To dispense or not to dispense:
NCLT's position in schemes

June 21, 2017

BACKGROUND

The abstract to the paper titled *Measuring the Law: Legal Certainty as a Watermark*, authored by Anne-Julie Kerhuel and Arnaud Raynouard[1], notes the relationship between law and economic development as follows:

"*The relationship between law and economic development remains enigmatic. There is no doubt that, broadly speaking, legal mechanisms for social control (or "institutions," to use North's words) play a major role. Nevertheless, the impact of legal organization on economic development has not been clearly identified. Whatever progress was attained by major studies in recent years (without much contribution from French legal doctrine) these studies have not definitively resolved whether law is a condition precedent to economic development, or rather a supporting element thereof, much less whether a particular legal system is necessarily and universally optimal. The failure of collectivization is evident. However, the open market model has multiple variants of the state's role and the degrees of regulation. A first approximation challenging the relevance of economic analysis of this topic notes the frequent confusion between legal system, legal rule, administrative and bureaucratic organization, political system, substantive law, and legal practice. This confusion produces uncertainty about the purpose of the evaluation. The Doing Business reports aspire to measure the ease of doing business in a country, within its legal framework. However, contrary to the oft-advanced idea, this approach involves an assessment, not of the legal system within its functional organization but rather of public policies and their implementation. In this regard, hasty conclusions recognizing a correlation between the ease of doing business and membership in a particular legal family are of dubious validity. Evaluating legal systems per se requires an assessment of the proper applicability of rules falling within the corpus of the law, the predictability of legal solutions, and the substantive guarantee of the rights recognized by legal rules. This approach perforce raises the question of legal certainty. The establishment of an index of legal certainty will contribute to an analysis of this characteristic, which is an essential attribute of the law in various national systems and at various stages of the development of norms and their implementation. This study provides rationales for a legal certainty index.*"

The effect of legal certainty on the doing of business has been well documented, including in India. For instance, the *Report of the Standing Council on International Competitiveness of the Indian Financial Sector*[2], has highlighted the plights of financial firms (and their global customers) in India due to lack of certainty on rules and regulations. Even the World Bank Flagship Report on *Doing Business 2017- Equal Opportunity for All*[3], notes that in

[1] Kerhuel, Anne-Julie and Raynouard, Arnaud, Measuring the Law: Legal Certainty as a Watermark (In French) (July 28, 2010). International Journal of Disclosure and Governance, Vol. 8, 4, pp. 360–379, 2011; Georgetown Law and Economics Research Paper No. 10-12. Available at SSRN: https://ssrn.com/abstract=1650153

[2] *Report of the Standing Council on International Competitiveness of the Indian Financial Sector, Volume I*, Department of Economic Affairs, Ministry of Finance, New Delhi, Available at http://mof.gov.in/reports/Standing%20Council%20Report%20IFS.pdf (last accessed on June 20, 2017).

[3] *Doing Business 2017- Equal Opportunity for All*, World Bank Group, Page 66 Available at <

deciding the rules and practices that individual companies must follow to achieve higher returns on equity and greater efficiency by way of sound corporate governance, legal scholars and legislators have traditionally relied on concepts such as *legal certainty, predictability, equity and enforceability*.

Whilst the implementation of legal certainty and predictability has primarily been associated with the role of policy makers and executives, the responsibility of the judiciary in upholding the aforementioned principles also cannot be belittled.

It is in this aforementioned context, that we wish to analyse the recent conflicting decisions of the various benches of the National Company Law Tribunal ("**NCLT**") in the context of whether it retains the power to dispense with the meeting of the members of companies engaged in a scheme of arrangement and understand whether the controversy has finally been put to rest.

STORY SO FAR- POSITION UNDER CA 56

Under the Companies Act, 1956 ("**CA 56**"), the High Courts were bestowed with the power to sanction schemes of arrangements, under Sections 391 to 394, read with relevant rules under the Company Court Rules, 1959. Section 391(1) of CA 56, which governed the power of the Court to convene or dispense with the meeting of the members, read as follows:

http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf > (last accessed on June 20, 2017).

391. Power to compromise or make arrangements with creditors and members
(1) Where a compromise or arrangement is proposed –
(a) between a company and its creditors or any class of them; or
(b) between a company and its members or any class of them;

*the Court **may**, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs."*

As to whether the aforesaid provision empowered a Court to dispense with the meeting of members of a company engaged in a scheme of arrangement, the question was answered in the affirmative as early as in 1974 by the Delhi High Court in *Mazda Theatres Pvt. Ltd. v. New Bank of India Ltd.*[4] in the following manner:

"(13) … The meeting contemplated in Section 391 is analogous to an extraordinary general meeting of the members of the company, inasmuch as a three-fourth majority is required to pass the required resolution. The normal rule is that the consent of the shareholders, whether it is unanimous or by a three-fourth majority, must be obtained in a meeting summoned on the orders of the Court under Section 391. This is in accordance with the general principle, that members must act in a general meeting. Inroads have, however, been made on this formal

[4] *Mazda Theatres Pvt. Ltd. v. New Bank of India Ltd.* (1975) ILR 1 Delhi 1

doctrine. Firstly, the consent of all or virtually all the shareholders given even outside a meeting is sufficient to comply with the requirement of a meeting. (emphasis applied)

…

(15) The second inroad on the requirement of a formal meeting is that the consent of the shareholders may be ascertained without calling any meeting at all. Further, the doctrine of lifting the veil of incorporation and looking at the reality of the action of the members of the company enables us to hold that the ***consent of the overwhelming majority of the shareholders*** *outside a meeting is sufficient to show that the resolution was supported virtually by all the members of the company.*

…

(19) A third exception to the rule that all the shareholders of a company must cast their votes in a formally called meeting is made by the doctrine of acquiescence. If all the shareholders acquiesce in a certain arrangement, the question of a meeting having been called does not arise at all." (emphasis applied)

The aforesaid principle, recognising the celebrated *Duomatic Principle*[5], was applied and followed in plethora of cases[6], where the meetings of the members were dispensed with basis receipt of consent from the shareholders. The principle was further reiterated recently by a single bench of the Delhi High Court in the case of *In Re: Adobe Properties Private Limited*[7]. In this matter, while granting dispensation with the requirement of convening meetings of the creditors and members of the applicants in the matter, the court held:

"28. A bare reading of the provision of sub-section (1) of section 391 of the Act reveals that the expression that has been used therein is 'may'. As a general principle of interpretation of statutes, the expression 'may', as used in sub-section (1) of section 391 of the Act, is permissive and operative to confer discretion. The intent of the Legislature is to empower the Court, with wide powers in order to approve the Scheme whilst ensuring that the rights of members and creditors of the company proposing the scheme are protected. (emphasis applied)

…

31. Therefore, it would not be incorrect to conclude that this judicial discretion conferred on the Court under the provision of sub-section (1) of section 391 of the Act may also be exercised in a manner so as to dispense with the requirement of convening meetings of members and/or creditors or a class thereof, in

[5] The Duomatic Principle derives its name from the celebrated judgment in *In Re Duomatic*. [1969] 2 Ch. 365 Ch D, where Buckley J. explained the principle upon which he would approach the matter before him as follows:

> *"Where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."*

[6] *Ansal Properties and Industries Limited* (1978) 48 Comp Cas 184 (el); *Bengal Tea Industries Limited v. Union of India* 93 CWN 542, *In Re: Kirloskar Electric Company* [2003] 116 Comp Cas 413 (Kar)

[7] *In Re: Adobe Properties Private Limited* [Co. Appl. (M) 150/2016, decided on January 16, 2017 (Del).

certain circumstances. (*emphasis applied*)

32. Thus, the discretion so conferred upon the Court under the provision of section 391(1) can be summarized as follows:

"i. Upon taking a prima facie view, the Court may dismiss the application, proposing a scheme of compromise or arrangement between a company and its creditors or any class thereof; or between a company and its members or any class thereof, on various grounds; OR

ii. Direct convening of meetings of the members and/or creditors or any class thereof, of the company, to whom a scheme of compromise or arrangement is proposed, in order to enable such members and creditors to consider and if thought fit, approve, with or without modification, such scheme; OR

iii. Dispense with the requirement of convening meetings of members and creditors or any class thereof, of the company proposing a scheme of compromise or arrangement." (emphasis applied)

It would, however, be wrong to contend that in all the cases, the High Courts had waived the requirement of holding a meeting of the members solely basis the consent received from the majority of members. For instance, in the matter of *In Re: Bharat Explosives Ltd*[8], where even though consent was accorded by approximately 90% (ninety percent) of the shareholders being the promoter group companies, yet the meeting of the shareholders was not dispensed with by the Allahabad High Court, after observing the following:

"53. It is evident from the above Table that while 89.85% of the shareholding of the Transferee Company is held by the promoter Companies, the remaining 10.15% is held by Other Bodies Corporate (1.05%). Indian Public (7.00%) and NRIs/OCBs (2.10%).

54. These minority groups of shareholders holding 10.15% of the shareholding in the Transferee Company have not given their consent to the proposed Scheme of Amalgamation or to waiver of the meeting of the shareholders of the Transferee Company.

55. I am of the opinion that in order to safeguard the interest of the said three minority groups of shareholders, namely, other bodies corporate, Indian Public, and NRIs/OCBs, it is necessary to convene the meeting of the shareholders/members of the Transferee Company for consideration of the proposed Scheme of Amalgamation as per the requirements of Section 391(1) and (2) read with Section 393 of the Companies Act, 1956." (emphasis applied).

A similar view was taken in the order of the Allahabad High Court in the matter of *In Re: Jagran TV (P.) Ltd.*[9], where the learned single judge observed as follows –

"…Merely because the equity shareholders and unsecured creditors are few in numbers and have given their no objection, would not be sufficient criteria for dispensing the convening of the meeting under the supervision of the Court. Thus, the prayer for dispensing with the meeting of equity shareholder and

[8] *In Re: Bharat Explosives Ltd* 2005 58 SCL 370 All

[9] [2009]150CompCas532(All), [2009]90SCL138(All)

unsecured creditors cannot he accepted."

The judgments discussed under preceding paragraph merely restricted themselves to not granting the prayer of the applicant companies to dispense with the meetings for reasons as mentioned in those paragraphs. However, they did not specifically deal with the question about the existence of discretion vested in the High Courts to grant dispensation of the meeting of members and/or creditors. In this regard, it is noteworthy to make reference at this point, to a judgment of the Calcutta High Court in *In Re: Singhal Enterprises P. Ltd*[10] in this case, the court observed that the requirement under section 391(1) is a statutory requirement and cannot be done away with by the High Court.

"*61. … The language and intent of the Act is that a meeting of the shareholders or creditors has to be held and cannot be dispensed with. …*"

However, in a later paragraph the Learned Judge I.P. Mukerji, J. added –

68. Therefore, in case where a company is closely held or is a family company or has a small number of shareholders or creditors who have signified their consent in the petition, or when the financial position of the company is such that it would be unable to bear the expenses for advertising, convening and holding of a meeting, strictly according to the Rules, the court may call a meeting on such terms as it thinks fit dispensing with some of the formalities, considering each case on its merits" (emphasis applied)

Notably, *Singhal Enterprise* was not the only case where the Courts have questioned the power available with the Courts to dispense with the meeting basis receipt of consent. Reference may be made to the decision of the Karnataka High Court in the case of *Ansys Software Pvt. Ltd*.[11], where the Court voiced its concerns as follows:

"*6. I find it a little difficult to accept this submission. Under the scheme of the Act, an application under section 391 of the Act is contemplated for the purpose of requesting the court for permission to hold a meeting of members and creditors who can have an opportunity to discuss the proposal under the scheme, debate over it and then vote upon it, based on which it can be said the scheme is approved or otherwise in terms of the resolution passed at such a meeting. The whole idea of filing an application is for the purpose of seeking permission of the court to hold such meetings. A prayer for dispensation of holding of such meetings is a contradiction in terms, as, while the provision itself is for a permission sought for from the court to hold such meeting, it is also prayed for dispensing with the holding of meetings.*

7. A situation where non-adherence to the letter of the law construing a substantial compliance as a fulfilment of the requirement of law by resorting to the interpretative process of directory and mandatory requirements, depending on the words used being "may" or "shall" is different from a situation where the entire requirement in itself is sought to be done away. A

[10] *In Re: Singhal Enterprises P. Ltd* [C.P. No. 384 of 2007, decided on January 17, 2011 (Cal)]

[11] *Ansys Software Pvt. Ltd* [(2004) 122 Comp Cas 526 (Kar)].

substantial compliance being construed as a fulfilment of a requirement of law is not the same as no compliance at all also being construed as a fulfilment of the requirement of law. The whole object of making an application under section 391(1) of the Act is for permission to hold a meeting. As indicated earlier, the holding of a meeting, the deliberations that can take place in such a meeting, the discussion, the exchange of ideas amongst the members and after discussion of the pros and cons of the proposal or the merits of the scheme, members voting upon it, cannot be said to be the same as of a mere consent letter issued by such members or creditors by themselves. A consent letter of the type that has now been given by the members and shareholders can never be a substitute for the holding of the meeting of the members and creditors as contemplated in law. When law says that there should be a meeting of the members and creditors for the purpose of discussing and approving a proposed scheme, it has a definite purpose and object. That cannot be done away by a process of dispensation.

8. It is no doubt true that in a situation where the number of members who are not in favour of approving a proposed scheme are less or are very few, the company may find it very convenient to obtain their consent by private circulation. But unfortunately there is no substitute for a meeting that is attended by the members and creditors.

9. I am of the clear view that any dispensation from holding of the meeting of the members and creditors will be clearly a thing which is in conflict with the very provisions of law which provides for the court ordering the manner of holding of the meeting, the place and time for the purpose, the chairman to be appointed, etc." (emphasis added).

Similar was also the view of the Allahabad High Court in *In the matter of Ganges Concast Industries Ltd.*[12], where the following was observed:

"8. Section 391 (1) says that the Court may order a meeting of creditors or class of creditors or members or class of members, as the case may be, to be called, hold and conducted in such manner as the Court directs. It is suggested that the word 'may' gives a discretion to this Court and in given circumstances, Court may dispense with the requirement of calling a meeting of creditors or members as the case may be.

9. Section 391(1) needs to be read with Rules 67 and 69 of The Companies (Court) Rules, 1959 (hereinafter referred to as "Rules 1959"). The aforesaid provisions nowhere contemplate dispensation of meeting of members or creditors, as the case may be, altogether. The purpose is that scheme for amalgamation proposed must be considered by members and creditors etc., i.e. stock holders in the company. In a given case, there may be a situation where a particular class of members or creditors, the number thereof is so small that instead of directing to hold the meeting, they may convey their consent for approval of scheme by appearing before the Court, on a notice put to them. For example, if there is only one creditor of a particular class, no purpose would be served in calling for meeting of single person but he may be issued notice by Court to appear and convey his decision, whether he approves the scheme of amalgamation or not and thereafter, the Court may proceed.

[12] *In the matter of Ganges Concast Industries Ltd.* [Company Application No. 2 of 2015, decided on April 15, 2015 (All)]

10. When the applicant company along with petition under Section 391(1), files letters alleged to have been given by members and/or creditors expressing their consent, the question would arise, whether those documents are genuine, valid and consent has actually been given by those persons to whom they are assigned and said to have been given to the applicant. Without verification thereof, ex parte acceptance of such documents presented by applicant company itself would amount to allowing petition under Section 391(1) ex parte. Neither there would be verification before Court nor in a meeting of members or creditors or class of members/creditors to discuss about the scheme of amalgamation. Such a procedure, in my view, is neither contemplated, nor would be valid. No authority has been placed before this Court, where this aspect has been examined and any law otherwise, has been laid down. It is true that in some of the orders placed before this Court, application for dispensation of meeting has been allowed on the basis of documents placed before the Court by applicant company or companies, as the case may be. However, I do not find that any law in this regard has been laid down therein that such procedure is recognized in the Act and Rules framed thereunder and even without verification of documents, ex parte version of applicant company should/must be accepted. In practice, it may happen that in a large number of cases, no one may have come forward to dispute those documents but so long as possibility of such dispute or manipulation cannot be ruled out, it is always prudent for a Court of law to follow the procedure, consistent with principles of natural justice and more specifically consistent with the procedure, prescribed in the statute. There is no such hurry in the matter of amalgamation of companies, justifying deviation from the procedure prescribed in the statute." (emphasis added).

If we can summarise the aforesaid discussion, where there have been dissenting voices raised from time to time about the power of the Courts to dispense with the meeting, the practice developed and routinely followed across the High Courts were allowing dispensation of the meetings basis consent filed by the members. Further, whilst there have been objections, except in solitary cases, the Courts have not questioned their power to dispense with the requirement of holding of meeting of members in the event of deserving situations.

CHANGE IN SCENARIO- POSITION UNDER CA 13

Under the new Companies Act, 2013 (**'CA 13'**), the provisions dealing with such schemes have been provided for under sections 230 to 240. With effect from December 15, 2016, the provisions of sections 230 to 233 and 235 to 240 of the CA 13 were notified[13], by virtue of which the NCLTs were conferred with the jurisdiction to oversee and accord sanction to schemes of reconstruction.

Section 230(1) of the CA 13, which is *pari materia* with Section 391(1) of CA 56, came up for discussion before Principal Bench of the NCLT in the first month of NCLT's tryst with approving schemes of arrangements in the case of *JVA Trading Private*

[13] Notification No. S.O. 3677(E) dated December 7, 2016 issued by the Ministry of Corporate Affairs.

Limited and C&S Electric Limited[14]. In this case, all four (4) members of the transferor company in a scheme of amalgamation, had given their consent by way of affidavit to the scheme, and a prayer was made to the Principal Bench of NCLT to dispense with the meeting of the members of the transferor company. While rejecting this prayer the Principal Bench held that the Tribunal is not empowered to dispense with the meeting of the shareholders. While disallowing the request for dispensation, NCLT made reference to sub-section (9) of section 230[15] of CA 13, read with Rule 5[16] of the Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 (**'CAA Rules'**) and held at page 9 of the order that –

"*… In relation to the dispensation of the meeting of the equity shareholders of the Transferor Company is concerned we are not inclined to grant dispensation taking into consideration the provisions of Companies Act, 2013 and the rules framed thereunder, both of which expressly do not clothe this Tribunal with the power of dispensation in relation to the meeting of shareholders/members.*" (emphasis added).

The aforesaid stance was followed by Mumbai bench of NCLT in the scheme of amalgamation involving *Basis Point Commodities Private Limited*[17], where, in its order dated January 20, 2017, the following was observed:

"*…Keeping in view the provisions of Section 230 of the Companies Act, 2013, dispensation of meeting of members cannot be granted and following directions are issued in relation to the calling, convening and holding of the meeting of the equity shareholders and preference shareholders….*"

A different approach was, however, taken by the Bangalore bench of NCLT, when, in the case of scheme of amalgamation involving *Coffee Day Overseas Private Limited*[18], meeting of the members was dispensed with basis consent letters, without going into the merit of whether NCLT had such power to dispense.

Whilst the Bangalore NCLT continued to dispense with the meeting of the members[19], the Ahmedabad bench of NCLT refused to dispense with such meeting in its order dated February

[14] *JVA Trading Private Limited and C&S Electric Limited* [(CA No. CAA-1(PB)/2017), decided on January 13, 2017 (NCLT Principal Bench)]

[15] **230.(9)** - The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent. value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

[16] **5. Directions at hearing of the application** - Upon hearing the application under sub-section (1) of section 230 of the Act, the Tribunal shall, unless it thinks fit for any reason to dismiss the application, give such directions as it may think necessary in respect of the following matters -
(a) determining the class or classes of creditors or of members whose meeting or meetings have to be held for
considering the proposed compromise or arrangement; or dispensing with the meeting or meetings for any class or classes of creditors in terms of sub-section (9) of section 230;

[17] *Basis Point Commodities Private Limited* [Transfer Company Scheme Application No. 58 of 2017, decided on January 20, 2017 (NCLT Mum)]

[18] *Coffee Day Overseas Private Limited* [T.P. No. 265/2017 in C.A. No. 738/2016, decided on February 2, 2017 (NCLT Bang)]

[19] See, *Altair Engineering India Private Limited*, [T.P. No. 272/2017 in C.A. No. 760/2016, decided on February 3, 2017 (NCLT Bang)] and *Altisource Business Solutions Private Limited* [T.P. No. 276/2017 in C.A. No. 768/2016, decided on February 6, 2017 (NCLT Bang)]

6, 2017, in the case of *Aditya Birla Financial Services Ltd.*[20], noticing the *complexities of the matter involved*.

The next significant order, in the development of the jurisprudence in this area, was rendered by NCLT Mumbai on February 13, 2017, in the case of *L&T Valves Limited*[21], exactly one month after the decision on *JVA Trading*. While deciding the matter in this case, the NCLT was of the opinion that where section 230(9) of CA 13 specifically permits the creditors to give consent to avoid calling of meeting, had it been the intention of the Parliament to extend the same liberty to take consent of the members as well, Parliament would have provided for that. Hence, in the absence of such an enabling provision in favour of the members, NCLT does not have the power to dispense with the meeting of the members. In this regard, the NCLT observed the following in *para 35* –

"35. Having said earlier and having also explained how sections 230 and 232 work, there can't be any doubt that subsection (1) of section 230 has been conditioned in such a way that it is not possible to dispense with calling members' meetings.

…

The discretion given using the word "May" cannot be construed as discretion to dispense with member's meetings as well. As to dispensation of creditors meetings, since sub-section (9) is carved out for it, this Bench will have to consider it. It goes without saying that the Courts or specifically Tribunals cannot take out discretion from somewhere else to say that mandate in the section could be dispensed with or to create a procedure that is consciously omitted. Courts and Tribunals will search for discretion that has been permitted under the section, so under sub-section 230(1) discretion is given to the Tribunal as to whether an approval is to be given to the meeting sought by the applicant or not. It need not be said again and again that as long as the purpose and intent of the Parliament in the section is clear and unambiguous, Courts are not supposed to give their interpretation either by reading something into it or taking out something from the section of the law that has been legislated by the Parliament."

Moreover, the NCLT also considered the debates and reports for the enactment of Section 230 of CA 13 and came to the following conclusion –

"48. Here, the point to be noted is, the parliament standing committee suggested the Government to apply dispense with provision envisaged u/s 230(9) to members as well, it has not been suggested for compromises alone, it has been suggested to compromises and arrangement as well. The Government said that the shareholders have to be considered on different footing, therefore there cannot be any dispensing with calling meetings of members in respect to compromises and arrangements. It need not be said that in all merger and amalgamations, scheme will be with shareholders only, that being the situation, how a meeting of the shareholders could be dispensed with. As all we know, Mergers and Amalgamations are species, Arrangements is the genesis to Mergers and Amalgamations. Therefore, the mandate under section 232 is in addition to procedure u/s 230.

[20] *Aditya Birla Financial Services Ltd* [CA(CAA) No. 3/230-232/NCLT/AHM/2017, decided on February 06, 2017 (NCLT Ahm)

[21] *L&T Valves Limited* [*CA No. 61 of 2017*, decided on February 13, 2017 (NCLT Mum)]

When it is a scheme with creditors falling under compromise with creditors, then the procedure under section 230 suffice, but when it comes to merger and amalgamation, the procedure under section 230 (3-6) is mandatory and the procedure in respect to post sanction under 232 is also mandatory. So, the liberty of taking consent is limited to creditors meeting falling under section 230, but not to the members' meetings." (emphasis applied)

Whilst one would have assumed that the aforesaid decision had finally put to rest all issues pertaining to NCLT's power (or lack of it) to dispense with the meeting of the members, it was not to be. For instance, the Principal Bench itself, even after depriving itself of the power to dispense with member's meeting in *JVA Trading*, did exactly the opposite, first in its order dated February 23, 2017, in the case of *Standipack Private Limited*[22] basis receipt of consent letters from the only two (2) shareholders of each of the transferor and transferee company, and then again on March 3, 2017, when the bench allowed dispensation of the meeting of the members in the scheme involving *Apollo Pipes Limited*[23]. Other benches of NCLT also followed suit, with Ahmedabad[24], Allahabad[25], Chandigarh[26], Chennai[27] and Hyderabad[28] benches of NCLT, all allowing dispensation of meeting of the members. Notable amongst the decisions was the order passed by NCLT Bangalore in the scheme involving *RMZ Infotech Private Limited*[29], where the NCLT, dispensed with the meeting of the members, after observing the following:

"*No doubt the word used in Section 230(1) of the Companies Act, 2013 that the Tribunal "may" order for meeting of creditors or shareholders. It is true, discretion is vested on the Tribunal in the case of dispensing with the holding and convening of meetings of creditors and shareholders. The discretion is judicial exercise and must be within the parameters of law….*" (emphasis added)

A notable exception to all the benches as specified in the preceding paragraph was the Kolkata bench of NCLT, which also had towed the line adopted in *JVA Trading* and *L&T Valves*[30]. This continued, until the issue of whether NCLT has the power to dispense with the meeting of the members, was assigned to a special bench in the matter of *Jupiter Alloys and Steel (India) Limited and Jupiter Wagons Limited*[31] in view of the divergences in views between the judicial and technical member of the bench.

[22] *Standipack Private Limited* [Company Application No. A. 10/PB/2017, decided on February 23, 2017 (NCLT Principal Bench)]
[23] *Apollo Pipes Limited* [Company Application (M) No. 169/2016, decided on March 3, 2017 (NCLT Principal Bench)].
[24] *Welspun Energy Private Limited* [CA (CAA) No. 4/ NCLT/AHM/2017, decided on March 14, 2017 (NCLT Ahm)]
[25] *MKU Armors Private Limited* [CP No. 22/ALD/2017, decided on April 28, 2017 (NCLT All)]
[26] *Bagrrys Finance Private Limited* [CA (CAA) No. 6/Chd/HP/2017, decided in April 28, 2017 (NCLT Chd)]
[27] *L&T Shipbuilding Limited and Marine Infrastructure* [CP No. 17 of 2017, decided on March 20, 2017 (NCLT Chen)]
[28] *Virtusa Software Services Private Limited* [CA (CAA) No. 35/230/HDB/2017, decided on May 8, 2017 (NCLT Hyd)]
[29] *RMZ Infotech Private Limited* [T.P. No. 285/2017 in C.A. No. 652/2016, decided on April 11, 2017 (NCLT Bang)]
[30] See, Order in the matter of *Oriental Sales Agencies (India) Private Limited* [I.A. No. 50/2017, decided on February 21, 2017 (NCLT Kol).
[31] *Jupiter Alloys and Steel (India) Limited and Jupiter Wagons Limited* [(T.A.No. 11 of 2017 connected with C.A. No. 896 of 2016), decided on April 26, 2017 (NCLT Kol)].

The special bench, while analyzing the provisions of sections 230 and 232 of the CA 13 noted the use of the words ***"may"*** under section 230(1) of the CA 13 and ***"where"*** under section 230(3) and 232(2) of CA 13 read with Rule 6 of the CAA Rules and observed the following –

"…*Upon reading of section 391(1) of the Companies Act, 1956 vis-à-vis Section 230(1) of the Companies Act, 2013, it manifests that the language used under the old Act and the new Act being pari materia to each other and both the Acts use the words "may" before "...order meeting". Section 232 (1) of the Companies Act, 2013, also use the word "may" in similar manner as section 230(1) of the Companies Act, 2013. Section 230 (3) of the Companies Act, 2013 and section 232(2) of the said Act and Rules 6 of the Companies (*(Compromises, Arrangements and Amalgamation) Rules, 2016, *both start with the word "where" and this has to be read with the word "may" …*" (emphasis applied)

By adopting this line of interpretation, the special bench has propounded that the word "may" introduces an element or essence of discretion, and thus vests in the NCLT an inherent power to dispense with the meeting of the member and/or creditors. Finally, the bench, noting that NCLT has *inherent power* under Rule 11 of National Company Law Tribunal Rules, 2016 read with Rule 24(2) of CAA Rules allowed dispensation of the meeting of the shareholders, whilst observing the following:

"*It cannot be ignored that almost all the High Courts have exercised this discretion since long and dispensed with the calling of the meetings in appropriate situations. The precedents created by the High Courts to dispense with the requirement of convening the meetings are worth and continuation of such precedents are virtue in the era of ease of doing businesses as well as future course of corporate actions. A settled issue should not be unsettled without proper reasons. Thus the notion that calling of meetings is mandatory does not stand.*

Regard being had to the precedents set forth by the Hon'ble High Courts, I am of the view that I have no reason to depart from the precedents created by the Hon'ble High Courts to dispense with the requirements of convening the meetings of the shareholders and creditors of the Company, if the Bench is satisfied in all respects. In the instant case both the applicant companies have few shareholders and all of them have given their written consents/ affidavits and post merger there shall be positive net worth and the creditors are not compromised.

That apart, as we are in the era of ease of doing business, sometimes the advantage/effectiveness of corporate actions like mergers and amalgamations will be reduced to nullity if there is delay in time and unless the discretion can be used to plug the gaps, such delays may fade away the purpose of mergers and amalgamations." (emphasis added).

The decision of the special bench, which was issued on April 26, 2017, was however not uploaded until May 17, 2017, where all the three orders of the members of NCLT Calcutta bench was uploaded together under a common interim order. However, following the aforesaid order and even before uploading the same, the Kolkata bench had, in its order dated May 9, 2017 had allowed dispensation of the meeting of the members in the case

of *Surichi Distributors Private Limited*[32], and subsequently followed the trend in the scheme of arrangement involving *Eternity Infrabuild Private Limited*[33] and *Modern Mining Private Limited*[34].

OBSERVATION

Whilst the special bench of Kolkata NCLT has provided an alternative to the arguments raised by *L&T Valves*, it did not provide further explanation for allowing dispensation of the meeting of the members, rather than simply relying on NCLT's inherent power and the practice developed by the High Courts over the ages. It would have been ideal if the bench had addressed the issues raised in *L&T Valves*, or in the alternative, provided legal rationale for arriving at the conclusion.

If one were to attempt to critique the orders passed by different benches of NCLT, holding that the tribunal does not have the power to dispense with the meeting of members, especially, in the absence of an enabling provision as has been incorporated in Section 230(9) dealing with dispensation of the meeting of the creditors basis affidavit received from at least 90% of the creditors by value, one could have probably relied on the following arguments:

one primary confusion regarding the power of the court/tribunal to dispense with the meeting of the members emanated from the use of the expression "*may*" in both Section 391(1) of CA 56 and 230(1) of CA 13. However, as has been noted by us in the preceding paragraphs, the overwhelming judicial orders, whilst interpreting Section 391(1), have favoured the interpretation of the expression '*may*' to confer discretionary power upon the judiciary to determine about such dispensation. It is now a well-accepted principle of law that *in case of an enactment, if judicial decisions have consistently adopted one construction, inaction of the legislature in not amending the enactment may lend support to the view that the construction so adopted is in accord with the intention of the legislature*[35]. On the basis of the aforesaid logic, when the High Courts have favoured an interpretation, bestowing them with the discretionary power to dispense with the meeting, it probably would have served well the NCLT, if the aforesaid judicial construct had been adopted.

The reliance on the provision of Section 230(9) of CA 13 to argue that, absence of a specific clause enabling NCLTs to dispense with the meeting of the creditors is probably based on the doctrine of *expression unius est exclusio alterius*-the express prevention of the one thing implies the exclusion of another and *expressum facit cessare tacitum*-what is expressed makes what is silent to ceases-is attracted[36]. However, the Courts have also cautioned that, whilst such maxim is a useful servant, but a

[32] *Surichi Distributors Private Limited* [CA.(CAA) No. 170/KB/2017, decided on May 9, 2017 (NCLT Kol)].
[33] *Eternity Infrabuild Private Limited* [Company Application No. 156/2017, decided on May 18, 2017 (NCLT Kol)].
[34] *Modern Mining Private Limited* [Company Application No.108/2017, decided on May 26, 2017 (NCLT Kol)].

[35] See, para 23 of *Sumer Corporation v. State of Maharashtra* Writ Petition No. 2119 of 2016, decided on April 25, 2017 (Bom) and also, *K.M. Ramakrishne Godwa vs Senior Assistant Commissioner* ILR 1990 KAR 3770.
[36] See, *Firm Adarsh Industrial Corporation Vs. Market Committee, Karnal* AIR 196 2P&H 426, for discussion on the meaning of the aforesaid doctrines.

dangerous master, if its resorted to indiscriminately[37]. In *Mary Angel v. State of T.N.*[38], the Supreme Court observed as follows on the scope of the maxim:

"*19. Further, for the rule of interpretation on the basis of the maxim "expressio unius est exclusio alterius", it has been considered in the decision rendered by the Queen's Bench in the case of Dean v. Wiesengrund [(1955) 2 QB 120 : (1955) 2 All ER 432]. The Court considered the said maxim and held that after all it is no more than an aid to construction and has little, if any, weight where it is possible to account for the "inclusio unius" on grounds other than intention to effect the "exclusio alterius". Thereafter, the Court referred to the following passage from the case of Colquhoun v. Brooks [(1887) 19 QBD 400 : 57 LT 448] QBD at 406 wherein the Court called for its approval—*
"… 'The maxim "expressio unius est exclusio alterius" has been pressed upon us. I agree with what is said in the court below by Wills, J. about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.' In my opinion, the application of the maxim here would lead to inconsistency and injustice, and would make Section 14(1) of the Act of 1920 uncertain and capricious in its operation."

20. The aforesaid maxim was referred to by this Court in the case of CCE v. National Tobacco Co. of India Ltd. [(1972) 2 SCC 560]. The Court in that case considered the question whether there was or was not an implied power to hold an enquiry in the circumstances of the case in view of the provisions of Section 4 of the Central Excise Act read with Rule 10-A of the Central Excise Rules and referred to the aforesaid passage "the maxim is often a valuable servant, but a dangerous master …" and held that the rule is subservient to the basic principle that courts must endeavour to ascertain the legislative intent and purpose, and then adopt a rule of construction which effectuates rather than one that may defeat these. Moreover, the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for the performance of a duty. In the case of Parbhani Transport Coop. Society Ltd. v. Regional Transport Authority [AIR 1960 SC 801 : (1960) 3 SCR 177] this Court observed that the maxim "expressio unius est exclusio alterius" is a maxim for ascertaining the intention of the legislature and where the statutory language is plain and the meaning clear, there is no scope for applying. Further, in Harish Chandra Bajpai v. Triloki Singh [AIR 1957 SC 444 : 1957 SCR 370, 389] SCR at p. 389 the Court referred to the following passage from Maxwell on Interpretation of Statutes, 10th Edn., pp. 316-317:

"*Provisions sometimes found in statutes, enacting imperfectly or for particular cases only that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim expressio unius, exclusio alterius. But that maxim is inapplicable in such cases. The only inference which a court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts), is that the legislature was either ignorant or unmindful of the real*

[37] See, *Ramdev Food Products Private Limited v. State of Gujarat* [Criminal Appeal No. 600 of 2007, decided on March 16, 2015 (SC)].
[38] *Mary Angel v. State of T.N.* (1999) 5 SCC 209

state of the law, or that it acted under the influence of excessive caution." (emphasis added)

In the instant case also, provision contained in Section 230(9) can be said to be an enactment more under the influence of excessive caution and not to prohibit the dispensation of meeting of the members in appropriate cases.

In *L&T Valves* case, the NCLT had referred to the views of the ministry of corporate affairs as to how the proposal of parliamentary standing committee to dispense with the meeting of the members basis consent letter was rejected by noting that *members and creditors stand on different footing so far as protection of their interests are concerned. The meetings of members are considered to be essential for such important matters to ensure corporate democracy and principle of participation in important decision makings*[39]. Whilst the value of the legislative history in ascertaining the intention of the legislature cannot be belittled, notably, the suggestion was made in the context of Section 230(9) of CA 13, which is part of Section 230 dealing with compromise or arrangement between a company and its creditors, or a company and its members. The same was not made in the context of Section 232 of CA 13, which deals with a scheme of arrangement between two companies and makes only provisions of sub-sections (3) to (6) of Section 230 to be applicable *mutatis mutandis* to a scheme covered under Section 232. Accordingly, one could argue that, when Section 230(9) has not been made applicable to Section 232, any implied prohibition of dispensing with the meeting of the members would not be applicable to a scheme covered under Section 232.

An alternative counter to the observation of the corporate ministry can be based on Rule 9 of CAA Rules, which allows a person to vote in the meeting either *in person or through proxy or through postal ballot or through electronic means*. In fact, the circular issued by Securities and Exchange Board of India on March 10, 2017, bearing reference no. CFD/DIL3/CIR/2017/21, dealing with schemes of arrangements by listed entities, specifically provide that listed entities to ensure that the scheme of arrangement submitted with the NCLT for sanction, provides for voting by public shareholders through e-voting, after disclosure of all material facts in the explanatory statement sent to the shareholders in relation to such resolution. The question that begs for discussion is, where the regulators are permitting or encouraging the shareholders to cast their votes from remote location, without being present in the physical meeting, whether the objective of holding a meeting of the members *to ensure corporate democracy and principle of participation in important decision makings* is being achieved, which cannot be achieved basis consent letters submitted by the shareholders.

CONCLUDING THOUGHTS

Reader may well recollect how, in the background of the paper, we have discussed how the certainty of legal principles is essential in achieving rule of law, which has a ripple effect on the ease of doing business by providing comfort to the market players and other stakeholders. Whilst the initial few months were bit turbulent one, with different benches of NCLT adopting

[39] See, 57th report of the Parliamentary Standing Committee on Finance on the Companies Bill, 2011, available at < http://www.prsindia.org/uploads/media/Company/Companies_Bill_%20SC%20Report%202012.pdf> (last accessed on June 20, 2017).

different stances, the dust seems to have finally settled on the issue, with all NCLTs, except for the notable exception of Mumbai bench, allowing dispensation of the meeting of the members.

The story is however far from over, with different benches taking different views on whether the meeting can be dispensed only in case of unanimous consent or with the majority in number or value. For instance, the Chennai NCLT had, in the case of *Tablets India Limited*[40], allowed dispensation of the meeting of members basis receipt of consent of 23 (twenty three) shareholders (out of 34 (thirty four) members), constituting 99.81% of the equity shareholders in value. Whereas, the Ahmedabad bench refused to dispense of such meeting in the scheme of amalgamation involving *Mahadev Infrastructure Private Limited*[41], as out of five (5) shareholders, one (1) has not given the consent, without ascertaining the shareholding value of such one (1) shareholder. In the interest of legal certainty, we can only hope that there is an alignment of views on the issue and there is certainty whether dispensation can be granted, where the proposal has not met with unanimous consent, but with substantial majority, subject to such case being appropriate for dispensation of meeting of members.

This update has been contributed by Mr. Arka Majumdar, Partner and Mr. Saptarshi Chatterjee, Associate. For any query please write to us at argusknowledgecentre@argus-p.com.

[40] *Tablets India Limited* [CA/43/CAA/2017, decided on April 25, 2017 (NCLT Chen)].
[41] *Mahadev Infrastructure Private Limited* [CA(CAA) No. 48 of 2017, decided on June 14, 2017 (NCLT Ahm)].

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