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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

❖ Removal of independent directors re-appointed for a second term only by way of a special resolution

❖ Section 149(10) of the Companies Act, 2013 ('**Companies Act**') provides that an independent director of a company is eligible for re-appointment for a second term on passing of a special resolution by the company. However, under Section 169(1) of the Companies Act, a company is permitted to remove any director before the expiry of his term, by passing an ordinary resolution. Based on a joint reading of the aforementioned sections, it appeared that an independent director could be re-appointed for second term only by way of a special resolution, but may be removed thereafter by way of an ordinary resolution. The Central Government has, by way of the Companies (Removal of Difficulties) Order, 2018, amended Section 169(1) to provide that an independent director, who is re-appointed for a second term, can be removed only by passing a special resolution after giving him a reasonable opportunity of being heard.

Foreign Exchange

❖ RBI notifies the Cross Border Merger Regulations

❖ The Reserve Bank of India ('**RBI**') has notified the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ('**Cross Border Merger Regulations**'), by way of a notification dated March 20, 2018. Some of the key provisions of the Cross Border Merger Regulations are set out below:

i. **Inbound Mergers:** In case of an inbound merger (*i.e.* a cross border merger wherein an Indian company is the resultant company), the resultant Indian company may issue shares to persons resident outside India, subject to compliance with the requirements prescribed by the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 ('**FEMA 2017**'). Further, if (a) the foreign company in an inbound merger is a joint venture ('**JV**') or wholly owned subsidiary ('**WOS**') of the Indian company; or (b) the inbound merger of a JV or WOS results in the acquisition of a step down subsidiary, then compliance with the provisions of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 ('**ODI Regulations**') is required. Some of the key provisions governing inbound mergers are set out below:
   - *Acquisition/transfer of assets and liabilities by the resultant Indian Company*: If the resultant Indian company acquires any asset or comes to hold any liability outside of India as a result of the inbound merger, which acquisition is not permitted under FEMA, then the resultant Indian company would be required to sell such asset / security or extinguish such liability from the sale proceeds of the overseas assets, within two years of the merger scheme being sanctioned by the National Company Law Tribunal ('**NCLT**').
   - *Offices of the foreign transferor company*: The overseas office(s) of the foreign transferor company would be deemed to be the offshore branches/office outside India of the resultant Indian company, which will be required to undertake the activities of a branch/office as permitted under the Foreign Exchange Management (Foreign Currency Account by a person resident in India) Regulations, 2015.
   - *Borrowings and guarantees of the foreign transferor company*: Any borrowings raised or guarantees issued by the foreign transferor company, which come to be held by the resultant Indian company, will have a period of two years to become compliant with the applicable foreign exchange regulations governing external commercial borrowings, borrowing or lending in Rupees or guarantees. No remittance for paying such liability can be made by the resultant Indian company within the two years of the merger scheme being sanctioned by the NCLT. In such cases, end use restrictions will not apply.

   With respect to an inbound merger, if the resultant Indian company intends to continue operations outside India post completion of such cross-border merger, then such resultant Indian company will be required to maintain a presence outside India, through an offshore branch or a subsidiary in the manner permitted under foreign exchange regulations.

ii. **Outbound Mergers:** In case of an outbound merger (*i.e.* a cross border merger wherein a foreign company is the resultant company), a person resident in India may hold or acquire securities of the resultant foreign company, in accordance

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with the provisions of ODI Regulations (including the fair market value of such foreign securities being within the limits prescribed under the Liberalized Remittance Scheme, where the resident Indian is an individual). Some of the key provisions governing outbound mergers are set out below:

- *Offices of the Indian transferor company*: Indian offices of the Indian transferor company will be deemed to be branch offices of the resultant foreign company. Transactions can be undertaken out of such Indian branch offices in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016.
- *Borrowings and guarantees of the Indian transferor company*: The guarantees or outstanding borrowings of the Indian company which become the liabilities of the resultant foreign company are required to be paid as per the scheme sanctioned by the NCLT. However, the resultant foreign company will not be permitted to acquire any liability payable towards an Indian lender in Rupees which is not in conformity with the provisions of the Foreign Exchange Management Act, 1999 ('**FEMA**').
- *Acquisition/transfer of assets by the resultant foreign Company*: If the resultant foreign company acquires any asset or security which it is not otherwise permitted to hold under FEMA, it will be required to sell such asset or security within two years of the merger scheme being sanctioned by the NCLT, and the proceeds of such divestment are required to be repatriated outside India immediately through normal banking channels. However, repayment of Indian liabilities from the proceeds of the sale of such assets or securities within such two year period is permitted.
- *Valuation*: In accordance with Rule 25A of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016, valuation for an outbound merger has to be conducted by a valuer who is a member of a recognized professional body in the jurisdiction of the transferee company in accordance with internationally accepted principles on accounting and valuation.

With respect to an outbound merger, if the resultant offshore company intends to continue operations in India post completion of such cross-border merger, then such resultant offshore company will be required to maintain a presence outside India through a subsidiary in the manner permitted under foreign exchange regulations.

❖ Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018

❖ The RBI has, by way of a notification dated March 26, 2018, issued the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 ('**2018 Regulations**') that replaces the erstwhile Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 ('**2000 Regulations**'). Some of the key changes introduced by way of the 2018 Regulations are set out below:

i. The 2018 Regulations has replaced the concepts of 'a person resident outside India who is a citizen of India' and 'a person of Indian origin' under the 2000 Immovable Property Regulations with 'Non-Resident Indian' ('**NRI**') and 'Overseas Citizen of India ('**OCI**'), respectively and treats NRIs and OCIs at par with respect to their capacity to hold and / or transfer immovable property in India.

ii. An NRI or an OCI is generally permitted to acquire any immovable property, other than agricultural land/ farm house / plantation property in India, by way of a sale or gift from a person resident India or another NRI or OCI, who is a 'relative' (as defined under Section 2(77)[1] of the Companies Act, 2013). While the 2000 Regulations were silent on this aspect, the 2018 Regulations provide that a person resident outside India, not being an NRI or OCI but whose spouse is an NRI or an OCI, may acquire one such immovable property, jointly with the NRI / OCI spouse.

iii. Any person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan, or persons of Hong Kong, Macau or Democratic People's Republic of Korea, and including persons from aforesaid countries having a place of business in India in a manner permissible under FEMA, will not be permitted to acquire or transfer any immovable property in India in their individual capacity, without the prior approval of the RBI, other than on lease not exceeding five years. However, such restriction would not apply where such person is an OCI.

iv. Under the 2018 Regulations, a person resident in India under a long term visa, who

1 Section 2 (77) of the Companies Act, 2013 states: "relative", with reference to any person, means any one who is related to another, if— (i) they are members of a Hindu Undivided Family; (ii) they are husband and wife; or (iii) one person is related to the other in such manner as may be prescribed.

is a citizen of Afghanistan, Bangladesh or Pakistan and belongs to minority communities in those countries (namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians), may purchase only (a) one residential immovable property for self-occupation and (b) one immovable property for carrying out self-employment activities, *inter alia* subject to such immovable property not being in / around any restricted / protected areas and cantonment areas. This dispensation was not provided for under the 2000 Regulations.

v. The 2018 Regulations do not have retrospective application on any existing holding of immovable property by a person resident outside India, which was acquired under the 2000 Regulations.

❖ Amendments to FEMA 2017

❖ The RBI has, by its notification dated March 26, 2018 introduced the following amendments to the sector specific policy for foreign investment, under FEMA 2017:

i. **Foreign investment in investing companies**: (a) Foreign investments in investing companies not registered as non-banking financial companies ('**NBFCs**') with the RBI and in core investment companies, both engaged in the activity of investing in the capital of other Indian entities, will require prior Government approval; and (b) foreign investment in investing companies registered as NBFCs with the RBI, will not require any prior approval and will be permissible under 100% automatic route.

ii. **Single brand product retail trading**: In case of entities undertaking single brand retail trading of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible, a committee under the chairmanship of the Secretary, DIPP, with representatives from Niti Aayog, concerned Administrative Ministry and independent technical expert(s) on the subject will examine the claim on the issue of the products being in the nature of 'state-of-art' and 'cutting-edge' technology, and give recommendations for such relaxation.

iii. **Issuance of capital instruments to persons resident outside India**: No prior Government approval will now be required for issuance of capital instruments to persons resident outside India against: (a) import of capital goods / machinery / equipment (excluding second hand machinery); or (b) pre-operative / pre-incorporation expenses, unless the Indian investee company is engaged in a sector under the Government route.

As set out in our January 2018 edition of the *Inter Alia*, the Union Cabinet had approved certain amendments to the foreign direct investment regime in India on January 10, 2018, which have now been incorporated in FEMA 2017.

Capital Markets

❖ Manner of achieving minimum public shareholding

❖ The Securities Exchange Board India ('**SEBI**') has, by its circular dated February 22, 2018 ('**MPS Circular**'), introduced the following two additional methods that can be adopted by listed entities to achieve minimum public shareholding in compliance with the requirements under the Securities Contracts (Regulation) Rules, 1957 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**ICDR Regulations**'):

i. **Open Market Sale**:

(a) Promoters/ promoter group are now permitted to sell up to 2% of their total paid-up equity share capital in the company in the open market, subject to five times' average monthly trading volume of the shares of such company.

(b) The entity is required to, at least one trading day prior to every such proposed sale, announce the: (A) intention and purpose of sale; (B) details of the sellers and the shares to be sold; and (C) time period for completion of the sale, to the stock exchange(s) where its shares are listed.

(c) The listed entity is also required to give an undertaking to the relevant stock exchange(s) obtained from the promoters/ promoter group to not buy any shares in the open market on the dates on which the offer for sale is open.

ii. **Qualified Institutions Placement of eligible securities under Chapter VIII of the ICDR Regulations**: SEBI, by way of a circular dated February 12, 2018, has dispensed with the requirement of adhering to minimum public shareholding for a listed issuer intending to make a Qualified Institutions Placement.

The MPS Circular supersedes a previous circular issued by SEBI on November 30, 2015.

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❖ Easing of access norms for investments by Foreign Portfolio Investors

❖ SEBI has, by way of circulars dated February 15, 2018 and March 13, 2018 (collectively, the '**FPI Circulars**'), revised the regulatory framework governing foreign portfolio investors ('**FPIs**') under the SEBI (Foreign Portfolio Investors) Regulations, 2014 ('**FPI Regulations**') to ease the access norms for investments by FPIs. Some of the key changes that have come into force are set out below:

i. The current requirement of prior SEBI approval for a change in local custodian/ designated depository participant ('**DDP**') has been replaced with the requirement of obtaining a no-objection certificate from the earlier DDP, followed by a post-facto intimation to SEBI.

ii. The regime has been liberalized concerning FPIs having 'Multiple Investment Managers' structure and the same permanent account number, with respect to 'Free of Cost' transfer of assets. Approval of SEBI is now not required and DPPs are now entitled to process such requests.

iii. In case of addition of a new share class, where a common portfolio of Indian securities is maintained across all classes of shares/fund/sub-fund and broad based criteria are fulfilled at a portfolio level after adding a new share class, prior approval of the DDP is no longer required.

iv. Private banks and merchant banks are now permitted to undertake investments on behalf of their respective investors, provided that the investment banker/merchant banker submits a prescribed declaration.

v. SEBI also clarified that appropriately regulated Category II FPIs *viz.* asset management companies, investment managers/ advisers, Portfolio managers, Broker-dealer and Swap-dealer etc. are permitted to invest their proprietary funds.

❖ Participation by Strategic Investor(s) in InvITs and REITs

❖ Pursuant to SEBI's circular dated January 18, 2018 ('**SEBI Circular**'), a Real Estate Investment Trust ('**REIT**') / Infrastructure Investment Trust ('**InvIT**') may invite subscriptions from strategic investors subject to *inter alia* the following:

i. The strategic investors can, either jointly or severally, invest not less than 5% and not more than 25% of the total offer size.

ii. The investment manager or manager is required to enter into a binding unit subscription agreement with the strategic investors proposing to invest in the public issue, which agreement cannot be terminated except if the issue fails to collect minimum subscription.

iii. The entire subscription price has to be deposited in a special escrow account prior to opening of the public issue.

iv. The price at which the strategic investors have agreed to buy units of the InvIT/ REIT should not be less than the public issue price. In case of a lower price, the strategic investors should bring in the additional amounts within two working days of the determination of the public issue price, and in case of a higher price, the excess amount will not be refunded and the strategic investors will be bound by the price agreed in the unit subscription agreement.

v. The draft offer document or offer document, as applicable, will disclose details of the unit subscription agreement, including the name of each strategic investor, the number of units proposed to be subscribed etc.

vi. Units subscribed by strategic investors, pursuant to the unit subscription agreement, will be locked-in for a period of 180 days from the date of listing in the public issue.

❖ Schemes of arrangement by listed entities

❖ SEBI, by its circular dated January 3, 2018 ('**Scheme Circular**'), has amended its circular issued in March, 2017 ('**March Circular**'). Some of the key amendments are as follows:

i. The scope of the March Circular has been extended to schemes which solely provide for merger of a division of a WOS with its parent company, in addition to the merger of a WOS with its parent company.

ii. In respect of the valuation report and a fairness opinion by an independent chartered accountant and an independent SEBI registered merchant banker to be submitted by a listed entity, SEBI has clarified that the term 'independent' will mean that there is no material conflict of interest among the chartered accountant and the merchant banker or with the company, including that of common directorships or partnerships.

iii. The percentage of pre-scheme public shareholders of the listed entity and the Qualified Institutional Buyers of the unlisted entity should not be less than 25% on a fully diluted basis in the post-scheme shareholding pattern of the merged company.

iv. The requirements under the March Circular, in relation to the scheme once the scheme has been sanctioned by the High Court or the NCLT, have been dispensed with.

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v. The lock-in requirements relating to the pre-scheme share capital of the unlisted issuer seeking to be listed in case of a scheme involving merger of a listed company or its division into an unlisted entity have been amended as follows:
   - Shares held by promoters up to the extent of 20% of the post-merger paid-up capital of the unlisted issuer to be locked-in for three years from the date of listing of the shares of the unlisted issuer.
   - The remaining shares are to be locked-in for one year from the date of listing of the shares of the unlisted issuer.
   - No additional lock-in is applicable if the post-scheme shareholding pattern of the unlisted entity is exactly similar to the shareholding pattern of the listed entity.

❖ SEBI informal guidance in the matter of UBS AG

❖ UBS AG is a Category II registered FPI and is not a promoter of any listed entity. Regulation 32(2)(d) of the FPI Regulations requires the depository participant engaged by an FPI to ensure that equity shares held by the FPI are free from encumbrances and to obtain a declaration from the FPI to this effect. UBS AG, under the SEBI (Informal Guidance) Scheme, 2003, sought certain clarifications from SEBI:

i. whether the term 'encumbrance' would include non – disposal undertakings in relation to the FPIs who are investors in the capacity of acquirer and not promoter.[2]; and
ii. whether the FPIs are restricted from executing non disposal undertaking with third parties by providing limited undertaking to the depository participant.

SEBI, by way of clarification dated March 14, 2018, was of the view that the term 'encumbrance' would include non – disposal undertakings and accordingly, FPIs would not be permitted to execute the non – disposal undertakings.

❖ SEBI Order in the matter of Price Waterhouse relating to the case of Satyam Computer Services Limited.

❖ An order was passed by SEBI in relation to the financial fraud perpetrated by the senior management of Satyam Computer Services Limited ('**Satyam**').

PriceWaterhouseCoopers, Chartered Accountants ('**PWC**') were the statutory auditors of Satyam since April 1, 2000. When the financial irregularities at Satyam came to light, SEBI issued notices to 11 entities in the PWC group and the 2 signatories of the auditors' report of Satyam on behalf of PWC, namely, Mr. S Gopalakrishnan and Mr. Srinivas Talluri (collectively, the '**Noticees**'). The Noticees were accused by SEBI of (i) acting in violation of certain provisions of the SEBI Act and the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ('**FUTP Regulations**') and in gross violation of their duties and responsibilities as auditors while certifying the financial statements of Satyam for the period from 2000 to 2008; and (ii) being complicit or acquiesced in the fraud perpetuated at Satyam.

In its order of January 10, 2018 ('**Order**'), SEBI observed that there had been a total abdication by PWC of its duty to follow minimum standards of diligence (including PWC's own manual), which *inter alia* required external confirmation of bank balances and fixed deposits. Further, PWC failed to reconcile discrepancies in the records of Satyam, which it had full knowledge of and which had been flagged by Satyam's internal auditors, and its report certified the fairness of Satyam's financial statements, forming a vital component of the prospectus inducing investors to trade in the scrip of Satyam believing it to be in a sound financial position.

SEBI inferred that their involvement was *mala fide*, and that the only reason for such a casual approach taken by PWC could be either complacency or complicity, and that PWC's acts amounted to commission of fraud for the purposes of the SEBI Act and the PFUTP Regulations. In SEBI's view, while PWC group entities are separate entities, they functioned as a single unit for all practical purposes in the context of the fraud at Satyam, and therefore, SEBI directed: (i) debarment from directly or indirectly issuing certificates of audit of listed companies, compliance of obligations of listed companies and intermediaries registered with SEBI for a period of two years for all PWC entities practicing as chartered accountants in India, and for a period of three years for the Noticees; (ii) disgorgement of wrongful gains of approximately ₹13.09 crore (approx. US$ 2 million) (joint and several liability) by PWC, Bangalore and the Noticees, with interest; and (iii) all listed companies and intermediaries registered with SEBI not to engage audit firms forming part of the PWC network for issuing any certificate with respect to compliance of statutory obligations for a period of two years.

An appeal against this Order filed by PWC is pending before the Securities Appellate Tribunal ('**SAT**'). SAT has refused to grant a stay on the two-year audit ban imposed by SEBI, but has clarified that PWC is permitted to service its existing clients for the fiscal year 2017-2018 and is also permitted to complete assignments already undertaken for listed entities that follow the calendar year as their fiscal year, but is not permitted to undertake any new listed assignments.

2 It is pertinent to note that the term 'encumbrance' is not defined under the FPI Regulations. However the term includes pledges, liens, non disposal undertakings and other transactions in terms of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011.

❖ In its meeting held on March 28, 2018, SEBI accepted the recommendations of the Kotak Committee on Corporate Governance ('**Committee**') along with certain other proposals discussed. Set out below are some of the key proposals:

i. (a) Reduction in the maximum number of listed entity directorships from 10 to (x) eight by April 1, 2019, and (y) seven by April 1, 2020; (b) expanding the eligibility criteria for independent directors; (c) disclosure of utilization of funds from qualified institutional placement or preferential issue; (d) separation of chief executive officer/managing director and chairperson (to be initially made applicable to the top 500 listed entities by market capitalization with effect from April 1, 2020); (e) enhancing the role of the audit committee, nomination and remuneration committee and the risk management committee; (e) strengthening the disclosures pertaining to related party transactions and related parties being permitted to vote against such transactions; (f) enhancing the obligations on listed entities with respect to subsidiaries; and (g) shareholder approval (majority of minority) for royalty/brand payments to related party exceeding 2% of consolidated turnover.

ii. Certain amendments to SEBI (Alternative Investment Funds) Regulations, 2012, with respect to 'Angel Funds': (i) Maximum investment amount in venture capital undertakings by an angel fund has been increased from ₹5 crores to ₹10 crores (approx. US$ 750,000 to US$ 1.5 million); (ii) mandatory minimum corpus of an angel fund has been reduced to ₹5 crores (approx. US$ 750,000); and (iii) provisions of the Companies Act have been made applicable to an angel fund, if formed as a company.

iii. Revision of the existing framework for non-compliance of the listing regulations by listed companies, *inter alia*, empowering the stock exchanges to freeze the shareholding of the promoter and promoter group in a non-compliant entity along with their shareholding in other securities. SEBI is empowered to order suspension if the non-compliance persists.

iv. Undertaking a public consultation process for a review of the SEBI (Buy-back of Securities) Regulations, 1998 and the Takeover Regulations and inviting comments from stakeholders in relation to compliance with various SEBI regulations by listed entities subject to the corporate insolvency resolution process under the IBC.

❖ Outcome of SEBI meeting held on March 28, 2018

Banking and Finance

❖ RBI, by its circular dated February 12, 2018 on 'Resolution of Stressed Assets – Revised Framework' ('**Revised Framework**'), has discontinued all existing RBI schemes on the resolution of stressed assets including the Corporate Debt Restructuring Scheme, Strategic Debt Restructuring Scheme, Scheme for Sustainable Structuring of Stressed Assets and the Framework for Revitalising Distressed Assets (collectively, '**Extant Stressed Asset Schemes**') as well as the Joint Lenders' Forum ('**JLF**') as an institutional mechanism for resolution of stressed accounts. The Revised Framework accounts for the changes brought about by the Insolvency and Bankruptcy Code, 2016 ('**IBC**') and creates a streamlined framework for the resolution of non-performing assets ('**NPAs**') and other stressed assets. Some of the salient features are set out below:

❖ RBI Circular on Revised Framework for Resolution of Stressed Assets

i. The Revised Framework applies to all accounts, excluding accounts where any of the Extant Stressed Asset Schemes have been implemented [except where the aggregate exposure of lenders is at least ₹20 billion (approx. US$ 300 million)]. It currently does not cover NBFCs, Asset Reconstruction Companies or Regional Rural Banks – applicability is limited to Scheduled Commercial Banks and All-India Financial Institutions (such as Exim Bank, National Bank for Agriculture and Rural Development, National Housing Bank and Small Industries Development Bank of India).

ii. All lenders are required to prepare board approved policies for resolution of stressed assets ('**Resolution Plan**') and take steps to resolve accounts immediately upon default. Each lender is required to document a Resolution Plan, even if there is no change in the terms between the Resolution Plans prepared by different lenders.

iii. A Resolution Plan is '*implemented*' if the borrower is no longer in default with any of the lenders. However, if the Resolution Plan involves '*restructuring*', then implementation requires certain additional steps.

iv. For accounts where the aggregate exposure of lenders, on or after March 1, 2018, is at least ₹20 billion (approx. US$ 300 million) ('Large Accounts'), a Resolution Plan is required to be '*implemented*' within 180 days from the date of first default, fail-

ing which the lenders are required to file a corporate insolvency application under the IBC before the NCLT within 15 days from the expiry of the above timeline.

v. If the Resolution Plan for a Large Account involves restructuring / change in ownership, lenders are mandated to file a corporate insolvency application under the IBC before the NCLT if such Large Account goes into default before the completion of the '**Specified Period**', which is the later of: (a) one year from the first payment of principal / interest (whichever is later) of the credit facility with the longest period of moratorium under the terms of the Resolution Plan; or (b) repayment of at least 20% of the outstanding debt. Notwithstanding the above, lenders can file an application under IBC any time, even without attempting a Resolution Plan.

vi. The Revised Framework further prescribes requirements for independent credit evaluation of accounts by the Lenders and imposes stricter reporting norms.

vii. Upon a change of ownership of the borrower, the restructured account would be upgraded to 'standard', upon satisfaction of certain conditions.

viii. The Revised Framework further states that the RBI would take '*stringent supervisory / enforcement actions as deemed appropriate*' including monetary penalties and increased provisioning requirements, in the event of (a) actions by lenders with an intent to evergreen stressed accounts / conceal the actual status of accounts; or (b) failure on part of the lenders to meet the prescribed timelines.

❖ Ombudsman Scheme for Non-Banking Financial Companies, 2018

❖ RBI, by its notification dated February 23, 2018, notified the Ombudsman Scheme for NBFCs, 2018 ('**Ombudsman Scheme**') to regulate the credit system of the country and to provide for a system of ombudsman for redressal of complaints against deficiency in services concerning deposits, loans and advances and other specified matters.

NBFCs registered with the RBI under Section 45-IA of the RBI Act, 1934 which (i) are authorised to accept deposits; or (ii) have customer interface, with assets size of ₹1 billion (approx. US$15 million) or above, as on the date of the audited balance sheet of the previous financial year, or of any such asset size as the RBI may prescribe, should comply with the Ombudsman Scheme, whereas, NBFC - infrastructure finance company, core investment company, infrastructure debt fund - NBFC and an NBFC under liquidation, are excluded from the ambit of the Ombudsman Scheme.

The Ombudsman Scheme came into force on February 23, 2018 and is being introduced at the four metro centers *viz*. Chennai, Kolkata, Mumbai and New Delhi.

Telecommunications

❖ The Telecommunication Interconnection Regulations, 2018

❖ In addition to the existing framework of interconnection in India under the Unified License regime, the Telecom Regulatory Authority of India has, on January 1, 2018, issued the Telecommunication Interconnection Regulations, 2018 which have been made applicable to all telecom service providers ('**TSPs**') in India with effect from February 1, 2018. These regulations, *inter alia*, provide for important aspects of interconnection, such as, the procedure for entering into interconnection agreements, bank guarantee to be furnished by TSPs prior to entering into agreements, interconnection charges, framework for provisioning of initial interconnection and augmentation of points of interconnection ('**POIs**'), disconnection of POIs and financial disincentive on interconnection matters.

Taxation

❖ Finance Act, 2018

❖ Some of the key amendments introduced by the Finance Act, 2018 ('**Finance Act**') are summarized below:

i. **New long-term capital gains tax regime for listed shares etc.**
   - Under the unamended provisions of the Indian Income-tax Act, 1961 ('**IT Act**'), with respect to transfer/redemption of units of an equity oriented mutual fund or an on-market[3] sale of Indian equity shares (listed or as part of an initial public offer) or units of a business trust, long-term capital gains were exempt from tax in India, subject to payment of securities transaction tax ('**STT**') (which may vary from 0.001% to 0.2% of the transaction value).
   - The Finance Act has withdrawn the aforesaid long-term capital gains tax exemp-

3 Sale on the floor of a recognized stock exchange in India.

tion and has proposed a new long-term capital gains tax regime for the above asset class. Under the new regime, the long-term capital gains, in excess of ₹0.1 million (approx. US$1,500) in a tax year, arising from transfer/redemption of units of an equity oriented mutual fund or an on-market transfer of Indian equity shares (including sale of shares as part of initial public offer) will be taxed at the rate of 10% (plus applicable surcharge and cess) subject to payment of STT, as applicable as before.[4] The computation of such capital gains will be subject to step up of the cost base till January 31, 2018. This amendment will apply on any capital gains arising on or after April 1, 2018.

ii. **Scope of 'Business Connection' proposed to be widened:**

- The scope of 'business connection' under the IT Act is similar to the provisions relating to Dependent Agent Permanent Establishment ('**DAPE**') in India's Double Taxation Avoidance Agreements ('**DTAAs**'). However, this scope is proposed to be widened pursuant to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ('**MLI**'). In order to align the scope of 'business connection' with the expanded definition of DAPE, the Finance Act has introduced an amendment to the definition of 'business connection' to also include any business activities carried through a person who, acting on behalf of the non-resident, habitually plays the principal role leading to conclusion of contracts by the non-resident. This has taken effect from the financial year beginning April 1, 2018.
- Until now, the scope of 'business connection' under the IT Act provided for physical presence based nexus rule for taxation of business income of the non-resident in India. Therefore, emerging business models such as digitized businesses were not covered within its scope.

  In light of the above, Section 9(1)(i) of the IT Act has been amended to provide that 'significant economic presence' in India should also constitute 'business connection'. This amendment in the domestic law will enable India to negotiate for inclusion of the new nexus rule in the form of 'significant economic presence' in the DTAAs. Unless corresponding modifications to permanent establishment rules are made in the DTAAs, the cross border business profits will continue to be taxed as per the existing DTAA rules. However, where the foreign enterprise is not entitled to a DTAA protection, the above amendment would become immediately effective. This amendment has taken effect from financial year beginning April 1, 2018.

Employment

❖ Payment of Gratuity (Amendment) Act, 2018

❖ The Payment of Gratuity Act, 1972 ('**Gratuity Act**') entitles every employee who has completed five years of service (taken as (i) four years and 240 days for establishments having a six day work week; and (ii) four years and 190 days for those working less than six days a week), upon cessation of employment, to gratuity calculated at the rate of 15 days wages for each year of completed service or part thereof in excess of six months.

With effect from March 29, 2018, the Ministry of Labour and Employment has: (i) increased the statutory ceiling for gratuity to ₹2 million (approx. US$30,000), from the erstwhile ₹1 million (approx. US$15,000); and (ii) stipulated 26 weeks as the maximum duration of maternity leave that would be considered as 'continuous service' for the purpose of computing gratuity.

❖ Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018

❖ On October 7, 2016, the Central Government amended the Industrial Employment (Standing Orders) Act, 1946 ('**SO Act**') and allied rules, to permit employment on fixed terms in the apparel manufacturing sector. Pursuant to the Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018 ('**Amendment Rules**') notified by the Ministry of Labour and Employment, effective from March 16, 2018, all sectors covered under the SO Act have now been permitted to employ personnel on 'fixed terms'. The Amendment Rules defined a 'fixed term employment workman' as '*a workman who has been engaged on the basis of a written contract of employment for a fixed period*'. However, such a 'fixed term employment workman' is eligible for all statutory benefits on a pro-rated basis and his hours of work, wages, allowances and other benefits cannot be less than that of a permanent workman.

4 In certain notified listed equity shares, there is a condition that STT should have been paid at the time of acquisition of such shares as well at the time of transfer so as to be eligible for this regime.

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Inter alia…

Litigation

❖ Applicability of the Arbitration and Conciliation Act (Amendment) Act, 2015 to pending arbitration/ court proceedings

❖ The Supreme Court ('SC') in **Board of Control for Cricket in India *v.* Kochi Cricket Private Limited**[5] has decided on whether the amendments introduced to the Arbitration and Conciliation Act, 1996 on October 23, 2015 ('**Commencement Date**'), would be applicable to pending arbitration/court proceedings, which came into force.

Kochi Cricket Private Limited successfully defended the decision of the Bombay High Court ('**Bombay HC**') on the applicability of the amended Sec-tion 36 to a pending challenge to an arbitral award filed under Section 34 of the Act. Under theamended Section 36, a party cannot obtain an automatic stay of an arbitral award (and may berequired to deposit security for the amount in dispute), whilst the challenge to the award waspending in Court. The issue before the SC was whether amended Section 36 would apply to aSection 34 challenge proceeding, which was filed before the Commencement Date.

The SC held that the amendment is prospective in nature, and will apply to those arbitral proceedings commencing, on or after the Commencement Date. However, only the amended Section 36 will be applicable to Section 34 applications filed both before and after the Commencement Date even if the arbitral proceedings were initiated prior to such date.

The SC has interestingly also opined on the proposed Section 87 of the Arbitration and Conciliation (Amendment) Bill, 2018 ('**Bill**'), approved by the Cabinet of Ministers on March 7, 2018, which stipulates that the amendment introduced in 2015 does not apply to Court proceedings arising out of or in relation to arbitral proceedings which commenced prior to the Commencement Date, irrespective of whether such Court proceedings commenced prior to or after the Commencement Date. In fact, the SC has observed that the proposed Section 87 would defeat the specific purpose of the amendment.

❖ Whether foreign law firms / foreign lawyers are permitted to practice in India?

❖ The SC in **Bar Council of India *v.* A.K. Balaji and Ors.**[6] was called upon to decide the question of whether foreign law firms / foreign lawyers are permitted to practice in India and held that foreign law firms/companies and foreign lawyers cannot practice Indian law in India either in relation to litigation or non litigation matters. However, there is no bar on foreign law firms or foreign lawyers visiting India for temporary periods, on a *'fly in and fly out'* basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues. The expression '*fly in and fly out*' will only cover a casual visit, not amounting to '*practice*'. Whether a foreign lawyer is limiting itself to '*fly in and fly out*' would be determined by the Bar Council of India. However, the Bar Council of India or the Union of India will be at liberty to make appropriate rules in this regard, including extending the Code of Ethics to such cases.

With regard to the conduct of arbitration proceedings by foreign lawyers in India, the SC held that there is no absolute right of a foreign lawyer to conduct arbitration proceedings in respect of disputes arising out of a contract relating to the international commercial arbitration. In some cases, foreign lawyers may not be debarred from conducting arbitration proceedings arising out of international commercial arbitration in view of Sections 32 and 33 of the Advocates Act, 1961 ('**Advocates Act**'). However, they will be governed by code of conduct applicable to the legal profession in India.

Business process outsourcing companies do not come within the purview of the Advocates Act or the Bar Council of India Rules. However, if in pith and substance the services amount to practice of law, then the provisions of the Advocates Act will apply and foreign lawyers/law firms will not be allowed to do so.

❖ Supreme Court grants Recognition to "Living Wills"

❖ The SC, in its judgment dated March 9, 2018 in the case of **Common Cause (A Regd. Society) *v.* Union of India and Another**,[7] gave recognition to "living wills" by terminally ill patients, and held that the right to life and liberty as envisaged under Article 21 of the Constitution of India includes the right to live with dignity. The SC further observed that the right to live with dignity also includes the smoothening of the process of dying in case of a terminally ill patient or a person in a persistent vegetative state with no hope of recovery. The SC drew a distinction between active euthanasia and passive euthanasia as the former entails a positive affirmative act, while the latter relates to withdrawal of life support measures or withholding of medical treatment meant for artificially prolonging life. Further, the SC provided that directions and guidelines laid down by it to give effect to passive euthanasia will remain in force till a legislation is passed by the Parliament on this subject.

5 2018 SCC Online SC 232.
6 2018 SCC Online SC 214.
7 Writ Petition (Civil) No. 215 of 2005.

❖ Division Bench of the Bombay High Court restrains Wockhardt from using the mark 'CHYMTRAL FORTE'

❖ In the matter of **Torrent Pharmaceuticals Ltd.** ('**Torrent**') ***v.*** **Wockhardt Ltd. & Anr.**[8] ('**Wockhardt**'), by way of order dated November 17, 2017, the Division Bench of the Bombay HC set aside the order of the Single Judge dated March 15, 2017 following an appeal filed by Torrent and granted an interim injunction restraining Wockhardt.

Torrent filed a suit *inter alia* for infringement and passing-off against Wockhardt based on their registrations for the marks CHYMORAL and CHYMORAL FORTE with rights dating back to the year 1962, and Wockhardt's subsequent adoption, use and registration of the mark CHYMTRAL FORTE ('**Impugned Mark**'). The key arguments relied upon by Wockhardt were that: (i) both the rival marks were derived from the active ingredient TRYPSIN – CHYMOTRYPSIN and the prefixes CHYM and CHYMO are *publici juris*; (ii) the Impugned Mark was not deceptively similar to CHYMORAL FORTE; (iii) Torrent failed to prove any misrepresentation by Wockhardt; and (iv) there has been significant delay as well as acquiescence as the Impugned Mark had been registered and allegedly coexisted in the market with Torrent's product CHYMORAL FORTE for a period of eight years.

The Single Judge dismissed Torrent's application for an interlocutory injunction against Wockhardt and held that the three tests in the classical trinity of passing off, *i.e.* reputation, misrepresentation and likelihood of damage, had not been satisfied, and that Torrent (and its predecessors) were also held to have acquiesced in the use of the Impugned Mark by Wockhardt as it failed to oppose or object to the use and registration for a considerable period of time.

The Division Bench allowed the appeal, *inter alia*, on the basis that Torrent had satisfied the tests for establishing passing-off. The Division Bench held that in order to prove 'misrepresentation', the plaintiff does not have to prove any mala fide intention and the act of putting the goods in the market with a deceptively similar trademark, is enough to constitute misrepresentation. The Division Bench also held that an incorrect test had been applied to determine 'reputation' and that association of the product with its source or the maker is not required to prove reputation. Further, the Division Bench observed that the tests laid down in **Cadila Health Care Ltd.** ***v.*** **Cadila Pharmaceuticals Ltd.** should be adopted while determining possibility of confusion between medicinal products and accordingly, Wockhardt ought to be restrained from continuing the use of the same. On the issue of delay and acquiescence, the Division Bench opined that there was no proof of a positive act attributable to Torrent and mere inaction or delay must not be confused with acquiescence.

Wockhardt has now challenged this order of the Division Bench by way of aSpecial Leave Petition before the Supreme Court, which is currently pending.

❖ Trade variations of footwear / sandals should not be given exclusive monopoly: Delhi High Court denies interim protection for Crocs registered designs

❖ In the matter of **Crocs Inc. USA** ('**Crocs**') ***v.*** **Liberty Shoes Limited & Ors.** and other footwear manufacturers in India ('**Defendants**'), the Delhi High Court ('**Delhi HC**') rejected Crocs' applications for interim injunctions for piracy of copyright in their registered design.

Crocs had obtained design registrations under the Designs Act, 2000 for its perforated and non-perforated clog-type slippers/shoes in May of 2004. Crocs brought various infringement suits against the Defendants who were manufacturing and selling sandals with clog-type designs largely similar to Croc registered design. The Delhi HC was of the opinion that the registered designs ought not to have been registered in the first place and the registrations were liable to be cancelled as these designs were published and disclosed prior to their registration dates. This finding was arrived at on the basis of internet archival pages dated 2002 (which disclosed similar designs) from the website of Holey shoes. Evidence was also gathered from Crocs' own website prior to 2004 which also revealed largely similar designs. On the issue of novelty and originality, the Court was of the view that the designs registered by Crocs were neither original nor novel as they were not significantly distinguishable from products already existing in the market and were mere 'trade variants' of a sandal, which did not deserve any exclusivity or monopoly.

8 Commercial Appeal No. 125 of 2017 in Notice of Motion of (L) 35 of 2017 in Commercial Suit (L) 32 of 2017.

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Inter alia...

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 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 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

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

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

Rank 1
for M&A Rankings by Deal Count
Venture Intelligence League Tables of Legal Advisors 2018

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

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

Best Indian Law Firm
International Legal Alliance Summit Awards 2017

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

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

M&A Law Firm of the Year
Corporate INTL 2016

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