Inter alia…

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

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Corporate & SCRA

❖ Commencement of Certain Provisions of the Companies (Amendment) Act, 2017

❖ The Ministry of Corporate Affairs (‘**MCA**’) has, from time to time, notified certain provisions of the Companies (Amendment) Act, 2017 for amending the provisions of the Companies Act, 2013 (‘**Companies Act**’). Pursuant to recent MCA notifications dated July 5, 2018, July 31, 2018, August 7, 2018 and September 12, 2018, amendments to Section 42 (relating to private placement of securities), Sections 73 and 74 (relating to acceptance of deposits by companies) and Section 197 (dealing with managerial remuneration) of the Companies Act have been notified. Please refer to our *Client Update* dated April 9, 2018 available at https://www.azbpartners.com/bank/the-companies-amendment-act-2017/), for a detailed summary of the Amendment Act, as well as *June 2018 edition of Inter Alia*… for a summary of the commencement notifications issued on May 7, 2018 (available at https://www.azbpartners.com/bank/commencement-of-certain-provisions-of-the-companies-amendment-act-2017/).

Pursuant to the MCA notification dated September 19, 2018, Section 135 of the Companies Act has been amended to clarify that for determining whether the threshold for constituting a corporate society responsibility (‘**CSR**’) committee has been met, the net worth / turnover / net profit of ‘the immediately preceding financial year’ is to be considered. Further, the requirement of appointing at least one independent director on the CSR Committee has been relaxed to provide that a company which is not required to appoint an independent director under Section 149(4) of the Companies Act does not need to appoint an independent director on its CSR Committee, and instead, must have two or more directors on its CSR Committee.

❖ Constitution of the National Financial Reporting Authority

❖ Pursuant to the MCA notification dated October 1, 2018, Sections 132(1) and 132(12) of the Companies Act have been notified and the National Financial Reporting Authority (‘**NFRA**’) has been constituted as on October 1, 2018, with its head office in New Delhi. The NFRA has been established to deal with matters relating to accounting and auditing standards under the Companies Act. It may be noted that the other sub-sections of Section 132, which provide for administration, functions and powers of NFRA, are yet to be notified.

❖ Issue of Securities in Demat Form by Unlisted Public Companies

❖ The MCA has, by way of a notification dated September 10, 2018, incorporated Rule 9A to the Companies (Prospectus and Allotment of Securities) Rules, 2014 (‘**Prospectus Rules**’), which sets out conditions required to be adhered to by unlisted public companies with respect to securities issued by them. Some of the key conditions are set out below.

i. Securities are required to be issued only in dematerialized form and the company should facilitate dematerialization of all its existing securities;
ii. Securities held by promoters, directors and key managerial personnel of unlisted public companies have to be dematerialized prior to making any offer for issue of any securities or buyback of securities or issue of bonus shares or rights offer;
iii. Any securities proposed to be transferred on or after October 2, 2018, will be required to be converted into dematerialized form prior to the transfer; and with respect to any subscription on or after October 2, 2018, the securities will be allotted to the subscriber in dematerialized form; and
iv. A company will not be permitted to offer any new securities, buyback existing securities, or issue bonus or right shares, till such time that it is in non compliance with the regulations, directions etc. in relation to dematerialization of shares.

❖ Amendments to Provisions relating to Maintenance of Minimum Public Shareholding

❖ The Ministry of Finance (Department of Economic Affairs) has, by way of a notification dated July 24, 2018, amended Rule 19A of the Securities Contracts (Regulations) Rules, 1957. The amendment provides that if pursuant to the implementation of a resolution plan under Section 31 of the Insolvency and Bankruptcy Code, 2016, (i) the public shareholding of a listed company falls below 25%, then the company is required to increase its public shareholding to at least 25%, within a period of three years; and (ii) if the public shareholding of a listed company falls below 10%, the company is required to increase its public shareholding to at least 10% within a period of 18 months from the date of such decrease.

Foreign Exchange

❖ Amendment to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017

❖ In light of the revised reporting structure for foreign investments under the recently notified Single Master Form, the Reserve Bank of India (‘**RBI**’) has, by a notification dated August 30, 2018, amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 as under:

i. **Form ARF**: The requirement of reporting foreign investments in the advance reporting form (Form ARF) has been discontinued.

ii. **Downstream Investment Reporting**: Prior to the amendment, an Indian company making an investment which would have been considered as indirect foreign investment in another Indian company was required to: (a) notify the Secretariat for Industrial Assistance, Department of Industrial Policy and Promotion ('**DIPP**') of such investment; and (b) file Form DI (Downstream Investment) within 30 (thirty) days of such investment, even if the capital instruments had not been allotted to such investing company. Pursuant to the amendment, in addition to an Indian company, an investment vehicle making any downstream investment which is considered as indirect foreign investment for the investee Indian entity is also required to report such downstream investment to DIPP within 30 days of such investment. Further, the Form DI is now required to be filed by the Indian company and investment vehicle within 30 days from the date of allotment of capital instruments to the investing entity.

iii. **Form InVi**: An investment vehicle[1] which has issued its units to persons resident outside India is required to file Form InVi within 30 days from the date of issue of such units.

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Capital Markets

❖ SEBI Circular on Investment by Foreign Portfolio Investors in Debt

❖ On June 15, 2018, the Securities and Exchange Board of India ('**SEBI**') issued a circular withdrawing the minimum residual maturity restriction of three years for investment by Foreign Portfolio Investors ('**FPIs**') in Government Securities ('**G-secs**') and State Development Loan's ('**SDLs**') and permitting FPIs to invest in corporate bonds with minimum residual maturity of above one year, subject to certain specific conditions relating to short-term investments. Further, the circular discontinued the auction process being carried out by BSE Limited and the National Stock Exchange of India Limited, as had been previously stipulated in SEBI's circular dated October 9, 2014. The circular also provides for the overall monitoring of G-secs and SDLs to be conducted by the Clearing Corporation of India Ltd., and not depositories, as was previously required, and sets out other revised requirements for investments by FPIs in corporate debt securities, including in relation to concentration limits, investment limits in corporate bonds, pipeline investments in corporate bonds, partly paid instruments and actions in case of default. These changes were made in accordance with the RBI A.P. (DIR Series) circular No. 31 dated June 15, 2018 (*Investment by Foreign Portfolio Investors in Debt – Review*).

❖ Investments by FPIs through Primary Market Issuances

❖ On July 13, 2018, SEBI issued a circular on monitoring of investment limits applicable to FPIs in case of primary market issuances. Under the SEBI (Foreign Portfolio Investors) Regulations, 2014 ('**FPI Regulations**'), a single FPI or an investor group (including entities with the same ultimate beneficial owner) cannot acquire more than 9.99% of the total issued capital of a company.

SEBI had previously clarified in its FAQs that, for the purpose of identifying the investor group, the Designated Depository Participant ('**DDP**') is required to obtain the details provided by the FPI under reporting requirements in accordance with the FPI Regulations and that depositories should monitor the investment limits at the level of the investor group based on information provided by DDPs. To ensure compliance with these requirements, SEBI has mandated that at the time of finalizing the basis of allotment during primary market issuances, Registrar and Transfer Agents ('**RTA**') should: (i) use Permanent Account Numbers to verify compliance for a single foreign portfolio investor; and (ii) obtain validation from depositories to ensure there is no breach of investment limits within the timelines for issue procedure.

❖ Role of Sub-Broker vis-a vis Authorized Person

❖ SEBI has, by a circular dated August 3, 2018, discontinued the intermediary category of sub-broker ('**Sub-Broker**'). Accordingly, SEBI has instructed that no fresh registration will be granted to any person as a Sub-Broker and any pending applications would be returned. The registered Sub-Brokers have until March 31, 2019, to migrate to act as an Authorized Person and/or Trading Member. Sub-Brokers who do not choose to migrate would be deemed to have surrendered their registration.

❖ Enhanced Monitoring of Qualified Registrars to Issue and Share Transfer Agents

❖ SEBI has, by a circular dated August 10, 2018, notified that qualified Registrars to Issue and Share Transfer Agents (*i.e.*, Registrars to Issue and Share Transfer Agents servicing more than 200 million folios) ('**QRTA**') are required to comply with enhanced monitoring requirements

1 *'Investment Vehicle' means an entity registered and regulated under relevant regulations framed by Securities and Exchange Board of India or any other authority designated for the purpose and shall include Real Estate Investment Trusts (REITs), Infrastructure Investment Trusts (InvIts) and Alternative Investment Funds (AIFs).*

through adoption and implementation of internal policy framework, periodic reporting on key risk areas, data security measures, business continuity, governance structures, measures for enhanced investor services, service standards, grievance redressal, insurance against risks, *etc.*

Consequently, QRTAs must formulate and implement a comprehensive policy framework, approved by the Board of Directors of the QRTAs, which will include aspects relating to maintaining risk management policies, business continuity plan, manner of keeping records, wind-down plans, data access and data protection policy, ensuring integrity of operations, scalable infrastructure, reports of board of directors/ committees of the board of directors, investor services and service standards and insurance against risks. All QRTAs must ensure compliance with this circular within six months of its notification. They must also submit compliance reports within 60 days of the expiry of each calendar quarter.

❖ SEBI Streamlines Process of Public Issue of Debt Securities, Non-convertible Redeemable Preference Shares and Securitized Debt Instruments

❖ On August 16, 2018, SEBI issued a circular to make the existing process of the issuance of debt securities, non-convertible redeemable preference shares ('**NCRPS**') and securitised debt instruments ('**SDI**') easier, simpler and cost effective for both issuers and investors under the SEBI (Issue and Listing of Debt Securities) Regulations, 2008, SEBI (Issue and Listing of Debt Securities by Municipalities) Regulations, 2015, SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 and SEBI (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008. The circular has sought to reduce the time taken for listing after the closure of the issue to six working days (instead of the earlier requirement of twelve working days). Some of the other key features of the circular are:

i. **Submission of application form**: For subscription to a public issue, all investors have to use an application supported by blocked amount facility for making payment, and submit a completed bid-cum-application form to Self-Certified Syndicate Banks ('**SCSBs**') (with whom the bank account to be blocked is maintained) or certain specified intermediaries.

ii. **Role of SCSBs and intermediaries**: The circular provides for the process of acknowledgement of applications by investors, uploading details in the electronic bidding system and *blocking* of funds in specified bank accounts to the extent of application money.

iii. **Role of stock exchanges:** Stock exchanges are required to validate electronic bid details with depository's records for the DP ID, client ID and Permanent Account Number, by the end of *each* bidding day and notify the inconsistencies to SCSBs or intermediaries concerned, for rectification and re-submission. Stock exchanges are also required to develop systems to facilitate investors to view the status of their applications.

This circular is applicable for all public issues of debt securities, NCRPS and SDI opening on or after October 1, 2018.

❖ SEBI order in the matter of United Spirits Limited

❖ In 2012, the Diageo Group (comprising Relay B.V., Diageo Plc and their related parties) entered into certain share acquisition arrangements (which included a shareholders' agreement ('**SHA**')) with the UB Group (comprising United Breweries Holding Ltd., Kingfisher Finvest India Limited and their related parties) in relation to shares of United Spirits Limited ('**USL**'). The SHA accorded certain limited veto rights to the UB Group and prescribed certain voting arrangements between the shareholders in relation to USL. An open offer was undertaken pursuant to execution of such arrangements, followed by a voluntary open offer by the Diageo Group, as a result of which the shareholding of Diageo Group and UB Group in USL was 54.78% and 4%, respectively, thereby rendering the voting arrangement clause in the SHA infructuous. Subsequently, (following certain events) the SHA ceased to exist with effect from November 24, 2015. By way of its order dated September 6, 2018, SEBI *inter alia* deliberated on the issue of whether the UB Group held joint control over USL due to its veto rights under the SHA after completion of the voluntary open offer and prior to cessation of the SHA.

SEBI held that the UB Group's veto rights were protective in nature and could not be construed as the UB Group having 'control' over USL, and that veto rights can grant control only if they are sufficient enough to govern the decision making process of a company's management. It was also observed that listed companies would undergo repeated corporate restructuring if limited protective shareholder rights were equated with control. Therefore, the Diageo Group had acquired sole control over USL post the voluntary open offer, when the voting arrangement clause had ceased to exist. No change in control had taken place on November 24, 2015 with the cessation of the SHA. It was also noted that cessation of any one person from joint control, leaving the remaining person with sole control, cannot be considered as 'change in control' under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 considering that the public shareholders are already aware of the persons who are in control.

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❖ On August 29, 2018, SEBI passed an order[2] ('**Order**') against Mr. Hariharan Vaidyalingam ('**Respondent**') who had traded in the scrip of Multi Commodity Exchange of India Limited ('**MCX**') while in possession of certain information considered to be price sensitive by SEBI. By way of the Order, SEBI disposed of an interim order passed against the Respondent on August 2, 2017 which *inter alia* directed the impounding of losses averted by the Respondent while dealing in shares of MCX, given that the Respondent had not actually made a profit or averted a loss pursuant to such trading. However, SEBI did clarify that as to the charge of insider trading, it is irrelevant whether the person indulging in insider trading made a profit/ averted a loss, and therefore directed that the Respondent be restrained from accessing the securities market and be prohibited from buying, selling or otherwise dealing in securities either directly or indirectly for a period of seven years from the date of the Order.

❖ SEBI Order in the matter of In Re Insider Trading in the Scrip Of Multi Commodity Exchange of India Limited

❖ Pursuant to recommendations of the SEBI Working Group under the chairmanship of Shri H.R. Khan, SEBI issued two circulars on September 21, 2018, relating to guidance on the manner in which FPIs are required to identify and verify their respective beneficial owners and provide disclosures relating thereto, and dealing with eligibility criteria for participation in and management and control of FPIs by non-resident Indians, overseas citizens of India and resident Indians.

❖ SEBI Circulars on KYC Requirements and Eligibility Criteria for Foreign Portfolio Investors

❖ On September 11, 2018, SEBI issued the SEBI (Buy-back of Securities) Regulations, 2018 ('**New Regulations**'), repealing the erstwhile SEBI (Buy-back of Securities) Regulations, 1998 ('**1998 Regulations**'), which *inter alia* aligns the provisions of the New Regulations with those under the Companies Act. In addition to such alignment, some of the key changes prescribed under the New Regulations include: (i) providing much needed clarity on the meaning of the 'buy-back period' (which is now defined to mean the period between the date of board of directors' resolution or date of declaration of results of the postal ballot for special resolution, as the case may be, to authorize buyback of shares of the company and the date on which the payment of consideration to shareholders who have accepted the buyback offer is made), and (ii) according SEBI with discretionary powers to relax strict enforcement of procedural requirements under these regulations, subject to certain exceptions.

❖ Key Changes under the SEBI (Buy-back of Securities) Regulations, 2018

Banking and Finance

❖ The Central Government had received representations in relation to pending cheque dishonour cases where the final adjudication of such cases was being delayed by merely filing appeals and obtaining stay on proceedings. Therefore, the Ministry of Law and Justice amended the Negotiable Instruments Act, 1881 ('**NIA**') on August 2, 2018. Set out below is a summary of the key changes:

i. Pursuant to the newly inserted Section 143A, Courts trying offences under Section 138 of the NIA (*in relation to dishonour of cheque for insufficiency, etc., of funds in the account*) have been granted the power to direct the drawer of a cheque to pay interim compensation, not exceeding 20% of the amount of the cheque, to the complainant (a) in a summary trial or summons case, where he pleads not guilty; and (b) in any other case, upon framing of charge against such drawer.

ii. By inserting the new Section 148, the Appellate Court, in an appeal by the drawer against a conviction under Section 138 of the NIA, has been granted the power to order the appellant to deposit a minimum of 20% of the fine or compensation awarded by the Trial Court. This section clarifies that such amount will be in addition to any interim compensation paid by the appellant under Section 143A of the NIA.

❖ Amendments to the Negotiable Instruments Act, 1881

Infrastructure

❖ The Ministry of Environment, Forest and Climate Change ('**MOEF**') had notified the Environmental Impact Assessment Notification, 2006 ('**EIA Notification**') imposing certain restrictions on proposed projects or on the expansion / modernization of existing projects based on their potential environmental impacts. Projects seeking environmental clearance are appraised by the relevant authorities pursuant to a screening, scoping, public consultation and appraisal process by relevant authorities, which then make categorical recommendations to the applica-

❖ Standardisation of Environment Clearance Conditions by MOEF

2 SEBI Order No. WTM/MPB/EFD-DRA-3/33/2018.

ble regulatory authority for grant or rejection of the application for environmental clearance.

By way of an office memorandum dated August 9, 2018 ('**Office Memo**'), the MoEF has now prescribed certain standard conditions for consideration by the Expert Appraisal Committee ('**EAC**') in relation to 25 specified industrial sectors including, *inter alia*, integrated iron and steel plants, sponge iron plants, integrated cement plants, coal mines (both open cast and underground), pharmaceutical and chemical industries, off-shore and on-shore oil and gas exploration, development and production and industrial estates, at the time of appraisal of proposals seeking environment clearance. The EAC, after due diligence, can modify, delete and add conditions based on the project specific requirements. The Office Memo has been issued by the MOEF to bring uniformity across various projects and sectors and as a general guidance to the EAC as well as project proponents.

❖ Amendments to Specific Relief Act, 1963

❖ The Central Government has, by way of a notification dated August 1, 2018, introduced the Specific Relief (Amendment) Act, 2018 ('**Amendment Act**'), which amends the Specific Relief Act, 1963 ('**1963 Act**'). However, the date on which the provisions of the Amendment Act will come into effect has not yet been notified.

The 1963 Act provides for, *inter alia*, parties to a contract to seek specific performance when aggrieved by the non-performance of such contract. Some of the key amendments introduced by the Amendment Act have been set out below:

i. **Specific performance:** The 1963 Act provided that specific performance is a limited remedy, which may be granted by a Court, at its discretion, subject to certain conditions. The Amendment Act empowers the Court to grant specific performance as a general rule, subject to the certain exceptions. A brief comparison of the conditions, pre and post amendment of the 1963 Act, under which Courts would not grant specific performance are:

PRE-AMENDMENT	POST AMENDMENT
A contract for the non-performance of which compensation is an adequate relief	This condition does not apply
A contract which runs into such minute or numerous details or which is so dependent on the volition of the parties or otherwise from its nature is such that the court cannot enforce specific performance of its material terms	These conditions do not apply
A contract which is so dependent on the personal qualification of the parties that the court cannot enforce specific performance of its material terms	This condition is still applicable
A contract which is in its nature determinable	This condition is still applicable
A contract, the performance of which involves the performance of a continuous duty which the court cannot supervise	This condition is still applicable

ii. **Substituted performance:** The Amendment Act gives an affected party the option to arrange for performance of the contract by a third party or by his own agency (substituted performance), and costs for such substituted performance may be recovered from the defaulting party. After obtaining substituted performance, specific performance cannot be claimed. However, the affected party's right to claim compensation will not get affected.

iii. **Infrastructure projects:** A schedule has been added pursuant to the Amendment Act which broadly describes the infrastructure projects which would be under the purview of the 1963 Act. These projects can be categorized as follows: (i) transport; (ii) energy; (iii) water and sanitation; (iv) communication (such as telecommunication); and (v) social and commercial infrastructure (such as affordable housing).

iv. **Injunctions:** The Amendment Act prevents Courts from granting injunction in respect of contracts relating to infrastructure projects, if such an injunction would hinder or delay the progress or completion of the infrastructure project.

v. **Special Courts:** The Amendment Act requires that State Government will, in consultation with the Chief Justice of the relevant High Court, designate one or more Civil Courts as Special Courts to deal with cases under the 1963 Act, in relation to *infrastructure* projects. Such cases must be disposed off within 12 months, which period can be extended by six months, of the date of service of summons to the defendant.

vi. **Experts:** The Amendment Act inserts a new provision which empowers the Courts to engage experts in suits where expert opinion may be needed. Such expert may be examined in the Court in relation to the expert's findings, opinions, etc.

Telecommunications

❖ On July 19, 2018, the Telecom Regulatory Authority of India ('**TRAI**') notified the Telecom Commercial Communication Customer Preference Regulation, 2018 ('**Customer Preference Regulations**') to curb the problem of unsolicited commercial communication (popularly known as 'spam'). The Customer Preference Regulations, *inter alia,* provide for: (i) registration of senders (businesses and telemarketers) with telecom service providers to reducing the ability of unknown entities reaching customers with calls and messages that are fraudulent or otherwise of dubious nature; (ii) registration of headers, *i.e.* alphanumeric string of characters or numbers assigned to a sender of commercial communications for segregating different types of messages related to one time passwords, balance enquires, flight alerts, special offers, etc.; and (iii) complete control to the subscriber to consent to receiving commercial communication and the ability to revoke the consent already granted. Additionally, the concept of registered templates for both message service and voice communication has been introduced to prevent deliberate mixing of promotional messages into the transactional stream.

The salient features of these regulations also include the adoption of 'distributed ledger technology' (or blockchain) by telecom service providers to ensure regulatory compliance is carried out for sending commercial communication. Every telecom service provider is required to develop an ecosystem, with the prescribed functions, to regulate the delivery of the commercial communications to customers.

❖ TRAI Notifies the Telecom Commercial Communication Customer Preference Regulation, 2018

❖ The TRAI on July 5, 2018, issued the Telecommunication Interconnection (Amendment) Regulations, 2018, *inter alia*, amending certain provisions under the Telecommunication Interconnection Regulations, 2018. The key amendments include the following: (i) a service provider may request any other service provider for additional ports at a point of interface ('**PoI**'), if the projected utilisation of the capacity of such PoI at the end of 60 days from the date of placing the request, is likely to be more than 85%; (ii) the time-frame for provisioning of ports for initial interconnection and augmentation of ports at PoIs has been increased to 42 working days; (iii) every service provider is required to provide to the interconnecting service provider, at intervals of every six months, its forecast of busy hour outgoing traffic, for the succeeding six months, at each PoI, and the first such forecast is required to be provided within 60 days of the amendment and thereafter on April 1 and October 1 every year; and (iv) the port charges and infrastructure charges, for all ports provided before February 1, 2018 shall continue to be payable as per the terms and conditions which were applicable to them prior to February 1, 2018.

❖ TRAI amends the Telecommunication Interconnection Regulations

❖ In 2016, the Department of Telecommunications ('**DoT**') had issued Guidelines for Grant of Unified License Virtual Network Operators ('**Unified License Guidelines**') to facilitate delinking of licensing of networks from the delivery of services. Under such guidelines, Category B licenses were issued with the validity of one year and subsequently extended from time to time.

By way of notification dated August 31, 2018, the DoT has issued revised guidelines for the grant of a new category of license to Virtual Network Operators ('**VNO**') *viz.* UL (VNO) Category B. A new application may be submitted by the existing Category B license holders within a period of six weeks from August 31, 2018, failing which such existing licenses will cease to exist. The new license shall be valid for a period of 10 years. The total amount of entry fee is required to be the cumulative entry fee of each authorization subject to a maximum of ₹75 million (approx. US$1.01 million).

The basic features of the licence includes: (i) treating VNOs as an extension of Network Service Operators ('**NSO**') or Telecom Service Providers, and not allowing them to install equipment interconnecting with the network of other NSOs; and (ii) enabling the applicant to apply for the license along with any one or more additional services such as internet services. Some key requirements under the revised guidelines for the grant of new license are: (i) the applicant must be an Indian company or a partnership firm or an organization registered under the relevant Shops and Establishment Act or a legal person for Access Services Category B license; (ii) one applicant can have only one licence; (iii) the total composite foreign holding in the applicant shall be governed by extant foreign direct investment policy; (iv) no restriction on the number of VNO licensees per service area; and (v) the following entities in the same service area should not have any beneficial interest in each other directly or indirectly: (a) VNO or its promoter(s) and another NSO (other than the VNO's parent NSO) or its promoter(s); (b) VNO or its promoter(s) and another VNO or its promoter(s), authorized to provide access services using the access spectrum of NSO(s).

❖ Department of Telecommunication Introduces Guidelines for Grant of Unified License (Virtual Network Operators)

Media

❖ Commencement of TRAI Tariff Order, Interconnection Regulations and Quality of Service Regulations for Broadcasting and Cable Services

❖ As reported in March 2017 issue of *Inter alia…*, the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 ('**Tariff Order**') and the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 ('**Interconnection Regulations**') issued by TRAI on March 3, 2017, had been challenged in the Madras High Court by Star India and Vijay Televisions. Consequently, TRAI had suspended the implementation of the Interconnection Regulations, Tariff Order and the Telecommunication (Broadcasting and Cable) Services Standards of Quality of Service and Consumer Protection (Addressable Systems) Regulations, 2017 ('**QoS Regulations**'). The validity of the Interconnection Regulations and the Tariff Order has now been upheld by the Madras High Court, other than with respect to the provisions imposing a cap of 15% on maximum discounts on bouquets of channels. As per TRAI's Press Release dated July 3, 2018, the Tariff Order, Interconnection Regulations and QoS Regulations are now in force with effect from July 3, 2018 and accordingly, all timelines prescribed in the Tariff Order, Interconnection Regulations and QoS Regulations would be deemed to commence from such date.

However, do note that a Special Leave Petition filed by Star India in this regard is still pending before the Supreme Court.

Taxation

❖ Share Buy-back at Lower than Book Value, not Subject to Deemed Income-tax Implications

❖ The Mumbai bench of the Income-tax Appellate Tribunal ('**ITAT**'), in a recent ruling,[3] has ruled on the applicability of Section 56(2)(viia)[4] of the Income-tax Act, 1961 ('**ITA**') on buy-back of shares by an Indian company. Section 56(2)(viia), *inter alia*, provides that in case of receipt of shares for a consideration below fair market value, the excess of fair market value over the consideration is subject to tax in the hands of the recipient (subject to certain exceptions). The fair market value for this purpose means the book net asset value of the shares being received. The ITAT has held that Section 56(2)(viia) will be applicable only where the shares become 'property' of the recipient which is only possible where the recipient receives shares of another company (and not possible where the recipient company receives its own shares). In case of a share buy-back, the company purchases its own shares which are extinguished by reducing the capital and, hence, the test of becoming property fails in this case. Accordingly, the ITAT has held that Section 56(2)(viia) does not apply in case of a share buy-back.

❖ Exemption to Interest Income on Specified Offshore Rupee Denominated Bonds

❖ The ITA currently provides for a tax rate of 5% (plus applicable surcharge and cess) for interest payable with respect to moneys borrowed by an Indian company / REIT / InvT from a source outside India by way of the issuance of Rupee denominated bonds (at any time till June 30, 2020) subject to compliance with prescribed conditions and interest ceiling. These borrowings have now been further incentivized to augment the foreign exchange inflow in the country. Pursuant to a press release dated September 17, 2018, tax exemption has been announced for interest payable by an Indian company / REIT / InvT to a non-resident / foreign company in respect of Rupee denominated bonds issued outside India during September 17, 2018 to March 31, 2019. No tax will be deducted on the payment of interest on such bonds. The press release further states that legislative amendments in this regard will be proposed in due course.

❖ E-commerce Operators to collect 1% GST from October 1, 2018

❖ Goods and Services Tax ('**GST**') laws provide that every Electronic Commerce Operator ('**ECO**')[5], not being an agent, is required to collect tax at source ('**TCS**') on the net value of taxable supplies made through it by other vendors, where the consideration for such supply is to be collected by the ECO. Although GST was introduced with effect from July 1, 2017, the provisions relating to TCS were kept in abeyance thus far. The Central Board of Indirect Taxes and Customs has now notified that the provisions pertaining to TCS would be applicable from October 1, 2018. Further, the rate of TCS has been notified to be 1% (0.5% Central GST + 0.5% State GST for intra state supply; or 1% Integrated GST for inter-state supply). Accordingly, ECOs would be required to collect 1% TCS on the net value of each taxable supply made through them with effect from October 1, 2018.

3 M/s Vora Financial Services Private Limited v ACIT: ITA No. 532/Mum/2018.

4 Section 56(2)(viia) has been superseded by Section 56(2)(x) of the ITA with effect from April 1, 2017.

5 ECO has been defined under GST to mean as any person who owns, operates or manages digital or electronic facility or platform for electronic commerce. As the GST laws do not provide for centralized registration, every ECO (foreign or domestic) is required to obtain registration with GST authorities in each State where the vendors might be supplying from through such ECO, before October 1, 2018.

Intellectual Property

- Delhi High Court imposes costs on Defendant in a Trademark Infringement Action to Curb Dilatory Tactics

❖ Skechers Inc. ('**Skechers**'), a US footwear brand, filed a civil suit[6] before the Delhi High Court ('**Delhi HC**') against a local footwear manufacturer, M/s Pure Play Sports and other retailers, on the grounds of trade dress infringement, passing-off, dilution, unfair competition etc., as the defendants were involved in the commercial dealing of lookalikes / replicas of Skechers GOwalk 3 products. On May 25, 2016, the Delhi HC granted an interim injunction restraining the defendants and appointed a local commissioner to visit the premises of the defendants to seize the offending goods.

As the defendants failed to appear and/or file pleadings in their defense, within the prescribed period under the recently introduced Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, the right of all the defendants to file their written statements was declared to have been closed, and the Delhi HC proceeded *ex-parte* against the defendants, except Pure Play. In view of the above, the Delhi HC passed a summary order for disposal and imposed costs in favor of Skechers and opined that it had the power to pass a summary decree in a suit, even in the absence of a specific application requesting the same, as it is satisfied that nothing would come out of putting the parties through the rigmarole of a trial. Thereafter, Skechers filed an application under Sections 35, 35A and 35B of the Civil Procedure Code read with Chapter 23 of the Delhi High Court Original Side Rules, 2018 ('**DHC Rules**'), accompanied with a detailed bill of costs, praying for quantification of the costs of the proceedings due to be paid to it. This application file by Skechers was the first of its kind under the DHC Rules.

The key considerations to be taken into account by a Court when granting such costs are (i) judicial time consumed in litigation; (ii) delay in service of summons or efforts made; (iii) delay caused by any party by raising frivolous issues or unnecessary objections; (iv) failure of a party to effect discovery of documents or refusal to answer interrogatories; (v) incorrect denial of facts/ documents, thus, protracting trial; (vi) monetary and other stakes involved in the proceedings; (vii) costs incurred on execution of commission; and (viii) any other cost which the Court may deem fit and proper. Further, under Rule 2 of the DHC Rules, the Taxing Officer / Joint Registrar of the Court ('**JR**') has been empowered to entertain, adjudicate and quantify costs by appreciating the documentary evidence put forth.

After reviewing the bill of costs submitted by Skechers, the JR awarded costs amounting to ₹8,698,173 (approx. US$118,000) to Skechers. Pure Play has filed a chamber appeal against the order of JR, which is currently pending adjudication. However, the execution petition of Skechers has been admitted and the Court has directed Pure Play to disclose its assets and remain present before the Court on the next date of hearing.

This case has set an important precedent on two counts. First, it lays down with clarity that a Court has the powers to pass a summary judgment / decree *suo motu*, even in the absence of a written application. Second, the quantum of costs granted by the JR demonstrate the Court's seriousness in curbing the dilatory tactics employed by litigants, which will likely act as an effective deterrent / disincentive for infringers, who otherwise find it profitable to continue their illegal activities until shut down by an injunction of the Court (as they are fully aware of general trend of Courts being reluctant to impose financial sanctions in intellectual property matters).

AZB represented Skechers before the Delhi HC.

Litigation

- Supreme Court Upholds the Constitutional Validity of Aadhaar Act

❖ The SC, by way of its order in ***Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.***[7][1], upheld the constitutional validity of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 ('**Aadhaar Act**'), but struck down certain provisions including its linking with bank accounts, mobile phones and school admissions. The judgment was passed with a majority of 4:1.

Some of the key observations of the majority decision are set out below:

i. The Aadhaar Act meets the concept of limited government, good governance and constitutional trust, and does not tend to create a surveillance state. It is not held to be violative of the right to privacy under Article 21 of the Constitution of India ('**Constitution**') and serves the legitimate State aim, *i.e.* to ensure that social benefits reach the deserving community.

6 Skechers USA Inc. II v Pure Play Sports, CS(COMM) 573/2016, High Court of Delhi

7 [1] Judgment dated September 26, 2018, in Writ Petition (Civil) No. 494 of 2012

ii. The passing of the Aadhaar Act as a 'Money Bill' was upheld on the ground that Section 7, which is the core provision of the Aadhaar Act, satisfies the conditions of Article 110 of the Constitution (*which sets out the criteria for a 'Money Bill'*).
iii. Authentication records are not to be retained beyond six months (as opposed to six years required under the Aadhaar Act).
iv. Any individual, whose information is sought to be released, will be afforded with an opportunity of being heard. The provision enabling any body corporate/person to seek authentication services on the basis of purported agreement between an individual and such body corporate/ person has been struck down as unconstitutional as it would lead to commercial exploitation of individual biometric and demographic information by private entities.
v. Section 139AA of the IT Act which makes it mandatory to quote Aadhaar when filing tax returns or for allotment of Permanent Account Number, was upheld.
vi. A robust data protection regime, in the form of an enactment on the basis of Justice B.N. Srikrishna (Retd.) Committee Report with necessary modifications, should be adopted. Please refer to our *Client Alert* dated August 3, 2018 available at https://www.azbpartners.com/bank/the-personal-data-protection-bill-2018/, for key highlights of the Personal Data Protection Bill, 2018.

Dissenting with the majority, Justice D.Y. Chandrachud held the Aadhaar Act to be unconstitutional for failing to meet the requirements of a Money Bill under Article 110(1) of the Constitution. While elaborating on several other infirmities in the Aadhaar Act, he also declared the Aadhaar Act to be violative of various fundamental rights, including the right to privacy and directed the Government to initiate steps to bring a fresh legislation for ensuring conformity with this judgment, till which time the data collected under the Aadhaar Act will neither be destroyed nor be used for any purpose whatsoever. If the Government fails to bring such legislation within a period of one year, it is directed that the data will be destroyed.

❖ Application for Setting Aside an Arbitral Award to require Examination of Evidence beyond record of the Arbitrator

❖ In its judgment dated August 20, 2018 in **M/s Emkay Global Financial Services Limited *v.* Girdhar Sondhi**[8], the Supreme Court of India examined whether a party can lead evidence in proceedings instituted under Section 34 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'). Relying on its judgment in **Fiza Developers & Inter-Trade Private Limited *v.* AMCI (India) Private Limited.**[9], the Supreme Court held, *inter alia*, that in order to ascertain whether a party has "*furnishe[d] proof*" under Section 34(2)(a) of the Arbitration Act, a Court need not examine anything beyond the record of the proceedings before the arbitrator. If the matters relevant to the determination of issues exist, which are not contained in the record of the arbitration proceedings, the same may be brought to the notice of the Court by way of affidavits filed by the parties in the proceedings under Section 34 of the Arbitration Act. It was also held that cross-examination of persons swearing to such affidavits should not be permitted unless absolutely necessary.

❖ Madras High Court directs non-signatories to arbitrate under the 'Group of Companies' doctrine

❖ A division bench of the Madras High Court ('**Madras HC**') in its judgment dated July 23, 2018 in **SEI Adhavan Power Private Limited &** ***Anr. v.*** **Jinneng Clean Energy Technology Limited & Other,**[10] held that non-signatories to an arbitration agreement may be referred to arbitration, on the basis of the '*group of companies*' doctrine. AZB & Partners successfully represented Jinneng Clean Energy Technology Limited ('**Jinneng**') in this matter.

Jinneng, along with SunEdison Energy Holding (Singapore) Pte Ltd. ('**SunEdison Singapore**') were parties to a Non-Disposal Undertaking ('**NDU**'). Upon a breach of the NDU, Jinneng initiated arbitration against SunEdison Singapore as well as SEI Adhavan Power Private Limited ('**SEI**') and SunEdison Solar Power India Private Limited ('**SunEdison India**'), neither of which were signatories to the NDU. SEI and SunEdison India therefore filed a suit before the Madras HC, seeking an injunction against the arbitration, on the ground that they were non-signatories to the NDU and thus were not bound by the arbitration agreement thereunder.

The Madras HC (single and division benches) referred SunEdison India and SEI to arbitration under the NDU, on the ground that SEI, SunEdison India and SunEdison Singapore constituted a single economic entity, *i.e.*, the SunEdison group of companies, were "*intrinsically connected to each other*", and the transactions between the parties were all in respect of the same project. The Madras HC referred to and relied upon the Supreme Court judgment in **Chloro Controls India Private Limited *v.* Severn Trent Water Purification Inc. and Others,**[11] in which it was held, *inter alia*, that an arbitration agreement entered into by a company within its group of companies can bind its non-signatory affiliates.

8 M/s Emkay Global Financial Services Ltd. *v.* Girdhar Sondhi, 2018 SCC OnLine SC 1019
9 Fiza Developers & Inter-Trade Pvt. Ltd. *v.* AMCI (India) Private Limited, (2009) 17 SCC 796
10 Judgment dated July 23, 2018 in Original Side Appeal Nos.170 to 175 and 206 to 210 of 2018 (Madras High Court)
11 Chloro Controls India Private Limited *v.* Severn Trent Water Purification Inc. and Others, (2013) 1 SCC 641

❖ In the case of **Shriram EPC Limited *v.* Rioglass Solar SA**,[12] the SC held that non-payment of stamp duty would not render a foreign arbitration award unenforceable in India. The Supreme Court found that the term 'award' under Item 12 of Schedule I of the Indian Stamp Act, 1889 ('**Stamp Act**') has never included a foreign award, from the date of commencement of the Stamp Act till date.

Tracing the history of the Stamp Act, the erstwhile provisions of the Code of Civil Procedure, 1882 and the Indian Arbitration Act, 1899, the SC concluded that the Stamp Act only referred to an award made in the territory of British India provided that such award was not made pursuant to a reference made by an order of the Court in the course of a suit. Accordingly, an award made in a princely State or in a foreign country, if enforced by means of a suit in British India, would not be covered by the expression 'award' as contained in Item 12 of Schedule I of the Stamp Act. The Supreme Court noted that this position has remained unchanged even after the introduction of the Arbitration Act, and, therefore, a foreign award is not liable to stamp duty under the Stamp Act.

❖ Payment of Stamp Duty not a Requisite for Enforcement of a Foreign Arbitration Award in India

❖ The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 ('**Amendment Act**') came into force with effect from May 3, 2018, amending the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ('**2015 Act**'). Some of the notable amendments to the 2015 Act are: (i) decrease in the value of the subject matter in respect of which a commercial suit may be instituted from ₹1 crore (approx. US$ 135,000), to ₹3 lakh (approx. US$ 4,000); and (ii) a suit not contemplating urgent interim relief cannot be instituted unless the remedy of pre-institution mediation has been exhausted.

❖ Update on Amendments to the Commercial Courts Act, 2015

Miscellaneous

❖ The Government of India has, on August 1, 2018, notified the Fugitive Economic Offenders Act, 2018 ('**Economic Offenders Act**') to *deter fugitive economic offenders from evading the process of law by staying outside the jurisdiction of Courts in India*. For operationalising the Economic Offenders Act, the Fugitive Economic Offenders (Procedure for Conducting Search and Seizure), Rules, 2018 have also been notified with effect from August 24, 2018. Some of the key provisions of the Economic Offenders Act are as follows:

i. A 'fugitive economic offender' has been defined as an individual against whom an arrest warrant has been issued for committing any prescribed offence (where the value exceeds ₹1 billion (US$13.5 million)), and has left the country to avoid facing prosecution or has refused to return to face prosecution.
ii. If any person to against whom an application have been filed, fails to appear post a notice issued by the Special Court, then such person would be declared a 'fugitive economic offender'. Any property of the fugitive economic offender can be attached for 180 days, unless further extended by the special court. The properties shall be released if the person is not found to be a fugitive economic offender at the conclusion of proceedings.
iii. The Special Court is entitled to confiscate properties, free of encumbrances, of any person declared as a 'fugitive economic offender' which: (i) are proceeds of a crime; (ii) are *benami* properties in India or abroad; and (iii) any other property in India or abroad. However, the Special Court is empowered to exempt from confiscation, any property in which a third party has a *bona fide* interest, without knowledge of the fact that the property is a proceed of crime.

❖ Government Notifies the Fugitive Economic Offenders Act

12 Judgment dated September 13, 2018, in Civil Appeal No. 9515 of 2018 (Supreme Court of India)

AZB & PARTNERS
ADVOCATES & SOLICITORS

Inter alia...

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Law Firm of the Year
VC Circle, 2018, 2017, 2016 & 2015

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

❖

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

❖

India Deal Firm of the Year
ALB SE Asia Law Awards, 2018

❖

Law Firm of the Year in India
Corporate INTL, 2018

❖

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

❖

Ranked No.1
for the Indian M&A Announced Deals League Table by Value and Volume
Ranked No. 1
for the Indian M&A Completed Deals League Table by Value and Volume
Thomson Reuters' Emerging Markets M&A Legal Rankings, Q1 2018

❖

Ranked No. 1
for India in the M&A Announced Deals League Table by Deal Value and Deal Count
Bloomberg's Global M&A, Legal Rankings, Q1 2018

❖

Ranked No. 1 for India in the M&A Rankings by Deal Value and Deal Count
Mergermarket's Global and Regional M&A League Tables of Legal Advisors, Q1 2018

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Ranked No. 1
for India and Asia (excl. Australasia & Japan)
in the M&A Announced Deals League Table by Deal Value and Deal Count
Mergermarket's Global and Regional M&A, Legal Rankings, Q1 2018

❖

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

❖

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

❖

Best Indian Law Firm
International Legal Alliance Summit Awards, 2017

❖

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

❖

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

❖

M&A Law Firm of the Year
Corporate INTL, 2016

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