Inter alia...

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In This Issue

PAGE

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

❖ Commencement of Certain Provisions of the Companies (Amendment) Act, 2017

❖ In the Special Edition of *Inter alia* (April 2018), we had highlighted the key amendments to the Companies Act, 2013 ('**Companies Act**') proposed to be introduced pursuant to the provisions of the Companies Amendment Act, 2017 ('**Amendment Act**'), as and when notified. With effect from May 7, 2018, the Ministry of Corporate Affairs ('MCA') has notified certain provisions of the Amendment Act ('**MCA Notification**'). Set out below are the key amendments to the Companies Act that have been notified by way of the MCA Notification:

i. Section 2(6) of the Companies Act (definition of 'associate') has been amended to modify the meaning of the term 'significant influence' and clarify the meaning of the term 'joint venture', as used in the definition of 'associate';
ii. In the definition of subsidiary, the phrase 'total share capital' has been replaced with 'total voting power'. Along with this amendment, the MCA has issued a notification dated May 7, 2018, deleting the definition of 'total share capital'[1] under Rule (2)(1)(r) of the Companies (Specification of Definitions Details) Rules, 2014 as the term is not used under the Companies Act anymore;
iii. Amendments to Section 26 of the Companies Act relating to matters to be disclosed in the prospectus;
iv. Section 54(1) of the Companies Act has been amended by deleting the criterion of one year having elapsed from the date the company had commenced business for it to be eligible to issue sweat equity shares;
v. Section 89 of the Companies Act has been amended to introduce the definition of "beneficial interest" for the purpose of Sections 89 and 90 by inserting a new subsection (10);
vi. Section 90 of the Companies Act has been amended to incorporate provisions relating to declaration of significant beneficial interest;
vii. Section 129(3) of the Companies Act has been amended by extending the requirement to prepare consolidated financial statements to cover both subsidiaries and associates (earlier, only subsidiaries were covered);
viii. Section 139(1) of the Companies Act has been amended by deleting the requirement for appointment of auditors to be ratified by shareholders at every general meeting;
ix. Section 149 of the Companies Act has been amended to clarify the residency requirement of directors for newly incorporated companies and to amend the eligibility criteria for independent directors;
x. Section 164 of the Companies Act has been amended to provide that a person appointed as a director of a company, who is in default of Section 164(2), would not incur the disqualification for a period of six months from the date of their appointment;
xi. Section 167 of the Companies Act has been amended in connection with the circumstances in which the office of a director is vacated;
xii. Section 173(2) of the Companies Act has been amended to provide directors with the ability to attend meetings, to consider certain matters through video conferencing and other audio visual means;
xiii. Section 177 of the Companies Act has been amended to modify the circumstances in which a company is required to constitute an audit committee and amends the terms of reference of the audit committee;
xiv. Section 178 of the Companies Act has been amended to modify the circumstances in which a company is required to constitute a nomination and remuneration committee and amends the role of such nomination and remuneration committee;
xv. Section 185 of the Companies Act has been amended to modify the provisions relating to companies granting loans, giving guarantee or providing security to directors and certain persons/entities considered to be related to such director; and
xvi. Section 186 of the Companies Act has been amended relating to loans/guarantees/security provided by or securities of another body corporate acquired by, a company.

❖ Amendments to Companies (Meetings of Board and its Powers) Rules, 2014

❖ The MCA has, by way of notification dated on May 7, 2018, amended the Companies (Meetings of Board and its Powers) Rules, 2014 ('**Board Meeting Rules**'). The key amendments are:

i. Rule 4 of the Board Meeting Rules provides a list of matters which had to be dealt with only in a physical meeting of the board of directors of a company. Pursuant to the amendment, in respect of these matters, directors are now been permitted

1 The term 'total share capital' was defined to mean the aggregate of (a) the paid-up share capital, and (b) the convertible preference capital.

to participate in such a meeting through video conferencing or other audio visual means, provided that the quorum to constitute such a board meeting is present through physical presence of directors. This has also been clarified by way of an amendment to Section 173(2) of the Companies Act, effective from May 7, 2018.

ii. Rule 6 of the Board Meeting Rules required every 'listed company' to set up an audit committee and a nomination and remuneration committee. Pursuant to the amendment, this requirement has been restricted only to only 'listed public companies'.

Foreign Exchange

❖ Changes in Investment in Debt Securities by Foreign Portfolio Investors

❖ The Reserve Bank of India ('**RBI**') recently issued a notification dated June 15, 2018, in supersession of the RBI notifications dated April 27, 2018 and May 1, 2018, for providing some operational flexibility as well as transition path for investments by Foreign Portfolio Investors ('**FPIs**') in debt ('**Notification**'). Below is a summary of the key changes brought about by this notification:

i. **Reduced minimum residual maturity for corporate bonds:** The minimum residual maturity requirement for investments by FPIs in corporate bonds has reduced from three years to one year (subject to the condition that short-term investments[2] in corporate bonds by a FPI, calculated on an end-of-day basis, must not exceed 20% of the total investment of that FPI in corporate bonds). Investments: (a) made in security receipts issued by asset reconstruction companies ('**SRs**'); or (b) made on or before April 27, 2018, must not be included to calculate such limit.

ii. **Single/ Group investor wise concentration limits:** This notification imposes the following investor and group wise limits for investments in corporate bonds:
   - *Per 'issue' limit:* FPIs can invest in any issue of corporate bonds subject to a cap of 50% of such issue. If such limit is already breached by investments made by an FPI and/or its investor group, such FPIs may not make further investments in such issue until such limit is met. This requirement is not applicable in respect of investments by FPIs in SRs.
   - *Per 'corporate' limit:* As on April 27, 2018, FPIs cannot have an exposure of more than 20% of its entire corporate bond portfolio to a single corporate (this includes exposures to related entities of the corporate). If the exposure exceeds 20%, the FPI cannot make further investments in that corporate / group until the above concentration limit is met. Investments in new corporate bonds made by the FPI after April 27, 2018 (in corporates other than those referred to in para a) above) will have to meet the 20% corporate limit from April 1, 2019 onwards. FPIs registering after April 27, 2018 are permitted to comply with this requirement by: (a) March 31, 2019; or (b) six months from the date of registration, whichever is later. The restrictions mentioned above in respect of corporate bonds are not applicable to investments by multilateral financial institutions and to investments by FPIs in SRs.

iii. **Relaxation of norms for pipeline investments:** Investment transactions by FPIs in corporate bonds that were under process but had not materialised as on April 27, 2018 (pipeline investments), will be exempt from the 'per issue' limit and 'per corporate' limits described above, subject to the custodian of the FPI reasonably satisfying itself that: (a) the major parameters such as price/rate, tenor and amount of the investment have been agreed upon between the FPI and the issuer on or before April 27, 2018; (b) the actual investment will commence by December 31, 2018; and (c) the investment is in conformity with the extant regulations governing FPI investments in corporate bonds prior to April 27, 2018.

iv. **Concentration limits per category of FPI:** The following limits for the relevant category, *inter alia*, have been prescribed by this notification for investments by FPIs in Central Government securities ('**G-secs**'), State Department Loans ('**SDLs**') and corporate debt securities: (i) 15% of the prevailing limit; and (ii) 10% of the prevailing limit.

v. **Minimum residual maturity for G-secs:** The Notification permits FPIs to invest in G-secs (including in treasury bills and SDLs) without any minimum residual maturity requirement, provided that investments by a FPI in securities with residual maturity less than one year, will not exceed 20% of the total investment of that FPI in that category.

2 Investments with residual maturity up to one year.

vi. The cap on aggregate FPI investments in Central G-secs has been increased from 20% to 30% of the outstanding stock of that security.
vii. FPIs have been prohibited from investing in partly paid instruments.

Capital Markets

❖ Know Your Client Requirements for FPIs

❖ SEBI has, by way of its circular dated April 10, 2018, prescribed the following key changes to the existing Know Your Client ('**KYC**') requirements for FPIs:

i. Identification and verification of beneficial owner ('**BO**') should be in accordance with Rule 9 of Prevention of Money Laundering (Maintenance of Records) Rules, 2005 ('**PMLA Rules**'). Accordingly, the BOs of FPIs having a company or trust structure should be identified on controlling ownership interest and control basis, and in case of partnership firms and unincorporated association of individuals, should be identified on ownership or entitlement basis.
ii. The materiality threshold for identification of BOs on controlling ownership interest will be: (i) 25% in case of a company; and (ii) 15% in case of a partnership firm, trust and unincorporated association of persons. In respect of FPIs from 'high risk jurisdictions', intermediaries may apply lower materiality threshold of 10% for identification of BOs and also ensure compliance with KYC documentation as applicable for category III FPIs. This threshold will first be applied at the FPI level, and next look through principle will be applied to identify the BO of the material shareholder / owner entity level. When no BO is identified, the BO will be the senior managing official of the FPI.
iii. Non Resident Indians ('**NRIs**') / Overseas Citizens of India ('**OCIs**') / resident Indian cannot be BOs of FPIs. However, if an FPI is Category II investment manager of other FPIs and is a non-investing entity, it may be promoted by NRIs / OCIs.

Clubbing of investment limits for FPIs will also be based on the abovementioned manner of identification of BOs.

❖ Amendments to the SEBI Listing Regulations

❖ The key amendments introduced by the Securities and Exchange Board of India ('**SEBI**') on May 9, 2018 to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**Listing Regulations**') are as follows:

i. Any person or entity belonging to the promoter or promoter group holding 20% or more of the shareholding in the listed entity is now deemed to be a 'related party'.
ii. Payments made by the listed entities to related parties with respect to brand usage/royalty amounting to more than 2% of consolidated turnover of the listed entity as per the last audited financial statements, will be considered to be a material related party transaction.
iii. The definition of 'independent director' has been amended to exclude: (i) any director who is or was a member of the promoter group of the listed entity; and (i) any director who is not a non-independent director of another company on the board of which any non-independent director of the listed entity is an independent director.
iv. At least one independent woman director is required to be appointed on the Board of the top 500 listed entities by April 1, 2019, and of the top 1000 listed entities by April 1, 2020.
v. The threshold for determining whether a subsidiary is a 'material subsidiary' has been reduced from 20% to 10% of the consolidated income or net worth of the listed entity and its subsidiaries in the previous accounting year.
vi. Additional requirements have been imposed in relation to age limits for non-executive directors, eligibility criteria for the chairman of the board, quorum for board and committee meetings, remuneration of directors and other related matters.
vii. No person can be a director on the Board of more than eight listed companies (with effect from April 1, 2019) and seven listed companies (with effect from April 1, 2020).
viii. Listed companies are now required to include clear threshold limits, duly approved by the Board of Directors, in their materiality policy for related party transactions and such policy must be reviewed once every three years.

❖ Implementation of Certain Recommendations of the Committee on Corporate Governance

❖ SEBI has issued a circular dated May 10, 2018 ('**Circular**') that provides for implementation of certain recommendations of the committee on corporate governance under the chairmanship of Uday Kotak. The following provisions will now apply to entities whose equity shares are listed on a recognized stock exchange:

i. **Disclosures on Board Evaluation:** A listed entity may consider including observations about Board evaluation of the current year, the previous year's observations and any actions taken pursuant to the same and proposed actions based on the current year's observations as part of its disclosure on Board's evaluation.
ii. **Group Governance Units:** If a listed entity has several unlisted subsidiaries, it may monitor their governance through a dedicated group governance unit or governance committee comprised of members of its Board and a strong and effective group governance policy.
iii. **Medium term and long term strategy:** The listed entity may consider disclosing its medium-term and long-term strategy under the management discussion and analysis section of the annual report, within limits of its competitive position and for a time frame as set by the board of directors. Additionally, the listed entity may articulate a clear set of long-term metrics specific to the company's long term strategy to allow for appropriate measurement of progress.

❖ Guidelines for Preferential Issue of Units by Invits

❖ SEBI issued a circular dated June 5, 2018 ('**Circular**') setting out guidelines for preferential issue of units by Invits.As per the Circular, listed Invits may make a preferential issue of units to an institutional investor subject to the fulfillment of the following conditions:

i. **Conditions for preferential issue:** (a) Unitholders of the Invit have to pass a resolution approving the preferential issue; (b) Invit must be in compliance with the minimum public unitholding requirements, conditions for continuous listing and disclosure obligations; (c) No preferential issue of units by the Invit should have been made in the six months preceding the relevant date and the issue will be completed within 12 months of the authorizing resolution; (d) The preferential issue of units can be offered to a minimum of two and maximum of 1000 investors in a financial year.
ii. **Placement document:** The preferential issue of units by an Invit will be done on the basis of a placement document, which must contain disclosures as specified in the Circular. While seeking in-principle approval from the recognised stock exchange, InvIts to furnish a copy of the placement document, a certificate issued by its merchant banker or statutory auditor confirming compliance with the provisions of this Circular along with any other documents required by the stock exchange.
iii. **Pricing:** The preferential issue is required to be made at a price not less than the average of the weekly high and low of the closing prices of the units quoted on the stock exchange during the two weeks preceding the relevant date. The Invit cannot allot partly paid-up units. Further, the prices determined for preferential issue will be subject to appropriate adjustments, if the Invit: (i) makes a right issue of units; and (ii) is involved in such other similar events or circumstances, which in the opinion of the concerned stock exchange, requires adjustments.
iv. **Restriction on allotment:** No allotment can be made to any party to the Invit or their related parties except to the sponsor.
v. **Restriction on transferability:** The units allotted under preferential issue cannot be sold by the allotee for a period of one year from the date of allotment, except on a recognized stock exchange.

❖ Guidelines for Issuance of Debt Securities by REITs and INVITs

❖ SEBI had recently permitted Real Estate Investment Trusts ('**REITs**') and Infrastructure Investment Trusts ('**Invits**') to issue debt securities by amending the SEBI (REIT) Regulations, 2014 ('**REIT Regulations**') and the SEBI (INVIT) Regulations, 2014 ('**Invit Regulations**'). SEBI has issued guidelines for issuance of such debt securities by REITs and Invits by its circular dated April 13, 2018 ('**Circular**') which provides that REITs and Invits issuing debt securities must follow the provisions of SEBI (Issue and Listing of Debt Securities Regulations), 2008 ('**ILDS Regulations**') in the following manner:

i. Restriction in Regulation 4(5) of the ILDS Regulations on issue of debt securities for providing loan to or acquisition of shares of any person, who is party of the same group or under the same management and the requirement for creation of a debenture redemption reserve, will not apply to issue of debt securities by REITs and Invits;
ii. Compliances to be made under Companies Act in terms of the ILDS Regulations, will not apply to REITs / Invits for issuance of debt securities, unless specifically provided in the Circular.

For the issuance of debt securities, REITs / Invits will appoint one or more SEBI registered debenture trustees, other than the trustee to the REIT / Invit issuing such debt securities. Further, the securities will be secured by the creation of a charge on the assets of the REIT / Invit or holding company or SPV, having a value which is sufficient for the repayment of the amount of such debt securities and interest thereon. The Circular also provided for certain additional

disclosure and compliance requirements.

❖ IBC Exemptions introduced under the Delisting Regulations and Takeover Regulations

❖ SEBI has, as on May 31, 2018, notified the amendments to the SEBI (Delisting of Equity Shares) Regulations, 2009 ('**Delisting Regulations**') and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('**Takeover Regulations**') to provide that, with respect to a listed entity, the Delisting Regulations and the Takeover Regulations will not be applicable to a transaction proposed to be undertaken pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code ('**IBC**'). The key amendments have been set out below:

i. The Delisting Regulations will not be applicable to delisting of equity shares of a listed entity made pursuant to a resolution plan, if such a plan: (i) lays down a specific procedure to complete the delisting of such shares; or (ii) provides an exit option to the existing public shareholders at a price specified in the resolution plan. However, the exit to shareholders should be at a price which is not less than the liquidation value as determined in accordance with the Section 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, after paying off dues in the order of priority as set out in the IBC. If the existing promoters or any other shareholders are proposed to be provided an opportunity to exit under the resolution plan at a price, then the delisting should be at a price which is not less than the price at which such promoters or other shareholders, directly or indirectly, are provided exit.
ii. The prohibition set out under the proviso to Regulation 3(2) of the Takeover Regulations, which restricts an acquirer from acquiring shares or voting rights in a target company, which would result in the aggregate shareholding of the acquirer, along with persons acting in concert with it, exceeding the maximum permissible non public shareholding *i.e.* 75%, will not be applicable to an acquirer proposing to acquire shares pursuant to a resolution plan approved under the IBC.

❖ Enhanced Disclosure and Transparency Norms for Credit Rating Agencies

❖ SEBI issued a circular dated May 30, 2018 ('**Circular**') setting out guidelines to enhance the governance, accountability and functioning of Credit Rating Agencies ('**CRA**').

i. **Review of Ratings** All cases of requests by issuers for review of the rating(s) provided to their instrument(s) by the CRA are required to be reviewed by a rating committee of the CRA that will consist of a majority of independent members[3].
ii. **Disclosures for non-acceptance of Ratings:** All non-accepted ratings have to be disclosed on the CRA's website for a period of 12 months from the date of such rating being disclosed as a non-accepted rating.
iii. **Rationalisation of Disclosures:** CRAs are required to upload a rating summary sheet presenting a snapshot of the rating actions carried out during the half-year on their websites, on a half-yearly basis, within 15 days from the end of the half-year (March / September). These ratings must be segregated into securities and financial instruments other than securities.

❖ Clarification on Clubbing of Investment Limits of Foreign Government / Foreign Government related entities

❖ SEBI has, by way of its circular dated April 10, 2018 ('**Circular**'), issued certain clarifications in relation to clubbing of investment limits of foreign Governments and their related entities *viz.* foreign central banks, sovereign wealth funds and foreign Governmental agencies registered as foreign portfolio investors ('**FPIs**') in India. The key clarifications are set out below:

i. In case of the same set of underlying beneficial owner(s), the holding of all foreign Government and its related entities from the same jurisdiction, as well as foreign Government agencies forming part of the same investor group, is required to be cumulatively below 10% of the total paid-up capital of the Indian company;
ii. If the Government of India enters into treaties with other sovereign Governments specifically recognizing certain entities to be treated distinctly, SEBI may, during the validity of such treaties, recognize them as such for the purpose of investment limits applicable to FPIs;
iii. The investment by foreign Government/ its related entities from provinces/ States of countries with federal structure will not be clubbed if such provinces/ States have different beneficial owners identified in accordance with the Prevention of Money Laundering (Maintenance of Records) Rules, 2005.

Lastly, the Circular clarifies that in case of a breach of the investment limits, the FPIs are required to divest their holdings within five trading days from the date of settlement of trades causing the breach. Alternatively, at the FPI's option, such investment may be considered as a foreign direct investment.

❖ Monitoring of Foreign Investment limits in listed Indian companies

❖ SEBI has, by way of its circular dated April 5, 2018 ('**Circular**'), issued guidelines for monitoring of foreign investment limits (based on the paid-up equity capital of the company on a

3 Persons not having any pecuniary relationship with the CRA or any of its employees.

fully diluted basis) in listed Indian companies. The Foreign Exchange Management Act, 1999 ('**FEMA**'), read with the regulations issued thereunder, prescribes the various foreign investment limits in listed Indian companies such as the aggregate FPI limit, the aggregate NRI limit and the sectoral caps. The onus of compliance with these foreign investment limits rests on the Indian company. In order to facilitate compliance by listed Indian companies, SEBI formulated a framework with effect from June 1, 2018.

The necessary infrastructure and IT systems for monitoring the limits in Indian listed companies are required to be implemented and housed at the depositories *i.e.* National Securities Depository Limited and Central Depository Securities Limited. Companies will have to appoint any one depository as its 'Designated Depository' for monitoring the foreign investment limits. The stock exchanges will provide the data on the paid-up equity capital of an Indian company to such company's Designated Depository.

A red flag will be activated whenever the foreign investment is within 3% or less than 3% of the aggregate FPI / NRI limits or the sectoral cap. Once a red flag has been activated for a given company, the foreign investors will take a conscious decision to trade in the shares of the company, with a clear understanding that in the event of a breach of the aggregate FPI / NRI limits or the sectoral cap, the foreign investors will be liable to disinvest the excess holding within five trading days from the date of settlement of the trades.

Banking and Finance

❖ Amendments to the ECB Policy

❖ On April 27, 2018, the RBI has issued the External Commercial Borrowings ('**ECB**') Policy – Rationalisation and Liberalisation ('**ECB Policy**'), which provides for the following key relaxations in the existing ECB framework:

i. A uniform all-in-cost ceiling of 450 basis points over the benchmark rate has been stipulated. The benchmark rate will be 6 month US$ LIBOR (or applicable benchmark for respective currency) for Track I and Track II, while it will be the prevailing yield of the Government of India securities of corresponding maturity for Track III (Rupee ECBs) and rupee denominated bonds.

ii. The liability to equity ratio for ECBs raised from direct foreign equity holder under the automatic route has been increased to 7:1. This ratio will not be applicable if the aggregate amount of ECBs raised by an entity do not exceed US$ 5 million.

iii. The RBI has permitted housing finance companies, regulated by the National Housing Bank, and port trusts, constituted under the Major Port Trusts Act, 1908, to avail ECBs under all tracks; provided such entities maintain a Board approved risk management policy and keep the ECB exposure hedged 100% for ECBs raised under Track I. Companies engaged in the business of maintenance, repair and overhaul and freight forwarding have been permitted to raise ECBs denominated in ₹ only.

iv. The RBI has stipulated a negative list for end use for all tracks which includes investment in real estate or purchase of land except when used for affordable housing, investment in capital market and equity investment. Additionally, for tracks I and III, except when raised ECB has been raised from direct and indirect equity holders or from a group company and provided the loan is for a minimum average maturity of five years, the following negative end uses will also apply: (i) working capital purposes, (ii) general corporate purposes, and (iii) repayment of Rupee loans. Additionally, on-lending to entities for the aforementioned activities would not be permitted.

❖ Prohibition on dealing in Virtual Currencies

❖ On April 6, 2018, the RBI issued a circular prohibiting entities regulated by the RBI from dealing in virtual currencies or providing services (including maintaining accounts, registering, trading, settling, clearing, giving loans against virtual tokens, accepting them as collateral, opening accounts of exchanges dealing with them and transfer / receipt of money in accounts relating to purchase / sale of virtual currencies) for facilitating any person or entity in dealing with or settling virtual currencies. Prohibited entities already providing these services as on the date of the circular, have been directed to exit such relationship by July 6, 2018.

This RBI circular was challenged in the Supreme Court, which has not granted a stay on the circular.

Media & Telecommunications

❖ TRAI recommendations on "Issues relating to Uplinking and Downlinking of Television Channels in India"

❖ The Telecom Regulatory Authority of India has on June 25, 2018, issued Recommendations on Issues relating to Uplinking and Downlinking of Television Channels in India. These recommendations have been issued with a view to review and amend the guidelines relating to the uplinking and downlinking of satellite television channels issued by the Ministry of Information & Broadcasting in 2011. The recommendations provide for various changes in the existing framework of uplinking and downlinking regulations including in relation to relaxations in security clearance requirements, streamlining of the application procedures overall and regulation of transfers of uplinking and downlinking permissions.

❖ Amendment in relation to Cap for Spectrum Holding

❖ The Department of Telecommunications ('**DoT**') has, by way of a circular dated May 30, 2018 amended the guidelines for transfer/merger of various categories of telecommunications service licenses/authorization under unified license on compromises, arrangement and amalgamation of companies dated February 20, 2014.

Pursuant to this amendment, DoT has removed the cap of 50% in a particular spectrum band for access services and increased the cap on the total spectrum holding by an entity to 35% of the total spectrum assigned for access services, from the previous cap of 25%. The revised overall cap also applies to entities resulting from implementation of a scheme of compromise, arrangement or amalgamation and merger of licenses in a service area.

However, the spectrum holding cap for 700 MHz, 800 MHz and 900 MHz bands ('**Sub 1 GHz Bands**') is different. DoT has prescribed that the combined spectrum holding of an entity must not exceed 50% of the total spectrum assigned in the Sub 1 GHz Bands. However, no such limit has been prescribed for individual or combined spectrum holding of an entity above the 1GHz band.

DoT has also notified an option for telecom licensees to choose higher number of installments for deferred payment liabilities in respect of the award of spectrum in 2012, 2013, 2014, 2015 and 2016. There is no change or modification in the moratorium period for payment of deferred payment liabilities and the instalments already paid.

❖ Instructions for implementing Restrictive Feature for SIMs used only for Machine-to-Machine communication service

❖ DoT released instructions on May 16, 2018 in relation to SIM cards used for Machine-to-Machine ('**M2M**') communication services[4] ('**M2M SIMs**'), along with related Know Your Customer instructions for issuing M2M SIMs to entities providing M2M communication services under the bulk category and instructions for Embedded-SIMs.

The entity providing M2M services may require SIMs from a telecom licensee authorized by the DoT for the purpose of providing connectivity for M2M services. The instructions from the DoT clarify that the ownership of all such M2M SIMs must be with the entity providing the M2M services. Further, in case of a sale or transfer of devices having M2M SIMs, the entity providing M2M services will be responsible for (i) intimating the telecom licensee(s) from which the M2M SIMs are obtained of the details of persons to whom such devices are transferred; and (ii) fulfilling the subscriber verification norms. The telecom licensees are also required to regularly update these details in their database.

❖ Indian Telegraph Right of Way Rules, 2016

❖ The DoT has, by way of a memorandum dated May 22, 2018, extended the benefit of the Indian Telegraph Right of Way Rules, 2016 ('**ROW Rules**') to Infrastructure Providers Category I ('**IP-1**'), by clarifying that under clause 2(d) of the ROW Rules, the term "licensee" includes IP-1s authorised to establish and maintain assets such as dark fibres, right of way, duct space and tower for the purpose of granting the same on lease/ rent/ sale basis to the telecom services providers licensed under Section 4 of the Indian Telegraph Act, 1885 on mutually agreed terms and conditions.

The erstwhile ROW Rules did not cover IP-1s within the ambit of ROW Rules. However, the right of way was effectively permitted to IP-1s in their respective registration certificate(s) creating ambiguity. With the aforesaid clarification provided by DoT, this ambiguity has been removed.

❖ Clarification and Amendments regarding Internet Telephony

❖ The DoT issued a clarification on June 19, 2018 stating that internet telephony service is an un-tethered service from the underlying access network and such service can be provided by access service provider to the customer using the internet services provided by other service providers. As a step further on this clarification, DoT has amended the telecom licenses, including the unified license, to incorporate certain provisions in relation to internet telephony service. Some of the salient features of the amendment are:

4 Machine to Machine (M2M) Communication Services means services offered through a connected network of objects/devices with identifiers in which Machine to Machine (M2M) communication is possible with predefined back end platform(s) either directly or through some gateway. 'M2M Communication' refers to a communication between two or more entities (object/devices/things) based on existing and evolving communication technologies that do not necessarily need any direct human intervention.

i. internet telephony calls originated by international out roamers from international locations need to be handed over at international gateway of licensed international long distance operators. The international termination charges must be paid to the terminating access service provider;
ii. the mobile numbering series should be used for providing internet telephony by a licensee. The same number may be allocated for cellular mobile service as well as internet telephony service;
iii. telecom licensees are required to comply with all the interception and monitoring related requirements as specified in the respective licence (as amended from time to time);
iv. IP address assigned to a subscriber for this service must conform to IP addressing scheme of Internet Assigned Numbers Authority; and
v. the licensees providing internet service may facilitate access to emergency number calls using location services. This is not a mandatory requirement presently.

Taxation

❖ Angel Tax Exemption Notification

❖ Section 56(2)(viib) of the Income-tax Act, 1961 ('**IT Act**') provides that where a closely held company issues its shares at a price which is more than its fair market value ('**FMV**'), the amount received in excess of fair market value will be charged to tax in the hands of the company as income from other sources. The section further prescribes various methods for valuation of FMV of shares of the closely held company. Amongst the various options for valuation of FMV, one of the methods prescribed is determination by a merchant banker or an accountant as per the 'Discounted Free Cash Flow Method'.

The Central Board of Direct Taxation ('**CBDT**') had, on June 14, 2016, issued a notification providing that investments received by 'start-ups' (as specified in the Department of Industrial Policy and Promotion ('**DIPP**')) would not be subject to taxation under Section 56(2)(viib) of the IT Act ('**Angel Tax Exemption**').

The DIPP issued a notification on April 11, 2018 specifying the procedure and criteria for start-ups to avail tax benefits ('**DIPP Notification**'). This DIPP Notification had specified three key conditions for availing the Angel Tax Exemption: (i) aggregate amount of paid-up share capital and share premium, after the proposed issue of shares, does not exceed ₹10 crore (approx. US$1.5 million); (ii) investor/ proposed investor fulfils the prescribed criteria; and (iii) startup procures a report from a merchant banker, specifying the FMV of shares in accordance with applicable rules.

Pursuant to the DIPP Notification, the CBDT has on May 24, 2018 also notified that the provisions of Section 56(2)(viib) of the IT Act will not apply to consideration received by a company for issue of shares that exceeds the face value of such shares, if the consideration has been received from an investor in accordance with the approval granted by the Inter-Ministerial Board of Certification as per the notification issued by the DIPP Notification. Simultaneously, the CBDT has issued another notification on May 24, 2018 making merchant banker valuation mandatory for the purposes of Section 56(2)(viib) of the IT Act by removing reference to 'accountant' in the valuation rules.

❖ POEM Rules on Tax Computation

❖ The concept of 'place of effective management' ('**POEM**') for deciding tax residency status of a company other than an Indian company was introduced in the IT Act and made effective from April 01, 2017. The CBDT has now issued a notification on June 22, 2018 specifying certain exceptions, modifications and adaptations from the normal provisions of IT Act applicable in case of such companies regarding computation of income, set-off or carry forward of losses, collection and recovery and tax avoidance, to apply to a foreign company having POEM in India. These rules cover only such income of the foreign company which is taxable in India specifically due to the existence of the POEM of that company in India. Key points of the notification are as below:

i. **Status and Tax Rate:** The foreign company which is considered resident in India on account of having POEM in India will nevertheless continue to be treated as a foreign company for the purposes of the IT Act. In case of a conflict between the provisions applicable to such foreign company as a foreign company and as a resident, the provisions applicable as a foreign company will prevail. The tax rate applicable to a foreign company which is considered resident on account of having POEM in India is the same as applicable to any foreign company (40% plus applicable surcharge and cess) which is higher than the rate prescribed for domestic companies (30% plus applicable surcharge and cess).

ii. **Tax withholding obligations on payments made to the foreign company:** Where more than one tax withholding provision is applicable to the foreign company *i.e.* as a resident as well as a foreign company, the provision applicable as a foreign company alone will apply. Additionally, compliance to the tax withholding provisions as are applicable to the foreign company prior to its becoming a person resident in India would be treated as sufficient compliance of the tax withholding provisions.

iii. **Credit for Foreign Taxes:** The foreign company having POEM in India would be entitled for credit of foreign taxes against Indian income-tax liability.

iv. **Carry forward and set-off of losses and depreciation allowance:** The notification sets out detailed mechanism for off-setting accumulated losses and unabsorbed depreciation of the foreign company against its taxable income and for determining the written down value of depreciable assets in the hands of the foreign company.

Employment

❖ Administrative Charges payable by the Employer under the Employees' Provident Funds Scheme, 1952

❖ By way of a notification bearing number S.O. 2011 (E), dated May 21, 2018, issued by the Ministry of Labour and Employment, the Central Government has fixed the administrative charges payable by the employer under the Employee's Provident Funds Scheme, 1952 at 0.50%, subject to a minimum of ₹500 per month for every establishment and ₹75 for a non-functional establishment, i.e., an establishment having no contributory member. This notification is effective from June 1, 2018. It was further clarified that the administrative charges payable in respect of the period up to May 31, 2018 i.e. 0.65%, would continue to apply until June 1, 2018.

Intellectual Property

❖ Summary Dismissal of Suit for infringement

❖ In the matter of **Jaideep Mohan *v.* Hub International Industries & Anr.**,[5] the Delhi High Court ('**Delhi HC**') summarily dismissed the suit for trademark infringement at the initial stage of framing of issues.

Jaideep Mohan ('**Plaintiff**') had instituted the suit, *inter alia*, for permanent injunction to restrain Hub International Industries and NV Distilleries & Industries Pvt. Ltd. ('**Defendants**'), from using the trade mark 'GOLDSMITH' on the grounds that the same is deceptively similar to the Plaintiff's registered trademark 'BLACKSMITH' in respect of identical goods *i.e.*, alcoholic beverages.

The Defendants contended that the Plaintiff cannot claim exclusivity in the mark 'SMITH' as the application for registration of the mark 'SMITH' in class 33 (which covers alcoholic beverages) was still pending, and, accordingly, argued that the Plaintiff's suit was liable to be dismissed under Section 17 of the Trade Marks Act, 1999. The Defendants also contended that there are many entities which have been using the word 'SMITH' and 'BLACKSMITH' prior to the use of the word by the Plaintiff and that the overall packaging and get-up of the rival goods are completely different.

The Delhi HC, relying on **Godfrey Philips India Ltd *v.* PTI Pvt Ltd**,[6] summarily dismissed the suit for infringement and passing off and took the view that the terms 'BLACKSMITH' and 'GOLDSMITH' have a definite meaning and are clearly understood by most of the population of the country, including those who are not conversant with the English language, and hence there was no infringement and the suit was not likely to succeed. The Delhi HC was also persuaded by the fact that more than 90% of the sales of the Plaintiff were effected through defense and police canteens, where the relevant public was unlikely to get confused merely by the commonality of the term 'SMITH'.

Real Estate

❖ Establishment of an Appellate Tribunal for the State of Maharashtra under RERA

❖ The Real Estate (Regulation and Development) Act, 2016 ('**RERA**') provides for appeals to be preferred to the appellate tribunals of the respective States against the orders passed by the regulatory authorities of such States. For the State of Maharashtra, the Maharashtra Revenue

5 2018 (74) PTC 154 (Del).

6 2017 SCC OnLine Del 12509.

Tribunal ("**MahaRT**") was designated as a temporary appellate tribunal for hearing appeals from the orders passed by the Maharashtra Real Estate Regulatory Authority ('**MahaRERA**') till the constitution of the appellate tribunal as required under RERA. The Government of Maharashtra has, on May 8, 2018 constituted the Maharashtra Real Estate Appellate Tribunal ('**Appellate Tribunal**'), as the permanent appellate tribunal under RERA for the State of Maharashtra, to hear appeals from the orders passed by MahaRERA. All matters pending with MahaRT now stand transferred to the Appellate Tribunal.

Litigation

❖ New Plea of Jurisdiction permitted to be raised for the first time during Set-Aside Proceedings for an Arbitration Award

❖ In **M/s Lion Engineering Consultants *v.* State of Madhya Pradesh & Ors.**, the respondent had filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') against an award passed in favour of the appellant. The respondent sought to belatedly amend this petition, which was rejected by the trial court, but was allowed by the High Court of Madhya Pradesh. The petitioner approached the Supreme Court contending, *inter alia*, that the amendment should not have been permitted as it introduced new grounds at the stage of the petition under Section 34 of the Arbitration Act, which had not been raised under Section 16 of the Arbitration Act before the tribunal. The appellant relied on **MSP Infrastructure Ltd. *v.* MPRDC Ltd.** ('**MSP Infrastructure**').

The Supreme Court overruled the MSP Infrastructure judgement to hold that there is no bar to the plea of jurisdiction being raised by way of an objection under Section 34 of the Arbitration Act, even if no such objection was raised under Section 16, as both stages are independent of one another. The MSP Infrastructure judgement had also held that public policy of India means the policy of the Union *i.e.*, central law and not State law. The Supreme Court overruled the same to hold that 'public policy of India' refers to law in force in India, whether State law or central law.

❖ NCLAT Ruling on Maintainability of Application under the IBC after Winding Up Proceeding is Initiated

❖ In **Indiabulls Housing Finance Limited *v.* Shree Ram Urban Infrastructure Limited**, the National Company Law Appellate Tribunal ('**NCLAT**') was faced with the issue of whether an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**') is maintainable when winding up proceedings against the 'Corporate Debtor' have been already initiated. The impugned order, passed by the National Company Law Tribunal, Mumbai ('**NCLT Mumbai**') had dismissed the application as not maintainable as the winding up proceeding against the 'Corporate Debtor' had already been initiated by the High Court of Bombay. The NCLAT upheld the NCLT decision and held that once the second stage *i.e.*, the initiation of liquidation process, is initiated, then there is no question of reverting to the first stage *i.e.*, initiation of corporate insolvency resolution process ('**CIRP**').

❖ NCLAT stays admission of an Insolvency Petition against Reliance entities based on an Out-of-court Settlement

❖ By orders dated May 15, 2018 and May 18, 2018, the NCLT Mumbai had admitted a petition filed under Section 9 of the IBC by Ericsson India Private Limited ('**Ericsson**') against Reliance Communications Limited ('**RCom**'), Reliance Infratel Limited ('**RIL**') and Reliance Telecom Limited ('**RTL**'). RCom, RIL and RTL, along with certain financial creditors / the Joint Lenders' Forum, had approached the NCLAT, seeking a stay on the ground that the CIRP would prejudice recovery. On May 30, 2018, the NCLAT passed an order staying the CIRP till September 30, 2018, to enable RCom to pay Ericsson ₹550 crore (approx. US$ 80 million) (out of the ₹1150 crore (approx. US$ 167 million) due) and settle the matter ('**NCLAT Order**').

The NCLAT has granted a stay on the orders dated May 15, 2018 and May 18, 2018 passed by the NCLT Mumbai, taking into consideration the stand of the parties that if the CIRP was allowed to continue, financial and operational creditors may suffer more loss. The NCLAT Order mandates the resolution professionals to allow the managements of RCom, RIL and RTL to function and has stayed the CIRP until further orders.

This is arguably a precedent on the proposition that even after an operational creditor's petition is admitted by the NCLT and the CIRP commences, the process can be reversed / stayed if the dues of the operational creditors are settled.

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Law Firm of the Year
VC Circle, 2018, 2017, 2016 & 2015

❖

Law Firm of the Year | Best Overall Law Firm of the Year
India Business Law Journal, 2018 & 2017

❖

Best Law Firm of the Year – India
Corporate USA Today – Law Awards, 2018

❖

India Deal Firm of the Year
ALB SE Asia Law Awards, 2018

❖

Law Firm of the Year in India
Corporate INTL, 2018

❖

Outstanding Law Firm of the Year, India | Corporate and Mergers & Acquisitions
Highly Recommended Law Firm of the Year
AsiaLaw Profiles, 2018

❖

Ranked No. 1
for the Indian M&A Announced Deals League Table by Value and Volume
Ranked No. 1
for the Indian M&A Completed Deals League Table by Value and Volume
Thomson Reuters' Emerging Markets M&A Legal Rankings, Q1 2018

❖

Ranked No. 1
for India in the M&A Announced Deals League Table by Deal Value and Deal Count
Bloomberg's Global M&A, Legal Rankings, Q1 2018

❖

Ranked No. 1
for India in the M&A Rankings by Deal Value and Deal Count
Mergermarket's Global and Regional M&A League Tables of Legal Advisors, Q1 2018

❖

Ranked No. 1
for India and Asia (excl. Australasia & Japan) in the
M&A Announced Deals League Table by Deal Value and Deal Count
Mergermarket's Global and Regional M&A, Legal Rankings, Q1 2018

❖

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

❖

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

❖

Best Indian Law Firm
International Legal Alliance Summit Awards, 2017

❖

Ranked No.1
RSG Top 40 Indian Law Firms Ranking, 2017

❖

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
Corporate INTL, 2016