Inter alia...

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

AZB & PARTNERS
ADVOCATES & SOLICITORS

MUMBAI : AZB House | Peninsula Corporate Park | Ganpatrao Kadam Marg | Lower Parel | Mumbai 400013 | India | TEL +91 22 40729999 | FAX +91 22 66396888 | E-MAIL mumbai@azbpartners.com

MUMBAI : Sakhar Bhavan | 4th Floor | Nariman Point | Mumbai 400021 | India | TEL +91 22 49100600 | FAX +91 22 49100699 | E-MAIL disputeresolution.mumbai@azbpartners.com

DELHI : AZB House | Plot No. A8 | Sector 4 | Noida 201301 | National Capital Region Delhi | India | TEL +91 120 4179999 | FAX +91 120 4179900 | E-MAIL delhi@azbpartners.com

GURGAON : Unitech Cyber Park | 602 Tower-B | 6th floor | Sector 39 | Gurgaon 122001 | National Capital Region Delhi | India | TEL +91 124 4841300 | FAX +91 124 4841319 | E-MAIL gurgaon@azbpartners.com

BANGALORE : Embassy Icon | 7th Floor | Infantry Road | Bangalore 560 001 | India | TEL +91 80 42400500 | FAX +91 80 22213947 | E-MAIL bangalore@azbpartners.com

PUNE : Onyx Towers | 1101-B | 11th floor | North Main Road | Koregaon Park | Pune 411001 | India | TEL +91 20 67256666 | FAX +91 20 67256600 | E-MAIL pune@azbpartners.com

Corporate & SCRA

❖ Clarification on Prosecution of Independent Directors and Non-Executive Directors

❖ The Ministry of Corporate Affairs ('**MCA**') issued a Circular dated March 2, 2020 on the initiation of prosecution or internal adjudication proceedings against independent directors and non-executive directors (who are not promoters or key managerial personnel ('**KMP**') of a company). The Circular reiterates the position that the liability of independent directors or non-executive directors (not being promoters or KMPs) is limited to: **(a)** acts, omissions, and commissions by a company which occurred with his/her consent or connivance; and **(b)** instances where he/she failed to act diligently. It also provides certain procedural safeguards against initiation of prosecution proceedings against such directors, such as:

i. Ordinarily, whole-time directors or KMPs (associated with day-to-day functioning of a company), are liable for defaults committed by the company. In their absence, director(s) who have expressly given their consent for incurring liability for maintenance, filing and distribution of accounts or records in Form GNL–3, may be held liable for any non-compliance in this regard;
ii. Civil or criminal proceedings must not be initiated against independent directors or non-executive directors, without sufficient evidence of their involvement in lapses of decisions of the board or its committees; and
iii. If there are doubts regarding their liability, guidance may be sought from MCA, in which case, proceedings will be initiated only with the sanction of MCA. In cases where prosecution documents may have already been filed, without the criteria above having been met, the matter may be submitted to MCA for examination and further direction.

❖ Notification on Appointment of Whole-Time Company Secretary and Secretarial Audit

❖ MCA has, by a notification dated January 6, 2020, amended the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 ('**Managerial Personnel Appointment Rules**'), effective on and from April 1, 2020. Some of the key amendments are:

i. The paid-up share capital threshold beyond which private companies must mandatorily appoint a whole-time company secretary, has been increased from ₹5 crore to ₹10 crore (approx. US$ 660,000 to US$ 1.32 million); and
ii. A new category of companies which are mandatorily required to conduct a secretarial audit has been introduced, *i.e.*, every company having outstanding loans or borrowings from banks or public financial institutions, of at least ₹100 crore (approx. US$ 1.32 million), as on the date of the latest audited financial statements.

❖ Notification of Provisions Relating to Schemes of Arrangement Including Takeover Offers

❖ MCA on February 3, 2020, notified Sections 230(11) and 230(12) of the Companies Act, 2013 ('**Companies Act**'). Section 230(11) of the Companies Act allows for a takeover offer to be implemented through a scheme of compromise or arrangement. It also provides that, for listed companies, the takeover offer must be as per the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Section 230(12) of the Companies Act allows an aggrieved party to make an application to the National Company Law Tribunal ('**NCLT**') in the event of any grievances with respect to the takeover offer of companies (other than listed companies).

MCA has also notified the NCLT (Compromises, Arrangements and Amalgamations) Amendment Rules, 2020 to give effect to Section 230(11) of the Companies Act.

❖ Extension of Certain Provisions of the Companies Act to Limited Liability Partnerships

❖ With effect from January 30, 2020, MCA has extended the application of Section 460 of the Companies Act to limited liability partnerships ('**LLPs**'), which empowers the Central Government to condone any delays (for reasons to be recorded in writing), in making applications to the Central Government or filings with the ROC.

❖ Companies Fresh Start Scheme, 2020

❖ On March 30, 2020, MCA introduced the Companies Fresh Start Scheme, 2020 ('**CFSS**') which grants a one-time opportunity to defaulting companies to make delayed filings, with the 'MCA21' registry, without any penalty. The CFSS has come into force on April 1, 2020, and will remain in force until September 30, 2020. Some of the key provisions of the CFSS are:

i. Every defaulting company will be granted immunity against the launch of prosecution or proceedings for the imposition of penalties pertaining to any delays in the filing of documents. However, this immunity does not extend to consequential proceedings, proceedings involving interests of shareholders or any other person *qua* a company or its directors and KMPs;
ii. Companies are granted an additional 120 days to file appeals with the Regional Director, in matters relating to delays in making filings, and where the original limitation period for making such appeal expires between March 1 to May 31, 2020;
iii. The CFSS requires companies to make an application (in e-Form CFSS-2020) for the grant of immunity in respect of documents filed under the CFSS, within time-

lines specified therein; and

iv. The CFSS will not apply to companies: **(a)** against which an action for final notice for striking-off has already been initiated or where an application for striking off the name has been filed; **(b)** which have been amalgamated; **(c)** which have already filed an application for obtaining status as a 'dormant company'; **(d)** which are vanishing; or **(e)** where charge related documents or any increase in authorized capital is involved.

❖ MCA, on March 4, 2020, introduced the LLP Settlement Scheme, 2020 ('**LLP Scheme**') providing a one time relaxation on additional fees required to be paid by LLPs upon default in making timely filings. The LLP Scheme will remain in force up to September 30, 2020.[1]

❖ LLP Settlement Scheme, 2020

❖ MCA has by a Circular and an office memorandum dated March 23, 2020 and March 28, 2020, respectively, clarified that spending of funds by companies in relation to COVID-19, including by contribution to the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund ('**PM-CARES Fund**'), is an eligible corporate social responsibility ('**CSR**') expenditure under the Companies Act. Further, by FAQs dated April 10, 2020, MCA has clarified, that contributions to the State Disaster Management Authority will also be eligible CSR activity, but contributions towards: **(a)** 'Chief Minister's Relief Fund' or 'State Relief Fund for COVID-19'; and **(b)** payment of salary/ wages to employees and workers (including contract labour/ temporary/ casual/ daily wage workers) during the lockdown period will not be considered as eligible CSR expenditure. However, ex-gratia payment over and above the disbursement of wages to temporary/ casual workers/ daily wage workers, specifically for the purpose of fighting COVID-19, will be admissible towards CSR expenditure, provided there is an explicit declaration to that effect by the board of the company, duly certified by the statutory auditor.

❖ CSR Contribution towards COVID-19 Pandemic

❖ MCA on January 24, 2020 has notified the Companies (Winding Up) Rules, 2020 ('**Winding Up Rules**'), effective from April 1, 2020. While 'voluntary winding up' and 'winding up on the grounds of inability to pay off debts' fall within the purview of the (Indian) Insolvency and Bankruptcy Code, 2016 ('**IBC**'), the Winding Up Rules set out the procedure for winding up in accordance with Section 271 of the Companies Act, which prescribes circumstances in which a company may be wound up by the NCLT.

In order to reduce the burden on the NCLT, the Winding Up Rules provide for a summary procedure with the Government of India ('**GoI**') (as envisaged under Section 361 of the Companies Act), for liquidation of companies: **(a)** accepting deposit and having total outstanding deposits of upto ₹25 lakh (approx. US$ 32,500); **(b)** having total outstanding loans, including secured loans of upto ₹50 lakh (approx. US$ 66,000); **(c)** having total annual turnover of upto ₹50 crore (approx. US$ 6.6 million); and **(d)** with paid-up capital of upto ₹1 crore (approx. US$ 130,000). The summary procedure entails appointment of an official liquidator by the GoI, followed by the official liquidator immediately thereafter taking into his custody all assets, effects and actionable claims to which the company is or appears to be entitled, who will then submit a report to the GoI within 30 days of his appointment.

❖ Companies (Winding Up) Rules, 2020

Foreign Exchange

❖ The Voluntary Retention Route ('**VRR**') provides a separate channel of investment for Foreign Portfolio Investors ('**FPIs**') to invest in debt markets in India. Investments through this route are free of the macro-prudential and other regulatory norms applicable to FPI investments in debt markets, provided FPIs voluntarily commit to retain a required minimum percentage of their investments in India for a voluntarily committed period. By a Circular dated January 23, 2020, the Reserve Bank of India ('**RBI**') approved the following changes in this regard: **(a)** increased investment cap from ₹75,000 crore (approx. US$ 9.9 billion) to ₹150,000 crore (approx. US$ 19.8 billion); **(b)** FPIs that have been allotted investment limits under VRR may, at their discretion, transfer their investments made under the general investment limit to VRR; and **(c)** FPIs have been allowed to invest in exchange traded funds that invest only in debt instruments.

❖ Voluntary Retention Route for Foreign Portfolio Investors – Relaxations

❖ On January 23, 2020, RBI approved the following changes to the Circular on Investment by FPIs in Debt dated June 15, 2019: **(a)** increase of the cap on short term investments by FPIs in Central Government securities (G-secs), including in treasury bills, and state development loans, from 20% of the total investment in such securities to 30%; **(b)** increase of the cap on short term investments by FPIs in corporate bonds from 20% of the total investment in corpo-

❖ Investment by FPIs in Debt

1 It was originally valid till June 13, 2020. Pursuant to a circular issued by MCA dated March 30, 2020, its validity has been extended to September 30, 2020.

rate bonds to 30%; and **(c)** FPI investments in security receipts have been exempted from the short-term investment limit and the issue wise limit, with such exemption also extending to FPI investments in debt instruments issued by asset reconstruction companies and debt instruments issued by an entity under the corporate insolvency resolution process as per a resolution plan approved by the NCLT under the IBC.

❖ Changes in FDI in Civil Aviation

❖ The Department for Promotion for Industry and Internal Trade ('**DPIIT**'), Ministry of Commerce and Industry has issued Press Note 2 (2020 Series) dated March 19, 2020 which seeks to amend the Consolidated Foreign Direct Investment Policy dated August 28, 2017 with respect to foreign direct investment ('**FDI**') in civil aviation, which will be effective upon notification of corresponding amendments to the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ('**NDI Rules**'). The key changes are: **(a)** while foreign investments in Air India Limited should not exceed 49% (directly or indirectly), foreign investment by non-resident Indians, who are Indian nationals, is to be permitted up to 100% under automatic route; and **(b)** FDI in civil aviation will be subject to provisions of the Aircraft Rules, 1937, which, *inter alia*, prescribe that an 'Air Operator Certificate' to operate scheduled air transport services (including domestic scheduled passenger airline or regional air transport service) can be granted to a body corporate provided that: **(i)** it is registered and has its principal place of business within India; **(ii)** its chairman and at least two-thirds of the directors are citizens of India; and **(iii)** the substantial ownership and effective control is vested in Indian nationals.

Capital Markets

❖ SEBI issues Operating Guidelines for Investment Advisors in International Financial Services Centre

❖ The Securities and Exchange Board of India ('**SEBI**') has, by a Circular dated January 9, 2020, issued the Operating Guidelines for Investment Advisers ('**IA**') in International Financial Services Centre ('**IFSC**'). These provide that any company or LLP, having a net worth of US$ 1.5 million, formed by any recognized entity(ies) complying with specified 'fit and proper' norms, can apply for a certificate of registration as an IA in an IFSC. If the IA is set up as a subsidiary, the net worth of the parent company can be considered for the purpose of the application. Further, such IAs will provide investment advisory services only to the persons specified in the SEBI (IFSC) Guidelines, 2015, including persons resident outside India and non-resident Indians. It also prescribes compliance requirements for such IAs, such as minimum qualification, experience and certification requirements and an annual audit.

❖ SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2020

❖ The commencement date of the requirement under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**SEBI LODR**'), for the chairperson of the board of top 500 listed entities being a non-executive director not related to the managing director or chief executive officer of the company, has been postponed from April 1, 2020 to April 1, 2022.

❖ Reporting of Deviations in Use of Proceeds of Listed Non-Convertible Debt Securities or Listed NCRPS

❖ SEBI, by its Circular dated January 17, 2020, has prescribed a format for the statement required to be made by entities with listed non-convertible debt securities or listed non-convertible redeemable preference shares ('**NCRPS**') to the stock exchanges under Regulation 52(7) of the SEBI LODR, setting out the variation in the use of proceeds of issue of such non-convertible debt securities or NCRPS from the objects set out in the offer documents. This statement is required to be placed before the audit committee (or the board of directors, in case of entities which are not required to have an audit committee) of the listed entity for their review. The statement is required to be submitted on a half-yearly basis within 45 days of the end of the half year, until such funds are fully utilised or the purpose for which these proceeds were raised has been achieved. The first submission is required to be made for the half year ended March 31, 2020.

❖ Revised Fines and SOP in Case of Non-Compliance with SEBI LODR

❖ SEBI, by its Circular dated January 22, 2020, has issued a revised uniform structure for imposing fines for non-compliances with the SEBI LODR, freezing of entire shareholding of the promoter and promoter group (until the listed entity complies with the relevant provision of SEBI LODR and pays the fine levied) and the standard operating procedure ('**SOP**') for suspension of trading in case of continuing and/or repetitive non-compliances. The Circular has come into force with effect from compliance periods ending on or after March 31, 2020, in supersession of its previous Circular on the subject dated May 3, 2018.

❖ SEBI Circular for Streamlining the Rights Issue Process

❖ SEBI, by its Circular dated January 22, 2020, has amended the SEBI LODR and the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 with the objective of streamlining the rights issue process, applicable for all rights issues and fast track rights issues where the letter of offer is filed with the stock exchanges on or after February 14, 2020. Some of the key changes are:

i. Reduction of the mandatory period of advance notice to stock exchanges for a rights issue from seven working days to three working days (excluding the date of intimation and record date);
ii. Issuance of newspaper advertisement disclosing date of completion of dispatch and intimation of the same to the stock exchanges is now required to be completed by the issuer at least two days (instead of three days) before the date of opening of the issue;
iii. Concept of dematerialized rights entitlements has been introduced, with stipulation of provisions regarding process of credit of rights entitlements, trading and settlement of dematerialized rights entitlements on the stock exchange platform, renunciation, *etc*;
iv. Payment towards application for a rights issue should now be made only through the Application Supported by Blocked Amount facility; and
v. No withdrawal of application will be permitted by any shareholder after the issue closing date.

❖ SEBI (Issuing Observations on Draft Offer Documents Pending Regulatory Actions) Order, 2020

❖ The SEBI (Issuing Observations on Draft Offer Documents Pending Regulatory Actions) Order, 2020 issued on February 5, 2020, set out guidelines in respect of issuance of observations by SEBI on draft offer documents (applicable with immediate effect), which include:

i. Where there is a probable cause for investigation, examination or enquiry against the issuer or its promoter / director / group companies (collectively, '**entities**'), SEBI's observations will be kept in abeyance for a period of 30 days (which can be extended for a further period of 30 days);
ii. Where a show-cause notice has been issued in an adjudication proceeding, SEBI will direct the entities to make necessary disclosures in the offer documents. Where the notice has been issued under Section 11(4) or Section 11B(1) of the SEBI Act, 1992, the observations by SEBI will be kept in abeyance for a period of 90 days (which can be extended for a further period of 45 days);
iii. Where recovery proceedings have been initiated or there is non-compliance with an order for disgorgement or monetary penalty or any directions issued by SEBI, the observations will be kept in abeyance till conclusion of such proceedings, or compliance of such directions;
iv. Where an issuer has been restrained by a Court or Tribunal from making a public issue, SEBI will issue its observations subject to a qualification that the same is subject to orders of such Court or Tribunal; and
v. SEBI has clarified that issuance of observations during the pendency of proceedings or regulatory action does not amount to exoneration of any entity from such proceedings or action.

❖ SEBI Board Meeting on February 17, 2020

❖ Certain key decisions taken by SEBI in its board meeting dated February 17, 2020 are as follows:

i. A 'regulatory sandbox' mechanism will be introduced, within which all SEBI registered entities will be eligible for testing new products, processes, services and business models on a limited set of eligible customers for a specified period of time and with certain regulatory relaxations.
ii. A few key amendments proposed to the SEBI (IA) Regulations, 2013, with a view to strengthen the regulatory framework applicable to IAs, are: **(a)** segregation of advisory and distribution activities at client level to avoid conflict of interest, and prohibition on individuals from distribution services; **(b)** mandatory agreement between investment adviser and the client incorporating key terms; **(c)** clarification on payment of fees and introduction of an upper limit on the fees charged to investors; **(d)** enhanced eligibility criteria for registration as an IA including net worth, qualification and experience requirements; **(e)** restriction on the use of "Independent Financial Adviser (IFA)" or "wealth adviser" or other similar terms unless registered with SEBI as an investment adviser; **(f)** allowing implementation services (execution) through direct schemes / products in the securities market to IAs for the convenience of the investors.

❖ SEBI Press Release on Inclusion of Mauritius in the FATF Grey List

❖ SEBI, by its press release dated February 25, 2020, has clarified that the inclusion of Mauritius in the Financial Action Task Force's ('**FATF**') 'grey list' will not impact the eligibility of entities from Mauritius for registration as FPI under the SEBI (FPI) Regulations, 2019, but will only subject them to increased monitoring as per the FATF norms.

❖ Enhanced Disclosure Standards for Alternative Investment Funds

❖ SEBI, by its Circular dated February 5, 2020, introduced a template for private placement memorandums ('**Template PPM**') of alternative investments funds ('**AIFs**') and mandatory performance benchmarking for AIFs. Some of the key features are: **(a)** the framework for performance benchmarking to be complied with by the investment manager; **(b)** AIFs should under-

take an annual audit by an internal / external auditor / legal professional to ensure compliance with the Template PPM; **(c)** contribution agreement has to be compliant with and limited within the scope of the private placement memorandum; and **(d)** investor can provide waiver to the AIF from complying with the requirement to follow Template PPM and the annual audit, provided each investor of the AIF has committed a minimum of ₹70 crore (approx. US$ 10 million).

❖ SEBI Informal Guidance in the Matter of KCP Limited

❖ KCP Vietnam Industries Limited ('**KCP Vietnam**'), incorporated in Vietnam, is a 'material subsidiary' of KCP Limited ('**KCP**'). The governing body of KCP Vietnam is a members' council instead of a board of directors. Under the SEBI LODR, it is mandatory that at least one independent director on the board of a listed entity in India will be director on the board of an unlisted material subsidiary, including a material subsidiary incorporated outside India. Accordingly, SEBI, in its informal guidance dated January 9, 2020 clarified that KCP would be required to appoint one of its independent directors on the members' council of KCP Vietnam.

❖ SEBI Informal Guidance in the Matter of Infosys Limited

❖ Regulation 24(i)(f) of the SEBI (Buy-back of Securities) Regulations, 2018 ('**Buyback Regulations**') restricts further issue of capital for a period of 1 year from the expiry of buyback period, except in discharge of its 'subsisting obligations'. Infosys Limited ('**Infosys**') had requested SEBI for informal guidance as to whether Infosys can consider restricted stock units ('**RSUs**') granted during the buy-back period as a 'subsisting obligation' for the purpose of the Buyback Regulations. SEBI, relying on Section 68(8) of the Companies Act which includes 'stock option schemes' as subsisting obligations for the purpose of buyback, has noted in its informal guidance dated February 3, 2020 that issuance of shares pursuant to conversion of RSUs would be considered as 'subsisting obligation' under the Buyback Regulations.

Banking and Finance

❖ Operational and Business Continuity Measures for Banks / Financial Institutions during COVID-19

❖ RBI has, with a view to counter the impact of the pandemic caused by the recent outbreak of COVID-19, issued a Circular dated March 16, 2020, providing an indicative list of steps to be taken by banks/financial institutions as part of their existing operational and business continuity plans to prevent and control the local transmission of the disease, which include: **(a)** devising a strategy and monitoring mechanism concerning the spread of the disease within the organization; **(b)** taking stock of critical processes and revisiting business continuity plan in the emerging situation with the aim of continuity in critical interfaces; **(c)** taking steps to share important instructions/ strategy with the staff members at all levels; and **(d)** encouraging their customers to use digital banking facilities as far as possible. Further, the entities should also assess the impact on their balance sheet, asset quality, liquidity, etc. arising out of potential scenarios such as further spread of COVID-19 in India and its effect on the economy, contagion from wider disruption in the global economy and the global financial system, etc., based on which banks / financial institutions should take immediate contingency measures to manage the risks after intimating the same to RBI.

❖ Doorstep Banking Services for Senior Citizens and Differently Abled Persons

❖ RBI had previously encouraged banks to be sensitive to the requirements of senior citizens and differently abled persons and put in place appropriate mechanism for meeting the needs of such customers to enable them to avail of the bank's services without difficulty. Further to the same, RBI has, by its Circular dated March 31, 2020, advised banks to incorporate certain aspects of their board approved policy for providing basic banking services to senior citizens of more than 70 years of age and for differently abled persons, including: **(a)** offer doorstep banking services on pan India basis and develop a board approved framework for determining the nature of branches / centres where these services will be provided mandatorily and those where it will be provided on a best-efforts basis and make the policy public; and **(b)** give adequate publicity to the availability of these services in their public awareness campaigns, including prominent indication in brochures and publishing on their respective websites. Additionally, banks have been directed to report to the customer service committee of their boards every quarter, with the progress made in this regard. Banks are required to ensure strict compliance with the above by April 30, 2020.

❖ Guidelines on Restructuring of Advances for Delayed Commercial Real Estate Projects

❖ RBI has, by its Circular dated February 7, 2020, issued guidelines to scheduled commercial banks (excluding regional rural banks) and small finance banks ('**Select Banks**') in relation to deferment of the date of commencement of commercial operations ('**DCCO**') for projects in the commercial real estate ('**CRE**') sector. The Select Banks have been permitted, upon a determination on the viability of the CRE project and the restructuring plan, to extend the DCCO by up to one year and the repayment schedule for an equal or shorter duration, without classifying the account as restructured, subject to all other terms and conditions of the loans remaining

unchanged. Further, in case of standard accounts, where the CRE project is delayed for reasons beyond the control of promoter(s), Select Banks have been entitled to permit a further extension of up to one year in the DCCO without revision to the asset classification. However, this is contingent upon the account continuing to be serviced as per the revised terms and conditions under the restructuring. Select Banks have also been permitted to fund cost overruns arising on account of the extension in DCCO, in accordance with extant regulations on funding cost overrun.

RBI has, by its Circular dated April 17, 2020, extended the above mentioned guidelines to loans given by non-banking financial companies to CRE sector.

❖ Extension of Eligibility for Bank Credit to Registered Non-Banking Financial Companies for On-lending as Priority Sector Lending

❖ Under a Circular dated August 13, 2019 titled 'Priority Sector Lending – Lending by banks to NBFCs for On-Lending', bank credit to registered non-banking financial companies ('**NBFCs**') (other than micro finance institutions) for on-lending was eligible for classification as priority sector lending under certain categories up to March 31, 2020. RBI has, by a Circular dated March 23, 2020, extended the erstwhile priority sector classification for the financial year 2020-21. It has further clarified that the existing loans disbursed under the on-lending model will continue to be classified under priority sector till the date of repayment/maturity. Bank credit to registered NBFCs (other than micro finance institutions) and housing finance company for on-lending will now be allowed up to an overall limit of five percent of individual bank's total priority sector lending. The eligible portfolio under on-lending mechanism is to be computed by averaging across four quarters, to determine adherence to the prescribed cap.

Infrastructure

❖ Relief to Renewable Power Sector due to COVID-19

❖ The GoI had, in view of the COVID-19 pandemic, provided a moratorium period to the power distribution companies ('**DISCOMS**') in relation to payments to be made to power generating companies. Some of these policy directives and decisions of the Government were being interpreted by some of the DISCOMS to mean that on account of the COVID-19 pandemic, such DISCOMS were excused from sourcing power from the renewable power projects and making payments to the renewable power producers. In this context, the Ministry of New & Renewable Energy, GoI by its office memorandum dated April 1, 2020, has clarified that: **(a)** all renewable power projects have been granted "must run" status and such status would not change even during the period of lockdown pursuant to the COVID-19 pandemic. Effectively, DISCOMS are required to continue sourcing power from the renewable power projects even during the lockdown; and **(b)** the DISCOMS have to make payment to the renewable power producers on a regular basis, as was being done prior to the lockdown.

Since the instructions of the Ministry of New & Renewable Energy may not be mandatorily binding on the DISCOMS, the actual effect/ implementation of the above clarifications is yet to be seen.

Telecommunications

❖ Telecommunication Consumers Education and Protection Fund (Fifth Amendment) Regulations, 2020

❖ The Telecom Regulatory Authority of India ('**TRAI**') has, by a notification dated January 16, 2020, amended the Telecommunication Consumers Education and Protection Fund Regulations, 2007 which provides a basic framework for depositing unclaimed money of consumers by service providers, maintenance of the Telecommunication Consumers Education and Protection Fund ('**TCEPF**') and other related aspects. TRAI has clarified that telecom service providers will be required to deposit any unclaimed consumer money of any form (such as excess charges, security deposit, plan charges of failed activations, or any amount belonging to a consumer), which the service providers are unable to refund to their consumers, to the TCEPF, after providing a time of 12 months from the date on which such amount became due for refund or period of limitation specified under law, whichever is later.

❖ Amendment to the Unified Access Services License Agreement and the Unified License Agreement

❖ The Department of Telecommunication ('**DoT**') has, on February 5, 2020, amended the 'Unified Access Services License Agreement' and the 'Unified License Agreement' to enable the licensees to defer the spectrum auction instalment due for the years 2020-2021 and 2021-2022, either for one or both the years. The deferred amount is required to be equally spread over the remaining instalments to be paid by the relevant licensee, without any increase in the existing time period specified for making instalment payments. A licensee opting for a: **(a)** one year deferment, is required to continue to securitize the next payable annual instalment by way of a

financial bank guarantee ('**FBG**') of an amount equivalent to the revised annual installment; and **(b)** two year deferment, is required to provide the FBG of the revised annual instalment amount payable in the year 2022-2023 which will be valid for the entire two year duration of deferment.

❖ Supreme Court Order in the Matter of Union of India v. Association of Unified Telecom Service Providers of India

❖ As reported in the December 2019 issue of *Inter Alia...*, the Supreme Court of India ('**SC**') in its judgment dated October 24, 2019 ('**Judgment**'), had interpreted the terms 'gross revenue' and 'adjusted gross revenue' as defined under the Unified Access Service License ('**UASL**'). While doing so, the SC found Telecom Service Providers ('**TSPs**') to be in default of payment of license fee as demanded by DoT, in terms of the UASL and that interest and penalty had been rightly levied upon the TSPs over and above the license fee that was charged.

The SC in its order dated March 18, 2020 ('**Order**'), has prohibited any self-assessment / re-assessment of the license fee payable to the DoT by the TSPs, as that would amount to reopening of the issues which have been finally settled by the SC in the Judgment. The SC further held that such fee along with the levied interest and penalty will be payable as per its order dated October 24, 2019. Further, in relation to the application filed by DoT for providing reasonable time to the defaulting companies to make payment of the aforementioned dues and to cease the interest payment after a particular date, the SC held that the subject matter of the application will be taken up on the next date of hearing. However, the matter has not yet been listed on account of the lockdown imposed due to COVID-19.

❖ DoT Relaxes Terms and Conditions for Other Service Providers due to COVID-19 Concerns

❖ By its Circular dated March 13, 2020 ('**Circular**'), DoT has issued certain relaxations in the terms and conditions prescribed for Other Service Providers ('**OSPs**'), with respect to the ability of their employees to work from home, applicable till April 30, 2020, which includes exemptions to OSPs from: **(a)** the requirement to pay a security deposit and have an agreement to enable work-from-home options; **(b)** the requirement of having a secured VPN from an authorized service provider (OSPs may now use secured VPNs configured using 'static IP' addresses by themselves to enable interconnection between the home agent position and the OSP center with pre-defined locations); and **(c)** the requirement to seek prior permission for providing work-from-home facility. OSPs are however required to notify the designated field units of the DoT before starting the facility. Violation of the terms of this facility by any agent/employee or the OSP, until April 30, 2020 will render the OSP liable for a monetary penalty of up to ₹500,000 (approx. US$ 6,500), per work-from-home location which is in violation and the OSP registration is also liable to be cancelled.

Media

❖ Amendments to the TRAI Interconnection Regulations, Tariff Order and Quality of Standard Regulations for Broadcasting and Cable Services

❖ TRAI has by its notification dated January 1, 2020 further amended the following regulations governing broadcasters and distributors: **(a)** Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017; **(b)** Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff order, 2017; and **(c)** Telecommunication (Broadcasting and Cable) Services Standards of Quality of Service and Consumer Protection Regulations, 2017. The original regulations introduced in 2017 (collectively known as NTO) entirely overhauled the manner in which the packaging, pricing and distribution of television channels was carried out. These new amendments (collectively known as NTO 2.0) have made several key amendments to the pricing and packaging requirements, primarily relating to the composition and pricing of bouquets of television channels. NTO 2.0 has been challenged by various stakeholders including broadcasters, cable operators and distributors and producers before various High Courts in India and these proceedings are currently pending adjudication.

Insurance

❖ IRDAI Guidelines on Repatriation of Dividends by Insurance Intermediaries having Majority Foreign Investor Shareholding

❖ On October 30, 2019, the Insurance Regulatory and Development Authority of India ('**IRDAI**') issued the IRDAI (Insurance Intermediaries) (Amendment) Regulations, 2019, permitting 100% FDI in insurance intermediaries. One of the conditions specified in this regard was for an insurance intermediary to seek prior IRDAI approval for repatriating dividend, if such intermediary has majority foreign investor shareholding. On January 3, 2020, the IRDAI issued guidelines in relation to repatriation of dividends by insurance intermediaries having majority shareholding held by foreign investors.

❖ On February 21, 2020, the DPIIT issued Press Note 1 (2020 Series) ('**PN 1**'), notifying the amendment to the Consolidated FDI Policy of 2017 for operationalizing the proposal for allowing 100% foreign equity investment in insurance intermediaries under the automatic route, subject to certain conditions including, verification by the IRDAI. Some of the key conditions are: **(a)** conditions in relation to 'Indian ownership and control' will not be applicable to insurance intermediaries, with the composition of the board of directors and key management persons being in accordance with specifications of concerned regulators; **(b)** for entities whose primary business is not the insurance sector, and are permitted to function as insurance intermediaries (like a bank), foreign investment caps applicable in its primary sector will continue to apply, subject to the revenue of such entity from the primary (non-insurance) business remaining above 50% of its total revenue in any financial year; **(c)** foreign portfolio investment will be governed by regulations issued by RBI and SEBI; **(d)** an intermediary having majority foreign shareholding will be required to undertake, *inter alia*, that: **(i)** it is incorporated as a limited company under Companies Act; **(ii)** at least one amongst the chairman of the Board, CEO, principal officer or managing director of the intermediary is required to be a resident Indian citizen; **(iii)** repatriation of dividend will require prior approval of IRDAI; and **(iv)** payments to a foreign group or promoter or subsidiary or interconnected or associate entities are not permitted beyond what is necessary or permitted by IRDAI.

These changes took effect from April 27, 2020 *i.e.* the date of the corresponding amendment to the NDI Rules.

Taxation

❖ Government Promulgates an Ordinance Extending Time Limits for Various Compliances in View of the COVID-19 Outbreak

❖ In light of the COVID-19 pandemic, the Finance Minister, Ms. Nirmala Sitharaman, on March 24, 2020, announced various changes to statutory and regulatory compliance matters to deal with the economic impact caused by the outbreak. Our Client Alert on March 26, 2020, available here, sets out details of the same. Various direct and indirect tax measures as announced by the Finance Minister were promulgated by the Ministry of Law and Justice, by its notification dated March 31, 2020, in which it notified the Taxation and Other Laws (Relaxing of Certain Provisions) Ordinance, 2020 ('**Tax Relaxation Ordinance**'). The Tax Relaxation Ordinance also introduced certain additional tax measures. A few key amendments are:

Direct Tax

i. Date for commencement of operations for SEZ units for claiming deduction under Section 10AA of the Income-tax Act, 1961 ('**IT Act**') extended to June 30, 2020 for the units which received necessary approvals by March 31, 2020; and
ii. Amended Section 80G of the IT Act to provide that any donation made by a taxpayer to the PM-CARES Fund is allowable as deduction from the total income of such donor, similar to the treatment of donations to Prime Minister's National Relief Fund. Any donation made up to June 30, 2020 will be eligible for deduction from income of FY 2019-20. Hence, any person including a corporate paying concessional tax on income of FY 2020-21 under the new regime can make a donation to PM-CARES Fund up to June 30, 2020 and can claim deduction under Section 80G of the IT Act against income of FY 2019-20 and will also not lose its eligibility to pay tax in concessional taxation regime for income of FY 2020-21. Further, to a clarification dated April 9, 2020, issued by the Government, an employee who donates to the PM-CARES Fund through his/her employer, will also be eligible to claim a deduction under Section 80G of the IT Act on the basis of the Form 16 / certificate issued by the Drawing and Disbursing Officer/ Employer.

Indirect Tax

An enabling section has been inserted in the Central Goods and Services Tax Act, 2017 ('**CGST Act**') empowering the Government to extend due dates for various compliances *inter alia* including statement of outward supplies, filing refund claims, filing appeals, etc. specified, prescribed or notified under the CGST Act, on recommendations of the GST Council. Accordingly, the GoI by a notification dated April 3, 2020 ('**Notification**') has extended the time limit for completion or compliance of any action by any authority or person prescribed / notified under the CGST Act (except certain specified provisions) which falls during the time period from March 20, 2020 to June 29, 2020 till June 30, 2020. Further, where an e-way bill has been generated under Rule 138 of the Central Goods and Services Tax Rules, 2017 with its validity expiring during the period of March 20, 2020 to April 15, 2020, the validity period of such e-way bill will be deemed to have been extended till April 30, 2020.

❖ The Central Board of Direct Taxes of India has, on March 5, 2020, notified that from April 1, 2020, the following securities listed on a recognized stock exchange located in any IFSC, will be eligible for the capital gains tax exemption under Section 47(viiab) of the IT Act: **(a)** foreign currency denominated bond; **(b)** unit of a mutual fund (as specified under Section 10(23D) of the IT Act); **(c)** unit of a business trust; **(d)** foreign currency denominated equity share of a company; or **(e)** unit of an alternative investment fund.

Employment

❖ Please refer to this link on our website: https://www.azbpartners.com/covid-19 for COVID-19 related updates.

❖ The Employees' Provident Fund Organization has issued a Circular dated February 14, 2020, setting out guidelines for initiation of inquiries under Section 7A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 ('**EPF Act**'). Its key provisions are:

i. The inquiries must be initiated only on the following grounds: **(a)** dispute of applicability of the EPF Act; and **(b)** determination of adequacy of dues from an employer;
ii. The proceedings under Section 7A can be initiated only where there is a *prima facie* case, the reasons for which the assessing officer is required to record before initiation of the inquiry. A mere complaint will not be sufficient to initiate such an inquiry;
iii. In order to avoid prolonged proceedings, the assessing officer, before commencing an inquiry, is required to record (in writing) the time period for which the inquiry is intended to be conducted; and
iv. The reasons for initiation of the inquiry must be recorded in writing by the assessing officer, and shared with all relevant parties along with the notice of inquiry; and
v. The scope of an inquiry must be restricted to the issues and time period recorded by the assessing officer. A separate notice must be issued for conducting an inquiry into any unconnected issues or if the period of the inquiry extends beyond the time period originally indicated.

❖ The Employees' State Insurance Corporation ('**ESIC**') issued a Circular dated January 28, 2020 instructing ESIC officials to limit all demands for records to determine adequacy of contributions under the Employee State Insurance Act, 1948 ('**ESI Act**') to a look-back period of five years. This correlates with the provisions of the ESI Act which provides for a time-limit of five years for the ESIC to determine whether an employer has made inadequate contributions under the ESI Act.

Litigation & Arbitration

❖ The SC by its order dated March 23, 2020 took *suo motu* cognizance of difficulty being faced by litigants across the country in filing their petitions / applications / suits / appeals / all other proceedings, on account of COVID-19 within the prescribed period of limitation. Accordingly, the SC has, to obviate such difficulties, ordered that the period of limitation be extended in all such proceedings with effect from March 15, 2020 till further order(s) to be passed by the SC. This power was exercised by the SC under Articles 141 and 142 of the Constitution of India, and was declared to be a binding order on all Courts / Tribunals and authorities.

❖ The Ministry of Law and Justice, by a Gazette Notification dated January 17, 2020 declared United Arab Emirates ('**UAE**') as a '*reciprocating territory*' under Section 44A of the Code of Civil Procedure, 1908. As a result, a decree passed by a '*superior court*' in UAE can be executed in India as if it were passed by a Court in India. '*Superior courts*' in UAE are identified as – Supreme Court and the Federal, First Instance and Appeal Courts in the Emirates of Abu Dhabi, Sharjah, Ajman, Umm Al Quwain and Fujairah; and the following Local Courts – Abu Dhabi Judicial Department; Dubai Courts; Ras Al Khaimah Judicial Department; Courts of Abu Dhabi Global Markets and Courts of Dubai International Financial Center.

❖ SC Ruling on Inadequate Reasoning in Arbitral Awards

❖ The SC in **Dyna Technologies Private Limited *v.* Crompton Greaves Limited**,[2] set aside an arbitral award on the ground that the award was unintelligible as the award suffered from inadequate reasoning. The SC held that the award was confusing and had abruptly concluded at the end of the factual narration without providing any reasons. The SC observed that while this could have been cured under Section 34(4) of the (Indian) Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'), by sending the award back to the arbitral tribunal, the facts of the case did not merit such a remand as the disputes had been pending for more than 25 years. Accordingly, the SC set aside the award and directed the respondent to pay the claimant an amount to provide quietus to the litigation.

While the SC reiterated the settled position that Courts do not to sit in appeal over an award and ought not to interfere with an award merely because an alternate view on facts is possible, the challenge under Section 34 was upheld as the award was held to have been rendered without reasons. An important distinction was also drawn between inadequacy of reasons in an award and an award suffering from perversity. An award which suffers from inadequate reasoning can be cured of defects under Section 34(4) of the Arbitration Act, while an unintelligible award or an award which suffers from perversity of reasoning is required to be set aside.

❖ SC Ruling on Challenge to Award due to Misconduct by Arbitrator

❖ The SC, in **Jagjeet Singh Lyallpuri *v.* Unitop Apartments and Builders Limited**[3] has observed that once the parties have consented to the procedure of the arbitral proceedings, including not cross-examining the witnesses, the parties are thereafter estopped from challenging the arbitral award on the ground that the arbitrator misconducted himself by not permitting the parties to cross-examine the witnesses.

Since the arbitrator had, in the presence of the parties, recorded that the parties would rely upon the affidavits and documents that were filed and the procedure of cross-examination could be dispensed with, a party could not raise this issue as a ground to challenge the award at a later stage.

❖ SC Ruling on Framing Charges and Proving Criminal Conspiracy

❖ In **State (NCT of Delhi) *v.* Shiv Charan Bansal**[4], the SC held that while framing charges under Sections 227 or 228 of the Code of Criminal Procedure, 1973, a strong suspicion founded on some material is adequate. The veracity and the effect of the evidence are not required to be meticulously judged, nor is any weight required to be attached to the probable defence of the accused at the stage of framing charges.

The SC also held that the offence of conspiracy requires some kind of physical manifestation of the agreement between two or more persons to do an illegal act. However, the same need not be proved, nor is it necessary to prove the actual words of communication. It is sufficient if there is a tacit understanding between the conspirators for the execution of the common illegal object.

❖ SC Ruling on Statutory Time Limit for Defendant's Reply

❖ A full bench of the SC in a recent judgment passed in **New India Assurance Limited *v.* Hilli Multipurpose Cold Storage Limited**[5], held that the District Consumer Disputes Redressal Forum could not grant the defendant additional time to file a reply / written statement, beyond the total period of 45 days under Section 13(2)(a) of the (Indian) Consumer Protection Act, 1986 ('**CP Act**'). This provision was mandatory and not directory, and there is no scope for interpretation on equitable grounds.

❖ SC Judgement on Deciding Seat of Arbitration Proceedings in the Absence of Clear Delineation

❖ The SC in **Mankastu Impex Private Limited *v.* Airvisual Limited**[6] held that in the absence of a clearly delineated proper and curial law for the arbitration proceedings, the seat of the arbitration proceedings will have to be determined from the other clauses in the arbitration agreement along with the conduct/intention of the parties. The SC interpreted the provisions of the contract, stating that the disputes "*shall be referred to and finally resolved by arbitration administered in Hong Kong*" was indicative of the intention of the parties to nominate Hong Kong as the seat of the arbitration proceedings. The seat would have exclusive supervisory jurisdiction over the arbitration proceedings and declined to appoint an arbitrator under Section 11(6) of the Arbitration Act.

2 Civil Appeal No. 2153/2010.

3 *Jagjeet Singh Lyallpuri v. Unitop Apartments and Builders Limited*, (2020) 2 SCC 279.

4 (2020) 2 SCC 290.

5 Civil Appeal No. 10941-10942 of 2013, order dated March 4, 2020.

6 *Mankastu Impex Private Limited v. Airvisual Limited*, Arbitration Petition No. 32 of 2018, Supreme Court of India.

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India Business Law Journal, 2019

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