CRITICAL ISSUES IN MERGERS, AMALGAMATIONS AND FAST TRACK MERGERS

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Provisions of Law

Section 230 to 240 of the Companies Act, 2013 provides for the provisions in respect of Compromise, Arrangements and Amalgamations.

The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 govern the procedure and practice before the NCLT which are to be read with the National Company Law Tribunal Rules, 2016.

Process of making and filing an Application under section 230 & 232

- The rules provide for the making of singular or joint applications. However, based on practice, it is now established practice that joint applications can be made only by the entities having their registered office within the jurisdictional NCLT.

- The Application would normally carry of fee of Rs.5000/- without any necessity of paying separately at the time of filing the petition.

- Original documents would have to be filed with the Application. The copies of such documents need to be filed with the Petition rather than originals. Selective documents cannot be filed during the Petition stage.

Process of making and filing an Application

- The NCLT has now mandatory that on filing and before listing, the jurisdictional assessment circles details/addresses are provided as part of the Application.

- Latest financial statements not less than 6 months before the date of filing would be required. The list of creditors certified by an independent chartered accountant would need to contain details of the creditors closest to the filing of the application.

- The certification of the accounting treatment by the statutory auditor has become mandatory and matters would not be listed without this requirement being fulfilled.

Application in case of a WOS Scheme

- Normally, before the HC and all transferred matters, there was no requirement for the Transferee/Holding Company to file an application or petition or do any process under law in case of an amalgamation.

- The NCLAT has held in the case of *Mega Corporation Limited,* that despite the relationship, the Holding Company would need to hold meetings and follow the due process of law.

- The NCLT, Mumbai has adopted a practice wherein, no application or meetings would be held by the Transferee/Holding Company, however, service to statutory authorities and petitions would need be filed.

Hearing of the Application - Dispensation

- Consents of all shareholders mandatory by way of an affidavit for each class. Though different views were adopted by the NCLT Benches, it has now become uniform practice to grant dispensation of the meeting of a class of shareholders.

- Consents from all class of creditors to the extent of 90% value and not number is required as mandated under section 230. Separate consents from the classes of secured and unsecured creditors need to be filed to obtain dispensation of their meeting. The consent is mandated to be filed by way of an affidavit.

- Though no meetings and dispensation is granted, the NCLT, Chennai Bench would still direct advertisements to be published stating the fact of dispensation and inviting objections.

- Notices would be ordered to relevant statutory authorities which has to be served through the CAA3 format. Along with CAA3, it has become a practice, to serve the entire set of documents filed before the NCLT along with the order of dispensation.

Hearing of Application - Meeting

- In event the requisite consent affidavits are not filed, the NCLT would order meetings to be convened with the chairman, time, venue as submitted by the Applicant Companies.

- The quorum is left to the discretion of the NCLT Bench. Normally a reasonable quorum is fixed with value and number. The order would further permit a "**Deemed Quorum**" for voting on the resolution.

- Advertisements would be ordered along with directions for service on statutory authorities under Form CAA3, along with the notice/explanatory statements.

- The NCLT also permits service to the shareholders/creditors by email in certain situations. The proof of dispatch and the advertisements would need to be filed with the NCLT, Registry.

Service to Statutory Authorities – CAA3

- Notice is normally ordered to the Official Liquidator, Registrar of Companies, Regional Director, Income Tax Department and relevant sectoral regulators.

- The concept of ***"Deemed Consent"*** though provided under law is not followed in practice. The NCLT would sanction a scheme only on receipt of the reports from the Official Liquidator and the Regional Director.

- Notices are also ordered to the Competition Commission of India, stock exchanges and the Securities & Exchange Board of India is the entities are listed. The NCLT now in all cases directs the Companies to file an affidavit to state that the combination in the nature of amalgamation does not breach the thresholds laid down under the Competition Act, 2002.

- The Auditor is appointed by the Official Liquidator for the purposes of auditing the books of accounts for dissolution and not the NCLT.

Process at Meetings

- The threshold required under the Act would be "*majority of persons representing three-fourths in value of creditors or members voting in person or by proxy or by postal ballot."* The words in "present" are not carried into the Companies Act 2013.

- The threshold for objections for a shareholder is not less than 10% of the shareholder and for a creditor is outstanding debt not less than 5% of the total outstanding debt as per the latest audit financial statements. *Would these thresholds also apply for the meeting?*

- In case of listed companies, the results are to be determined as per the provisions of the Companies Act 2013 as well as the requirements of the SEBI Circulars which provides for voting by the *majority of the public and no promoter participation by postal ballot and e voting.*

- In case of a WOS-Holding Amalgamation and the transferee company is a listed entity, the requirement of following the SEBI Circulars which provides for voting by the *majority of the public and no promoter participation* has been exempted.

Admission of Petitions – Moving Towards the Final Hearing

- The dispensation order would fix the date on or before which the Petitions need to be filed.

- Normally, the Petitions would be admitted and a final date of hearing would be fixed. In certain cases, which does not involve substantial stakeholders, the NCLT has sanctioned schemes on the date of admission.

- Advertisements would be ordered in the same newspapers as ordered at the Application stage with a clear 10 day notice from the date of final hearing.

Final Hearing - Objections

- The most common observations raised by the Regional Director are the following:
  - *Differential Fee on clubbing of authorized capital;*
  - *Name swap or name change;*
  - *Filing of revised Moa, Aoa in event of name change clause or change in the above clauses;*
  - *Undertakings in event of any pending investigations (Financial Irregularities);*
- The NCLT directs the filing of an affidavit for the purposes of responding to these observations.
- The NCLT on sanctioning the Scheme would direct the registry to issue an order copy, CAA6 & CAA7, sealed order copy which are required to be filed with the Registrar of Companies within 30 days of receipt.

Restrictions on a Scheme – 230 (10)

- No buy-back under a Scheme of compromise or arrangement unless such buy back is in accordance with section 68 of the Companies Act, 2013.

- A company presenting a scheme of amalgamation or demerger also providing for a reduction of capital, need not follow the process of a reduction of capital under section 66 of the Companies Act 2013.

- The NCLT has sanctioned Scheme of Arrangement's involving a reduction of capital without any direction to follow section 66 of the Companies Act 2013. *(Selective Reduction Scheme with a deemed consent for cancellation of shares at the option of the shareholder)*

Section 231 – Power of Tribunal to enforce compromise or arrangement

- The Tribunal now has power to supervise the implementation, also pass such directions or make modifications as it may consider necessary for proper implementation of a scheme.

- Sub – Section (3) states that the provisions of this section shall apply to orders passed before the commencement of the Companies Act, 2013. Hence, by virtue of this sub-section, the NCLT would have powers to modify, supervise, alter the schemes which are sanctioned by the High Court under the Companies Act 1956.

- The NCLT, Chennai in a certain matter has passed an order permitting the amendment of a scheme sanctioned by a High Court.

Section 233 of the Companies Act – Fast Track Mergers

- Merger of two or more small companies or between a *"holding company and its wholly-owned subsidiary company"* or a prescribed class or class of companies. *Does this mean that the fast track amalgamation can be between a WOS and Holding as well as a Holding into a WOS?*

- Section 233 (12) permits a compromise or an arrangement or division or transfer. The scope and nature of transactions possible under section 233 (12) are wide which may also include demerger, slump sale, shareholder/creditor arrangements. *There exists a contrary view amongst the Ministry of Corporate Affairs that section 233 does not permit anything other than an amalgamation.*

Section 233 of the Companies Act – Fast Track Mergers

- No dispensation of meetings granted which is otherwise possible in a NCLT driven process. The value of approval calculated at the meeting is on 90% of the total number of shares in case of shareholders and majority representing 9/10ths in value for the creditors.

- The Central Government has power to refer the Scheme to the NCLT. *Would this mean that when the scheme is referred, no process of meetings, etc., would need to be obtained again?*

- Section 233 use the words "*on receipt of an application from the Central Government or from any person*". *Would it be possible for any creditor or shareholder to file an application before NCLT if the Regional Director does not refer to the NCLT or give his/her approval to the Scheme?*

Section 233 of the Companies Act – Fast Track Mergers

- The concept of treasury stock is available under section 233 alone. *Would it mean that in normal cases, treasury stock is possible?*

- It is to be seen how various regulatory authorities, tax authorities would view an order of the Regional Director when compared to an order of the NCLT.

- The Companies Act, 2013 intends to provide a faster process to complete merger transactions. However, If the Central Government opines that a normal merger process is it to be adopted, then the amalgamation would be done under the guise of the Tribunal. Hence, the role of the Tribunal is not completely done any with in a fast track amalgamation.

Section 234 – Inbound / Outbound Transactions

- The provisions relating the Foreign Inbound/ Outbound schemes have been notified and requisite rules have been framed.
- In case of an inbound or outbound merger, the Indian Company would have to make an application under the provisions of the Companies Act 2013 before the NCLT.
- Scheme of Amalgamation is subject to the prior approval of the Reserve Bank of India under rule 25 A of the CAA Rules.
- Rule 9 states that a merger undertaken in accordance with the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 would have the deemed prior approval as provided under rule 25A of the CAA Rules.

Section 234 – Inbound / Outbound Transactions

- Rule 4 (3) states that during an inbound merger, when guarantees or borrowings of a foreign company become the liabilities of the Indian Company.

- The Indian Company would have to comply with the requisite ECB Regulations, Borrowing Lending Regulations within a period of two years. The proviso says that there shall not be any remittance of liability for a period of two years and nor the restrictions for end use would apply. *Would the foreign creditors accept this and whether their consent would come through?*

Section 234 – Inbound / Outbound Transactions

- Rule 5 (4) for an Outbound merger provides that the guarantees or outstanding borrowings of the Indian Company becoming to the liabilities of the Foreign Resultant Company shall be repaid as per the sanctioned Scheme. *Does this mean that in cases of an outbound merger, the Scheme would have to provide the manner of payment to the Indian Company creditors?*

- The MD/WTD shall provide undertakings to comply with the Foreign Exchange Management (Cross Border Merger) Regulations, 2018

Section 236 – Minority Buy Out

- The section can be invoked when an acquirer or person acting in concert or persons or group of persons holds 90% or more of the equity share capital or in event a person becomes 90% majority;

- An offer can be made by the majority or the minority and the said amounts would have to be deposited with the company by the majority for at least one year and the shareholders shall be entitled to these amounts within 60 days;

- Duration for which the offer is to be kept open, the prescribed forms/documents necessary for making the offer, the time period required for the response of the minority has not be mentioned either in the rules or the Act.

Section 236 – Minority Buy Out

- In the absence of the physical delivery of the shares, the share certificates shall be deemed to cancelled and the Company shall complete the transfer by adopting the due process of law. *Would this section also be applicable to dematerialized shares?*

- No forum of challenge for the aggrieved minority shareholder has been provided. Instances have arisen wherein, the aggrieved minority shareholder have sued the majority for oppression and mismanagement citing actions under section 236 of the Companies Act 2013. The minority shareholder has the option of also moving a civil suit.

THANK YOU