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Fast Track Merger: Enhancing ease of doing business

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Fast Track Merger: Ease of doing business

Background

Company law in India has undergoing a complete overhaul due to the recently notified Companies Act, 2013 (hereinafter referred to as "the Act"). Chapter XV of the Act deals with "Compromises, Arrangements and Amalgamations." In this chapter, the Act consolidates the applicable provisions of compromises, arrangements and amalgamations. The Act creates a new regulator, the National Law Company Tribunal (hereinafter referred to as "the Tribunal") who will assume jurisdiction of the court for sanctioning mergers. Under the erstwhile Act, companies which have reached a consensus to merge must prepare a "scheme" of amalgamation / merger ("Scheme"). The lenders (financial institutions or banks) of the transferor and the transferee must approve the Scheme in principle, followed by the subsequent approval of the respective Board of Directors of the merging entities. The next step is to apply to the High Court having jurisdiction over the registered office of the company seeking an order to convene shareholders and creditors meeting. Without getting into further details of the process, the key point is that any objector amongst the stakeholders can object to the Scheme in the court proceedings.

Section 233 of the Act proposes simplified norms for mergers for certain class of companies viz. between the holding and its wholly owned subsidiary; and small companies. The erstwhile Act did not offer a simplified process and the intervention of high court was mandated thus making the process very time consuming and tiresome. The process involved seeking approval from shareholders, creditors, Registrar of Companies (RoC), Official Liquidator (OL) and High Court. A lot of the formalities under the old Act have been done away with.

In this article, we intend to analyse the impact that provisions pertaining to fast track mergers, its process and the probable impact of it on the Indian economy.

Fast track mergers: An introduction

A thorough examination of some of the foreign laws reveals that there are countries who have adopted this mechanism wherein the intervention of courts / company courts is not required under their prevailing laws. Similarly, section 233 of the Act provides the concept of a simplified merger. The merger between the following types of companies can be possible under section 233 of the Act:

1. <u>Holding company and its wholly-owned subsidiary:</u>
   A holding company can avail the benefit of this section for merger of its wholly-owned subsidiary into itself. Holding company and its wholly-owned subsidiary can be public or private company or it may be Section 8 Companies. Further, it seems from the text of Section

233 that if the holding company desires to merge with more than one of its wholly-owned subsidiary, it has to make more than one application. The consolidate one scheme cannot be filed under this section.

2. Merger between two or more small companies:
   As defined under section 2(85) of the Act, a small company is a company other than public company with paid up company not exceeding Rs. 50 lac and turnover not exceeding Rs. 2 crore. Therefore, this option is not meant for public company.

3. Such other class or classes of companies as may be prescribed:
   However, the rules under Companies (Compromise, Arrangement and Amalgamations) Rules, 2016 have been enforced from the 15.12.2016, but these do not define the other prescribed class or classes of Companies.

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, and will have to be approved by the following classes of persons:

a. Shareholders holding 90% of the total number of shares at the general meeting;
b. Creditors representing 90% in value.

After the approval of shareholders and creditors, the scheme will have to be filed with the OL, RoC and Regional Director[1]. 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 to the Tribunal for it to consider the scheme under the normal process of a merger. In this case, it is upon the liberty of Tribunal to either mandate that the scheme to be considered as a normal merger or it may confirm the scheme by passing an order to this effect.

Among the various features of fast-track mergers of companies, one is the exemption from the need to obtain auditors' certificates of compliance with applicable accounting standards.

[1] The power has been delegated from Central Government to Regional Director vide Notification S.O. 4090(E) dated 19th December, 2016. The notification can be viewed at:
http://www.mca.gov.in/Ministry/pdf/Notification_PowerRD_20122016.pdf

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Process of Fast track merger

Filing of draft scheme

Both the transferee and the transferor companies shall file the draft scheme proposing the merger or amalgamation with the RoC where the registered office of the respective companies is situated and the Official Liquidator in **Form No. CAA.9** for their suggestions and objections. (Rule 25)

Declaration of Solvency

Pursuant to the provisions of section 233(1)(c) of the Act read with Rule 25(2) of the rules, the companies part of the merger and amalgamation (i.e. the transferor and the transferee company) shall file their respective Declaration of Solvency Statement in **Form No. CAA. 10** with the RoC. The fees for filing the aforestated declaration shall be as provided under the Companies (Registration Offices and Fees) Rules, 2014.

Analysis

From the above declaration, it is imperative that only companies who have solvent status can utilise the mechanism under this section. This means that, reverse merger is not possible under the ambit of section 233 of the Act.

Approval of members

Pursuant to the provisions of section 233(1)(b) of the Act read with Rule 25(3), the companies shall obtain approval of members holding at least ninety per cent of the total number of shares for the scheme. The objections and suggestions received by RoC and OL shall also be considered by the companies in their respective general meetings.

Analysis

The criterion of "present and voting" has been done away with under the Act. But, under Rule 9; voting either in person or through proxy or through postal ballot or through electronic means have been accepted as a mechanism under the Act, therefore ending the ambiguity pertaining to "present and voting" scenario.

Creditors approval

Pursuant to the provisions of section 233(1)(d) of the Act read with Rule 25(3), the company shall obtain the approval of the creditors in any of the below mentioned manner:

- **By Meeting:** Such Scheme shall also be approved by the majority representing 9/10th in value of creditors or class of creditors of the respective companies indicated in a meeting convened by the company by giving a notice of 21 clear days; or

- **Without Meeting:** Such Scheme shall also be approved in writing by the majority representing 9/10th in value of creditors or class of creditors of the respective companies.

Notice of meeting of members and creditors

The Notice given to the shareholders or creditors or any class of them, shall be accompanied by:

- copy of the proposed scheme;
- Statement disclosing the details of merger or amalgamation;
- Copy of valuation report, if any;
- explanation stating the effect of the scheme on Creditors, Key Managerial Persons (KMP), Promoters and Non-promoter members and debenture holders and effect on any material interests of the directors of the companies or the debenture trustees;
- copy of Declaration of Solvency; etc.

Notice shall also be published on the website of the company, if any. In case of listed company, these documents shall be sent to the SEBI and Stock Exchanges where the securities of the company are listed.

Such notice shall also be published in newspaper. In case of newspaper advertisement, it shall indicate the time within which copies of the scheme shall be made available to the concerned persons. The copies of notice shall be made available to the concerned person free of charge from the registered office of the transferor and transferee companies.

Filing of scheme approved by members and creditors

Pursuant to the provisions Rule 25(4), the transferee company shall file a copy of the approved scheme along with the result of members meeting and approval by creditors in meeting or in writing as the case may be; in **Form No. CCA-11** with the Regional Director[2] within 7 days from the date of the meeting.

The transferee company shall also file scheme with Registrar of Companies in **Form GNL-1**. The form GNL-1 shall also be accompanied with Form No. CAA-11 filed with Regional Director. Also, the copy of scheme along with Form No. CAA-11 shall be delivered to the Official liquidator through hand delivery or speed post or registered post.

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http://www.mca.gov.in/Ministry/pdf/Notification_PowerRD_20122016.pdf

Approval of Scheme

Registrar of Companies and Official Liquidator may give objections or suggestions, if any, to the Regional Director within 30 days of the receipt of the scheme. However, where no objections or suggestions have been made, it shall be presumed that they have no objection to the Scheme.

Where Registrar of Companies and Official Liquidator have not given any objections or suggestions or the objections or suggestions have been given deemed to be not sustainable and Regional Director is of opinion that the scheme is in public interest or in interest of creditors, Regional Director shall confirm the scheme in **Form No. CAA-12.**

On the basis of objections or suggestions made by the Registrar of Companies and Official Liquidator or otherwise, Regional Director is of opinion that the scheme is not in public interest; it may file an application before the Tribunal in **Form No. CAA-13** within 60 days of the receipt of the scheme stating its objections or opinion and requesting that Tribunal may consider the scheme under section 232 of the Act.

Filing of Scheme

The order of Regional Director approving the scheme shall be filed inform **Form INC-28** with the RoC within 30 days having jurisdiction over the transferee and transferor company.

Effect of the Scheme

The confirmation of order filed in Form INC-28 shall be deemed to have the effect of dissolution of the transferor company without process of winding up. All the properties or liabilities of the transferor company shall be transferred and become the properties or liabilities of the transferee company. The legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company.

On merger, the share capital held by the transferee company in the transferor company would have to be cancelled and cannot be allotted to any trust either on its behalf or on behalf of any of its subsidiary or associate company.

Some other modalities

Demerger

Reconstruction in the form of demerger has not been included in the ambit of section 233(1) of the Act. Even the newly notified rules are silent on this part. The word “reconstruction” is also not in the included in section 233 of the Act like the same has been used in Section 232 of the Act. Section 232 of

the Act deals with ordinary route of merger and amalgamation to be followed by the companies which required intervention of NCLT.

Prohibition of treasury stock

A transferee company shall, on merger or amalgamation, not hold any shares of the transferor in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company. All such shares shall be cancelled or extinguished on the merger or amalgamation.

Pooling of authorised capital

Section 233(11) of the Act give legal sanctity to this concept. Fee, if any, paid by the transferor company on its authorized capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorized capital enhanced by the merger or amalgamation. The transferee company shall follow the same steps as mandated under the Act for increase of such authorised share capital.

Forms in brief

S. No.	Form No.	Provision	By	Particulars
1	CAA.9	Sec 233(1)(a) r/w Rule 25(1)	Transferor & transferee	Notice of scheme inviting objection or suggestions from concerned authorities
2	CAA.10	Sec 233(1)(c) r/w Rule 25(2)	Transferor & transferee	Declaration of solvency by the transferor and transferee company
3	CAA.11	Sec 233(2) r/w Rule 25(4)(a)	Transferee	Filing of scheme of merger or amalgamation approved by members and creditors with the Regional Director. (within 7 days of approval of members and creditors)
4	GNL-1	Sec 233(2) r/w Rule 25(4)(b)	Transferee	Filing of scheme and Form No. CAA. 11 with the Regional Director
5	CAA.12	Sect 233 r/w Rule 25(5)	Regional Director	Confirmation order for the scheme of Merger or Amalgamation by Regional Director.
6	INC-28	Sect 233 r/w Rule 25(7)	Transferor & transferee	Filing of order of Regional Director with RoC (within 30 days of the date of order)

Conclusion

Introduction of provision of fast track merger under the new Act has opened doors for companies intending quick merger. Removing the same from the ambit of Tribunal is also a big relief as it will provide the required push by saving a lot of time from the perspective of companies. Also, delegation of power from Central Government to Regional Director will be a ease for companies as it allows timely completion of processes. Further, while the regulators have enabled the corporates with an easy route, they have also enabled sufficient checks and balances to avoid its misuse. The RoC and OL have also been granted with second opportunity to place their objections after the scheme is approved by the members and creditors.

In order to bring the "ease of doing business" norms on par with other developed nations, such steps by the regulators is a step in the right direction.

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