Inter alia...

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

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Corporate & SCRA

❖ Notification of Cross-border Mergers

❖ On April 13, 2017, the Ministry of Corporate Affairs ('MCA') notified Section 234 (merger or amalgamation of a company with a foreign company) of the Companies Act, 2013 ('**Companies Act**'), paving the way for cross-border mergers and amalgamations. Simultaneously, the MCA notified an amendment to the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2016 ('**Merger Rules**') by inserting a new Rule 25A, which prescribes the rules governing (i) inbound mergers by foreign companies with Indian companies, and (ii) outbound mergers by Indian companies with foreign companies incorporated in certain 'notified jurisdictions'.

Section 234 of the Companies Act *inter alia* provides that, with the prior approval of the Reserve Bank of India ('RBI'), a foreign company may merge into an Indian company and *vice versa* and that the terms and conditions of the scheme of merger may provide, among other things, for payment of consideration to the shareholders of the merging company in cash, or in depository receipts, or partly in cash and partly in depository receipts. The amendment to the Merger Rules further prescribes that such cross-border mergers and amalgamations must adhere to the requirements under the Companies Act and that the valuation (in case of an outbound merger) be conducted by valuers who are members of a recognised professional body in the country of the transferee company and as per internationally accepted accounting standards and valuation.

While the MCA has now permitted cross-border mergers, there are certain aspects that would require evaluation for successful implementation of cross-border mergers, including feasibility of tax neutrality in all the relevant countries and evaluation of impact under other tax provisions such as general anti-avoidance rules etc.

❖ Draft Foreign Exchange Management (Cross Border Merger) Regulations, 2017

❖ Following the notification of Section 234 of the Companies Act, the RBI, on April 26, 2017, released the draft Foreign Exchange Management (Cross Border Merger) Regulations, 2017 ('**Draft Cross Border Merger Regulations**') to provide a regulatory framework for cross border mergers. Some of the key provisions of the Draft Cross Border Merger Regulations have been summarized below.

i. **Issue/ transfer/ acquisition of security:** Any issue or transfer of security by the resulting company is required to comply with the Foreign Exchange Management Act, 1999 ('FEMA') and the regulations issued thereunder.

ii. **Borrowings:**
   a. In inbound mergers, any borrowing from overseas sources entering the books of resultant company arising must conform to the External Commercial Borrowing ('ECB') norms or trade credit norms or other foreign borrowing norms.
   b. In outbound mergers, the resultant company must be liable to repay outstanding borrowings or impending borrowings as per the scheme sanctioned by the National Company Law Tribunal ('NCLT').

iii. **Repatriation on Contravention:** If the assets/ securities held by the resultant company is in contravention of the Companies Act or FEMA provisions, the resultant company would be required to sell those off within 180 days of the sanction of the scheme and the proceeds are to be repatriated to or outside India, as the case may require.

iv. **Valuation:** The valuation of both Indian and foreign company must be conducted as per internationally accepted pricing methodology, shares on arm's length basis and duly certified by an authorised chartered accountant/public accountant/ merchant banker in the relevant jurisdiction.

v. **Reporting:** Any transaction that arises in relation to the scheme must be reported in the same manner in which it is otherwise required to be reported under FEMA. The Indian company and the foreign company involved in an overseas merger will be required to furnish reports as prescribed by the RBI.

While Section 234 of the Companies Act only allows cross border mergers and amalgamations, the draft regulations include demergers and arrangements as well. Thus, this issue requires clarity and may need some amendments to the law. Further, effective implementation of the cross-border merger provisions will require amendments to FEMA, securities and tax laws, etc. While it is unclear how the proposed cross-border merger provisions will be specified under various laws, it may become a useful tool for companies to undertake expansion and restructuring activities.

❖ Additional Exemptions for Private Companies

❖ By way of notification dated June 13, 2017, the MCA has declared some additional exemptions to a specified class of private companies from certain provisions of the Companies Act, which have been summarized below:

i. The definition of 'Financial Statements' under Section 2(40) has been amended to provide that a private company which is a start-up[1] may not include cash flow statement as part of its financial statements.

ii. Section 73(2) of the Companies Act provides that companies may accept deposits from members subject to prescribed conditions, such as creation of a deposit repayment reserve account, maintenance of deposit insurance, etc. Following private companies are now exempted from complying with these requirements:
   a. A private company that accepts deposits from its members not exceeding the aggregate of 100% of the paid up share capital, free reserves and securities premium account; or
   b. For a period of five years from the date of incorporation for a start-up; or
   c. A private company (i) which is not an associate or subsidiary company of any other company; (ii) its borrowings from banks and financial institutions is less than twice its paid up share capital or ₹50 crores (approx. US$ 7.7 million), whichever is lower; and (iii) which has not defaulted in the repayment of borrowings from banks and financial institutions subsisting at the time of accepting deposits.

iii. Section 92(1)(g) provides that the annual returns prepared by a company should, *inter-alia*, provide details of remuneration to the directors and key managerial personnel. Pursuant to the exemption, private companies, which are small companies, are only required to provide details of the aggregate remuneration drawn by directors.

iv. As per the proviso to Section 92(1), annual return of one person companies and small companies are only required to be signed by the company secretary, or where there is no company secretary by the director of the company. This has now been made applicable to private companies which are start-ups.

v. A private company which: (i) is a one person company or a small company; or (ii) has turnover less than ₹50 crores (approx. US$ 7.7 million) as per the latest audited financial statements; or (iii) has aggregate borrowings at any point of time during the financial year less than ₹25 crores (approx. US$ 3.8 million), is exempt from the requirement under Section 143(5)(i) of the Companies Act of including under its auditor's report a statement on whether the company has adequate internal financial control systems in place and operating effectiveness of such controls.

vi. Start-ups have been exempted from the requirement of holding four board meetings in a year. Such companies are required to hold only one meeting of the Board in each half of the calendar year, provided that the gap between the two meetings is not less than 90 days.

vii. Interested directors can be counted towards quorum for adjourned board meetings of private companies under Section 174(3) of the Companies Act after disclosure of their respective interest pursuant to Section 184 of the Companies Act.

Benefits of the exemptions set out above can only be availed by a private company which has not committed a default in filing its financial statements under Section 137 or annual return under Section 92 of the Companies Act.

❖ Additional Exemptions for Section 8 Companies

❖ By way of notification dated June 13, 2017, the MCA has amended its earlier Notification GSR 466(E) dated June 5, 2015 ('**Section 8 Principal Notification**'), by prescribing additional exemptions for companies with charitable objects registered under Section 8 of the Companies Act ('**Section 8 Companies**') from compliance with certain provisions of the Companies Act, which have been summarised below:

i. Under the Section 8 Principal Notification, Section 8 Companies were exempted from complying with the minimum and maximum director requirements under Section 149(1) of the Companies Act. Pursuant to the recent amendment, Section 8 Companies are mandatorily required to have a minimum number of 3 directors (in the case of a public company) and 2 directors (in the case of a private company). However, there continues to be no limit on the maximum number of directors.

ii. As per Section 186(7) of the Companies Act, loans provided by any company to another person must bear interest not lower than at a rate specified under the Companies Act. Section 8 Companies are exempted from complying with this requirements if: (a) not less than 26% of its paid up share capital is held by the Central Government or any State Government(s) or both; and (b) the loan is being granted for funding industrial research and development projects, in furtherance of the objects stated in the memorandum of association of such Section 8 Company.

1 Means a private company recognized as a 'start-up' in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry

❖ Amendment to the Companies (Audit and Auditors) Rules, 2014

❖ Amendment to the Transfer of Pending Proceedings Rules, 2016

Benefits of exemptions set out above can only be availed by Section 8 Companies that have not committed a default in filing their financial statements under Section 137 or annual return under Section 92 of the Companies Act.

❖ By way of notification dated June 22, 2017, the MCA has notified an amendment to Rule 5 of the Companies (Audit and Auditors) Rules, 2014 ('**Audit Rules**'). Prior to the amendment, as per Section 139(2) of the Companies Act read with Rule 5, *inter alia* all private limited companies having a paid up share capital of ₹20 crores (approx. US$ 3 million) (or more), were permitted to appoint (i) an individual as the statutory auditor only for a single term of five consecutive years; and (ii) an audit firm as the statutory auditor only for two terms of five consecutive years. Pursuant to the amendment, the limit of ₹20 crores (approx. US$ 3 million) (or more) has been increased to ₹50 crores (approx. US$ 7.7 million) (or more).

❖ The MCA has by way of its notification dated June 29, 2017 amended the Companies (Transfer of Proceedings) Rules, 2016 ('**Transfer Rules**'), which specified rules for transfer of pending proceedings under the Companies Act, 1956 ('**CA 1956**') in relation to winding up and voluntary winding up of companies from the High Court to the NCLT. Rules 4 and 5 of the Transfer Rules have been amended as follows:

i. All proceedings related to voluntary winding up, where notice of resolution by advertisement has been given under CA 1956 but such company has not been dissolved before April 1, 2017, will continue to be dealt with under CA 1956 and not under the Insolvency and Bankruptcy Code, 2016 ('**IBC**').
ii. The erstwhile Rule 5 of the Transfer Rules provided for winding up proceedings pending before the High Court to be transferred to the NCLT. If the petition was not served on the respondent then such petitions, and the petitioner would, thereafter, be required to provide information as if such petition were an application under the IBC. The time for providing such information has now been extended up to July 15, 2017, failing which, such petition will stand abated and a fresh application under the IBC will have to be filed.

Foreign Exchange

❖ Abolition of the Foreign Investment Promotion Board

❖ The Department of Economic Affairs, Ministry of Finance ('**DEA**'), has, by way of an office memorandum dated June 5, 2017, notified the Government's approval to abolish the Foreign Investment Promotion Board ('**FIPB**'). 11 sectors (including telecom, broadcasting, defence and banking) would continue to require Government approval for foreign investments, while the responsibility to grant such approvals would now vest with the concerned administrative ministries / departments. Applications for investment in core investment companies or Indian investing companies, and investments in financial services sectors not regulated by any financial services regulator, will be processed by DEA.

Further, the following foreign investment proposals requiring Government approval, will be dealt with by the Department of Industrial Policy and Promotion ('**DIPP**'):

i. Trading (Single, Multi brand and Food Product Retail Trading);
ii. Proposals by non-resident Indians / export oriented units;
iii. Issue of equity shares under the Government route for import of capital goods / machinery / equipment (including second hand machinery); and
iv. Issue of equity shares for pre-operative / pre-incorporation expenses.

The DIPP will identify the relevant ministry in respect of applications where there is doubt about the administrative ministry concerned. The office memorandum also specifies that all applications pending with the FIPB portal as on the date of abolition of FIPB, will be transferred immediately by the DIPP to the relevant administrative ministry / department.

The DIPP has also issued a detailed standard operating procedure ('**SOP**') on June 29, 2017, which outlines the guidelines to the relevant administrative ministries / departments for processing of the FDI proposals. The SOP *inter alia* prescribes the process of inter-ministerial consultations as well as indicative timelines within which the proposals are to be assessed and disposed off. The applications will continue to be filed on the current online FIPB portal (now renamed as the 'Foreign Investment Facilitation Portal').

The SOP further prescribes that proposals involving a total foreign equity inflow of more than ₹5,000 crores (approx. US$ 772 million) will additionally require the approval of the Cabinet Committee on Economic Affairs (Ministry of Finance), and that the concerned ministry will also seek DIPP concurrence where a proposal is being rejected or being granted subject to conditions not specified in the relevant laws.

❖ Changes to Framework for Masala Bonds

❖ The RBI, by way of Circular No. 47 dated June 7, 2017, has reviewed the existing framework in relation to the issuance of rupee denominated bonds overseas ('**Masala Bonds**') in order to harmonize the various elements of the ECB framework and revised the framework. The circular provides as follows:

(i) Proposal for issuance of Masala Bonds will be examined by the Foreign Exchange Department; (ii) The minimum original maturity period for Masala Bonds up to US$ 50 million (equivalent in ₹per financial year) is 3 years and for Masala Bonds above US$ 50 million is 5 years. Previously, such bonds were subject to a minimum maturity of 3 years; (iii) The all-in-cost ceiling for Masala Bonds will be 300 basis points over the prevailing yield of the Government of India securities of corresponding maturity. Previously, the all-in-cost ceiling was to be commensurate with the prevailing market conditions; and (iv) Investors in Masala Bonds should not be related parties (within the meaning given in Ind-AS 24).

Capital Markets

❖ Disclosure Requirements for Issuance and Listing of Green Debt Securities

❖ The Securities and Exchange Board of India ('**SEBI**') has, by way of circular dated May 30, 2017, set out certain requirements to be considered, along with the requirements set out in the SEBI (Issue and Listing of Debt Securities) Regulations, 2008, for the issuance of and disclosures pertaining to 'Green Debt Securities'.

A debt security will be considered as a 'Green Debt Security', if the funds raised through its issuance are to be utilized for the following project(s)/ asset(s): (a) renewable and sustainable energy; (b) clean transportation; (c) sustainable water management; (d) climate change adaptation; (e) energy efficiency; (f) sustainable waste management; (g) sustainable land use; and (h) biodiversity conservation.

The issuer of green debt securities is required to make certain disclosures in its offer / disclosure documents including *inter alia*: (a) a statement on the environmental objectives of the issuance; (b) details of the system / procedures to be employed for tracking the deployment of proceeds of the issue; and (c) details of the project and/or assets where the issuer proposes to utilize the proceeds of the green debt securities.

❖ Amendment to the SEBI (Foreign Portfolio Investors) Regulations, 2014

❖ SEBI has amended the SEBI (Foreign Portfolio Investors) Regulations, 2014 ('**FPI Regulations**') with effect from May 29, 2017 to prohibit the issuance or transfer of an offshore derivative instrument ('**ODI**') to persons who are resident Indians or non resident Indians and to entities that are beneficially owned by resident Indians or non resident Indians.

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

❖ Pursuant to its notification dated May 31, 2017, the key amendments introduced to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('**ICDR Regulations**') are as follows:

i. The definition of Qualified Institutional Buyers ('**QIBs**') has been amended to include systemically important and RBI registered non-banking financial companies, having a net-worth of more than ₹500 crores (approx. US$ 77 million), as per the last audited financial statements.
ii. Regulation 16, which deals with monitoring agencies, has been amended to provide that:
   a. if the issue size, excluding the size of offer for sale ('**OFS**') by selling shareholders, exceeds ₹100 crores (approx. US$ 15 million), the use of proceeds is to be monitored by a public financial institution / scheduled commercial bank identified as the banker of the issue in the offer document;
   b. the monitoring agency will be required to submit quarterly reports to the issuer until utilization of at least 95% of the proceeds, excluding the proceeds under the OFS and amount raised for general corporate purposes; and
   c. the issuer to publically disseminate such report on its website and to the stock exchanges within 45 days from the end of each quarter.

❖ Participation of Category III Alternative Investment Funds in the Commodity Derivatives Market

❖ SEBI has by way of its circular dated June 21, 2017, permitted Category III Alternative Investment Funds to participate in the commodities derivatives market subject to the following conditions:

i. to participate on the commodity derivatives exchanges as 'clients', subject to compliance of all SEBI rules, regulations, position limit norms issued by SEBI / stock exchanges etc., as applicable to clients;
ii. to not invest more than 10% of the investable funds in one underlying commodity;
iii. leveraging or borrowing subject to consent from the investors and maximum limit

specified by SEBI (presently capped at 2 times the net asset value of the fund);

iv. disclosures to be made in the private placement memorandum of intent to invest in commodity derivatives, consent of existing investors to be taken and exit opportunities to be provided to the dissenting investors; and

v. to comply with SEBI reporting requirements.

❖ Proposals approved at SEBI Board Meetings

❖ Some of the key proposals approved in the board meetings of the SEBI held on April 26, 2017 and June 21, 2017 are as follows:

i. Amendment to the SEBI (Stock Brokers and Sub-brokers) Regulations, 1992 to permit stock brokers / clearing members currently dealing in commodity derivatives to deal in other securities and *vice versa*, without setting up a separate entity;

ii. Relaxations from preferential issue requirements under the ICDR Regulations and from open offer obligations under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 ('**SAST Regulations**') which are currently available to lenders undertaking strategic debt restructuring of listed companies in distress, and be extended to new investors acquiring shares in such distressed companies pursuant to such restructuring schemes. Such relaxations, however, will be subject to shareholder approval by way of a special resolution and lock-in of shares for a minimum period of 3 years. The relaxations will also be extended to lenders under other restructuring schemes undertaken in accordance with the guidelines of the RBI;

iii. Exemption from open offer obligations under the SAST Regulations, for acquisitions pursuant to resolution plans approved by the NCLT under the IBC;

iv. Extension of relaxations in relation to the lock-in provisions currently available to Category I AIFs in case of an initial public offering to Category II AIFs as well;

v. Proposal for initiation of a public consultation process to make amendments to the FPI Regulations: (a) expansion of the eligible jurisdictions for the grant of FPI registrations to Category I FPIs by including countries having diplomatic tie-ups with India; (b) simplification of broad based requirements; (c) rationalization of fit and proper criteria; and (d) permitting FPIs operating under the multiple investment managers structure and holding FVCI registration to appoint multiple custodians; and

vi. Levy of a regulatory fee of US$ 1,000 on each ODI subscriber, once every 3 years, starting from April 1, 2017 and to prohibit ODIs from being issued against derivatives except those which are used for hedging purposes.

❖ Recording of Non Disposal Undertaking in the Depository System

❖ In order to enable the recording of non-disposal undertakings ('**NDU**') in the depository system, SEBI has, by way of circular dated June 14, 2017, permitted depositories to offer a system for capturing and recording NDUs subject to prescribed conditions. The provisions of the circular are required to be implemented by the depositories within four months.

Pursuant to the circular, on the creation of the freeze for recording the NDU, the depository will not effect any transfer, pledge, hypothecation, lending, rematerialisation or alienation in any form or any dealing of the encumbered securities till instructions are received from both parties for the cancellation of the NDU. The depository participants are prohibited from facilitating or being parties to any NDU created outside the depository system.

❖ Review of OFS of Shares through Stock Exchange Mechanism

❖ SEBI has modified the guidelines pertaining to OFS of shares through stock exchange mechanism by way of its circular dated June 27, 2017. The rationale for such revisions was to encourage greater participation by employees. The key modifications are as follows:

i. Promoters of eligible companies are permitted to sell the shares within 2 weeks from the OFS transaction to the employees, and such an offer would be considered to be a part of the OFS transaction.

ii. Promoters have the discretion to offer the shares at the price discovered in the OFS transaction, or at a price which is at a discount to such discovered price.

Promoters are required to make necessary disclosures in the OFS notice disseminated to the stock exchanges, and such disclosure would be required to contain details of the number of shares offered to employees and the discount offered, if any.

Banking and Finance

❖ Clarifications on Framework for Revitalizing Distressed Assets

❖ The RBI has, by a notification dated May 5, 2017, issued clarifications on the Framework for Revitalizing Distressed Assets in the Economy – Guidelines on Joint Lenders' Forum ('**JLF**') and Corrective Action Plan ('**CAP**') after observing delays in finalizing and implementation of the CAP, leading to delays in resolution of stressed assets in the banking system. These clarifications include:

i. CAP can also include resolution by following the process stipulated under the 'Flexible Structuring of Project Loans' ('**5-25 Scheme**') – the change of ownership under the 'Strategic Debt Restructuring Scheme' ('**SDR Scheme**') and the 'Scheme for Sustainable Structuring of Stressed Assets', ('**S4A Scheme**'), etc.

ii. Lenders must adhere to the prescribed timelines for finalizing and implementing the CAP decisions and decisions agreed upon by a minimum of 60% of creditors by value and 50% of creditors by number in the JLF would be considered binding on all lenders.

iii. RBI has additionally noted that the stand of the participating banks while voting on the final proposal before the JLF shall be unambiguous and unconditional. Any bank which does not support the majority decision on the CAP may exit subject to substitution within the stipulated timelines, failing which it shall abide the decision of the JLF (as decided above) and that the bank shall implement the JLF decision without any additional conditions. Non-adherence to the instructions and frameworks under the timeline may attract monetary penalties.

Insurance

❖ IRDAI (Outsourcing of Activities by Indian Insurers) Regulations, 2017

❖ On April 20, 2017, the Insurance Regulatory and Development Authority of India ('**IRDAI**') issued the IRDAI (Outsourcing of Activities by Indian Insurers) Regulations, 2017 ('**Outsourcing Regulations**'), which supersede the guidelines previously issued on February 1, 2011. Some of the salient features of the Outsourcing Regulations are set out below:

i. "Core" functions of insurers have been prescribed, which are prohibited from being outsourced, including investment functions, product designing, actuarial functions (including risk management) and redressal of policyholders' grievances.

ii. The board of directors of an insurer is required to: (a) approve and put in place an outsourcing policy; and (b) constitute a committee comprising of key management persons, which has to mandatorily include the chief risk officer, chief financial officer and chief of operations. The committee is, *inter alia*, to be responsible for effective implementation of outsourcing policy, actions undertaken by each outsourcing service provider ('**OSP**'), by annual performance evaluation of each OSP and reporting exceptions to the board of directors.

iii. Outsourcing arrangements are to be governed by legally binding agreements for a specified period which describe all important aspects of the arrangement, and can be subject to periodical renewals, if necessary.

iv. To avoid conflicts of interest, outsourcing arrangements with related parties / group entities of insurers or insurance intermediaries registered with IRDAI ('**RPs**') are to be avoided. Where such arrangements are proposed to be implemented, insurers are required to ensure that the consideration amount agreed upon with the RP, and modifications thereon (if any) will be subject to specific approval of the outsourcing committee.

v. Existing outsourcing arrangements to which these Outsourcing Regulations become applicable are to be appropriately amended within 180 days from the date of coming into effect of the Outsourcing Regulations to ensure compliance. All outsourcing arrangements with an annual pay-out either per OSP / activity of ₹1 crore (approx. US$ 155,100) or more, are to be reported to the IRDAI in a prescribed format within 45 days from the close of a financial year.

Telecommunications

❖ Clarification on Direct Carrier Billing for Digital Content

❖ On March 23, 2017, the Department of Telecommunications ("**DoT**") has clarified, that mobile subscribers are permitted to download all paid digital content (such as e-books, applications, etc.) through their mobile phones, and make payments for such content using pre-paid account balance or post-paid bill payment methodology. The DoT has prescribed that the maximum value of such payments will be ₹20,000 (approx. US$ 310) per transaction. Further, the DoT has also clarified that such purchase of digital content will not be treated as a pass-through revenue for the purpose of computing the adjusted gross revenue for licence fee and spectrum usage charge.

❖ Amendment to the Unified Licence Agreement

❖ The DoT has, by way of notification dated June 23, 2017, amended the unified license in respect of the 'Technical and Operating Conditions' for ASP. Pursuant to the amendment, the Telecom Service Provider ('**TSPs**') can deploy any of its equipments anywhere in India (whereas earlier the TSPs could only deploy the IP based Next Generation Network, Media Gateway Controller, Soft Switch: (i) within the geographical boundaries of any of the authorised service area, provided the TSP had Access Services authorisation, or (ii) anywhere in India, if the TSPs had authorisation for National Long Distance ('**NLD**')/International Long Distance ('**ILD**') service), subject to interconnection points being located and operated in the service areas for inter operator, inter service area, NLD and ILD calls and meeting security conditions as mentioned in the licence. Further, the amendment has also deleted the requirement to intimate the DoT of the commissioning of the abovementioned equipment.

Taxation

❖ Goods and Services Tax

❖ Goods and Services Tax ('**GST**') has come into force with effect from July 1, 2017, and the Central Goods and Services Tax Act, 2017 ('**CGST**'), The Integrated Goods and Services Act, 2017 ('**IGST**') and the Union Territory Goods and Services Tax Act, 2017 ('**UTGST**') were notified in this regard. Further, all States have notified their respective State GST laws as well. Some of the key aspects of GST are as under:

i. GST is a levy on 'Supply' of goods and services in India and would be computed on the value of such supply. It is structured to be a dual GST i.e. GST would be levied by both Central and State Governments on a transaction. The indirect taxes such as excise duty, service tax, and State value added taxes, entry tax, entertainment tax and similar taxes have been subsumed into GST.
ii. The threshold exemption limit prescribed under GST is ₹2,000,000 (approx. US$ 30,880) and ₹1,000,000 (approx. US$ 15,440) for certain special category states. The threshold exemption would not apply in certain cases e.g. a non-resident taxable person, e-commerce operator, etc.
iii. For computing GST, the value of supply of goods or services would be the 'transaction value', which is the price actually paid or payable for supply of goods or services. However, in case of related party transactions or other specified situations, the taxable value will be determined as per the prescribed valuation rules.
iv. Under GST, broadly the tax rates prescribed are nil rate, 5%, 12%, 18% and 28%. Applicable rates for goods and services would depend on the nature of such goods, services and classification thereof.
v. Certain supplies have been declared as non-supplies of goods and services for the purposes of GST. These include services by an employee, services by a Court or Tribunal and sale of land or building. Additionally, certain goods have also been exempted from GST.
vi. Rules dealing with, *inter alia*, registration, valuation, input tax credits, returns, search and seizure and maintenance of records under GST have been notified.
vii. An enabling provision on 'anti-profiteering' has been introduced which requires businesses to pass on any benefit obtained under GST as a result of reduction in rate of tax or input tax credit to customers by way of commensurate reduction in prices. An authority and mechanism has been set up to examine and monitor the implementation of these measures.

❖ Qualification for Long Term Capital Gains Tax Exemption

❖ Finance Act, 2017 ('**Finance Act**') had amended Section 10(38) of Income Tax Act, 1961 ('**ITA**') to withdraw the long-term capital gains tax exemption available on transfer of listed equity shares acquired on or after October 1, 2004 and which were not chargeable to Securities

Transaction Tax ('STT'). However, the Central Government was authorized to carve out those transactions, which would not lose the capital gains tax exemption, by issuing a notification in that regard.

In pursuance thereof, the Central Board of Direct Taxes ('CBDT') has issued a notification dated June 5, 2017 listing both, *i.e.* the transactions which will lose exemption and also those transactions which will not lose the exemption, as per details below:

i. Acquisition of existing listed equity shares in a company, whose equity shares are not frequently traded in a recognized stock exchange of India, which are made through a preferential issue. However, the following acquisition of listed equity shares (even if made through a preferential issue) are protected and continue to be covered by Section 10(38) exemption:
   a. Acquisition of shares which has been approved by the Supreme Court ('SC'), High Court ('HC'), NCLT, SEBI or RBI in this behalf;
   b. Acquisition of shares by any non-resident in accordance with foreign investment guidelines;
   c. Acquisition of shares by an Investment fund or a Venture Capital Fund or a QIB; and
   d. Acquisition of shares through a preferential issue to which the provisions of Chapter VII of the ICDR Regulations do not apply.

ii. Transactions for acquisition of existing listed equity shares in a company which are not entered through a recognized stock exchange. However, the following acquisitions of listed equity shares are protected (even if not made through a recognized stock exchange) and continue to be covered by Section 10(38) exemption.
   a. Acquisition through an issue of share by a company other than preferential issue, as an example receipt of bonus shares, shares upon conversion of instruments or splitting of shares;
   b. Acquisition by scheduled banks, reconstruction or securitization companies or public financial institutions during their ordinary course of business;
   c. Acquisition which has been approved by the SC, HCs, NCLT, SEBI or RBI in this behalf;
   d. Acquisition under employee stock option scheme or employee stock purchase scheme framed under the SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;
   e. Acquisition of shares by any non-resident in accordance with foreign investment guidelines;
   f. Acquisition of shares under SAST Regulations;
   g. Acquisition from the Government;
   h. Acquisition of shares by an Investment fund or a Venture Capital Fund or a QIB; and
   i. Acquisition by mode of transfer referred to in Sections 47 or 50B of the ITA if the previous owner of such shares has not acquired them by any mode which is not eligible for exemption as per this notification.

iii. Acquisition of equity shares of a company during the period of its delisting from a recognized stock exchange.

Real Estate

❖ Maharashtra Rules Notified under Real Estate (Regulation and Development) Act, 2016

❖ The Government of Maharashtra has by way of notification no. 23 dated March 8, 2017 established Maharashtra Real Estate Regulatory Authority ('**MahaRERA**'), for regulation and promotion of the real estate sector in the State of Maharashtra. Additionally, the Housing Department, Maharashtra also released the Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, rates of interest and disclosures on websites) Rules, 2017 dated April 20, 2017, which came into effect on May 1, 2017 ('**Rules**'). The Rules *inter alia* set out (i) information required to be furnished by promoters for registration of a real estate project, (ii) parameters for ascertaining land cost; and (iii) the model form of the agreement for sale to be entered into with the allottees. Further, in the case of a termination or cancellation of the registration of a project (i.e. either by MahaRERA or by the association of allottees) the authority is required to take measures to protect the interests of lenders having a mortgage or investors, as disclosed by the promoter and the Rules require that an opportunity be given to such party.

Intellectual Property

❖ Well-known Trademarks

❖ The Trade Marks Rules, 2017 ('**New Rules**') and the public notice dated May 22, 2017 issued by the Trade Marks Registry *inter alia* provide for a mechanism whereby brand owners can file an application with the Registrar of Trademarks ('**Registrar**') for determination of a trademark as 'well known'[2]. The key provisions in connection with this mechanism have been briefly summarized below:

i. The application to the Registrar for determination of a trademark as 'well-known' will have to be based on, *inter alia*, the following criteria:
   a. knowledge or recognition in the relevant section of the public;
   b. duration, extent, geographical area of use and promotion / advertisement;
   c. duration and geographical area of any registration of or any application for registration reflecting use or recognition of the trade mark;
   d. record of successful enforcement of the rights by any court or the Registrar; and
   e. number of actual or potential consumers / person involved in the distribution of the goods or services.

The application will have to be accompanied by documentary evidence for each fact that is sought to be claimed including evidence as to use of the trademark, including publicity and advertisement, applications for registration made or obtained in India and outside, annual sale turnover based on the trademark etc.

ii. If the Registrar determines that the trademark is well-known and after deciding on the objections received (if any), the Registrar will publish the mark in the Trademark Journal and include it in the list of well-known trademarks. An appeal lies to the Intellectual Property Appellate Board ('**IPAB**') within three months from the date of any decision of the Registrar.

The New Rules do not provide for a specific time frame within which the Registrar will determine if the mark is well-known. One of the main advantages of the 'well known' mark status in India, if the mark is registered, is the availability of a remedy of dilution under Section 29(4) of the Trade Marks Act, 1999.

❖ Copyright Board Merged with the IPAB

❖ Sections 160 and 161 of the Finance Act, which have come into force on May 26, 2017, amend the provisions of the Copyright Act, 1957 and the Trade Marks Act, 1999 to pave way for the merger of the Copyright Board with the IPAB. As a result, all the functions of the Copyright Board (including adjudicating disputes in relation to assignment of copyright, granting of compulsory licenses and statutory licenses in relation to certain types of works) will now get transferred to the IPAB.

Pursuant to powers granted under the Finance Act, the Central Government has promulgated and brought into force the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 ('**Tribunal Rules**') which govern the qualifications, experience and other conditions of service of the members of various tribunals, including the IPAB. According to the Tribunal Rules, a search-cum-selection committee would be responsible for the recruitment of members for the IPAB.

Given the fact that the Copyright Board has not been functional for quite a few years now, the merger of the Copyright Board with the IPAB gives a forum to the concerned stakeholders to seek redressal of their grievances. However, it still remains to be seen how effectively the IPAB will be able to perform the tasks, roles and responsibilities erstwhile carried out by the Copyright Board, given the huge backlog of pending matters at the IPAB.

❖ Summary Judgment by the Delhi HC in a Trademark Suit

❖ In the case of **Ahuja Radios *v.* A Karim**,[3] filed under the Commercial Courts Act, 2015, the Delhi HC, by its order dated May 1, 2017, passed a summary judgment granting a permanent injunction restraining infringement of trademark, passing off and delivery in favour of the plaintiff, *i.e.* Ahuja Radios.

The plaintiff had procured an interim injunction on March 6, 2013 against the defendant restraining the defendant from dealing in products (being public address systems and audio equipment) bearing the plaintiff's model number 'SSA 250 M' under the 'AHUJA' trademark or those which were deceptively similar. Thereafter, upon the inspection of the defendant's premises by a local commissioner on April 3, 2013, amplifiers of 250 W [Model No. SSA 250 M] were recovered and the Commissioner's report mentioned that the defendant had admitted to the

2 The term 'well-known trade mark', in relation to goods or services, is defined under Section 2(1)(zg) of the Trade Marks Act, 1999 to mean a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

3 Ahuja Radios *v.* A Karim, CS(OS) 447/2013, Delhi High Court (order dated May 01, 2017).

amplifiers not being original. Despite of the defendant's allegation that the recovered amplifiers were fraudulently implanted at its premises, the Delhi HC determined that the plaintiff is the undisputed registered proprietor of the trademark in question and that the defendant is not entitled to use the same. The Court noted that the defendant has no real prospect of resisting the decree of injunction and also has little prospect of succeeding in its defense.

Litigation & Arbitration

❖ In **Indus Mobile Distribution Private Limited *v.* Datawind Innovations Private Limited**,[4] the SC held that an arbitration clause, pursuant to which a place has been determined as the 'seat', would vest the Courts of such place with exclusive jurisdiction for the purpose of regulating the arbitral proceedings. This is irrespective of the fact that such a venue may not, in the classical sense, have jurisdiction over the dispute at all, in that no part of the cause of action may arisen at such venue. Pursuant to this decision, the SC distinguished arbitral law from the law contained in the provisions of the Code of Civil Procedure, 1908 ('**CPC**') and observed that while under CPC, jurisdiction is closely linked to the place at which the cause of action of arises, under arbitral law, the courts having jurisdiction over the place designated as the seat of the arbitration would have exclusive jurisdiction for the purposes of regulating arbitral proceedings arising out of the agreement between the parties.

❖ Designation of the Seat of Arbitration is Akin to an Exclusive Jurisdiction Clause

❖ In **Kinnari Mullick *v.* Ghanshyam Das Damani**,[5] the SC held that Section 34(4) of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') does not allow the Court to *suo motu* relegate the parties back to the arbitral tribunal after having set aside the arbitral award. It held that the limited discretion available to the Court under Section 34(4) of the Arbitration Act to relegate the parties back to the arbitral tribunal can be exercised only upon a written application made by a party to the arbitration proceedings and not *suo motu*.

❖ Courts have no Power to Relegate Parties before the Arbitral Tribunal after having set aside the Arbitral Award and on its Own Motion

❖ In **Kirusa Software Private Limited *v.* Mobilox Innovations Private Limited**,[6] the National Company Law Appellate Tribunal ('**NCLAT**') held that the term '*dispute*' has to be given a wide meaning, for the purpose of Sections 8 and 9 of the IBC, which deal with applications made by an operational creditor. In the instant case, NCLAT held that the term '*dispute*' has to be given an inclusive meaning and not an exhaustive one, provided it is relatable to the existence of the amount of the debt, quality of good or service or breach of a representation or warranty as provided under Section 5(6) of the IBC. The term should thus cover all disputes on debt, default etc. without being limited to only two ways of disputing a demand made by an operational creditor, *i.e.* a pending suit or an arbitration.

The NCLAT however also cautioned against an illusory dispute being raised for the first time while replying to the notice under Section 8 of the IBC as a tool to reject an application under Section 9 of the IBC.

❖ Scope of the term 'dispute' under Section 5 (6) of the IBC

❖ On April 28, 2017, Bombay HC, in the case of **Aircon Beibars FZE *v.* Heligo Charters Pvt. Ltd** held that Section 9 of the Arbitration Act, as amended by the Arbitration (Amendment) Act, 2015, can be invoked in relation to a foreign award prior to the enforcement of such award under Section 48 of the Arbitration Act.

The Petitioners, Aircon Beibars FZE ('**Aircon**'), made an application under Section 9 of the Arbitration Act for an order of injunction to protect the assets of the respondent company, Heligo Charters Pvt. Ltd. ('**Heligo**'), in order to secure the amount of a final award dated January 25, 2017, made by an arbitral tribunal seated in Singapore in favour of Aircon. An ad-interim order in these terms had already been passed by the Bombay HC on April 17, 2017.

The primary issue before the Bombay HC was whether Section 9 of the Arbitration Act as amended by the Amendment Act would apply to a foreign seated arbitration which commenced after the Amendment Act came into force, and where the award had not yet been enforced under Section 48 of the Arbitration Act. The Bombay HC therefore allowed the respondent's petition and confirmed the ad-interim order dated April 17, 2017, to come to its finding that the amended Section 9 of the Arbitration Act would be applicable to awards pending recognition under Section 48 of the Arbitration Act.

❖ Applicability of Section 9 of the Arbitration and Conciliation Act, 1996 to Foreign Awards Prior to Enforcement under Section 48

4 Civil Appeal Nos. 5370-5371 of 2017.
5 Civil Appeal No. 5172 of 2017 (Arising out of SLP (Civil) no. 2370 of 2015).
6 Company Appeal (AT) (Insolvency) 6 of 2017.

AZB & PARTNERS
ADVOCATES & SOLICITORS

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Law Firm of the Year
VC Circle, 2017, 2016 & 2015

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Client Service Law Firm of the Year
Chambers Asia-Pacific Awards, 2017

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Ranked No. 1
for the M&A Announced League Table by Deal Volume and Deal Value
Bloomberg's Global M&A, Legal rankings, H1, 2017

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Ranked No. 1
for India in the M&A Rankings by Deal Volume
Mergermarket's Global and Regional M&A League Tables of Legal Advisors, H1, 2017

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Ranked No. 1
for the Indian M&A Announced League Table by Deal Completed by Value
Ranked No. 1
or the Indian M&A Announced League Table by Deal Announced by Value and Volume
Ranked No. 1
for Asia Pacific Emerging Market by Deal Announced by Deal Value and Volume
Thomson Reuters' Emerging Markets M&A Legal rankings H1, 2017

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Ranked No. 1
for PE and M&A Rankings by Deal Volume and Deal Value
Venture Intelligence League Tables of Legal Advisors, H1, 2017

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

❖

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

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

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