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



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Corporate & SCRA

- ❖ Amendment to the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014
 - ❖ Amendment to Schedule V of the Companies Act, 2013
 - ❖ Amendments to the Companies (Incorporation) Rules, 2014
 - ❖ Provisions Relating to Applications Against Oppression and/or Mismanagement Brought into Force
 - ❖ Companies (Accounts) Amendment Rules, 2016
- ❖ The Ministry of Corporate Affairs ('MCA') has, by way of a notification dated June 30, 2016, amended the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014. Pursuant to the amendment, the erstwhile thresholds applicable to the statement on employees prescribed for inclusion in the report by the board of directors of listed companies and such statement have now been revised to include, *inter alia*: (i) the top 10 employees in terms of remuneration; (ii) any employee who has received ₹10,200,000 (approximately US\$ 150,000) in the preceding financial year (the erstwhile threshold in this regard was ₹6,000,000 (approximately US\$ 90,000)); and (iii) any employee who was employed for a part of the preceding financial year and has received remuneration at any time, at a rate which, in aggregate was more than ₹850,000 per month (approximately US\$ 13,000) (the erstwhile threshold in this regard was ₹500,000 (approximately US\$ 7,000)).
 - ❖ The MCA has, by way of a notification dated September 21, 2016 ('Schedule V Notification'), amended Schedule V of the Companies Act, 2013 ('Companies Act') which prescribes certain conditions for the payment of remuneration by a company having no profits or inadequate profits to its managerial personnel, without approval of the Central Government. The Schedule V Notification has amended the limits and conditions prescribed under Schedule V by: (i) doubling the erstwhile yearly remuneration payable; and (ii) removing the requirement for Central Government approval for payment of remuneration to managerial personnel in excess of the prescribed limits, provided that such managerial personnel meet certain qualification criteria.
 - ❖ The significant amendments made to the Companies (Incorporation) Rules, 2014, by way of notification dated July 27, 2016 are: (i) permitting change in the name of company once its pending annual returns or financial statements have been filed or the payment or repayment of its matured deposits or debentures or interest thereon has been made; and (ii) requiring a registered non-banking financial company ('NBFC') to obtain a no-objection certificate from the Reserve Bank of India ('RBI') for changing the registered office from one State or Union Territory to another.

Further, by way of a notification dated October 1, 2016, the MCA has introduced the Simplified Proforma for Incorporating Company Electronically ('Spice') e-form for providing speedy incorporation related services, in line with international best practices. With Spice, the process of incorporation of a new company has become completely digital and can be achieved in a much faster time frame than previously.
 - ❖ The MCA has notified the following provisions of the Companies Act, which came into force on September 9, 2016:
 - i. Section 227, which deals with confidentiality of privileged communications made to any legal advisor and information regarding legal proceedings before any Governmental authority;
 - ii. Section 242(1)(b), which deals with the circumstances in which the company tribunal may exercise its powers for winding up of a company upon receipt of an application under Section 241 of the Companies Act, regarding oppression and mismanagement of the affairs of the company;
 - iii. Section 242(2) (c) and (g), which deals with the powers of the company tribunal to pass orders for reduction of the share capital of the company upon purchase of the shares of an existing member and / or for setting aside any transfer, delivery of goods payment, execution or other act relating to property taken by or against the company within the preceding three months of the date of application under Section 241; and
 - iv. Section 246, which states that Sections 337 to 341, which deal with liability for the fraudulent conduct of business and powers of the company tribunal to assess damages against delinquent directors in companies / partners in firms, respectively, would apply *mutatis mutandis* to applications made under Section 241 and Section 245 (which deals with class action suits), of the Companies Act.
 - ❖ The significant changes introduced by the MCA, by way of a notification dated July 27, 2016, to the Companies (Accounts) Rules, 2014 are as follows:
 - i. Companies that are unlisted (and not in the process of listing), both in India or overseas, are exempted from the obligation to prepare consolidated financial statements, provided that: (i) such company is a subsidiary of another company and all its members have been notified and no objection has been received from the members in relation thereto; and (ii) the ultimate or intermediate holding company of such company files consolidated financial statements (in compliance



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- with applicable accounting standards), with the relevant Registrar of Companies;
- ii. The Board's report in respect of the subsidiaries' / joint ventures' / associate companies' performance is now required to only provide highlights (and not contain a detailed report as was previously required); and
 - iii. In addition to 'a firm of internal auditors', companies may now appoint either individual/s, partnership firm/s, or a body corporate/s to act as internal auditors and a 'Cost Accountant' may be appointed along with a 'Chartered Accountant'.

❖ The significant amendments introduced by the MCA, by way of a notification dated July 19, 2016, to the Companies (Share Capital and Debentures) Rules, 2014 ('Share Capital Rules'), are as follows:

- i. A company that has defaulted in payment of: (a) dividend on preference shares or repayment of any term loan or interest that has become repayable; (b) dues with respect to statutory payments relating to employees; or (c) requisite amounts in the Investor Education and Protection Fund, is now permitted to issue shares with differential voting rights upon expiry of five years from the end of the financial year within which such default has been rectified;
- ii. Start-ups¹ have been provided with exemptions to issue: (a) sweat equity shares up to 50% of their paid-up capital for the first five years from the date of their incorporation as opposed to the limit of 25% applicable to other companies; and (b) employee stock option plans to its employee/s being a promoter or a director who either directly or indirectly, holds more than 10% of the outstanding equity shares of the company for the first 5 (five) years from the date of its incorporation (which is not permitted in case of other companies);
- iii. There is no longer a requirement for all shares issued by way of preferential allotment to be fully paid up;
- iv. In case of preferential allotment of convertible securities, the price of the resultant shares (pursuant to conversion) is permitted to be arrived at either: (a) at the time of issuance of the convertible securities, based on the valuation report given at the time of the offer; or (b) within 30 days prior to the date when the holder is entitled to apply for shares (on conversion), based on the valuation report given no earlier than 60 days from such date. Provided that, the relevant time for determination of the price is required to be determined and disclosed by the company at the time of offer of the convertible securities;
- v. Security for "secured debentures" can now be created not only by the issuing company, but also by its subsidiaries, holding company or associates companies; and
- vi. A company intending to redeem its debentures prematurely is now permitted to transfer such amounts as are in excess of the prescribed limits to the Debenture Redemption Reserve, the adequacy of which has been now clarified to mean at least 25% of the value of the outstanding debentures rather than the value of debentures issued.

❖ The MCA has, by way of a notification dated August 3, 2016, clarified that unless otherwise specified by RBI, provisions of Chapter III of the Companies Act (relating to prospectus and allotment of securities) and Rule 18 of the Share Capital Rules (relating to debentures) do not apply to issue of rupee denominated bonds made exclusively to persons resident outside India. A corresponding amendment has been made to Rule 18(11) of the Share Capital Rules as well.

❖ The MCA has, by way of a notification dated September 9, 2016, notified the Companies (Mediation and Conciliation) Rules, 2016 ('Mediation Rules'), whereby any party to a proceeding before the Central Government or the company tribunal or the Appellate Tribunal ('Authority') can apply to the Authority, or the Authority may apply *suo moto*, for the matter to be referred to the Mediation and Conciliation Panel in accordance with the process prescribed under the Mediation Rules.

❖ Companies (Share Capital and Debentures) Third Amendment Rules, 2016

❖ Rupee Denominated Bonds Issued by Indian Companies Exclusively to Persons Resident Outside India Exempted from Certain Provisions of the Companies Act

❖ Companies (Mediation and Conciliation) Rules, 2016

¹ As defined in notification dated February 17, 2016 issued by the Department of Industrial Policy and Promotion.



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❖ Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Thirteenth Amendment) Regulations, 2016

❖ Foreign Exchange Management (Remittance of Assets) Regulations, 2016

❖ Corrigendum to Foreign Exchange Management (Deposit) Regulations, 2016

❖ SEBI Circular for Disclosure of the Impact of Audit Qualifications by Listed Entities

❖ Informal Guidance under the Listing Regulations

❖ Amendment of the Listing Regulations

Foreign Exchange

❖ RBI has, by way of a notification dated September 9, 2016 ('**FEMA 20 Notification**'), amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 ('**FEMA 20 Regulations**'), to *inter alia*: (i) permit 100% foreign direct investment ('**FDI**') under the automatic route in financial services activities regulated by financial sector regulators (as may be notified by the Government of India ('**GoI**')); (ii) remove the restriction for FDI, under the automatic route, in NBFCs engaged in any one of the 18 specified activities; (iii) remove the erstwhile minimum capitalization requirements, however, capitalization norms and other limits prescribed by the relevant financial sector regulator will still apply; and (iv) clarify that in sectors where financial services are not regulated / partially regulated by a financial sector regulator, then 100% FDI is permitted under the Government approval route subject to conditions including minimum capitalization requirements, as may be decided by the Government.

❖ RBI has, by way of a notification dated April 1, 2016, issued the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 ('**2016 Remittance Regulations**'), which supercedes the erstwhile regulations. Some of the key changes introduced under the 2016 Remittance Regulations are as follows: (i) any non-resident Indian ('**NRI**') or person of Indian origin desirous of remitting any amounts from a non-resident ordinary rupee ('**NRO**') account is now required to submit an undertaking to the authorized dealer ('**AD**') bank confirming that the remittances are being made from the balance arising from legitimate receivables in India, and not by borrowing from any other person or a transfer from any other NRO account; and (ii) it is no longer required for Indian companies remitting assets when under liquidation to furnish a tax clearance certificate from the relevant tax authorities.

❖ RBI has issued a corrigendum dated September 8, 2016 (with effect from April 1, 2016) ('**Corrigendum**') to the Foreign Exchange Management (Deposit) Regulations, 2016 ('**Deposit Regulations**') clarifying that the restriction on ADs from allowing their branches / correspondents outside India to grant loans to or in favour of non-resident depositors or third parties for purposes other than for relending or carrying on agricultural / plantation activities or for investment in real estate business, has now been dispensed with.

Capital Markets

❖ The Securities and Exchange Board of India ('**SEBI**'), has issued a circular on May 27, 2016, for streamlining the existing process of disclosure of the impact of audit qualifications by listed companies under the SEBI (Listing and Other Disclosure Requirements) Regulations, 2015 ('**Listing Regulations**'). Listed companies are required to disclose the cumulative impact of all audit qualifications in a separate format for the period ending on or after March 31, 2016, simultaneously, while submitting the annual audited financial results to the stock exchanges. SEBI has now dispensed with the requirement of filing Form A or Form B for audit report with unmodified or modified opinion and the requirement of making adjustment in the books of accounts of the subsequent year, and the management of the listed entity will have the option to explain its views on the audit qualifications. If the impact of the audit qualification is not quantified by the auditor, the management must provide an estimate and if the management is unable to provide an estimate, it must state reasons for the same. In both instances, the auditor is required to review and provide comments.

❖ SEBI has issued an informal guidance dated August 23, 2016, under the SEBI (Informal Guidance) Scheme, 2003 ('**IG Scheme**') in the matter of Krebs Biochemicals & Industries Limited regarding the requirement to obtain a shareholders' resolution for reclassification of the promoters as per the Listing Regulations. SEBI has clarified that subject to compliance with Regulation 31A of the Listing Regulations (which lists down conditions for reclassification), reclassification of the promoters of a listed company as public shareholders, not being pursuant to an open offer (in terms of Regulation 31A(5) of the Listing Regulations) or pursuant to a listed entity becoming professionally managed (in terms of Regulation 31A(6) of the Listing Regulations), would not require any approval from the shareholders of the listed entity.

❖ Pursuant to the notification dated July 8, 2016, SEBI has amended the Listing Regulations to include Regulation 43A, which states that the top 500 listed entities based on market capitalization (calculated as on March 31 of every financial year) are required to formulate a dividend dis-

tribution policy that must be disclosed in their annual reports and on their websites. Further, if a listed entity declares dividend on the basis of any additional parameters or proposes to amend the dividend declaration policy, it will be required to disclose the rationale for such changes in its annual report and on its website. However, companies other than the top 500 listed entities may voluntarily disclose their respective dividend distribution policies.

❖ The frequently asked questions ('FAQS') released by SEBI in relation to the circular dated April 21, 2016, pertaining to the electronic book mechanism ('EBP Mechanism') for issuance of debt securities on private placement basis, contain certain clarifications including:

- i. For any issuance of debt securities on a private placement basis made after July 1, 2016, in case the issuer conducts multiple issuances in a financial year which are individually less than ₹500 crores (approximately US\$ 76 million) but where the aggregate issue size in the same year crosses ₹500 crores (approximately US\$ 76 million), the issuer is required to use the EBP Mechanism for any incremental private placement that takes the aggregate issue size in the year equal to ₹500 crores (approximately US\$ 76 million) or above;
- ii. For any issuance of debt securities on a private placement basis made after July 1, 2016, the EBP mechanism is applicable for such tranche issuance(s) that may individually be less than ₹500 crores (approximately US\$ 76 million), but which are part of a shelf offer, including any green shoe option, is more than ₹500 crores (approximately US\$ 76 million) in a single financial year; and
- iii. In case of issues below ₹500 crores (approximately US\$ 76 million) in a single financial year, where such issues have a single investor and the coupon rate is fixed, there is no requirement to mandatorily use the EB Mechanism. However, arrangers acting as underwriters will not be considered as single investors in these cases.

❖ SEBI, by way of a notification dated July 8, 2016, amended the SEBI (Foreign Portfolio Investment) Regulations, 2014, by substituting Regulation 22(2). The amendment stipulates that a foreign portfolio investor ('FPI') is required to ensure that transfer of offshore derivative instruments ('ODIs') issued by or on behalf of it, is made subject to: (i) the ODIs being transferred to persons subject to fulfilment of Regulation 22(1), i.e., no FPI may issue, subscribe to or otherwise deal in ODIs, directly or indirectly, unless: (a) such ODIs are issued only to persons who are regulated by an appropriate foreign regulatory authority, and (b) such ODIs are issued after compliance with 'know your customer' norms; and (ii) prior consent of the FPI having been obtained for such transfer (except when the transferee has been pre-approved by the FPI).

❖ As per the key clarifications provided by SEBI in the FAQs dated September 2, 2016, in relation to its circular dated June 10, 2016, which had specified the conditions for issuance and transfer of ODIs:

- i. The beneficial owners of an ODI subscriber cannot be a non-resident Indian, a person of Indian origin, or an Indian resident, (as defined under the Income-tax Act, 1961); and
- ii. Regarding verification of beneficial owners of ODI subscribers pursuant to the Prevention of Money-laundering (Maintenance of Records) Rules, 2005, SEBI has clarified that the relevant thresholds for identification of the beneficial owner are required to be applied at the subscriber level (and not to the material shareholder / owner entity of the subscriber, as prescribed earlier). Similarly, if no material shareholder / owner entity is identified as the ODI subscriber, the ODI issuer must obtain the identity and address proof of the relevant natural person who holds the position of senior managing official of the ODI subscriber entity (and not in the material shareholder / owner entity, as had been specified earlier).

❖ According to the SEBI (Alternative Investment Funds) Regulations, 2012, a debt fund is permitted to invest in 'debt or debt securities'. In the past, there was ambiguity on whether a debt fund is permitted to give loans. As per the FAQs issued by SEBI on August 18, 2016, it was clarified that alternative investment funds are not permitted to give loans and, accordingly, loans cannot be considered under the ambit of "debt or debt securities".

❖ SEBI has issued an interpretive letter under the IG Scheme to HDFC Bank Limited ('HDFC') on July 25, 2016 on whether a trade by a portfolio manager ('PM') under a discretionary portfolio management scheme can amount to insider trading under the SEBI (Prohibition of Insider Trading) Regulations, 2015 ('IT Regulations'), due to possession of unpublished price sensitive information ('UPSI') by a client. Under a discretionary portfolio management concept, a PM makes investments on behalf of a client, including the terms of such investments, and such decision-making of the PM is not influenced by the client. In this regard, SEBI has clarified the following:

- i. Regulation 4(1) of the IT Regulations states that no insider "shall trade in securi-



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❖ [FAQS in Relation to the Electronic Book Mechanism for Issuance of Debt Securities on Private Placement Basis](#)

❖ [Amendments to the SEBI \(Foreign Portfolio Investment\) Regulations, 2014](#)

❖ [FAQS in Relation to Issuance and Transfer of ODIs](#)

❖ [FAQS in Relation to the SEBI \(Alternative Investment Funds\) Regulations, 2012](#)

❖ [Informal Guidance on Insider Trading in case of HDFC Bank Limited](#)



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❖ Meeting of the SEBI Board

ties that are listed or proposed to be listed on a stock exchange when in possession of unpublished price sensitive information.” Further, as per the explanatory notes to Regulation 4 of the IT Regulations, when a person trades in securities when in possession of UPSI, his trades are presumed to be motivated by knowledge and awareness of the UPSI.

- ii. Accordingly: (a) when considering any dealing in securities, it is not relevant whether such dealing was direct or indirect; (b) under the IT Regulations, any insider when in possession of UPSI should not deal in securities of the company to which the UPSI pertains; and (c) even if such insider (having access to UPSI of a company) deals in such securities through a discretionary portfolio management scheme, the trades of insider will be presumed to be motivated by the knowledge and awareness of UPSI.

❖ The SEBI Board met on September 23, 2016 and took the following decisions:

- i. Currently, FPIs are required to transact in securities through stock brokers registered with SEBI, while domestic institutions such as banks, insurance companies, pension funds etc. are permitted to access the bond market directly (i.e. without brokers). SEBI has decided to extend this privilege to Category I and Category II FPIs.
- ii. In order to facilitate the growth of Investment Trusts (“InvIT”) and Real Estate Investment Trusts (“REIT”), SEBI has decided to amend the SEBI (Infrastructure Investment Trusts) Regulations, 2014 and the SEBI (Real Estate Investment Trusts) Regulations, 2014 (“REIT Regulations”). The key amendments will include:
 - (a) InvITs and REITs will be allowed to invest in the two level SPV structure through the holding company subject to sufficient shareholding in the holding company and other prescribed safeguards. The holding company would have to distribute 100% cash flows realised from the underlying SPVs and at least 90% of the remaining cash flows.
 - (b) The minimum holding of the mandatory sponsor in the InvIT has been reduced to 15%.
 - (c) REITs have been permitted to invest upto 20% in under construction assets.
 - (d) The limit on the number of sponsors has been removed under the REIT Regulations.
- iii. The SEBI Board has approved amendments to the SEBI (Portfolio Managers) Regulations, 1993, to provide a framework for the registration of fund managers for overseas funds, pursuant to the introduction of section 9A in the Income Tax, 1961.
- iv. The SEBI Board has decided to grant permanent registration to the following categories of intermediaries: merchant bankers, bankers to an issue, registrar to an issue & share transfer, underwriters, credit rating agency, debenture trustee, depository participant, KYC registration agency, portfolio managers, investment advisers and research analysts.
- v. The Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 have been amended to increase the upper limit of shareholding of foreign institutional investors mentioned in the Indian stock exchanges from 5% to 15% and to allow an FPI to acquire shares of an unlisted stock exchange through transactions outside of recognised stock exchange including allotment.

Banking and Finance

❖ Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016

❖ The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (‘ESIRDA Act’), which has been enacted by the Parliament and received Presidential assent on August 12, 2016, seeks to amend certain provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (‘SARFAESI’), the Recovery of Debts due to Banks and Financial Institutions Act, 1993, (‘RDBFI Act’), the Indian Stamp Act, 1899 (‘ISA’), and the Depositories Act, 1996 (‘Depositories Act’). Certain sections of the ESIRDA Act have been notified with effect from September 1, 2016.

- i. **Key Amendments to SARFAESI:** (a) Debenture trustees registered with SEBI have now been included in the definition of ‘secured creditor’, and can take enforcement action under Section 13 of the SARFAESI, as the remedies under SARFAESI have been extended to apply to listed debt securities. The scope of SARFAESI has been widened to include hire purchase, financial leasing and conditional sale transactions; (b) the process of taking possession over collateral against which a loan has been provided by a secured creditor, with the assistance of the Chief Metropolitan Magistrate or District Magistrate, has been made time-bound, requiring an order to be passed



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within 30 days from the date of application by the secured creditor; (c) amendments relating to registration of security interest have been introduced, including: (1) a proposal to set up a central database to integrate records of security registered under various registration systems including those made under the Companies Act and the Registration Act, 1908; (2) Central Government may require creditors not qualifying as “secured creditors” under SARFAESI to register the creation, modification and satisfaction of security interest with such central registry; and (3) after registration of security interest with the central registry, the debts due to any secured creditor will have priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central, State or local Governmental authorities.

- ii. **Key Amendments to ISA:** The ESIRDA Act amends the ISA to exempt stamp duty on instruments of transfer or assignment of rights or interest in financial assets to asset reconstruction companies, where such transfer is for the purpose of asset reconstruction or securitisation. Security receipts issued by such asset reconstruction companies may be subscribed to by non-institutional and other investors of prescribed classes.
- iii. **Key Amendments to RDBFI Act:** (a) Debenture trustees registered with SEBI can initiate proceedings under the RDBFI Act regarding defaults in listed debt securities; (b) a bank or a financial institution has now been permitted to take proceedings under RDBFI Act before a tribunal in whose jurisdiction where the defaulted account is maintained / located; (c) a defendant, upon service of summons under the RDBFI Act, is restricted from transferring the secured assets or other assets disclosed in the application made by the bank or financial institution without the approval of the tribunal, except in the ordinary course of business; and (d) electronic filing of recovery applications, documents and written statements has been introduced.
- iv. **Other Significant Changes:** The Depositories Act has been amended to require registration by a depository of any transfer of security in favour of an asset reconstruction company along with or consequent upon transfer or assignment of a financial asset of any bank or financial institution under SARFAESI. Additionally, every depository is also required to register any issue of new shares in favour of any bank or financial institution or asset reconstruction company or any of their assignees, by conversion of part of their debt into shares pursuant to reconstruction of debts of the company agreed between the company and the bank, financial institution or asset reconstruction company.

Taxation

❖ GoI has, by way of a press release dated August 24, 2016, announced that the Union Cabinet, chaired by the Prime Minister, has given its approval for signing the ‘Protocol between India and Cyprus for avoidance of double taxation and the Prevention of Fiscal Evasion’ amending the Indo – Cyprus Double Taxation Avoidance Agreement. As per the press release, India will get the right to tax capital gains arising in India, however, investments made prior to April 1, 2017 will be grandfathered, in respect of which, capital gains would be taxed in the country of which the taxpayer is a resident. It further provides that India will consider rescinding the notification dated November 1, 2013² declaring Cyprus as a notified jurisdictional area under Section 94A of the Income-tax Act, 1961, with retrospective effect. This follows the recent amendment of the India – Mauritius Double Taxation Avoidance Agreement which withdraws the capital gains tax exemption. Talks to amend the India – Singapore Double Taxation Avoidance Agreement are also in progress.

❖ The Bill for introduction of Goods and Services Tax (‘GST’) received the Presidential assent on September 8, 2016 and was notified³ as Constitution (One Hundred and First Amendment) Act, 2016 on September 16, 2016, which provides concurrent powers to the Central and State legislatures to make laws on GST. As a step towards implementation of GST, the Union Cabinet in its meeting held on September 12, 2016 approved setting-up of GST council (‘Council’), consisting of the Union Finance Minister, Union Minister of State for Revenue or Finance, and State Finance Ministers or any other minister nominated by any State Government. The Council will make recommendations on important aspects relating to GST e.g., exemptions, place of supply, threshold limits and GST rates.

❖ Revision of Indo - Cyprus Double Taxation Avoidance Agreement

❖ Constitution (One Hundred and First Amendment) Act, 2016 for Introduction of Goods and Services Tax

² Notification No.86/2013 [F.No.504/05/2003-FTD-1]/SO 4625] dated November 1, 2013.

³ F.No. 31011/07/2014-SO (ST) dated September 16, 2016.



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❖ Child Labour (Prohibition and Regulation) Amendment Act, 2016

❖ Overhaul of Employment Laws

Employment

❖ Amendments to the Child Labour (Prohibition and Regulation) Act, 1986, which have been brought into effect from September 1, 2016, seek to: (i) prohibit the engagement of children in all occupations (except employment: (a) in a family / family enterprise, other than in any hazardous occupation or process, after school hours or during vacations; or (b) as an artist in an audio-visual entertainment industry, except circus, subject to certain prescribed conditions and safety measures) and the engagement of adolescents in hazardous occupations and processes; and (ii) creates a distinction between an ‘adolescent’ and a ‘child’, by defining an ‘adolescent’ as a person between the age of 14 and 18 years, and a ‘child’ as a person who has not completed 14 years of age or such other age as may be prescribed.

❖ The following bills have been recently introduced in the Parliament:

- i. The Union Cabinet has, in its meeting dated June 29, 2016, approved the Model Shops and Establishments (Regulation of Employment and Conditions of Service) Bill, 2016, with an intention to *inter alia* align the statutory provisions on conditions of employment across various States and Union Territories;
- ii. The Rajya Sabha has, on August 11, 2016, passed the Maternity Benefit (Amendment) Bill, 2016 to amend the Maternity Benefit Act, 1961, to *inter alia* increase the maternity leave period in certain circumstances, provide for a ‘work-from-home’ option for women, and provide crèche facilities in certain establishments. This Bill will be notified upon receipt of approval from the Lok Sabha and receipt of Presidential assent;
- iii. The Lok Sabha has, on August 9, 2016, passed the Employees’ Compensation Amendment Bill, 2016, to amend the Employee’s Compensation Act, 1923, to *inter alia*, introduce an obligation on the employer to notify the employee of the compensation amount at the time of appointment. This Bill will be notified upon receipt of approval from the Rajya Sabha and receipt of Presidential assent; and
- iv. The Lok Sabha has, on August 10, 2016, passed the Factories Amendment Bill, 2016 to amend the Factories Act, 1948, to *inter alia* provide for increase in the maximum permitted overtime hours. This Bill will be notified upon receipt of approval from the Rajya Sabha and receipt of Presidential assent.

We will be providing a detailed update on the above proposed legislations once the same have been enacted.

Intellectual Property

❖ National Intellectual Property Rights Policy

❖ The National Intellectual Property Rights Policy (‘IPR Policy’), which was announced by GoI, Department of Industrial Policy and Promotion (‘DIPP’) on May 12, 2016, recognises that the Indian regime on intellectual property rights (‘IPRS’) is compliant with the standards specified by the World Trade Organisation under the Agreement on Trade-Related Aspects of IPRS, and has identified certain objectives to promote an ecosystem to catalyze the full potential of IPRS. These objectives include:

- i. creating public awareness about the economic, social and cultural benefits of IPRS by launching campaigns linked to initiatives like “Make in India” and “Smart Cities”, specifically targeting industry and R&D entities, creating suitable course materials for educational institutions and sensitizing the media to IPRS;
- ii. evaluating potential in specific sectors through comprehensive base line surveys, formulating and implementing targeted programs for creating and utilizing IPRS, and devising mechanisms that benefit medium and small scale enterprises, start-ups and grassroot innovators;
- iii. carrying out appropriate legislative changes to update IPR laws in consonance with national needs and priorities and enhancing transparency and efficiency in administration and enforcement of laws, by undertaking adequate stakeholder consultation;
- iv. modernising and strengthening IPR administration by, *inter alia*, increasing manpower and focus on training officers to ensure that Indian IPR offices operate efficiently, while providing user friendly services;
- v. capitalizing the existing intellectual property assets in the country by, *inter alia*, setting up of a platform that functions as a common database of IPRS, which would allow interaction among potential users, buyers and funding institutions, thereby



- improving IP networking;
- vi. sensitizing creators of IPRs of their rights to enforcement and protection measures, strengthening IPR-targeted forces in State police forces and conducting IPR workshops at judicial academies for facilitating effective adjudication of IPR disputes; and
- vii. strengthening and expanding human resources, institutions and capacities for teaching, training, research and skill building in IPRs.

While the responsibility for actual implementation of the objectives will remain with the identified Ministries / Departments under the IPR Policy, DIPP will be the nodal point to coordinate, guide and oversee implementation and future development of IPRs in India.

❖ DIPP issued an office memorandum dated September 5, 2016, clarifying that internet broadcasting companies are also covered, along with radio and television broadcasting organizations, within the statutory licensing regime prescribed under Section 31D of the Copyright Act, 1957 ('CR Act'). This view was taken based on a broad interpretation of the words "any broadcasting organization desirous of communicating to the public" under Section 31D of the CR Act read with the definition of the term "broadcast" under Section 2(dd) of the CR Act and the definition of the term "communication to the public" under Section 2(ff) of the CR Act.

❖ The Bombay High Court ('Bombay HC') recently passed a number of orders dated June 16, 2016,⁴ July 1, 2016⁵ and July 22, 2016⁶ that have narrowed down the scope of *John Doe* orders. The Bombay HC refused to pass orders that would result in wholesale blocking of hundreds of websites that allegedly offered and hosted illicit links to the movies 'Udta Punjab', 'Great Grand Masti' and 'Dishoom'. The Bombay HC held that an order to block entire website without demonstrating that the entire website contains infringing material cannot be granted and that specific uniform resource locators ('URL') containing infringing material must be identified and established.

On the other hand, in the case of **Department of Electronics and Information Technology v. Star India Private Limited**,⁷ a division bench of the Delhi High Court ('Delhi HC'), by its judgement dated July 29, 2016, upheld a sweeping *John Doe* order for blocking 73 websites on the grounds that if only a single URL is blocked, the same website can very easily provide access to the blocked content through another URL.

❖ Pursuant to the decision of the Supreme Court of India ('SC') in **Indian Performing Rights Society Ltd. v. Sanjay Dalia and Anr.**⁸ ('Sanjay Dalia Case'), the Bombay HC and the Delhi HC have had the opportunity to interpret this ruling and have adopted diverging views.

For instance, in the case of **Manugraph India Limited v. Simarq Technologies and Ors**⁹ the plaintiffs (having registered offices in Mumbai) brought a suit for trademark infringement before the Bombay HC, although the cause of action arose in Delhi for one set of plaintiffs, and in Kolhapur for the other set. The Bombay HC, however, ruled that it continues to have jurisdiction despite no cause of action having arisen in Mumbai on the reasoning that Sections 134 and 62 of the Trade Marks Act, 1999 and the CR Act, respectively, allow plaintiffs to institute suits at the place where they carry on their business, irrespective of whether or not a cause of action arose in that place. Further, the Bombay HC held that the only mischief the SC was trying to remedy in Sanjay Dalia Case was the mischief of plaintiffs filing suits at far-flung subordinate offices where no cause of action had arisen.

However, a Division Bench of the Delhi HC has taken a contrary view in the case of **Ultra Homes v. Purushottam Kumar Chaubey & Ors.**¹⁰ In this case as well, the plaintiff instituted a suit before the Delhi HC on the ground that it carried on business in Delhi, i.e. its principal office was located in Delhi. However, the cause of action arose in Deogarh, Jharkhand (where the plaintiff's subordinate office is located). Applying the principle laid down in the Sanjay Dalia Case, the Delhi HC held that the plaintiff would be deemed to carry on business at the place of his subordinate office and not at the place of the principal office and therefore, in such a situa-

❖ **Statutory License for Internet Broadcasting under the Copyright Act, 1957**

❖ **Diverging John Doe Orders in Relation to Blocking URLs**

❖ **Diverging Rulings by the Bombay HC and Delhi HC on the Issue of Jurisdiction in Trademark and Copyright Infringement Cases**

4 Balaji Motion Picture Limited & Anr. v. Bharat Sanchar Nigam Ltd. & 49 Ors., Notice of Motion (L) No. 1783 of 2016 in Suit (L) No. 633 of 2016.

5 Balaji Motion Pictures Ltd. & Anr. v. Bharat Sanchar Nigam Ltd. & Ors., Notice of Motion (L) No. 1940 of 2016 in Suit (L) No. 694 of 2016.

6 Eros International Media Ltd. and Anr. v. Bharat Sanchar Nigam Limited & Or., Notice of Motion (L) No. 2147 of 2016 in Suit (L) No. 751 of 2016.

7 Department of Electronics and Information Technology v. Star India Private Limited, R.P. 131/2016 in FAO (OS) 57/2015.

8 Indian Performing Rights Society Ltd v. Sanjay Dalia and Anr., Civil Appeal Nos. 10643-44/2010 (arising out of Civil Suit FAO (OS) No. 359/2007) and Civil Appeal arising out of SLP [C] No. 8253/2013.

9 Manugraph India Limited v. Simarq Technologies and Ors, Notice of Motion No. 494 of 2014 in Suit No. 516 of 2013, Bombay High Court (judgement dated June 15, 2016).

10 Ultra Homes v. Purushottam Kumar Chaubey & Ors., FAO (OS) 494/2015, Delhi High Court (judgement dated January 20, 2016).



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Inter alia...

- ❖ Photocopying for Course Packs Falls within “Fair Dealing” and Does Not Amount to Copyright Infringement

tion, the plaintiff could sue only at the subordinate office and not at the place of its principal / registered office.

❖ In the case of **The Chancellor, Masters & Scholars of the University of Oxford & Ors v. Rameshwari Photocopy Services and Or.**¹¹, a suit was filed by five publishers against Delhi University and Rameshwari (a photocopying shop attached to Delhi University) alleging that by photocopying and distributing substantial extracts of academic text books for course packs, for sale, the defendants were infringing the publishers’ copyright in these books. However, the defendants’ main argument that photocopying of academic books for course packs fell under Section 52 of the CR Act, i.e. the fair dealing provisions, was upheld by the Delhi HC. On the grounds that the acts of the defendants fell under Section 52(1)(i) of the CR Act i.e. reproduction of a work by a teacher / pupil in the course of instruction, the Delhi HC held that: (i) this provision applies to an institution and its students and is not limited to an individual teacher and his / her student; (ii) the words “course of instruction” is not limited to a lecture in a class room and extends to various acts of imparting instruction throughout the academic session; (iii) the course packs were provided to students at nominal rates and only contained extracts of the books and, hence, would not be considered as competing with the books of the publishers; and (iv) such an interpretation would not violate the Berne Convention for the Protection of Literary and Artistic Works or the Agreement on Trade-Related Aspects of Intellectual Property Rights as these conventions have left this issue to be decided by their respective member countries. The publishers have filed an appeal on October 5, 2016 challenging this decision and the matter is pending before a Division Bench of the Delhi High Court.

Litigation

- ❖ Disputes under Trust Deeds and the (Indian) Trust Act, 1882 Not Arbitrable

❖ The sc, in the matter of **Vimal Kishor Shah & Ors v. Jayesh Dinesh Shah**¹², by way of an order dated August 17, 2016, has held that disputes relating to trusts, trustees and beneficiaries arising out of trust deeds and the (Indian) Trust Act, 1882 (“Trust Act”) are not capable of being decided in arbitration despite the existence of an arbitration clause in the trust deed. This judgment is significant as it adds another category of disputes that are not capable of being decided in arbitration prescribed by the sc in the matter of **Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.**¹³

The dispute in the present case arose in respect of a family trust deed that contained an arbitration clause that provided for arbitration in terms of the (Indian) Arbitration Act, 1940 for disputes between / with beneficiaries who were not parties to the trust deed. The beneficiaries in the present matter challenged the appointment of an arbitrator by the Bombay HC before the sc on the ground that a valid and enforceable arbitration agreement did not exist.

Referring to Section 7 of the Arbitration and Conciliation Act, 1996 which sets out the requirements of a valid arbitration agreement, the sc held that since the beneficiaries did not sign the document (being the trust deed), they are not parties to such deed and therefore, no agreement could have been entered into between the beneficiaries. The sc also examined the provisions of the Trust Act and observed that the Trust Act exhaustively deals with trusts, trustees and beneficiaries and provides for adequate and sufficient remedies to all aggrieved persons by giving them a right to approach civil courts.

11 The Chancellor, Masters & Scholars of the University of Oxford & Ors v. Rameshwari Photocopy Services and Or., CS(OS) 2439/2012, Delhi High Court (judgement dated September 16, 2016).

12 Vimal Kishor Shah & Ors v. Jayesh Dinesh Shah, (2016) SCC OnLine SC 825

13 Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 wherein sc had held that the following types of disputes are not capable of being settled by arbitration: (i) disputes regarding rights and liabilities arising out of or giving rise to criminal offences; (ii) matrimonial disputes including child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters; and (iv) eviction or tenancy matters governed by special statutes.



❖ The Insurance Regulatory and Development Authority of India ('IRDAI') has notified the IRDAI (Registration of Indian Insurance Companies) (Eighth Amendment) Regulations, 2016 ('IRDAI Amendment'), on July 25, 2016. Regulation 11 of the erstwhile regulations provided that foreign investment in insurance companies is to be calculated as the aggregate of: (i) quantum of paid-up equity share capital held by foreign investors (including foreign venture capital investors) in the insurance company; and (ii) proportion of the paid-up equity share capital held or controlled by each such foreign investor either by itself or through its subsidiary companies in the Indian promoter / Indian investor of the insurance company. Pursuant to the IRDAI Amendment, (ii) above is no longer applicable to an Indian promoter / any Indian investor of listed Indian insurance companies where the concerned Indian promoter / Indian investor is regulated by RBI, SEBI and / or the National Housing Bank.

❖ The salient features of the IRDAI (Listed Indian Insurance Companies) Guidelines, 2016 ('IRDAI Guidelines') issued by IRDAI on August 5, 2016, which will apply to all insurers whose equity shares are listed on stock exchanges and to the allotment process pursuant to a public issue, are as follows:

- i. Any transfer / arrangement or agreement to transfer between 1% to 5% of the paid up equity share capital of an insurer by any person will be subject to the "fit and proper" criteria - creating an exemption from the operation of Section 6A of the Insurance Act, 1938, which requires prior IRDAI approval for transfers in excess of 1% of the share capital of an insurer. Assessment of whether the "fit and proper" criteria are satisfied by an acquirer would be based on an analysis of, *inter alia*, past regulatory record, existence of any convictions / investigations by revenue or regulatory authorities and credit rating, etc.
- ii. Any acquisition / arrangement or agreement for acquisition that will or is likely to take the aggregate holding¹⁴ of an acquirer to 5% or more of the paid-up equity share capital of the insurer or entitles such person to exercise 5% or more of the total voting rights of the insurer, will require prior approval of IRDAI in the manner specified under the IRDAI Guidelines;
- iii. Any fresh acquisitions by a shareholder already having / likely to have an aggregate holding to the extent of 5% or more of the paid up equity share capital of the insurer: (a) where such acquisition results in the aggregate holding of such shareholder up to 10% of the shares/ voting rights of the insurer, will not require prior approval of IRDAI; and (b) where such acquisition results in the aggregate holding of such shareholder exceeding 10% of the paid up equity share capital / voting rights of the insurer, will require fresh approval of IRDAI; and
- iv. Minimum holding by promoters / promoter group is required to be maintained at 50% of the paid up equity capital of the insurer at all times. However, in cases where the present holding of the promoters is below 50%, such holding will be considered to be the minimum holding.

❖ IRDAI has issued a discussion paper on listing of Indian insurance companies on August 11, 2016, which *inter alia* provides for: (i) all general insurance companies, including standalone health and reinsurance companies to mandatorily take steps to list their shares upon completion of eight years of operations; (ii) all life insurance companies to mandatorily list their shares upon completion of 10 years of operations; (iii) all insurance companies that have already exceeded the number of years of operation indicated in (i) and (ii) to initiate steps to ensure that they list their shares within a period of three years from the date of issue of the proposed guidelines; and (iv) Indian insurance companies that meet the above criteria to: (a) take up the matter of listing with their respective board of directors within a period of three months from the date of issue of the proposed guidelines; (b) file the roadmap for an initial public offering ('IPO'), duly approved by their respective board of directors, with IRDAI within a period of 45 days from the date of such approval; and (c) initiate process of IPO in accordance with the approved roadmap within such period as may be approved by IRDAI.

❖ IRDAI (Registration of Indian Insurance Companies) (Eighth Amendment) Regulations, 2016

❖ IRDAI (Listed Indian Insurance Companies) Guidelines, 2016

❖ IRDAI issues Discussion Paper on Listing of Indian Insurance Companies

¹⁴ 'Aggregate holding' has been defined in the IRDAI Guidelines to mean the total holding through acquisition and the shares held by the applicant, his relatives, associate enterprises and persons acting in concert with him.



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

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

❖
Ranked No. 1
for the M&A Announced League Table by Deal Count
Bloomberg's Global M&A, Legal rankings Q3, 2016

❖
Ranked No. 1
for the Indian M&A Announced League Table by Deal Completed
Ranked No. 1
for India involved Mid-Market M&A Rankings by Deal Count (up to US\$ 500m)
Ranked No. 1
for India involved Small Cap M&A Rankings by Deal Count (up to US\$ 50m)
Thomson Reuters' Emerging Markets M&A Legal rankings First Nine Months, 2016

❖
Ranked No. 1
for India in the Q3 M&A Rankings by Deal Count
Mergermarket's Global and Regional M&A League Tables of Legal Advisors, Q1 - Q3 2016

❖
Ranked No. 1
for the M&A Announced League Table by Deal Count
Venture Intelligence, January to April 2016

❖
Law Firm of the Year | Best Overall Law Firm
Firm of the Year
for categories of Banking & Finance, Capital Markets, Competition & Antitrust,
Mergers & Acquisitions, Private Equity & Venture Capital,
Restructuring & Insolvency and Structured Finance & Securitization
India Business Law Journal, 2015

❖
Ranked No.1
by Deal Count and Deal Value for the Indian M&A Announced Deals League Table
Thomson Reuters' Emerging Markets – M&A Review, 2015

❖
Ranked No.1
by Deal Count and Deal Value for India League Tables
Mergermarket's Global & Regional M&A League Tables of Legal Advisors, 2015

❖
Ranked No.1
in APAC ex Japan Mid-Market by Deal Count (up to US\$ 500m) and
Ranked No.1
in APAC ex Japan Mid-Market by Deal Count (up to US\$ 250m)
Bloomberg's Global M&A Mid-Market M&A Ranking, 2015

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