



DEVELOPMENTS IN CORPORATE LAW

IN OCTOBER

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. UNION OF INDIA, MCA V.
INFRASTRUCTURE LEASING
& FINANCIAL SERVICES LTD
& ORS,
01 OCTOBER 2018**

This newsletter covers developments with respect to corporate laws during the month of October 2018. We have covered case laws with respect to oppression and mismanagement; conversion of a public limited company to a private limited company; and forum for adjudicating disputes regarding allotment of shares. Additionally, we have also covered master directions and guidelines issued by the Reserve Bank of India with respect to Prepaid Payment Instruments and the guidelines for interoperability amongst them. Please see below summaries of the relevant developments.

In the present case, the Government has contended that the management / managerial persons of Infrastructure Leasing & Financial Services Limited (IL&FS) are responsible for negligence and incompetence, that they have projected "rosy financial statements" and that the directors of the holding company have failed to discharge their fiduciary duties. The Ministry of Corporate Affairs (MCA) has further argued before the National Company Law Tribunal (NCLT) that a preliminary ROC enquiry has prima facie concluded that there has been mismanagement and compromise in corporate governance norms & risk management resulting from indiscriminate raising of both, long term / short-term funds from public sector banks / financial institutions. Further, the MCA has alleged that IL&FS has been "camouflaging its financial statements by hiding severe mismatch between its cash flows and payment obligations, total lack of liquidity and adverse financial ratios." A Finance Ministry note dated 30 September 2018 was placed before the NCLT which highlighted the "systemically important nature" of IL&FS and its impact on debt, money and capital markets. This note concludes that there has been an apparent mis-governance / mismanagement, which can be reversed only by management change, and further advises that continuation of the present board is not in public interest due to its adverse impact on financial stability.

NCLT held the following:

- That the IL&FS Board of Directors be superseded, and 6 new directors be appointed. These new directors should be as follows: managing director of Kotak Mahindra Bank, Uday Kotak should serve as chairman of the new IL&FS board; former chairman of the Life Insurance Corporation of India (LIC), Ghyanendra Nath Bajpai; IAS officer Malini Shankar; Tech Mahindra's executive vice-chairman Vineet Nayyar; ICICI Bank's non-executive chairman Girish Chandra Chaturvedi; and former Deputy Comptroller and Auditor General, Shri Nand Kishore.
- That the newly constituted board is to hold a meeting on or before 08 October 2018 and report to the NCLT, a plan of action with respect to the stabilizing the affairs of the company by the next date of hearing, i.e. 30 October 2018.
- That the superseded directors should not represent the company as a director before any authority.
- That IL&FS and its 7 directors are arraigned, including the company's former longest serving whole-time director Mr. Ravi Parthasarathy, current CFO & company secretary as respondents, all of whom are to file their replies to the petition by 15 October 2018.
- In conclusion, the NCLT has taken a 'considered' view that the affairs of the company were being conducted in a manner prejudicial to public interest.

2. IN THE MATTER OF ROCKLAND HOSPITALS LIMITED, 08 OCTOBER 2018

A petition was filed by Rockland Hospitals Ltd. (**Applicant Co.**) under section 14(1) of the Companies Act, 2013 (**the Act**) praying for conversion of its status from a public limited company to a private limited company. The management of the Applicant Co. was of the view that business can be carried out effectively as a private limited entity without impacting the debts, liabilities, obligations and contracts incurred or entered into by or on behalf of the Applicant Co. The decision for conversion was taken by the board to do away with the onerous compliance requirements for public companies.

VPS Healthcare Pvt. Ltd. (**VPS**) being the Holding Co., held 100% of the issued share capital of the Applicant Co. The other 7 shareholders, who were the nominees of VPS, held one share each on behalf of VPS. The board of directors, in a board meeting and shareholders in an Extra Ordinary General Meeting (**EOGM**) approved the resolution for conversion of the Applicant Co. to a private limited company, which was also reflected in the minutes of the respective meetings.

NCLT observed that all necessary compliances were done with respect to the conversion, however, objections were raised with respect to the conversion petition by creditors holding 0.05% of the total debt and 1.39% of contingent debt (i.e., a total of 1.44%), on grounds of a pending dispute regarding the Applicant Co.'s ownership.

The NCLT perused the application; objections filed by the objectors; and replies of the applicant and observed the following shortcomings:

- The application for conversion was filed late (i.e., not within 3 months from passing of special resolution) and without an application for condonation of delay.
- The EOGM was held without giving notice of 21 days under section 101 of the Act.
- No consent was received from VPS with respect to shareholding of nominee shareholders.
- Deloitte Haskins & Sells suspiciously resigned from the post of statutory auditors and Dayanand Yadav & Co. were subsequently appointed on the same day.
- A new director was appointed during the pendency of the said application.
- Two independent directors, Ms. Kalpana Merchant & Mr. A.J. Pai resigned after passing the resolution for conversion.
- Pendency of claims by erstwhile promoters, directors of the Applicant Co. and erstwhile statutory auditor in the arbitral tribunals.

The NCLT thus rejected the conversion petition on the grounds that there are matters involving the Applicant Co. that are sub judice. During the pendency of such, it would not be appropriate to permit conversion of the company from public to private limited. Further, the NCLT was unable to persuade themselves that the proposed conversion of the Applicant Co. from public limited company to private limited company would be in the public interest since it appeared that the Applicant Co. did not come with clean hands before the NCLT and have concealed material particulars such as the balance sheet as on 31 March 2017 was not filed before the NCLT until the same was objected to.

**3. SANGEETA MAHESHWARI
v PREMSAGAR
AGRICULTURAL PRIVATE
LIMITED & ORS.,
10 OCTOBER 2018**

Sangeeta Maheshwari (**the Appellant**) was married to Mr. Kamal Agal (**Respondent No. 2**) and was the owner of 200 shares (**the Shares**) of M/s Premsagar Agricultural Private Limited (**Respondent No. 1**). After disputes arose between the Appellant and Respondent No. 2, they entered into a settlement MOU, which was never acted upon by either party.

In 2013, the Appellant came to know that her shares had been transferred to Mrs. Premlata Agal (**Respondent No. 3**), a relative of Respondent No. 2. Further, the share capital of Respondent No. 1 was increased from INR 1,00,000 (Indian Rupees One Lakh) to INR 10,00,000 (Indian Rupees Ten Lakhs), in a board meeting dated 27 August 2015. Aggrieved by the said transfer, the Appellant filed a company petition before the National Company Law Tribunal, Ahmedabad (**NCLT**). This petition was dismissed on the ground of laches. Aggrieved by the order of the NCLT, the Appellant preferred an appeal before the National Company Law Appellate Tribunal (**NCLAT**).

The Appellant argued that the petition was not vitiated by laches, as she was only made aware of transfer of the Shares as late as 2013. Further, the Appellant was not in receipt of any notice of an AGM / EOGM, which was effected for the purposes of increasing Respondent No. 1's share capital and diluting hers. Respondent No. 2 contended that the MOU entered into between him and the Appellant had effected a transfer of the Shares in his favour. However, the Appellant responded that the said MOU was never presented before a court of law and was not taken into consideration by the court, while decreeing the parties' consent application for divorce. The Appellant also alleged gross mismanagement and siphoning of Respondent No.1's funds.

NCLAT observed the following:

- That the fact the Appellant was the holder of the Shares of Respondent No. 1 has not been disputed. Further, there has been no documentary evidence to suggest a valid transfer of the Shares from the Appellant to any other party. The MOU signed by the Appellant and Respondent No. 2 was labelled "Subject to Verification". Therefore, the court cannot be expected to rely upon the same as effecting a valid transfer. However, even if a valid transfer had taken place, Respondent No.1 was bound to inform the Appellant, who has been reflected as a shareholder in Respondent No. 1's records, that she is no longer the shareholder.
- That Respondent No. 1 was bound to send adequate notices of any AGM / EOGM conducted.
- That the NCLT erred while dismissing the dispute on the ground of laches as the Shares were transferred in 2013. The NCLT ought to have decided upon the petition on merits.

Consequently, the NCLAT set aside the order of the NCLT, while holding that the transfer of the Shares in favour of Respondent No. 3 is illegal. The NCLAT also found the Appellant to be the rightful owner of the Shares and remanded the matter back to the NCLT to adjudicate on other issues. The parties to the dispute have been directed to appear before the NCLT on 01 November 2018.

**4. SAS HOSPITALITY LTD AND
ANR. v SURYA
CONSTRUCTION PVT. LTD. &
ORS.
DELHI HIGH COURT
16 OCTOBER 2018**

SAS Hospitality (**the Plaintiff**), filed a suit, before the Delhi High Court (**the Court**), seeking a declaration to the effect that the allotment of shares by Surya Constructions Pvt. Ltd (**the Company**) in favour of five investors is null and void. The Plaintiff argued that the Company's management surreptitiously allotted the shares by using monies belonging to the Company. As a result of the transaction, the Plaintiff's shareholding from the Company was reduced to 21.44% from 99.96%. The Company along with its managers (**the Defendants**) contended that the Delhi High Court had no jurisdiction over the matter and that the same must be adjudicated before the National Company Law Tribunal, Delhi (**NCLT**).

The Court began by examining the scheme of the Companies Act, 2013 (**the Act**) and the powers it divests to the NCLT. The Court observed that section 430 of the Act ousted the jurisdiction of the civil court. Additionally, the NCLT is vested with broader powers than civil courts with respect to the rectification of register of members, allotment of shares, voting rights thereof and so on. Thus, the Court held that the NCLT would be the appropriate forum for the same, in as much as the NCLT is a specialized tribunal for speedier adjudication of such issues.

The Court also observed that while adjudicating upon the propriety of the forum, the Court was conscious of the difference between the terms "High Court" and "Civil Court". Even the Companies Act, 1956 while providing for reference to the Court, must be understood to mean references to the High Court exercising the functions of a Company Court and not that of a Civil Court. Now with the advent of the NCLT, the Civil Court cannot have jurisdiction.

The Court considered the test laid down in the case of *Daulabhai v State of Madhya Pradesh*, upheld in *Jai Kuma Arya v Chhaya Devi*, which was determinative of whether the jurisdiction of the civil court was ousted by enactment of a separate tribunal to try specialized cases. The test laid down is two-fold:

- a. whether the decision of the tribunal, on which jurisdiction is conferred, is attributed finality by the statute
- b. whether such tribunal can do what the civil court would be able to do and is, therefore, an efficacious alternative to the civil court

The court observed that the NCLT's decisions under section 59 of the Act has specific consequences for non-compliance. The order is appealable to the National Company Law Appellate Tribunal. The NCLT also has all the powers of a civil court, with respect to the matters within its jurisdiction. Additionally, the matter was sub-judice before the Company Law Board and has now been transferred to the NCLT. Thus, the Court observed that it does not have any jurisdiction to adjudicate upon the dispute.

5. PREPAID PAYMENT INSTRUMENTS – GUIDELINES FOR INTEROPERABILITY

Background

On 11 October 2017, the Reserve Bank of India (RBI) issued master directions on Issuance and Operation of Prepaid Payment Instruments (**Master Directions**). These Master Directions resulted in mandating the first phase for all Know Your Customer (**KYC**) compliant Prepaid Payment Instruments (**PPIs**) (bank and non-bank) issued in the form of wallets to have interoperability amongst themselves through Unified Payment Interface (**UPI**) within 6 months from the issue of the Master Directions. The RBI subsequently issued Guidelines for Interoperability dated 16 October 2018 (**Guidelines**), providing direction for the second and third phase of interoperability, i.e., between wallets and banks through UPI and PPIs issued in the form of cards through card networks, respectively. PPIs who choose to adopt interoperability must comply with the Master Directions and the Guidelines.

Requirements to Achieve Interoperability

1. Interoperability common to cards and wallets

Where PPIs are issued in the form of wallets, interoperability will be achieved through UPI and where PPIs have been issued in the form of cards, the cards shall be affiliated with the authorized card network. PPI issuers must adhere to all the requirements of card networks / UPI such as membership type, criteria, merchant on-boarding, etc. PPI issuers must also adhere to all dispute resolution and customer grievance redressal mechanisms as prescribed by the card networks / UPI.

2. Achieving Interoperability through UPI

All PPIs issued in the form of wallets can be made interoperable through UPI. Such PPIs must be KYC compliant. The PPI issuers shall act as Payment System Providers (**PSPs**) in the UPI. The National Payment Corporation of India (**NPCI**) taking into consideration the risk management aspects, will issue handle to the PPI users as per its policy. The PPI users shall link their customer wallets to the handle issued to them. For the purposes of settlement, a non-bank PPI issuer shall participate through a sponsor bank and it shall adhere to the requirements of the sponsor bank's arrangement in UPI. It shall also meet all requirements of NPCI in this regard.

3. Requirements for achieving interoperability through card networks

Card networks can have PPI issuers join their network. Non-Bank PPIs on the other hand can issue cards in compliance with requirements of the card networks and their settlement systems. The cards issued by non-bank PPIs and PPIs operating exclusively in the meal segment must be Europay Mastercard Visa (**EMV**) chip and PIN compliant. However, gift cards and card for mass transit system may be issued with or without EMV Chip and PIN enablement.

Conclusion

Considering the exponential growth of the payment sector over the last few years the said Guidelines and Master Directions are a welcome move by the RBI. Users will now be able to transfer money more freely between different wallets and an increase in market players shall ensure depth in the sector. It will be interesting to see how PSPs manage KYC for its customers as interoperability between market players increases.