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ANALYSIS OF KEY CHANGES UNDER COMPANIES (AMENDMENT) ACT, 2017

The Companies (Amendment) Act, 2017 ("**Act, 2017**") has seen the light of the day with the receipt of President's assent on January 03, 2018. The Companies (Amendment) Bill, 2017 ("**Bill, 2017**") was duly passed in both the Houses of the Parliament on July 27, 2017 and December 19, 2017. The Bill, 2017 as approved by Lok Sabha was mutatis mutandis adopted by Rajya Sabha. The Act, 2017 addresses the difficulties in implementation, facilitates the ease of doing business, helps achieving better harmonisation with other statutes and rectifies inconsistencies in the Companies Act, 2013. An overview of the key changes brought about by the Amendment Act is as under.

Incorporation of company and matters incidental thereto

- The period for reservation of name is substituted from 'sixty days from the date of the application' to 'twenty days from the date of approval or such other period as may be prescribed'. However, in case of change of company by an existing company, there is no impact as the timelines are same.
- At the time of incorporation of the company, declaration by each subscriber will be required to be attached instead of an affidavit.
- The timeline for having a registered office by a new company and reporting of shifting of registered office to the Registrar has been increased from fifteen days to thirty days.

Private Placement

The provisions related to the private placement have been completely revamped. Section 42 now contains an express provision that companies cannot use funds till return of allotment has been filed with RoC within 15 (Fifteen) days from the date of allotment. There is no requirement to file Form GNL-2.

Clarification has been given to the effect that the private placement offer and application shall not carry a right of renunciation. The Companies are also allowed to make offer of multiple security instruments simultaneously.

Issue of shares at discount

Companies may now issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949. This provision has been inserted to facilitate restructuring of a distressed company, when the debt of such a company is converted into shares in accordance with any specified regulations or guidelines.

Significant beneficial ownership

The whole of Section 90 has been revamped and the new concept of 'significant beneficial owner' and related reporting requirements (by companies and shareholders) has been introduced.

Holders of beneficial interest of not less than 25% of the shares, or the right to exercise, or the actual exercise of significant influence or control are now classified as 'significant beneficial owners'. Companies are required to maintain a register of members with significant beneficial interest which shall be open to inspection by members. The requirement of maintenance of a register of significant beneficial ownership will certainly bring about complete transparency about holdings of shareholders including individuals, trusts and persons not resident in India, who may have significant influence or control.

Loans and Investments

- Loans to Directors – Companies are now permitted to give loans to entities in which directors are interested, after passing special resolution at a general meeting, adhering to disclosure requirements, and the borrowing

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company can utilise the loan for its principal business activities.

- Loans/security/guarantee provided to WOS or JV Company, or acquisition of securities of WOS exceeding the prescribed limits (60% of paid up share capital, free reserves and securities premium or 100% of free reserves and securities premium) does not require special resolution but will have to be disclosed in the financial statements.

Related Party Transactions (RPTs)

Section 188 of the Companies Act, 2013 requires RPTs to be approved by disinterested shareholders in case the exemption criteria are not met, thereby restricting the related party from voting. Compliance with this requirement will be challenging for companies that are closely held having 2-3 shareholders, since all shareholders will be related parties. To address this issue, a provision clarifying the same has been introduced to exempt the restriction of abstaining the related party to vote on related party transactions, if 90% or more members (in number) are relatives of promoters or are themselves related parties.

Director or officer of the Company may enter into a RPT not exceeding Rs. 1,00,00,000/- (Rupees One Crore only) without the approval of the Audit Committee. However the same is to be ratified by the Audit Committee within 3 (Three) months. If the same is not ratified, RPT shall be voidable at the option of the Audit Committee and the director concerned shall be required to indemnify company against any loss incurred by it.

Deposits

A Company accepting deposit will be required to deposit and keep in a scheduled bank an amount which is not less than 20% of the amount of deposits maturing during the current financial year. There is no need to deposit any amount in a scheduled bank in respect of deposits maturing in the next financial year. The amount should be deposited in a scheduled bank on or before the 30th day of April each year.

The requirement to have deposit insurance is omitted considering the fact that none of the insurance companies are offering insurance products for covering company deposit default risks.

Audit and Auditors

The requirement relating to ratification of auditors by the members of the Company at every AGM has been removed by the Act, 2017. It also clarifies that any person who provides directly or indirectly any service referred under Section 144 of the Companies Act, 2013 to the Company, its holding company or to its subsidiary, is ineligible to be appointed as an auditor of the Company.

The Act, 2017 clarifies on the powers and duties of the auditor to have a right to access the records of all its associates in addition to the subsidiaries for the purpose of consolidation of its financial statements and the auditor would also report on the internal financial control with regard to the financial statements.

Corporate Social Responsibility

A new proviso has been inserted after section 135(1), where a company that is not otherwise required to appoint an independent director under Section 149(4), can constitute a CSR committee with two or more non independent directors.

For the purpose of determining the applicability and constitution of CSR Committee net worth, turnover or net profit of immediately preceding financial year shall be considered.

Filing Fees

The Companies Amendment Act, 2017 has increased the fee in delay in filling forms, returns, documents, information under section 92 (Annual Return), and section 137 (Financial Statements). The additional fees will not be less than hundred rupees per day. Delayed filing fees will vary depending on the number of defaults and nature of form to be filed.

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Appointment and Remuneration of Managerial Personnel

The change provides that the company may appoint or continue the appointment of a person as a managing director, whole time director or manager who has attained the age of seventy years in case no special resolution has been passed, but an ordinary resolution has been passed and the Central Government is satisfied on an application that such appointment is beneficial to the company.

The change also replaces the approval of the Central Government for managerial remuneration above the prescribed thresholds with approval by the shareholders in a general meeting by way of a special resolution.

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CRYPTOCURRENCY – LEGAL TENDER OF DOWNFALL OF GLOBAL CURRENCY MARKETS

The methods of payment today are not what we knew a decade ago. Leave alone the barter system that the man from back then used to pay for goods to today's age of unimaginable technology where money is carried on a portable mobile device to make payment through infra-red scanners, the way we see and understand currency has evolved to extents we cannot fathom.

One such growing field of currency is that of crypto-currency, or to put it in layman terms, the generic term we use for one kind of crypto-currency that is dominating the world today is Bitcoin.

What are Crypto-Currencies?

Crypto-currency is nothing but a form of digital currency (such as Paytm Cash or Airtel Money) which is developed based on block chain technology, through a process called electronic mining and encrypted through cryptography for safety of transactions that take place with crypto-currencies.

There are dedicated exchanges through which a person can place an order for a crypto currency (e.g. Litecoin, Bitcoin, Ethereum, Ripple etc. being just a few of the many types currently available in the digital marketplace) by paying regular money, be it Dollars or Euros, and keep the same is a specific wallet by which such person can make payments for commodities/products/vendors who accept crypto-currency as a medium of exchange and payment.

Digital Marvel or Downfall?

In the recent past, the idea of the use of crypto-currency and their future led to a speculation that it could be the future of payments which led to the price of an average, recognized type, being the Bitcoin's price to rise from a mere $0.39 (US Dollars point thirty nine) in the year 2009 when it was first coded to hitting an enormous peak of $ 17, 549 (US Dollars Seventeen Thousand Five Hundred and Forty Nine) in December, 2017, almost reaching $21,000 (US Dollars Twenty One Thousand) at one point in early 2018. Such uncertainty coupled with factors such as lack of safety for digital information due the very recent ransom-ware attacks that demanded payments through crypto-currencies and not being governed/recognized by a central regulatory authority which has developed an apprehension amongst the general populous, causing the massive fluctuations in its price leading to enormous losses to people who have heavily invested in it.

Digital safety, being one of the primary factors, has been the pivotal reason for many financial institutions and governments across the world to not recognize crypto-currency as a valid legal tender.

Crypto-Currency in India:

The Government of India, in its union budget which was announced in February 2018, provided a rather categorical finality with respect to the legality of crypto-currencies and their utility in India stating that

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crypto-currencies are the source of a number of illegitimate and untraceable payments for activities that do not work in the nation's interest and same shall not be legal tender for any transaction across the country.

However, the Government has not discredited the use of block-chain technology. The Ministry of Finance has proposed the use of block-chain technology for the development and maintenance of a chain of records and ledgers for transactions without the need of intermediaries, in order to further develop the Digital India initiative in India and promote the use of online payment applications such as Bharat Interface for Money (BHIM).

Conclusion:

Regulation and safety of online transactions are a few common reasons cited for the non-acceptance of crypto-currency as being the future of payments. Addressing such factors as well as creating an awareness among the technologically challenged to understand the basic fundamentals of crypto-currency could lead to crypto-currencies becoming a major linchpin in the international monetary economy and could revolutionize how we see and understand money!

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MACQUARIE BANK LIMITED V. *SHILPI TECHNOLOGIES LIMITED:* SOLVING TWO AMBIGUITIES IN ONE SHOT

A year has passed since the effectuation of the Insolvency and Bankruptcy Code, 2016 ("**Code**"). As with a legislation as powerful, influential and complicated as this, the Code is still evolving with changes, doubts and subsequent clarity pouring in every other day. One such clarification was provided by the Supreme Court ("**SC**"), in *Macquarie Bank Limited* v. *Shilpi Cable Technologies Ltd*[1], where it established two much disputed procedural aspects of the Code.

The pre-cursor to the appeal: The NCLT and NCLAT had both quashed Macquarie's application under Section 9 of the Code filing for initiation of insolvency proceedings against Shilpi, as the later hadn't honoured two invoices raised by the former, to the tune of US$ 6,321,337.11/- (US Dollars Six Million Three Hundred and Twenty One Thousand Three Hundred and Thirty Seven point Eleven only).The grounds of dismissal of the application was (1) the non-compliance of Section 9(3)(c) of the Code, absence of certificate from a financial institution; and (2) the demand notice was issued by an advocate, instead of an employee or person who is holding a position in relation to the operational creditor in accordance with Section 8 of the Code.

Held: The SC rejected both these interpretations and held that (1) a certificate from a financial institution is not mandatorily required and (2) a demand notice can be issued by an advocate of the operational creditor and need not necessarily be an 'insider' or employer of the operational creditor. The reasoning of the court as it provided with these much sought out clarifications are summarised below.

Section 9 (3) (c) – Certificate from a financial institution

While the NCLT and NCLAT had held that the certificate from financial institutional was a mandatory requisite for admission of application under Section 9, the SC held that it is a procedural provision which is directory in nature.

[1] Civil Appeal No. 15135 of 2017

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While holding the same, it set out the distinction between Section 9 (1) of the Code, which lays down the conditions precedents for triggering application of the Code with respect to an operational debt which was mandatory in nature; Section 9 (2) as a matter of fact whereby either the corporate debtor has raised a dispute or not, while the language of Section 9 (3) itself denotes that it is confirmatory and thus only a piece of evidence, as important an evidence it may be and not a mandate under the Code.

Further, the court also brought out the anomaly that would arise if the section was to be interpreted as a mandatory one. Section 3 (14) of the Code defines financial institutions which is currently a very limited list of scheduled banks, financial institutions defined under Reserve Bank of India Act, 1934 or public financial institutions defined under the Companies Act, 2013 thus eliminating among other types of financial institutions, importantly foreign financial institution or unscheduled bank with which an operational creditor might maintain an account with. While the Code does provide for recognition of other institutions as a financial institution, the court refused to accept the argument that an operational creditor can approach the central government for recognising their respective foreign bank as a financial institution. Thus arises the issue that if a person otherwise qualified to be an operational debtor should he be disallowed from filing an application under Section 9 merely because his bank doesn't qualify as 'financial institution' and he is thus unable to comply with the mandate of Section 9 (3)(c). The court further went on to observe that it would be violation of Article 14 of the constitution to make a distinction between an operational creditor who has a resident bank account and an operation creditor who maintains a foreign bank account. Thus, it was held that a provision impossible of compliance cannot be put as a mandatory requirement to the processing of an application under Section 9 of the Code.

Section 8 - Issue of Demand Notice by Advocates

The second issue in the matter, as to who is entitled to issue a demand notice on behalf of the operational creditor has been practically much debated issue with, since the NCLT's judgment on the matter. The argument of the respondents on the matter was that other earlier legislations governing insolvency, such as the Companies Act 1956 and Recovery of Debts due to Bank and Financial Institutions Act, 1993 contain express provisions enabling a lawyer to do things on behalf of a party unlike the Code. Since it is not expressly allowed, it was deemed to be taken as prohibited.

However, the SC held that The Advocates Act, 1961 has to be read harmoniously with the Code. Section 30 of the Advocates Act, provides advocates with the right to practise. The court cited the case of *Harish Uppal (Ex-Capt.)* v. *Union of India*[2] while elaborating on the right to practise and held that this includes preparatory steps like filing applications before tribunals. It held that the non-obstante clause of the Code will not override the Advocates Act as there is no inconsistency between the two.

Further, it also pointed out that the language of Section 8 which denotes 'authorized to act' and 'position in relation to the operational creditor' which expressions, refers both to an authorized agent or a lawyer acting on behalf of his client.

Conclusion: The two purposive interpretations provided by the SC comes as a huge respite for any creditor as it not only eases the process for filing for insolvency but also denotes the pro-ease of convenience and liberal approach taken by the SC in implementing the Code and is a step forward for the Code which was introduced with the view to simplifying the insolvency process.

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[2] (2003) 2 SCC 45

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SEBI introduces Online Registration Mechanism and Filing Mechanism

In order to ease the process of application for recognition/renewal, reporting and other filings, SEBI has introduced a digital platform for online filings for Stock Exchanges and Depositories. Hereupon stock exchanges and depositories can complete their registration, renewal process and regulatory filings on the platform.

SEBI eases access norms for investment by Foreign Portfolio Investors

In order to open the Indian capital market to clients of foreign banks, SEBI has now introduced a series of relaxations on the various compliance requirements that were mandated earlier. Few of the major changes, are that there has been relaxation of due diligence requirements, and waiving of the requirement of prior approval for change in custodian. Further, banks are now allowed to invest on behalf of their clients.

RBI introduces Ombudsman Scheme

The RBI has introduced Ombudsman Scheme for NBFCs registered with RBI. The Scheme will provide a cost-free and expeditious complaint redressal mechanism relating to deficiency in the services by NBFCs covered under the Scheme and will function at four metro centres viz. Chennai, Kolkata, Mumbai and New Delhi and will handle complaints of customers in the respective zones.

Cabinet approves Insolvency Bankruptcy Code (Amendment) Bill, 2017

The bill replaces the Insolvency Bankruptcy Code (Amendment) Ordinance, 2017 which has brought in a few changes including insertion of Section 29A whereby several persons including wilful defaulters were prohibited from submitting a insolvency resolution plan.

SEBI notifies role of the Independent Oversight Committee for Product Design

Earlier, in 2015 SEBI had mandated all national commodity derivatives exchanges to constitute an oversight committee for product design. SEBI has now come out with clarifications on the committee's role which includes overseeing introduction of new products and contracts and SEBI inspection in any product related matters

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