# M&A booster – New Companies Act has it all easy and clean

Rikita Ganju and Pooja Khanna of *Phoenix Legal* discuss India's Companies Act of 2013, made effective April 1, 2014, and how its implementations will streamline India's M&A process, making it smooth and transparent.

The Companies Act 2013 (New Act), which was substantially made effective from April 1, 2014, has the potential and capability to be an historic milestone for implementing M&A's. The New Act replaced the nearly 60 year-old Companies Act, 1956 (Old Act) and has done well in recognising the importance and growing need for domestically and internationally operating Indian companies to be involved in restructuring and M&A's. So far, the provisions relating to M&A under the New Act are yet to be noted and made effective, but it seems many companies have put their M&A plans on hold, and are waiting for the M&A provisions of the New Act to be made effective which will hopefully make the process faster and easier.

The New Act seeks to streamline the M&A process and make it smooth and transparent. It appears that the New Act has been equipped with practical solutions, easier norms and tighter regulatory checks to deal with the challenges and complexities that the companies and shareholders continue to face amidst the procedures provided in the Old Act.

There are pragmatic reforms for M&A's under the New Act, which could make the process easier, faster and cleaner for companies. Some of the highlights include: fast track mergers, mergers between foreign companies and Indian companies, setting up of National Company Law Tribunal to hear and decide on M&A proposals, cutting down on the probability and scope of objections to M&A's and easier as well as wider participation of shareholders through postal ballot approval. These, along with other, more creative and hurdle-free approaches towards M&A's have been introduced in the New Act.


Chapter XV of the New Act deals with "Compromises, Arrangements and Amalgamations", and consolidates the applicable provisions and related issues. The Old Act requires for M&A's to be approved by a court process, wherein the court sanctions a scheme of arrangement (Scheme). The said process would continue under the New Act (with certain exemptions and relaxations) but the jurisdiction of courts with regard to such Schemes would be vested in a tribunal.

### Establishment of tribunal – National Company Law Tribunal (NCLT)

The New Act envisages creation of a new tribunal, the National Company Law Tribunal, which is contemplated to assume jurisdiction that is presently vested with the state High Courts for the sanctioning of the M&A's/Schemes. Under the Old Act, a Scheme is required to be approved by the state High Courts having jurisdiction over the registered office of the companies seeking the approval of the Scheme. This is done to ensure fairness and an effective oversight of the Scheme, but at the same time, there have been serious concerns regarding huge delays. The New Act seeks to address the concern of undue delay caused owing to time-consuming proceedings before the state High Courts, and entrusts the NCLT with such power. The said change

> "The New Act seeks to address the concern of undue delay caused, owing to time-consuming proceedings before the state High Courts, and entrusts the NCLT with such power"

> "The New Act seeks to streamline the M&A process and make it smooth and transparent. It appears that the New Act has been equipped with practical solutions, easier norms and tighter regulatory checks to deal with the challenges and complexities that the companies and shareholders continue to face amidst the procedures provided in the Old Act"

Ritika Ganju

is expected to help in reduce the time that is usually taken in obtaining sanctions in M&A cases.

## M&A process

While the New Act prescribes the normal sanctioning process in respect of a Scheme, with certain positive amendments, the recognition for preferable exceptions is well reflected in the New Act. The normal sanctioning process has been kept largely the same as in the Old Act, involving sanctions to be obtained by the NCLT.

One of the glaring differences between the Old Act and the New Act is that the current regulatory framework under the Old Act does not distinguish between M&A's on the basis of companies involved, and the same set of relatively complex and time-consuming processes have to be followed for all M&A's. On the contrary, in order to take away the problems faced in recent times by companies during the M &A process, the New Act has established a simplified procedure for M&A's between wholly-owned subsidiary companies and small companies. It also recognises the need for mergers between Indian and foreign companies, and provides a relatively transparent procedure, which takes care of approvals from relevant regulatory and government authorities.

## Simplified M&A procedures

### *Fast track M&A's – open to small companies and M&A's between holding and wholly-owned subsidiaries*

The Old Act provides that the mergers of all companies, irrespective of their nature and size, require court approval. Countering this, the New Act specifically carves out a simplified procedure for M&A's involving small companies and M&A's between holding and wholly-owned subsidiary companies.

As per the provisions of Section 233 of the New Act, a notice with regard to the proposed Scheme is to be placed before the Registrar of Companies, the Central Government and the Official Liquidator[1] to invite objections to the Scheme. The Scheme must be approved by shareholders totalling 90 percent in value, and creditors representing nine tenths of debt in value.

In the event of there being no objection, the Scheme will be approved. However, in the event of any objections being raised against the proposed Scheme, or in case of the Central Government being of the view that the Scheme is not in public interest, the Central Government may request that the NCLT considers the proposed Scheme under the normal M&A process. The exclusivity of fast-track mergers is expected to reduce the time elapsed during court proceedings, and will result in faster disposal of matters. This is definitely a welcome step, as its intention is to reduce the administrative burden, timelines and cost for smaller companies when carrying out M&A's.

The relaxation to fast track M&A's also includes dispensation from sending out notices to regulatory authorities to seek clearance or submission of compliance reports from the auditors.

## New enabling provisions

### *Cross border M&As – Indian companies with foreign companies*

The Old Act does not contain provisions for all mergers of Indian companies with foreign ones. It does permit cross-border mergers, but only when the transferor is a foreign company.

On the contrary, the New Act does permit mergers both ways between Indian and foreign companies located in a jurisdiction which is noticed by the Central Government in periodic consultation with RBI. Such a merger would be subject to RBI approval in respect of a foreign exchange transaction that may be involved in the process.

M&A experts have observed that the cross-border merger provision in the New Act would help Indian companies by: restructuring their shareholdings, wherein they can migrate ownership to an international holding structure; facilitating listing of entities, which may have Indian assets in overseas jurisdictions; and providing exit routes to current investors in overseas jurisdictions.

By Ritika Ganju and Pooja Khanna, ***Phoneix***

The cross-border M&A enabling provision could have ground-breaking significance on the global M&A landscape, since corporate deals have failed in the past due to the lack of this provision in the Old Act. Corporates are rightly enthusiastic as an opportunity for growth into India is being foreseen due to this permittance of M&A's.

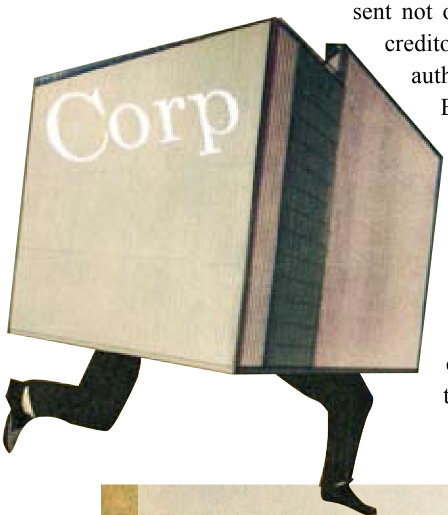
### *Merger of a listed company with an unlisted company*

The New Act provides for the NCLT's order to state that the merger of a listed company with an unlisted one will not ipso facto make the unlisted company listed. Instead, it will continue to be unlisted until the applicable listing regulations and SEBI guidelines in relation to allotment of shares to public shareholders are complied with. Further, in the event that the shareholders of a listed company decide to exit, the unlisted company would facilitate the exit with a pre-determined price formula, which shall be within the price specified by SEBI regulations.

On the contrary, the Old Act does not contain any specific provision governing the merger of a listed company with an unlisted one.

### *Cleaner procedure – regulatory approvals*

Under the Old Act, the requirement of notice and approval is limited to the shareholders and creditors. The New Act requires service of notice of the Scheme along with other documents to be sent not only to the shareholders and creditors, but to various regulatory authorities such as the Reserve Bank of India (where non-resident investors are involved), SEBI (only for listed companies), income tax authorities, the stock exchanges (only for listed companies), the Competition Commission of India (in cases of the prescribed fiscal thresholds being crossed and if the proposed merger could have an adverse effect on competition) and other regulators and authorities which are likely to be concerned with the proposed Scheme. This would ensure compliance of the Scheme with other regulatory requirements imposed on the merging entities.




> "Though the impact of the aforesaid provisions of the New Act will come to light only after these provisions are made effective, these provisions definitely reflect a genuine effort made to bring about easier, simpler and more transparent norms in relation to M&A's"

However, the drafters of the New Act have been careful not to provide the regulators with any reason to delay the process, and have prescribed a 30-day time-frame for the regulators to make representations.

In all, it seems that the existing procedure of submitting documents to the court will become a multi-party process with the involvement of various regulatory authorities, the aim being to conquer all checks and balances simultaneously.

## Other ease outs

### *Approval of the Scheme through postal ballot*

The Old Act requires the Scheme to be approved by a majority representing three quarters in value of the creditors and shareholders present, and voting in physical meetings, either in person or by proxy, to cast votes for or against the Scheme.

Under the New Act, the shareholders and creditors will have the option of casting votes through postal ballot while considering a Scheme. The Old Act did not allow this as the shareholders and creditors could only cast votes physically.

> "One of the glaring differences between the Old Act and the New Act is that the current regulatory framework under the Old Act does not distinguish between M&A's on the basis of companies involved, and the same set of relatively complex and time-consuming processes have to be followed for all M&A's"

*Pooja Khanna*


> "Corporates are rightly enthusiastic as an opportunity for growth into India is being foreseen due to this permittance of M&A's"

The right to cast votes through postal ballot will ensure wider participation of the shareholders and creditors, particularly those scattered around the country who find it difficult to be either physically present or provide a proxy.

### *Valuation report*

The Old Act does not mandate disclosing the valuation report to the shareholders. As a matter of transparency and good corporate governance, the companies provide the valuation report to the shareholders, and also the Courts required the valuation report to be annexed to the application which had been submitted for approval before them.

However, the New Act makes it mandatory for the valuation report to be annexed to the Scheme, as well as to the notice for the meetings in order to make it readily available to the shareholders and creditors. The said mandatory requirement of annexing the valuation report with the Scheme will enable the shareholders to understand the business rationale of the transaction and make an informed decision.

### *Objections*

The Old Act permitted any shareholder, creditor or other interested person to raise objections to the Scheme before the adjudicating court, if such person's interests are adversely affected. Such right to object to the Scheme is no longer available to any and every person.

The New Act provides that objections can be raised by shareholders holding 10 percent or more equity, and creditors whose debt represents five percent or more of the total debt as per the last audited financial statements.

In view of the above, the said threshold limit for raising objections and concerns with respect to the Scheme will protect the Scheme from small shareholders and creditors raising frivolous litigation and objections.

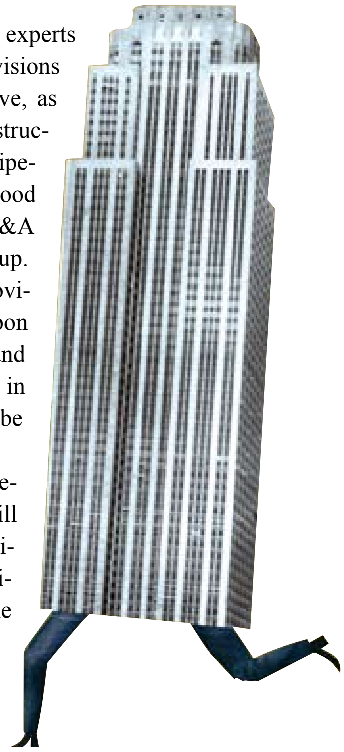
### *Accounting standards*

The New Act provides that no Scheme, whether for a listed company or an unlisted one, shall be sanctioned, unless a certificate by the company's auditor has been filed with the tribunal to the extent that the accounting treatment of the proposed Scheme is in conformity with the prescribed accounting standards. Thus, the significance given to accounting standards and audit compliance is reflected in the New Act as opposed to the Old Act, which did not contain said requirement.

## Conclusion

The provisions of the New Act seem to target a positive change and would be welcomed by Indian companies.

In view of the aforesaid discussions on the provisions of the New Act, the idea or proposal behind introducing certain simple and forward-looking concepts is to recognise the need for M&A's to be carried out in practice.



Indian business and legal M&A experts are eagerly awaiting the M&A provisions of the New Act to be made effective, as many deals and internal corporate restructurings are expected to be in the pipeline, and strategically, their likelihood would increase as and when the M&A provisions under the New Act open up.

The implementation of the provisions of the New Act may call upon regulatory authorities such as RBI and SEBI to introduce certain changes in their regulatory framework, so as to be in line with the New Act.

Though the impact of the aforesaid provisions of the New Act will come to light only after these provisions are made effective, these provisions definitely reflect a genuine effort made to bring about easier, simpler and more transparent norms in relation to M&A's.

**Endnote**

1. an office created under the New Act for the purpose of M&A and implementation of Schemes

*ritika.ganju@phoenixlegal.in*
*pooja.khanna@phoenixlegal.in*
*www.phoenixlegal.in*