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Date:

Ref No.:

Method:

To,

The Registrar,
National Company Law Tribunal,
Block No. 3, Ground Floor, 6th,7th & 8th Floor,
CGO Complex, Lodhi Road, New Delhi – 110 003

Sub: Representation concerning affirmation and swearing of affidavits using
electronic signatures and other modern tools

Sir,

As you are aware, the COVID-19 pandemic has necessitated an unprecedented and drastic national lockdown. Due to this national lockdown, the functioning of the National Company Law Tribunal (“NCLT”), as well as other courts and tribunals, has shifted to the virtual sphere. It is generally accepted amongst professionals who practice before the NCLT that its experiment of virtual courts has been largely successful.

However, due to the untiring efforts of your good office as well as all the officers of NCLT, this Tribunal is not a stranger to the adoption of electronic tools. Even prior to the lockdown, the NCLT began the process of e-filing – a process that was largely streamlined and one which was adopted by practitioners without any significant issues. However, the weak link in the e-filing process, which is particularly being felt now during the pandemic, is the requirement of notarization of affidavits and filing of the physical paperbook containing the notarized affidavit. In fact, the requirement of filing of the physical paperbook can be said to be a direct result of the purported requirement of notarization.

The requirement for affidavits to be notarized is thought to generally arise from Section 139 of the Code of Civil Procedure, 1908, which reads as below:

139. Oath on affidavit by whom to be administered.— In the case of any affidavit under this Code—

(a) any Court or Magistrate, or





(aa) any notary appointed under the Notaries Act, 1952 (53 of 1952); or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the State Government has generally or specially empowered in this behalf, may administer the oath to the deponent.

However, in this regard I would like to draw your attention to Rule 127 of the National Company Law Tribunal Rules, 2016, which is a departure¹ from the general rule and reads as below:

127. Persons authorised to attest.- Affidavits shall be sworn or affirmed before an advocate or notary, who shall affix his official seal.

It may be noticed that this provision, unlike Section 139 of the Code of Civil Procedure, 1908, allows an affidavit to be sworn or affirmed by a notary **OR** an advocate – which means that an affidavit that is required to be filed before the NCLT **does not mandatorily require notarization** by a notary appointed under the Notaries Act, 1952 (53 of 1952).

While this in itself can greatly streamline the e-filing procedure adopted by NCLT, it can be even more useful when seen in conjunction with the provisions of the Information Technology Act, 2000 (“IT Act”).

As per Section 4 of the IT Act, “where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is – (a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference”. Thus, any pleadings which are required to be “legibly type written, lithographed or printed” to be filed in the NCLT²

¹ It may also be noted that the NCLT is not bound by the procedure laid down in the Code of Civil Procedure, 1908, due to the provisions of Section 424 (1) of the Companies Act, 2013. This related to proceedings both under the Companies Act, 2013, as well as the Insolvency and Bankruptcy Code, 2016.

² Rule 20 of the National Company Law Tribunal Rules, 2016.



may be filed as an electronic record instead; indeed, this is the legal justification for e-filings in the first place.

However, of particular note is Section 5 of the IT Act, which is reproduced below:

5. Legal recognition of electronic signatures.— Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signature affixed in such manner as may be prescribed by the Central Government.

Explanation.—For the purposes of this section, “signed”, with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression “signature” shall be construed accordingly.

Reading Section 5 of the IT Act (reproduced above) alongwith Rule 127 of the National Company Law Tribunal Rules, 2016, we can infer the following:

- (1) The affidavit which accompanies every pleading filed before the NCLT is not required to be mandatorily notarized;
- (2) Instead of notarization, the affidavit may be sworn or affirmed before an Advocate;
- (3) The deponent may sign the affidavit electronically; and
- (4) The Advocate may also sign the affidavit electronically, identify the deponent³, and acknowledge that the affidavit has been sworn before him/her (ideally by affixing his/her electronic signature above an acknowledgement to this effect).

It can be seen that if the above methodology results in an affidavit which is valid as per the provisions of the National Company Law Tribunal

³ As required by Rule 129 of the National Company Law Tribunal Rules, 2016



Rules, 2016, and is also purely in electronic form. Once it is e-filed, there would be no legal requirement for a physical paperbook to also be filed as there is no need to examine physical notarization. This method is extremely useful in situations such as this lockdown, when notarization is not possible. However, it can be used even in the future while e-filing to truly achieve the end goal of paper-less pleadings.

I must also note that the procedure to affix electronic signatures onto documents has become simplified with the advent of Aadhaar e-Signing, which is legally recognized by Section 3A of the IT Act read with the Second Schedule⁴ thereto.

I would like to add that the affixing of an electronic signature upon a document automatically “locks” the document insofar as it cannot be edited further without disturbing the electronic signature. This ensures that there is no security concern or apprehension of tampering of the pleadings after it is electronically signed.

I would also like to point out a practical aspect of this scheme. The requirement of pleadings being either signed in the presence of an officer of the court or a notary arose as a requirement was felt that the identity of a person making an affidavit or signing a pleading ought to be confirmed, so as to prevent mischievous elements from misrepresenting themselves in court matters. Even for this purpose, electronic signatures are superior to physical signing in the presence of a notary, for the following reasons:

- (1) All electronic signatures have an inbuilt mechanism to ensure that the identity of the person claiming to sign a document is verified. This is because of the nature of electronic signatures which rely upon authentication of the signatory. This authentication can be in the form of a password-protected private key (in the case of Digital Signature Certificates) or “One-Time Passwords” sent to the Aadhaar-registered

⁴ You may refer to the Electronic Signature or Electronic Authentication Technique and Procedure Rules, 2015, issued by the Ministry of Communications and Information Technology and published in the Official Gazette on the 27th of January, 2015, bearing reference number G.S.R. 61(E). These rules specifically allow electronic signatures to be created and used using “e-authentication techniques using Aadhaar e-KYC services”.



mobile number and email id of the deponent (in case of Aadhaar e-Sign electronic signatures). Either way, the identity of the signatory is confirmed. This is, in fact, far less susceptible to foul play than signing a document before a notary, who would be limited to verifying identity by examining an identity card such as Drivers' License, etc (which may be a forgery or a duplicate).

- (2) The fact that electronic signatures are secure is also evident by the recognition granted to them in the Evidence Act, 1872. Section 85B of the Evidence Act, 1872, states as below:

85B Presumption as to electronic records and electronic signatures. —

(1) In any proceedings involving a secure electronic record, the Court shall presume unless contrary is proved, that the secure electronic record has not been altered since the specific point of time to which the secure status relates.

(2) In any proceedings, involving secure electronic signature, the Court shall presume unless the contrary is proved that—

(a) the secure electronic signature is affixed by subscriber with the intention of signing or approving the electronic record;

(b) except in the case of a secure electronic record or a secure electronic signature, nothing in this section shall create any presumption, relating to authenticity and integrity of the electronic record or any electronic signature.

- (3) Therefore, the execution of a document in the form of an electronic record (i.e., any affidavit or pleading required to be filed before the NCLT) by way of affixing an electronic signature is recognized by law to be a secure means of both executing a document as well as confirming the identity of the signatory.

Therefore, the NCLT is poised to take this leap into the future as the National Company Law Tribunal Rules, 2016, already provide for it. ***I reiterate that the legal framework within which the NCLT operates already contemplates purely electronic pleadings affirmed by parties before***



advocates in accordance with Rule 127 of the National Company Law Tribunal Rules, 2016 (reproduced above). I am writing this letter to you with a request that the contents set out above be circulated amongst the Hon'ble Members of the NCLT, the officers of the registry, and the practitioners at large.

I also request that this letter be treated as a representation for dispensing with the need to file physical paperbooks for pleadings which have been affirmed in the manner described above.

I hope and pray that all the Hon'ble Members and officers of the registry of the NCLT stay safe during these times; and shall be at your service in case any assistance is required from the practitioners who attend to the NCLT regularly.

Yours Sincerely,

**Amir Arsiwala,
Advocate**