The only stable state is the one in which all men are equal before the law.

- Aristotle

Bo Xilai, son of one of China’s 8 ‘Immortals’ is a ‘princeling’. He was Governor of the major province of Chongqing and a leading frontrunner for elevation to the standing committee of the politburo, the body that rules China. Becoming general secretary of the Communist Party of China and taking over the reins of the world’s newest superpower seemed destined.

With the world seemingly at Bo Xilai’s feet, his life took a dramatic twist which could easily find a place in any Hitchcock thriller. Bo Xilai was expelled from the Communist Party and stood trial for corruption, embezzlement and abuse of power. His political demise was complete when he was convicted after a 5 day trial and sentenced to life imprisonment.

Whilst certain sections of the western media have criticised the verdict in the sensational Bo Xilai case as the outcome of a power struggle between factions of the Communist Party, such political conspiracy theories are mere red herrings. The principle issue in this case is the enforcement of law against a high political functionary for the crime of corruption.

Bo Xilai’s trial is a reminder that the core principle of treating every person equally before the law is paramount in establishing the rule of law in any state and should never be compromised. In India where corruption cases involving senior politicians grab headlines regularly, it is important to drive home the message that no matter which high political office the accused holds, he is not above the law. Whilst the recent conviction of a former chief minister sends out this message it is important that political and judicial manoeuvring do not delay or deny justice.
Apart from this presentation of Aristotle’s principle which is fundamental to the rule of law and also enshrined in the Indian constitution, this 26th edition of the Lex Scripta presents an informative article on the key features of the headline grabbing new Companies Act, 2013 as well as handpicked content on interesting and informative legal developments. Of course we also bring to you our regular features.

We invite your suggestions on topics/legal issues on which you would like to read an article. Do write in with your topics and we shall endeavour to present an article on a topic of your choice. As always, we invite and look forward to your comments, suggestions and feedback on this edition of the Lex Scripta. Please do write in to us at legal.newsletter@kotak.com. We greatly appreciate your feedback.

Happy Reading !!!!
HIGHLIGHTS OF THE COMPANIES ACT, 2013

- Satyajit Joshi

The Companies Bill, 2013 received the President’s assent in August 2013 and is now promulgated as ‘The Companies Act, 2013’ ("the Act"). The Act is being notified in a phased manner with the first set of 98 sections being notified in September 2013. MCA had subsequently clarified that the corresponding provisions of the Companies Act, 1956 are repealed. The remainder of the Companies Act, 1956 will continue to be applicable till the corresponding sections in the Act get notified. It is expected that the entire Act will get notified by the end of this financial year.

The Act brings about significant changes to existing corporate law and procedures. The changes are varied in nature, ranging from issues with regard to company formation, to governance, structuring, corporate social responsibility and mergers and acquisitions. On an analysis of the changes the following key themes seem to emerge:

• **New Concepts:** The Act has introduced various new corporate forms such as the One Person Company, Small Company, Dormant Company etc. The One Person Company is conceptualized as a new vehicle for corporatizing sole proprietorship firms which can enjoy advantages of limited liability whereas the Small Company (paid up capital upto Rs. 5 Cr. / turnover upto Rs. 2 Cr.) can avail relaxations in governance / reporting requirements. Dormant Company is one which is formed for some future project or to hold an IPR. There is also a provision for outbound mergers (Indian company merging with foreign company), though it may take a while to operationalize this due to notification of territories and changes in other applicable laws.

• **No difference between a Private Company and a Public Company:** The Act treats private companies at par with public companies. Exemptions enjoyed by private companies under various sections of the old act are removed. The thought process seems to be that just because a private company does not have public interest in terms of shareholding does not mean that it can be allowed to function with lesser governance standards as large private companies may have significant stakeholder interest.

• **Learning from recent events:** The occurrence of certain events seems to have had a bearing on the drafting of the Act. Loopholes in capital raising practices through the private placement route have been plugged by providing that offer cannot be made to over 50 persons in a year other than to QIBs and employees. There is a significant focus on audit function and auditors’ independence with provisions such as rotation of auditors, prohibition of auditors from rendering other services and stiff penalties.

• **M&A:** On the M&A side, the requirement of involving all major regulators in the M&A process as against the current regime where a High Court order is akin to a “ganga snan” for all that is stated in the order is going to impact the M&A timelines and expose the transactions to greater market risks. There is also provision for fast track merger between two or more small companies and between holding and subsidiary companies under which court approval will not be required. This is expected to benefit internal restructuring type of transactions where public interest is not significantly involved.

• **Clarificatory:** The Act gives legal validity to the entrenchment provisions which can now be provided explicitly in the Articles of Association (AOA) of the Company. Thus AOA can now have provisions which are more stringent than the
provisions of the Act and these shall be enforceable amongst the shareholders. Further the Act also clarifies that contracts / arrangements between two or more persons in respect of transfer of securities of a public company shall be enforceable. These changes augur well and provide much needed clarity for the private equity space where debate on these issues was going on for long.

- **Enhanced corporate governance and transparency:** Throughout the Act, there is a strong leaning towards good corporate governance and transparency. Provisions have been inserted requiring appointment of independent directors, resident directors, code of conduct for independent directors with the intent of improving governance standards. To improve transparency, related party transactions have been defined and it is provided that a special resolution of shareholders will be required for approving such transactions. M&A / restructuring schemes will now need a valuation certificate and a valuation report is also required to be annexed to the notice for meetings for approval of the scheme which is expected to improve transparency. The Act has also introduced absolute restrictions on multi-layered investment structures where a company is now required to make investments through not more than two layers of investment companies.

- **Investor Protection:** The Act has provided special emphasis on investor protection by introducing class action suits which can allow a group of investors with common interest in a matter to sue the management of a firm. Further in certain circumstances such as variation of contracts mentioned in the IPO offer document or change in the use of proceeds of an IPO, the investor can exercise an exit option which is required to be provided by the promoter.

- **Corporate Social Responsibility (CSR):** Every company having (a) networth of Rs. 500 Cr. or more or (b) turnover of Rs. 1000 Cr. or more or (c) net profit of Rs. 5 Cr. or more is required to spend at least 2% of average net profits during the last three years towards CSR. India is probably the only country where spending on CSR has been mandated by law. The much talked about concept of CSR has been drafted in a queer way, though the CSR spend is compulsory as per law however the consequence of non-compliance is that the Board has to explain the reason of non-compliance in its report to the shareholders. Therefor the Act has adopted a ‘comply or explain’ approach. The draft rules do clarify that companies are free to spend the amount themselves or through other agencies or through donations to certain funds.

- **Enhanced cost of non-compliance:** The Act has increased penalties all across and has conveyed that compliance pays and non-compliance has a huge cost attached to it.

**Key Concerns**

Industry and the legal fraternity have been raising the following key concerns at various forums and it is expected that some clarification will come out from the MCA.

- **Excessive Delegation:** The Act has significantly lesser number of sections but a large number of sections refer to rules which are yet to be notified. The arrangement of sections is more logical and it is easier to navigate through the Act, however with a large section of the Act being dependent on rules, the executive will have substantial powers to change the law without going through the elaborate legislative process. Currently MCA is in the process of finalizing the rules and has invited public comments on two sets of rules and the industry and the legal fraternity are working towards sending their representations.

- **Overburdened NCLT:** Existing jurisdiction exercised by High Courts, Company Law Board and BIFR to be transferred to NCLT which will become the one stop shop for all company law matters. In principle this sounds like a good proposal,
however the industry is expressing concern over how NCLT will be able to handle such a wide range of matters and whether it will have the required infrastructure.

- **Holding Company/Subsidiary Company/Associate Company:** As per the Act, contribution to the total share capital (including preference share capital) has to be considered for reckoning relationship between two corporates, i.e., whether it’s a subsidiary or an associate company. This would mean that a preference share holder who has invested more money than an equity share capital holder could become a holding/associate company of the investee company. Further, the earlier act had a specific exclusion for shares held in fiduciary capacity whilst reckoning holding company/subsidiary company relationship which is excluded in the current Act. These have implications for the private equity, asset management and trusteeship businesses.

- **Third Party Guarantee/Security:** The Act seems to impose an absolute bar on companies providing loans to/guaranteeing obligations of, directors/persons in which directors are interested. This is a deviation from the current position which allows such loans, subject to central government approval. Further, such loans by private companies, and loans from parent to subsidiaries, which are allowed under the old act, will also no longer be permissible.

To sum up, the Act is a rule based legislation which can be flexible and quick to change in the changing circumstances. It is very contemporaneous and has a strong leaning towards good corporate governance, transparency and investor protection. There is a marked attempt to put to rest certain legal controversies which were being debated for long and to put to use learning of recent corporate events. However, having said that, the entire picture will be clear only on notification of all the rules and the combined reading of the Act together with the rules.
Supreme Court rules that poverty can be a ground to convert death punishment to life term

The Supreme Court has carved out an additional exception- ‘poverty’ to commute a convict’s death penalty to life imprisonment in the ‘rarest of rare’ category of cases warranting award of the death penalty. The judgment came in the matter where the accused having meagre income with a family of a four to support, killed all of them and thereafter admitted his crime before the police authorities.

The lower courts held him guilty and sentenced him to death, unanimous that the case fell within the ‘rarest of rare’ category. The Apex Court too held him guilty but sentenced him to life –imprisonment as it felt that socio-economic factors such as poverty had to be considered by the courts while awarding a sentence.

The Supreme Court was of the view that the accused could be reformed and rehabilitated since he had no prior criminal record and that facts revealed that the accused was not likely to be a menace or threat or danger to society. The intent to murder was solely based due to his abject poverty.

Bombay High Court rules that women can be charged for domestic violence

The Bombay High Court while adjudicating an appeal preferred against an order of the Sessions Court has ruled that women relatives can be charged under the Protection of Women from Domestic Violence Act, 2005. The Sessions Court had dropped the charges against the female relatives. The High Court held that the view of the Sessions Court that the women did not fall within the scope of the term “Respondent”, as defined in the Act, was clearly contrary to law.

The High Court observed that the provisions of the Act could not be equated with a criminal trial as they were akin to civil proceedings and the question of whether the allegations levelled by the petitioner are ultimately be proved or not could be decided only after the evidence was concluded with and upon hearing both the parties in the matter.

Bombay High Court rules that ESIS claim is valid in respect of natural death cases occurring at the workplace.

The Bombay High Court has ruled that a dependent of an employee who dies a natural death at the workplace is eligible for compensation as the death shall construed to be in the nature of ‘an employment injury’. The judgment came in a matter where a widow had challenged the order of the Employees State Insurance Corporation (ESIC) refusing to pay her monetary benefits that she was entitled to under the scheme upon the death of her husband on duty due to his suffering a heart attack.

ESIC had rejected her claim on the grounds that her husband’s death could not be termed as employment injury by relying upon a senior state medical commissioner’s certificate stating that her husband had died a natural death and that there was no involvement of stress or strain at work.

The High Court arrived at the aforesaid conclusion by observing that ESIC had viewed the matter in a cryptic manner and by further relying on previous High Court judgments on the presumption of death as an accident in the absence of evidence to the contrary and the basic objective of the Employees’ State Insurance Act, 1948, being to provide certain benefits to employees or dependents in case of sickness, maternity and employment injury.
Case Notes

-Lex Scripta Team

Supreme Court on Exclusive Jurisdiction

In the case of *Swastik Gases v. Indian Oil Corp.*, the Supreme Court examined the position of Indian law dealing with exclusive jurisdiction clauses.

**Background & Issues:** The Court was concerned with a case where an agreement was executed in Kolkata, while the cause of action had taken place in Jaipur. The Agreement provided for arbitration (clause 17) in accordance with the 1996 Act, without specifying any seat. A separate jurisdiction clause (clause 18) stated, “The Agreement shall be subject to jurisdiction of the Courts at Kolkata.”

The appellant had filed a petition u/s.11 in the Rajasthan High Court, on the basis that a substantial part of the cause of action arose in Jaipur. The Respondent resisted the jurisdiction of the Rajasthan High Court, on the strength of clause 18.

The fulcrum of the Appellant’s case was the decision in *ABC Laminart v AP Agencies (1989, Supreme Court)*, where the court did not absolutely rule out an ouster of jurisdiction in the absence of express words like ‘alone’ or ‘only’.

The Apex Court held that “It is a fact that whilst providing for jurisdiction clause in the agreement the words like ‘alone’, ‘only’, ‘exclusive’ or ‘exclusive jurisdiction’ have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties - by having clause 18 in the agreement – is clear and unambiguous that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts.”

Accordingly, the appeal was dismissed. The Court affirmed that the choice of one of two jurisdictions is sufficient to (at least) raise a presumption as to valid ouster of the jurisdiction, even in the absence of specific exclusionary words. [Lokur J. delivered a separate concurring judgment, also separately analyzing the case law stating that : “The absence of words like “alone”, “only”, “exclusive” or “exclusive jurisdiction” is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute.”]

Bombay High Court on Arbitration Agreements

Yashvant Chunilal Mody v. Yusuf Karmali Kerwala & Ors.

-Decided on September 19, 2013 – In this case the issue to be decided by the Bombay High Court was whether for referring a dispute under an agreement to arbitration, is there a specific requirement of having an arbitration clause in writing. The Court held that reference to arbitration had to be mentioned in writing in order that the same may be invoked. The Court added that the fact that parties have agreed in writing to arbitration, has to be actually shown to be so agreed at the time of invoking arbitration. A party cannot make any application for appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996, unless they can show that the agreement for arbitration is in writing and has been able to produce that at the first instance.
Delhi High Court on Garnishee Proceedings in Escrow Accounts

Case: Aaa Portfolios Pvt. Ltd. v. Deputy Commissioner of Income Tax

Background: Pursuant to the share purchase arrangement, the parties also entered into an Escrow Agreement which, inter alia, recorded the obligations of the escrow agent. Hence the court examined the question: whether the escrow agent held any money of the petitioner pursuant to the Escrow Agreement & whether the escrow agent can be compelled to pay the funds held in escrow.

Held: Highlighting the limitations of the powers of the tax department in tax recovery by garnishee proceedings the court held that funds lying in an escrow account cannot be appropriated by the tax authorities as recovery of taxes in connection with a taxpayer’s liability, when such funds are not held by the escrow agent on behalf of the taxpayer, or owed by the third party to the taxpayer. This case indicates the tax risks of this nature may still exist in diverse scenarios.

Did You Know?

-Yogeshsingh Rohilla

If a person purchases a flat/unit in a project developed by a developer in Maharashtra and such person conveys the said flat/unit to another person under an agreement within one year from the date of purchase, the stamp duty already paid shall be adjusted from the amount of stamp duty payable on the Agreement of such sale.

If you purchase property from an NRI, you have to pay sale consideration only after deducting income tax as per prevailing rates. There is no such provision in the Income Tax Act, 1961 for purchase of property from resident Indians.

In - House News !!
GOWNS AND ROBES-
THE FUNNY SIDE !!

Sign in a Lawyer’s Office

We do three kinds of jobs: cheap, quick, and good. You can have any three.
A good job quick, won’t be cheap.
A good job cheap, won’t be quick.
A cheap job quick, won’t be good.

LEX SCRIPTA RECOMMENDS !!!

Rashomon (An Akira Kurosawa classic)
Defending Your Life (*ing Meryl Streep and Albert Brooks)
Billy Budd (A portrayal of a sailor’s murder trial)

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