Inter alia...

AZB & PARTNERS
ADVOCATES & SOLICITORS

APRIL 2016 • STRICTLY FOR PRIVATE CIRCULATION

In This Issue

PAGE

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

AZB & PARTNERS
ADVOCATES & SOLICITORS

MUMBAI: AZB House | Peninsula Corporate Park | Ganpatrao Kadam Marg | Lower Parel | Mumbai 400013 | India | TEL +91 22 66396880 | FAX +91 22 66396888 | E-MAIL mumbai@azbpartners.com

MUMBAI: Sakhar Bhavan | 4th Floor | 230 Nariman Point | Mumbai 400021 | India | TEL +91 22 66396880 | FAX +91 22 49100699 | E-MAIL disputeresolution.mumbai@azbpartners.com

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

GURGAON: Unitech Cyber Park | 602 Tower-B | 6th floor | Sector 39 | Gurgaon 122001 | India | TEL +91 124 4200296 | FAX +91 124 4038310 | E-MAIL gurgaon@azbpartners.com

BANGALORE: AZB House | 67-4 4th Cross | Lavelle Road | Bangalore 560001 | India | TEL +91 80 42400500 | FAX +91 80 22213947 | E-MAIL bangalore@azbpartners.com

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

Corporate & SCRA

❖ Companies (Amendment) Bill, 2016

❖ The Companies (Amendment) Bill, 2016 ('**Bill**') was introduced in the Lok Sabha on March 16, 2016, to amend the Companies Act, 2013 ('**Companies Act**'), pursuant to the recommendations of the Companies Law Committee in its report dated February 1, 2016. In order to give effect to the proposed amendments, modifications will also be required to be made to the extant rules framed under the Companies Act. Some of the significant amendments proposed by the Bill to the Companies Act, *inter-alia* include:

i. definition of 'subsidiary' to be determined based on exercise of total voting power as opposed to the entire share capital;
ii. permitting companies to have a generic objects clause in the Memorandum of Association;
iii. streamlining of the private placement process and allowing flexibility in relation thereto;
iv. enabling unlisted companies to hold annual general meetings at any place in India and a wholly owned subsidiary of a foreign body corporate to hold extra-ordinary general meetings outside India;
v. introducing enabling language to empower the Government of India to exempt certain classes of foreign companies from the applicability of the provisions relating to corporate social responsibility;
vi. restricting applicability of Section 177 (relating to Audit Committees) to listed public companies and permitting Audit Committees to ratify contracts involving an amount in excess of ₹1 crore (approximately US$ 150,000), providing for consequences of non-ratification, and introducing exemptions from approval in the case of related party transactions between holding company and its wholly owned subsidiary;
vii. introducing test of materiality for determining pecuniary interest for determining the independence of independent directors;
viii. introducing more flexibility under Section 185 by allowing a company to give loans to entities in which directors are interested after passing special resolution and adhering to disclosure requirements. However, no company can provide any loan to/guarantee for/security in connection with any loan taken by: (a) any director of a company, or of a company which is its holding company or any partner or relative of any such director; or (b) any firm in which any such director or relative is a partner;
ix. deleting Section 186(1), which imposed restrictions on making investments through more than two layers of investment companies;
x. granting exemption to closely-held companies from the applicability of Section 188, which governs related party transactions;
xi. deleting provisions relating to forward dealing and insider trading by directors and key managerial personnel; and
xii. doing away (subject to certain conditions) with the requirement of Central Government approval for managerial remuneration in excess of prescribed limits.

A Special Issue of *Inter alia…* will be published once the Bill is passed, summarizing the significant changes.

❖ Central Registration Centre for Company Incorporation

❖ By way of a notification dated March 23, 2016 issued by the Ministry of Corporate Affairs, the Central Registration Centre, established by the Central Government under the notification dated January 22, 2016, has been granted territorial jurisdiction all over India, for discharging or carrying out the function of processing and disposal of applications for reservation of names under the provisions of the Companies Act. This function was earlier exercised by each of the distinct State level Registrars, leading to considerable delays. With effect from March 28, 2016, all name approval applications will be considered and dealt with by a centralized agency, which is expected to considerably shorten the timeline for the name approval process.

Foreign Exchange

❖ Amendments to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000

❖ Reserve Bank of India ('**RBI**') has, by way of various notifications, amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 ('**FEMA 20**'). A brief summary of the key amendments have been set out below:

i. Pursuant to notification dated November 16, 2015 ('**November Notification**'), RBI

has amended FEMA 20 to facilitate foreign investments under the automatic route in entities regulated by Securities Exchange Board of India ('**SEBI**') or any other designated authority, including alternative investment funds ('**AIFs**'), real estate investment trusts ('**REITs**') and infrastructure investment trusts ('**InvIts**'). Some of the key amendments proposed under the November Notification are: (a) the term 'investment vehicle' has been defined to mean "*an entity registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose and shall include Real Estate Investment Trusts (REITs) governed by the SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (InvIts) governed by the SEBI (InvIts) Regulations, 2014 and Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012*", and the term 'unit' has been defined to mean "*beneficial interest of an investor in the Investment Vehicle and shall include shares or partnership interests*"; (b) a new schedule *i.e.* Schedule 11 has been introduced which, *inter-alia,* specifies the terms and conditions for foreign investments in an investment vehicle; (c) a person resident outside India (other than an individual who is citizen/entity that is registered/incorporated in Pakistan or Bangladesh), including a registered foreign portfolio investor or a non-resident Indian ('**NRI**') is permitted to acquire, purchase, hold, sell or transfer units of an investment vehicle subject to prescribed conditions; and (d) downstream investment by an investment vehicle will be regarded as foreign investment if neither the sponsor nor the investment manager is Indian 'owned and controlled' as defined under FEMA 20.

ii. Thereafter, by way of a notification dated February 15, 2016, RBI has provided clarity on the permissible investments by NRIs. Prior to the amendment, a NRI was defined to mean a person resident outside India, who was either an Indian citizen or a person of Indian origin. Pursuant to the amendment, a NRI has been defined to mean "*a person resident outside India who is either a citizen of India or an 'Overseas Citizen of India' cardholder (as provided for by the Citizenship Act, 1955)*". Additionally, prior to the amendment, (a) Regulation 5(3)(i) of FEMA 20 permitted NRIs to purchase shares and convertible debentures of an Indian company on a stock exchange under the Portfolio Investment Scheme, in accordance with Schedule 3 thereto; and (b) Regulation 5(3)(ii) of FEMA 20 permitted NRIs to purchase shares and convertible debentures of an Indian company on a non-repatriation basis other than under the Portfolio Investment Scheme, in accordance with Schedule 4 thereto. Pursuant to the amendment, the scope under Regulation 5(3)(i) (read with Schedule 3) and Regulation 5(3)(ii) (read with Schedule 4) has been widened to permit NRIs to *acquire securities or units* (as opposed to shares and convertible debentures).

iii. By way of notification dated March 30, 2016, RBI permitted foreign direct investment ('**FDI**') up to 49% in the insurance sector under the automatic route with effect from the date of the notification. The Indian Insurance Companies (Foreign Investment) Rules, 2015 have also been amended in this regard. Foreign investment in the insurance sector will be subject to approval/verification by the Insurance Regulatory and Development Authority of India ('**IRDA**'). Prior to this amendment, FDI up to 26% was permitted in the insurance sector under the automatic route, while FDI from 26% onwards up to 49% was permitted under the approval route.

iv. Further, RBI has pursuant to a circular dated April 21, 2016 reiterated that foreign investment in units of 'Investment Vehicles' registered and regulated by SEBI or any other competent authority is permitted and also set out the salient features of this new investment regime.

❖ Revision of Sectoral Limits – Pension Sector

❖ The Department of Industrial Policy and Promotion ('**DIPP**') has, by way of Press Note 2 of 2016 dated March 23, 2016 ('**Press Note 2**'), revised the sectoral limit applicable to the pension sector. Earlier, foreign investment up to 26% was permitted under the automatic route, and beyond 26% and up to 49% was considered under the approval route. Pursuant to Press Note 2, foreign investment up to 49% is permitted under the automatic route in the pension sector.

❖ Guidelines for FDI in E-commerce

❖ DIPP has, by way of its Press Note 3 of 2016 dated March 29, 2016 ('**Press Note 3**'), prescribed guidelines for FDI in E-commerce. Press Note 3 defines '**E-commerce**' to mean '*buying and selling of goods and services including digital products over digital & electronic network*'. In terms of Press Note 3, no FDI is permitted in an Inventory Based Model of E-commerce[1]. 100% FDI under the automatic route is permitted in the Marketplace Model of E-commerce[2] subject to, *inter-alia*, the following conditions:

1 An e-commerce entity, that owns the inventory of goods and services, which are directly sold to the consumers.

2 An e-commerce entity providing an information technology platform on a digital & electronic network, to act as a facilitator between buyer and seller.

i. such entity following the Marketplace Model will be permitted to enter into transactions with sellers registered on its platform on B2B basis;
ii. it will not permit more than 25% of the sales implemented through its marketplace to emanate from one vendor or their group companies;
iii. it will not, directly or indirectly, influence the sale price of goods or services, and will maintain a level playing field;
iv. guidelines on cash and carry wholesale trading as given in the FDI Policy will apply to B2B e-commerce;
v. such entity may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services; and
vi. it will not exercise ownership over the inventory *i.e.*, goods purported to be sold since such ownership over the inventory will render the business into Inventory Based Model.

Further, sale of services through e-commerce will be under the automatic route, and subject to prescribed conditions.

❖ Foreign Exchange Management (Acquisition and Transfer of Immovable Property outside India) Regulations, 2015

❖ RBI has, by way of a notification dated January 21, 2016, issued the Foreign Exchange Management (Acquisition and Transfer of Immoveable Property outside India) Regulations, 2015 ('**2015 Regulations**') that replaces the erstwhile Foreign Exchange Management (Acquisition and Transfer of Immoveable Property Outside India), Regulations, 2000 ('**2000 Regulations**'). While the 2015 Regulations are substantially similar to the 2000 Regulations, a new provision has been inserted, whereby a person resident in India may acquire immoveable property outside India jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India. The term 'relative' in relation to an individual has been defined to mean husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

❖ RBI announces Regulatory Relaxations for Startups

❖ By way of a Press Release dated February 2, 2016, RBI has proposed regulatory changes for easing cross-border transactions, particularly relating to the operations of the start-up enterprises. Further, by way of a circular dated February 11, 2016, RBI has, *inter-alia*, clarified that:

i. a start-up in India, having an overseas subsidiary, is permitted to open foreign currency account abroad to pool the foreign exchange earnings out of the exports/sales made by the concerned start-up and the balance in the foreign currency account due to the Indian start-up should be repatriated to India within nine months from realization of exports;
ii. the overseas subsidiary of the start-up is permitted to pool its receivables arising from the transactions with residents in India as well as the transactions with non-residents abroad into such foreign currency account opened abroad in the name of the start-up;
iii. a start-up is permitted to avail the facility for realising the receivables of its overseas subsidiary or making the repatriation through online payment gateway service providers for a value not exceeding US$ 10,000 or up to such limit as prescribed; and
iv. to facilitate the above arrangement, an appropriate contractual arrangement between the start-up, its overseas subsidiary and the customers concerned should be in place.

Further, the DIPP has issued a notification dated February 17, 2016 wherein it has clarified that an entity (*i.e.*, a private limited company, a Limited Liability Partnership ('LLP') or registered partnership firm) will be permitted to be registered and recognized as a start-up for up to five years from the date of its incorporation/registration, if: (i) its turnover for any of the financial years has not exceeded ₹25 crores (approximately US$ 3,800,000); and (ii) it is working towards innovation, development, deployment or commercialisation of new products, processes or services driven by technology or intellectual property. Further, any such entity formed by splitting up or reconstruction of a business already in existence will not be considered a 'start-up'.

❖ Mandatory filing of Form ARF, FCGPR and FCTRS on e-Biz platform

❖ RBI has enabled online filing of Advance Remittance Form, Form FC-GPR and Form FC-TRS. The physical filing of such forms has been discontinued with effect from February 8, 2016.

❖ On February 17, 2016, SEBI amended the ICDR Regulations by introducing Chapter VI-A, which provides for certain conditions and the manner of providing an exit opportunity to dissenting shareholders, who have voted against any proposal to vary the terms of contracts[3] or objects referred to in a prospectus. Certain criteria for making an exit offer have been prescribed along with the requirements that an exit offer process is required to comply with. Consequential amendments have been made to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('**Takeover Regulations**') to exempt acquisition of shares or voting rights of a listed company pursuant to such exit offer made to dissenting shareholders, from the requirement of making an open offer.

❖ Amendment to ICDR Regulations

❖ SEBI, in its board meeting held on March 12, 2016, approved the following proposals with respect to the imposition of restrictions on wilful defaulters:

i. no issuer will be allowed to make a public issue of equity securities / debt securities / non-convertible redeemable preference shares, if such issuer company or its promoter or its director is on the list of the wilful defaulters;
ii. any company or its promoter or its director categorized as wilful defaulter may not be allowed to take control over any other listed entity. However, if a listed company or its promoter or its director is categorized as a wilful defaulter, and there is a takeover offer in respect of the listed company, such person(s) may be allowed to make a competing offer for such listed company in accordance with the Takeover Regulations; and
iii. the criteria for determining a 'fit and proper person' under the SEBI enacted regulations should be amended to include that no fresh registration will be granted to an entity, if the entity or its promoters or its directors or key managerial personnel, as defined under the ICDR Regulations, are included in the list of wilful defaulters.

❖ SEBI Board Meeting – Imposition of Restrictions on Willful Defaulters

❖ SEBI has, on March 14, 2016, released a discussion paper seeking public comments on proposals for defining a brightline test for acquisition of 'control' under the Takeover Regulations. SEBI has sought comments and suggestions from the public on whether Option 1, Option 2 or any other option is preferable in the Indian context, on or before April 14, 2016. SEBI has noted that the definition of 'control' under the Takeover Regulations reflects a principle-based approach (namely, that 'control' includes the right to appoint majority of the directors or to control the management or policy decisions of a company), as opposed to a rule-based approach (which would provide for clear factors to be considered when determining 'control'), which has led to multitude of opinions (and consequent litigations) regarding the meaning of 'control'. SEBI has also observed that the different definitions of 'control' under various Indian regulations may result in multiple regulators arriving at differing results in the same scenario, thereby causing confusion in the market. Based on international practice, SEBI has concluded that in most jurisdictions, 'control' has been defined in terms of a specified quantum of voting rights, irrespective of *de facto* control. In view of the foregoing, SEBI is of the view that there is a need to identify brightlines for defining 'control', and has put forth two proposals in this regard, which are briefly described below:

❖ SEBI releases Discussion Paper on Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations

Option 1: Framework for Protective Rights This proposal recognises the principle that veto rights may be protective in nature rather than participative, provided the concerned investor does not have the power to exercise control over the day-to-day business or policy making. SEBI has recognized that rights with regard to decisions involving a significant change in the current business activity, or which apply only in exceptional circumstances, would be considered protective rights. SEBI has, *inter alia*, proposed that, subject to certain conditions: (i) investors may appoint the chairman/vice chairman of the company as well as an observer to the board; (ii) lenders may be given rights that are customary rights to the lending business; and (iii) rights may be conferred on parties pursuant to commercial agreements. SEBI has further set out an illustrative list of veto/affirmative rights, which would not be construed as 'control' pursuant to this proposal and that may be provided to the investor subject to the certain conditions.

Option 2: Adopting a numerical threshold This proposal is premised on defining 'control' on the basis of the right or entitlement to exercise a specified quantum of voting rights of a company, or the right to appoint a specified number of directors. In this context, SEBI has pro-

3 There currently exists an ambiguity as to what would amount to "*terms of contracts… referred to in the prospectus*". While the discussion paper dated December 1, 2015 issued by SEBI sought to restrict this understanding to contracts which substantially affect the main line of business or revenue generation of the company, this understanding is not reflected in the SEBI (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2016.

- Discussion paper on 'Review of framework for public issuance of Convertible Securities'
- Report of the SEBI Alternative Investment Policy Advisory Committee

posed the following thresholds: (i) the right or entitlement to exercise at least 25% of voting rights of the company, irrespective of whether such holding provides *de facto* control; and/or (ii) the right to appoint majority of the non-independent directors of the company.

❖ Based on the recommendations of the primary market advisory committee set out in the discussion paper dated December 1, 2015 on 'Review of framework for public issuance of Convertible Securities', SEBI has placed for public comments, key suggestions relating to tenure, issuance and terms of listed convertible securities by companies.

❖ In March 2015, SEBI had constituted the Alternative Investment Policy Advisory Committee ('**AIPAC**'), headed by Mr. Narayan Murthy, for further development of AIFs in India. Based on the report submitted by AIPAC, SEBI had invited public comments on the report until February 10, 2016.

Banking & Finance

- Revisions to the Guidelines on Revitalizing Stressed Assets

❖ RBI has, pursuant to a circular dated February 25, 2016, issued certain modifications and clarifications regarding guidelines previously issued by it for revitalising stressed assets including, *inter alia*, those in relation to the strategic debt restructuring ('**SDR**') mechanism and the scheme on flexible structuring of long term project loans to Infrastructure and Core Industries ('**5-25 Scheme**').

The impact of the key modifications and changes are summarised as follows:

i. the current management of the borrower cannot be allowed to continue without representatives of banks on the board of the company and without supervision by an entity/person appointed by the banks. This creates an opportunity for firms/individuals with experience in the relevant industries to step-in and assist in managing companies that have undergone an SDR, until ownership is transferred to the new promoters;
ii. banks needed to divest a minimum of 51% of an SDR company in order to be entitled to asset classification benefits under the SDR mechanism. This limit has been reduced to 26%;
iii. timelines prescribed for various activities related to the acquisition of shares under the SDR scheme have been relaxed and the new requirement is that banks must ensure that the conversion of debt into equity under the SDR mechanism occurs within 210 days from the review of achievement of milestones/critical conditions; and
iv. the decisions on the 'corrective action plan' ('**CAP**') by a joint lenders' forum ('**JLF**') must now be approved by a minimum of 50% of creditors by number (previously 60%). However, by value, 75% of creditors must still approve the CAP.

The key changes to the prudential guidelines on restructuring of advances include:

i. while borrowers involved in fraud/malfeasance were ineligible for restructuring under the erstwhile regulations, restructuring of accounts of such borrowers has now been permitted and asset classification benefits for such accounts have been made available, provided that the existing promoters have been replaced by new promoters and the borrower company is totally delinked from such erstwhile promoters/management; and
ii. certain additional general conditions have been introduced that will apply to restructuring of advances, which include, *inter alia*, a 90 day time limit for implementation of all restructuring packages, corporate debt restructuring, JLF, consortium and multiple banking arrangements and 120 days for all other restructuring packages, and a stipulation that additional funds will be infused into the borrower by promoters to the extent of at least 20% of banks' sacrifice or 2% of the restructured debt, whichever is higher.

RBI has also clarified that the 5-25 Scheme provided under the circulars dated July 15, 2014 and December 15, 2014 will be applicable to external commercial borrowings, subject to regulations issued under the Foreign Exchange Management Act, 1999.

Telecommunications

❖ On February 8, 2016, Telecom Regulatory Authority of India issued the Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016 ('**Regulations**') which, *inter alia*, supports the principles of net neutrality *i.e.*, not imposing discriminatory tariff for data services provided by telecommunication service providers ('TSPs'). The Regulations prohibit the charging of discriminatory tariff for data services provided by TSPs, on the basis of content being provided by them to the consumer.

❖ Regulations for Prohibition of Discriminatory Tariffs for Data Services by Telecom Service Providers

Taxation

❖ Some of the key amendments proposed to be made to the Income Tax Act, 1961 ('**IT Act**') under the Finance Bill, 2016 ('**Finance Bill**') are as under:

❖ Key Proposals to amend the Income Tax Act under the Finance Bill

i. deferment of the applicability of 'place of effective management' based residence test by one year, which will now apply from the assessment year 2017-18;
ii. exemption to non-resident recipients of taxable sum or income under the IT Act from the requirement of furnishing 'Permanent Account Number' subject to conditions prescribed;
iii. in respect of payments made by investment funds to its investors, the person responsible for making the payment will deduct tax at source at the rate of 10% where the payee is a resident, and at the rates in force where the payee is a non-resident. Further, a non-resident payee can approach the assessing officer for obtaining a certificate for deduction of tax at lower rate or no deduction of tax;
iv. out of the 15 point action plan of Base Erosion & Profit Shifting, the following three points have been proposed to be implemented: (a) addressing challenges of digital economy; (b) implementation of patent box regime; and (c) master file and country-by-country reporting in transfer pricing documentation.
v. in case of a resident individual, a Hindu undivided family or a firm receiving any income by way of dividend in excess of ₹10 lakh (approximately US$ 15,000), will be chargeable to tax at the rate of 10% on gross basis;
vi. exemption from levy of dividend distribution tax in respect of distributions made by a special purpose vehicle to the business trusts being REITs and InvIts;
vii. introduction of the Income Declaration Scheme, 2016 ('**Declaration Scheme**') where persons who have not paid full taxes in the past can avail the benefit of the Declaration Scheme and declare the undisclosed income and pay tax surcharge and penalty totaling 45% of such undisclosed income declared. In such cases no scrutiny, enquiry and prosecution would be launched under the IT Act and the Wealth Tax Act, 1957 ('WTA') against such declarant. Cases covered by specific enactments including the Black Money Act, 2015 are ineligible for the Declaration Scheme;
viii. introduction of Direct Tax Dispute Resolution Scheme, 2016 ('**Dispute Resolution Scheme**') wherein a taxpayer can settle his tax arrears by paying specified amounts in terms of the Dispute Resolution Scheme and thus avoid penalty and prosecution under the IT Act and the WTA;
ix. taxpayers covered by retrospective taxation have been granted the option of settling their tax dispute by paying only the amount of tax outstanding, subject to specified conditions;
x. introduction of presumptive taxation scheme for persons earning professional income from certain specified professions and whose total gross receipts do not exceed ₹50 lakh (approximately US$ 75,000); and
xi. increase in threshold limit for tax audit for persons having income from profession and increase in threshold limit for presumptive taxation scheme for persons having income from eligible business.

❖ Some of the key proposals in the Finance Bill with respect to service tax are as follows:

❖ Key Proposals with respect to Service Tax under the Finance Bill

i. levy of Krishi Kalyan Cess (Cenvatable) on any or all taxable services at the rate of 0.5% of the value of taxable services with effect from June 1, 2016;
ii. assignment by the Government of the right to use the radio-frequency spectrum and subsequent transfers thereof has been proposed to be declared as a service under Section 66E of the Finance Act, 1994 ('**Finance Act**') so as to make it clear that such assignment is to be taxed as a service and not as sale of intangible goods;

iii. the limitation period for recovery of service tax not levied or paid or short-levied or short paid or erroneously refunded, for cases not involving fraud, collusion, suppression, etc. is proposed to be enhanced from 18 months to 30 months;
iv. a higher rate of interest is proposed to apply to a person who has collected the amount of service tax from the service recipient but not deposited the same with the Central Government;
v. penalty proceedings under Section 78A of the Finance Act will be deemed to be closed in cases where the main demand and penalty proceedings have been closed under Section 76 or Section 78;
vi. the monetary limit for filing complaints for punishable offences is proposed to be enhanced to ₹2 crore (approximately US$ 300,000);
vii. the power to arrest under service tax law is proposed to be restricted only to situations where the taxpayer has collected the tax but not deposited it with the exchequer, and amount of such tax collected but not paid is above the threshold of ₹2 crore (approximately US$ 300,000);
viii. exemption in respect of the following services to be withdrawn: (a) services provided by a senior advocate to an advocate or partnership firm of advocates, and (b) a person represented on an arbitral tribunal to an arbitral tribunal. Service tax in the above instances would be levied under forward charge. However, the existing dispensation regarding legal services provided by a firm of advocates or an advocate other than senior advocate will be continued.
ix. service tax has been proposed to be exempted in the case of canal, dam or other irrigation works with retrospective effect;
x. service tax exemptions have been introduced impacting the National Pension System, SEBI, Employees Provident Fund Organisation, Biotechnology Industry Research Assistance Council, National Centre for Cold Chain Development, IRDA, and Indian Institutes of Management;
xi. services by way of construction, erection, etc., of original works pertaining to low cost houses up to a carpet area of 60 square meters per house in a housing project approved by the competent authority under the 'Affordable Housing Scheme';
xii. change in rates of abatements are proposed in relation to services of construction of complex, tour operator, transport of goods by rail, transport of goods by vessel;
xiii. changes in reverse charge mechanism are proposed, *e.g.*: liability to pay service tax on any service provided by a Government or a local authority to business entities, will be on the service recipient. Recipient of services availed from foreign shipping line by a business entity located in India will get taxed under reverse charge at the hands of the business entity;
xiv. interest rates on delayed payment of duty/tax across all indirect taxes is proposed to be made uniform at the rate of 15%, except in case of service tax collected but not deposited with the Central Government, in which case the rate of interest will be at the rate of 24% from the date on which the service tax payment became due; and

The Indirect Tax Dispute Resolution Scheme, 2016 was introduced during the Budget 2016-17 to address the problem of plethora of cases pending before the first appellate authority of the revenue departments. Such provisions require more clarity for any kind of tangible success.

❖ No Set Off and Carry Forward of Business Losses if there is no Change in Shareholding of the Ultimate Holding Company

❖ The High Court of Delhi ('**Delhi HC**'), by way of a judgment dated January 13, 2016 in the matter of **Yum Restaurants**[4], has held that if there is a change at immediate shareholder level beyond 49%, then the losses of the company that are brought forward will lapse even if there is no change in shareholding at the ultimate holding company level. The Delhi HC refused to 'pierce the corporate veil' stating that there was nothing to show that there was any agreement or arrangement that the beneficial owner of Yum India's shares is Yum USA, *i.e.* the ultimate holding company.

Infrastructure

❖ Union Cabinet approves amendment to the MMDR Act, 1957

❖ On March 10, 2016, the Union Cabinet gave its approval for amending the Mines and Minerals (Development and Regulation) Act, 1957 ('**MMDR Act**'). The MMDR Act restricted the scope of transferability of mining leases granted by way of auction. The proposed amendment will allow transfer of captive mining leases not granted through auction, subject to prior consent

4 Yum Restaurants (India) (P.) Ltd. v. Income Tax Officer, [2016] 380 ITR 637 (Delhi).

of the Government and compliance with the terms and conditions to be framed by the Central Government in this regard. If the proposed amendment is passed by the Parliament, then it will enable transfer of assets/ undertakings by companies, including the captive mining leases, and also help banks and financial institutions liquidate stressed assets where a captive mining lease has been mortgaged.

The explanatory note to the draft amendment indicated that the Central Government may, if feasible, while framing terms and conditions for transfer of captive mining leases, *inter alia*, specify conditions relating to realisation of an appropriate amount, if any.

❖ Government notifies the Minerals (Other than Atomic and Hydro Carbons Energy Minerals) Concession Rules, 2016

❖ The Central Government has issued the Minerals (Other than Atomic and Hydro Carbon Energy Minerals) Concession Rules, 2016 ('**MCR**'), which have been notified on March 4, 2016. MCR will apply to all minerals except (i) minor minerals defined under the MMDR Act; and (ii) minerals listed in Part A and Part B of the First Schedule to the MMDR Act, *i.e.*, hydro carbon energy minerals (coal and lignite) and atomic minerals. MCR supersedes the Mineral Concession Rules, 1960, with respect to all minerals to which MCR is applicable.

❖ Supreme Court judgment in the matter of State of Rajasthan and Others v. Gotan Limestone Khanij Udyog Private Limited and Another

❖ The Government of Rajasthan ('**GoR**') had, under Rule 15 of the Rajasthan Minor Mineral Concession Rules, 1986 ('**RMMCR**'), permitted transfer of a mining lease in respect of limestone (of a grade qualifying it to be a minor mineral) ('**ML**') from Gotan Limestone Khanij Udyog, a partnership firm ('**Firm**'), to Gotan Limestone Khanij Udyog Private Limited ('**Company**'). The Company was formed with the partners of the Firm as shareholders and directors of the Company, and the only asset being ML. Soon after the transfer of ML in April, 2012, the shareholders of the Company sold all their shares to Ultratech Cement Limited in July, 2012 for a substantial consideration. This was objected to by GoR. The matter reached the Supreme Court ('**SC**') wherein SC held that looking at the two transactions as one, it was clear that the transaction was structured to avoid the restrictions under the RMMCR. SC directed GoR to formulate a policy in respect of transfer of mining leases and then decide on the change in shareholding of the Company.

It is pertinent to note that Rule 15 of the RMMCR has language substantially similar to the language of Rule 37 of the Mineral Concession Rules, 1960, which deals with the transfer of mining leases pertaining to major minerals.

In this matter, SC has not specifically addressed the question as to whether transfer of majority shareholding in a company that holds mining lease(s) requires prior consent of the competent authority. It appears that the ratio of the aforesaid judgment, which has to be seen in light of the facts of the matter, is primarily based on the principle of lifting the corporate veil.

Intellectual Property

❖ Indian Patent Office Rejects Compulsory License Application Filed by Lee Pharma

❖ The Controller General of Patents ('**Controller**') by order dated January 19, 2016[5] ('**CL Order**') rejected the compulsory license ('**CL**') application filed by Lee Pharmaceuticals Ltd. ('**Lee**') for AstraZeneca's SAXAGLIPTIN patent. SAXAGLIPTIN is a class of drug used to treat Type II Diabetes Mellitus (DM) and held that Lee failed to establish the following three factors required to grant a CL, as specified under Section 84(1) of the Patents Act, 1970 ('**Patents Act**'): (i) the Controller held that Lee had failed to provide evidence of what constitutes reasonable requirements of the public with respect to SAXAGLIPTIN, in the context of (a) total number of patients suffering from Type II DM in India; (b) the number of patients that were unable to procure it due to non-availability; and (c) the comparative requirements of the public, with respect to SAXAGLIPTIN as against other Dipeptidyl Peptidase-4 inhibitors ('**DPP-4 Inhibitors**') for treatment of Type II DM, which are also available in the market; (ii) the Controller observed that the other DDP-4 Inhibitors, which are substitutes of SAXAGLIPTIN, were available at the same price range as SAXAGLIPTIN and Lee failed to provide any evidence that SAXAGLIPTIN was the only option available to the patients in India at a reasonably affordable price; and (iii) the Controller observed that as Lee had failed to provide the exact quantitative demand of SAXAGLIPTIN in India and any factual details regarding the shortage in the Indian market, it was very difficult to conclude whether manufacturing of the drug covered by the SAXAGLIPTIN patent in India was necessary.

The Order of the Controller in respect of Lee's CL application is critical as it categorically rejects any arguments or claims based on mere assumptions or estimates and requires the applicant to support its claims by providing credible and authentic data and evidence.

❖ Initiation of Rectification Proceedings in a pending Trademarks Infringement Suit

❖ A full bench of the Delhi HC, in the case of **Infosys Technologies Ltd. *v.* Data Infosys**[6], was

5 Lee Pharma Ltd. v. AstraZeneca AB., C.L.A. No. 1 of 2015.

6 Infosys Technologies Ltd. v. Data Infosys, FAO (OS) 403/2012, Delhi High Court.

approached to address a judicial conflict on the issue of whether prior permission of the Court was necessary for filing a rectification application before the Intellectual Property Appellate Board ('IPAB'), during the pendency of an infringement suit, as per Section 124(1)(b)(ii) of the Trade Marks Act, 1999 ('TMA'). By its judgement dated February 5, 2016, the Delhi HC held that, as per Section 124(1)(b)(ii) of the TMA, prior permission of the Court, before which an infringement suit was pending, was not a condition precedent to filing a rectification application before the IPAB. In coming to this conclusion, the Delhi HC observed that the TMA confers exclusive jurisdiction on the Registrar of Trademarks/IPAB for deciding the matters regarding validity of a trademark. Therefore, the IPAB's jurisdiction is not conditional or subordinate to that of a Civil Court.

Real Estate

❖ Delhi HC Order holding that Property can be Registered with Stamp Duty Less than the Circle Rate

❖ In its recent judgement in the matter of **Manu Narang & Anr *v*. The Lt. Governor, Government National Capital Territory of Delhi & Ors**[7], the Delhi HC held that in case the consideration declared in an instrument for the transfer of a property is less than the applicable/notified circle rate, then such instrument can be registered by paying the stamp duty calculated on the basis of the consideration contained in the instrument, provided the procedure under Section 47-A of the Indian Stamp Act, 1899 as applicable to Delhi ('**Delhi Stamp Act**') is followed. Section 47-A of the Delhi Stamp Act provides that while registering an instrument transferring property, if the registering officer has reason to believe that the value of the property or the consideration has not been truly set forth in the instrument, he may, after registering such instrument, refer the same to the Collector for determination of the value or consideration and the proper stamp duty payable thereon.

Litigation & Arbitration

❖ Mauritius recognized as a Reciprocal Territory under the Arbitration and Conciliation Act, 1996

❖ By a notification issued by the Ministry of Law and Justice of the Government of India ('**Notification**'), the Republic of Mauritius has been recognized as a reciprocal territory for enforcement of foreign awards under Section 44(b) of Part II of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'). This Notification has retrospective effect from October 11, 1960. Consequently, an arbitral award passed, where the seat of arbitration is Mauritius, will now be enforceable in India under Sections 46, 47 and 49 of the Arbitration Act.

❖ LCIA India to close from June 1, 2016

❖ The Indian Chapter of the London Court of International Arbitration ('**LCIA India**') has announced that it will be closed with effect from June 1, 2016. The key impact of the closure will be as under:

i. existing cases that are already registered with LCIA India will continue to be administered as per the LCIA India Rules, and will be administered by the London Office after June 1, 2016;
ii. references that are made pursuant to agreements that were concluded prior to June 1, 2016 will also be administered by the London Office in accordance with the LCIA India Rules; and
iii. for contracts concluded after June 1, 2016, if the parties agree to arbitrate as per LCIA India Rules, a reference made under such contract will not be accepted for administration, unless the parties agree to arbitrate as per the LCIA (UK) Rules.

❖ Madras & Calcutta High Courts deliver contrary rulings in respect of the prospective applicability of the Arbitration and Conciliation (Amendment) Act, 2015

❖ In the January 2016 edition of *Inter alia...*, we had reported that the Arbitration Act has been amended by the Arbitration and Conciliation (Amendment) Act, 2015 ('**Amending Act**'). Section 26 of the Amending Act provides that its provisions will not apply to any arbitral proceedings initiated under Section 21 of the Arbitration Act, prior to the commencement of the Amending Act, unless otherwise agreed to by the parties. The term 'arbitral proceedings' has not been defined in the Amending Act or the Arbitration Act. The Madras High Court ('**Madras HC**') and the Calcutta High Court ('**Calcutta HC**') have recently delivered conflicting rulings on whether the prospective applicability of the Amending Act would apply also to Court proceedings arising out of such arbitral proceedings.

Prior to the Amending Act, filing an application to set aside an arbitral award under Section 34 of the Arbitration Act operated as an automatic suspension on execution of the award

7 Manu Narang & Anr v. The Lt. Governor, Government National Capital Territory of Delhi & Ors., 226(2016)DLT1

under Section 36 of the Arbitration Act. The Amending Act, however, provides that such filing would no longer automatically stay execution of the arbitral award, unless the Court orders stay of execution on an application made for that specific purpose. In **New Tirupur Area Development Corporation Ltd. *v.* M/s Hindustan Construction Co. Ltd.**[8], proceedings were filed under Section 34 of the Arbitration Act to set aside an arbitral award and contended that filing an application requesting stay of execution was not required, as the arbitration proceedings had commenced prior to the Amending Act.

In its judgement dated February 3, 2016, the Madras HC analyzed Section 85 of the Arbitration Act (repeal and saving) that applied "*in relation to arbitral proceedings*…" and the judgement of the SC in this regard in **Thyssen Stahl Union GMBH *v.* Steel Authority of India Ltd**[9] ('**Thyssen Case**'). Section 85 was enacted, *inter alia*, in the context of the substitution of the (Indian) Arbitration Act, 1940 ('**Old Act**') with the Arbitration Act. In that context, SC in the Thyssen Case, had held that Section 85 would cover court proceedings due to the usage of the words "in relation to" in Section 85, and therefore the Arbitration Act would not apply to pending Court proceedings under the Old Act. Distinguishing the judgment in Thyssen Case, the Madras HC held that since Section 26 of the Amending Act did not use the term "in relation to" with respect to pending arbitral proceedings, the Amending Act would apply to pending Court proceedings.

However, the Calcutta HC in **Electro Steel Casting Limited *v.* Reacon (India) Pvt. Ltd**[10] has delivered a contrary ruling. Dealing with a similar question relating to enforcement under Section 36 of the Arbitration Act, the Calcutta HC in its judgement dated January 14, 2016 held that "*Since the subject arbitration commenced much prior to coming into force of the Amendment Act, nothing in it applies to the subject arbitration*."

The judgement of the Madras HC is in line with the emphasis in recent years on the need to expedite arbitration proceedings in India in order to make it an attractive hub for international commercial arbitrations, and to put parties to terms if an arbitral award is challenged. If the divergent view taken by the Calcutta HC eventually prevails, it would, to a large extent, render ineffective the emphasis on expeditious arbitration timelines as contemplated by the Amending Act.

❖ SC holds that Chairman, Managing Director and Executive Directors of a Banking Company are 'Public Servants' for the Prevention of Corruption Act, 1988

❖ In a recent case of Central Bureau of Investigation of India, **Bank Securities & Fraud Cell *v.* Ramesh Gelli and Others**[11] a two judge bench of SC held that employees of a private banking company are public servants and can be prosecuted under the provisions of the Prevention of Corruption Act, 1988 ('**PCA**'). SC relied on Section 46A of the Banking Regulation Act, 1949 ('**Banking Regulation Act**'), which provides that a Chairman appointed on a whole time basis, managing director, director, auditor, liquidator, manager and any other employee of a banking company is deemed to be a "public servant" for the purposes of Chapter IX, *i.e.*, Sections 161 to 171 of the Indian Penal Code, 1860 ('**IPC**'). Chapter IX of the IPC deals with 'Offences by or relating to Public Servants'.

SC reasoned that Sections 161 to 165A of the IPC, that deal with penalties on public servants for corruption, were deleted from IPC and introduced into Sections 7 to 12 of the PCA. However, no corresponding amendments were made to Section 46A of the Banking Regulation Act, which continued to refer to Chapter IX of the IPC. In this background, SC relied on the 'Objects and Reasons' to PCA, as well as the definition of 'public servant' and 'public duty' under the PCA and concluded that the legislative intent was to retain the wide scope of the definition of 'public servant'. Applying this reasoning, SC held that in this case, the chairman and managing director, and executive director, respectively, of Global Trust Bank, a private bank, were public servants within the meaning of PCA. However, SC clarified, vitally, that distinctions between holders of private office and public office ought to be maintained and that the mere performance of public duties by the holder of any office does not make such person a 'public servant' as defined in Section 2(c) of PCA.

8 New Tirupur Area Development Corporation Ltd. v. M/s Hindustan Construction Co. Ltd., Application No. 7674 of 2015 in O.P. No. 931 of 2015.

9 Thyssen Stahl Union GMBH v. Steel Authority of India Ltd., 1999 (9) SCC 334.

10 Electro Steel Casting Limited v. Reacon (India) Pvt. Ltd., Application No. 1710 of 2015 decided on January 14, 2016.

11 Bank Securities & Fraud Cell v. Ramesh Gelli and Others, Writ Petition (Criminal) no. 167 of 2015.

AZB & PARTNERS
ADVOCATES & SOLICITORS

❖

Law Firm of the Year
VC Circle, 2016

❖

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

❖

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

❖

Ranked No. 1
in APAC ex Japan Mid-Market by Deal Count (up to US$ 250m)
Bloomberg's Global M&A, Legal Rankings, Q1 2016

❖

Ranked No. 1
in Asia-Pac buyouts by Deal Count
Mergermarket's Global and Regional M&A League Tables of Legal Advisors, Q1 2016

❖

Ranked No. 1
for the Indian M&A Announced League Table by Deal Count
Ranked No. 1 for India involved
Mid-Market M&A Rankings by Deal Count and Deal Value (up to US$ 500m)
Ranked No. 1 for India involved Small Cap M&A Rankings by
Deal Count and Deal Value (up to US$ 50m)
Thomson Reuters' Emerging Markets M&A Review, Legal Advisors, Q1 2016

❖

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

❖

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

❖

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

❖

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