



DEVELOPMENTS IN CORPORATE LAW

IN NOVEMBER

2018

ABOUT ACUITY LAW

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers led by Souvik Ganguly and Gautam Narayan, who have deep and diverse experiences in their chosen areas of practice. We have advised Indian and multinational companies, funds, banks and financial institutions, founders of companies, management teams, international law firms, domestic and international investment banks, financial advisors and government agencies in various transactions in and outside India.

Acuity Law takes pride in rendering incisive legal advice taking into consideration commercial realities. Our areas of practice are divided into two departments.

The Corporate practice is led by Souvik Ganguly and the Disputes practice is led by Gautam Narayan.

As part of the Corporate practice, Acuity Law advises on:

- Mergers and acquisitions;
- Distressed mergers and acquisitions;
- Insolvency Law;
- Private Equity and Venture Funding;
- Employment and labour laws
- Commercial and trading arrangements; and
- Corporate Advisory

As part of the Disputes practice, Acuity Law under the leadership of Gautam Narayan advises and represents clients on domestic and cross - border:

- Civil disputes;
- Criminal law matters; and
- Arbitration matters

Acuity Law actively follows legislative and policy developments in its chosen areas of practice and shares such developments with clients and friends on a regular basis.

If you want to know more about Acuity Law, please visit our website www.acuitylaw.co.in or write to us at al@acuitylaw.co.in.

INTRODUCTION

1. COMPANIES (AMENDMENT) ORDINANCE 2018

This newsletter covers developments with respect to corporate laws during the month of November 2018. We have covered the Companies (Amendment) Ordinance 2018; amendments made to the Companies (Registered Valuers and Valuation) Rules 2017; the National Financial Reporting Authority Rules 2018; and the Companies (Cost, Records and Audit) Amendment Rules, 2018. Additionally, we have also covered a case law with respect to intentional violation of the National Company Law Tribunal's interim order.

Please see below summaries of the relevant developments.

The Companies (Amendment) Ordinance, 2018 (**Ordinance**) has been assented to by the President of India and brought into effect on 02 November 2018. The Ordinance has resulted in amending some of the sections of the Companies Act, 2013 (**the Act**) by giving effect to the recommendations placed in the Report of the Committee to review Offences under the Act.

Following are the key amendments introduced through the Ordinance:

1. Divesting of powers of the National Company Law Tribunal (NCLT)

The Ordinance has divested certain powers of the NCLT. These powers have now been vested in the Central Government. The Central Government is now authorized to decide on an application by an Indian company having a holding / subsidiary / associate company situated outside India to consider a different period as its financial year. Additionally, the Central Government is now authorized to approve alteration of articles having the effect of conversion of public companies to private companies. It is pertinent to note that any pending applications before the NCLT with respect to the abovementioned issues shall be disposed off as per the previously applicable provisions.

2. Commencement of Business

The Ordinance inserts a new section 10A, which makes it mandatory for a company in order to commence business or exercise borrowing powers, to file a declaration with the Registrar confirming that every subscriber to the memorandum has paid completely for the shares agreed to be taken by him on the date of making such declaration. Furthermore, the company should have filed with the Registrar a verification of its registered office. Such declaration is to be made within 180 days of the incorporation of the company.

In case of default, the company shall be liable to a penalty of INR 50,000 and every officer in default shall be liable to a penalty of INR 1,000 for each day of the default period which shall not exceed INR 100,000. Further, the Registrar has also been empowered to initiate action for removal of the company from the Register of Companies when no declaration has been filed within 180 days provided that he has reasonable cause to believe that the company has no intention to carry on its operations.

3. Registered Office of Company

The Registrar is now authorized to carry out a physical verification of the registered office of the company if he has reason to believe that the company is not carrying on any business or operation. If the company fails to have a registered office within 15 days of its incorporation, then the Registrar has been empowered through this Ordinance to initiate action for the removal of the company from the Register of Companies.

**COMPANIES (AMENDMENT)
ORDINANCE 2018
...CONTINUED**

4. Prohibition of issue of shares at a discount

As per the Ordinance, non-compliance with sub-section (3) of section 53, shall result in the company and any officer in default being liable to only a penalty, instead of being punishable with fine or imprisonment or with both. The company along with any officer in default has been made liable to pay an amount equivalent to the amount collected by issuing the shares at a discounted price or INR 500,000 whichever is lesser. Further, the company shall also be liable to refund the shareholders all their monies with an interest of 12% per annum from the date of issuance of the shares.

5. Notice for alteration of share capital

Failure / delay in filing with the Registrar a notice for alteration of share capital shall result in the company and the officers in default being held liable with a penalty of INR 1,000 for each day of default or INR 500,000, whichever is less.

6. Registration of charges

As per the Ordinance, registration of charges with the Registrar is now to be made within a maximum period of 60 days from the date of creation of charge, instead of within 300 days of creation of charge as permitted prior to this amendment. The Ordinance also provides that the Registrar may allow such registration to be made within an additional period of 60 days on payment of prescribed ad valorem fees. It is further stated that if any person willfully furnishes any wrong information or purposely suppresses any material information required to be registered under section 77, he shall be liable for action under section 447 of the Act i.e. punishment for fraud.

7. Registration of significant beneficial owners in a company

The Ordinance has considered the importance of disclosures under section 90 of the Act and the punishment for violation of section 90(1) prescribed under section 90(10) is enhanced to the effect that the contravention is now punishable with fine of INR 1,000,000 or imprisonment which may extend to a period of 1 year or with both, instead of being punishable with only fine.

8. Filing of annual return

As per the Ordinance, failure / delay in filing of annual return before the period specified under sub-section (4) of section 92 of the Act, shall result in the company and every officer in default being liable to a penalty of INR 50,000 for a continuing failure, with a further penalty of INR 1,000 for each day of default which shall not exceed INR 500,000, instead of being punishable with fine or imprisonment or with both which was earlier the case.

9. Resolutions and agreements to be filed

As per the Ordinance, the quantum of penalty if any company fails to file resolutions / agreements under section 117(1) of the Act has been reduced and such a company is liable to a penalty of INR 100,000 and in case of continuing failure, with a further penalty of INR 500 for each day while such failure continues, which shall not exceed INR 2,500,000 and every officer in default, including the liquidator of the company, shall be liable to a penalty of INR 50,000 and in case of continuing failure, with a further penalty of INR 5,000 for each day while such failure continues, which shall not exceed INR 500,000.

**COMPANIES (AMENDMENT)
ORDINANCE 2018
....CONTINUED**

10. Copy of financial statements to be filed with the Registrar

As per the Ordinance, failure to file a copy of the financial statements with the Registrar shall result in the company being liable to a penalty, instead of being punishable with a fine; and the managing director and the chief financial officer of the company, if any, and, in the absence of the managing director and the chief financial officer, any other director who is charged by the board of directors with the responsibility of complying with the provisions of section 137, and, in the absence of any such director, all the directors of the company, shall be liable to a penalty, instead of being punishable with a fine or imprisonment or with both.

11. Contraventions related to Directors Identification Number (DIN)

Through the Ordinance, any non-compliance with section 152 (Appointment of directors), section 155 (Prohibition to obtain more than one DIN) and section 156 (Director to intimate DIN) of the Act, shall result in any individual or director of a company in default being liable to a penalty of INR 50,000 and where the default is a continuing one, a further penalty of NR 500 for each day of such continuing default, instead of being punishable with fine or imprisonment.

12. Appointment of Key Managerial Personnel (KMP)

As per the Ordinance, in case of contravention with the provisions of section 203 of the Act with respect to appointment of KMPs, the company shall be liable to an absolute penalty of INR 500,000 and the director and KMP shall be liable to penalty of INR 50,000. Further, the upper limit of penalty in case of a continuing contravention has been introduced through the Ordinance, which is a penalty of INR 1,000 for each day after the first during which such default continues up to a maximum of INR 500,000.

13. Compounding of certain offences

The Ordinance has resulted in enlarging the jurisdiction of Regional Director (RD) by enhancing the pecuniary limits up to which they can compound offences under section 441 of the Act. Pre-Ordinance, where the maximum amount of fine which may be imposed for an offence did not exceed INR 500,000, such offence was compounded by the RD or any officer authorized by the Central Government. Through the Ordinance, where the maximum amount of fine which may be imposed for such offence does not exceed INR 2,500,000, such offence shall be compounded by the RD or any officer authorized by the Central Government

14. Penalty for repeated default

Through the Ordinance, a new section 454A has been inserted to ensure compliance with the provisions of the Act and prescribing stricter penalties in case of repeated defaults. This section provides that where a penalty in relation to a default has been imposed on a person under the provisions of the Act, and the person commits the same default within a period of 3 years from the date of the order imposing such penalty, passed by the adjudicating officer or RD as the case may be, it or he shall be liable for the second and every subsequent default for an amount equal to twice the amount provided for such default under the relevant provision of the Act.

**COMPANIES (AMENDMENT)
ORDINANCE 2018
....CONTINUED**

**2. BAHL PAPER MILLS LTD. &
ORS. V. M/S. MANILA
RESORTS PVT. LTD. & ORS.**

Conclusion

Through the promulgation of this Ordinance, certain powers which were previously conferred on the NCLT have been delegated to the Central Government to reduce the workload of the NCLT, which is also the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016. Furthermore, quantum of penalties under different provisions have been altered and imprisonment under select sections have been removed. Through this Ordinance relief has been granted to corporates and professionals alike by decriminalizing a host of offences. Recategorization of certain 'acts' indictable as compoundable offences to 'acts' carrying civil liabilities through the Ordinance has further endorsed the Indian Government's intent to promote ease of doing business.

National Company Law Tribunal, Delhi (**NCLT**) has held M/s Manila Resorts Pvt. Ltd. (**Respondent Company**) guilty of intentional violation of the NCLT's interim order dated 19 May 2016 for creating a third-party interest in the attached property and issued notices for framing charges against the director of the Respondent Company, vide its order dated 26 October 2018.

Facts

Bahl Paper Mills Ltd. (**Petitioner**) is a 51% shareholder of the Respondent Company. The Petitioner had previously filed an oppression and mismanagement petition under the provisions of sections 297-398 of the Companies Act 1956. The NCLT had passed an interim order in this matter on 19 May 2016 which inter alia mentioned that the Respondent Company had to maintain status quo on its fixed assets. Any transaction with regards to its fixed assets could only be executed with the prior permission of the NCLT. Subsequently, the Respondent Company entered into 12 transactions selling its property. The Respondent Company in its rejoinder denied all the Petitioner's allegations and made the following submissions: (a) That it was engaged in the business of selling of plots under one of its projects; (b) That the assets alienated fall under the definition of 'Goods' as defined under Indian Accounting Standard 18 (Indian AS) and form a part of the stock-in-trade and inventory; and (c) That there can be more than one interpretation of the term "fixed assets" and thereby it should not be considered deliberate violation on the part of the Respondent Company.

NCLT's order

The NCLT denied all the contentions put forth by the Respondent Company. It held that there has been a deliberate violation of the NCLT's order and that the Respondent Company's contention of violation of principles of natural justice cannot be upheld. The NCLT defined 'fixed assets' to be land, property and capital assets. Any transaction with respect to the fixed assets should have been executed only with prior approval of the NCLT. Since the term 'goods' had not been mentioned in the NCLT's order dated 19 May 2016, the Respondent Company's arguments were not considered. Based on the above reasoning the NCLT held the respondent guilty of contempt of court and issued notices for framing of charges against them.

3. COMPANIES (REGISTERED VALUERS AND VALUATION) RULES 2017

The Ministry of Corporate Affairs vide a notification dated 13 November 2018 has amended the Companies (Registered Valuers and Valuation) Rules 2017 (**Rules**). The amendment has come into force from the date of publication in the Official Gazette.

The salient features of the amendment are as follows:

- The amendment has inserted sub rule 3 in rule 1 which specifies that the valuation of any property, stocks, shares, debentures, securities or goodwill or any other assets or net worth of a company or its liabilities under the provision of the Companies Act, 2013 (**the Act**) or these Rules shall only be conducted by abiding these Rules.
- The amendment has omitted the words “and having qualification mentioned at clause (a) or (b)” from rule 4(c) which implies that any member of a professional institute established by an act of Parliament for the purpose of regulation of a profession is now eligible to be registered as a valuer under rule 3 provided that he has at least 3 years’ experience after such membership. Prior to the amendment, however, members had to fulfil the conditions specified under rules 4(a) and 4(b) which specifies the educational qualifications that need to be fulfilled by a valuer.
- The amendment has omitted the words “and he may conduct valuation as per these rules if required under any other law or by any other regulatory authority” from rule 10 which implies that it is now mandatory for a valuer to conduct valuation required under the Act by following these rules. Prior to the amendment the Rules specified that a valuer had the liberty to follow these rules if specified by any other law or regulatory authority.

4. NATIONAL FINANCIAL REPORTING AUTHORITY RULES 2018

The Ministry of Corporate Affairs vide notification dated 13 November 2018 has incorporated the National Financial Reporting Authority Rules, 2018 (**Rules**). The amendment has come into force from the date of publication in the Official Gazette.

The salient features of the Rules are as follows:

- The National Financial Reporting Authority (**Authority**) shall have the power to monitor the following entities: Companies listed on any Indian or foreign stock exchange; unlisted public companies having a paid-up capital of INR 500 crore or more; an annual turnover of INR 1000 crore or more; or having INR 500 crore in outstanding loans, debentures and deposits; insurance companies; banking companies; companies which generate and supply electricity; companies governed under any Special Act; any body corporate incorporated in accordance with Section 1(4)(b), 1(4)(c), 1(4)(d), 1(4)(e) of the Companies Act 2013; any body corporate, person, or company referred to by the Central Government in public interest; and any subsidiary or associate company of any company registered in India, provided that the net worth of such company is 20% or more of the holding company.

**NATIONAL FINANCIAL
REPORTING AUTHORITY
RULES 2018
...CONTINUED**

- Firms, Limited Liability Partnerships, Charitable Trusts, Private Companies will continue to be under the authority of ICAI.
- Every body corporate other than a company, needs to inform the Authority on or before 13 December 2018 about their auditor present on the date of commencement of the Rules and / or if it appoints a new auditor, in the manner as provided in the Form NFRA-1.
- If any company or body corporate governed by the Authority, subsequently does not fall under any of the qualifying categories, it shall continue to be governed by the Authority for a further period of 3 years.
- Every auditor governed by these Rules shall file a return with the Authority on or before 30 April every year.
- To ensure compliance with the recommended accounting standards, the Authority has the power to review the financial statements of any body corporate or company and issue notice to such entity seeking further information or other relevant documents. The Authority needs to publish its findings related to non-compliance by companies on its website.
- Every auditor who has been requested by the Authority to make changes in their audit process shall send a report explaining that the recommendations have been complied with.
- Any suo moto investigation undertaken by the Authority must be supported by reasons recorded in writing. If the investigated body corporate / company is found to have committed a fraud of INR 10,000,000 or more, the Central Government shall be notified by the Authority.
- Once the Authority begins its investigation, no other institute or body can initiate or continue any proceedings against the body corporate / company with respect to a similar matter of misconduct.
- In case of disciplinary proceedings, the Authority shall send a show cause notice to the auditor stating, inter alia, the facts and the supporting evidence; the statutory provisions violated; the proposed directions to be issued if the allegations are proved; the time before which a reply needs to be filed; and the consequences in case of failure to respond to the notice.
- The Authority needs to dispose of the proceeding within 90 days by giving a reasoned order, which shall come into effect not before 30 days have elapsed from the date of issue of the order.
- The auditor needs to deposit the amount of penalty with the Authority within 30 days of the order and in case he wishes to appeal, 10% of the amount needs to be deposited with the Appellate Tribunal.