Inter alia…

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In This Issue

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

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Corporate & SCRA

❖ Notification of Section 2(87) of the Companies Act, 2013 and the Companies (Restrictions on number of layers) Rules, 2017

❖ The Ministry of Corporate Affairs ('**MCA**') has, by way of notifications dated September 20, 2017, notified the proviso to Section 2(87) of the Companies Act, 2013 ('**Companies Act**') and the Companies (Restrictions on Number of Layers) Rules, 2017 ('**Layers Restrictions Rules**'). Pursuant thereto, no company can have more than two layers of subsidiaries other than (i) banking companies, (ii) non-banking financial companies, (iii) insurance companies, and (iv) Government companies. Existing companies, which currently have more than two layers of subsidiaries, are:

i. required to file a return in Form CRL- 1, disclosing details in relation to such companies, within 150 days from September 20, 2017; and

ii. restricted from having any additional layer of subsidiaries over and above the layers existing on the date of notification of the Layers Restrictions Rules, and will not, in case one or more layers are reduced by it subsequent to the commencement of these rules, have the number of layers beyond the number of layers it has after such reduction or maximum layers allowed under the Layers Restrictions Rules (whichever is more).

The Layers Restriction Rules specify that for computing the number of layers, a layer comprising of one or more wholly owned subsidiary or subsidiaries will not be counted. It has also been clarified that Layers Restrictions Rules do not derogate from the proviso to Section 186(1) of the Companies Act which deals with the layers of investment companies a company may have. These provisions do not restrict any company from acquiring a company outside India with subsidiaries beyond two layers, as per the laws of such foreign country.

❖ Exemption to Certain Unlisted Public Companies from Appointment of Independent Directors

❖ By way of notification dated July 5, 2017, the MCA amended the Companies (Appointment and Qualification of Directors) Rules, 2014 *inter-alia* amending Rule 4 whereby an unlisted public company which is a joint venture, wholly owned subsidiary, or a dormant company, has been exempted from appointing independent directors. In this regard, the MCA has, by way of notification dated September 5, 2017 clarified that "joint venture" would mean a joint arrangement, entered into in writing, whereby the parties that have joint control of the arrangement, have rights to the net assets of the arrangement. The usage of the terms is similar to that under the accounting standards.

❖ Notification of Provisions related to Investigations by Serious Fraud Investigation Office

❖ On August 24, 2017, the MCA issued a notification for bringing into force subsections (8), (9) and (10) of Section 212 of the Companies Act. Section 212 deals with investigation into affairs of a company by the Serious Fraud Investigation Office ('**SFIO**'). The newly notified subsections deal with the powers of arrest given to the designated officers of the SFIO.

The MCA has also notified the Companies (Arrests in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017 ('**SFIO Rules**') on August 24, 2017, which SFIO Rules are to be read with Section 212 and 469 of the Companies Act and *inter alia* elaborate the powers and manner in which arrests are to be made by SFIO officers pursuant to Section 212.

❖ Amendment to the Companies (Acceptance of Deposit) Rules, 2014

❖ Under Rule 3 of the Companies (Acceptance of Deposit) Rules, 2014 ('**Deposit Rules**'), a company is prohibited from accepting or renewing deposits from its members if the amount of such deposits, together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits, exceeds 35% of the aggregate of the paid-up share capital, free reserves and securities premium account of the company; provided that in case of private companies the applicable limit was 100% instead of 35%. Rule 3 of the Deposit Rules has been amended pursuant to the MCA notification dated September 19, 2017, whereby the enhanced limit of 100% has been extended to a Specified IFSC Public Company.[1] The following classes of private companies have been exempted from the 100% limit as well:

i. a private company which is a start-up, for five years from its incorporation; and

ii. a private company which is not an associate or subsidiary of any other company; **and** the borrowings of such company from banks, financial institutions or body corporate is less than twice of its paid up share capital or INR 50 Crores, whichever is less; **and** such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under Section 73.

1 An unlisted public company licensed to operate by a regulatory authority from the International Financial Services Centre located in an approved multi services Special Economic Zone.

❖ On August 28, 2017, the Department of Industrial Policy and Promotion ('**DIPP**') issued the consolidated foreign direct investment policy circular of 2017 ('**FDI Policy 2017**'), which replaces the consolidated foreign direct investment policy circular of 2016, dated June 7, 2016 ('**FDI Policy 2016**'). The FDI Policy 2017 also consolidates press notes issued by the DIPP since June 7, 2016.

Set out below are the key changes introduced in the foreign direct investment ('**FDI**') regime through the FDI Policy 2017.[2]

i. **Conversion of companies and LLPs**: The FDI Policy 2016 did not cover or prescribe any rules for conversion of companies into Limited Liability Partnerships ('**LLPs**') and vice versa. The FDI Policy 2017 now provides that conversion of LLPs with foreign investment into a company and vice-versa is permitted under the automatic route, if the converting LLP / company is operating in sectors/activities in which: (a) 100% FDI is allowed through the automatic route; and (b) there are no FDI linked performance conditions. The term 'FDI linked performance conditions' has been clarified to mean "*sector specific conditions for companies receiving foreign investment*".

ii. **Retail trading by wholesale companies**: Per FDI Policy 2016, a wholesale / cash & carry trade was permitted to undertake 'single brand retail trading'. FDI Policy 2017 provides that wholesale/cash & carry traders may undertake 'retail trading', *i.e.*, both single brand retail trading and multi brand retail trading (subject to applicable conditions).

iii. **'State of the Art' and 'Cutting Edge' single brand product retail trading:**
   a. Press Note 5 (2016 series) dated June 24, 2016 issued by the DIPP did away with local sourcing norms for a period of three years from commencement of business (being, opening of the first store) for entities undertaking single brand retail trading of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible.[3]
   b. FDI Policy 2017 provides that a committee under the chairmanship of Secretary, DIPP, with representatives from NITI Aayog, concerned administrative ministry and independent technical expert(s) on the subject will examine the claim of applicants on the issue of the products being in the nature of 'state-of-art' and 'cutting-edge' technology where local sourcing is not possible and give recommendations for such relaxation.

iv. **E-commerce**: Under the FDI Policy 2016, an e-commerce entity with foreign investment was not permitted to effect more than 25% of sales through its market place by one vendor or its group companies. FDI Policy 2017 clarifies that the 25% threshold applies to sales value on a financial year basis.

v. **Government approval for additional FDI**: Per FDI Policy 2016, additional FDI into the same entity within the approved foreign equity percentage or into a wholly owned subsidiary did not require fresh Government approval. FDI Policy 2017 provides that Government approval will be required for additional FDI within the approved foreign equity percentage or into a wholly owned subsidiary beyond a cumulative amount of ₹5,000 crores (approx. US$ 764 million).

vi. **Downstream investment intimation**: FDI Policy 2017 requires intimation of downstream investments by foreign owned and/or controlled Indian companies to be made to the Reserve Bank of India ('**RBI**') and the Foreign Investment Facilitation Portal within 30 days of the investment (instead of the Secretariat of Industrial Assistance, DIPP and the Foreign Investment Promotion Board, as prescribed earlier).

2 This article does not cover changes introduced through press notes and other amendments since June 7, 2016 (which have only been consolidated and introduced in the FDI Policy 2017).

3 Incorporated in Note (iii) of Paragraph 5.2.15.3 of FDI Policy 2017

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Capital Markets

❖ Guidelines on Issuance of Offshore Derivative Instruments with Underlying Derivatives

❖ On July 7, 2017, the Securities and Exchange Board of India ('**SEBI**') issued a circular on guidelines for issuance of offshore derivative instruments ('**ODIs**'), with derivatives as underlying, by the ODI issuing foreign portfolio investors ('**FPI**') ('**ODI Guidelines**'). As per the SEBI (Foreign Portfolio Investors) Regulations, 2014 ('**FPI Regulations**'), FPIs are required to comply with certain conditions for issuance of ODIs. Per the ODI Guidelines, FPIs issuing ODIs are required to comply with the following from July 7, 2017:

i. The ODI issuing FPIs will not be allowed to issue ODIs with derivatives as underlying, with the exception of those derivative positions that are taken by the ODI issuing FPIs for hedging the equity shares held by them, on a one-to-one basis;
ii. If there are existing ODIs issued by FPIs where the said underlying derivatives position are not for the purpose of hedging the equity shares held by it, the ODI issuing FPIs are required to liquidate such ODIs latest by the earlier of the date of maturity of the ODI instrument or by December 31, 2020. However, such FPIs must endeavor to liquidate such ODI instruments prior to the said timeline;
iii. If fresh ODIs are issued with derivatives as underlying, a certificate would need to be issued by the compliance officer (or its equivalent) of the ODI issuing FPI, certifying that the derivatives position, on which the ODI is being issued, is only for hedging the equity shares held by it, on a one-to-one basis. The said certificate will be submitted alongwith the monthly ODI reports; and
iv. It has been clarified that the term 'hedging of equity shares' means taking a one-to-one position in only those derivatives which have the same underlying as the equity share.

❖ Debt Investments by FPIS

❖ SEBI issued a circular on July 20, 2017, which brought about the following modifications to the existing legal framework governing investments in corporate debt by FPIs:

i. 95% of the combined corporate debt limit ('**CCDL**') will be available for FPI investment on tap, after which an auction mechanism will be initiated for allocating the remaining limits.
ii. Once such limit is exceeded, the National Securities Depository Limited and Central Depository Services Limited will direct custodians to halt further investments in corporate debt securities by FPIs, and inform BSE Limited and National Stock Exchange of India Limited to conduct an auction for allocation of the unutilised FPI corporate debt limit, provided such limit is at least ₹100 crores (approx. US$ 15.3 million). If the unutilised FPI corporate debt limit continues to remain lower than the above amount for 15 consecutive trading days, then an auction is to be conducted on the 16th day.
iii. The minimum bid is ₹1 crore (approx. US$ 153,000), and the maximum bid is for 10% of the unutilised FPI corporate debt limit. A single FPI/ FPI group cannot bid for more than 10% of the limits being auctioned.
iv. Once the unutilised FPI corporate debt limit has been auctioned, the FPIs have a utilisation period of 10 trading days to make investments, after which the unutilized FPI corporate debt limit allocated to them, reverts to the pool of free limits.
v. Investment in corporate debt by FPIs on tap and issuance of rupee denominated bonds overseas by Indian companies will again be available once the FPI corporate debt limit utilisation levels fall back to less than 92%.
vi. Investments by FPIs in unlisted corporate debt will compulsorily be in dematerialised form, and be subject to a minimum residual maturity period of three years.

❖ Change in Corporate debt limits for FPIS

❖ SEBI, on August 4, 2016, had redefined the corporate debt limit of ₹244,323 crores (approx. US$ 38 billion) for FPIs as the CCDL for all foreign investments in rupee denominated bonds ('**RDBs**') issued onshore and offshore by Indian corporates. Subsequently, the RBI, by way of its circular dated September 22, 2017, excluded foreign investment in RDBs issued offshore by Indian corporates from CCDL, with effect from October 3, 2017. In line with the same, SEBI, on September 29, 2017, has notified that foreign investments in rupee denominated bonds issued offshore by Indian corporates would no longer form a part of CCDL. Additionally, CCDL would be renamed as the corporate debt investment limits ('**CDIL**') for FPIs and the upper limit for CDIL would be stated only in Rupee terms.

The circular also contemplates the creation of a sub-limit within the overall CDIL exclusively for investments by long term FPIs in the infrastructure sector, which sub-limit would include investment in both listed and unlisted corporate debt issued by companies in the infrastructure sector. The sub-limit would be ₹9,500 crores (approx. US$ 1.5 billion) from October 3, 2017 and will be enhanced to ₹19,000 crores (approx. US$ 3 billion) on January 1, 2018 and will also be available for investment on tap. As mandated by SEBI previously, investment by FPIs in unlisted corporate debt securities and securitized debt instruments is not permitted to exceed ₹35,000 crores (approx. US$ 5.4 billion) within the extant CDIL.

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Inter alia...

❖ Consultation Paper on Easing of Access Norms for Investment by FPIs

❖ SEBI, on June 28, 2017, issued a consultation paper on Easing of Access Norms for Investment by FPIs, which *inter alia* proposes the following key amendments to the FPI Regulations:

i. The jurisdictions from which Category I FPI registrations are allowed should also include jurisdictions that are compliant with the extant foreign exchange regulatory framework and that have formal diplomatic ties with India (such as Canada). Presently, such registrations are limited to those entities which are resident of a country whose securities market regulator is either a signatory to International Organisation of Securities Commissions' Multilateral Memorandum of Understanding or has a bilateral Memorandum of Understanding with SEBI;
ii. Discontinuance of the requirement to seek prior approval from SEBI in case of change of the designated depository participant / custodian of the FPI.
iii. Deeming as 'broad based' (for the purpose of Category II FPI registration) applicant funds which have banks, sovereign wealth funds, insurance/ reinsurance companies, pension funds, and/or exchange traded funds as underlying investor(s), subject to the condition that such underlying investor(s) in the applicant fund should either individually or jointly hold majority stake in the applicant fund at all times; and
iv. Permitting different custodians for FPI and foreign venture capital investor ('**FVCI**') registrations for the same entity (presently, an entity holding FPI and FVCI registration is required to have the same custodian for both registrations). SEBI has also proposed that if an entity has a FPI registration and a FVCI registration, then the investment limit of 10% under the FPI Regulations should also include FVCI investments by entities forming a part of the same investor group. Further, SEBI proposes that FPIs must report details of all other FVCIs which share more than 50% common beneficial ownership to the designated depository participant at the time of seeking registration, and FVCI applicants are also proposed to be mandated to provide details of 'group' FPI accounts to SEBI at the time of making an application for FPI registration.

The Consultation Paper also prescribes norms for rationalization of fit and proper criteria for FPIs, rationalization of certain compliance requirements, and other related matters. SEBI invited comments and views on the consultation paper by stakeholders, the window for which is now closed.

❖ Disclosure of Divergence in the Asset Classification and Provisioning by Banks

❖ Pursuant to the RBI notification dated April 18, 2017 requiring certain disclosures by banks in cases of divergence in asset classification and provisioning, SEBI, by its circular dated July 18, 2017 mandated banks with listed specified securities (equity shares and convertible securities) to disclose divergences in asset classification and provisioning to the stock exchanges in the prescribed format where:

i. the additional provisioning requirements assessed by the RBI exceed 15% of the published net profits after tax for the reference period; and/or
ii. the additional gross non performing assets identified by the RBI exceed 15% of the published incremental gross non performing assets for the reference period.

Such disclosures are required to be made along with the annual financial results filed immediately following communication of such divergence by the RBI to the concerned bank, as an annexure to the disclosures to the annual financial results filed with the stock exchanges in accordance with the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

❖ Disclosure by Listed Entities of Defaults on Payment of Interest or Repayment of Principal Amount on Loans

❖ SEBI had issued a circular on August 4, 2017 mandating disclosures by listed entities that have defaulted on *inter alia,* either the payment of interest or the repayment of the principal amount on loans taken from banks or financial institutions, with effect from October 1, 2017. Accordingly, all entities which have listed any specified securities (*equity and convertible securities*), non-convertible debt securities or non-convertible and redeemable preference shares, are required to disclose any default with respect to, either the payment of interest, or instalment obligation on debt securities (including commercial paper), medium term notes, foreign currency convertible bonds, loans from banks and financial institutions, external commercial borrowings, etc.

However, SEBI, through its press release dated September 29, 2017, has decided to indefinitely defer the implementation of this circular.

❖ Amendments to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

❖ SEBI, on August 14, 2017, notified amendments to Regulation 10 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('**Takeover Regulations**') pursuant to which exemptions from making an open offer have been accorded to certain acquisitions under the Insolvency and Bankruptcy Code, 2016 ('**IBC**') and under debt restructuring schemes subject to compliance with the conditions specified therein.

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❖ Definition of 'Control' under the Takeover Regulations

❖ Consultation Paper on Amendments/Clarifications to the SEBI (Investment Advisers) Regulations, 2013

❖ With a view to bring about clarity on the definition of "control" under the Takeover Regulations, SEBI had, on March 14, 2016, published a discussion paper setting out certain bright line tests for the interpretation of the term "control", which, *inter alia*, sets out a set of protective (as opposed to participative) rights which would not be constituted as 'control'. However, SEBI has, by a press release, on September 8, 2017, clarified that it does not propose to formalize these rights into the Takeover Regulations and, instead, proposes to continue with the subjective definition of "control", and determine what constitutes "control" on a case to case basis.

❖ SEBI, on June 22, 2017, issued a consultation paper on Amendments/ Clarifications to the SEBI (Investment Advisers) Regulations, 2013 ('**IA Regulations**'), setting out the following key proposals:

i. **Segregation between "investment advisory" services and "distribution/execution services"**: To maintain a clear segregation between these two services provided by the same entity and to prevent associated conflicts of interest, SEBI has proposed amending the IA Regulations to prohibit entities offering investment advisory services from offering distribution/execution services, including in cases of banks, non-banking financial companies and body corporates that offer such services through separately identifiable departments or divisions. Such departments will be required to be segregated within a period of six months through a separate subsidiary. Entities which provide advice solely on products which do not qualify as securities have been excluded from the purview of the IA Regulations.
ii. **Distribution of mutual fund schemes by distributors**: To maintain a clear segregation between "advising" and "selling / distribution" of mutual fund products", SEBI proposes that mutual fund distributors will only be permitted to explain the features of schemes of which they are distributors and distribute them while ensuring suitability of the scheme to the investors, but will not give any investment advice.
iii. **Incidental advice by recognized intermediaries**: Under the existing framework, exemptions from IA registration have been granted to *inter alia* various intermediaries, who give investment advice to their clients *incidental* to their primary activity. SEBI has now proposed that in order to have a clear segregation between "investment advisory services" and other services provided by such intermediaries, all intermediaries who receive separate identifiable consideration for investment advisory services will need to register with SEBI as an investment adviser. Moreover, persons who provide holistic advice/ financial planning services are compulsorily required to be registered as investment advisers.
iv. **Relaxation in registration requirements**: SEBI has proposed that the educational qualification requirements for representatives/employees of registered investment advisers be relaxed. It has also been proposed to reduce the net worth requirement for body corporates from ₹25 lakhs (approx. US$ 38,000) to ₹10 lakhs (approx. US$ 15,000).
v. **Regulation of the activity of ranking of mutual fund scheme**: SEBI has proposed that the activity of ranking of mutual fund schemes be brought within the ambit of SEBI (Research Analyst) Regulations, 2014, under a separate chapter.

❖ SEBI Circular in relation to Schemes of Arrangement by Listed Entities

❖ Rule 19(7) of the Securities Contracts (Regulation) Rules, 1957 ('**SCRR**') provides that SEBI may, at its own discretion or on the recommendation of a recognized stock exchange, waive or relax the strict enforcement of any or all of the requirements with respect to listing as prescribed under the SCRR in relation to schemes of arrangements by listed entities. By its circular dated March 10, 2017, SEBI had provided that at least 25% of the post-scheme paid up share capital of the transferee entity seeking relaxation from Rule 19(2)(b) of the SCRR (which provides specific conditions for securities offered to the public for subscription) should comprise shares allotted to the public shareholders in the transferor entity.

By its circular dated September 21, 2017, SEBI has provided that in the event the entity fails to comply with the aforementioned requirement, it may alternatively satisfy the following conditions:

i. It has a valuation in excess of ₹1,600 crores (approx. US$ 246 million) as per the valuation report;
ii. The value of post-scheme shareholding of public shareholders of the listed entity in the transferee entity is not less than ₹400 crores (approx. US$ 62 million);
iii. At least 10% of the post-scheme paid-up share capital of the transferee entity comprises shares allotted to the public shareholders of the transferor entity; and
iv. It must be required to increase its public shareholding to at least 25% within a period of one year from the date of listing of its securities and an undertaking to this effect is incorporated in the scheme of arrangement.

Banking and Finance

❖ Notification of Reserve Bank Commercial Paper Guidelines, 2017

❖ The RBI has by a notification dated August 10, 2017 issued the Reserve Bank Commercial Paper Directions, 2017 ('**New CP Directions**') in supersession of the existing directions on the same, which *inter alia* specifies the following:

i. A commercial paper ('**CP**') will be issued in the form of a promissory note, held in a dematerialized form with a denomination of ₹5 lakhs (approx. US$ 7,600) or multiples thereof. The issuance must be at a discount to face value with no issuer having such issue underwritten or co-accepted. Optionality clauses, such as put and call options, are not permitted on a CP. The original tenor of a CP must be between seven days to one year.
ii. Companies, including non-banking financial companies and All India Financial Institutions will be eligible to issue CPs, with no minimum net worth requirement. Entities such as co-operative societies / unions, Government entities, trusts, LLPs and other bodies corporate can also issue CPs, provided that they have a presence in India and a minimum net worth of ₹100 crores (approx. US$ 15.3 million).
iii. Eligible investors include all residents, non-residents who are permitted to invest in CPs under the exchange control regulations. However, no person is allowed to invest in CPs issued by related parties either in primary or secondary market. Additionally, investment by regulated financial sector entities will be subject to conditions imposed by the concerned regulator.
iv. Issuers, whose total CP issuance during a year is ₹1,000 crores (approx. US$ 153 million) or more, should obtain credit rating of a minimum of 'A3' from at least two SEBI registered credit rating agencies.
v. No end-use restriction to a CP issuance has been prescribed but it should be disclosed in the offer document at the time of issuance.
vi. The buyback of a CP, in full or in part, must be at the prevailing market rate, which cannot be made before 30 days from the date of the issue.
vii. A CP will be a 'stand-alone' product, with banks and financial institutions optionally choosing to provide stand-by assistance / credit, back stop facility, etc. as a means of credit enhancement. Non-banking entities may provide unconditional and irrevocable guarantee for credit enhancement for CP issue provided the offer document for CP properly discloses the net worth of the guarantor company, among other details.
viii. In case of secondary market trading and settlement of CP, all over-the-counter trades in CP will be reported within 15 minutes of the trade to the Financial Market Trade Reporting and Confirmation Platform of Clearcorp Dealing System (India) Ltd.

❖ Liability of Personal Guarantors of a Corporate Debtor during the Corporate Insolvency Resolution Process

❖ State Bank of India ('**SBI**') had sanctioned a loan to Lohia Machines Limited ('**LML**') which was guaranteed by the directors of LML. Upon non repayment, SBI approached the Debt Recovery Tribunal, Allahabad ('**DRT**'). However, in parallel, LML also filed an application before the National Company Law Tribunal ('**NCLT**'), Allahabad Bench, to initiate a corporate insolvency resolution process ('**CIRP**') in respect of itself. In response to the CIRP being admitted, although the DRT stayed the proceedings against LML, it continued to hear the matter in relation to the enforcement of personal guarantees given by the directors of LML. Aggrieved by DRT, the personal guarantors filed a writ petition before the Allahabad High Court. The Allahabad High Court passed an order[4] dated September 6, 2017, staying the DRT proceedings against the personal guarantors and stated: (i) under Section 60(1) of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'), NCLT is the adjudicating authority for resolution of insolvency and liquidation of a corporate person (including a personal guarantor); (ii) when liability is co-extensive and proceedings are still in a fluid stage, two split proceedings cannot go on simultaneously before the DRT and the NCLT for the same cause of action; and (iii) the scope of the CIRP order passed by NCLT imposing a moratorium on all legal proceedings, extends beyond the properties of the corporate debtor and suits/proceedings pertaining to the corporate debtor. Accordingly, the Allahabad High Court stayed the DRT proceedings against the personal guarantors till the finalisation of the CIRP or till approval of the resolution plan by NCLT or passing of an order for liquidation of LML by NCLT, as the case may be.

❖ Ability of a Power of Attorney Holder to Initiate Insolvency Proceedings

❖ ICICI Bank Limited ('**ICICI**') filed an application before the NCLT through a representative, holding a power of attorney ('**PoA**'), on behalf of ICICI to commence CIRP for Palogix Infrastructure Private Limited ('**Palogix**'). Under the PoA in question, ICICI gave a general authority

4 ***Sanjeev Shriya v. State Bank of India***, Writ - C Nos. 30285 and 30033 of 2017

to the representative to appoint pleaders, advocates and solicitors to appear and act on behalf of ICICI before any NCLT bench and/or before other forums and to attend meetings of creditors in insolvency or bankruptcy or winding up matters and to vote at such meetings and to accept composition and to take such proceedings as he may think proper. Palogix objected that the person authorised by ICICI did not have adequate authority under the PoA to initiate bankruptcy proceedings before the NCLT. The National Company Law Appellate Tribunal ('**NCLAT**'), in this case, took the view that IBC being a specialized law creating new rights and obligations, requires that a PoA be interpreted strictly so that the powers given to the agents are not abused and the actions are restricted only to the extent the power is indicated or given. It further stated that an authorization, in case of a company, means a specific authorization by the board of directors of the company by way of passing a resolution. Any application under Section 7 of the IBC, if signed and filed by a 'general PoA holder' without specific authorization under the IBC, will not be maintainable.

❖ Limitation Act does not apply to Proceedings under the IBC

❖ By its order dated August 11, 2017,[5] NCLAT held that the provisions of the Limitation Act, 1963 ('**Limitation Act**') do not apply to the insolvency and bankruptcy process under the IBC. It stressed on the fact that the IBC was not enacted for the purpose of recovery of money claims, but rather for the initiation of CIRP. Accordingly, NCLAT allowed a debt that was time barred under the Limitation Act to form the basis of an application for the initiation of CIRP.

On August 23, 2017, the Supreme Court ('**SC**') dismissed an appeal from the order of NCLAT and declined to interfere with it. However, it noted that the question of law, *viz* whether the Limitation Act applies to IBC proceedings, has been kept open.

❖ IBC prevails over the Maharashtra Relief Undertakings (Special Provisions) Act, 1958

❖ In its first extensive ruling on the operation and functioning of the IBC, the SC in its order dated August 31, 2017[6] held, *inter alia,* that the Maharashtra Relief Undertakings (Special Provisions) Act, 1958, being a State legislation, cannot stand in the way of CIRP under the IBC, being a Central enactment, especially in view of the *non-obstante* clause contained in Section 238 of the IBC.

Telecommunications

❖ Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017

❖ The Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 ('**Suspension Rules**') have been issued by the Department of Telecommunications ('**DoT**') on August 7, 2017. Pursuant to the Suspension Rules, a direction to suspend telecom services ('**Suspension Order**') can only be issued by: (i) the Secretary to the Government of India in the Ministry of Home Affairs in case of the Central Government, or (ii) the Secretary to the State Government in-charge of the Home Department in case of a State Government, (each a '**Competent Authority**'). The Suspension Rules recognise that, in unavoidable circumstances, the Suspension Order may be issued by an officer at least of the rank of Joint Secretary of the Government of India (authorised by the Union Home Secretary) or State Home Secretary, as the case may be. However, such order is to be confirmed by the Competent Authority within 24 hours of issuance. The Suspension Rules provide for setting up of a review committee to record its findings if a Suspension Order, for public emergency or public safety, has been issued as per the Indian Telegraph Act, 1885.

Taxation

❖ Transfer Pricing Adjustment – AMP Expenses

❖ The Delhi Income Tax Appellate Tribunal ('**ITAT**') in the case of ***Toshiba India Pvt. Ltd. v. DCIT***,[7] ruled on the applicability of transfer pricing on advertisement, marketing and promotion expenses ('**AMP**') for promoting the brand owned by its associated enterprise ('**AE**'), and held that the transaction on account of AMP expenses incurred by Toshiba India Pvt. Ltd ('**Toshiba**') qualified as an international transaction subject to transfer pricing regulations.

The ITAT relied on the following key facts:

i. The distribution agreement between Toshiba and its AE provided that Toshiba would use its best efforts to promote the 'Toshiba' brand name in India.
ii. The AE had also reimbursed a portion of the AMP expenses incurred by Toshiba.

5 ***Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Limited***, Company Appeal (AT) (Insolvency) No. 44 of 2017.

6 ***M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr.***, Civil Appeal Nos. 8337-8338 of 2017.

7 ITA No.1357/Del/ 2017

The ITAT observed that the very fact that Toshiba expressly undertook to promote the 'Toshiba' brand in India and the AE reimbursed a portion of the AMP expenses clearly demonstrated that Toshiba undertook promotion of the 'Toshiba' brand in India on an understanding with the AE, which evidently amounts to an international transaction.

❖ CBDT notifies Final Rules prescribing Method of Valuation

❖ The Finance Act, 2017 amended the Income-tax Act, 1961 to insert two new provisions, namely Section 56(2)(x) and Section 50CA. Section 56(2)(x) provides that where a person receives any property for a consideration less than its fair market value ('**FMV**'), the difference between the consideration received and such FMV shall be taxable in the hands of the recipient. Section 50CA provides that where a person receives any consideration for transfer of unquoted shares which is less than their FMV, the FMV shall be deemed to be the full value of consideration for computation of capital gains tax liability. The Central Board of Direct Taxes has now notified the final Rules[8] providing for the manner of computation of FMV of unquoted shares under the aforesaid provisions.

Employment

❖ Employee's Compensation (Amendment) Act, 2017

❖ The Employee's Compensation Act, 1923 has been amended with effect from May 15, 2017. Some of the key amendments introduced are:

i. Every eligible employer should inform workmen, at the time of employment, of compensation rights under the statute in writing and through electronic means.
ii. Penalties for contravention have been increased from ₹5,000 (approx. US$ 77) to a minimum of ₹50,000 (approx. US$ 775), which may extend to ₹100,000 (approx. US$ 1,550).

❖ Code on Wages

❖ As part of the Government's exercise to reform labour laws and rationalize 38 existing legislations by framing four labour codes, namely: (i) the Code on Wages; (ii) Code on Industrial Relations; (iii) Code on Social Security; and (iv) Code on Occupational Safety, Health and Working Conditions; the Code on Wages Bill, 2017 ('**Bill**') has been introduced in the Lok Sabha on August 10, 2017. The Bill seeks to create a comprehensive code on wages by consolidating: (i) the Minimum Wages Act, 1948; (ii) the Payment of Wages Act, 1936 ('**POW Act**'); (iii) the Payment of Bonus Act, 1965; and (iv) the Equal Remuneration Act, 1976.

❖ Rights of Persons with Disabilities

❖ The Rights of Persons with Disability Act, 2016 ('**Disability Act**'), replaces the erstwhile Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The Disability Act was brought into effect on April 19, 2017 with the objective of implementing the United Nations Convention on the Rights of Persons with Disabilities. The key difference is the enhanced scope of the term "disability" and the applicability of the Disability Act to private employers. The Ministry of Social Justice and Empowerment has introduced Rights of Persons with Disability Rules, 2017 ('**Disability Rules**') with effect from June 15, 2017.

❖ Payment of Wages Act – Enhancement of Ceiling

❖ The Ministry of Labour and Employment has, by a notification dated August 28, 2017, enhanced the salary threshold for applicability of the POW Act from ₹18,000 (approx. US$ 300) per month to ₹24,000 (approx. US$ 350) per month. The POW Act regulates the payment of wages to certain classes of employed persons, including in relation to time and mode of payment and permissible deductions.

❖ Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017

❖ The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 ('**2017 Act**'), which received assent of the Governor of Maharashtra on September 7, 2017, will come into force and repeal the Maharashtra Shops & Establishments Act, 1948 with effect from such date appointed by the State Government by notification in the Official Gazette. Some of its key provisions are:

i. It applies to establishments employing 10 or more workers. Establishments with less than 10 workers are only required to provide an intimation of commencement/closure of business.
ii. The registration certificate granted under the 2017 Act would be valid for a period of up to 10 years.
iii. The employer is required to notify the relevant authority within 30 days of closure of its business.
iv. Overtime is payable where a worker is required to work beyond nine hours a day or 48 hours a week, subject to a maximum of 125 overtime hours in a period of three months.

8 Rules 11UA and 11UAA of the Income-tax Rules, 1962 [Notification No. 61/ 2017 dated July 12, 2017].

v. The 2017 Act prohibits discrimination against women in matters relating to recruitment, training, transfers, promotion or wages. Women workers may now be allowed to work between 9:30 PM to 7:30 AM, if they consent to the same and the employer provides adequate protection and transportation.

vi. Every worker is entitled to eight days of casual leave with wages in a calendar year, to be credited to his/her account on a quarterly basis, but which will lapse if not availed by the end of the year. Workers who have worked for a period of at least three months are entitled to five days leave for every 60 days worked during the year and those who have worked for 240 days are entitled to 18 days paid leave during the subsequent year. Paid leaves of up to 45 days can be accumulated by workers.

vii. Establishments with 50 or more workers are required to provide crèche facilities. Further, the State Government may require establishments with 100 or more workers to maintain canteen facilities. A group of establishments may provide a common crèche and canteen facilities, subject to prescribed conditions.

viii. The penalties have been enhanced, with *inter alia* a maximum fine of ₹1 lakh (approx. US$ 1,500) and an additional fine of up to ₹2,000 (approx. US$ 30) per day for continuing contravention.

❖ Payment of Gratuity Act – Ceiling to be Doubled

❖ The Union Cabinet has, on September 12, 2017, given its approval for introduction of the Payment of Gratuity (Amendment) Bill, 2017 ('**Bill**') in the Parliament. The Bill seeks to double the maximum limit of gratuity under the Payment of Gratuity Act, 1972 ('**Gratuity Act**') from ₹10 lakhs (approx. US$ 15,000)[9] to ₹20 lakhs (approx. US$ 30,000).

Intellectual Property

❖ Knee Implants brought under Price Control

❖ On August 16, 2017, the National Pharmaceuticals Pricing Authority ('**NPPA**'), Department of Pharmaceuticals, Ministry of Chemicals and Fertilizers, published an order under Paragraph 19 of the Drugs (Prices Control) Order, 2013[10] fixing the ceiling price of orthopedic knee implants for primary and revision knee replacement systems ('**Order**'). This Order has primarily been passed by the NPPA as it found that the trade margins for orthopedic-knee implants were unjustified, unreasonable and irrationally high leading to exorbitant prices, making such implants less accessible and affordable to a vast section of patients in India.

Pursuant to the Order, the price of primary and revision knee replacement systems has been capped at a range of ₹4,090 (approx. US$ 62) to ₹38,740 (approx. US$ 600) and ₹4,090 (approx. US$ 62) to ₹62,770 (approx. US$ 960), respectively per unit, depending on the feature/material and the component of the knee implant. The capped prices are inclusive of trade margins and exclusive of goods and services tax. The ceiling price has to be complied with for a period of one year from the date of the Order, by manufacturers and importers of knee implants, as well as by hospitals/nursing homes/clinics performing orthopedic surgical procedures using knee implants.

Further, the Department of Pharmaceuticals, by its order dated September 18, 2017 has directed companies to *inter alia* maintain production/import/supply of orthopedic knee implant systems at the same levels prior to August 2017 and submit a weekly report on the implants produced and distributed. The order is valid for a period of six months.

It is important to note that, similar to the above, the NPPA had published an order on February 13, 2017 fixing the ceiling prices of coronary stents. This was discussed in the April 2017 quarterly edition of the *Inter alia* ….

9 The Gratuity Act entitles every employee who has completed five years of service, upon cessation of employment, to gratuity calculated at the rate of 15 days wage for each year of completed service or part thereof in excess of six months, currently subject to a maximum of ₹10 lakhs (approx. US$ 15,000).

10 The Drugs (Prices Control) Order, 2013 authorizes the Government (which powers have been delegated to the NPPA), in extraordinary circumstances, if it considers necessary so to do in public interest, to fix the ceiling price or retail price of any drug (including notified medical devices).

❖ A nine-judge SC bench, on August 24, 2017, held that an inalienable fundamental right to privacy resides in Article 21 of the Constitution of India and other fundamental freedoms contained in Part III of the Constitution.[11] It however observed that the fundamental right to privacy must yield in given circumstances to legitimate State interests and will be subject to reasonable restrictions. Consequently, any encroachment to privacy will have to subscribe to the touchstone of permissible restrictions and invasion of privacy would have to be justified against the standard of a fair, just and reasonable procedure.

❖ Fundamental Right to Privacy

However, the SC did not categorically comment on the Aadhar scheme, which was the original subject matter in the context of which the nine-judge bench had been constituted. The bench observed that it had not been constituted to look into the constitutional validity of the Aadhar scheme, and the same is currently pending before another bench of the SC.

❖ On July 6, 2017, the SC held that an arbitral tribunal is empowered under Section 27 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') to make a representation before the Court for contempt of any order passed during the arbitral proceeding.[12]

❖ Arbitral Tribunal has the Power to make Representation to the Court for Contempt of its Orders

While the Bombay High Court had taken a restricted interpretation of Section 27 stating that the power of the arbitral tribunal to make a representation before the Court for contempt of orders is limited to the failure of the parties to follow the process of taking evidence, the SC took a broader view and held that if the parties fail to comply with any orders, including interim orders of an arbitral tribunal, they may be liable for contempt, on representation by the arbitral tribunal. Such orders would be deemed to be orders of the Court for all purposes and would be enforced under the Civil Procedure Code, 1908 in the same manner as if they were orders of the Court.

❖ Under Section 9 of the IBC, the existence of a dispute could bar an application by a financial or operational creditor. Section 8(2) of the IBC provides that, while pendency of "*arbitration proceedings*" has been included as "*existence of dispute*", pendency of an application under Section 37 of the Arbitration Act has not been included as "*existence of dispute*".

❖ Proceedings under Section 37 of the Arbitration Act would not constitute 'Dispute' for IBC

By an order dated August 29, 2017,[13] the NCLAT considered the relationship between the IBC and the Arbitration Act. It held that an arbitral award reaches finality upon: (i) expiry of the time within which an application under Section 34 of the Arbitration Act to set aside the arbitral award can be made, or (ii) an application made under Section 34 being rejected. Accordingly, the pendency of an appeal under Section 37 of the Arbitration Act would not constitute an "*existence of a dispute*" within the meaning of the IBC.

11 ***Justice K.S. Puttaswamy* v. *Union of India and Ors.***, WP (Civil) No. 494 of 2012.

12 ***Alka Chandewar* v. *Shamshul Ishrar Khan***, Civil Appeal No. 8720 of 2017.

13 ***M/s Annapurna Infrastructure P. Ltd.* v. *Soril Infra Resources Ltd.***, Company Appeal (AT) (Insolvency) No. 32 of 2017.

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Best Indian Law Firm
International Legal Alliance Summit Awards, 2017

❖

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

❖

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

❖

Ranked No. 1
for India in the M&A Announced Deal League Table by Deal Value and Deal Count
Bloomberg's Global M&A, Legal Rankings, Q3, 2017

❖

Ranked No. 1
for India in the M&A Rankings by Deal Value and Deal Count
Mergermarket's Global and Regional M&A League Tables of Legal Advisors, Q3, 2017

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Ranked No. 1
for the Indian M&A Announced League Table
by Deal Completed by Value
Ranked No. 1
for the Indian M&A Announced League Table
by Deal Announced by Value and Volume
Ranked No. 1
for Asia Pacific Emerging Market
by Deal Announced by Deal Value and Volume
Thomson Reuters' Emerging Markets M&A Legal Rankings H1, 2017

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Ranked No. 1
for PE and M&A Rankings by Deal Volume and Deal Value
Venture Intelligence League Tables of Legal Advisors, H1, 2017

❖

Ranked No. 1
for the Asia-Pacific M&A Announced League Table by Deal Volume
Experian Business Research, M&A Legal Rankings H1, 2017

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Best Overall Law Firm of the Year
India Business Law Journal, 2016

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

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M&A Law Firm of the Year
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