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CORPORATE RESTRUCTURING AND COMPANIES ACT 2013- AN IMPACT ANALYSIS

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Abstract
The Companies Act 2013 is undoubtedly an important legislation of recent years. It was in the making for almost a decade, in an attempt to make the 1956 act more relevant to the changing economic and business needs. This paper attempts to capture some new and important provisions of this act relating to Corporate Restructuring in India. Undoubtedly, the companies Act, 2013 has opened new and simple avenues for mergers, acquisitions and restructuring operations in India. The legal aspects governing corporates involved in a Corporate Restructuring scheme, particularly Mergers and Acquisitions (M&A) have been discussed in detail from the light of the New Companies Act of 2013. While the Act retains the old provisions of the erstwhile Companies Act of 1956, it also adds robust and progressive new ones.

Key words: Corporate Restructuring, Mergers and Acquisitions, Companies Act.

Introduction
The companies Act, 2013 has opened new and simple avenues for mergers, acquisitions and restructuring operations in India. The legal aspects governing corporates involved in a Corporate Restructuring scheme, particularly Mergers and Acquisitions (M&A) have been discussed from the light of the New Companies Act of 2013. While the Act retains the old provisions of the erstwhile Companies Act of 1956, it also adds robust and progressive new ones. The 2013 Act provides for the constitution of the National Company Law Tribunal (NCLT) as the single authority for all schemes relating to restructuring. Changes made in the new act are likely to have a positive impact on the manner in which corporate structuring is undertaken in India due to numerous procedural changes. This paper attempts to execute an in depth analysis of some important provisions proposed by the New Companies Act, that would change the way Corporate Restructuring happened in India.

Research Methodology
Objectives of the Paper
The objectives of the paper are as follows
1. To critically analyze the key provisions of the Companies Act 2013 with respect to Mergers and Acquisitions.
2. To provide an impact analysis of the key provisions.
3. To study the issues and challenges associated with the actual implementation of the Companies Act 2013.

Methodology
This paper is a descriptive study and is purely based on facts, figures and data, collected from primarily the bare act of 2013, various research articles from journals, magazines and websites especially from top corporates and accounting firms of the industry. Further latest contributions of various experts on the subject have also been referred.

Scope of the Study
This study extends to the impact of the Companies Act 2013 on Mergers and Acquisitions only. Other forms of Reconstruction have not been considered for the study. All provisions of the New companies Act 2013 have been analyzed irrespective of whether they have been notified or not.

Mergers & Acquisitions and The Companies Act 2013 - Key provisions and Impact Analysis
The key provisions relating to mergers, compromises and arrangements in the 2013 Act and an impact analysis of these provisions have been outlined below:

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A. Fast – track Merger ("short form" Mergers)

As in some overseas jurisdictions, the 2013 Act has introduced the new concept of fast-track mergers and demergers. These provide the option of a simplified and fast-track merger/ demerger process, which can be used for the following:

1. Merger of two or more specified small companies
2. Merger between holding company and its wholly owned subsidiary
3. Such other classes of companies as may be prescribed

In the above mentioned cases, the merger will have to be approved only by Central Government.

Approval Process

Under this process, the schemes approved by the boards of directors of companies will need to be sent to the Registrar of Companies (RoC) and the Official Liquidator (OL) for their suggestions or objections within 30 days. The scheme will then be considered in the meetings of shareholders or creditors, along with their suggestions or objections, andwill have to be approved by the following classes of persons:

- Shareholders holding 90% of the total number of shares at a general meeting.
- Majority creditors (representing nine-tenth in value) in a meeting convened with 21 days' notice.

Currently, under the 1956 Act, the criterion of "present and voting" is essential for the conduct of shareholders' and creditors' meetings. However, the similar concept of "present and voting" has not been included in the 2013 Act.

After the approval mentioned above, the scheme will have to be filed with the OL, RoC and the Central Government. In the event of there being " no objection," this will be deemed as approved. However, in the event of objections from the RoC or OL, the scheme may be referred by the Central Government to NCLT for it to consider the scheme under the normal process of a merger. If it is mandated that the scheme is to be considered a normal merger, the company is at risk of the process being considered a normal merger process instead of a fast-track merger.

Impact Analysis

This provision is fresh change to the long processes involved generally. This may help in reducing the administrative burden of the existing system, shorten the time frame in completing a merger and may reduce the costs of smaller companies that fall within threshold limits.

B. Cross-border Mergers

The flow of transactions in a Cross- border Merger, could be inbound (non-residents investing in India) or outbound (Indian business making investments abroad). However, current laws only permit inbound mergers (foreign companies merging with Indian ones) and not the other way round. The 2013 Act proposes to allow both –inbound and outbound cross-border mergers between Indian companies and foreign ones. It provides for the merger of an Indian company into a foreign one, whether its place of business is in India or in certified jurisdictions (to be notified by the Central Government from time to time), subject to the approval of the proposed National Company Law Tribunal (NCLT) and RBI's approval. The consideration of a merger, which will also be subject to the approval of the RBI, could either be in cash or depository receipts, or partly in cash and partly in depository receipts.

Impact Analysis

Enabling of cross-border mergers is expected to help Indian companies in more ways than one, including in the following:

1. Restructuring their shareholdings, wherein they can migrate ownership to an international holding structure.
2. Facilitating listing of entities, which may have Indian assets in overseas jurisdictions.
3. Providing exit routes to current investors in overseas jurisdictions.

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Cross-border mergers could have ground-breaking significance in plotting India on the global M & A landscape, since corporate deals have fallen through or failed to meet their desired objectives in the past due to the lack of such provisions in the 1956 Act.

C. Mergers of listed Companies with unlisted ones

The 1956 Act does not contain any specific provision governing the merger of a listed company with an unlisted one. It is generally assumed that shares issued pursuant to the merger of a listed company with an unlisted one (or vice versa) need to be listed on the stock exchanges where the transferor company was listed. There have been situations, however, where the resulting company has continued to be unlisted after the demerger.

The 2013 Act sets out formal guidelines and provides an option to a transferee company to remain unlisted till it is listed or applies for listing, provided the shareholders of the merged listed company are given an exit opportunity. It also provides that provision should be made by the NCLT for an exit route for the shareholders of a transferor company who decide to opt out of the transferee company by making payment amounting to the value of the shares and other benefits, in accordance with a pre-determined price formula or after a valuation report is produced.

Impact Analysis

An analysis of the new provisions brings to light attempts made to codify the existing practice while providing more clarity on valuation requirements. A specific provision in the 2013 Act, regarding the same, will encourage companies to explore this option as an alternative or in addition to the Delisting Guidelines. It is imperative to have a seemless interplay between SEBI's delisting regulations and these provisions listed above, especially in light of the requirements of delisting regulations, where minority shareholders effectively determine their own exit price. It is important that the provisions between SEBI and Ministry of Corporate Affairs be aligned to suit the requirements.

D. Minority Buyout

The 2013 Act has introduced an exit mechanism for minority shareholders. The Act grants access to the acquirer or person holding 90% or more of the issued equity share capital of the target company (listed or unlisted) by virtue of amalgamation, share exchange, conversion, securities or for any other reasonto acquire shares from minority shareholders subject to some compliances. Such an acquirer, person or a group of persons will notify minority shareholders about their intention of buying the remaining equity shares. In addition, minority shareholders may also off load their shares suo-motto to majority shareholders.

Impact Analysis

The price mechanism for the minority buy-back in the case of a listed company will be the price according to SEBI's regulations, but this needs to be carried out by a registered valuer. In addition, an registered valuer will provide a valuation report to the board of directors of a company, justifying the methodology of arriving at such a price. Hence compulsory valuation by a registered valuer becomes imperative. On the other hand, the shares of minority shareholders need to be acquired by majority shareholders and not by the company and that will entail outflow of funds in the hands of the majority shareholders.

Mergers, Acquisitions and Companies Act 2013- Issues and Challenges

1. The 2013 Act seeks to simplify the overall process of acquisitions, mergers and restructuring, facilitate domestic and cross-border mergers and acquisitions, and thereby, make Indian firms relatively more attractive to investors. While some of the changes to look for at the conceptual level include merger/demerger processes, cross-border and fast track mergers between small companies and holdings, subsidiaries and provisions relating to minority shareholders' protection and exits, among others, a lot still needs to be done in terms of provision of increased clarity on some critical areas and the overall interplay of the 2013 Act with other laws.

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2. Pending notifications of some of the sections and rules in relation to restructuring and the absence of transitional provisions will be a concern within the industry and for professionals engaged in restructuring in the corporate world.
3. The 2013 Act provides for the constitution of the National Company Law Tribunal (NCLT) as the single authority for all schemes relating to restructuring. However, NCLT is yet to be constituted and become operational. Practical difficulties are expected in implementation of provisions relating to restructuring till the MCA provides clarity on these issues.
4. There is no clarity on whether fast-track mergers will be allowed prior to NCLT becoming operational. Under existing tax laws, there is no need for a company to seek the approval of a court to prove the tax neutrality of a merger or demerger. However, clarity in this regard will be required in the case of fast track mergers involving non-court approved schemes.
5. In case of cross border mergers, corresponding amendments are required in existing laws including the Income Tax Act, Exchange Control Regulations, Security-related laws etc.
6. In case of cross border mergers, notification of the “specified jurisdictions’ for cross-border mergers and the amendment of Exchange Control Regulations is yet to be made. This notification is important as it may restrict the scope of outbound mergers as well as inbound ones, which are currently allowed from any jurisdiction that allow cross-border mergers under their domestic laws.
7. In case of merger of listed firm with unlisted firm, in a merger, practical issues may arise on the applicable date of valuation of shares (e.g. the appointed date, the effective date etc.) and procedures for compensating shareholders if the NCLT process consumes considerable time and in case of any disputes on the exit price determined on the basis of the valuation, the redressal mechanism for such disputes needs further clarity.
8. The provision virtually recognize minority squeeze out as a legal option. However, there is not much clarity on whether this is a mandatory exit mechanism and a scenario where one minority shareholder desires to exist would the acquirer be forced to buy out all.

Conclusion

The Companies Act 2013 is undoubtedly an important legislation of recent years. It was in the making for almost a decade, in an attempt to make the 1956 act more relevant to the changing economic and business needs.This article has analyzed the impact of some of the new provisions introduced by the act in respect of Corporate Restructuring more definitely in case of Mergers and Acquisitions. The changes proposed by the act and the implementation of the changes would in many ways determine the effectiveness of the Companies Act of 2013.

References

1. Companies Act, 1956, http://www.mca.gov.in/Ministry/companies_Act.html.
2. Companies Act, 2013, http://www.mca.gov.in/Ministry/companies_Act.html.
3. Insight into companies Bill 2012, Corporate Professionals, WoltersKulwer (India) PrivateLtd.
4. Companies Act 2013, New rules of the Game. KPMG, October 2013.
5. Companies Act 2013, Impact on Corporate Restructuring. EZY Laws.
6. Companies Act 2013, Key Highlights and Analysis. PWC.