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KSR&Co
Company Secretaries

CONFERENCE ON
COMPANIES ACT 2013:
NEW VISTAS OF CORPORATE REGULATION

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INDEX

WORD FINDER

ONE PERSON COMPANY

The Act has made it possible to have a new category of company known as “One Person Company” apart from the already known private companies and public companies, and companies that are “not for profits associations” duly registered under the Act for promoting art, science, culture and charity,. Practically, several companies in India and in several other jurisdictions abroad, ultimate decisions are taken by a single person only. This new form of organisation enables the leader to operate with limited liability and also as a body corporate, leaving him independent without having even one more person as a director / shareholder. One Person Company symbolises one command, one decision, one direction and the “one person” bearing all the business risks, of course, circumscribed by ‘limited liability”. Many private companies and “so called” public companies can now look forward to switch over as One Person Company.

SMALL COMPANIES

The Act introduces a new class of companies called “Small Companies”. The entire business community and the corporate sector believe that small companies will be granted several privileges and exemptions. If a company is formed as a public company, it will not be eligible to be called as a small company. A small company is a company, other than a public company, whose (i) paid-up share capital of which does not exceed Rs.50 Lakhs or such higher amount as may be prescribed which shall not be more than Rs.5 Crores; or (ii) turnover of which as per its last profit and loss account does not exceed Rs.2 Crore or such higher amount as may be prescribed which shall not be more than Rs.20 Crores. A holding company or a subsidiary company and a company registered which is a “not for profit association” and a company or body corporate governed by any special Act are not eligible to be regarded as “small companies”. Merger of small companies need not go through Tribunal process, subject to meeting certain conditions.

EXPECT EXEMPTIONS

Section 462 of the Act is an interesting provision under which the Government has powers to grant full or partial exemptions or exemptions with conditions or qualifications to any class or classes of companies. A small company is expected to be granted several exemptions on the strength of this provision. We have to wait and watch.

PRIVATE COMPANIES

Now, under the Act, one of the advantages of having a private company is that the maximum number of members could be as high as 200 without counting the past and present employees who could also be the members. This makes it possible for several unlisted public companies to convert itself into private companies taking advantage of the increase in the maximum number of members. The flip side of this increase in number is that the Act does not grant various exemptions and privileges which a private company has been enjoying under Companies Act, 1956.

PUBLIC DEPOSITS

Stringent provisions have been introduced with respect to inviting and accepting public deposits. For performing companies, public deposits have always been a good way of raising money on comfortable terms for general corporate purposes. Deposits which have not been taken in terms of the new provisions have to be returned within a stipulated time. In short, we can say, the Act has introduced a new regime for companies intending to accept deposits.

DUTIES OF DIRECTORS

- Section 166 of the Companies Act, 2013 [the Act] imposes duties on directors.

- Any contravention of the law Section 166 is a punishable offence.

- Act in accordance with Articles of Association

  Generally the Board of Directors is collectively responsible for the management of the affairs of the company in accordance with the Memorandum and Articles of Association subject to any provisions of the Act and any regulations of the company reflected in any resolutions of the shareholders of the company.

  In view of Section 166 of the Act, subject to provisions of the Act, a director is liable to comply with the regulations contained in the Articles of Association of a company. This provision places individual directors under a duty to comply with the Articles of Association of the company.

  The words “subject to provisions of the Act” indicate that the Articles of Association are supreme generally. But the Act will prevail in respect of matters stated in the Articles of Association to the extent they are repugnant to or inconsistent with the provisions of the Act.

- Act in Good faith to Promote Objects

  A director must act in good faith and his objective must be to promote the objects of the company. And it must be for the benefit of the all the members of the company as a whole, and in the best interests of company, its employees, the shareholders, the community and for the protection of environment.

The words “to promote objects of the company” imply that the objects of a company are those set out in the memorandum of association of the company.

The words “in the best interest of the company” clearly indicate that a proposed transaction must be gauged from its impact or likely impact on the affairs of the company.

- Exercise Due Care

  A director of a company must exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

- Duty to avoid conflict of interest

  This provision expects every director not to get involved in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

- No undue gain or advantage

  A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

- Assignment of Office Prohibited

  A director of a company shall not assign his office and any assignment so made shall be void. This provision does not permit to a director to empower another to act on his behalf.

INDEPENDENT DIRECTORS

Once upon a time, the expression “Independent Directors” used to be an expression rarely used in corporate sector. Slowly, this breed of directors has entered the scene in a big way and have occupied an important position under the law. Over a period of time, a strong impression has been created that Independent Directors promote corporate governance and ensure protection of shareholders. Under the Act, Independent Directors are a force to reckon with. Appointing Independent Directors is now mandatory not only for listed companies but also unlisted public companies. It may be a statutory requirement even for private companies. Therefore Independent Directors will have to be identified and appointed in accordance with the law. For this purpose, *we suggest companies to set up a proper mechanism and a robust board process such that there is a definite demarcation between what must be placed before the Board and what are capable of being independently decided by corporate management*. It is only those matters which are specifically stated in law as mandatory, would require to be placed before the Board.

FINANCIAL STATEMENT

Section 2(*40*) of the Companies Act, 2013, states that "financial statement" in relation to a company, includes—

(i) a balance sheet as at the end of the financial year;

(ii) a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;

(iii) cash flow statement for the financial year;

(iv) a statement of changes in equity, if applicable; and

(v) any explanatory note annexed to, or forming part of, any document referred to in sub-clause (*i*) to sub-clause (*iv*):

Provided that the financial statement, with respect to One Person Company, Small company and Dormant company, may not include the cash flow statement;

BOARD'S REPORT

(i) Extract of Annual Return

Section 134 requires an extract of the Annual Return to be provided as part of the Board's Report. The Annual Return would disclose the principal business activities of the company, particulars of holding, subsidiary and associate companies, details of Promoters & Key Managerial Personnel [KMP], remuneration to Directors and KMP, etc., as the Annual Return is prepared as at the end of the financial year and not as on the date of the Annual General Meeting. The extract will contain information pertaining to financial year in relation to which the Financial Statements have been prepared.

(ii) Details of meetings of the Board

The Board's Report should contain the number of meetings of the Board and its committees, the details thereof and the attendance of the directors.

(iii) Directors' Responsibility Statement

Through the Director's Responsibility Statement, the Board's Report must, inter alia, inform shareholders that adequate systems exist for ensuring compliance of all applicable laws and those systems are adequate and are operating efficiently. This would require putting in place an effective legal compliance and management system. By inference, it is implied that major non-compliances must be reported.

The Board of Directors of a listed company must ensure that they have laid down proper internal financial controls for the efficient conduct of business, for safeguarding its assets, prevention and detection of frauds and errors, the accuracy and completeness of accounting records and the timely preparation of reliable financial information.

(iv) Particulars of loans, investments, guarantees

Much similar to Section 372A of the CA, 1956, Section 186 of the Act imposes restrictions relating to granting of loans or provision of guarantee or security in connection with a loan to any person or to other body corporate. The Board's Report should provide details of loans granted, guarantees or security provided and investments made within the meaning of Section 186 of the Act.

(v) Risk Management Policy

The Board's Report must disclose the policy that has been put in place for identification of risk which may threaten the existence of the company.

(vi) Related Party Transactions

As per Section 188(2) of the Act, every contract or arrangement (otherwise than contract or arrangement which are not in the ordinary course of business or which are not on arms length basis should be disclosed in the Board's Report together with a justification for entering into with such contract or arrangement.

In addition to the above, *every listed company or such other class of companies as may be prescribed* are required to report on the following additional matters in the Board's Report

a. Assurance on declaration given by Independent Directors

Section 149(7) of Act, states that every independent director must disclose to the Board of Directors any circumstances or any change in circumstances which may affect his independence. Independent director must give a declaration about his independence to ensure that he qualifies to be an independent director. The

Board Report must carry a statement that all requirements with respect to appointment of independent directors as per Section 149(7) of the Act have been complied with.

b. Policy on fit and proper criteria for appointment and remuneration of directors, key managerial personnel and other employees

Section 178 of the Act requires every listed company and such other class of companies as may be prescribed to constitute a Nomination and Remuneration Committee of the Board consisting three or more non-executive directors of which not less than one half shall be independent directors. The Board in its report needs to disclose the policy put in place by the said Committee for determining qualification, positive attributes, independence of director and recommend to the Board the a policy relating to the remuneration for the directors, key managerial personnel and such other employees whose appointment must be decided by the said Committee.

c. Board's Performance Evaluation

The Code for Independent Directors [Schedule IV to the Act] provides for an evaluation mechanism on the performance of the independent directors. The Board's Report must disclose the mode of evaluation and the outcome thereof. The performance of the committees of the Board and individual directors would also get evaluated in the process.

(vii) CSR Policy

The policy developed and implemented by the company on Corporate Social Responsibility [CSR] and initiatives taken during the year and the amount spent on CSR have to be disclosed in the Board's Report.

(viii) Explanation to the qualifications of PCS

The Board should provide proper explanation to every qualification or reservation or adverse remark or disclaimer made by a Practising Company Secretary (PCS) in his Secretarial Audit Report.

(ix) Additional Requirements may be prescribed

In addition, the Central Government may prescribe such additional matters which are required to be disclosed in the Board's Report.

RELATED PARTY TRANSACTIONS

Sub-section (1) of Section 188 states that the contracts or arrangements for the following matters cannot be entered into without the consent of the Board of Directors:

1. sale, purchase or supply of any goods or materials;
2. selling or otherwise disposing of, or buying, property of any kind;
3. leasing of property of any kind;
4. availing or rendering of any services;
5. Appointing agent for purchase or sale of goods, materials, services or property;
6. Appointing a related party to any office or place of profit in the company, its subsidiary company or associate company; and
7. underwriting the subscription of any securities or derivatives thereof, of the company.

The words “at a meeting of the Board” appearing in this sub-section indicates that the consent of the Board of Directors must be given at a “physical” or “sit down” meeting of the Board of Directors. By implication, it seems to such consent cannot be accorded in a meeting held in a video conference mode.

For certain contracts and arrangements between a company and a related party, if the company has a share capital which is more than the prescribed share capital or if value of the contracts and arrangement is beyond the prescribed value, prior approval of the shareholders by way of a special resolution is also necessary.

It is necessary to note that the related party with whom the contract or arrangement in question is being or proposed to be entered into is a shareholder of the company, and if such contract or arrangement comes before a general meeting of the company, the related party share holder is statutorily disentitled to vote in relation to that resolution.

However if a contract or arrangement is in the ordinary course of business and also on arms length basis, this sub-section does not apply at all.

Therefore it is incumbent upon the Board of Directors to (a) keep an updated list of all Related Parties and sensitize all senior executives and employees to know the important of transactions with Related Parties and (b) raise the following two mandatory questions with respect any contract or arrangement with any related party:

- Whether the contracts or arrangements is in the 'ordinary course of the business' of the Company?
- Whether the terms and conditions of such contracts or arrangements are on 'arms length basis'?

If any contract or arrangements which requires either the Board's consent only or the consent of the Board as well as the prior approval of shareholders by a special resolution is entered into without any such consent or approval and if it is not ratified (within 3 months) by the Board and the shareholders as the case may be, the contract or arrangement is voidable at the option of the Board of Directors.

A Related Party as per definition includes any company which is— (*A*) a holding, subsidiary or an associate company of such company; or (*B*) a subsidiary of a holding company to which it is also a subsidiary.

An Associate Company, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company. An e*xplanation under this definition states that* for the purposes of this clause, "significant influence" means control of at least 20% of total share capital, or of business decisions under an agreement.

A look at the above sentence will show that though one company may be an associate of another, that other company may not be an associate of the first mentioned company. In order to be qualified as an associate company, that company [Associate Company] must be under the significant influence of another company [Other Company] and the Associate Company cannot be a subsidiary of the Other Company. The Other Company must be able to exercise influence over the Associate Company either by having control over 20% of the total share capital of the Associate Company or by having significant influence over the business decisions of the Associate Company.

DISCLOSURE OF INTEREST

Disclosure of Interest / Concern by Directors

Section 184(1) makes it statutorily mandatory for directors to disclose their concern or interest in any company or companies or bodies corporate, firms or other association of individuals. The disclosure must be made by every director. The director must disclose his concern or interest. He may be concerned or interested in several companies, firms and associations. His such concern or interest might be pre-existing on the date he becomes a director of a company or he might have acquired such concern or interest subsequent to his becoming a director. Irrespective of whether the concern or interest is pre-existing or subsequently acquired, it is mandatory to make the disclosure. The words “shall include the shareholding indicates that, having shares or partnership in firms or any proprietary interest would certainly attract the disclosure requirement under this provision. A person will be certainly regarded as “concerned” or “interested” if he holds a directorship or partnership in a company or firm. He may be merely a director of a company or a body corporate. But still he has to comply with the requirement under this provision.

The disclosure must be made at the first meeting of the Board in which he participates as a director.

Such disclosure under this sub-section must be made at the first meeting of the Board of Directors in every financial year. Whenever, a change occurs with respect to a disclosure, a director have already made, such change, must be disclosed at the first board meeting held after the change.

Disclosure of Interest or Concern in Contracts or Arrangements

Section 184(2) requires directors of a company who may have direct or indirect interest in any contract or arrangement in which the company is a party to disclose nature of their concern or interest. If a director acquires or becomes concerned or interested subsequent to the entering into the contract or arrangement, he is bound to disclose the same.

This provision imposes upon every director of a company to disclose any concern or interest he may have in any contract or arrangement. A director may be interested in a contract or arrangement directly or indirectly.

This disclosure requirement is not dependent upon any of the following factors:

- The value of the contract or arrangement;
- That the contract or arrangement is in the ordinary course of its business
- That the contract or arrangement is on arms length basis;

The disclosure is mandatory in nature if any contract or arrangement entered into proposed to be entered into by a company (a) with a body corporate in which such director or such director in association with any other director, holds more than two per cent, shareholding of that body corporate; (b) with a body corporate in which such director is a promoter, manager, Chief Executive Officer of that body corporate; and (c) with a firm or other entity in which, such director is a person, owner or member, as the case may be.

Where the other party is a body corporate and if the shareholding of a director in such body corporate, whether on his own or in association with any other director, is 2% or less than 2% in that body corporate, this provision will not apply.

Any director who is interested or concerned in any contract or arrangement in one or more ways cannot participate in the Board meeting in relation to that subject matter. It goes without saying that he cannot vote too.

If the company enters into a contract or arrangement in which any director is concerned; or If any such interested director participates in the discussion inspite of the prohibition contained in sub-section (2), such a contract or arrangement is voidable at the option of the company.

ATTEND BOARD MEETINGS

Section 167 states that a director must necessarily attend atleast one meeting within 12 months after his becoming a director. If he fails to attend even one board meeting in any period of 12 months after he becomes a director, he would vacate office automatically.

The office of a director will become vacant if he acts in contravention of the requirements under Section 184 of the Act.

REGISTER OF CONTRACTS AND ARRANGEMENTS

Section 189 requires a company to keep one or more registers giving separately the particulars of contracts or arrangements in which directors are interested or concerned. Specifically this Section refers to contracts or arrangements to which sub-section (2) of Section 184 or Section 188 applies.

Under sub-section (2) of Section 184, a director must disclose his interest or concern in any contract or arrangement a company may enter into or has entered into (a) with a body corporate in which such director or such director in association with any other director, holds more than 2% shareholding of that body corporate, or if the interested director is the promoter, manager, Chief Executive Officer of that body corporate; or (b) with a firm or other entity in which, the interested director is a partner, owner or member, as the case may be.

Section 188 of the Act applies only to the contracts and arrangements with related parties other than those which are in the ordinary course of business as well as on arms length basis.

As per Section 189, the following requirements also arise:

- The register of contracts and arrangements must be kept at the registered office.
- The registers are open for inspection by any member of the company.
- The registers should be kept open during every annual general meeting of the company.

APPOINTMENT AND REMUNERATION TO MANAGERIAL PERSONNEL

The expression “Managerial Personnel” is not a defined expression. Managing directors, whole-time directors and managers are the officers who will fall within the description of the expression “Managerial Personnel”.

When the appointment is not in accordance with Section 197, and Schedule V, approval of the Central Government is also necessary.

This provision states that if the General Meeting does not approve the appointment, it does not render invalid any act done by the Managing Director, Whole time director or Manager, during the period between the date of his appointment and the date on which the resolution for approving the appointment gets rejected at the General Meeting.

In view of the words “in case such appointment is at variance to the conditions specified in that Schedule”, it is clear that no power has been conferred upon the Central Government to approve the appointment of any candidate who does not meet the eligibility criteria stipulated in the form of specific disqualifications set out in sub-section (3) of the Act.

The total remuneration to Directors cannot exceed 11% of the net profits of the company. Within the overall limit aforesaid, the aggregate remuneration payable to all the managerial personnel put together cannot exceed 10% of the net profits of the company irrespective of the number of managerial personnel the company has.
The remuneration payable to ordinary Directors, also known as non-executive Directors cannot exceed 1% of the net-profits of the company if the company has appointed any managerial personnel and it cannot exceed 3% if the company has not appointed any managerial personnel.

Apart from the above remuneration, Directors may be entitled to sitting fees for participation in Board meetings. In the case of Independent Directors, a sitting fee higher than what is prescribed for non-independent directors is possible.

It is further stated that an independent director may be paid remuneration by way of commission on net-profits but it prohibits grant of stock options to independent directors. recovery of excess remuneration paid to managerial personnel. The law also provides for payment of premium on insurance policy which are taken primarily to cover risks to which a managerial personnel is exposed arising from any default, negligence or breach.

The words “except with the approval of the company in general meeting” and the words “if there is more than one such director remuneration shall not exceed 10% (ten percent) of the net profits to all such directors and manager taken together” indicate that *the over limit of 10% (ten percent) on remuneration to managerial persons can also be breached with the approval of the members in a general meeting*.

Various Limits on managerial remuneration

1% - this limit is stipulated in clause (ii) of second proviso to sub-section (1). This applies to remuneration to non-executive directors, if the company has employed any managerial person. If the company intends to pay remuneration to its non-executive directors more than this limit, it can do so invoking the provisions of the first proviso read with sub-section (3).

3% - this limit is stipulated in clause (ii) of second proviso to sub-section (1). This applies to remuneration to non-executive directors, if the company has not employed any managerial person. If the company intends to pay remuneration to its non-executive directors more than this limit, it can do so invoking the provisions of the first proviso read with sub-section (3).

5% - this limit is stipulated in clause (i) of second proviso to sub-section (1). This applies to remuneration to managerial persons. If the company intends to pay remuneration to any one individual managerial person more than this limit, it can do so with the approval

of the company in general meeting. If the overall remuneration to all its managerial persons is within 10% (ten percent) and within the said limit, if the company would like to pay to its managing director upto 8%, a case such type will not require any approval of Central Government. A resolution duly passed at a general meeting of the company authorising such remuneration structure will do.

10% - this limit is stipulated in clause (i) of second proviso to sub-section (1). This applies to remuneration to managerial persons. If the company intends to pay remuneration to any one individual managerial person more than this limit, it can do so with the approval of the company in general meeting, if clause (i) of second proviso under sub-section (1) alone is read in isolation. However the first proviso under sub-section (1) read with sub-section (3) makes it clear that the approval of central government is absolutely necessary if such remuneration will not be in terms of Schedule V.

11% - this limit is stipulated under sub-section (1). This overall limit applies to aggregate of remuneration to all managerial persons and aggregate of remuneration to all non-executive directors. Sub-section (2) makes it clear that payment of “sitting fees” to directors as stated in sub-section (5) of the Act does not come under this overall limit. If the company intends to pay a sum as remuneration which will be more than this overall limit, it can do so invoking the provisions of the first proviso read with sub-section (3).

APPLICATION TO CENTRAL GOVERNMENT

For every requirement relating to managerial remuneration, there is a provision for breach of the stipulated limits by making applications to Central Government.

CORPORATE SOCIAL RESPONSIBILITY

Corporate Social Responsibility, it is said, is all set to bring in about 1500 to 2000 Crores of money being available, for being deployed to activities that promote the social welfare of the people. The Act has made it mandatory to earmark a portion of profits of the company to be spent on Corporate Social Responsibility activities. We do not subscribe to the view that Corporate Social Responsibility activity must be understood as contributing to help the provision and under privileged people by dolling out freebies.

We suggest companies involve independent professionals to study the footprints they make on the environment and take suitable measures for sustainable development of the entire world. One of the pitfalls of individual companies independently spending the funds earmarked for Corporate Social Responsibility activities is that it is like to be spent without an integrated approach. As such there could be development without creating any uniform level of impact across the country. *Spending Corporate Social Responsibility funds according to whims and fancies and passion of the promoters must certainly be avoided. We suggest formation of regional corporate consortiums by the industrial captains so that it is possible to introduce a positive change in the Corporate Social Responsibility landscape.*

COMPLIANCE OF ALL APPLICABLE LAWS

The directors have an onerous responsibility collectively.

An important feature of the Act is that the Board of Directors has to make an affirmative statement in their report that the company has complied with all applicable laws, rules and regulations and the company has a system to ensure such compliance in an effective manner. The Act introduces a mandatory need for risk perception and risk mitigation. The Board of Directors must make an affirmative statement that the company has an effective system to manage risks. Further the Act introduces the concept of self evaluation of performance of directors. In short, the Act introduces, OECD principles of Corporate Governance.

ROTATION OF AUDITORS

The much talked about concept of “rotation of auditors” has now become a mandatory provision in statute book. Rotation of auditors is mandatory for all listed companies and companies belonging to a prescribed class. Definitely it is mandatory for all companies that should mandatorily constitute an audit committee. An individual auditor or a firm of auditors would be able to do audit services continuously only for a fixed tenure. Thereafter the company will be under a statutory obligation to appoint some other auditor or audit firm. Added to that, auditors cannot render non audit services. The Act is also much talked about in view in stringent penalties it introduces on professionals such as auditors. The significance of the role of auditors has increased tremendously. Auditors have to discharge their duties effectively making it a win-win for the auditors and auditee companies.

AUDITING STANDARDS

Auditors have now a mandatory duty to follow auditing standards too.

KEY MANAGERIAL PERSONNEL

Every listed company and every other company having a paid-up share capital of five crore rupees or more shall have whole-time key managerial personnel.

REVISION OF ADOPTED ACCOUNTS – PROVISION INTRODUCED SECTIONS 130 AND 131

Re-opening of accounts on Court's or Tribunal's Order

On an application by the competent authority on the ground that the relevant earlier year accounts were prepared in a fraudulent manner; or that the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statement, it is possible to re-open adopted accounts. The Court or the Tribunal shall not give an order unless an notice is given to the authorities like Income Tax, SEBI or any other statutory body or authority concerned and taken into consideration their representation. Such revised or re-cast accounts shall be the final.

Voluntary revision of financial statements or Board's Report

The directors can make an application to the Tribunal and get their prior approval and after filing such approval with the Registrar can revise the financial statement or the board's report if it appears to them that they do not comply with the respective provisions. However such revision can be in respect of any of the three preceding financial years and shall be allowed only once in a year.

NON-AUDIT SERVICES

As per Section 144, an Auditor **shall not provide** the following services directly or indirectly to the company or its holding company or its subsidiary company:

a) accounting and book keeping services;

b) internal audit;

c) design and implementation of any financial information system;

d) actuarial services;

e) investment advisory services;

f) investment banking services;

g) rendering of outsourced financial services;

h) management services; and

i) any other kind of services as may be prescribed.

A proviso under this section clarifies that an auditor or audit firm who or which has been performing any non-audit services on or before the commencement of this Act shall comply with the provisions of this section before the closure of the first financial year after the date of such commencement.

SECRETARIAL AUDIT

Secretarial Audit is being made mandatory for all listed companies and bigger companies. As per the draft rules, every public company having a paid-up share capital of Rs.100 Crores or more will be treated a big company. Secretarial audit has to be done for a wide range of topics. Secretarial audit is going to result in a sea change in the quality of systems which are in place with respect to Corporate Legal Compliance Management, Board Process, Manner of Oversight and Review by the Board and Corporate Governance. Therefore, it goes without saying that the secretarial audit must be done by capable and competent secretarial auditor who can add value beyond what the secretarial audit is expected to add.

SECRETARIAL STANDARDS

Companies have to mandatorily follow secretarial standards issued by the Institute of Company Secretaries of India [ICSI] and approved by Government of India. Initially those standards issued by ICSI relating to meetings of Board of Directors and General Meetings must be followed mandatorily. This is the yet another reason why there is a need to carry out a thorough study of the existing Board Process and meeting procedures and revamp the same adequately to meet the new needs arising from the Act.

INSPECTION AND INVESTIGATION

- Section 206(1) – Registrar of Companies [RoC] may ask for information!

  RoC may, by issuing a written notice, require the company to furnish information on explanation or produce documents.

- Section 206(2) – Duty to furnish information and documents

  Upon receipt of any such notice, the company and its officers should furnish to RoC all necessary information and documents within the given time.

- Section 206(3) – If information furnished is inadequate?

  If information is not furnished or if it is inadequate or if RoC feels it does not disclose full information, he can issue notice calling upon the company to furnish books of account and books and papers.

- Section 206(4) – Punishable for Fraud

  If RoC finds the business being carried on for any fraudulent or unlawful purpose or if the grievances of the investors are not addressed, he can issue an order to the company for further explanation.

  If circumstances require, Central Government may direct the RoC or an inspector to carry out enquiry.

  If it is found that the business is carried on for a fraudulent or unlawful purpose, every officer of the company who is in default is punishable for fraud in the manner provided under Section 447.

As per Section 447 of the Act “Fraud means any act, omission or concealment of any fact or abuse of any position committed by any person with an intend to deceive, or to gain undue advantage or injure the interest of the company or its shareholders or creditors whether or not any wrongful gain or wrongful loss”.

- Section 206(5) – Inspection of Books and Papers!

  Without prejudice to the above provisions, quite independently, if Central Government is satisfied that circumstances so warrant, it may direct inspection of books and papers.

  Books & Papers include books of account, vouchers, documents, minutes and registers.

- Section 206(6) – Inspection by any Statutory Authority

  Central Government may authorise any statutory authority to carry out inspection of books of account of any company or any class of company.

- Section 206(7) – Penal Clause

  If a company fails to furnish any information or explanation or produce any document required under this section, the company and every officer of the company who is default may undergo punishment for failure for compliance with a fine of Rs.1,00,000/- [Rs.1 Lakh] with an additional fine which may extend to Rs.500/- [Rupees five hundred] for every day after the first during which the failure continues..

- Section 207(1) – Duty to furnish information and documents

  Apart from the duty stipulated under Section 206(2) of the Act, Section 207(1) of the Act states that it shall be the duty of every director, officer or other employee of the company to produce all such documents to the Registrar or inspector and furnish him with such statements, information or explanations in such form as the Registrar or inspector may require and shall render all assistance to the Registrar or inspector in connection with such inspection.

- Section 207(2) – Notes and Marks

  RoC or inspector may make copies and also make notings and identification marks in token of inspection.

- Section 207(3) – Powers of Civil Court

  - ✓ RoC or inspector has the power of a civil court.
  - ✓ To require discovery and production of documents.
  - ✓ Summoning and enforcing of attendance of persons and examining them on oath.
  - ✓ Inspection of books, registers and documents of the company at any place.

- Section 207(4) – If a director or officer disobeys any direction, he may incur disqualification from holding any office in any company

  If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than Rs.25,000/- [Rupees Twenty Five Thousand] but which may extend to Rs.1,00,000/- [Rs.1 Lakh].

An analysis of the sub-sections (1) to (3) of this Section will show as follows:

- ✓ Sub-section (1) has more to do with Section 206. Properly it should have been placed right under Section 206 itself. In fact, sub-section (2) of Section 206 almost states the same thing.
- ✓ Sub-section (2) enables RoC or the Inspector to make markings and notings on the papers inspected for the purpose of identification.
- ✓ Sub-section (3) gives RoC or the Inspector certain powers of a civil court.

Therefore the real effect of sub-section (4) of this Section which is a penal clause will arise only if the RoC or the Inspector, as the case may be, summons any information or the production of any document and if the same is not complied with, the penal provision under sub-section (4) may be invoked.

As the language refers to a director or officer who has disobeyed a direction of RoC or the Inspector, it goes without saying that the direction must refer to any particular director or officer and it is only such director or officer who is liable to punishment if such director or officer disobeys.

Any director or officer who is convicted of an offence punishable under the above penal provision shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

The most important part of this penal provision is that the director or officer who is convicted of an offence as aforesaid gets disqualified from holding any office in any company!

As the word “office” is not defined, a reference to Section 2(59) of the Act would show the word “officer” includes any director, manager or key managerial

personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act. As such "disqualified from holding any office" should be understood in the context of the word "Officer" under the Act to mean any office the holding of which will make him an Officer.

- Section 208 –Report of RoC or the Inspector

  RoC or inspector to submit his report to the Central Government and recommend investigation.

- Section 209 – Seizure of Books and Papers requires Order of Special Court

  If the RoC or the Inspector has reasonable ground to believe that the books and papers of a company, or relating to the key managerial personnel or any director or *auditor or company secretary in practice* if the company has not appointed a company secretary, are likely to be destroyed, mutilated, altered, falsified or secreted, he may, after obtaining an order from the Special Court for the seizure of such books and papers,—

  - ✓ *enter*, with such assistance as may be required, and search, the place or places where such books or papers are kept;
  - ✓ *seize* such books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books or papers at its cost.

- Section 210 – Investigation into the affairs of a Company

  - ✓ Central Government may direct an investigation into the affairs of the company
  - ✓ Based on the report of the RoC or Inspector

- ✓ Based on any special resolution
- ✓ Based on public interest
- ✓ Central Government shall direct an investigation into the affairs of the company
- ✓ Based on a order passed by a court or tribunal

- Section 212 – Serious Fraud Investigation Office

  - ✓ Central Government may direct an investigation into the affairs of the company by SFIO
  - ✓ On the basis of the report of RoC or Inspector,
  - ✓ special resolution
  - ✓ in public interest
  - ✓ on request from any department of Central Government or State Government.

- Section 213 – On the application of eligible members, Tribunal may direct investigation

  On the application of not less than 100 members or 1/10th of the total voting power or in case of a company without share capital, 1/5th of the number of members, Tribunal may order investigation into the affairs of the company.

  On the application made by any person that the affairs of the company are carried on with an intention to defraud the creditors, members or any other person or otherwise, fraudulent or unlawful purpose or oppressive of members or persons in the management or guilty of fraud, misfeasance or other misconduct or members have not been given information with respect to the affairs of the company.

  If fraud is proved, action under Section 447 can be initiated.

- Section 216 – Investigation to find out true owners

  The Central Government may order investigation to decide the true persons who are or who have been financially interested in the success or failure or who have been able to control or influence the policy of the company.

- Section 217 - Powers of inspectors

  - ✓ Inspector may call for records, books and papers;
  - ✓ Inspector may hold in his custody records, books and papers for not more than 180 days.
  - ✓ Inspector may examine on oath any person who is an officer or director of the company
  - ✓ Inspector has the powers of the civil court for the following :
    - o To require discovery and production of documents.
    - o Summoning and enforcing of attendance of persons and examining them on oath.
    - o Inspection of books, registers and documents of the company at any place.

- Section 217(6) – Director or Officer who disobeys may undergo severe punishment!

  If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than Rs.25,000/- [Rupees Twenty Five Thousand] but which may extend to Rs.1,00,000/- [Rs.1 Lakh].

A look at the entire Section 217 would show that it has no reference to anything to be done by RoC. This section pertains to powers of an Inspector appointed for carrying out an investigation into the affairs of the Company. However the above penal clause alone refers to RoC also.

Any director or officer who is convicted of an offence punishable under the above penal provision shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

Note: Discussion under Section 207(4) may also be read in conjunction with this explanation.

- Section 212(8) – Powers of Directors of SFIL to Arrest

  Any director, additional director, additional director of SFIO has the power to arrest any director or any other person who has any material in his possession or any person who is guilty of an offence referred to in various sections.

  Every person arrested by SFIO must be produced before the magistrate within 24 hours.

- Section 221 -Freezing of assets of a company

  Any creditor to whom not less than Rs.1 lakh is due may apply to Tribunal and obtain an order of injunction against alienation of properties.

COMPROMISES AND ARRANGEMENTS

The concept of law under Section 230 can be summarised as under:

1. The Section 230 deals with arrangements / compromises with creditors / members. It also provides for re-organisation of share capital by consolidation, division or by both.

2. The Application by way of an affidavit made to the Tribunal shall disclose the following

    a. All material facts relating to the company including latest financial position, latest auditor's report on accounts and pendency of any investigation or proceedings against the company

    b. Valuation on shares, assets should be done by a Registered Valuer.

    c. In case of Corporate Debt Restructuring (CDR)– 75% of secured creditors in value need to consent.

        i. To provide Creditors Responsibility Statement in prescribed form.

        ii. Safeguard to protect other secured & unsecured creditors.

        iii. Auditors report on fund requirements post CDR about meeting liquidity test based on estimates by Board.

        iv. If CDR is as per RBI guidelines, the Scheme should provide a statement to that effect.

        v. Valuation on shares, assets should be done by a Registered Valuer.

    d. Objection to scheme can be made only by shaeholders holding 10% or more and by creditors 5% of the total outstanding debt.

3. The notice of the meeting to them will require a statement disclosing the details of compromise or arrangement which should also explain the effect of the scheme on creditors, key managerial personnel, promoters and non-promoter members, debenture holders, effect of scheme on any material interests of directors, debenture trustees and such other matters to be prescribed along with a copy of the valuation report, if any. Further supplementary accounting statement needs to be circulated if the last annual accounts related to a financial year ending more than 6 months before the meeting. Reduction of capital envisaged

4. Notice and other documents shall be placed on website of the company, if any.

5. Listed Companies to send the same to SEBI, Stock Exchanges for placing on their websites

6. Notice to be published in newspapers as may be prescribed

7. To provide in advertisement time limit within which documents are made available free of cost

8. Communicate the mode of voting in person or by proxy, by postal ballot within one month from the date of receipt of such notice to be mentioned

9. Notice and all documents to be sent to Central Government, Income Tax authorities, RBI, SEBI, Stock Exchanges, Official Liquidator, Competition Commission of India , if necessary and other Sectoral Regulators.

10. If no Representation is received within 30 days from the date of receipt of the aforesaid notice from the aforesaid agencies, then it will be presumed no representation to make on the proposal.

11. Voting by 3/4ths in value for the scheme to be binding on company, creditors, members.

12. Order to provide receipt of arrears of dividend by cash or additional shares in case of preference shareholders, protection of creditors, variation of shareholder rights, in respect of sick companies BIFR proceedings can abate, exit offer to dissentient shareholders.

13. Auditor to provide certificate for compliance of and conformity of AS if scheme is implemented

14. To file the order within 30 days of receipt with RoC

15. To dispense creditors meeting if atleast 90% creditors consent

16. Buy-back to be in accordance with Section 68.

POWER OF TRIBUNAL TO ENFORCE COMPROMISE OR ARRANGEMENT

The concept of law under Section 231 can be summarised as under:

1. Tribunal to have power to supervise implementation of the scheme
2. Tribunal to have power to modify for proper implementation
3. If scheme could not be properly implemented or company unable to pay debts as per scheme to order winding-up
4. Can order winding-up even for schemes sanctioned under S.391 of Companies Act, 1956.

MERGER & AMALGAMATION OF COMPANIES

The concept of law under Section 232 can be summarised as under:

1. If two or more companies desire to merge they can propose a Scheme of Arrangement and move the Tribunal through an application. The Tribunal will then direct the companies to conduct meetings of creditors or calls of creditors or members or class of members. The notice of the meeting to them will require a statement disclosing the details of compromise or arrangement which should also explain the effect of the scheme on creditors, key managerial personnel, promoters and non-promoter members, debenture holders, effect of scheme on any material interests of directors, debenture trustees and such other matters to be prescribed along with a copy of the valuation report, if any. Further supplementary accounting statement needs to be circulated if the last annual accounts related to a financial year ending more than 6 months before the meeting.

2. Upon satisfaction of the procedure, the Tribunal will order transfer of undertaking together with all assets, liabilities from the date as determined by the parties to the scheme and allotment of shares or securities as per the scheme, continuation of legal proceedings pending on the transferor company, dissolution without winding-up of the transferor compay.

3. The order of Tribunal shall also include time within which persons concerned with the scheme can dissent from the compromise or arrangement.

4. Allotment of shares to non-resident will be as per laws in force at that time will be specified in the order.

5. Transfer of employees of the transferor company to the transferee company.

6. If the merger is between a listed transferor company to a unlisted transferee company, then the transferee company shall remain as unlisted company. Where shareholders of Transferee Company opt out, then the price at which payment need to be made to them and other benefits should be decided by a pre-determined formula.

7. Fee paid by the transferor company on its capital can be set off by the transferee company.

8. To file order within 30 days of receipt with RoC

MERGER OR AMALGAMATION OF CERTAIN COMPANIES

The concept of law under Section 233 can be summarised as under:

1. Merger or amalgamation of small companies, between holding and wholly owned subsidiary, such classes as may be prescribed

2. Provisions of Sections 230 and 232 does not apply

3. Serve notice to jurisdictional Registrar of Companies, Official Liquidator, persons affected by the scheme with in 30 days.

4. Objections and suggestions received to be considered in general meetings of members holding at least 90% of shares

5. Filing of declaration of solvency with Registrar of Companies.

6. 9/10ths of value of creditors or class of creditors of respective companies to approve the scheme or give in writing for waiver of meeting.

7. Approved scheme to be filed with Central Government, Registrar of Companies, Official Liquidator by Transferee Company.

8. Objections by Registrar of Companies, Official Liquidator to be intimated to Central Government within 30 days.

9. Central Government to register the scheme if Registrar of Companies , Official Liquidator have no objections or if no Objection from Registrar of Companies, Official Liquidator is received within 30 days.

10. If there are objections and Central Government feels that the scheme is not in public interest or interest of creditors, to file application to Tribunal with 60 days of receipt of Scheme, else deemed that Central Government has no objection to the scheme.

11. Tribunal to follow Section 232 procedure and pass such orders.

12. Order to be registered by Registrar of Companies and intimate Registrar of Companies of transferor companies.

13. Transferor Companies to dissolve without winding-up.

AMALGAMATION OF A COMPANY WITH FOREIGN COMPANY

The concept of law under Section 234 can be summarised as under:

1. Merger or amalgamation with foreign company is also provided, however subject to any other law for the time being in force

2. Provisions of Chapter XV to apply mutatis mutandis to such merger.

3. Subject to any other law and **may** with prior approval of RBI a foreign company may merge into a company in India or vice-versa and the terms of scheme may provide payment of consideration in shares, cash, Depository Receipts.

4. Foreign company need not have place of business in India

ACQUISITION OF MINORITY INTEREST

The concept of the law contained in Section 236 could be summarized as follows:

1. This section imposes a statutory obligation upon persons who are known as acquirers and persons who act in concert with such acquirers [Let us refer to all of them as Acquirers], becoming majority shareholders whose names are registered in the Register of Members of the Company for 90% or more than the issued equity share capital of the Company.

2. Such Acquirers, upon becoming registered holders of 90% or more shares forming part of the issued equity share capital, must notify the company and offer to purchase the shares held by other shareholders who are known as the minority shareholders.

3. The offer price must be discovered by a valuation process.

4. Once an offer is made, the amount required for buying the entire stake of minority shareholders must be deposited with the Company and such deposit should be kept with the Company for a period of 1 year.

5. Payment to minority shareholders who are entitled to such payment must however be made within 60 days.

6. In case any minority shareholder does not surrender his share certificates and transfer instruments, the company can issue fresh certificates to the majority treating the share certificates of such minority as cancelled and effect payment to such minority.

7. In case the whereabouts of some minority shareholders or their legal heirs could not be traced, the right of such minority shareholders or persons claiming title to such shares to offer their shares for acquisition by majority must continue for a period of 3 years from the date the majority becomes registered holders of 90% or more of the issued equity share capital.

8. In case prior to transfer of shares by minority to majority by virtue of this provision, if holders of 75% of more of the issued equity share capital enter in any proposal, agreement, contract or deal to transfer their shares at a price that is higher than the price at which shares are liable to acquired by majority by virtue of sub-clause (2), or as the case may be, shares may be offered by the minority under sub-clause (3), minority shareholders must be compensated and majority shareholders are liable to share with the minority shareholders the additional compensation so received by them on a pro rata basis.

9. Even after the offer of the majority lapses, the remaining minority shareholders who are known in this section as ‘residual minority equity shareholders’ have the statutory right to require the majority to purchase their shares.

NATIONAL COMPANY LAW TRIBUNALS

Tribunals are being established with enormous powers at the head quarters of almost all the States. Several matters hitherto handled by high courts such as Mergers, Demergers, Scheme of Arrangements, compromises, Corporate transactions, winding up of companies and liquidation are all going to be directly handled and adjudicated by these Tribunals. Gone are the days when winding up used to take decades even in respect of companies in existence only for a few years. The net result of such a long drawn bureaucratic and judicial process is the purpose of insolvency regime is lost. Economic value of assets fall and recycling becomes difficult. Under the Act, Company Secretaries, Chartered Accountants and other Professionals with specified qualifications and training may be appointed by the National Company Law Tribunal as Liquidators so as to deal with corporate insolvency in a “business-like” manner.

REVIVAL OF SICK COMPANIES

1. Under the Sick Industrial Companies (Special Provisions) Act, 1985, the Board for Industrial and Financial Reconstruction [BIFR] has powers to declare a company having one or more industrial undertakings as a Sick Industrial Company and consider and sanction a scheme for revival and rehabilitation of the Sick Industrial Company.

2. Whenever the net worth of an industrial company erodes completely, Section 15 of SICA mandates the making of a reference to BIFR for the purpose of determination whether the company that has made the reference as aforesaid has become a sick industrial company and thereafter for determining the measures that have to be taken for revival and rehabilitation of the sick industrial company. If the BIFR forms an opinion that a revival and rehabilitation of the sick industrial company is not possible, it has powers to order a winding up of the sick industrial company.

3. Whenever the net worth of an industrial company erodes by 50%, Section 23 of SICA requires the industrial company to submit a report to BIFR on the ground that the company has become potentially sick.

4. When the relevant provisions of the Act are brought into force, the above requirements will become a thing of the past. When the Central Government notifies a date under Section 434 of the Act, inter alia, the jurisdiction and powers of BIFR and the Appellate Authority for Industrial and Financial Reconstruction [AAIFR] under SICA will eventually end.

5. Under the Act, there are provisions paving way for making a reference to the NCLT though not on the same lines as are there under SICA. Even a sick industrial company in respect of which proceedings before BIFR / AAIFR have got abated in pursuance of the coming into force of the relevant provisions of the Act may make a reference to the Tribunal in accordance with the Act.

6. Without prejudice to the special enforcement rights of secured creditors under the SARFAESI Act, the Act introduces provisions for revival and rehabilitation of a sick company. In other words, SARFAESI Act retains its supremacy.

7. The trigger for filing an application to the Tribunal to determine whether a company is a Sick Company or not is based on a default on the part of the Company if upon demand by secured creditors representing 50% or more of outstanding amount of debt the company has failed to pay the debt within 30 days or to secure or to compound the debt to the reasonable satisfaction to the creditors.

8. In other words, the entire process involving declaration of a company as a sick company is triggered by the failure of the company to pay the debt or to secure or compound the same to the satisfaction of the creditors.

9. The secured creditors of the defaulting company may approach the Tribunal with an application for determining whether the company has become a sick company and for determining measures for its revival.

10. Thus there is no possibility of making any application to Tribunal unless there is a demand and a default to meet the demand as aforesaid.

CLASS ACTION SUITS

Class Action Suits has now become a reality in India which is likely to cause discomfort to the corporate sector. However, we do not see any reason for the corporate leaders to be unreasonably worried so long as they take care, comply with applicable law, rules and regulations, install and promote a sound corporate governance. It is only aimed to prevent those corporate whose dealings are not transparent and who try to act in a manner prejudicial to the interests of shareholders and creditors.

TRANSFERS OF POWERS AND JURISDICTION

Upon coming into force of the relevant provisions of the Companies Act, 2013, the jurisdiction and powers of High Courts under that Act to the extent explained in this article and that of the quasi-judicial forums, the Company Law Board [CLB] under that Act as well as that of the Board for Industrial and Financial Reconstruction [BIFR] and the Appellate Authority for Industrial and Financial Reconstruction [AAIFR] under the Sick Industrial Companies (Special Provisions) Act, 1985 are going to end.

CLB to NCLT

Presently the CLB is empowered under Section 10E (1A) of the 1956 Act to exercise such powers and functions with respect to various matters requiring adjudication. Prominent amongst the disputes that are adjudicated by the CLB are those matters relating to rectification of register of members and oppression and mismanagement, besides other powers exercised in relation to compounding of offences.

Section 434 of the Act states that all matters, proceedings and cases pending before CLB will stand transferred to the NCLT. However in respect of any orders issued before the date notified by the Central Government for such transfer, appeals will lie before the High Court only.

BIFR and AAIFR

Under the Sick Industrial Companies (Special Provisions) Act, 1985, the BIFR has powers to declare a company having one or more industrial undertakings as a Sick Industrial Company and consider and sanction a scheme for revival and rehabilitation of the Sick Industrial Company. In case, the BIFR finds that it is not possible for the revival and rehabilitation of the Sick Industrial Company, it has powers to order winding up of the Sick Industrial Company. Appeals against orders of the BIFR lie before the AAIFR. No provision for further challenge by way of a statutory appeal against any order of AAIFR is available save and except the writ jurisdiction of High Courts.

When the relevant provisions of the Act are brought into force, the powers, substantially, different from those of the BIFR will stand transferred to and vested in and exercised by the NCLT and appeals arising from orders of the NCLT will lie before the NCLAT.

High Court to NCLT / NCLAT

Under Section 10F of the Companies Act, 1956, appeals arising from the orders of the CLB are decided by a Single Judge of the High Court having jurisdiction over the registered office of the company in relation to which the CLB had passed the order. Under the Act, the appeals against the orders of the NCLT will lie before the NCLAT.

Under the Companies Act, 1956, schemes of compromises, arrangements, mergers, demergers are subject to sanction of High Court. Further all matters relating to winding up of companies come under the jurisdiction of the High Courts. Appeal arising from the orders of the High Courts in the above matters lie before a division bench of the High Courts. Further appeals may be made before the Supreme Court of India by special leave. Similarly any order or decision of a single judge of the High Court under Section 10F also goes straight to Supreme Court of India subject to special leave.

When the relevant provisions of the Act are brought into force, powers of the High Courts with respect to such schemes of arrangement and those relating to winding up of companies will stand transferred to and vested in and exercised by NCLT and appeals arising from orders of NCLT will lie before the NCLAT.

Continuance of Appeals pending adjudication

Upon coming into force of the relevant provisions of the Act INSPITE OF the establishment of NCLT and NCLAT, Section 434 of the Act states that appeals relating to any matter arising from any order of the CLB under Section 10F of the 1956 Act and other appeals arising from orders of High Courts which are pending disposal before

High Courts / Supreme Court of India will continue to be considered, adjudicated and disposed by the respective Court.

Powers of High Courts to grant relief in matters relating to apprehended prosecution for offences under the Act will continue to be vested and exercised by High Courts by virtue of Section 463 of the Act.

Continuance of certain things despite repeal of the Companies Act, 1956

The important things that are saved by this sub-section despite the repeal of 1956 Act are given below:

- The repeal does not affect any rule, notification, order and any proceeding taken or any fine or any penalty imposed under 1956 Act would be construed as having been taken under the corresponding provisions of this Act in so far as it not inconsistent with the provisions of this Act.
- Any order, rule, notification or direction issued under 1956 Act will remain in force as if it has been issued under this Act.
- Any prosecution instituted under the 1956 Act and pending disposal at the commencement of this Act should be continued to be heard and disposed of by the same Court before which the said prosecution is pending disposal.
- Any inspection investigation or enquiry commenced under 1956 Act will have to continue as if the inspection or investigation or enquiry had been ordered under the corresponding provision of this Act.
- Any application of representation filed / made to the Registrar of Companies, Regional Director or the Central Government under 1956 Act shall be dealt with in terms of the 1956 Act despites its repeal.

COMPOUNDING OF OFFENCES

Compounding of offences was a comfortable option because most of the offences under the Companies Act are technical offences. It is quite possible that despite sincere attempts contraventions do happen. The Act makes it clear that only those offences which are punishable with "fine only" are compoundable offences. Therefore it would not be fine any longer to afford to commit any contravention in the case of any offence coming under any other category. An offence punishable with fine or imprisonment or both may have to be dealt with great care and caution. *Therefore we suggest that every company sets up a compliance management system and sensitises its secretarial staff, senior managers and directors on the fall out of contraventions of the provisions of the Act*.

ADJUDICATORY MECHANISM

Adjudicatory mechanism and Special Courts are two new dispensations brought about under the Act in order to deal with offences and prosecutions. In the case of a compoundable offence, the company and its offices in default have to necessarily admit the offence and suffer the compounding fee without any room for arguing their case. The new law enables an adjudication process before an adjudication officer whereby it is possible to show that technically there is no offence though the Registrar seems to have formed an opinion as though an offence has been committed. Special Courts will be established under the Act for speedier disposal of criminal cases.

ESTABLISHMENT OF SPECIAL COURTS

Section 435 of the Act seeks to establish a special court consisting of a Single Judge appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the Judge to be appointed is working. The Special Court has powers to try all the offences under this Act under the jurisdiction of which the registered office of the company is situated.

SPECIAL COURTS HAVE POWERS - SUMMARY TRIAL TO REGULAR TRIAL

Section 436 makes it clear that any offence under this Act which is punishable with imprisonment not exceeding 3 years may be tried in a Special Court in a summary way. However the Special Court must be satisfied that based [on the facts and circumstances of case, it may not necessary] it would not pass any sentence of imprisonment for a term exceeding one year. In case, during the course of a summary trial, if it appears to the Special Court that a sentence of imprisonment exceeding one year may have to be passed, Section 436 enables the court to close the summary trial and proceed to hear or rehear the case as a regular trial.

POWER OF SPECIAL COURTS TO ORDER DETENTION OF AN ACCUSED / SUSPECT

The Special Court has powers to order detention of a person accused of having committed an offence under the Act for a period not exceeding 15 days, where the Magistrate is a Judicial Magistrate and for a period not exceeding 7 days if the Magistrate is a Executive Magistrate. By virtue of this provision, it becomes clear that the person accused of having committed an offence under this Act can be forwarded to a Magistrate under subsection (2) or subsection (2(A)) of Section 167 of the Code of Criminal Procedure 1973 and it appears that for committing the accused to trial in any case, the Special Court alone will have jurisdiction.