Inter alia…

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In This Issue

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

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Corporate & SCRA

❖ Amendments to the Companies (Adjudication of Penalties) Rules, 2014

❖ Pursuant to the amendment notified by the Ministry of Corporate Affairs ('MCA'), on February 19, 2019, to the Companies (Adjudication of Penalties) Rules, 2014 ('**Adjudication Rules**'), Rule 3 relating to adjudging penalties under the provisions of the Companies Act, 2013 ('**Companies Act**'), has been amended. The key changes introduced, *inter alia*, include: (i) amended timelines and process for responding to show cause notices by the recipient (which, in addition to the company and every officer in default, can now be any person in the company); (ii) requirement for show cause notice to include the nature of non-compliance, relevant penal provisions under the Companies Act and the maximum penalty that may be imposed; (iii) provision for e–filing to be made once the e-adjudication platform is created; and (iv) timelines within which the adjudicating officer has to pass an order.

The amendments to the Adjudication Rules further provide that: (i) while adjudging the quantum of penalty, certain additional factors must now be taken into consideration such as the size of the company, nature of business, injury to public interest, and nature of the default; and (ii) the penalty imposed cannot be less than the minimum penalty, if any, prescribed under the relevant section of the Companies Act, and if the Companies Act provides a fixed penalty for a default, then the adjudicating officer must impose such fixed penalty.

❖ Non-applicability of Rule 9A of Companies (Prospectus and Allotment of Securities) Rules, 2014 to Certain Companies

❖ In September 2018, Rule 9A was introduced into the Companies (Prospectus and Allotment of Securities) Rules, 2014 ('**Allotment Rules**'), whereby all issuances of securities by public unlisted companies were required to be made in dematerialized form. By way of a notification dated (and effective from) January 22, 2019, the MCA has, amended Rule 9A by introducing a new sub-rule (11) thereunder, pursuant to which: (i) a Nidhi company; (ii) a Government company; and (iii) a wholly owned subsidiary, are exempted from the scope of Rule 9A.

❖ Amendment to the Companies (Incorporation) Rules, 2014

❖ MCA has, by way of a notification dated March 29, 2019, amended the Companies (Incorporation) Rules, 2014 ('**Incorporation Rules**), by inserting a new Rule 38A in the Incorporation Rules. Pursuant to Rule 38A, a new e-form AGILE (INC-35) needs to be filed alongwith the application for incorporation. This e-form AGILE is effectively a consolidated application for registration of goods and service tax identification number, registration with the Employees' State Insurance Corporation and registration with the Employees' Provident Fund Organisation, with the aim of facilitating applicants to easily obtain the aforementioned registrations alongwith the incorporation certificate.

❖ New E-Form Active Notified to Curb Shell Companies

❖ As part of its efforts to curb shell companies, the MCA has notified a new electronic form ACTIVE (Active Company Tagging Identities and Verification) ('**Form INC-22A**') through Rule 25A of the Incorporation Rules, with effect from February 25, 2019. Form INC-22A, *inter alia*, requires companies to furnish details of the registered office, including the photo of the registered office showing at least one director/ key managerial personnel who has affixed his Digital Signature to Form INC-22A and geographical coordinates of the registered office. Rule 25A requires every company incorporated on or before December 31, 2017 (subject to a few exceptions) to file the Form INC-22A on or before April 25, 2019. Please refer to our *Client Alert* dated March 7, 2019 available at https://www.azbpartners.com/bank/new-e-form-active-notified-to-curb-shell-companies, for more details.

Foreign Exchange

❖ Establishment of a Branch / Liaison / Project Office in India

❖ 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 ('**Branch Office Regulations**') required prior approval of Reserve Bank of India ('**RBI**') to be obtained for opening a branch office, liaison office or project office or any other place of business in India ('**BO/LO/PO**'), if the principal business of the non-resident applicant was within the defence, telecom, private security or information and broadcasting sector(s) (the '**Relevant Sectors**'). RBI, by way of its circular dated March 28, 2019, has notified that:

i. for the opening of a BO/LO/PO in the Relevant Sectors, prior approval of RBI will not be required to be obtained, if the concerned ministry or regulator in India has granted its approval or license or permission regarding such proposal. The circular clarifies that the term 'permission' will not include general permission, if any, available under the automatic route in respect of the abovementioned sectors (*vis-à-vis* foreign direct investment); and

ii. for proposals regarding opening of project offices in the defence sector, a separate reference or approval from the Government of India will not be required, if the applicant has been awarded a contract by, or has entered into an agreement with, the Ministry of Defence or Service Headquarters or Defence Public Sector Undertakings.

❖ Investment by FPIs in Debt

❖ The Securities and Exchange Board of India ('**SEBI**') and RBI had, by way of their circulars dated June 15, 2018, *inter alia*, introduced a 'per corporate' limit, disallowing a foreign portfolio investor ('**FPI**') from having an exposure of more than 20% of its entire corporate bond portfolio to a single corporate (including exposures to related entities of such corporate). In order to encourage a wider spectrum of investors to access the Indian corporate debt market, on February 15, 2019, RBI issued a notification withdrawing the above mentioned 'per corporate' limit with immediate effect. The 'per issue' limit for FPIs (*i.e.*, an FPI and its investor group may invest in any issue of corporate bonds subject to a cap of 50% of such issue) and the 20% short-term investments limit for FPIs continues to remain in place. This withdrawal is in line with the announcement made in paragraph 10 of the Statement on Developmental and Regulatory Policies of the Sixth Bi-monthly Monetary Policy Statement for 2018-19 of RBI, dated February 7, 2019.

To give effect to RBI's circular dated February 15, 2019, SEBI similarly withdrew this requirement by its circular dated March 12, 2019, with immediate effect.

❖ Voluntary Retention Route for Investments by FPIs

❖ RBI has, by way of its circular dated March 1, 2019, announced a separate scheme called the Voluntary Retention Route ('**VRR**'). Investments under the VRR scheme have been open for allotment from March 11, 2019. The aggregate investment limit by FPIs under this scheme is ₹40,000 crores (approx. US$ 5.5 billion) for making investments in Government securities (G-secs, treasury bills and state development loans) and ₹35,000 crores (approx. US$ 5 billion) for making investments in corporate debt instruments. The minimum retention period for investment under VRR is three years, and during this period, the FPI must maintain a minimum of 75% of the allocated amount in India. The requisite investment amount is required to be adhered to on an end-of-day basis and can include cash holdings in the Rupee accounts used for VRR. Allocation of investment amount to FPIs under VRR must be made on-tap or through auctions. Subject to certain relaxations, FPIs are required to invest the amount allocated, referred to as the Committed Portfolio Size ('**CPS**'), in the relevant debt instruments and remain invested at all times during the voluntary retention period. Successful allottees are required to invest 25% of their CPS within one month and the remaining amount within three months from the date of allotment. FPIs that wish to liquidate their investments through VRR prior to the end of the retention period may do so by selling their investments to another FPI. Investments made through VRR are not subject to any minimum residual maturity requirement, concentration limit or single/group investor-wise limits applicable to FPIs for making investments in corporate bonds under the general investor route. FPIs investing through VRR are eligible to participate in repos for their cash management subject to certain conditions. Additionally, FPIs investing under VRR are eligible to participate in any currency or interest rate derivative instrument, whether over-the-counter or exchange traded, to manage their interest rate risk or currency risk.

Capital Markets

❖ Format for Disclosure of Details of Significant Beneficial Owners

❖ SEBI had issued a circular on December 7, 2018 ('**SBO Circular**'), specifying that all listed entities would be required to disclose details pertaining to significant beneficial owners ('**SBOs**'), in the prescribed format. The SBO Circular was based on the Companies (Significant Beneficial Owners) Rules, 2018 ('**SBO Rules**'), which were amended by the MCA by way of the Companies (Significant Beneficial Owners) Amendment Rules, 2019. Pursuant to the MCA amendment, SEBI issued a circular on March 12, 2019, and amended the SBO Circular.

The key amendments pursuant thereto pertain to the previous requirement of the number and percentage of shares held being required to be disclosed. The format has been amended to require disclosure of the details of shares, voting rights, rights on distributable dividend or any other distribution, exercise of control and exercise of significant influence held by the SBO. A footnote has been added to clarify that if the nature of the holding/ exercise of the right of an SBO falls under multiple categories (as set out above), multiple rows for the same SBO will need to be inserted for each of the categories.

The amendments to the SBO Circular will come into force with effect from the quarter ended June 30, 2019, and will apply to all listed entities that are reporting companies as per the SBO Rules, as amended.

❖ Establishment of Committees of Market Infrastructure Institutions

❖ SEBI has, by way of a circular dated January 10, 2019, on Committees at Market Infrastructure Institutions (as modified by SEBI circular dated February 15, 2019) ('**MII Circular**'), prescribed detailed requirements in relation to the functions and composition of the committees required to be set up by stock exchanges, clearing corporations and depositories (collectively, '**Market Infrastructure Institutions**' or '**MIIs**') under the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018 and the SEBI (Depositories and Participants) Regulations, 2018, with a view to protect the interests of investors in the securities market and to regulate the securities market.

The MII Circular stipulates the establishment of: (i) functional committees (comprising of member selection committee, investor grievance redressal committee and nomination and remuneration committee); and (ii) oversight committees (comprising of standing committee on technology, advisory committee, regulatory oversight committee and risk management committee). The MII Circular also prescribes requirements in relation to composition, quorum and functions of each of the committees.

❖ Guidelines for the Public Issue of Units of InvITs and REITs

❖ SEBI has introduced amendments to the guidelines for public issue of units of Infrastructure Investment Trusts and Real Estate Investment Trusts (together, '**Investment Vehicles**') in order to further rationalise and ease the process of public issue of units of Investment Vehicles. Key highlights amongst them are:

i. the definition of 'institutional investors' has been updated to refer to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018;
ii. Mutual funds, alternative investment funds ('**AIFs**'), FPIs other than category III FPIs sponsored by associate entities of the merchant bankers, insurance companies promoted by, and pension funds of, associate entities of the merchant bankers have been permitted to invest under the category of anchor investors;
iii. Bidding period may be extended on account of force majeure, banking strike or similar circumstances, subject to total bidding period not exceeding 30 days;
iv. Time period for announcement of the floor price or the price band by the investment manager has been reduced from five days to two days prior to the opening of the bid (in case of initial public offer); and
v. Investment Vehicles are required to accept bids using only the application supported by blocked amount ('**ASBA**') and consequent changes in bidding process have been made.

❖ SEBI Informal Guidance in the Matter of JM Financial Limited

❖ SEBI has, in its informal guidance to JM Financial Limited, stated that the objective of Regulation 15(1)(f) of SEBI (Alternative Investment Funds) Regulations, 2012 ('**AIF Regulations**') is to further the interests of investors with respect to the un-invested portion of investable funds, till deployment of these funds in accordance with the investment objective of the AIF. Accordingly, applying the same rationale, SEBI has clarified that investment proceeds from sale/transfer of investments or returns earned from the investments can be invested in temporary investment instruments specified in Regulation 15(1)(f) of the AIF Regulations pending distribution of investment proceeds to the investors, provided that details of such transactions are disclosed to the investors and the diversification requirements under Regulation 15(1)(c) of the AIF Regulations would be applicable to such investments as well.

❖ SEBI Order on Buy-Back of Securities in the Matter of Wipro Limited

❖ SEBI, by way of its order dated February 15, 2019 ('**Wipro Order**'), has granted an exemption to Wipro Limited ('**Wipro**') from the strict enforcement of Regulation 24(ii) of the SEBI (Buy–back of Securities) Regulations, 2018 ('**Buyback Regulations**'), which provided that a company cannot make a public announcement of buyback during the pendency of any scheme or amalgamation. Wipro had filed the application on account of a scheme of amalgamation providing for Wipro's wholly owned subsidiaries with Wipro.

In the application seeking relaxation of enforcement of Regulation 24 (ii), Wipro submitted that there would be no new issue of equity shares or change in the shareholding pattern of Wipro consequent to the scheme of amalgamation with its wholly owned subsidiaries and that the merger is merely an internal re-organization with its group of companies and there will not be any material impact from the perspective of consolidated financial statements of Wipro. SEBI granted the exemption subject to the proposed buyback (if approved by the board of directors of Wipro) being in accordance with applicable laws, and the averments made by Wipro in its application and the scheme of amalgamation intimated to the relevant stock exchanges being true and correct.

❖ SEBI Informal Guidance in the Matter of DSP Merrill Lynch Limited

❖ SEBI issued an interpretative letter on February 8, 2019, to DSP Merrill Lynch Limited ('**DSPML**'), a SEBI registered intermediary engaged in activities including stock broking, merchant banking, underwriting and research analysis, and provided guidance under the SEBI (Informal Guidance) Scheme, 2003 regarding the SEBI (KYC (Know Your Client) Registration Agency) Regulations, 2011 ('**SEBI KRA Regulation**') and SEBI's Master Circular on 'Guidelines on Anti-Money Laundering (AML) Standards and Combating the Financing of Terrorism (CFT) /Obligations of Securities Market Intermediaries under the Prevention of Money Laundering Act, 2002 and Rules framed thereunder' dated July 4, 2018 ('**Master Circular**').

DSPML had sought guidance on whether it could rely on the client's status as 'verified or registered' on the KYC Registration Agency ('**KRA**') system while performing due diligence on the client, if certain KYC documents were deficient, obsolete or missing. SEBI clarified that the intermediary is responsible for identifying and verifying its client by using the KYC documents provided and any discrepancies in the documents are required to be informed to KRA for subsequent corrective action.

In this regard, SEBI highlighted various rules / regulations, including the SEBI KRA Regulations, the Master Circular, Frequently Asked Questions (FAQs) on KYC Requirements, and the Prevention of Money-laundering (Maintenance of Records) Rules, 2005 ('**PML Rules**') and stated that the ultimate responsibility to verify and identify the client is cast upon the registered intermediary while commencing an account-based relationship with the client. In case of mismatch in information, the intermediary is required to immediately refer the matter for corrective action to the custodian and KRA, before on-boarding the client.

Therefore, DSPML would not be permitted to rely on documents which are deficient, obsolete or missing, if the KYC status is shown as *'verified/ registered'* in the KRA system. DSPML, as part of conducting a KYC check is required to do due diligence by seeking the proper KYC documents in accordance with SEBI regulations / circulars and the PML Rules, before onboarding the client.

❖ SEBI Informal Guidance on Investment in Corporate Debt by FPIs

❖ SEBI has issued an interpretative, non-binding letter dated November 28, 2018, to Genpact India Private Limited ('**Genpact**') under the SEBI (Informal Guidance) Scheme, 2003 providing guidance on SEBI (FPI) Regulations, 2014 ('**FPI Regulations**'), RBI circulars dated November 17, 2016 and April 17, 2018 and SEBI circular dated February 28, 2017 on Investment by FPIs in debt (collectively the '**Circulars**').

Genpact had issued certain rated, unsecured, redeemable and non-convertible debentures ('**NCDs**') on a private placement basis to a FPI registered with SEBI ('**FPI Entity**'). The NCDs issued had a maturity period of more than three years and were utilized to meet funding requirements for day-to-day operations, downstream investments and general corporate purposes.

Prior to the Circulars, except for infrastructure companies, FPIs were allowed to invest in listed NCDs only. Pursuant to the Circulars, FPIs had been permitted to invest in unlisted corporate debt, subject to a minimum residual maturity of more than one year, and an end-use restriction on investment in real estate business, capital market and purchase of land.

A clarification was sought on whether Genpact is permitted to delist its existing listed NCDs subscribed to by the FPI Entity prior to the date of the Circulars coming into effect and utilize the proceeds of such listed NCDs in making downstream investments on private arrangement basis. In this regard, SEBI was of the view that:

i. There was no violation to the end-use restriction rules for the proceeds raised from the issuance of NCDs as Genpact's nature of business was in accordance with the said rules; and
ii. On de-listing of NCDs, SEBI was of the view that it depends on the terms of the offer document/private placement memorandum issued by Genpact to the FPI Entity on whether the NCDs are required to be necessarily listed or 'may be' listed. If as per the offer document/private placement memorandum, the NCDs have to necessarily be listed, then they should be held till maturity and subsequently delist in accordance with the procedure set out in Regulation 59 of the SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015.

❖ SEBI Informal Guidance in the Matter of Infosys Limited

❖ On March 12, 2019, SEBI issued an informal guidance pursuant to certain questions raised by Infosys Limited in relation to SEBI (Share Based Employee Benefits) Regulations, 2014 ('**SBEB Regulations**') and the Buyback Regulations. Infosys had sought the following clarifications:

i. Whether Infosys can issue stock options grant letters ('**Grant Letters**') for issuing stock options ('**ESOPs**') to eligible employees during the 'buyback period' in the context of Regulation 24(i)(b) of the Buyback Regulations;
ii. If the equity shares are to be issued by the company, pursuant to exercise of ESOPs granted during the 'buyback period', whether the minimum vesting period of one year (as stated in Regulation 18(1) of the SBEB Regulations) is to be computed from the date of grant of such ESOPs or from the date being one year from the expiry of the 'buyback period'; and
iii. Further, with respect to equity shares to be transferred by the Infosys Employee Benefits Trust to the eligible employees pursuant to exercise of ESOPs granted during the 'buyback period' (there being no new equity shares issued by the Infosys upon exercise of such ESOPs), whether the minimum vesting period of one year is to be computed from the date of grant of such ESOPs.

The Buyback Regulations define 'buyback period' as the period between the date of board of directors resolution or date of declaration of results of the postal ballot for special resolution of shareholders (as the case may be) to authorize the buyback of shares and the date on which the payment of consideration to shareholders who have accepted the buyback offer is made. Regulation 24(i)(b) of the Buyback Regulations provides that a company must not issue any shares or other specified securities including by way of bonus till the date of expiry of 'buyback period'. Specified securities under the Buyback Regulations also include ESOPs. Regulation 18(1) of the SBEB Regulations provides that the minimum vesting period for employee stock options will be one year.

With respect to the first query, SEBI noted that the company is not prohibited from issuing Grant Letters to the employees during the buyback period but the ESOPs would convert or vest only after expiry of the buyback period and subject to Regulation 18(1) of the SBEB Regulations (which provides that in case of ESOPs, there should be a minimum vesting period of one year). With respect to the second query, SEBI noted that the minimum vesting period of one year would be computed from the date of the Grant Letters. Further, with respect to the third query, SEBI noted that with respect to equity shares which are to be transferred by the Infosys Employee Benefits Trust to the employees pursuant to exercise of ESOPs granted during the 'buyback period', the minimum vesting period of one year should be computed from the date of grant of such ESOPs.

❖ Amendments to SEBI (Prohibition of Insider Trading) Regulations, 2015

❖ SEBI on December 31, 2018 has issued key amendments to the SEBI (Prohibition of Insider Trading) Regulations, 2015 with effect from April 1, 2019. Please refer to our *Client Alert* dated April 8, 2019 available at https://www.azbpartners.com/bank/amendments-to-sebi-prohibition-of-insider-trading-regulations-2015-key-highlights, for more details.

Banking and Finance

❖ RBI (Prevention of Market Abuse) Directions, 2019

❖ RBI has, on March 15, 2019, issued the RBI (Prevention of Market Abuse) Directions, 2019 ('**PMA Directions**'), to all persons dealing in securities, money market instruments, foreign exchange instruments, derivatives or other instruments of similar nature as RBI may specify from time to time, with a view to prevent market abuse. The PMA Directions have come into force on March 15, 2019. The key features of the PMA Directions are as follows:

i. **Market manipulation:** The PMA Directions stipulate that persons transacting or facilitating a transaction in the markets for financial instruments ('**Market Participants**') will not: (i) engage in any transaction or any act of omission or commission which may result in, or seek to convey, a false or misleading impression as to the price of, or supply of, or demand for, a financial instrument, carried out with the intention of making an undue financial gain or any other material benefit. This includes any transaction or action which may result in, or is intended to result in, an artificial price of a financial instrument; and/or (ii) undertake transactions on an electronic trading platform which may disrupt or delay its functioning.

ii. **Benchmark manipulation**: Market Participants will not undertake and/or initiate any action with the intention of manipulating the calculation and/or influencing a benchmark rate or a reference rate.

iii. **Misuse of information**: Market Participants will not: (i) use any non-public price-sensitive information (*i.e.*, information which is not publicly available, and which may affect the price of a financial instrument if made publicly available) for any material benefit to itself or to others; (ii) use any price sensitive customer information (*i.e.*, information pertaining to transactions or potential transactions of a customer which is not publicly available, and which may affect the price of any financial instrument if made publicly available) for any transaction on their own account in a manner which adversely affects the outcome for the customer; and (iii) intentionally (*i.e.*, without exercising due diligence as to the veracity of the information) create or transmit false or inaccurate information or withhold timely information which is required to be reported or made public, which influences or is likely to influence the price of any financial instrument.

iv. **Monitoring, compliance and reports:** Market Participants must report any instance of market abuse or attempted market abuse detected by them to RBI promptly and must provide any data and/or information as may be required by RBI in this regard.

v. **Regulatory action for market abuse:** Market Participants committing market abuse will be liable to be denied market access in one or more instruments for a period which may not exceed one month at a time. All instances of such action will be made public by RBI.

❖ RBI has, pursuant to the circular dated March 13, 2019, introduced changes and rationalised the extant framework for trade credits ('**TC**'), with effect from the date of the circular. Some of the key additions and amendments introduced by the circular are set out below.

i. TC can now be raised in any freely convertible foreign security as well as in Indian Rupees.
ii. The circular has increased the limits under which TC could be raised under the automatic route and provides for a higher limit for sectors such as for oil / gas refining & marketing, airline and shipping where the transaction value is generally larger, and has specified the persons who can grant TC depending on the type of TC proposed to be availed.
iii. The circular has aligned the tenure of TC for import of capital goods, non-capital goods and shipyards / shipbuilders with the changes in the minimum average maturity for external commercial borrowings.
iv. The circular has also reduced the all-in cost ceiling for raising TC and borrowers availing TC are now permitted to hedge their exposure created by the TC.
v. The circular now permits change of currency of TC from one freely convertible foreign currency to any other freely convertible foreign currency as well as to Rupees, but not from Rupees to any freely convertible foreign currency.

In addition to guarantees, the circular now permits creation of security over certain movable and immovable assets for the TC.

❖ Revised Framework for Trade Credits

Telecommunications

❖ The Department of Telecommunications ('**DoT**') by way of its notifications dated February 25, 2019 and February 28, 2019 amended the license agreement pertaining to: (i) Public Mobile Radio Trunking Services (PMRTS) licenses (other than unified licenses); (ii) International Long Distance (ILD) licenses (other than unified licenses); and (iii) National Long Distance (NLD) licenses (other than unified licenses) for modification in the rate of interest chargeable on delayed payments of license fee/spectrum usage charges or any other dues by the licensee, from 2% above the prime lending rate (PLR) of the State Bank of India ('**SBI**') to 4% above the marginal cost of lending rate (MCLR) of the SBI (as on the beginning of the financial year, compounded monthly). The amendments come into effect retrospectively from April 1, 2016.

❖ DoT amends PMRTS, ILD and NLD Licence Agreements to Change Rate of Interest for Payment Defaults

Taxation

❖ 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 FMV will be charged to tax in the hands of the company as income from other sources.

The Central Board of Direct Taxes ('**CBDT**') had issued a notification dated June 14, 2016, providing that investments received by 'start-ups' (as specified by the Department of Industrial Policy and Promotion ('**DIPP**')) would not be subject to tax under Section 56(2)(viib) of the IT Act. Further, the DIPP issued a notification dated April 11, 2018, as modified by another notification dated January 16, 2019, specifying the procedure and criteria for start-ups to avail tax benefits ('**DIPP Notification**'). The CBDT had also issued a notification dated May 24, 2018, specifying 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 DIPP Notification.

In supersession of the DIPP Notification, the Department for Promotion of Industry and Internal Trade ('**DPIIT**') issued a notification dated February 19, 2019 ('**DPIIT Notification**'), introducing new measures for taxation of angel investments. Pursuant to the DPIIT Notification, the CBDT issued a notification dated March 5, 2019 stating that provisions governing angel tax will not be applicable to start-ups that have been recognized by DPIIT in the DPIIT Notification. The salient features of DPIIT Notification are as follows:

i. An entity will be considered a start-up up to a period of 10 years from the date of incorporation if: (i) the turnover of the entity does not exceed ₹100 crores (approx. US$ 14.4 million) during any year; (ii) the entity is working towards innovation, development and improvement of products, processes or services or employ-

❖ Angel Tax Exemption Notification

ment generation or wealth creation; and (iii) the entity is not formed as a result of reorganization or restructuring.

ii. A start-up will be eligible for exemption under Section 56(2)(viib) if it is recognized by DPIIT and fulfills the following conditions:
 (a) The aggregate amount of paid-up share capital and share premium or issuance or proposed issuance thereof does not exceed ₹25 crores (approx. US$ 3.6 million). This limit of ₹25 crores (approx. US$ 3.6 million) will exclude investments made by (i) non-residents; (ii) venture capital companies or funds; and (iii) listed companies having net worth of ₹100 crores (approx. US$ 14.5 million) or turnover of at least ₹250 crores (approx. US$ 36 million).
 (b) The start-up has not invested in certain specified assets (*e.g.*, immovable properties, loans or advances, shares or securities, capital in other entities, jewelry, drawing, painting, etc.) and does not invest in such assets up to a period of 7 (seven) years from the end of the year in which its shares are issued at a premium. An exception has however been carved out to permit investments carried out by the start-up in the ordinary course of its business.

Employment

❖ SC Decision on Definition of 'Basic Wages' under the EPF Act

❖ The Supreme Court of India ('**SC**') heard multiple appeals[1] arising from various High Courts raising a common question of law *i.e.*, whether special allowances paid by an establishment to its employees would fall within the expression 'basic wages' for computation of contribution towards the employees provident fund.

In its judgment dated February 28, 2019, the SC reiterated the position that had been earlier laid out in relation to the question of what would constitute 'basic wages' for the purposes of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('**EPF Act**'). The SC applied the tests laid down in, *inter alia*, **Bridge and Roof Co. (India) Limited *v.* Union of India**[2] and **Manipal Academy of Higher Education *v.* Provident Fund Commissioner**[3], and reaffirmed the position that had been set out in these judgements, *viz.* where an allowance is universally, necessarily and ordinarily paid to all across the board, such allowances would be 'basic wages' for the purpose of the EPF Act. This is not a new position, but the SC has simply reinforced the position that had already been laid out clearly. However, it appears to have created a ripple amongst employers who continued to exclude all allowances, even those that are paid universally to all employees, for the purposes of computation of basic wages under the EPF Act.

Intellectual Property

❖ New Drugs Exempted from Price Control

❖ The Ministry of Chemicals and Fertilizers (Department of Pharmaceuticals) has, by way of notification dated January 3, 2019, notified an order amending the Drugs (Prices Control) Order, 2013 ('**DPCO 2013**'). The DPCO 2013 controls and regulates the prices of all drugs (including medical devices) that are sold in India. The salient features of the Drugs (Prices Control) Amendment Order, 2019 ('**Drugs Order**') are set out below:

i. **Exemption of Patented New Drugs from Price Control:** The Drugs Order grants all manufacturers of patented new drugs an exemption from price control under the Indian Patent Act, 1970 for a period of five years from the commencement of 'commercial marketing' in India. Earlier, such exemption was only available to a manufacturer of patented new drugs (i) not produced elsewhere; and (ii) developed through indigenous research and development. These requirements have now been done away with. The other exemptions under the DPCO 2013 available to a manufacturer producing new drugs in India *viz.*: (i) by a new process developed through indigenous research and development; and (ii) involving a new delivery system developed through indigenous research and development, continue to remain in force.

1 (1) Regional Provident Fund Commissioner *v.* Vivekananda Vidyamandir (Civil Appeal No. 6221 of 2011), (2) Surya Roshni Ltd. *v.* Employees Provident Fund (Civil Appeal Nos. 3965-66 of 2013), (3) U-Flex Ltd. *v.* Employees Provident Fund (Civil Appeal Nos. 3969-70 of 2013), (4) Montage Enterprises Pvt. Ltd. *v.* Employees Provident Fund (Civil Appeal Nos. 3967-68 of 2013), and (5) Management of Saint-Gobain Glass India Ltd. *v.* The Regional Provident Fund Commissioner, Employees' Provident Fund Organisation (Transfer Case (C) No.19 of 2019, arising out of T.P. (C) No. 1273 of 2013).

2 Bridge and Roof Co. (India) Limited *v.* Union of India, (1963) 3 SCR 978.

3 Manipal Academy of Higher Education *v.* Provident Fund Commissioner, (2008) 5 SCC 428.

ii. **Exemption available for drugs treating orphan diseases:** The Drugs Order also empowers the Government to exempt from price control, certain drugs that treat orphan diseases. This power was not available under the DPCO, 2013.

iii. **Collecting and using market based data:** The Drugs Order further empowers the Government to obtain price related data on drugs from any company specializing in pharmaceutical market data and allows the Government to validate such data by appropriate evaluations and surveys. Under the DPCO, 2013, the Government had no flexibility and was required to exclusively source such data from IMS Health. The Drugs Order also empowers the Government to use the market data on price of drugs of any given month (as it deems fit), for the purpose of fixing the price of notified drugs, without any rigid requirement of using data pertaining to the previous six months only (as was required under the DPCO 2013).

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Inter alia...

❖ The Ministry of Health and Family Welfare in consultation with the Drugs Technical Advisory Board has, by way of a notification dated February 8, 2019, introduced eight new medical devices under the purview of 'drugs', as defined under Section 3(b)(iv) of the Drugs and Cosmetics Act, 1940 ('**DCA**'). These devices include all implantable medical devices, CT scan equipment, MRI equipment, defibrillators, dialysis machines, PET equipment, X-ray machine and bone marrow cell separator (collectively, '**Medical Devices**'), and are in addition to the pre-existing list of 23 other medical devices defined as 'drugs' under the DCA. The Medical Devices will be brought under the regulatory purview of the DCA and the Medical Devices Rules, 2017, with effect from April 01, 2020.

❖ Eight New Medical Devices Brought under the Regulatory Purview of 'Drugs'

Real Estate

❖ The Government of Maharashtra, by its notification dated March 8, 2019, notified the Maharashtra Land Revenue (Conversion of Occupancy Class-II and Leasehold lands into Occupancy Class-I) Rules, 2019 ('**Conversion Rules**'). The Conversion Rules apply to the lands granted or allowed (generally by the State Government through the Collector) to be used for agricultural, residential, commercial or industrial purpose on Occupancy Class II basis (*i.e.*, lands which are not freely transferable and require prior permission of the competent authority for any transfers) or on a leasehold basis.

The Conversion Rules permit the conversion of the abovementioned lands to Occupant Class I (*i.e.*, lands that are freely transferable and are not subjected to any permission of the competent authority) on an application to the District Collector and on the payment of the prescribed premium, provided that the violations or breaches (if any) of the terms or conditions of the grant of the land have been rectified. The premium prescribed under the Conversion Rules varies from 15%–75% of the value of the land as per the applicable rate of assessment, depending on the category of holding. Further, the Conversion Rules provide for an increase in the premium, in the event the application for the conversion is made after the expiry of three years from the date of publication of the Conversion Rules. The Conversion Rules also provide relief to the extent that any amount that is already paid to the Government towards change of use or towards conversion of leasehold rights into Occupancy Class II as per the prevailing policy of the Government will be adjusted towards the amount payable for conversion to Occupant Class I.

❖ Maharashtra Land Revenue (Conversion of Occupancy Class-II and Leasehold lands into Occupancy Class-I) Rules, 2019

Litigation

❖ SC, in its decision dated March 7, 2019 in **Isha Distribution House Private Limited *v.* Aditya Birla Nuvo Limited**[4], has considered if the High Court was justified in allowing the defendants' application for revoking the leave granted to the plaintiff under Clause XII of the Letters Patent Act, 1865 ('**LPA**'). Setting aside the order of the High Court, SC held that a plea of territorial jurisdiction is a mixed question of fact and law, which ought to be raised in the written statement to enable the Court to try it on merits in accordance with Order XIV of the Code of Civil Procedure, 1908 and other relevant provisions. As such, a plea of such a nature cannot be tried by filing an application for revocation of the leave granted under Clause XII of the LPA. Accordingly, SC remanded the case to the High Court for deciding the plea of territorial jurisdiction afresh in accordance with the above observations.

❖ SC Clarifies that Plea of Territorial Jurisdiction cannot be Raised through Application for Revocation of the Leave Granted under the Letters Patent Act, 1865

4 Isha Distribution House Private Limited *v.* Aditya Birla Nuvo Limited, Civil Appeal Nos. 25542555 of 2019 (arising out of S.L.P.(C) Nos. 1977719778 of 2017).

❖ SC Strikes Down the Requirement of 10% Pre-Deposit for Initiating Arbitration against a State Entity

❖ SC, in its decision dated March 11, 2019 in **Icomm Tele Limited *v.* Punjab State Water Supply & Sewerage Board**[5], had to judge the validity of an arbitration clause that provided for a deposit of 10% of the claim amount in a scheduled bank in the name of the arbitrator, as a condition for initiation of arbitration by a claimant, prescribed in tender documents of a State entity.

SC held that deterring a party from invoking the arbitration process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the courts, and would render the arbitral process ineffective and expensive. Accordingly, the impugned clause was held to be violative of Article 14 of the Constitution and was struck down to such extent. SC has also reiterated that terms of an invitation to tender are not open to judicial scrutiny, as they are in the realm of contract, unless they are arbitrary, discriminatory or actuated by malice.

❖ SC Clarifies Regarding Appointment of an 'Independent Arbitrator'

❖ SC, in its decision dated March 29, 2019 in **Union of India *v.* Parmar Construction Company**[6], has held that with respect to appointment of an independent arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('**A&C Act**'), there should be emphasis to act on the agreed terms and to first resort to the procedure in the arbitration agreement, which should be given effect to as closely as possible. Therefore, an independent arbitrator should be appointed by the Court under Section 11(6) of the A&C Act after the remedies provided for in the agreement had been exhausted. The SC also held that the Arbitration and Conciliation (Amendment Act), 2015, which came into force on October 23, 2015, would not apply to arbitral proceedings which had commenced (in accordance with Section 21 of the A&C Act) before the coming into force of such amendment, unless the parties had otherwise agreed.

❖ Delhi HC Refuses to Grant an Anti-Bilateral Investment Treaty Arbitration Injunction

❖ The Delhi High Court in its decision dated January 29, 2019 in **Union of India *v.* Khaitan Holdings (Mauritius) Limited**[7] has refused to grant an anti-Bilateral Investment Treaty ('**BIT**') arbitration injunction to restrain Khaitan Holdings (Mauritius) Limited from relying upon the arbitration provision in the BIT agreement entered into between India and Mauritius. It was held that: (i) the A&C Act, would not apply to BIT arbitrations as they were not commercial arbitrations and therefore, the provisions of the Code of Civil Procedure, 1908 would apply; (ii) while the Indian Courts did have jurisdiction to grant anti-BIT arbitration injunctions, such injunctions would only be granted in very rare circumstances given that it is a principle of public policy that the Government has to honour its commitments; and (iii) an arbitral tribunal constituted under a BIT is competent to decide its own jurisdiction.

❖ Bombay High Court Decides on Enforceability of a Put Option in a Share Purchase / Shareholders' Agreement

❖ The Bombay High Court in its decision dated March 27, 2019 in **Edelweiss Financial Services Limited *v.* Percept Finserve Private Limited**[8] has set aside an arbitral award which had held that a put option provided to Edelweiss Financial Services Limited was void and unenforceable. The arbitral award held that such put option was a forward contract and in any event a derivative contract under the Securities Contracts (Regulation) Act, 1956 ('**SCRA**') and therefore illegal under the notifications issued under Section 16 and also contrary to Section 18A of the SCRA. The Bombay High Court set aside the arbitral award on the ground of 'patent illegality' and held that such a put option is enforceable as the contract of sale comes into existence only after the exercise of such option. Therefore, such an option is neither a forward contract nor a derivative contract under Section 2(ac) of the SCRA. The Court further held that even assuming the option is a derivative, its illegality must not be borne from Section 18A of the SCRA – which only positively provides for legality and validity of contracts in derivative. The Court has also ruled that cross objections filed by a respondent in a petition under Section 34 of the A&C Act are not maintainable since the provisions of Civil Procedure Code, 1908 are not applicable to proceedings under Section 34 as the A&C Act is a code in itself and Section 34 does not make any provision for filing of cross objections.

❖ NCLAT holds that it is not necessary to Initiate IBC Proceedings against the Principal Borrower before Initiating CIRP against the Corporate Guarantors

❖ The National Company Law Appellate Tribunal ('**NCLAT**'), in its decision dated January 8, 2019, in **Ferro Alloys Corporation Limited *v.* Rural Electrification Limited**[9], has reasoned that the Insolvency and Bankruptcy Code, 2016 ('**IBC**') does not exclusively prescribe any inter-se rights, obligations and liabilities of a guarantor qua a financial creditor. Thus, the NCLAT has held that, in the absence of any express provisions to this effect, the same will have to be noticed from the provisions of the Indian Contract Act, 1872 and therefore it is not necessary to initiate Corporate Insolvency Resolution Process ('**CIRP**') under the IBC against the 'Principal Borrower' before initiating it against the 'Corporate Guarantors'. Without initiating any CIRP against the 'Principal Borrower', it is open to the financial creditor to initiate CIRP against the

5 Icomm Tele Limited *v.* Punjab State Water Supply & Sewerage Board, Civil Appeal No. 2713 of 2019 (arising out of SLP (Civil) No. 3307 of 2018).

6 Union of India *v.* Parmar Construction Company, Civil Appeal No(s). 3303 of 2019 (arising out of SLP(C) No(s). 6312 of 2018).

7 Union of India *v.* Khaitan Holdings (Mauritius) Limited, CS (OS) 46 of 2019.

8 Edelweiss Financial Services Limited *v.* Percept Finserve Private Limited, Arbitration Petition No. 220 of 2014.

9 Ferro Alloys Corporation Limited *v.* Rural Electrification Limited, Company Appeal (AT) (Insolvency) No. 92 of 2017.

'Corporate Guarantors', as such financial creditor is also the 'Financial Creditor' qua the 'Corporate Guarantor' under Section 7 of the IBC.

❖ In **Dharani Sugars and Chemicals Limited *v.* Union Of India**[10], the SC dealt with various petitions challenging the constitutional validity of RBI circular dated February 12, 2018 ('**RBI Circular**'). The SC struck down the RBI Circular and declared it as ultra-vires.

With respect to the scope of RBI's power to issue the RBI Circular under Section 35AA of the Banking Regulation Act, 1949 ('**BR Act**'), the SC held that RBI can direct banking institutions to initiate insolvency proceedings if two conditions are fulfilled, namely if: (i) there is a Central Government authorization to do so, and (ii) the direction is in respect of specific defaults. Section 35AA, by necessary implication, prohibits RBI to exercise the power in any manner other than as set out in Section 35AA. Whilst prior to the enactment of Section 35AA of the BR Act, RBI could have issued directions under Section 21 and Section 35A of the BR Act to initiate an insolvency resolution process under the IBC; after the enactment of Section 35AA, this can be done only within the four corners of Section 35AA.

With respect to the scope of Section 35AB of the BR Act, the SC interpreted the words "*without prejudice*" appearing in Section 35AB to be only illustrative of a general power which does not restrict such general power. Therefore, the power to issue directions under Section 35AB is in addition to the power under Section 35A. Additionally, Section 35AB is not without prejudice to the provisions contained in Section 35AA and, therefore, the power under Section 35AB (read with Section 35A) is to be exercised separately from the power conferred by Section 35AA. The SC held that the scheme of Sections 35A, 35AA, and 35AB of the BR Act is as follows:

i. Section 35AA is the only source of power to issue directions to initiate the insolvency resolution process under IBC;
ii. When it comes to issuing directions in respect of stressed assets, which directions are directions other than resolving the problem of stressed assets under IBC, such power falls within Section 35AB (read with Section 35A).

The SC was of the view that all actions taken under the RBI Circular, including actions by which IBC has been triggered, falls along with this RBI Circular. As a result, all cases in which debtors have been proceeded against by financial creditors under Section 7 of IBC, only because of the operation of the RBI Circular, have been declared to be *non-est*.

❖ The NCLAT, in its judgment dated February 4, 2019, has dismissed the appeal filed by Tata Steel Limited ('**TSL**') against Liberty House Pte. Ltd. ('**Liberty**'). TSL had challenged the order of the National Company Law Tribunal, Principal Bench ('**NCLT**') dated April 23, 2018 whereby the Committee of Creditors ('**CoC**') of Bhushan Power & Steel Limited ('**BPSL**') was directed to consider the resolution plan submitted by Liberty after expiry of the last date for submission of the same. During the CIRP of BPSL, TSL and JSW Steel Limited ('**JSW**') had submitted their respective bids within the timelines provided by the resolution professional. Whilst TSL's appeal against the NCLT's order dated April 23, 2018 was pending before the NCLAT, JSW revised its earlier bid and, thereafter, continued to revise its bid, which was also challenged by TSL before the NCLAT (along with actions of the CoC in connection with the same).

The issues for consideration before the NCLAT were whether the NCLT/CoC could provide multiple opportunities to resolution applicants to revise their respective resolution plans and if the CoC was authorized to entertain fresh or revised resolution plans without exhausting available bids. The NCLAT relied upon the judgment in the *Binani Industries* case and confirmed that prior to the voting on resolution plans placed before the CoC, the CoC can call for and consider the 'improved financial offer(s)' in order to ensure value maximization and within the IBC timelines it was open for the CoC to grant multiple opportunities to the resolution applications to revise their respective financial offers.

The NCLAT also held that the appeal filed by TSL was premature in absence of any final decision taken by the NCLT as to the approval of the resolution plan. The NCLAT took note of the approval of the resolution plan of JSW by the CoC during the pendency of the appeal and directed that proceedings could be initiated before the NCLT for approval of the same. Subsequently, the resolution professional has filed an application before the NCLT for approval of the resolution plan of JSW, which is currently pending.

❖ SC Strikes Down RBI Circular dated February 12, 2018

❖ NCLAT Dismisses Tata Steel's Appeal Against Liberty in the Matter of Bhushan Power & Steel

10 Dharani Sugars and Chemicals Limited v. Union Of India, Transferred Case (Civil) No. 66 of 2018 in Transfer Petition (Civil) No. 1399 of 2018.

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Chambers Forum India Awards, 2019

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