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Newsletter

RRG & ASSOCIATES
LAW OFFICES

COMPANIES ACT, 2013

COMPANIES (AMENDMENT) ACT, 2019

The Companies (Amendment) Act, 2019 (the Act) was notified on July 31, 2019 and (barring few provisions) deemed to have come into force on the 2nd day of November, 2018. It has brought about 16 corporate offences under the ambit of civil liability, including failure to file annual returns and financial statements within a specified time frame, and issuance of shares at a discount. These offences, which earlier attracted criminal proceedings against the offender, are now liable for a penalty.

Key Notes:

- Issuance of dematerialized shares
- Re-categorization of certain Offences
- Corporate Social Responsibility (CSR)
- Debarring auditors
- Commencement of business
- Registration of charges
- Change in approving authority
- Bar on holding office
- Beneficial ownership
- Compounding of offences

COMPANIES (AMENDMENT) ACT, 2019

- **Issuance of dematerialized shares (Section 29):** Under the Act, certain classes of public companies are required to issue shares in dematerialized form only. The Act states that this may be prescribed for other classes of unlisted companies as well.
- **Re-categorization of certain Offences:** The Companies Act, 2013 contains 81 compoundable offences punishable with fine or imprisonment, or both. These offences are triable by courts. The Act re-categorizes 16 of these offences as civil defaults, where adjudicating officers (appointed by the central government) may now levy penalties instead. These offences include: (i) issuance of shares at a discount, and (ii) failure to file annual return. Further, the Act amends the penalties for some other offences.

- **Corporate Social Responsibility (Section 135):** Under the Act, if companies which have to provide for CSR, do not fully spend the funds, they must disclose the reasons for non-spending in their annual report. Under the Act, any unspent annual CSR funds must be transferred to one of the funds under Schedule 7 of the Act (e.g., PM Relief Fund) within six months of the financial year. However, if the CSR funds are committed to certain ongoing projects, then the unspent funds will have to be transferred to an Unspent CSR Account within 30 days of the end of the financial year, and spent within three years. Any funds remaining unspent after three years will have to be transferred to one of the funds under Schedule VII of the Act. Any violation may attract a fine between Rs 50,000 and Rs 25,00,000 and every defaulting officer may be punished with imprisonment of up to three years or fine between Rs 50,000 and Rs 25,00,000, or both.

  This is however, yet to be notified.

- **Debarring auditors for proven misconduct (Section 132):** Under the Act, the National Financial Reporting Authority debars a member or firm from practicing as a Chartered Accountant for a period between six months to a maximum of ten years, for proven misconduct. The Act amends the punishment to provide for debarment from appointment as an auditor or internal auditor of a company, or performing a company's valuation, for the abovementioned period.
- **Commencement of business (Section 10A):** The Act states that a company may not commence business, unless it (i) files a declaration within 180 days of incorporation, confirming that every subscriber to the Memorandum of the company has paid for the shares agreed to be taken by him, and (ii) files a verification of its registered address with the ROC within 30 days of incorporation. If it fails to comply with these provisions and is found not to be carrying out business, its name of the company may be removed from the Register of Companies.
- **Registration of charges (Section 77):** The Act requires companies to register charges (e.g., mortgages) on their property within 30 days of creation of charge, extendable upto 300 days with the permission of the ROC. Further, in case of charges created on or after the commencement of the Amendment, the RoC may, on an application by the company, allow registration of such charges to be made within 60 days of its creation, which may further be extended to another 60 days on payment of ad valorem fees.
- **Change in approving authority:** Under the Act, change in period of financial year for a company associated with a foreign company, has to be approved by the National Company Law Tribunal. Similarly, any alteration in the incorporation document of a public company which has the effect of converting it to a private company, has to be approved by the Tribunal. Under the Act, these powers have been transferred to Central Government.
- **Compounding of offences (Section 454):** Under the Act, a regional director can compound (settle) offences with a penalty of up to twenty five lakh rupees.
- **Bar on holding office**: Under the Act, the central government or certain shareholders can apply to the NCLT for relief against mismanagement of the affairs of the company. The Act states that in such a complaint,

the government may also make a case against an officer of the company on the ground that he is not fit to hold office in the company, for reasons such as fraud or negligence. If the NCLT passes an order against the officer, he will not be eligible to hold office in any company for five years. This provision of the Act is yet to be notified.

- **Beneficial ownership (Section 90):** If a person holds beneficial interest of at least 25% shares in a company or exercises significant influence or control over the company, he is required to make a declaration of his interest. The Act requires every company to take steps to identify an individual who is a significant beneficial owner and require their compliance under the Act. The Companies (Significant Beneficial Owners) Amendment Rules, 2019 are yet to be notified.

INSOLVENCY & BANKRUPTCY

Amendment to IBBI (Insolvency Professionals) Regulations

IBBI amended the IBBI (Insolvency Professionals) Regulations, 2016 on 23rd July 2019 to provide for the following:

(a) An Insolvency Professional (IP) shall not accept or undertake any assignment as an interim resolution professional, resolution professional, liquidator, bankruptcy trustee, authorized representative or any other role under the Code unless he holds an 'Authorization for Assignment' (AFA) issued by his Insolvency Professional Agency. This would be effective starting from 1st January 2020.

(b) An IP shall not engage in any employment when he holds an AFA or when he is undertaking an assignment. This would enable an individual to seek registration as an IP even when he is in employment. He must, however, discontinue employment when he wishes to have an AFA. He may surrender AFA when he wishes to take up employment. This is effective starting from 23rd July 2019.

(c) Where an IP has conducted a CIRP, he and his relatives shall not accept any employment, other than an employment secured through open competitive recruitment, with, or render professional services, other than services under the Code to a creditor having more than ten percent voting power, the successful resolution applicant, the Corporate Debtor or any of their related parties, until a period of one year has elapsed from the date of his cessation from such process. This is effective starting from 23rd July 2019.

(d) An IP shall not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment. This is effective starting from 23rd July 2019.

Amendment to IBBI (Liquidation Process) Regulations

IBBI amended the IBBI (Liquidation Process) Regulations, 2019 and brought them into effect on 25th July 2019. The salient amendments are:

(a) The amendments specify the process for

(i) Sale of Corporate Debtor as going concern, and

(ii) Sale of business of Corporate Debtor as going concern under liquidation. Where a Corporate Debtor is sold as a going concern, the liquidation process shall be closed without its dissolution.

(b) The amendments require completion of liquidation process within one year of its commencement, notwithstanding pendency of applications for avoidance transactions. These provide a model timeline for each task in the liquidation process.

(c) The amendments require the Financial Creditors, who are financial institutions, to contribute towards the liquidation cost, where the Corporate Debtor does not have adequate liquid resources to complete liquidation, in proportion to the financial debts owed to them by the Corporate Debtor, in case the Committee of Creditors did not approve a plan for such contribution during corporate insolvency resolution process. However, such contribution along with interest at bank rate thereon shall form part of liquidation cost, which is paid in priority.

(d) The amendments provide for constitution of a Stakeholders' Consultation Committee having representation from secured Financial Creditors, unsecured Financial Creditors, workmen and employees, government, other operational creditors, and shareholder/partners to advise the liquidator on matters relating to sale. However, the advice of this committee is not binding on the liquidator.

(e) The amendments require that a stakeholder may submit its claim or update its claim submitted during the CIRP, as on the liquidation commencement date. Along with submission of claim, a secured creditor shall inform the liquidator of its decision to relinquish its security interest to liquidation estate or to realize its security interest.

(f) The amendments have introduced a comprehensive compliance certificate to be submitted along with the final report to the Adjudicating Authority.

SOME IMPORTANT JUDGMENTS IN RELATION TO INSOLVENCY AND BANKRUPTCY LAW, 2016.

Supreme Court

Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors. (2019 SCC OnLine SC 1039)

While dismissing the various petitions filed by builders and upholding the constitutional validity of status of allottees as Financial Creditors, the Supreme Court has made several important findings and rulings as under:

(a) In real estate projects, money is raised from the allottees, against consideration for the time value of money. The amounts raised from allottees is subsumed within section 5(8)(f) of IBC even without adverting to the explanation introduced by the Amendment Act. The deeming fiction that is used by the explanation is to put beyond doubt the fact that allottees are regarded as Financial Creditors. The allottees/home buyers were included in the main provision, i.e., section 5(8)(f) with effect from the inception of the Code. The explanation was added in 2018 merely to clarify doubts that had arisen.

(b) The provisions of Real Estate Regulatory Authority (RERA) are in addition to and not in derogation of the provisions of any other law for time being in force. Further, Parliament was aware of RERA when it added explanation to section 5(8)(f) of the Code which came into force on 6 June 2018. **Therefore, the Code as amended, must be given precedence over RERA**. Even by a process of harmonious construction, RERA and the Code must be held to co-exist, and, in the event of a clash, RERA must give way to the Code. The Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the Corporate Debtor by means of a resolution plan, so that the Corporate Debtor may be pulled out of the woods and may continue as a going concern, thus benefitting all stakeholders involved. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions.

(c) The remedies under RERA to allottees are additional and not exclusive remedies. The allottees have concurrent remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.

National Company Law Appellate Tribunal

Standard Chartered Bank vs. Satish Kumar Gupta, R. P. of Essar Steel Ltd. & Ors. (2019 SCC OnLine NCLAT 388)

NCLAT upheld the resolution plan submitted by ArcelorMittal approved by NCLT in the resolution proceedings in respect of Essar Steel India Limited while modifying the distribution of money to the financial and the operational creditors. The Hon'ble Supreme Court in the Appeal against the NCLAT Judgment, had ordered the status quo on the sale of Essar to ArcelorMittal vide Order 22.07.2019 and finally vide Order dated 15.11.2019 the Hon'ble Supreme Court has set aside the NCLAT judgment, upholding that the ultimate discretion of distribution of claims lies with the Committee of Creditors.

NUI Pulp and Paper Industries Pvt. Ltd. Vs. M/s. Roxcel Trading GMBH (Company Appeal (AT) (Insolvency) No. 664 of 2019)

In this matter the issue for consideration was whether before admission of an application filed under section 7 or 9, the AA can restrain the Corporate Debtor and its directors from alienating, encumbering or creating any third-party interest on the assets of the Corporate Debtor. The NCLAT noted that the AA can make any such

order as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal. It was held: *"...it is clear that once an application under Sections 7 or 9 is filed by the Adjudicating Authority, it is not necessary for the Adjudicating Authority to await hearing of the parties for passing order of 'Moratorium' under Section 14 of the 'I&B Code'. To ensure that one or other party may not abuse the process of the Tribunal or for meeting the ends of justice, it is always open to the Tribunal to pass appropriate interim order."*

Jet Airways (India) Ltd. (Offshore Regional Hub/ Office), Holland Vs. State Bank of India & Anr. (Company Appeal (AT) (Insolvency) No. 707 of 2019)

The NCLAT, vide order dated 4 September 2019, held that the IRP is required to collate the claim of all offshore creditors, and take control and custody of the assets of the Corporate Debtor situated outside India (in Holland) or other places. However, for giving it effect, the RP is required to reach an arrangement or agreement with the Administrator appointed pursuant to the proceeding initiated in Holland. The NCLAT, vide order dated 26 September 2019, directed use of certain elements of cross border insolvency in the form of 'Cross Border Insolvency Protocol' agreed to between the Administrator of Jet Airways (India) Limited (Offshore Regional Hub) and the Resolution Professional of Jet Airways (India) Limited. The Protocol recognizes that the company being an Indian company with its centre of main interest in India, the Indian Proceedings are the main insolvency proceedings and the Dutch Proceedings are the non-main insolvency proceedings. It maintains the independent jurisdiction, sovereignty, and authority of NCLT, NCLAT and Dutch Bankruptcy Court. The NCLAT observed that the 'Cross Border Insolvency Protocol' shall be treated as its direction. It further directed that the Dutch Trustee shall be invited to participate in the meetings of the CoC as an observer but shall not have a right to vote in such meetings

Jindal Steel and Power Ltd. v. Arun Kumar Jagatramika and Anr. (C.A. (CAA) No.198/KB/2018])

The NCLAT removed the ambiguity around the applicability of Section 29 A of the Code under the scheme of arrangement. The question raised in this case was whether Arun Kumar Jagatramka (promoter), ineligible under Section 29A of the Code to be a resolution applicant (buyer), could ask for a financial scheme of comprise and arrangement under Section 230 of the Companies Act. The NCLAT held that "even during the period of liquidation, the 'Corporate Debtor' is to be saved from its own management, meaning thereby that the promoters who are ineligible under Section 29A are not entitled to file application for compromise and arrangement in their favour under Section 230 to 232 of the Companies Act." Hence, a promoter, ineligible under Section 29A of the

Code, cannot make an application for compromise and arrangement for taking back the immovable and movable property or actionable claims of the debtor.

OTHER LEGAL UPDATES

Social media platforms bound to block offending content globally, geo-blocking not acceptable: Delhi HC

Ruling against the practice of geo-blocking or partial disabling content on the basis of territory, in **Swami Ramdev & Anr. Vs Facebook, Inc. & Ors** (2019 SCC OnLine Del 10701), a Single Judge Bench of Justice Prathiba M Singh stated,

"..any injunction order passed by the Court has to be effective. The removal and disablement has to be complete in respect of the cause over which this Court has jurisdiction. It cannot be limited or partial in nature, so as to render the order of this Court completely toothless. If geo-blocking alone is permitted in respect of the entire content, there cannot be any dispute that the offending information would still reside in the global platforms of the Defendants, and would be accessible from India, not only through VPN and other mechanisms, but also by accessing the international websites of these platforms..."

The Court held that the interpretation of Section 79 of the Information Technology Act, 2002 leads to the conclusion that the disabling and blocking of access has to be from the computer resource, and such resource includes a computer network, i.e., the whole network and not a mere (geographically) limited network.

SC upholds DoT's definition of AGR

In **Union of India v. Association of Unified Telecom Service Providers of India** (2019 SCC OnLine SC 1393), the Supreme Court upheld the definition of adjusted gross revenue (AGR) provided by the department of telecommunications (DoT), putting an end to a 14-year old legal battle between telecom operators and the government.

This came as a major blow for telecom operators as they will have to shell out a massive Rs. 92,000 crore in past dues at a time when they are already grappling with debt pressure and shrinking revenues.

Signed Carbon Copy as Good as Original in Evidence, Says Supreme Court

The Supreme Court, in **Mohinder Singh v. Jaswant Kaur** (Civil Appeal No(s). 6706/2013), has held that signed carbon copy of a document is as good as the original document and can be relied as evidence. The court maintained that a carbon copy in this form will be admissible as a primary evidence under Section 62 of the Indian Evidence Act.

"This finding of the High Court is absolutely incorrect and against the provision of Section 62 of the Evidence Act. This carbon copy was prepared in the same process as the original document and once it is signed by both the parties, it assumes the character of the original document," held the bench.

Magistrate Has Power To Order Further Investigation Even In Post Cognizance Stage Until Trial Commences: SC

In a significant judgment on October 16, 2019, the Supreme Court, in the case of **Vinubhai Haribhai Malaviya and Ors. v. The State of Gujarat and Anr.** (2019 SCC OnLine SC 1346), has held that a Magistrate has power to order further investigation into an offence under Section 156 (3) of the Code of Criminal Procedure, 1973, in post cognizance stage, until the trial commences.

Consumer Protection Act, 2019

The Consumer Protection Act was published in the Official Gazette on 09.08.2019. Once notified, it will replace the Consumer Protection Act, 1986. The Key features of the Act include:

- **Definition of consumer:** A consumer is defined as a person who buys any good or avails a service for a consideration. It does not include a person who obtains a good for resale or a good or service for commercial purpose. It covers transactions through all modes including offline, and online through electronic means, teleshopping, multi-level marketing or direct selling.
- **Rights of consumers:** Six consumer rights have been defined in the Act, including the right to: (i) be protected against marketing of goods and services which are hazardous to life and property; (ii) be informed of the quality, quantity, potency, purity, standard and price of goods or services; (iii) be assured of access to a variety of goods or services at competitive prices; and (iv) seek Redressal against unfair or restrictive trade practices.
- **Central Consumer Protection Authority:** The central government will set up a Central Consumer Protection Authority (CCPA) to promote, protect and enforce the rights of consumers. It will regulate matters related to violation of consumer rights, unfair trade practices, and misleading advertisements. The CCPA will have an investigation wing, headed by a Director-General, which may conduct inquiry or investigation into such violations.

  CCPA will carry out the following functions, including: (i) inquiring into violations of consumer rights, investigating and launching prosecution at the appropriate forum; (ii) passing orders to recall goods or withdraw services that are hazardous, reimbursement of the price paid, and discontinuation of the unfair trade practices, as defined in the Act; (iii) issuing directions to the concerned trader/ manufacturer/ endorser/ advertiser/ publisher to either discontinue a false or misleading advertisement, or modify it; (iv) imposing penalties, and; (v) issuing safety notices to consumers against unsafe goods and services.
- **Penalties for misleading advertisement:** The CCPA may impose a penalty on a manufacturer or an endorser of up to Rs 10 lakh and imprisonment for up to two years for a false or misleading advertisement. In case of a subsequent offence, the fine may extend to Rs 50 lakh and imprisonment of up to five years.

  CCPA can also prohibit the endorser of a misleading advertisement from endorsing that particular product or service for a period of up to one year. For every subsequent offence, the period of prohibition

may extend to three years. However, there are certain exceptions when an endorser will not be held liable for such a penalty.

- **Consumer Disputes Redressal Commission:** Consumer Disputes Redressal Commissions (CDRCs) will be set up at the district, state, and national levels. A consumer can file a complaint with CDRCs in relation to: (i) unfair or restrictive trade practices; (ii) defective goods or services; (iii) overcharging or deceptive charging; and (iv) the offering of goods or services for sale which may be hazardous to life and safety. Complaints against an unfair contract can be filed with only the State and National Appeals from a District CDRC will be heard by the State CDRC. Appeals from the State CDRC will be heard by the National CDRC. Final appeal will lie before the Supreme Court.
- **Jurisdiction of CDRCs:** The District CDRC will entertain complaints where value of goods and services does not exceed Rs one crore. The State CDRC will entertain complaints when the value is more than Rs one crore but does not exceed Rs 10 crore. Complaints with value of goods and services over Rs 10 crore will be entertained by the National CDRC.
- **Product liability:** Product liability means the liability of a product manufacturer, service provider or seller to compensate a consumer for any harm or injury caused by a defective good or deficient service. To claim compensation, a consumer has to prove any one of the conditions for defect or deficiency, as given in the Act.

AMENDMENT TO PATENT RULES, 2003

In order to boost the economy in India, the government has recently introduced Patent (Amendment) Rules, 2019. The rules are placed for the patents filed by small entities, women and government authorities along with encouraging Indian Applicants to file International Patent applications.

The change made in Patent Rules mainly concentrate on fast-tracking the patent applications through expedited examinations. For fast-tracking the applications, it is required:

a. *that the applicant is a start-up; or*
b. *that the applicant is a small entity; or*
c. *that if the applicant is a natural person or in the case of joint applicants, all the applicants are natural persons, then the applicant or at least one of the applicants is a female; or*
d. *that the applicant is a department of the Government; or*
e. *that the applicant is an institution established by a Central, Provincial or State Act, which is owned or controlled by the Government; or*
f. *that the applicant is a Government company as defined in clause (45) of section 2 of the Companies Act, 2013 (18 of 2013)*
g. *that the applicant is an institution wholly or substantially financed by the Government;*

WHISTLEBLOWERS IN INDIA

In India, whistleblowers are protected by the Whistle Blowers Protection Act, 2014. The law provides for the protection of their identity and also has strict norms to prevent their victimization. For instance, an organization cannot initiate proceedings against a whistleblower pending a probe into allegations. The same sections have been adopted in the Companies Act, which applies to listed companies, and are a part of the Securities and Exchange Board of India's governance norms. All listed and public sector firms need to have a whistleblower policy that outlines procedures and recourses available to complainants.

Whistleblowing may sometimes be used to settle personal vendettas or manipulate the stock market. To prevent this from occurring, the audit committee that investigates the allegations will examine them for their merit. If a complaint is proven to be frivolous, the complainant can face a jail term of up to two years.

To improve success rates, the market regulator recently introduced a tipping mechanism. **SEBI will award up to Rs. 1 crore for information and successful action against insider traders.** It has also created a "*cooperate and confidentiality*" mechanism. This means that if someone guilty of violating securities law is willing to assist in the larger probe, the person will be given exemption from penal action and their identity will be kept confidential.

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