrangement on or after April 1, 2017 (such date previously being April 1, 2015).

Infrastructure

❖ Government Notifies the MMDR (Amendment) Act, 2016

❖ The Central Government has notified the Mines and Minerals (Development and Regulation) Amendment Act, 2016 ('**2016 Amendment**') on May 9, 2016. By virtue of amendments to the Mines and Minerals (Development and Regulation) Act, 1957 ('**MMDR Act**') in 2015, transfer of only those mineral concessions granted by auction was allowed. By virtue of the 2016 Amendment, where a mining lease: (i) has been granted otherwise than through auction; and (ii) the mineral from such mining lease is being used for captive purpose, such mining lease can be transferred subject to compliance with such terms and conditions and payment of transfer charges as may be prescribed. The term 'used for captive purpose' has been defined under the 2016 Amendment to mean use of the entire quantity of mineral extracted from the mining lease in a manufacturing unit owned by the lessee.

❖ Government Notifies the Minerals (Transfer of Mining Lease Granted Otherwise than Through Auction for Captive Purpose) Rules, 2016

❖ Pursuant to the 2016 Amendment, the Central Government has notified the Minerals (Transfer of Mining Lease Granted Otherwise than through Auction for Captive Purpose) Rules, 2016 ('**ML Transfer Rules**') on May 30, 2016, which set out the procedure for transfer of mining leases granted otherwise than through auction and for captive purpose ('**ML**'). The salient features of ML Transfer Rules are as below:

i. Deemed approval for transfer of ML, if the State Government does not reject the application within 90 days from the application;

ii. Transferee to make an upfront lumpsum payment of 0.5% of the value of estimated resources of the ML upon receipt of approval and execute the mine development and production agreement with the State Government;

iii. Transferee to provide performance security to the State Government for an amount equivalent to 0.5% of the value of estimated resources, to be adjusted every five years to correspond to 0.5% of the reassessed value of estimated resources;

iv. Transferor and transferee to jointly submit a duly registered transfer deed for ML to the State Government within the specified period; and

v. State Government to execute a mining lease deed with the transferee upon registration of the deed of transfer of ML.

The ML Transfer Rules also stipulate that whenever royalty is payable in terms of the second schedule to the MMDR Act, the transferee is to pay to the State Government an amount equal to 80% of the royalty, in addition to the royalty payable, simultaneously with payments of royalty, which will be adjusted against the upfront payment mentioned under (ii) above.

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Inter alia...

❖ Patent Amendment Rules, 2016 Come into Effect

Intellectual Property

❖ The Patent (Amendment) Rules 2016 ('**Patent Amendment Rules**') were brought into force on May 16, 2016 to provide several incentives to 'startups' for facilitating intellectual property right ('**IPR**') creation and protection, and clearing the huge backlog at the patent office, streamlining patent procedures and reducing the prosecution timelines. Some of the key amendments are mentioned below:

i. A new applicant category, *i.e.*, 'startup' has been introduced. A 'startup' is defined to mean an entity where: (a) more than five years have not lapsed from the date of its incorporation or registration; (b) the turnover for any financial year out of the five years has not exceeded ₹25 crores (approximately US$ 3.7 million); and (c) it is working towards innovation, development, deployment or commercialisation of new products, processes or services driven by technology or IPR;
ii. An applicant may request for expedited examination of the patent application within 48 months from the date of priority on the permitted grounds.
iii. The timeline for filing the response to the first examination report has been reduced from 12 months to six months;
iv. At the time of filing a national phase application (in India) corresponding to an international application filed under the Patent Cooperation Treaty, the applicant may now be allowed to delete claims; and
v. The Controller General of Patents Designs and Trademarks will be required to dispose of the request for a foreign filing license within 21 days from the date of request. In case of inventions relating to defence or atomic energy, the period of 21 days would be considered from the date of receipt of consent from the Central Government.

Litigation

❖ Orders of Two Different High Courts on Stamp Duty Payable on a Scheme of Amalgamation

❖ A bench of three judges of the Mumbai HC in the case of **Chief Controlling Revenue Authority, Maharashtra State, Pune and Superintendent of Stamp (Headquarters), Mumbai *v.* Reliance Industries Limited, Mumbai and Reliance Petroleum Limited, Gujarat**[4] has considered whether stamp duty would be payable on orders of two different HCs in case of a scheme of arrangement under Sections 391 to 394 of the CA 1956 involving two States.

In 2002, Mumbai HC and the Gujarat High Court sanctioned a scheme of amalgamation between Reliance Industries Limited ('**RIL**') having its registered office in Maharashtra and Reliance Petroleum Limited ('**RPL**'), having its registered office in Gujarat ('**Scheme**'). While RPL paid stamp duty in Gujarat on the order passed by the Gujarat High Court, RIL contended before the Superintendent of Stamps, Mumbai that the stamp duty paid in Gujarat by RPL should be set off against the stamp duty payable on the Mumbai HC order under the Maharashtra Stamp Act, 1958.

Based on an application made by RIL, Mumbai HC held that: (i) stamp duty is charged on an 'instrument', and not on the 'transaction' effected by the 'instrument'; and (ii) orders passed by two different HCs, *albeit* pertaining to the same scheme of amalgamation, are separate instruments, and therefore, full stamp duty is payable in all States where such a scheme of amalgamation is sanctioned.

❖ Reference to BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985

❖ SC, in the case of **Madras Petrochem Limited *v.* Board for Industrial and Financial Reconstruction and Ors.**[5], dealt with the interaction between SARFAESI and the Sick Industrial Companies (Special Provisions) Act, 1985 ('**SICA**') and held that SARFAESI prevails over SICA to the extent that the latter is inconsistent with the former.

The main issue before SC was with regard to Section 22 of SICA which provides that if a company is registered as a sick industrial company with the BIFR, all other legal proceedings against the company will be suspended and cannot be resumed without the BIFR's permission. Further, Proviso 3 to Section 15(1) of SICA provides that a reference pending before the BIFR will abate if secured creditors representing 75% or more of the borrower's total debts initiate action under SARFAESI to recover their debts. In considering the above, SC held as under:

i. Where a single secured creditor in whose favour an exclusive charge has been created seeks to recover its debt under SARFAESI, such secured creditor may realise such secured debt notwithstanding provisions of SICA;

4 Chief Controlling Revenue Authority, Maharashtra State, Pune and Superintendent of Stamp (Headquarters), Mumbai *v.* Reliance Industries Limited, Mumbai and Reliance Petroleum Limited, Gujarat, AIR 2016 Bom 108

5 Madras Petrochem Limited v. Board for Industrial and Financial Reconstruction and Ors., (2016) 4 SCC 1

ii. Where there are more than one secured creditors of a sick industrial company, and at least 60% of such secured creditors in value of the amount outstanding as on a record date decide to proceed against the security charged in their favour, the provisions of SICA will not be applicable; and

iii. Where secured creditors representing not less than 75% in value of the amount outstanding against financial assistance decide to enforce their security under SARFAESI, any reference pending under SICA cannot be proceeded with and the proceedings under SICA will abate. Hence, if such SICA proceedings abate, any party can proceed to recover its dues and all pending proceedings against the industrial undertaking will stand revived.

Miscellaneous

❖ National Civil Aviation Policy, 2016

❖ On June 15, 2016, the Ministry of Civil Aviation issued the National Civil Aviation Policy (‘**Policy**’), focusing on affordable air travel, improving connectivity, boosting tourism, infrastructure, sustainable development and job creation in tier-II and tier-III cities and tax/economic sops. The Policy covers 22 facets of Indian civil aviation including maintenance, repair and overhaul operations, ground-handling, security and customs. ‘Regional Connectivity’, being a key focus-area, the Policy encourages the development of regional airports and airstrips, provides incentives to airline operators to fly to less connected sectors and provides for a cross-subsidy between popular routes and regional routes.

Additionally, the erstwhile ‘5/20 Rule’ which provided that an Indian airline could operate on international routes only if it had previously operated for a period of five years on domestic routes *and* had a fleet of at least 20 aircraft, has been liberalised by permitting all airlines to commence international operations, provided that they deploy at least 20 aircraft or 20% of total capacity, whichever is higher, for domestic operations.

Other significant changes include the implementation of ‘open sky agreements’ (permitting Indian operators to launch both passenger and cargo flights to and from a range of countries), development of greenfield and brownfield airports by the private sector, State governments and/or by a public-private-partnership, promotion of air cargo services to further the *‘Make in India’,* e-commerce and export policies of the Government.

❖ Defence Procurement Procedure, 2016

❖ The Ministry of Defence, GoI (‘**MOD**’), has with effect from April 1, 2016 notified the new Defence Procurement Procedure, 2016 (‘**DPP 2016**’) for capital acquisitions in the Indian defence sector, to, *inter alia,* evolve a policy framework to facilitate the ‘*Make in India*’ initiative in defence manufacturing. Key changes to the defence procurement procedure include replacement of ‘Buy (Indian)’ category with the newly introduced ‘Buy (Indian – IDDM)’ category as the most preferred category for capital acquisitions, which places highest importance on indigenous design, development and manufacture. ‘Make’ category programs have been classified into sub-categories of ‘Make-I (Government funded)’, where 90% of the project is funded by the MOD and ‘Make-II (Industry funded)’ where the entire project is funded by the vendor.

DPP 2016 defines ‘Indian Vendor’. Further, the threshold of cost of procurement proposals for applicability of offset obligations has been raised. The request for proposal (‘**RFP**’), may, on case to case basis, now allow foreign vendors to engage agents in India for marketing of equipment manufactured by the vendor, subject to disclosures and conditions prescribed in the DPP 2016. Depending on the procurement requirement, the RFP may provide for meeting certain enhanced performance parameters as prescribed in the DPP 2016. As per the draft RFP, vendors may be required to provide confirmation at the time of submitting the proposal, that, *inter alia*, there would be no review, revocation or suppression of the relevant export license. Execution of integrity pact has been made mandatory for all procurement schemes exceeding ₹200 million (approximately US$ 2.98 million).

❖ New Construction and Hazardous Waste Management Rules

❖ The Ministry of Environment and Forests has: (i) on March 29, 2016, notified the Construction and Demolition Waste Management Rules, 2016, replacing the Municipal Solid Waste (Management and Handling) Rules, 2000; and (ii) on April 4, 2016, notified the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 replacing the erstwhile rules of 2008.

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VC Circle, 2016

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Best National Corporate Law Firm
Best Overall National Law Firm of the Year
Legal Era 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 and Deal Value
Bloomberg's Global M&A, Legal Rankings H1, 2016

❖

Ranked No. 1 for the M&A Announced League Table by Deals Completed
Thomson Reuters' Emerging Markets M&A Review, Legal Advisors, H1, 2016

❖

Ranked No. 1 for the M&A Announced League Table by Deal Count and Deal Value
Thomson Reuters' Mid Market M&A Legal Rankings, India, 2016

❖

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

❖

Ranked No. 1 in APAC ex Japan Mid-Market by Deal Count (up to $250m)
Bloomberg's Global M&A, Legal Rankings, Q1 2016

❖

Ranked No. 1 in Asia-Pac buyouts by Deal Count
Mergermarket's Global and Regional M&A League Tables of Legal Advisors, Q1 2016

❖

Ranked No. 1 for the Indian M&A Announced League Table by Deal Count
Ranked No. 1 for India involved Mid-Market M&A Rankings
by Deal Count and Deal Value (up to US$ 500m)
Ranked No. 1 for India involved Small Cap M&A Rankings
by Deal Count and Deal Value (up to US$ 50m)
Thomson Reuters' Emerging Markets M&A Review, Legal Advisors, Q1 2016

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Law Firm of the Year | Best Overall Law Firm
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

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