

## HIGHLIGHTS OF THE COMPANIES BILL, 2012

### **Background**

After much hindrance and brainwork, the Companies Bill, 2012 (“**the Bill**”) got approved in the lower house i.e. Lok Sabha on December 18, 2012. The much awaited Bill intends to replace the present Companies Act, 1956 which has been in existence for over fifty years now. Indian companies have come a long way to mark their presence in the international arena and keeping into consideration the changing dynamics of the Indian as well as global market, a comprehensive revision of the Company law was imminent. The Bill has been divided into 29 chapters 470 clauses and 7 schedules as compared to the voluminous existing Companies Act, 1956 which consists of over 750 sections and 15 schedules.

The Bill aims to improve the corporate governance of the companies through corporate social responsibility, increased accountability of the directors, ensuring more powers to the Serious Fraud Investigation Office, introduction of class action suits, establishment of special courts for speedy trials etc. This article discusses a few key highlights of the Bill.

### **A. One Person Company**

The concept of One Person Company (“**OPC**”) is common abroad and has now been introduced in India under Clause 2 (62) of the Bill and is defined as a company which has only one person as its member. This individual member is deemed to be the first director in terms of Clause 152 of the Bill, until the director or the directors are duly appointed by him.

Clause 3 (*Incorporation of a Company and Matters Incidental thereto*) requires the person registering an OPC to indicate in its memorandum the name of the other person, with his prior written consent in the prescribed form, who shall, in the event of the death or incapacity to contract of the registering member become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the OPC along with its memorandum and articles.

Such person may withdraw his consent at any time as may be prescribed and the registering member also has the freedom to change the name of such other person by giving a notice in a manner as may be prescribed and such a change shall be indicated in the memorandum of the Company and the same shall be intimated to the Registrar.

### **B. Directors**

Under the Companies Act, all the directors of a Company could be foreigners not residing in India but the Bill has come up with a mandatory provision that every company should have at least one resident Indian director who has stayed in India for a period of not less than 182 days. The maximum limit of directors has also been increased from 12 to 15 in the Bill.

The provisions of the Companies Act, 1956 do not define the term 'Independent Director'. The Act only defines the term 'Director', 'Managing Director/Whole Time Director'. However, as per Clause 49 of the Listing Agreement, SEBI has provided for induction of Independent Directors on the Board of the listed companies.

The Bill has introduced the concept of Independent Director ("ID") under Clause 149. The company and the independent directors are also required to abide by the provisions of Schedule IV (*Code for Independent Directors*) of the Bill. Some of the important provisions relating to IDs are as below:

- Clause 149 of the Bill provides that every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of IDs in case of any class or classes of public companies;
- In terms of Clause 149 (10), an ID shall hold office for a term up to five consecutive years on the Board of the Company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report. However, no ID shall hold office for more than two consecutive terms, but shall be eligible for appointment after expiration of three years of ceasing to become an ID; provided he shall not in the said period of three years, be appointed in or associated with the company in any other capacity, either directly or indirectly;
- Clause 197 (7) of the Bill provides that, an ID shall not be entitled to any remuneration, other than the sitting fees, reimbursement of expenses for participation in the Board meeting and any profit related commission as approved by the members
- The Bill has also introduced the concept of mandatory appointment of certain Key Managerial Personnel ("KMP") which includes (a) chief executive officer or the managing director or manager (b) company secretary (c) whole time director (d) chief financial officer and such other officers as may be prescribed. KMP are included within the meaning of "officer in default" and therefore they are subject to liabilities in case of default.

### **C. Corporate Social Responsibility**

Clause 135 of the Bill introduces the concept of Corporate Social Responsibility ("CSR") and provides as under:

- Clause 135 (1) makes CSR mandatory for every company having a net worth of

Rs. 500 crore or more, or turnover of Rs. 1,000 crore or more or a net profit of Rs. 5 crore or more during any financial year;

- Such company is required to constitute a Corporate Social Responsibility Committee of the Board (“**CSRC**”) consisting of 3 or more directors, out of which at least 1 director shall be an independent director. The Committee shall formulate a Corporate Social Responsibility Policy (“**CSR**”) indicating the corporate social activities to be undertaken by the company and recommend the amount of expenditure to be incurred on such activities;
- Clause 135 (5) provides that, such company shall spend, in every financial year, at least 2% (two percent) of the average net profit of the company made during three immediately preceding financial years and in the case of any failure on the part of the company with respect to above provision, the board shall prepare a report stating the reasons for not spending the aforesaid amount.

#### **D. Serious Fraud Investigation Office (“SFIO”)**

Central Government shall, by notification, establish an office to be called as the SFIO to investigate frauds relating to a company. The SFIO shall be headed by a Director and consist of such number of experts as may be appointed by the Central Government. Statutory status has been conferred upon SFIO.

Companies Bill has empowered SFIO to arrest in respect of certain offences including fraud. Reports filed by SFIO to the relevant court shall be treated as a report filed by the police officer.

#### **E. Class Action Suits**

The biggest boost for the small investors under the Bill comes in the form of class-action suits. Clause 245 of the Bill introduces the concept of class action suits, whereby members or the depositors or any class of them have been empowered to file an application before National Company Law Tribunal if they are of the opinion that the management or the conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors. Thus, class-action lawsuits allow a large number of people with common interest in a matter to sue or be sued as a group.

#### **F. Audit and Auditors**

Chapter X (Clause 139-148) of the Bill lays down the provisions relating to audit and the auditors. Some of the important provisions are as under:

- The Bill provides for mandatory rotation of auditors every five years;
- Ratification of appointment of auditors, by the members at every annual general meeting of the company has been made mandatory;
- More stringent laws have been enacted for listed companies. No listed company shall (a) appoint an individual as auditor for more than one term of five consecutive years and (b) an audit firm as auditor for more than two terms of five

consecutive years;

- Members of the company in terms of Clause 139(3) have been empowered to decide by resolution whether the auditing partner and his team shall be rotated every year or whether audit shall be conducted by more than one auditor;

### **G. Compromises, Arrangement and Amalgamation**

Chapter XV Clause 230 to 240 of the Bill deals with Compromises, Arrangement and Amalgamation. The provisions in relation to the mergers and amalgamation have been relaxed under the bill.

- Clause 234 of the Companies bill makes it possible to merge an Indian company into a foreign company and vice versa in accordance with the provisions of the Bill and subject to the approval of the RBI.
- Mergers and amalgamation between two small companies or between holding company and its wholly owned subsidiary has now been simplified without the requirement of a court process.
- The bill also ensures protection to the minority shareholders by providing them exit opportunities in the event they dissent from any restructuring taking place. They may offer their shares for sale to the majority shareholders at a price which shall be determined by a registered valuer.
- The bill introduces the composition of National Companies Law Tribunal (“**NCLT**”) which has been in the books for a long time and passage of the bill may ensure its composition. The bill proposes to move the jurisdiction of High Court for approval of scheme of arrangement to NCLT. This move would ensure a speedy implementation of scheme of arrangements as High Courts under the Companies Act, 1956 take a long time for approving the same.
- The bill makes it mandatory for the companies in case of merger and amalgamation to send the notice of the scheme as provided to the shareholders and creditors of the company, to Central Government and various regulatory authorities such as SEBI, Income tax authorities, Reserve Bank of India, Competition commission of India etc. Presently there is no such provision under the Companies Act, 1956.
- The bill provides that in case of merger between a listed transferor company and an unlisted transferee company, the transferee company may continue as an unlisted company by payment of consideration to the shareholders of the listed transferor company who decides to opt out of the unlisted transferee company.

### **H. Winding up**

Under this chapter a few grounds for winding up have been **deleted** which are:

- *non commencement of business within 1 year;*
- *number of members falling below the minimum prescribed number; and*
- *default in providing statutory report to the ROC or in holding the statutory meeting.*

- *the affairs of the company have been conducted in a fraudulent manner;*
- *the company was formed for fraudulent and unlawful purpose;*
- *the persons concerned in its formation or management have been guilty of fraud, misfeasance or misconduct in connection therewith*

## **I. Related Party Transactions (for details see D.H. Law January 2013 Newsletter)**

The term “related party” has been defined under clause 1(76) of the Companies Bill, 2012 (the Bill). Under the definition of related party, the Bill includes, a holding, subsidiary or an associate company of such company or a subsidiary of a holding company to which it is also a subsidiary; key managerial personnel or his relative; any person on whose advice, directions or instructions a director or manager is accustomed to act; and anybody corporate whose board of directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager, provided that nothing apply to the advice, directions or instructions given in a professional capacity.

Further, under clause 188, the Bill appears to be more preventive as compared to Section 297 of the Act with respect to a company entering into a contract or arrangement with a related party. Unlike Section 297 of the Act, Clause 188 of the Bill bars a company to enter into contracts with a related party for the following contracts or arrangements-

- Selling or otherwise disposing of, or buying, property of any kind;
- Leasing of property of any kind;
- Availing or rendering of any services;
- Appointment of any agent for purchase or sale of goods, materials, services or property;
- Such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and
- Sale, purchase or supply of any goods or material
- Underwriting the subscription of any securities or derivatives thereof, of the company

Moreover, Clause 188 of the Bill also proposes that for entering into such contracts, prior approval of shareholders along with the consent of board of directors is required in case the paid up capital of the company or transaction amount exceeds the prescribed limit.

## **J. Shares**

The bill envisages the following manner in which the companies may issue their securities

**(i) Public Offer** – Only public companies can issue securities under this arrangement. Public offer includes issue of securities or an offer for sale of securities to the public through issue of a prospectus.

**(ii) Private Placement** – Private placement under the bill is defined as *offer of securities or invitation to subscribe securities to a select group of person through issue of a private placement offer letter*. The offer shall be made to not more than 50 person in order to qualify as a private placement.

**(iii) Other modes** in which the company may issue shares are through rights issue, sweat equity or under an employee stock option scheme of the company.

A significant change introduced in the Bill is the enforceability of a contract or arrangement between two or more persons in respect of transfer of shares of a public company. This removes the ambiguity regarding the enforcement of contracts imposing restrictions on transfer of shares in case of public companies as the Companies act contemplated that the shares of a public company are freely transferable.

## **K. Insider Trading**

Insider trading means the act of buying, selling or dealing in any securities by any director or officer of a company if such director or officer is expected to have access to any non-public price sensitive information in respect of the securities of the company or the act of soliciting any non-public price sensitive information to any outsider. The concept of insider trading has been newly inserted in the Companies Bill and the violation of the above clause will amount to a criminal offence and the person shall be punishable with 5 years imprisonment or fine of not less than 5 lakh rupees extending upto 25 crores rupees or three times the amount of profits made out of insider trading.

## **Conclusion**

The bill reflects India's seriousness in making Indian companies an attractive business vehicle and at the same time it adequately captures the investor interest. In light of the existing laws the Bill contains a number of welcoming changes and shall play a significant role to give a boost to the Indian economy. The Bill seeks to minimize government intervention in the affairs of the company and a significant amount of approvals and controls are shifted in the hands of NCLT. The concept of independent directors in public company is introduced to bring professionalism in the corporate management of the company. Whilst the Bill is a much needed change, majority of the clauses of the Bill are subject to rules which are yet to be prescribed.

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## **Petitioner must be a shareholder on the date of filing a petition for oppression and mismanagement**

Recently, in the case of K Venkatachalam v. Premier Roller Floor Mills Limited (C.P. No. 36 of 2008), the Chennai Bench of Company Law Board has held that a consideration of oppression and mismanagement arises only if the petitioners are found to be shareholders of the company at the date of filing the petition under section 397/398 of the Companies Act, 1956.

Whilst analyzing the grant of reliefs provided under Section 402(f) of the Companies Act, 1956, the Board held that if the petitioner is not a shareholder at the date of filing petition for relief under Section 402, the company petition does not make out a case of oppression and mismanagement.

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## **Machinery of winding up should not be allowed to be utilised merely as a means of realizing its debts**

Delhi High Court in the case of PLD International Pvt. Ltd. v. Reebok India Co. (C.P. No. 612 of 2012) held that the machinery of winding up should not be allowed to be utilised merely as a means of realizing its debts. The High Court dealt with a situation where it was agreed between the parties that disputes shall be referred to arbitration, the Court relied upon the judgment in case of Prime Century City Developments vs Ansal Buildwell Limited 102 (2003) DLT 445 and it was categorically held “once a bona fide defence is shown to exist, arbitration can be efficacious and proper remedy; where the defence is mala fide and moonshine, arbitrable disputes would not exist in actuality”.

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## **Winding up petition not maintainable if petitioner accepts receiving lesser amount towards full & final settlement**

In “Arun Kumar Engineer and Contractors v. Finolex Cables Ltd.” it has been held by the Bombay High Court that “The acknowledgement and/or acceptance of the admitted amount, received by the petitioner towards the full and final settlement conclude the issue for the purpose of winding up petition. Therefore, having once settled the matter, the averment and/or allegations given of coercion and or undue influence just cannot be gone into the Company Petition.” In view of the same, it is crystal clear that “Winding up petition is not maintainable if the Petitioner accepts receiving lesser amount towards full & final settlement”.

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## **Liability of the Insurer under the Motor Vehicles Act, 1988**

In “National Insurance Co. Ltd. v. Saju P. Paul” it is held by the Hon’ble Supreme

Court that the Insurer is liable to pay compensation only in respect of those employees for whom insurance premium is paid, and not for each and every employee who might be travelling as a gratuitous passenger in vehicle concerned.

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## THE CRIMINAL LAW (AMENDMENT) ORDINANCE, 2013

THE CRIMINAL LAW (AMENDMENT) ORDINANCE, 2013 has been brought into force and by it the amendment has been carried out in various provisions of the Indian Penal Code, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872. These amendments are carried out to curtail the offences against the women.

Sections where punishments are made more severe are:

- Section 326 A Voluntarily causing grievous hurt by use of acid, etc. Punishment is 10 Years.
- 326B. Voluntarily throwing or attempting to throw acid. Punishment is upto 7 year.
- 354A: Sexual harassment and punishment for sexual harassment. Punishment is rigorous imprisonment for 5 years.
- 354B. Assault or use of criminal force to woman with intent to disrobe. Punishment is upto 7 year.
- 354C. Voyeurism. Punishment is upto 7 year.
- 354D. Stalking. Punishment is upto 3 year.

There are broad changes carried out in section 370 and 375 of IPC. Certain changes has been also introduced in the Cr. P. C. and Evidence Act, like the recording of statement of the victim, which has been made more friendly and easy, character of the victim has been made irrelevant, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.

The above Amendment has been strongly criticized by various human rights and women Rights organizations for not including some of the suggestions recommended by the Verma Committee Report on age of consent, Armed Forces (Special Powers) Act so that no sanction is needed for prosecuting an armed force personnel, who is being accused of crime against woman. The Government of India replied to these criticism that they have not rejected the said suggestions fully, but changes may be made after proper discussion

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**Cheque issued by way of security not amounting to offence of dishonor**



The Supreme Court of India in a recent judgment in *Vijay v. Laxmanand Anr.* (MANU/SC/0125/2013) has held that any cheque issued by way of security, if dishonored shall not amount to an offence as envisaged under Section 138 of the Negotiable Instruments Act (hereinafter referred to as “The Act”), provided it shall be upon the accused to prove that the cheque has not been issued towards discharge of a legal debt but was issued by way of security or any other reason on account of some business transaction or was obtained unlawfully.

While analyzing the provisions of Section 118(a) and Section 139 of the Act, the Supreme Court relying on its own decision in *P. Venugopal v. Madan P. Sarathi* where it was held that at the first instance it is upon the complainant to prove the existence of debt or other liabilities but thereafter the burden of proving to the contrary shifts to the accused. It was held that the presumptions as mentioned in Section 118 and 139 of the Act are rebuttable in nature. It is important that the standard of proof required for rebutting such presumption is not high as that required of the prosecution.

Applying the definitions of proved or disproved to the principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for it, the evidence put forward by the complainant can be relied upon.

Therefore, based on the version of the facts produced by the Respondent, deposition of the witness and evidence put forth by the Complainant, the Hon'ble Supreme Court was pleased to uphold the order passed by the High Court of Madhya Pradesh that the prosecution failed to make out a case against the accused and acquitted him from the charges and dismissed the present appeal.

## News 10 @ a glance

### **Committee for Inquiry into Wal-Mart's Lobbying Activities**

A Committee, under Shri Justice Mukul Mudgal, former Chief Justice of Punjab and Haryana High Court has been constituted to inquire into the recent media reports on

disclosures of Wal-Mart before the US Senate regarding their lobbying activities and details thereof. The Committee is to submit its report within 3 months from issuance of this Resolution.

### **Irretrievable Breakdown of Marriage-New ground for divorce**

The Law Commission of India in its 71st Report recommended amendments in the Hindu Marriage Act to make irretrievable breakdown of marriage as a new ground for granting divorce among the Hindus. The Commission examined the extant legislations as well as a number of judgments of the Supreme Court and High Courts on the subject and has expressed the view that "irretrievable breakdown of marriage" should be incorporated as another ground for granting divorce.

### **Supreme Court awards compensation of Rs. 1 crore to victim in a claim for medical negligence**

The Supreme court has awarded exemplary damages of Rs. 1 crore to the victim – a software engineer who suffered permanent disability (partial paralysis and other disabilities) due to medical negligence at a government hospital in the state of Andhra Pradesh. The High Court of Andhra Pradesh had awarded compensation of Rs. 15 Lakhs. However, it was increased from Rs. 15 lakhs to Rs. 1 crore by

the Supreme Court.

### **Bar Council of India introduces age bar for admission in law colleges**

The Bar Council of India has introduced age bar for admission into law colleges in India. As per the new rule, students applying for the 5 years integrated law course will not be eligible if above the age of 20 and students applying for the 3 year law course will not be eligible if above the age of 30. However, SC/ST and OBC students are eligible till they reach the age of 22 and three-year course till the age of 35.

### **RBI relaxes the ECB norms for corporates**

Corporates can raise funds through external commercial borrowings through the automatic route, notwithstanding the pending investigations by law enforcement agencies against them, as the Reserve Bank has relaxed the ECB guidelines.

### **New arrangement promises to reduce transfer pricing row**

The new arrangement, called Advance Pricing Agreement (APA), aims to improve clarity in transfer pricing rules and reduce litigation. An APA is a mutual pact between a company and tax authorities that determines in advance the way in which intra-group transactions can

be structured.

### **NBFCs to adopt revised Fair Practices Code**

RBI vide its circular dated February 18, 2013 has revised the guidelines on Fair Practices Code (FPC) for all NBFCs to be adopted by them while doing lending business. This Circular has made some inclusions such as the requirements of Grievance Redressal Mechanism and details of Nodal Officer of RBI in the existing guidelines issued by the on March 26, 2012.

### **Regulations for issuance and listing of non-convertible redeemable preference shares**

The Security Exchange Board of India approved the SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 thereby providing a comprehensive regulatory framework for issuance and listing of non-convertible redeemable preference shares. As in case of SEBI (Issue and Listing of Debt Securities) Regulations, 2008, the proposed Regulations provide framework for public issuance of non-convertible redeemable preference shares and also listing of privately placed redeemable preference shares.

### **States to share Central Taxes**

The States' share has been fixed at 32% of the net proceeds of sharable

Central Taxes for the period from 1.4.2010 to 31.03.2015, and accordingly, devolution is being made to the State Governments. This recommendation was made by 13th Finance Commission.

**TDS on sale of immovable properties**

The Finance Minister in Finance Bill 2013 has proposed withholding tax at 1% to be deducted by every buyer from any sum payable to the resident seller if the sale consideration is Rs.50 lacs or more for transfer of immovable property, other than agricultural land.