Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

Critical insights to the Company Law Committee Report 2022

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Received 17 May 2022; *Accepted* 30 May 2022; *Published* 09 June 2022

The Company Law Committee("Committee")with the helping hands of the legal fraternity and professional institutions, presented its 3rd report ("Report") in March 2022 to ease doing business in India, facilitate effective corporate governance, smoothen the regulatory framework by consolidating corporate laws in India and reducing regulatory gaps in the Companies Act, 2013 ("CA-13"). This paper is divided into four parts. Part one discusses the importance of change and briefly discusses the objectives of the report. Part two walks you through the concepts of corporate governance and the ease of doing business in India, respectively. Part three takes a nosedive into the recommendations proposed by the Committee in six subparts, namely, the harnessing of technology in the ease of doing business, bolstering the audit framework, the introduction to novel concepts in the CA-13, facilitating the ease of doing business in India, tightening corporate compliances and miscellaneous (drafting and clarificatory changes), and finally the concluding thoughts of the author.

Keywords: *CLC, CLC recommendations 2022, CLC report, companies act, 2013.*

INTRODUCTION

We have all been recipients of the zeitgeist shift caused by the COVID-19 pandemic (**"Pandemic"**) and its tremors are continued to be felt globally at every turn of the curb to this very day. Add to that the great resignation, inflation, red tape, and many corporations have moved to a hybrid model of working. As a result, unprecedented uncertainties and large-scale changes have occurred. Put in context, there is a choice between two distinct approaches that can be taken to respond to these uncertainties.

PROACTIVENESS *vs* STILLNESS

***''The best is the enemy of the good''* – Voltaire**

On the one hand, often, the notion of enforcing change is rejected or painfully brushed off or even unhelpfully discouraged from bringing development because, what is proposed falls short of 'ideal' and on the other hand, if we want to make progress, we must strive for improvement instead of perfection. Yet, one must avoid falling for the illusion of constant improvement. Instead, one must stay put and 'remain at one place, the value of which is not to be underestimated. One can quite simply sense the yawning gap between these two meanings- they are rather opposing approaches to uncertainty: You have pragmatism on the one end of the spectrum, aiming for the improvement on every step of the journey and embracing the unknown situations even if they are not ideal. On the other end of the spectrum, taking to a cautious approach to attain idealism at the cost of progress, avoiding progress for the mere sake of it, and running the risk of making matters worse. As mentioned earlier, we are often faced with the dilemma of deciding between being proactive or cautious – corporate governance is no exception. Legislations have stood still before – think of times before the 'much needed' amendments to laws were made – and paid heavily for the tardiness. When you think of pragmatism, let's cast our minds to the year 1991, when the Indian government broke with the erstwhile industrial policies to combat uncertainty and this opened the floodgates to a 180-degree twist and welcomed new radical reforms that encouraged a spirit of business activity, stimulated growth in the private sector, and revived international trade.[1]

However, despite all the fanfare around the resultant dynamism in the business ecosystem and the ever-fast-growing Indian economy during modern times, the regulatory framework must play catch up, keep up and upgrade itself, and step up from time to time to meet with the staggering challenges that corporate governance has on offer. Fortunately, in March 2022,

[1] Salvador Amaya, 'The Success of India's Liberalization in 1991' (*UFM Market Trends*, 12 March 2020) <https://trends.ufm.edu/en/article/indias-liberalization-1991/> accessed 08 May 2022

the Company Law Committee (**"Committee"**), with a great deal of thought, took proactive measures to address the above uncertainties and presented their third report (**"Report"**) in the form of recommendations to the Indian government.[2] The primary objectives of these recommendations were aimed at facilitating and promoting the interests of greater ease of doing business (ease of company compliance burdens) in the Republic of India (**"India"**), seeking to invigorate the welfare of the major stakeholders associated with the corporate business structure and the effective implementation of the Companies Act, 2013 (**"CA-13"**), the Limited Liability Partnership Act, 2008 and the Rules made thereunder[3], inter alia, albeit the scope of this paper is strictly restricted to discussions on the recommendations presented on the CA-13 solely. Similar to that of the workings of an orchestra, an orchestra has myriad talents but the conductor brings them together to move the dial – collective engagement, practical knowledge, clarity of thought, creativity – come from the quality and talents of the people who work in it and who lead it and therefore, the Committee had fittingly benefitted from the participation of representatives from the legal fraternity, professional institutes, and industry chambers – who furthered their views through detailed deliberations with the Committee to contribute to the recommendations contained in this Report.

On an unsurprising note, several experts and professionals in the corporate field believe that the recommendations contained in this Report, if accepted and becoming a part of the Companies Amendment Bill (**"CAB"**), would serve as a progressive bridge and create a perfect axis by bringing Indian company laws (**"Laws"**) in tune with globally recognised best practices and improve ease of living for corporates and stakeholders.[4]

EFFECTIVE CORPORATE GOVERNANCE

The rationale behind these recommendations: Primarily, it is essential to appreciate the reasoning behind these recommendations. In many ways, company law reform seems to be on

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[2] Ministry of Corporate Affairs, *Report of the Company Law Committee* (21 March 2022) <https://www.mca.gov.in/bin/dms/getdocument?mds=bwsK%252FBEAFTVdpdKuv5IR5w%253D%253D&type=open> accessed 04 May 2022

[3] *Ibid*

[4] *Ibid*

the agenda in nearly all the countries and the driving forces behind the reform of extant company law are much the same: i.e. the pressure of internationalisation and competition, rapid growth, and changes in the shareholder population, the emergence of new industries, and the striking developments in financial markets, digitalisation, and modern technology.[5]Therefore and objectively, the necessity behind these recommendations boils down to bolstering and invigorating corporate governance in India, even if that means weeding out anomalies in the Laws. There is a direct causal link between sound corporate governance practices and the success of companies. Many studies argue that better corporate governance practices translate into better access to both, equity and debt financing, resulting in a lower cost of capital,[6] which is a benefitting prospect to any company.

WHAT IS CORPORATE GOVERNANCE AND WHAT IS ITS SIGNIFICANCE?

The Oxford Dictionary defines the word 'corporate' as an adjective belonging to a corporation and on the other hand, 'governance' is an act on the function of governing.[7] The term 'governance' derives from the Latin term 'gubernare', meaning 'to steer, which implies that corporate governance involves the function of direction rather than control. Therefore, in simple terms, corporate governance is a function of governing a corporation.[8] In the year 1998, the Organisation for Economic Cooperation and Development (**"OECD"**) Business Sector Advisory Group on Corporate Governance, developed a model report on corporate governance, more popularly known as the "Millstein Report" and this group was chaired by

[5] Prof. Klaus J. Hopt, 'Modern Company Law Problems: A European Perspective Keynote Speech' (*OECD, 8* December 2000) <https://www.oecd.org/daf/ca/corporategovernanceprinciples/1857275.pdf> accessed 4 May 2022

[6] Eustaquio de Nicolás & João Pinheiro Nogueira Batista, 'The Tangible Benefits of Good Governance' (*OECD*) <https://www.oecd.org/daf/ca/corporategovernanceprinciples/43654500.pdf> accessed 6 May 2022

[7] Shamsher Mohamad & Zulkarnain Muhamad Sori, 'An Overview of Corporate Governance: Some Essentials' (*Research Gate,* April 2011) <https://www.researchgate.net/publication/228134164_An_Overview_of_Corporate_Governance_Some_Essentials> accessed 06 May 2022

[8] *Ibid*

an imminent corporate governance expert Ira M. Millstein, who propounded two definitions for the term 'corporate governance, either narrowly or broadly.[9]

DEFINITIONS UNDER THE MILLSTEIN REPORT

Corporate governance in the narrow version: The relationship between managers, company directors (**"Directors"**) and shareholders and includes the relationship of the corporation to the stakeholders and the society.[10]

Corporate governance in the broad version: Corporate governance in the broader sense would encompass the combination of laws, regulations, listing rules, and voluntary private-sector practices that enable the corporation to attract capital, perform efficiently, generate profit and meet both legal obligations as well as the expectations of society generally.[11] In essence, the takeaways from the above definitions of effective corporate governance amount to, the corporation assuring finance providers or investors (in whatever form), that their investments are managed and used in a manner that is protected and productive.[12]

THE SIGNIFICANCE OF CORPORATE GOVERNANCE

"The governance of the corporation is now as important in the world economy as the government of countries".[13]

Over the past few decades, with the introduction of technology, large-scale investments, and the growth of business complexities, the private sector has been viewed as a special vehicle for the growth of the economy. Therefore, the significance placed on corporate governance is staggering and the following points as noted by Gregory and Simms, briefly cover the significance of corporate governance that have a direct impact on, namely:

[9] Shafi Mohamad, 'Why Effective Corporate Governance Matters' (*ResearchGate*, December 2018) <https://www.researchgate.net/publication/333530437_Why_Effective_Corporate_Governance_Matters> accessed 13 May 2022

[10] *Ibid*

[11] *Ibid*

[12] *Ibid*

[13] J.D. Wolfensohn, *A Battle for Corporate Honesty'The Economist: The World in 1999* (1999) 38

a. The efficiency with which a corporation employs assets;

b. Its ability to attract low-cost capital;

c. Its ability to meet the expectations of society; and

d. Its overall performance.[14]

THE EFFICIENCY WITH WHICH A CORPORATION EMPLOYS ASSETS

Sound corporate governance ensures that resources are used optimally both intra-firm and inter-firm and channels debit and equity capital to those corporations that are capable of investing most efficiently into prospects that yield the highest rate of return. Therefore, promoting healthy asset management practices.[15]

It's the ability to attract low-cost capital

Effective corporate governance puts into place a systematic mechanism that garners the confidence of both, foreign and domestic investors that their investments will be used for the purposes agreed.[16]

Its ability to meet the expectations of society

For sustained and long-term success, corporations must abide by the laws, regulations, and other altruistic expectations of the societies where they operate, and therefore, corporations occupy the role of corporate citizens and contribute to civil society.[17]

Its overall performance

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[14] Holly J. Gregory & Marsha E. Simms, 'Corporate governance: What it is and why it matters' (*Growth Oriented Sustainable Entrepreneurship*, 1999) <https://growthorientedsustainableentrepreneurship.files.wordpress.com/2016/07/gv-corporate-governance-what-it-is-and-why-it-matters.pdf> accessed 06 May 2022

[15] *Ibid*

[16] *Ibid*

[17] *Ibid*

Sound corporate governance demands and equips the firm's management with oversight (to have the end in mind) and holds the Board of Directors (**"Board"**) and the management accountable in their management of corporate assets.[18] This oversight and accountability combined with the efficient use of resources, improved access to lower-cost capital, and increased responsiveness to societal expectations would lead to improved corporate performance. This would encourage the management to focus on improving the firm's overall performance and are expectedly replaced when they fail to do so.

On a side note, corruption in business dealings is curbed as sound corporate governance renders it difficult for corrupt practices to develop and take root in corporations. However, despite all signs of sound corporate governance, it is important to cultivate the right corporate culture and attitude to facilitate the objectives of effective corporate governance. The amount of the Board's in-depth knowledge and understanding of the workings of the principles of sound corporate governance and its accountability in having these principles implemented will determine the long-term success of the corporation.

THE EASE OF DOING BUSINESS IN INDIA

What is the ease of doing business?

Ease of doing business is a ranking system that is established and published by the World Bank from time to time and contains an aggregate figure that includes various parameters that define the ease of doing business in a country. For instance, how the regulatory framework is conducive to business activities in a specific country, the stronger the regulatory framework would determine a higher ranking in the ranking system.

India is ranked 63 among 190 world economies in the ease of doing business according to the 2019 World Bank annual ratings. The rank of India leap-frog-ed to 62 in 2019[19] from 77 in 2018. A country occupying a higher rank would instill a greater spirit of investor confidence in that country and potentially larger sums of investment from both, foreign and domestic investors.

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[18] *Ibid*

[19] 'Ease of doing business rank (1=most business-friendly regulations)' (*World Bank*) <https://data.worldbank.org/indicator/IC.BUS.EASE.XQ> accessed 13 May 2022

Therefore, countries would be vying for higher rankings in the World Bank annual ratings in the ease of doing business.

Thus, by the aforementioned factors, we have a clearer understanding as to why the Committee furthered its recommendations to amend the extant Laws.

RECOMMENDATIONS OF THE REPORT AND THEIR IMPLICATIONS: NEW WINE IN OLD BOTTLES?

''It is not the most intellectual of the species that survives; it is not the strongest that survives, but the one that is able to adapt to and to adjust best to the changing environment in which it finds itself.''

- Charles Darwin[20]

Amendments (change) to corporate laws appears to be the newest cry of civilised countries on both sides of the ocean and conforming to global corporate best practices is what has forced the Committee to give a fresh look at the venerable Laws (along with its practices) and to face the fact that they are a far cry from that of reality. The Committee though has, as discussed above, obsequiously come up with practical recommendations to combat these challenges and they are discussed in detail hereunder.

THE INFUSION OF RECOMMENDATIONS

The harnessing technology (digitalisation) will have a positive impact on the ease of doing business in India

The revolution of 1789 (**"French revolution"**), was a revolutionary movement of universal significance that shook France to its very grassroots, causing major social upheaval.[21] The French Revolution changed completely the relationship between the rulers and those they

[20] Nikol Chen, 'The One Most Adaptable to Change is the One that Survives' (*Laid Law Scholars*, 19 April 2021) <https://laidlawscholars.network/posts/the-one-most-adaptable-to-change-is-the-one-that-survives> accessed 06 May 2022

[21] 'French Revolution 1787-1799' (*Britannica*) <https://www.britannica.com/event/French-Revolution> accessed 06 May 2022

governed, ergo, this emanated many mottos in use, namely: "Liberty, Equality, and Fraternity".[22]

In my opinion, this Pandemic and the French Revolution are no different as far as the notion of furthering 'change' is concerned, and this Pandemic is continuing to cause major upheaval globally. Additionally, by this Pandemic, our efforts have been intensified towards the use of digital technology in our dwellings and these changes should not be viewed as a ''new normal'', on the contrary, these changes are no lesser than a revolution in the manner we work. As a result, major changes have been effectuated on the digital front by the Committee to cope with user demands, and stakeholder engagement and such changes have mottos to abide by, namely, "Legality, Equitability, and Technology".

Section 20 of CA-13 outlines the different modes by which documents can be served on a company, its officers, or the RoC. Section 20(2) of the CA-13 stipulates that a document may be delivered to the RoC or any other member through registered post, speed post, courier, or any other electronic mode as may be prescribed. While Section 20(2) of the CA-13 expressly permits the service of documents in electronic form, the Committee deliberated whether the provision should be amended to mandate/enable certain classes or classes of companies to serve documents to their members in electronic mode only.

The service of documents in electronic form

The extant provisions: Section 20 of CA-13 stipulates different modes (registered post, speed post, courier, or any other electronic mode as may be prescribed) by which documents can be served on a company, its officers, any member of the Registrar of Companies (**''RoC''**).

The Committee's observations: The Committee took into account the convenience factor, especially in the times of the restrictions imposed by the Pandemic, of the innovative use of technology, in the form of electronic communication. The Committee albeit did not rule out

[22] 'Liberty, Equality, Fraternity' (*Diplomatie*) <https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/symbols-of-the-republic/article/liberty-equality-fraternity> accessed 08 May 2022

the notion of serving documents by the means of physical modes for the stakeholders that prefer it.[23]

The Committee's recommendations: A recommendation was furthered to amend section 20 of the CA-13 to introduce an enabling special provision to entitle the Central Government of India (**"Central Government"**) to stipulate rules, with safeguards to secure the interests of the investors, for a certain class or classes of companies to mandatorily serve such documents as may be stipulated to their concerned members through the electronic mode solely for compliance with the CA-13.[24]

Concurrently, the Committee proposed that, for those members opting for the delivery of prescribed documents through physical modes, the charges against such deliveries shall be decided by the concerned company, by affixing such fees as it deems fit, in any general meeting instead of deciding the same in the Annual General Meeting (**"AGM"**) which is the current requirement in the extant provisions of the CA-13.[25]

ANALYSIS

Greater convenience and flexibility: The use of electronic communication (mainly electronic mail in this context) is common and would serve as a relatively cost-effective model of dispatching and delivering documents by the obliged user, especially amid the Pandemic and its surging restrictions, further, this would reduce overall effort and time, apart from serving other altruistic reasons (e.g. decreasing carbon footprint).

The affixing of fees in any general meetings bears less onerous on the company: The affixing of a fee by the company as it deems fit for the delivery of prescribed documents through physical modes in any general meeting grants the company the much-needed breathing space it needs in the form of liberty. The AGM is convened once a year and the company may have to wait for the AGM to take place to affix a price for the delivery of the

[23] Ministry of Corporate Affairs (n 2)
[24] *Ibid*
[25] *Ibid*

prescribed documents through physical modes which renders the extant process untenable and onerous.

Promoting the objectives of re-adjudication and e-enforcement

The extant provisions: Section 398 of the CA-13 entitles the Central Government to make rules for the filing of applications, documents, inspection, etc., in electronic form. However, the explanation welded to section 398(1) of CA-13(**"Explanation"**) clarifies that the Central Government is not entitled to impose fines or other pecuniary penalties or any demand of fees in contravention of CA-13.

The Committee's observations: The Committee thought that the Explanation retracted the adjudication and enforcement activities through electronic mode. Further, considering the hindrances caused by this Pandemic and giving effect to the objectives of the e-Courts Project (**"Project"**), the Committee considered the omission of the said Explanation necessary.[26]

Analysis: The protraction of re-adjudication and re-enforcement rights in the judicial ecosystem- This recommendation, in particular, gives special emphasis to the objectives of the project, which are: to provide transparency of information to the litigants; to help judicial administration in streamlining their day-to-day activities; and to assist judicial administration in reducing the pendency of cases, etc.

Expediency in the dispensing of cases: The Explanation is not aligned to the objectives of the Project and this recommendation if accepted, would protract the rights of the Central Government to prescribe rules for conducting enforcement-related actions in a manner transparent and non-discretionary with a proper trail through an electronic platform, under the CA-13 which is expected to result in the expediency in the disposal of cases.

Acknowledging the difficulties in these times: This is a welcome step, especially in the times of this Pandemic, to complement e-adjudication by granting the Central Government the

[26] *Ibid*

authority to prescribe rules to litigate disputes through the electronic form, to a subject of law that is robustly in use (Laws).

Picking the right dance partner: In the adjudication process, a physical meeting as an option to choose from is still left open to the stakeholders (either the adjudicating officer or the parties involved) that prefer it,[27] thereby promoting flexibility.

Setting up a common digital platform ("Platform") for the maintenance of statutory registers

The extant norms: Presently, companies must maintain records in the form of registers containing certain specified information about the company but there is no mandatory provision compelling any company to maintain their records in electronic form.

The Committee's Proposal: The Committee took into account the burden of compliance costs with the physical maintenance of statutory registers and emerging global regulatory practices of using a Platform to maintain statutory registers and recommended a setting up of a Platform for certain classes of companies, to maintain, store and periodically update their registers in a manner prescribed by the Central Government.[28] This would render the process of maintaining registers secure and transparent, staving off duplication of effort for companies and easier access to these registers by all the stakeholders. Additionally, since there would take some getting used to, the Platform by the concerned companies, it was further recommended that adequate transitional time should be granted to the said companies to upload past records about statutory registers on the Platform.

Analysis: The use of Platforms for maintenance and storage of registers is common practice

In the world of arbitration, the avant-garde practice of 'the streamlining of the process through the means of digital technology' stemmed from the Stockholm Chamber of Commerce (**"SCC")** and in September 2019, guidelines were issued by which, all SCC arbitrations would be

[27] Companies (Adjudication of Penalties) Rules, 2014, r 3(5)
[28] Ministry of Corporate Affairs (n 2)

managed on the SCC Platform – a secure digital platform that enables communication and file sharing between the SCC and the participants of the arbitration.[29]

The Platform aspires to serve four overarching functions, namely: (i) efficiency; (ii) simplicity; (iii) transparency; and (iv) security.[30]

The purpose of the Platform is to provide the participants of the arbitration (parties, counsels, the tribunal) with a simple, efficient, and secure manner of sharing documents, i.e. exhibits, submissions of reports, etc, and a communication mechanism throughout the arbitral proceedings on the Platform with the participants.[31] The data contained and garnered within the Platform is encrypted using military-grade encryption and all files are scanned, to detect malware when uploaded, therefore, serving the interests of security. These guidelines paved the way for the use of digitalisation (in practice) in arbitration, the learnings of which, were subsequently extrapolated and adopted by other arbitral institutions. Hence, working with a Platform on the maintenance and storage of documents is a common practice even before the break-out of this Pandemic.

The Committee took into consideration the cost of regulatory compliance and other afflictions caused to companies by this Pandemic and thus, objectively encouraged the setting up of a Platform. This would streamline the regulatory compliance process in the long run, however, with Platforms, security threats to confidential information and privacy are always looming risks lurking at every turn of the curb and the Central Government must further prescribe rules for certain standard practices that must be followed when accessing the Platform i.e. encryption.

The harnessing of technology to conduct meetings

[29] 'COVID-19: Information and Guidance in SCC Arbitrations' (*Arbitration Institute of the Stockholm Chamber of Commerce,* 27 March 2020) <https://sccinstitute.com/about-the-scc/news/2020/covid-19-information-and-guidance-in-scc-arbitrations/> accessed 13 May 2022
[30] *Ibid*
[31] *Ibid*

Extant norms: The CA-13 mandates companies to hold an AGM each year and an Extraordinary General Meeting (''EGM'') when necessary.

Further, amid the Pandemic, the Ministry of Corporate Affairs (**"MCA"**) permitted companies to convene EGMs through Video-Conference (**"VC"**) or Other Audio-Visual Means (**"OAVM"**), and these permits were subsequently permeated to AGMs as well. The MCA further permitted 'hybrid meetings', thereby allowing flexibility for stakeholders to attend meetings either physically or virtually.

A win-win outcome: The Committee received feedback, from the stakeholders and beneficiaries of these permits, to include enabling provisions in the CA-13, to permit the use of VC or OAVM, either fully or partially, when holding AGMs and EGMs. This enabling provision would reduce the cost of companies when holding meetings and ensures greater stakeholder convenience, engagement, and participation,

The Committee's recommendations: Assessing the heaping benefits of relaxing the requirements of physical meetings, the Committee recommended amending suitable provisions of CA-13 to enable the Central Government to prescribe how companies can hold AGMs and EGMs physically, virtually, and in hybrid mode through detailed procedures and safeguards by way of rules.[32]

CLASSIFYING THE TYPES OF AGMS

Physical or in-person meetings: The most commonly accepted and traditionally followed forms of AGMs. The meeting comes to pass at a physical location where the main stakeholders of the company attend the meeting and vote in person.

Remote meetings: This form of the meeting takes place over the internet, with the use of OAVM or VC, its entirety and there is no ability to attend the meeting physically. The stakeholders of the company are situated at different physical locations.

[32] Ministry of Corporate Affairs (n 2)

Hybrid meetings: The stakeholders of the company have the discretion either to attend and participate in the meeting either in person or remotely. The use of this form of meeting is mushrooming and proved to be a viable alternative in the times of this Pandemic.

Analysis: There are several factors to consider for this recommendation. On the one hand, keeping the wheels of business continuity and affairs turning in the form of convenience, and on the other hand, one would imagine that privacy and security threats, indirect dilution of shareholder rights, and unfamiliarity among the concerned stakeholders of the company in the use of the concerned technology would pose as potential roadblocks when opting remote and hybrid meetings. These are polarised views on the use of technology in AGMs and it is essential to weigh the pros and the cons on both sides of the coin.

SHAREHOLDER VIEWS ON REMOTE MEETINGS

A slew of vocal institutional shareholders has for many years voiced objections to remote meetings because their ability to exercise their rights is negatively impacted.[33]In essence, shareholders have expressed their disdain for remote meetings because, intentionally or unintentionally, the Board and the management of the company are shielded from shareholder interaction as compared to a physical meeting, potentially undercutting their ability to hold the management accountable in the following ways, namely:

- **tighter control over the meeting -**in the general sense, shareholders in their experience had tighter control over the structure and flow of the question and answer sessions in physical meetings as compared to the other types of meetings, additionally, there is a feeling that some companies were 'cherry picking' innocuous questions and favourable comments over thorny questions; and
- **the shareholder's difficulty in the follow-up -** there is a general difficulty for shareholders to ask follow-up questions the way they could in physical meetings.[34]

[33] Douglas K. Chia and Ann S. Lee, 'Report on Practices for Virtual Shareholder Meetings' (*Harvard Law School Forum on Corporate Governance*, 11 January 2021) <https://corpgov.law.harvard.edu/2021/01/11/report-on-practices-for-virtual-shareholder-meetings/> accessed 13 May 2022
[34]*Ibid*

COMPANIES' VIEWS ON REMOTE MEETINGS

General inertia from the conduct of remote meetings influenced an overwhelming majority of 'bricks and mortar companies' (conventionally run companies), though many saw remote meetings as a viable alternative (to physical meetings), should the situation arise that necessitated such a format, albeit, before the outbreak of this Pandemic, those companies that held remote meetings cited the 'environmentally friendly'' aspects of online events, greater engagement in a diverse pool of shareholders in corporate governance, etc.[35]

However, practically, companies opting for remote meetings reported a positive experience, be it the cutting of costs as compared to physical meetings that required procuring physical venues, considering the restrictions of this Pandemic, or greater shareholder participation by accommodating for time zone differences concerning international participants, however, some companies that held their AGMs at their headquarters with few attendees reported that the cost for them to hold remote meetings was far greater, among other limitations such as technological glitches and stakeholder unfamiliarity with the use of technology which in turn used up more time in preparation.[36]

OVERARCHING VIEWS

There is no denying the constraints caused by the outbreak of this Pandemic. The pros of conducting remote meetings far outweigh its cons. Worst case scenario, take, for instance, a remote participant during the AGM faces technological glitches or network issues. There are always methods to plan around these contingencies. Ideally, a solution, in this case, would amount to ensuring pre-recorded or written statements provided by this respective participant in lieu of attendance are made audible with the same sound quality as the rest of the meeting (to the extent it is within the company's control).[37]

Certainly, the bare-knuckle truth concerning remote and hybrid meetings does carry a disclaimer tagged "uncertainty", yet it is important not to veer off from the benefits that we

[35] *Ibid*
[36] *Ibid*
[37] *Ibid*

have accrued from the use of technology in AGMs and EGMs. With the evolution of standard practices, one can rightly expect continual enhancement and innovation in technology and lower costs, together with the learning curve for companies and their shareholders.[38] It would often leave one preoccupied with the question of choice between convenience or certainty, sometimes the delineation between the two is a sharp line, and sometimes it's a blur. It boils down to conducting an objective assessment of the requirement and choosing a certain type of meeting and appreciating the uniqueness of each transaction.

To reground, to serve the best interests of the stakeholders, the Committee rightly found it pertinent to grant the Central Government authority to prescribe reducing the notice period for remote meetings to such period as may be deemed reasonable.[39]Considering its upsides, the use of hybrid meetings is expected to be the type of meetings companies would opt for, onwards. Finally, the considerations that the Central Government would need to take to implement technology in meetings are comprehensive, although taking this step would fittingly lead the way to propel the objectives of effective corporate governance.

Bolstering the audit framework

Proposing the relaxation of certain non-audit services the extant provision: Auditing plays a key role in maintaining the accounts of the company and detecting potential frauds. Section 144 of the CA-13 denotes, an exhaustive list of services that a statutory auditor of a company is barred from rendering (either directly or indirectly).

The Committee's recommendations: It was opined by the Committee to amend section 144 of CA-13 to authorise the Central Government to stipulate a differential list of prohibitions on availing non-audit services or prohibition in entirety for the same for such class or classes of companies where the public interest is inherent.[40]

Analysis: The underlying objective of section 144 of CA-13 is to ensure safeguard auditor independence. Perhaps if this recommendation comes to pass into the CAB and further into

[38] *Ibid*
[39] Ministry of Corporate Affairs (n 2)
[40] *Ibid*

law, this is likely to defeat the intention of the said section in its entirety and no longer uphold auditor independence, causing unnecessary variations in rendering non-auditing services across different classes of companies, and auditors would then possess vested interests in the company. In other words, this recommendation would amount to being counter-intuitive by depriving the intentions of what the said section originally seeks to serve. Notwithstanding, taking into consideration the concepts of, companies having public interest or prescribing differential lists to provide for permits concerning the render of certain non-auditing services to distinct classes of companies, there should be no trace nor opportunity to give rise to any compromise in the statutory auditor's obligation to maintain independence. Therefore, in light of the aforementioned reasons, this recommendation should not be considered for the CAB to safeguard the long-term interests of companies and their investors.

Tightening the screws on the auditor's resignation obligations

The extant provisions: Auditors are entitled to resign from companies and established procedures need to be carried out in the process of the same thereof, for instance, an auditor that resigns from a company is obligated to file a statement within 30 days with the RoC indicating the reasons for her resignation and other relevant facts therefor.[41]

The Committee's recommendations: The Committee gave special reference to the UK Companies Act, 2006(**"UKCA"**) concerning the resignation of auditors. An auditor may resign from office by submitting a statement to the company concerning the circumstances of the resignation and must expressly state the matters which she considers necessary to be brought to the attention of members or creditors of the company.[42]Therefore, the Committee thought that there is a need to re-examine the provisions relating to the resignation of auditors and necessitated the explicit need for a resigning auditor to give assurance to the members of the company that, in her opinion, the company's accounts are managed truthfully and fairly in the manner prescribed under the law and that her decision for such resignation is that of an

[41] Companies (Audit and Auditors) Rules, 2014, r 8
[42] Companies Act, 2006, s 519

independent one.[43] Conversely, if for instance, the reason for her resignation was due to non-compliance, fraud, or any severe non-compliance by the auditee company, such information must be disclosed in detail before her resignation in the form of a resignation statement and if for instance, after her resignation, any information concerning the above non-compliance acts fails to feature in, or be part of, her resignation statement and such information comes to light, she will be liable to suitable action.[44]

Analysis: This recommendation aligns itself with sound corporate governance practices. The resigning auditor would be accountable to the shareholders and other important members of the company, this promotes greater transparency, stability, and assurance in the functioning of the company. Additionally, if there are non-compliance practices undertaken by the concerned company, the onus is now shifted on the auditor to bring these non-compliance practices to light in the form of ''detailed disclosures''. Though there is a provision in the CA-13 for the resigning auditor to furnish reasons for her resignation, the borrowing of similar obligations of a resigning auditor from the UKCA conspicuously takes the severity of her obligation a notch further.

MANDATING JOINT AUDITS FOR SPECIFIED CLASSES OF COMPANIES

Definition of a joint audit: A joint audit is an audit of the Financial Statements (**''Statements''**) of an entity by two or more auditors appointed to issue the audit report.[45]

The extant provisions: The provisions of section 139(3) of CA-13 provide for a joint audit but do not mandate the application of a joint audit for any classes of companies.

The Committee's recommendations: The Committee recommended that joint audits for such class of companies as the Central Government may prescribe in addition to giving recognition to the extent of liability of the individual auditors.[46]

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[43] Ministry of Corporate Affairs (n 2)

[44] *Ibid*

[45] 'Standard on Auditing (SA) 299 (Revised) Joint Audit of Financial Statements' (*ICAI*) <https://kb.icai.org/pdfs/PDFFile5b3b4ceff235b7.81466773.pdf> accessed 13 May 2022

[46] Ministry of Corporate Affairs (n 2)

Analysis: Audits paint the true picture of the overall financial status of the company and with the burgeoning growth of the corporate ecosystem in India, audits are challenging tasks therefore, joint audits can serve the function of the auditee company accruing the benefit of availing technical expertise of more than one audit firm (or individual auditor), thereby enhancing the level of service. Additionally, each auditor or audit firm would be liable only to the extent of their liability and not the liability of other auditors, therefore, this mechanism of allotting liability would facilitate the audit process running with clarity and smoothness.

Run a tight ship - additional rights bestowed upon the auditor of a holding company ("Principal Auditor")

The extant provisions: The Principal Auditor is entitled to access the records of all its subsidiaries and associate companies in so far as it relates to the consolidation of its Statements with that of its subsidiaries and associate companies.[47]

The Committee's recommendations: Since there is a slew of cases of the diversion of funds occurring through subsidiary companies and consequently, the Committee made fitting recommendations that the Principal Auditor must be given assurance about the truthfulness and fairness of the audit of each subsidiary company by the concerning auditors and additionally, the Principal Auditor may independently verify the accounts of the subsidiary companies.[48]

Analysis: Since there are no statutory obligations on the Principal Auditor to verify the fairness and truthfulness of the accounts of the subsidiary companies, rendering power to the Principal Auditor to verify the veracity of the accounts of the subsidiary companies on an independent basis would bolster transparency in clean accounting. Though on further thought concerning this recommendation, adding layers to this recommendation would make for added sense, for instance, when auditors from the subsidiary companies when giving assurance, an oral assurance may not suffice, consider whether such assurances should be furnished in written form to the Principal Auditor or in a particular manner that could be

[47] Company Act, 2013, s 143(1)
[48] Ministry of Corporate Affairs (n 2)

documented and recorded, this would further fine-tune this recommendation and address the lacuna in entirety, resulting in a more clear and deliberate exercise.

CALLING FOR CLARITY ON FORENSIC AUDITS

Definition of a forensic audit: An audit that involves an examination of past financial records of an entity to detect any illegal action, manipulation in the books of accounts, siphoning of funds, etc.[49]

The Committee's recommendations: For enforcement actions concerning cases of serious non-compliances, it was observed that forensic audits are being conducted on the specific directions of regulators or the demand of creditors, and clarity on specific trigger events is lacking, nor is there uniformity across all regulators. The Committee prescribed that the Central Government should be empowered to render rules on the manner forensic audits are conducted when they may be ordered during investigations.[50]

Analysis: Forensic audit assists in fishing out frauds or the misappropriation of company funds and would bring financial certainty and stability to the company. The ascribing of trigger events as to when a forensic audit can be ordered would bring about uniformity across all regulators and streamline the process therefor.

STANDARDISING QUALIFICATIONS BY THE AUDITOR

The extant provisions: The auditor is obligated to provide observations and comments on Statements of the company and to provide qualifications, reservations, or any adverse remarks, as the case may be, concerning the maintenance of accounts in that company.[51]

Additionally, Directors carry a fiduciary relationship vis-à-vis its shareholders and the company, and section 134(3)(f) of CA-13 mandates Directors to provide information and

[49] 'Forensic Auditing – Meaning and its Basic Concepts' (*Taxmann*,27 May 2021) <https://www.taxmann.com/post/blog/6194/forensic-auditing-meaning-and-its-basic-concepts/> accessed 14 May 2022
[50] Ministry of Corporate Affairs (n 2)
[51] Companies Act, 2013, s 143(3)(f) and 143(3) (h)

explanations on qualification, adverse remarks, or disclaimer contained in the auditor's report and secretarial audit report on annual Statements.[52]For instance, wherein the Statements an adverse remark is likely to stymie the Statements, corrective measures proposed to be taken shall be disclosed in the Board's report.[53]

The Committee's recommendations: The Committee opined that the adverse remarks (where applicable) entailed in the auditor's report lacked elaboration corresponding to any negative effects on the economic health or functioning of the company and therefore, to ensure greater clarity, disclosure, and standardisation, the Committee proposed that an enabling provision be inserted in CA-13 to empower the Central Government to introduce a format for auditors enabling them to state the impact of every qualification or adverse remark contained in the Statements of the company for circulation to the Board before the same is passed on to shareholders.[54]

Analysis: This form of standardisation concerning Statements as described in the above paragraph, would better prepare the Board when giving account to the shareholders of the company and instill uniformity across all companies when it concerns qualifications or adverse remarks in Statements rendered by the respective auditor/s.

The introduction to novel concepts

Recognising the issuance and holding of fractional shares

What is a fractional share?

[52] A. Ramaiya, *Guide to the Companies Act* (19th edn.,Lexis Nexis 2020) 248; Ministry of Corporate Affairs (n 2)
[53] Company Act, 2013, s 134(4)
[54] Ministry of Corporate Affairs (n 2)

Less than one full share of equity or one share unit is called a fractional share and such shares may be the result of mergers or stock splits, etc[55] the holding of fractional shares is not permitted under the CA-13.[56]

The Committee's recommendations: In recent times, there is a massive surge in retail investors in the share market, and the Committee observed that whilst retail investors are keen to invest in certain companies, they may not possess the purchasing power to buy one unit of share due to its high price. However, holding and trading fractional shares would enable retail investors to access the shares of these companies and the Committee took notice of international practices on fractional shares in countries such as Japan, Canada, and the United States of America. Therefore, the Committee felt that the concept of fractional shares should be introduced into the CA-13 for a class or classes of companies in the manner prescribed and in cases involving a fresh issue of fractional shares by the company.[57]

Analysis: If this recommendation is accepted in the CA-13, this would result in fresh waves of investment from small investors and there would be greater access to raising capital.

For instance, retail investors would need to shell out thousands of rupees to invest in an expensive stock like MRF Limited (**''MRF''**), however, if fractional shares are recognised and introduced, retail investors can own a meagre share of MRF at a nominal and affordable price and build a diversified portfolio. Additionally, the issue of fractional shares is an international practice and hence such an introduction would help India to align its norms with already established global standards and norms.[58]

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[55] Christina Majaski,'Fractional Share' (*Investopedia*, 31 December 2021) <https://www.investopedia.com/terms/f/fractionalshare.asp#:~:text=Less%20than%20one%20full%20share,are%20also%20difficult%20to%20sell.> accessed 15 May 2022

[56] Company Act, 2013, s 4(1)(e)(ii)

[57] Ministry of Corporate Affairs (n 2)

[58] 'Analysis of Key Changes proposed by Company Law Committee Report (2022)' (*Taxmann*,21 April 2022) <https://www.taxmann.com/post/blog/analysis-of-key-changes-proposed-by-company-law-committee-report-2022-clc-2022/> accessed 15 May 2022

RESTRICTED STOCK UNITS ("RSUS") AND STOCK APPRECIATION RIGHTS ("SARS")

Definitions

RSUs: A form of compensation issued by an employer to an employee in the form of company shares, through a vesting plan and a distribution schedule after achieving required performance milestones or being retained in employment in the company for a particular duration of time, therefore, obtaining the active interest of the employees in the company stock (assigned a market value) until the vesting period is complete.[59]

SARs: A form of employee compensation linked to the company's stock price during a predetermined period and are profitable to the employees of the company when such stock prices rise. The major upside to SARs is that employees can receive proceeds from stock price spikes without having to buy stock.[60]

The Committee's recommendations: The Committee opined that in addition to monetary remuneration, employees should have access to the ownership rights in the company in the form of schemes such as RSUs and SARs to subscribe to the company's equity capital. Further, there are no regulations set up for RSUs and these schemes should be recognised in the CA-13 through enabling provisions to reduce regulatory gaps (when comparing employee benefit plans such as employees' stock option plans that are well recognised).[61]

Analysis: RSUs garnered popularity as a type of employee compensation and were preferred over employees' stock options plans after scandals such as WorldCom surfaced.[62]These introductions would bring about a sense of ownership, incentivise greater employee

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[59] Jason Fernando, 'Restricted Stock Unit' (*Investopedia*, 1 January 2022)v <https://www.investopedia.com/terms/r/restricted-stock-unit.asp> accessed 15 May 2022
[60] Adam Hayes, 'Stock Appreciation Rights (SARs)' (*Investopedia*, 26 December 2020) <https://www.investopedia.com/terms/s/sar.asp#:~:text=What%20Are%20Stock%20Appreciation%20Rights,employee%20stock%20options%20(ESOs)> accessed 15 May 2022
[61] Ministry of Corporate Affairs (n 2)
[62] 'What went wrong at WorldCom?' (*Knowledge At Wharton*,3 July 2002) <https://knowledge.wharton.upenn.edu/article/what-went-wrong-at-worldcom/> accessed 15 May 2022

engagement to perform for maximal growth, and encourage employee retainment in the company, thereby bringing mutual long-term growth to companies and the employees.

RECOGNISING SPECIAL PURPOSE ACQUISITION COMPANIES ("SPAC")

SPAC: A corporation formed to raise investment capital through an Initial Public Offering (**"IPO"**) and such a business structure enables investors to render monetary contributions (**"Contributions"**) towards a fund, which then is used to acquire one or more unspecified businesses to be identified after the IPO has taken place. Therefore, when a SPAC raises the required funds through an IPO, the money is held in a trust until a predetermined period elapses or the desired businesses are acquired.[63]

The Committee's observations: SPACs are regulated across different jurisdictions and this concept is thriving in Europe. SPAC IPO value on European exchanges came in significantly ahead of the year 2020 full-year figures, with the issuance totaling US$ 8.56 billion, up from US$496.05 million in 2020.[64] The Committee thought that enabling the listing of Indian incorporated SPACs would enable Indian companies to list on overseas exchanges and carry out business in different global jurisdictions through the SPAC route and additionally, foreign investors would possess a keener awareness of the Indian company's potential as compared with that of their counterparts.[65]

The Committee's recommendations: Enabling provisions must be inserted in the CA-13 to allow entrepreneurs to list a SPAC incorporated in India on domestic and global exchanges, and for this to effectuate, the commencement of sections 23(3) and 23(4) of the CA-13 is a necessary pre-condition.[66]

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63 'Special Purpose Acquisition Company (SPAC)' (*CFI*) <https://corporatefinanceinstitute.com/resources/knowledge/strategy/special-purpose-acquisition-company-spac/> accessed 15 May 2022

64 'European SPACs Data Hub' (*White&Case*, January 2022) <https://www.whitecase.com/publications/insight/european-spacs-data-hub> accessed 15 May 2022

65 Ministry of Corporate Affairs (n 2)

66 *Ibid*

Analysis: There exists established (tried and tested) regulations in several overseas jurisdictions and there is a burgeoning success in European exchanges year after year concerning SPACs (the successful established working model in place). Further, there is a lesser risk on the part of the overseas investor because their Contributions are deposited in a trust until the target company is acquired. For instance, if within the timeframe of the predetermined period, a company is not acquired, it is then that their respective contributions minus the bank fees must be remitted to the said investors.[67]

Steppingstones to better ease of doing business in India

Easing the requirement of raising capital in distressed companies

The extant provisions: Under the CA-13, a company shall not issue shares at a discount,[68] unless its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme by the applicable guidelines specified by the Reserve Bank of India (**"RBI"**), it is in this exceptional circumstance that the indebted company is permitted to issue shares at a discount to their creditors,[69] among other exceptional circumstances.

The Committee's observations - Distinguishing distressed companies: For clarity, the Committee guided the definition of distressed companies (such class or classes of companies that have cash losses other than those arising out of depreciation or revaluation for the previous three consecutive years or more).

Considerations were taken of the impediments caused by this Pandemic and therefore, the Committee deliberated that, enabling certain distressed companies in the public interest to issue shares at a discount, for the Central Government to inject capital into such companies, by purchasing their shares at a discount and revive these companies.

The Committee's recommendations: The Committee recommended that distressed companies should be allowed to issue shares at discount to the Central Government or State Government

[67] European SPACs Data Hub' (n 65)
[68] Company Act, 2013, s 53(2)
[69] Company Act, 2013, s 53(2A)

or to such class or classes of person as may be prescribed through the respective delegated legislature.[70]

Analysis: Firstly, proposing a definition by the Committee for distressed companies would aid in identifying such companies. Several governments on both sides of the ocean have proposed relaxation to companies in light of the difficulties of this Pandemic and this move would also protract the scope of the Insolvency and Bankruptcy Board of India (**"IBBI").**

Replacing affidavits with self-declaration

An affidavit is a willingly made declaration in writing, signed by the deponent (person making the affidavit) and accompanied by an oath (vis-à-vis the authenticity of the contents).[71]

Summary: The extant provisions of the CA-13 require companies to furnish an affidavit before the RoC, Regional Director (**"RD"**), the National Company Law Tribunal (**"NCLT"**) and the National Company Law Appellate Tribunal (**"NCLAT"**) and these requirements prove to be onerous to companies.

The Committee's recommendations: The Committee believed that self-declarations serve the same function as that of an affidavit without the formality of printing the declaration on a stamp paper and attestation on oath by a magistrate or public notary. Practically and contextually, the replacement of affidavits with self-declarations would not detract from the severity of consequences, given that furnishing, a false declaration attracts punishment under section 448 of the CA-13 and therefore, would not dilute deterrence. Therefore, in light of the benefits of self-declaration, the Committee recommended that the requirement of furnishing an affidavit should be replaced with filing a declaration under the provisions of CA-13 and the respective delegated legislation made thereunder, except in those provisions involving filing an affidavit in a judicial or quasi-judicial proceeding before the NCLT, the NCLAT, or the RD.

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[70] Ministry of Corporate Affairs (n 2)

[71] Amartya Bag, 'Affidavit and the law in India' (*iPleaders*,13 June 2014) <https://blog.ipleaders.in/affidavit-and-the-law-in-india/> accessed 16 May 2022

Analysis: If this recommendation is accepted and later features in the CA-13, the filing of self-declaration would be time and cost-effective for companies, resulting in easing the declaratory process and forming a trust-based system.[72]

Setting up Risk Management Committees ("RMC")

***"If you don't invest in risk management, it doesn't matter what business you're in, it's a risky business"* – Gary David Cohn**[73]

Summary: Presently, the corporate landscape is dynamic and active RMCs are imperative to work around contingencies and more imperatively, identify, mitigate and resolve risks.[74]

The Committee's observations: The Committee pointed out that there are no express provisions in the CA-13 that concern the formation of RMCs. At best, certain weak provisions deal with risk management, that is, section 134(3)(n) of the CA-13 mandates the Board's report to contain a statement indicating the development and implementation of a risk management policy for the company, including identifying risks that may pose a threat to the existence of the company.[75]

The Committee's recommendations: Therefore, to strengthen the Board's power to supervise risk management systems, the Committee recommended the inclusion of new provisions in CA-13 for the constitution of an RMC for such classes of companies, as may be prescribed by the Central Government.[76]

Analysis: The introduction of active RMCs would strengthen the extant legislation that deals with risk management and in addition, facilitate the Board's roles in, identifying and mitigating potential or inherent risk to the company.

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[72] Analysis of Key Changes proposed by Company Law Committee Report (2022) (n 58)
[73] Christine Harper, 'Goldman's Cohn Says Firms Burned by Poor Controls, Not Products' (*Bloomberg,* 25 September 2011) <https://www.bloomberg.com/news/articles/2011-09-25/goldman-s-cohn-says-companies-burned-by-poor-risk-management-not-products> accessed16 May 2022
[74] 'Report of the Committee on Corporate Governance' (*SEBI,* 5 October 2017) <https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html> accessed16 May 2022
[75] Ministry of Corporate Affairs (n 2)
[76] *Ibid*

Introducing twin tests for approvals on fast-track mergers

Summary: Prescribed class of companies may enter into a fast-track merger or amalgamation if the scheme is approved by shareholders holding at least ninety percent of the total number of shares of the company.[77]

The Committee's observations: The threshold of approval of the scheme of shareholders holding ninety percent of total company share capital is considered onerous by stakeholders and not the shareholders attending and voting in the meeting (which is still an onerous task) and this framework overshadows the minority shareholder rights. In other words, their vote in the meeting will stand only if the shareholders owning ninety percent of the company's share capital vote in favour of the same outcome for which the minority shareholders voted therefor. Additionally, this threshold delays the approval process, thereby falling short of the respective section's objective that seeks to expedite mergers.

The Committee's recommendations: To tackle the above concerns, the Committee proposed a modified twin test requiring approval by: i) majority of voting shareholders present at the meeting accounting for seventy-five percent, in value, of the shareholding of the voting shareholders present; and ii) representing more than fifty percent, in value, of the total number of shares of the company.

Analysis: Introducing a twin test for approval would demand greater time being spent in calculating votes and coming to a conclusion of the final decision of the shareholders, albeit this framework is not as onerous (rational as compared to the extant fast-track provisions) and seeks to alleviate the concerns of minor shareholders and grants greater weightage on their votes, thereby reducing arbitrage.

[77] Company Act, 2013, s 233

Easing the restoration of struck-off companies

The RoC is empowered to remove the name of a company from the register of companies (''Register'') after due compliance with the procedures laid down under applicable laws for the time being in force.[78]

The Committee's observations: The NCLT may order restoration of the company's name upon satisfaction that the name was struck off without any justified cause or in the absence of a valid ground.[79] Additionally, the NCLT hears matters both under CA-13 and the Insolvency and Bankruptcy Code 2016 (**''IBC''**) and is reported to be overburdened, thereby struggling to dispose-off cases expediently.[80]

The Committee's recommendations: In cases where the aggrieved persons apply for restoration within three years from the decision of the RoC,[81] the application should be filed before the RD instead, and the RD may pass an order of restoration of the company name to her satisfaction.[82]

Additionally, the Committee noted that in instances where the application for restoration is filed after three years but before the expiry of twenty years,[83] the power of restoration should continue to vest with the NCLT to exercise adequate discretion and scrutiny before the name of the company is restored in the Registers.

Analysis: As a consequence, the same powers under the CA-13 shall vest and be exercised by executive officers (for applications within 3 years) and subsequently quasi-judicial body (for the balance of the remaining 17 years) and therefore, two different authorities shall have same

[78] Company Act, 2013, s 248
[79] Company Act, 2013, ss 252(1) and 252(3)
[80] Ministry of Corporate Affairs (n 2)
[81] Company Act, 2013, s 252 (1)
[82] *Ibid*
[83] Company Act, 2013, s 252 (3)

powers under different timeframes of filing respective applications.[84] Furthermore, this arrangement appears to be a promising aspect to de-burden the NCLT concerning caseloads.

Increasing and tightening corporate compliances

Corporate compliance is a gateway through which companies ensure that they are following all the laws and regulations applicable to their business.[85] However, non-compliance can be expensive on companies because of heavy fines being imposed by regulatory authorities.

"If you think compliance with ethical criteria is expensive, try non-compliance"

The Committee has proposed key compliance frameworks to safeguard the interests of stakeholders in companies, reduce regulatory gaps and strive towards better consolidation across different corporate laws, thereby reducing ambiguity. The following discusses a few key compliance recommendations proposed by the Committee.

Safeguarding the rights of Nominee Directors ("NDs")

Summary: Under the CA-13, the ND is required to represent the interest of the appointing financial institution and may not be actively involved in the day-to-day affairs or decisions of the company.

The Committee's recommendations: A new proviso be in section 164(2) of the CA-13 to the effect that disqualification, as referred to clause (b) [failure to repay deposits/debentures, interest on deposits/debentures], shall not apply to NDs appointed pursuant to nomination by the debenture trustees registered with the Security and Exchange Board of India (**"SEBI"**).[86]

Analysis: The essence behind this recommendation is to protect the interests of all NDs and not just NDs appointed by debenture trustees registered with the SEBI because the underlying

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84 Gaurav N. Pingle, '[Analysis] Important Recommendations by CLC to Revamp Company Law' (*Taxmann*,11 May 2022) <https://www.taxmann.com/post/blog/analysis-important-recommendations-by-clc-to-revamp-company-law> accessed May 15 2022

85 'Corporate Compliance' (*Priori Legal*) <https://www.priorilegal.com/resources/additional-resources/additional-legal-topics/corporate-compliance> accessed17 May 2022

86 Ministry of Corporate Affairs (n 2)

purpose of appointing NDs is the same, notwithstanding which financial institution appointed the ND.

Modifying the six-month time period for new Directors

Summary: Section 164(2) of the CA-13 seeks to safeguard all freshly appointed Directors by granting such Directors a period of six months from the date of their appointment to make good the company's default (**"Default"**).

The Committee's observations: It was felt that a six-month timeframe was far too few a timeframe to remedy Defaults and such a short duration of time serves as a disincentive for any person willing to get appointed in a company that has committed Defaults, where remedying such Defaults in entirety would take significantly more time.[87]

The Committee's recommendations: The Committee proposed that for Defaults ensuing from section 164(2)(a) such as failure to file annual returns, which is a reasonable timeframe to remedy such Defaults. Furthermore, the Committee deemed fit to extend the timeframe for Defaults ensuing from section 164(2)(b) [failure to repay deposits/debentures, interest on deposits/debentures] to two years from the date of appointment for new Directors and if Defaults ensuing from section 164(2)(b) are not remedied in the satisfactorily, the newly appointed Director would be liable to automatic disqualification upon the completion of two years from the date her appointment.[88]

Analysis: The extension of two years for Defaults ensuing from section 164(2)(b) would grant the much-needed breathing space for freshly appointed Directors to structure and run the business operations in a manner efficient.

Introducing a cooling-off period before auditors become Directors

The Committee's observations: While there is a restriction on auditors from holding an independent directorship, the CA-13 presently does not contain any provision prohibiting an

[87] *Ibid*
[88] *Ibid*

auditor from becoming a Non-Executive Director ("**NED**"), Managing Director ("**MD**") or Whole-Time Director ("**WTD**") in the same company or group of companies.[89]

The Committee's recommendations: To uphold the independence of auditors, the Committee recommended the insertion of a mandatory one-year cooling-off period, from the date of cessation of office, only after which an auditor of a company may be permitted to hold the position of a NED, MD, WTD in the same company or its holding company, subsidiary company, fellow subsidiary or associate company.[90]

Analysis: With this proposed framework, the independence of auditors who subsequently wish to be appointed a Director in the same company. The role of a Director is critical and therefore, the person carrying this role must be free from all prejudice and vested interests. The introduction of enforcing a mandatory cooling-off period for the former auditor of the company would assist in maintaining the independence of the auditors.

Introducing a cooling-off period before an Independent Director ("ID") becomes key managerial personnel

Summary: In essence, IDs keep safeguarding sound corporate governance practice in the operations of the company and acts as a deterrent to fraud or mismanagement occurring in the company. Hence, it is important to maintain the independence of IDs in ensuring they do not hold office in certain managerial roles. With that being said, the CA-13 prescribes no restriction on the appointment of the ID as a managerial person, i.e. an MD, WTD, or manager, in the same company or group of companies after ceasing to be an ID of such company or groups of companies.

Albeit, it was observed that Regulation 25(11) of SEBI (Listing Obligations and Disclosure Requirements), 2015 provides no ID who resigns from a listed entity shall be appointed as an Executive Director or WTD on the board of the company, its holding or subsidiary, associate

[89] *Ibid*
[90] *Ibid*

company or any other company belonging to its promoters group before the lapse of a period of one year from the date of resignation as an ID.

The Committee's recommendations: In the interests of safeguarding transparency and upholding greater accountability, the Committee proposed the insertion of a mandatory one-year cooling-off period, from the date of cessation of office, only after which an ID may be permitted to hold the position of a managerial role in the same company or any of its affiliates.[91]

Note: This proposed framework will mirror the provisions of the CA-13 with that of Regulation 25 of SEBI (Listing Obligations and Disclosure Requirements), 2015, and bridge any present regulatory gaps. The proposed one-year cooling-off period after resignation from the role of ID has a higher chance of maintaining the independence of the ID.

Miscellaneous – drafting and clarificatory changes

'Penalty in relation to section 188' shall be included as a ground for disqualification under section 164(1)(g)

Section 164 of CA-13 provides for the disqualification for the appointment of Directors. A Director who has been convicted of an offence dealing with related party transactions under Section 188of CA-13 at any time during the last preceding five years shall be disqualified.[92]In the year 2020, section 188 of CA-13 was decriminalised[93] and presently attracts a penalty only.

The Committee's recommendations: It was proposed that the inclusion of such penalties attracted under section 188 of the CA-13should be added as a ground for disqualification under section 164(1)(g) of CA-13.[94]

Note: A levy of fine (Indian rupees 25,000/-) for example, ordered by an adjudicating authority would amount to disqualification under section 164 of the CA-13. However, there is

[91] *Ibid*
[92] Company Act, 2013, s 164(1) (g)
[93] Companies (Amendment) Act, 2020, s39
[94] Ministry of Corporate Affairs (n 2)

no provision where such a penalty order has been appealed and therefore, if this recommendation is accepted as part of the law, it is not worth the economy of decriminalising non-compliance of related party transactions because this would ultimately result in de facto disqualification of the Director.[95]

CONCLUDING REMARKS

The Committee after a great deal of thought, and assistance received from the legal fraternity and practical institutions as the needed paraphernalia, presented this Report for the reasons mentioned above. A cornucopia of practical recommendations (if accepted and included in the law) was proposed by the Committee that would change the practicalities and compliances under the CA-13. Many practising professionals believe that this Report is overall is coherently drafted to combat the corporate practical challenges and regulatory gaps currently prevailing in the CA-13. Furthermore, the inclusions of most of these recommendations into law would take giant strides in the advancement of the CA-13 standing pari passu with globally established company laws. This Report creates its seat at the table and is distinct from those of the past because of the promotion of the use of technology to facilitate the business obligations and activities of companies. If for instance, these recommendations (in part or entirely) are accepted into the law, the rules that the Central Government would prescribe to complement these recommendations would be pivotal to their success. Would this Report flatter deceive? Time will tell.

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[95] Gaurav N. Pingle (n 84)