An Article of India Companies Act 2013 Issues and Challenges

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Abstract

The 2013 Act introduces significant changes in the provisions related to governance, e-management, compliance and enforcement, disclosure norms, auditors and mergers and acquisitions. Also, new concepts such as one-person company, small companies, dormant company, class action suits, registered values and corporate social responsibility have been included

The changes in the 2013 Act have far-reaching implications that are set to significantly change the manner in which corporate operate in India. In this publication, we have encapsulated the major changes as compared to the 1956 Act and the potential implications of these changes. We have also included, where relevant, the provisions of the draft rules, which have been issued by the Ministry of Corporate Affairs (MCA) till date for public comments. Such inclusions have been highlighted with an apteryx at the end of the sentence. However, please note that these are only draft rules and will undergo changes before being notified.

Keyword: Introduction, definitions and concepts, Management and administration, corporate social responsibility, other notifications

Big Steps Ahead, But with Challenges

The Act brings more transparency in – among other areas - auditing procedures. For example, the law contains significant changes in relation to the appointment of auditors. It stipulates that audit firms must be rotated after two terms of five consecutive years, while individual auditors can serve up to only one five-year-term. A cooling-off period of five years applies in both cases. There are also better checks and balances on management. For instance, every public-listed company must have at least one-third of its total number of directors as ‘independent directors’. Furthermore, the new legislation provides for the streamlining of reporting requirements. For example, the act requires companies to have a uniform financial year that ends on 31 March. Companies with subsidiaries or joint ventures also need to consolidate their finances, and the law better defines the required content of the director’s report, which will be more comprehensive. ‘Financial statements’ is now a concept that is more clearly defined, and there are restrictions on multi-layered investments into subsidiaries – the new law provides for a limit of two layers.

Secretarial Audit - Scope under the New Companies Act

The ‘audit’ may mean the examination of books of accounts of an entity. When we talk about the ‘Secretarial Audit’, it may mean the examination relating to the compliance of the various laws applicable to a Company.

Enforcement Agencies

The Act empowers existing enforcement agencies and provides for the establishment of new ones. These are crucial measures, as the lack of enforcement agencies, and the limited powers of existing ones, have often meant that hugely publicized arrests have often fizzled out into decade-long litigation that rarely leads to conviction. The new legislation empowers the Serious Fraud Investigation Office (SFIO) as the sole authority to investigate corporate crimes; mandates the establishment of the National Financial Reporting Authority (NFRA) to set and supervise auditing and accounting standards; and gives the National Company Law Tribunal (NCLT) power to approve certain corporate developments such as mergers and the winding up of companies, while all corporate cases currently dealt with by district and high courts will be transferred to this new body.

However, these mandated changes are yet to happen: the SFIO still carries out its investigations under the old law, and rules for the establishment of the NFRA and NCLT are yet to be framed.

If India's poor history of legislative implementation is any guide, there are likely to be delays, and possibly glitches, to the process. The creation of the NFRA, for example, is already facing strong opposition from the Institute of Chartered Accountants of India (ICAI), which claims that the new body would "duplicate" its efforts and "undermine the authority of the institute". Furthermore, better enforcement capacity will also hinge on broader reform of India's notoriously overburdened judicial system, reform which currently does not appear to be on the horizon.

With the introduction of the Secretarial Audit in the Companies Act 2013 and making it mandatory for all the listed companies and for a certain class of public companies, is a welcome step towards the way of Corporate Governance. Secretarial Audit is the examination and verification of the compliance status of the various laws applicable to the company, however it should not merely be treated as the Compliance Audit, rather it should be an audit of the examination and verification of the ethical standards, observance of the transparency and disclosure, observance of integrity and honesty of the key managerial persons, efforts for environmental protection for sustainable growth and Corporate Social Reasonability for the benefit of the society at large. This paper is an attempt to review our professional duties just not limited to the adherence of laws but also to observer the ethical standards too.

India's Companies Acts in Shorts

History of a Body Corporate

- Indian Company Law is conceived and developed in UK. Cherished child of English parents born and brought up England.
- The earliest glimpse of a body corporate is found in England During 11th to 13th Centuries, were called the Merchant Guilds, Obtained Charter from the King or Queen to establish a body corporate- Purpose was to secure monopoly in a particular trade.-Two Types of Guilds Prevalent- Commends& Societies
- Incorporation of East India Company in 1600-

- The characteristics of modern day body corporate a Governor and several Committee members equivalent of present day directors.
- The Successors were to be elected annually in the General Courts.
- Trading companies like Peninsular & Oriental Steam Navigation Company (in 1840) that still operates in England
- Non- trading concerns incorporated by a Charter and that still are operative include BBC, public schools, colleges and Universities and some learned professional bodies like:
  - The Institute of Chartered Accountant in England & Wales,
  - The Chartered Institute of Secretaries and Administrators,
  - The Chartered Institute of Management Accountants.
  - The Chartered Association of Certified Accountants.
  - Evolution of Company
- Joint Stock Companies Act, 1844 of UK (Joint Stock Companies Act, 1850 in India)
- Limited Liability Act, 1855 of UK (Joint Stock Companies Act, 1857 in India)
- Companies Act, 1862 of UK (Companies Act, 1866 In India)
- Companies Act, 1908 of UK (Indian Companies Act, 1913)
- Companies Act, 1948 of UK (Companies Act, 1956 of India)
- Companies Act, 2006 of UK having 46 chapters,

1300 sections and 16 schedules (Companies Act,
2013 of India having 29 chapters, 470 sections, and only 7 schedules)

Need for Change

- Corporate Governance has received focused attention in the recent year's world over and many countries have reformed their company laws to keep pace with the Changed world.
- As a part of reform process, government of India has initiated number of legislative reforms and radical changes in the area of corporate laws and governance (2000, 2002, 2006 and 2013).
- In the light of Satyam fiasco, many new and unheard concepts have been introduced in the New Company Law.

- Manifold Increase in No of Companies1956 - 30,000 approx. 2009 (31.12.09)--8,21,212 (now 13.3 Lakh)

Journey to a New Company Law

- Companies Act 1956 was amended 25 times:

The first attempt in the direction of company

Law reforms in India were initiated in 1993 when Bill consisted of 637 clauses and 13 Schedules.

However, the Bill did not see the light of the day, as both the Houses of Parliament could not pass it.

- The Bill 1997 consisted of 458 clauses and 3 schedules was introduced in the Rajya Sabha. The purpose of this Bill was to have massive overhaul of the Company Law by reducing the size of the Act by 200 clauses. But even this Bill met with the similar fate due to frequent changes in the Government set-up.
- A serious effort was made in the years 1999, 2000, 2002, 2006 when certain reforms were introduced by amending the law.
- Enactment of Companies Act 2013, bids goodbye to 57 year old Companies Act, 1956.
- Bill 2008Introduced in Lok Sabha on Oct.23,2008
- Lapsed due to dissolution of Parliament Bill 2009
- 2008 bill modified and re-introduced in 2009 on Aug.03,2009
- Standing Report 2010Standing Committee Repot tabled in Lok Sabha on August 31, 2010
- Bill 2011Introduced in Lok Sabha on December 14, 2011
- Bill 2012 Passed by LokSabha on December 18, 2012 and by the Rajya Sabha on Aug 8, 2013Co Act 2013 Passed by Lok Sabha on December 18, 2012 and by the Rajya Sabha on Aug 8, 2013

A Comparison Companies Act, 1956Companies Act, 2013

Particulars	Company Act 1956	Company Act 2013
Sections	658	470

Parts/Chapters	13 Parts	29Chapters
Schedules	15	7

Highlights of Companies Act 2013Structure of the Act, 2013

 Chapters: 29

 Sections: 470

 Schedules: 7

1. Schedule I- Formats of MOA - (Table A to E) and Formats of AOA (Table F to J).
2. Schedule II- To compute depreciation.
3. Schedule III- General Instructions for preparation of B/S and P&L A/c.
4. Schedule IV- Code for Independent Directors
5. Schedule V- Apt and Remuneration of MD/WTD
6. Schedule VI- Infrastructure Projects and Facilities
7. Schedule VII- CSR Activities10

Themes Detailed Coverage

- Philosophy,
- Thrust and Principles
- Subordinate Legislation,
- Self-Regulation,
- Time Bound Delivery,
- deleting the Redundant provisions,
- adopting best global practices
- Novelties OPC,
- Small Company,
- Dormant Company,
- Registered Valier's,
- Layers of Companies,
- E-Governance,

- Key Managerial Personnel (KMP),
- Corporate Social Responsibility (CSR) and Corporate Governance
- Incorporation Memorandum, Articles, Entrenchment, Alterations of M&A, Registered Office,
- Certification by Professionals
- Regulatory Jurisdiction Responsibilities of MCA and
- SEBI, Rules, Regulations
- Fund Raising Public Offer, Private Placement, Deposits, Charges, Dividend
- Management and administration
- General Meetings, Voting, E-voting, Resolutions
- Disclosures and Transparency
- Annual Return, Board's Report, Report on AGM,
- Promoter Holding Accounts and Audit NFRA,
- Rotation of Auditors, Reopening of Accounts, Voluntary Revision of Financial Statements,
- Internal Audit Corporate Governance Accountability,
- Board Composition, Meetings, Committees, Independent
- Directors, Gender Diversity, Vigil Mechanism, Remuneration, CSR, Functions and Responsibilities of Company Secretary,
- Secretarial Audit, Secretarial Standards
- Enforcement Actions Inspection, Inquiry, Investigation, SFIO, Fraud, Mediation & Conciliation
- Compromise, Amalgamation and Arrangements
- Single forum for approval of mergers and acquisitions,simple and shorter merger
- Process for two Small Companies or Holding- Subsidiary Companies.
- Investor Protection IEsPF, Class Action, Exit opportunity, E-Voting, Disgorgement, Deposits,
- Fair valuation by registered values, Oppression and mismanagement
- Winding up Voluntary, By Tribunal, Liquidators, Unregistered Companies, Summary
- Procedure for Liquidation

- Enforcement Actions II Penalties, Special Courts, Adjudication, NCLT, NCLAT, Supreme Court, Compounding

New Chapters

Ch 17-Registered Valier's
Ch 23-Government companies
Ch 25-Companies to furnish information or statistics
Ch 26-Nidhis
Ch 27-NCLT & Appellate Tribunal
Ch 28-Special Courts

More Compact, Better Defined and Organized

The new Companies Act, 2013 was signed into law in August 2013. The 2013 act replaces legislation dating back to 1956, and shifts the focus away from the excessive government control that defined the business environment before market liberalization towards greater self-governance. We attach considerable importance to the passing of the law, particularly as other legislation targeting bribery remains stalled in parliament. If fully implemented, we hold that the law should facilitate more transparent and efficient corporate behavior, which would strengthen investor confidence.

33 New Definitions (95 Definition in all)

- New One Person Company (OPC)
- Key Managerial Personnel (KMP)
- Associate Company Chief Executive Officer (CEO)
- Small Company Chief Financial Officer (CFO)
- Employee Stock Option (ESOP)
- Indian Depository Receipt

- Promoter
- Global Depository Receipt
- Fraud Related Party
- Accounting Standards Turnover
- Auditing Standards Control
- Financial Statement Deposit
- Independent Director
- Voting Right
- Interested Director CSR

CSR Rules

The act also defines norms for mandatory corporate philanthropy. This is an entirely new provision that makes 2% CSR spend - on clearly defined categories of CSR activities - mandatory for companies with a net worth of more than a turnover of The rules for this provision were notified on 27 February, and will come into effect on 1 April.

Conclusions

Thus, the Secretarial Audit should not be treated merely as the Compliance Audit, rather it is an audit of the examination and verification of the ethical standards, observance of the transparency and disclosure, observance of integrity and honesty of the key managerial persons, efforts for environmental protection for sustainable growth and corporate social responsibility (CSR) for the benefit of the society at large.

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