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MEDIATION AND CONCILIATION UNDER THE NEW COMPANIES ACT

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I. Dispute Resolution under the Companies Act, 2013

The Companies Act, 2013 ("**CA 2013**") attempts to modernise the way companies in India are owned and operated, in sync with the practices across the world. In the same spirit, the CA 2013 makes it possible for parties in a dispute before government administrators (such as Regional Director, Registrar of Companies, etc.) or the tribunals formed under the CA 2013, i.e. National Company Law Tribunal or the National Company Law Appellate Tribunal, to request for the dispute to be referred to mediation or conciliation. The process of mediation and conciliation is to be conducted before experts empanelled with the mediation and conciliation panel ("**Panel**") under the CA 2013.

The government has now commenced the process for constitution of the Panel, and invited individuals with specified experience to apply for their empanelment and published the Companies (Mediation and Conciliation) Rules, 2016 on September 9, 2016 ("**Rules**") in such regard. Once constituted, the Panel is expected to assist in expeditious disposal of a number of shareholder and creditor disputes.

The Rules however specify, that the following disputes cannot be referred to mediation and conciliation:

- Matters in respect of inspection, investigation or inquiry under CA 2013;
- Matters relating to defaults or offences for which applications for compounding have been made by one or more parties;
- Cases involving serious and specific allegations of fraud, fabrication of documents forgery, impersonation, coercion etc.;

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- Cases involving prosecution for criminal and non-compoundable offences; or
- Cases which involve public interest or interest of numerous persons who are not parties before the government administrator or tribunal as the case may be.

II. Analysis

Considering the alarming pendency of disputes before the administrators and courts, the process of mediation and conciliation to resolve disputes is being proactively promoted in India. It was usual for the erstwhile Company Law Board to refer the parties to mediation/conciliation if it felt that a settlement was possible between the parties. Most high courts in India have their separate state-specific mediation rules, and parties are often referred to mediation by the high courts and their subordinate courts. The mediation process is however kept confidential and the mediators usually submit a short report saying “mediation failed”, if the parties are unable to settle their disputes through mediation. Viewed against this established protocol and practice, the provisions for mediation and conciliation under the CA 2013 may give rise to certain concerns:

1. Firstly, the mediator/conciliator under the CA 2013 are expected to make recommendations to the administrator/tribunal upon completion of the mediation proceedings. However, it has not been specifically provided that no recommendations or observations are required in case of a failed mediation. On the other hand, mediation and conciliation rules adopted by various high courts specify that in the event of a failed mediation, no detailed report/recommendations needs to be submitted by a mediator to the referring court. This helps parties to discuss their actual and real concerns in an open manner before the mediator without worrying about such a disclosure causing prejudice to their case in the future, if the mediation eventually fails.

2. For an alternative dispute resolution mechanism to be successful, the process must be both confidential and inexpensive for the parties. Mediation proceedings under the aegis of the high courts and the subordinate courts are usually free of cost. The parties, if eventually successful in resolving their disputes through mediation, are also entitled to get refund of the court fee paid by them at the time of instituting the court action. The mediation and conciliation process under CA 2013, however is envisaged as being conducted upon payment of a fee to the mediator by the parties as fixed by the administrator or the tribunal at the time of referral. It would therefore, be upto the administrator and the tribunal to ensure that such fee of the mediators/conciliators under the Act is kept nominal/reasonable so as not to deter the parties from opting for the process.

3. Interestingly, during the pendency of mediation proceedings under CA 2013, participants may not initiate any arbitral or judicial proceedings concerning the same subject matter. A party may however initiate a separate judicial or arbitral proceeding (during mediation) if such party feels that such proceeding is necessary to protect its rights. The CA 2013 however, provides no specific guidance or parameters in this

regard, and as such it needs to be seen how the restriction/permission to initiate parallel proceedings would be interpreted by the administrator/tribunal, in real life situations.

III. Conclusion

The formal inclusion of the mediation/conciliation process in CA 2013 is a welcome initiative, especially in India where the alternative dispute resolution mechanism holds greater hope for speedy resolution of disputes as compared to the formal process of adjudication on merits by courts/tribunals, etc.

However, it must be ensured that the mediation/conciliation process under the CA 2013 remains voluntary. While the mediation/conciliation process ensures speedy resolution/settlement of disputes, any judicial system should be capable of expeditiously adjudicating disputes on merits by itself *de hors* settlement through mediation/conciliation. As such, the option of the parties to voluntarily opt for mediation/conciliation should remain an option and not an obligation either imposed by the courts or opted for by the parties in view of the impossibility to have the subject dispute adjudicated expeditiously on merits.

Though settlement through mediation/conciliation improves the case disposal status of any particular court, the party/ies willing to having its dispute adjudicated on merits should also be given full opportunity to have their disputes so adjudicated on merits. Adjudication of disputes on merits is also vital for evolution and development of judicial precedents and goes on to strengthen the legal and judicial system of the country.

Feedback