INTERPRETATION OF DEFINITIONS OF COMPANIES ACT, 2013

For Pune Chapter of ICSI

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DEFINITIONS...

**Definition:**

- To Define: The Act of making something definite, distinct or clear.
- Definition: An exact statement or description of the nature, scope, or meaning of something (Oxford dictionary)
Definitions....

- **In relation to a Statute:**
  Definitions given in a statute are those of certain words or expressions used elsewhere in the Statute.

- **Object of using Definitions:**
  - To avoid frequent repetitions
  - To aid interpretation of words for that specific statute.
Types of Definitions:

**Restrictive Definitions**
- Use of the word “mean”

**Extensive Definitions**
- Use of the word “include”.

**Restrictive Definitions**
- Use of the words “mean” and “include”.
Definitions in Companies Act, 2013

**Important Restrictive Definitions:**

- **Associate Company** means...
- **Board of Director** means ...
- **Court** means...
- **Financial Year** means ...
- **Foreign Company** means ...
- **Key Managerial Person** means ...
Definitions in Companies Act, 2013

- **Body Corporate** or corporation includes ...
- **Book and paper** include ..... 
- **Books of accounts** include...... 
- **Control** shall include ...... 
- **Financial statement** in relation to company, includes ...
- **Officer** includes ..................
Definitions in Companies Act, 2013

**Important Restrictive Definitions:**

- **Paid up share capital** means ...... and includes
- **Remuneration** means ......and includes
- **Share** means ........ and includes
‘Explanations’ in Statutes:

- **Object and Purpose of explanations:**
  
  * To explain/clarify the meaning of words contained in the particular section
  * Part and Parcel of the enactment
  * Does not widen the scope of the word explained
Explanations in Companies Act, 2013

- Definition of Associate Company has an “Explanation”
- Definition of “Contributory” has an “Explanation”
- Definition of “Managing Director” has an “Explanation” –

.......For the purposes of this clause, the power to do administrative acts of a routine nature when so authorized by the board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within the substantial powers of management;
‘Proviso’ in Statutes:

- **Object and Purpose of Provisos:**
  - To *except* something from the applicability of the particular section...
  - or
  - To *qualify* or *make conditional* something enacted in the provision...
  - ...which would, but for such proviso, would not be excepted or qualified or made conditional.

Proviso is sometimes, also used as an Explanation.
Provisos in Companies Act, 2013

- **In the nature of Exception:**

Definition of **Promoter** – **Provided further** that nothing in sub clause (c) shall apply to a person who is acting merely in a professional capacity.

- **In the nature of Explanation:**

Definitions of Private and Public Company.

**Proviso in the def. of Private company:**
Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member.
ANALYSIS AND IMPACT OF IMPORTANT DEFINITIONS IN COMPANIES ACT, 1956
ASSOCIATE COMPANY: Section 2(6)

- Associate Company in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

- Explanation: For the purpose of this clause, “significant influence” means control of at least 20% of total share capital, or of business decisions under an agreement;
Associate Company

Impact and Analysis of the Definition:

A Ltd. is an associate company of B Ltd. If:
(i)
- B Ltd. has significant influence in A Ltd. and
- B Ltd. is not a holding company of A Ltd.
  or
(ii) A Ltd and B Ltd. are joint venture companies.

- Share capital includes preference shares as well as equity shares.
- Agreement could be oral or in writing.

Thus:
Holding-Subsidiary relationship **excluded**
Joint Venture **included** irrespective of ‘significant influence’.
What is Joint Venture? **Not defined in the Act.**

Hence, reference may be had to various dictionaries, court rulings and decisions:

Black's Law Dictionary (7th Edition, page 843) defines `joint venture' thus:

"Joint Venture: A business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project."

It is a symbiotic business alliance between two or more companies whereby the complimentary resources of the partners are mutually shared and put to use.
Joint Venture *contd*.....

Supreme Court decisions in respect of meaning of JV:

- New Horizons Limited v. Union of India (UOI) and Ors (1995) 1 SCC 478

- It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses.
CHARGE: Section 2(16)

- Charge means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.
Charge

Impact and Analysis of the Definition:

- Includes a Lien.
- Lien is not defined in the Companies Act, but the Contract Act refers to Bankers Lien or General Lien.
- In case of exercise of such lien, company will have to create a charge as per Section 77 of Companies Act 2013.
FOREIGN COMPANY: Section 2(42)

- Foreign Company means any company or body corporate incorporated outside India which-
  a. Has a place of business in India whether by itself or through an agent, physically or electronic mode; and
  b. conducts any business activity in India in any other manner.
Foreign Company:

- Two conditions to be satisfied –
  - Has a place of business in India whether by itself / thru agent, physically or through electronic mode; and
  - Conducts any business activity in India in any other manner.

- How to come to a conclusion that place of business is established thru electronic mode??
Different definition in Section 234 (Merger):

“Foreign company” means any company or body corporate incorporated outside India whether having a place of business in India or not –
This definition is used in the context of merger or amalgamation of company with foreign company.

Section 380 refers only to “foreign company establishing place of business in India” and does not refer to carrying out business in India or not – Hence meaning of establishment of place of business in electronic mode is important.
Section 381 requires every foreign company to file certain documents annually.
PUBLIC COMPANY: Section 2(71)

- Public Company means a company which-
  (a) Is not a private company;
  (b) Has a minimum Paid-Up Share Capital of Five Lakh Rupees or such higher paid-up capital, as may be prescribed:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where subsidiary company continues to be private company in its Articles;
Public Company:

Impact and Analysis of the Definition:

- What is the position of subsidiaries of bodies corporate incorporated outside India?
- Whether those are Private or Public?
- No corresponding provision for erstwhile section 4(7).
PROMOTER: Section 2(69)

Promoter means a person-
(a) Who has been named as such in a prospectus or is identified by the company in the Annual Return referred to in Section 92;
Or
(b) Who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise;
Or
(c) In accordance with whose advice, directions or instructions the Board of Directors of the Company is accustomed to act:
Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity;
Promoter

Impact and Analysis of the Definition:

- Section 92 requires certification of Annual Return- Difficult to determine for certifying professional, whether person named therein is real promoter.
- Wrong certification – punishable with fine Rs.50,000 to Rs. 500,000
- For interpretation of Clause (b) it is necessary to revisit the definition of “Control”
- Whether Veto rights would constitute control?
Promoter...contd.

- Professional Capacity: Not defined in the Act.
- Hence dictionary meaning:
  “Professional” means relating to a person's work, especially work that requires special training.

Help may also be made to definition of “Expert”.
CONTROL: Section 2(27)

- Control shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders’ agreements or voting agreements or in any other manner;
Control:

Impact and Analysis of the Definition:

- Two kinds of controls envisaged:
  - By appointment of majority of Directors.
  - By controlling management or policy decisions
Control.....

- What about the meaning of ....Control over shares?
- ....Control of management policy decisions?
- ....Control of business decisions?

Whether Negative veto right is control?
- In Subhakam Ventures(I)(P) Limited V/s SEBI (2010) it was held that “Power by which acquirer can only prevent a company from doing what the latter want to do is by itself not control. It should be positive power and not negative power.
- SEBI takeover code contains similar definition.
RELATED PARTY: Section 2(76)

Related Party, with reference to a company, means-

(i) A director or his relative;
(ii) A key managerial personnel or his relative;
(iii) A firm, in which a director, manager or his relative is a partner;
(iv) A private company in which a director or manager is a member or director
(v) A public company in which a director or manager is a director or holds alongwith his relatives, more than 2 percent of its paid-up share capital;
(vi) Any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or a manager;

(vii) Any person on whose advice, directions or instructions the director or manager is accustomed to act:

Provided that nothing in sub-clause (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity

(viii) Any company which is-

(a) A holding, subsidiary or an associate company of such company; or

(b) A subsidiary of a holding company to which it is also a subsidiary;

(IX) Such other person as may be prescribed;
Related Party

Impact and Analysis of the Definition:
**Public Company** in which (i) Director, (ii) Manager

- Director
- Shareholder of >2% Paid up Cap (singly or along-with relatives)

**Private Company** in which

- Director or
- Manager

- Director or
- Member

**Natural Persons**

- Director
- Director’s relative
- KMP
- KMP’s relative

**Firm** in which

- Director
- Manager
- Relative

Is a partner
**Body Corporate**
Whose (i) BOD (ii) MD or (iii) Manager
Acts as per advice, directions, instructions
of
a. Director or
b. Manager of Company

**A co-subsidiary company**
(two companies having a same holding company)

a. Holding Company
b. Subsidiary Company
c. Associate Company

**Any person** on whose instructions, directions, advice
a. Director
b. Manager
act
SMALL COMPANY: Section 2(85)

Small Company means a company other than a public company,-

(i) paid-up share capital of which does not exceed Fifty Lakh Rupees or such higher amount as may be prescribed which shall not be more than Five Crore Rupees; or

(i) Turnover of which as per its last Profit and Loss Account does not exceed Two Crore Rupees or such higher amount as may be prescribed which shall not be more than Twenty Crore Rupees;
Small Company....contd...

....Provided that nothing in this clause shall apply to-
(a) A holding company or a subsidiary company;
(b) A company registered under section 8; or
(c) A company or body corporate governed by any special act;
Small Company:

Impact and Analysis of the Definition:

- Not applicable to subsidiary or holding company
- Two alternative conditions to be satisfied. Interpretation of ‘or’?
- When two negative conditions are connected by “or” it is to be construed as “and”. Therefore both the conditions to be met. – Supreme court of India – Punjab Produce and Trading Co. Ltd. v/s Commissioner of Income Tax, West Bengal.
Subsidiary Company: Section 2(87)

- Subsidiary Company or subsidiary in relation to any other company (that is to say the holding company), means a company in which the holding company:
  
  (i) Controls the composition of the Board of Directors; or

  (ii) Exercises or controls more than one half of the total share capital either at its own or together with one or more of its subsidiary companies
Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation- For the purposes of this clause-
(a) A company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company.
(b) the composition of a company’s Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(c) the expression “company” includes any body corporate;

“layer” in relation to a holding company means its subsidiary or subsidiaries.
Subsidiary company:

Impact and Analysis of the Definition:
Holding Co.

BOD composition. (discretionary power to appoint or remove all or majority of directors)

More than one half of total share capital (whether singly or together)
Subsidiaries

- Meaning of Exercise or Control of share capital is not clear.
- Share Capital includes Equity and preference shares.
- As per explanation “Layer in relation to holding company means its subsidiary or subsidiaries”.
- Refer section 186 (1) Loan and Investment by Company-......a company shall unless otherwise prescribed, make investment through not more than two layers of investment companies:....
Company Liquidator- Section 2(23)

- Definition: Company Liquidator, in so far as it relates to the winding up of a company, means a person appointed by-
  (a) The Tribunal in case of winding up by the Tribunal; or
  (b) The company or creditors in case of voluntary winding up,
  as a company liquidator from a panel of professionals maintained by the Central Government under sub-section (2) of Section 275;
Company Liquidator

Impact and Analysis of the Definition:

- New Definition - New Opportunities for Company Secretaries since section 275 (2) provides that company secretaries could be liquidators.
Definition- Company Secretary or Secretary means a company secretary as defined in Clause (c) of sub-section (1) of Section 2 of the Companies Secretaries Act, 1980, who is appointed by a company to perform the functions of a company secretary under this Act;
CS/CS in Practice:

Impact and Analysis of the Definition:

- No scope to include any other person to become company secretary.
- Section 205 prescribes the function of the Company Secretary.
- Company Secretary is Key Managerial Person.
- Section 204 requires big companies to attach Secretarial audit report.
Deposit- 2(31)

- Definition: Deposit includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India;

Impact and Analysis of the Definition:

- “Receipt of Money in any other form is also a deposit” This is to be read “Ejusdem Generis” and hence every receipt may not be deposit unless it is in the nature of “borrowing”.
Director- 2(34)

Definition:

- Director means a director appointed to the Board of a Company;

Impact and Analysis of the Definition:

- Change in the definition
- Does not include a person occupying position by whatever name called, as was in the erstwhile Act.
- Appointment as director is necessary.
Document- 2(36)

- Document includes summons, notice, requisition, order, declaration, form and register, whether issued, sent or kept in pursuance of this Act or under any other law for the time being in force or otherwise maintained on paper or in electronic form;

Impact and Analysis of the Definition:

- Documents can be maintained in Electronic Form.
- Electronic Form not defined in Companies Act
As per Information Technology Act,
Section 2(r) – Electronic Form with reference to information, means any information generated sent, received or stored in media, magnetic optical, computer memory, micro film, computer generated micro fiche or similar device.
Section 2(t) Electronic record means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.
Interested Director- 2(49)

- Interested Director means a director who is in any way whether by himself or through any of his relatives or firm, body corporate or other association of individuals in which he or any of his relatives is a partner, director or a member, interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into by or on behalf of a company;
Interested Director

Impact and Analysis of the Definition:

- Very exhaustive definition.
- ‘Interested Director’ is not used anywhere in the Act.
- In section 184 regarding disclosure of interest, the specific disclosure requirements are mentioned, but definition of “Interested Director” is not used.
Officer who is in Default: 2(60)

- (i) whole time director
- (ii) Key managerial personnel
- (iii) where there is no KMP, director specifically appointed
- (iv) any person charged with specific responsibility.
- (v) any person as per whose advice the BOD acts;
- (vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance.
- (vii)....
Officer in Default

Impact and Analysis of the Definition:

- Director is also included in clause (vi). He is thus not responsible provided ---

- As per Section 149 (12) an independent director, notwithstanding anything contained in the Act shall be held liable only in respect of such acts of omission or commission by company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

- Diligence not defined in the Act, hence dictionary meaning. It means application of due care and caution, conscientiousness.

- Director under clause (vi) includes MD and WTD also. No exemption available to KMPs.
“Unless Context otherwise requires”

- The definition has to be applied in context of the provision of the section.

- E.g. Charge is defined as “------------------------“

- However the word “charge is also used in section 119 (1)(b) – regarding inspection of minute books of general meeting- ( be open during business hours to the inspection by any member without charge......)

- Every definition has to be read in context in which it is used and need not be interpreted with the same meaning.
Many new definitions introduced in the new Act in order to
- Introduce new concepts (for ex- one person company, CEO, CFO)
- Further clarify certain concepts for interpretation specific to this Act (for ex- accounting standards, auditing standards, control).

Plethora of case laws based on the old act would aid interpretation.

The Companies Act, 1956 shall continue to guide us in interpretation of the new Act.
Any Questions....?
THANK YOU!