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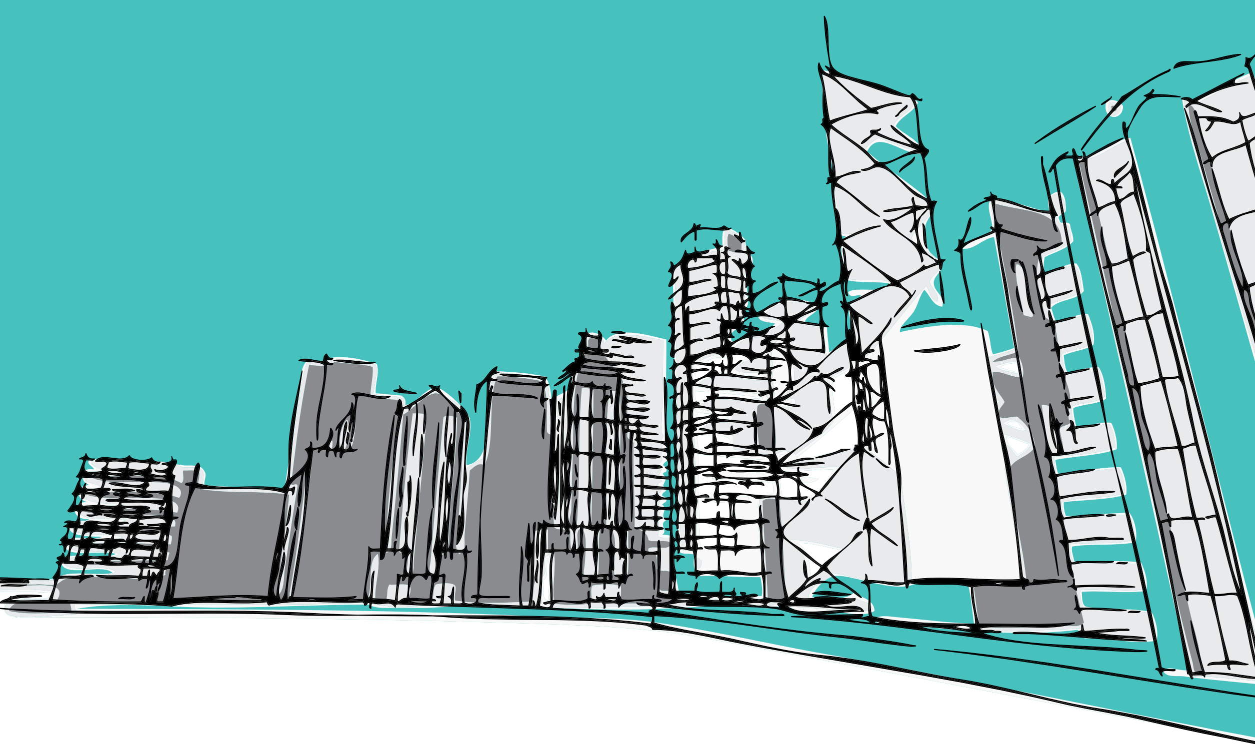
The (Indian) Companies Act, 2013 - A Snapshot



The (Indian) Companies Act, 2013 - A Snapshot

Corporate India was presented with a new company law regime - the Companies Act, 2013 ("2013 Act") repealed and replaced the erstwhile Companies Act, 1956 ("1956 Act") from 12th September, 2013 (*in parts*). While the underlying intention of enacting the new law is an idea, whose time had definitely arrived quite some time ago, the jury is still not out on the actual impact of this new legislation. This booklet attempts to provide a snapshot of some of the significant changes that the 2013 Act has brought about to the corporate landscape in India. The endeavour is to share thoughts and suggestions with respect to these changes, for the benefit of entities looking to invest in India.

The Tree of Knowledge

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NEW TYPES OF COMPANIES *- KEEPING UP WITH GLOBAL STANDARDS*

1

THE CHANGE:

- **One Person Company:**
  Under the earlier regime, a company was mandated to have at least two shareholders. The 2013 Act, in keeping up with other jurisdictions around the world, has allowed one person companies ("OPC") to be set up with a single shareholder. The requirement being that only an individual Indian national, resident in India, can incorporate an OPC. An OPC has some benefits with respect to compliances such as the following : it is not required to provide a detailed cash flow statement as part of its financial statements, conduct the mandatory annual general meeting, comply with certain procedural aspects for meetings, etc. However, if the paid up share capital of an OPC exceeds INR 5 million or its average annual turnover exceeds INR 20 million, it cannot continue as an OPC, hence is clearly meant for small Indian proprietorships which would like to move towards a corporate entity.

- **Small Company:**
  The concept of a small company has been introduced in addition to standard private and public companies. A small company cannot have a paid up share capital in excess of INR 5 million or an annual turnover in excess of INR 20 million. It should be noted that a holding company, subsidiary company, company established for charitable purposes or company governed by any special law cannot qualify to be a small company. Akin to an OPC, a small company has certain compliance related exemptions. But, the main advantage of small companies is the ability to do a fast-track merger/de-merger among two or more small companies. Such a merger can be completed without following the court approval process, which is otherwise

required for a merger/demerger. As long as members holding at least 90% of total number of shares and majority of creditors representing 9/10th in value approve the merger/demerger, and the Central Government (including Registrar of Companies) does not have objections to the merger/demerger, the Registrar of Companies ("RoC") can confirm the merger between two or more small companies.[1]

- **Listed company:**
  The 2013 Act has also introduced a definition for a listed company, which is not strictly in accordance with the conventional understanding of a listed company. A company with any of its securities (*including debt securities*) listed on a recognized stock exchange would be treated as a listed company under the 2013 Act. This entails certain additional compliance requirements as well as disclosures and transparency to ensure that all shareholders are adequately informed of relevant matters and are able to vote on important matters. For instance, filings have to be made with the RoC with respect to the change in the number of shares held by promoters and top ten shareholders within 15 days of any shareholding change. It is required to provide electronic voting facility to shareholders for all shareholder meetings, and also display the financial statements and other related documents on its website[2]. Every listed company is required to have at least one woman director. Rotation of auditors is mandatory for such a listed company. They also have to set up an audit committee and a nomination and remuneration committee, to carry out functions such as approval/subsequent modifications of related party transactions, recommending appointment and removal of directors/senior management, remuneration policy and to evaluate performance of directors.

- **Dormant Company:**
  Companies that are formed and registered under the 2013 Act for a future project or to hold an asset or intellectual property and have no significant accounting transaction, can make an application to the RoC for obtaining the status of a dormant company. Dormant companies can avail of exemptions from certain compliances.

[1] The provisions in relation to mergers under the 2013 Act are yet to be notified.
[2] Companies which have their equity or debt securities listed will, in addition, have to comply with the provisions of the respective equity and debt listing agreements.

L&S Thoughts:

The changes with respect to an OPC and small company are welcome for Indian proprietorship concerns which seek to formalise their operations into a company. But, an OPC or a small company may not be of much significance for a foreign investor, since the threshold caps on turnover may inhibit them from setting up such companies in India. However, these new types of companies could be used for structuring certain M&A transactions, depending on the requirements of the deal. The new definition of a listed company could be a challenge since even private or public companies with debt securities listed on the debt market segment of stock exchanges will be treated as listed companies. Going forward, if closely held companies intend to list their privately placed debt securities, they should be mindful of the additional compliance requirements under the 2013 Act.

PRIVATE COMPANIES *- NO LONGER PRIVILEGED*

2

THE CHANGE:

The 2013 Act has withdrawn various exemptions and privileges that private companies had under the 1956 Act. Private companies are now subjected to onerous procedures for fund raising, where details of potential investors may have to be filed with the RoC, prior to execution of any definitive agreement. They also need to adhere to certain minimum pricing guidelines while issuing shares. They cannot issue shares of different classes with varied rights, unless they comply with stringent requirements, as opposed to an unrestricted regime under the 1956 Act. All significant inter-corporate transactions such as disposal of assets, lending to group companies, etc., now need shareholder approval of more than 75%. These and other changes effectively nullify most of the material benefits that one had by operating a closely held private company.

L&S Thoughts:

One should still consider a private company, if restrictions on transferability of shares of a joint venture partner are of importance. This can be achieved with complete certainty in a private company as opposed to a public company. In a public company, while the law does recognize a private contract between shareholders restricting the shares of a public company, the fine print of the section creates a host of ambiguities with respect to enforcement. Further, a private company continues to enjoy certain other relaxations such as their directors not having to mandatorily retire by rotation each year, ability to finance acquisition of their own shares and so on.

PRIVATE FUND RAISING
- NO LONGER PRIVATE

3

THE CHANGE:

Under the 1956 Act, a public (unlisted) or private company could raise funds through private placement without fulfilling significant compliances or making the details of their transaction public. Under the 2013 Act, any fund raising from either a select person or a group of persons will be subject to a detailed compliance process. This includes preparation of a detailed information memorandum at the initial stages of approaching prospective investors and filing details of prospective investors with the RoC, within a specified time frame. Further, the company has to get a super majority approval from its shareholders before making any 'offer' to the prospective investors. The Ministry of Corporate Affairs is considering relaxing the rules for private companies and making it easier to raise funds but these are yet to be notified.

L&S Thoughts:

This clearly spells trouble for companies looking to attract private equity investors or strategic partners. Without a deal in hand, the company may have to provide detailed information of the company (including its business) and identity of prospective investors to the general public. These requirements can significantly compromise confidentiality during a transaction unless they are managed in a considered manner.

RESTRICTIONS ON TRANSFERABILITY OF SHARES *- A SETTLED POSITION FINALLY?*

4

THE CHANGE:

Under the 1956 Act and the corresponding jurisprudence, the law with respect to restrictions on transferability of the shares of a private company was settled. However, various High Courts in the country differed in their opinion on the status of restrictions on transferability of the shares of a public company. The 2013 Act has attempted to codify the latest judgment on this issue by recognizing that restrictions on transferability of the shares of a public company, contained in a private contract, would be enforceable. Therefore, going forward, shareholders of public companies can enter into enforceable private agreements which restrict each other from transferring their shares to a third party though in general, shares of a public company are freely transferable.

L&S Thoughts:

This is a welcome move and provides some clarity on M&A transactions and joint ventures on enforceability of contracts between shareholders of non listed public companies. It is however not clear whether joint venture partners of listed entities are able to enforce such restrictions on transfer of shares since stock exchanges frown upon such arrangements and insist on free transferability of all shares of companies that are listed on a stock exchange. Foreign investors should be mindful of this anomaly and ensure that they take appropriate measures to safeguard the transfer restrictions in shareholders' agreements of listed entities.

AFFIRMATIVE VOTE RIGHTS - *BEWARE!*

5

THE CHANGE:

The 2013 Act has attempted to define the elusive concept of 'control' and in its endeavour has adopted the inclusive definition of the term from the public market governance regime ("Takeover Regulations"). Along with adopting the definition of 'control', the 2013 Act may have inadvertently also inherited the jurisprudence associated with 'control' under the Takeover Regulations. The jurisprudence of the term 'control' under the Takeover Regulations has brought within its fold affirmative vote rights that are standard for minority protection but according to the capital markets regulator constitute negative control. It is worth noting that a person in control of a company is also deemed to be a promoter of that company. Under the 2013 Act, a promoter has added obligations to provide an exit to minority shareholders (discussed below), and be liable for defaults by the company (in some cases).

L&S Thoughts:

The correlation of 'control' and promoter can prove to be problematic for financial investors who usually negotiate certain affirmative vote rights under contracts. Financial investors, investing in India, must exercise caution while contracting the broad list of standard affirmative vote rights in their investment documents. The 2013 Act already has enhanced protections for minority shareholders. To that extent, the affirmative vote rights that investors negotiate should be watered down bearing in mind the statutory rights available under the 2013 Act. Any excess rights could classify the investors as promoters and club them along with the actual promoters for purposes of fixing liability.

BOARD COMPOSITION *- INDEPENDENT DIRECTORS ON UNLISTED COMPANIES!*

6

THE CHANGE:

The 2013 Act specifies the maximum board strength at 15 directors (which can be increased subject to shareholder approval) with a minimum of 2 directors for a private company and 3 directors for a public company. All companies are required to have at least 1 resident director, who has stayed in India for 182 days in the previous calendar year. All listed companies and public companies with a paid-up share capital greater than or equal to INR 1 billion or turnover greater than or equal to INR 3 billion are required to nominate 1 woman director on their boards. The maximum number of posts, as a director, that an individual can have is 20 (including private companies) with an inner limit of 10 public company directorships. In a public listed company at least 1/3rd of the board should be independent directors though listed entities with executive chairpersons or where the promoter is the chairman requires that at least half the Board needs to be independent. Public unlisted companies with paid up share capital of INR 100 million or more, turnover of INR 1 billion or more and aggregate outstanding loans or borrowings in excess of INR 500 million are required to appoint 2 independent directors. As regards the qualifications of an independent director, the 2013 Act has borrowed largely from the equity listing agreement and has also extended independence criteria to the affiliations that the director and/or his relatives have with the companies concerned or any firm doing business with the company with whom such director or his relative is connected.

L&S Thoughts:

The 2013 Act has undoubtedly tried to step up the role of non-executive directors by restricting the maximum posts that an individual can hold as a director. This could be to ensure that directors do not spread themselves across multiple companies without being able to devote sufficient time for each company. But the requirement to have independent directors on the boards of unlisted companies merely based on the paid up capital or turnover of the company could lead to hardships for closely held public companies. More so, since a subsidiary of a public company is also a public company and will be subjected to the same requirements. Further, the eligibility for independence is raised to such a level that independent directors could be found to be in violation of the requirements for no fault of their own, but because of their relatives especially on whom they have little or no "control". For e.g., if the son-in-law of an independent director offers some services to the directors or promoters of an associate company, the independent director is no longer independent! It would have been more reasonable if the list of relatives were limited to those financially dependent on the director.

DIRECTORS
- *ENHANCED ACCOUNTABILITY*

7

THE CHANGE:

The onus and liability attached to holding a position as a director or independent director of a company has gone up significantly. Earlier directors were bound by fiduciary duties understood under common law. Under the 2013 Act, the fiduciary duties of a director have been codified in statute and penalties have been prescribed for violation of these duties. A director's duty, among other things, includes acting in good faith in order to promote the objects of the company, act in the interests of its employees, shareholders, community and for protection of the environment and exercising due and reasonable care, diligence and skill as well as independent judgment. The law also provides that a director will be held liable only if he acted wilfully or negligently since he ought to have known or ascertained the full and correct facts before making a decision. Further, they will also be deemed to be 'officers in default' and potentially be penalised for contraventions by the company, if they were aware of a wrong doing. 'Awareness' is now benchmarked by communications received with respect to proceedings at a board level, which could include papers circulated prior to a board meeting. Additionally, if a director participated in a board meeting where the matter was discussed and the director failed to object to such matter, he would be considered an 'officer in default'. The consequences of becoming an officer in default include monetary penalties and in certain instances, imprisonment.

L&S Thoughts:

On a first look, the codification of fiduciary duties of a director appears reasonable. But, some of these duties could prove to be problematic in case of litigation against the directors for any default committed by the company, particularly in the nature of class action suits. One such area of concern is where directors are required to act in the best interests of the community, environment, employees and shareholders. For instance, how does the executive director of a mining and infrastructure company be compliant with his responsibility to shareholders and the environment? Would a director be liable as an officer in default where a particular matter was circulated via board papers but he was unable to attend the board meeting? These and such other issues are matters that individuals should consider when taking up office as a director in a company. Directors must at all times ensure that senior members of the management have been identified as responsible persons for compliance with company law matters. They should also ensure that D&O insurance with sufficient limits are in place. Further, they must ensure that the minutes of a board meeting accurately record their dissent on any subject matter which they did not approve.

KEY MANAGERIAL PERSON *- A MANDATORY APPOINTMENT*

8

THE CHANGE:

The 2013 Act has defined a Key Managerial Person ("KMP") to be any of the CEO, CFO, managing director or manager, whole-time director or company secretary. The law now mandatorily requires all listed companies and public companies having a paid up share capital of INR 100 million to appoint certain KMPs like CEO, company secretary and CFO. A KMP is also included within the definition of an officer in default and 'related party'.

L&S Thoughts:

This is a welcome step to have certain persons holding a position of responsibility and accountability in listed companies and other public companies. Companies should adhere to this requirement in letter and spirit, by appointing different persons to hold the various key managerial positions and not appoint 1 person who holds multiple posts, depending on the nature and size of the company, since the Act does not prohibit a person from holding more than one position.

AUDITOR
- ONEROUS RESPONSIBILITY

9

THE CHANGE:

Given the scale of the financial scandals that shook corporate India in the recent past and the inability of the auditors in detecting such financial irregularities, the new law has placed significant responsibility on auditors. The most striking change is that auditors are now required to report to the Central Government, if during the course of their audit they have ***reason to believe*** that a fraud has been/is being committed against the company. To ensure an unbiased approach to the audit, there is a mandatory rotation of auditors for listed companies and certain types of unlisted public and private companies. An individual auditor cannot be associated with such companies for more than 1 term of 5 years and an audit firm can have 2 terms of 5 years each. There is a mandatory cooling off period of 5 years before such auditors can be associated with the companies again. Auditors are also restricted from providing any of the services such as accounting and book keeping, internal audit, management services, etc., to the company, its holding company or subsidiary company.

L&S Thoughts:

The changes regarding auditors are an important move to increase accountability with respect to audit functions and ensure transparency for all stakeholders. But, from an Indian context, the onus of reporting fraud to the Central Government where an auditor suspects occurrence of fraud could create unwarranted frictions in the board and auditor relationship. Under the 2013 Act, auditors, both the firm and the partners have also been subjected to serious penalties for any non-compliance of their obligations. The enhanced penalty regime coupled with the significant responsibilities could push auditors in the direction of over-caution. Any reporting made to the Central Government for suspected fraud could lead to significant reputational damage for the company in question. The damage may in effect be irreversible, even if it is eventually established that no fraud had taken place in the first instance. Therefore, it would be in the best interests of the company to ensure that the auditor is at all times provided complete information and clarification with respect to ***any*** queries that they have.

INTER-CORPORATE TRANSACTIONS *- LIFE MADE MORE DIFFICULT*

10

THE CHANGE:

Changes brought about by the 2013 Act with respect to inter-corporate transactions could make things particularly difficult for transactions between holding companies and subsidiaries.

- **Loans to subsidiaries:**
  Under the 1956 Act, a holding company could freely lend funds to its wholly owned subsidiary (**"WOS"**), invest in securities of its WOS, or provide a guarantee or security on behalf of its WOS. The 2013 Act has placed certain restrictions on this by mandating that loans can be provided only if they are given at a rate of interest equal to the prevailing rate of 1 year, 3 year, 5 year or 10 year government security, closest to the tenor of the loan. Further, for any loan, security or guarantee to the WOS, it would need to obtain a unanimous resolution of its directors and prior approvals from a bank, if it has existing term loans with such banks. The holding company must also ensure that the loan, guarantee or security is availed by the WOS only for its principal business. Under the 1956 Act, a holding company could provide loans, guarantee or security to its subsidiary (other than WOS), as long as it complied with some procedural requirements. Under the 2013 Act, it appears that if the board of directors of the subsidiary usually operates in accordance with the directions of the board of the holding company, the holding company is barred from providing loans to such a subsidiary. However, a holding company can provide security or guarantee for loans availed by its subsidiary, from a bank or a financial institution, provided the subsidiary has utilised the loans for its principal business.

- **Disposal of undertaking:**
  Earlier a company could dispose its 'undertakings' or a 'substantial part of its undertaking' by obtaining an approval from its shareholders by way of a simple majority. Under the 2013 Act, the company would need to obtain an approval from its shareholders constituting a super majority, if it needs to dispose an undertaking or a substantial portion of the undertaking. The 2013 Act has attempted to objectively define an undertaking and substantial portion of the undertaking by providing certain monetary thresholds. The company need not approach its shareholders for approval if the value of the undertaking (or part of it) being sold is below such a threshold.

- **Investment layers:**
  Lastly, companies cannot make investments through more than 2 layers of investment companies. However this restriction will not apply for a company acquiring a company in another country if the target company has investment subsidiaries beyond 2 layers. Also, an Indian subsidiary company can have more than 2 investment subsidiaries for the purpose of meeting the requirements under any applicable law. An investment company has been defined to mean a company whose principal business is the acquisition of shares, debentures or other securities.

L&S Thoughts:

The changes in the inter-corporate transaction regime have serious implications for group companies within India, since most of the large Indian conglomerates operate though various holding structures. However, most foreign holding companies can be less concerned about the impact of these changes on transactions between them and their Indian subsidiaries. The relevant sections apply only to companies incorporated in India under the 2013 Act, whereas a foreign company will always be incorporated under the law of the country of its domicile. But, foreign companies with multiple subsidiary chain structures in India, would have to revisit the chain structure in order to ensure compliance with the layering restrictions and other inter-corporate transaction requirements.

RELATED PARTY TRANSACTIONS *- A NEW PARADIGM*

11

THE CHANGE:

Certain specific kind of transactions between a company and 'related parties' will need to be approved by a super majority of the shareholders. The 2013 Act has also codified the definition of a 'related party' to include KMPs, holding, subsidiary or associate companies, persons on whose advice, directions or instructions a director or manager is accustomed to act, etc. The landmark shift in ideology has been that interested shareholders are required to abstain from voting on a related party transaction! Further, the list of transactions for which this regime applies has been expanded to include any sale, lease or disposal of property. However, if the transactions envisaged are below a certain threshold value benchmarked by turnover, net worth, etc., the related party regime would not apply in such cases. An exemption is also available for transactions which are entered into by the company in the ordinary course of business and which are on an arm's length basis.

L&S Thoughts:

Abstention from voting at a shareholder meeting by an interested party is a significant shift from the principle that a shareholder is always free to act in his own interest, as opposed to directors who must always act in a fiduciary capacity. While, the applicability of such norms on listed companies can be understood, applying the same principles to closely held companies makes day-to-day business cumbersome. Companies with just 2 shareholders entering into a related party transaction with one of the shareholders would be at odds to ensure compliance of this regime. This regime could also create absurd situations where all shareholders of a company are interested in a related party transaction. If all shareholders are interested (which is likely in case of closely held companies and joint ventures with 2 partners), technically, the company cannot proceed with such a transaction even though no shareholder interest is compromised! Private companies and closely held public companies should explore certain alternate methods to avoid the process involved under the related party provisions. Foreign holding companies should be mindful of this regime, since it can directly impact any such transactions undertaken by it with its subsidiaries or other group entities in India.

CORPORATE SOCIAL RESPONSIBILITY *- IMPOSED CHARITY*

12

THE CHANGE:

A completely new introduction to the corporate regime is the Corporate Social Responsibility ("CSR") provisions. Indian companies and Indian branches of foreign companies are now required to spend 2% of their past three year's average net profits on certain specified social activities, in India, such as eradicating extreme hunger and poverty, promotion of education, etc. Companies (including Indian branches of foreign companies) which have a net worth in excess of 5 billion, turnover in excess of 10 billion, net profit in excess of 50 million in any financial year will have to comply with the CSR spend requirements. Such companies will have to constitute a CSR committee comprising of 3 or more directors, out of which at least 1 director shall be an independent director (not applicable to a private company). The CSR committee is responsible for formulating a CSR policy for the company and making recommendations for the expenditure. The board of directors of the company is responsible to ensure that the designated amount is spent by the company for activities in India. ***If the company is unable to spend this amount, it is required to explain the reasons for the same in its board report.*** CSR activities can also be undertaken through a registered trust, society, or a non-profit company. Two or more companies may also collaborate to conduct CSR activities to discharge their statutory responsibilities. It should be noted that activities undertaken solely for the benefit of employees of the company and their family will not amount to discharging the CSR obligations of the company. Also, CSR activities undertaken by the company cannot be activities which are part of its normal course of business.

L&S Thoughts:

Ostensibly, the CSR regime appears to be a "comply or explain" regime. But, we should consider if there is an implied requirement for the reasons for non-compliance to be justifiable, given the Board's responsibility to ensure compliance. In our view, companies should endeavour to meet their obligation to the extent possible, and offer explanations which are justifiable when they are unable to meet the spend obligation. Companies can also collaborate with each other in an innovative manner to jointly discharge their obligations and make this a win-win situation for the community and themselves. For, e.g., manufacturing companies could consider collaborating for conducting training programs for potential skilled and semi-skilled factory workers. Usually such workers learn on the job and companies have to remunerate them during this duration. Companies could use the CSR regime to conduct training for potential factory workers, consequently reducing operating costs, enhancing labour productivity and at the same time complying with the CSR spend requirement.

MINORITY SHAREHOLDERS *- SIGNIFICANTLY EMPOWERED*

13

THE CHANGE:

Minority shareholder rights have certainly received a shot in the arm by way of the 2013 Act. Under the new law, any entity acquiring more than 90% of the shares of a company will have to provide an exit to minority shareholders, at the option of the minority shareholders. The price for the exit is determined on the basis of a valuation by a registered valuer. After a round of public fundraising, any change in the objects of utilisation of the funds needs to be approved by a super majority of the shareholders. However, any minority shareholder who objects to the variation must be provided an exit by the promoters or controlling shareholders at a price as may be specified by the Indian capital markets regulator. Apart from exits, minority shareholders have also been empowered from a governance perspective with respect to listed companies. All listed companies are required to transact business for shareholders meeting by providing an electronic voting facility to the general body of shareholders. This facilitates easy participation by minority shareholders who would otherwise need to be physically present at a shareholders meeting to cast their vote. The related party regime (discussed above) is another instance where minority shareholders have been empowered.

L&S Thoughts:

The steps to protect minority shareholders are commendable, but certain aspects lack clarity. For instance, the provision which mandates an option for exit to the minority shareholders, upon acquisition of 90% of the shares, is unclear with respect to its applicability to listed or unlisted companies. There is no time frame specified within which the minority shareholders need to convey their acceptance or rejection of the offer by the acquiring entity. Therefore, foreign Investors should be mindful while acquiring an unlisted company in India, where minority shareholders are not party to any acquisition arrangement. The e-voting regime should be borne in mind by foreign holding companies when looking to carry out certain corporate actions in respect of their listed subsidiaries. Prior to the e-voting regime, holding companies with a non-controlling block of shares could exercise *de facto* control due to the dispersed shareholdings of minority investors. With the advent of mandatory electronic voting facilities, a significant block of non-controlling shares amounting to even 45% of the voting rights may not be sufficient to ensure that certain resolutions are approved at a shareholders meeting.

OUTBOUND MERGERS
- A WELCOME LIBERALISATION

14

THE CHANGE:

A significant step in the right direction has been the liberalisation of the merger regime under the 2013 Act. The 2013 Act permits an Indian domiciled company to merge with an offshore company. The 1956 Act did not allow Indian domiciled companies to merge with offshore companies. It is interesting to note that the merger of an Indian company will be allowed with an offshore company, only if the offshore company is domiciled in a notified (approved by the Government of India) territory.

L&S Thoughts:

While, this is a positive step towards liberalisation of the Indian market, unless corresponding changes are carried out to the exchange control regime and the tax laws, this would remain a positive step only on paper. Exchange control regulations restrict ownership of capital assets (including immovable property) in India by non-residents. Also, tax laws do not provide tax exemptions for a domestic company merging with an offshore company. If an offshore merger is tax inefficient, it would deter corporations from effecting any merger of an Indian company with a foreign company. .

CLASS ACTIONS
- ARE WE GOING THE US WAY?

15

THE CHANGE:

Shareholders or creditors meeting a certain specified threshold based on value of shares, debts owed or number can approach the National Company Law Tribunal ("NCLT") for preventing the company from performing certain corporate actions, if they consider that the company's interests are being prejudiced by the management. The NCLT will consider the application based on certain criterion such as, good faith of the applicants, availability of alternate remedies, etc. A noteworthy provision is that the claimants can seek damages from the directors, auditors or consultants for fraudulent or wrongful acts. The NCLT is not bound by any limits on the quantum of damages that it can award for a claim. Specifically with respect to auditors, if their liability is established, each partner and the firm as a whole would be liable for the damages being awarded. The NCLT can also entertain and club multiple similar claims by depositors and shareholders akin to the US style class action suits. The new law also allows public interest organizations to represent the shareholders or depositors and initiate action on their behalf.

L&S Thoughts:

This is a novel introduction into Indian company law and it will be interesting to see how the jurisprudence around this issue develops in the coming years. It is hoped that the NCLT will set down precedents in its first few cases whereby frivolous litigations can be dismissed at the admission stage itself. Companies and management should bear in mind that the NCLT has wide discretion in awarding uncapped damages for such class actions. While class action suits in the USA have been a major reason to ensure management accountability to shareholders, it does have its share of criticisms. It is hoped that the India learns and adopts only the positives from the class action regime in the USA.

THE NCLT
- A 'SUPER' TRIBUNAL

16

THE CHANGE:

Under the 1956 Act, schemes of arrangement of companies were approved by the High Courts of various states, the Board of Industrial and Financial Reconstruction assessed the position of sick industrial companies and the Company Law Board decided matters relating to oppression and mismanagement. The 2013 Act has mandated the NCLT with vast powers to approve rearrangement schemes between companies, decide upon oppression and mismanagement matters, approve the restructuring of sick companies, etc. It is also the authority to approve any corporate actions such as reduction of share capital, change in financial year, winding up of companies, etc. In short, the NCLT is empowered to solely decide upon almost all matters under the 2013 Act relating to companies.

L&S Thoughts:

The concentration of power at the NCLT can have positive outcomes as well as negative fall outs. Consequently, the success of the 2013 Act largely depends on the efficient functioning of the NCLT. If the NCLT is equipped with sufficient manpower, expertise and infrastructure, corporate actions can be completed with ease and the 2013 Act could actually improve 'doing business in India'. But, if the NCLT is poorly managed, significant corporate restructurings would be subjected to inordinate delays and time lags thereby impacting corporate activities.

Concluding Note:

It is without doubt that the 2013 Act is one of the most exhaustive legislations that is bound to impact businesses operating in India.

As it stands today, the 2013 Act is a mixed bag with some positives and some negatives.

The 2013 Act needs certain refinements in order to ensure that it acts as a facilitator for businesses in India.

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