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Abstract: Emerging countries like India needs a better governance framework to counter the current globalised & growing market’s challenges, difficulties and increasing responsibilities/duties for the investor, stakeholder & society and last but not the least the economic development. Company Act, 2013 is a step stone for better governance and positive atmosphere in Indian business environment which introduced various rules, regulation and provisions like simplifying the M&A rule, improve governance norms, enhance the corporate and auditor’s accountability, enhance self-regulation, increasing the levels of transparency and protect interests of small investors to compete with developed countries governance standard. The Company Act, 2013 is a good legislative attempt by the Indian government which is in line with international standard. This paper is focused on the key changes and analysis of Merger & Acquisition regulation framework by comparing the two major companies act i.e. Companies Act 1956 & Companies Act 2013.

Keywords: Companies Act 1956, Companies Act 2013, Merger & Acquisition, Corporate Governance, Buy back, shareholder

Introduction

The awaited new company Act 2013 has replaced the 1956 Act with prime objective to counter the present day challenges and in line with rapid developments, integrations, globalisation of financial markets and growing economy of the world by Lok sabha on 18 Dec 12 and in Rajya sabha on 08 Aug 13, has been received Hon’ble president assent on 29 Aug 13. The new act emphasized changes and improvised governance structure business-friendly corporate regulations, modification of e-management, enforcement, share holder protection, enhanced accountability, improved institutional structure, enhanced disclosure norms, efficient merger & acquisition, introduce the role of whistle blowers, one Person Company, and corporate social responsibility (CSR) changes. The Companies Act, 2013 not only simplifies the mergers, acquisitions and restructuring process but also modifying the previous constraint, regulatory body like National Company Law Tribunal (NCLT) and facilitates an effective impact on world business environment.

This paper is analysis of the Company Act 2013 regarding modification and new initiative taken in the field of M&A framework and trying to prove that the new M&A structure is in line with global context and in improving the efficiency and smoothness of doing business in India.

Objectives

1. The prime objective of this paper is to establish a healthy comparison between Companies Act, 2013 and Company Act 1956 regarding M&A process.

2. To evaluate the new initiative taken and its impact.

3. To find out the possible measures or necessary step to overcome the existing lapses.

Scope

Scope of the study is limited to study the new regulation and mostly focusing on the new development of as per Company Act, 2013.

Limitation

The new Company Act, 2013 has become fully implemented from 01 Apr 2014. So the actual output and the consequences the corporate sector faced cannot be measured in this sort time horizon. Further the paper is based on the secondary data so the realistic situation may be different.

Research Methodology

This paper is an exploratory type research and based on the secondary data & information from the following sources, Research journal available online, Article published in magazine & news paper, various websites & blogs, media reports and personal interaction & interview of professional on media.

Literature review

1. Maximum references is taken from the ‘Company Act, 2013: Rules, Circulars & Notifications’ published by Ministry of Corporate

Affairs, India, which emphasise the all aspect of company rule & regulation.


Development of Company Act

The expedition of Companies Act, 2013 as follows:

- **2008** - On 23rd October 2008, Companies Bill, 2008 was introduced in the Lok Sabha to replace existing Companies Act 1956. It is based on the recommendation of J.J. Irani committee.

- **2012** - The Companies Bill, 2012 was introduced and got its assent in the Lok Sabha on 18 December 2012.

- **2013** - Companies Bill, 2012 was passed by the Rajya Sabha on 8th August, 2013. After having received the assent of the President of India on 29 August 2013, it has now become the much awaited Companies Act, 2013. The Act comprises of 29 chapters, 470 clauses & 7 schedules. The key highlights of Company Act, 2013 are the extent of subordinated legislation. Which contain 300 references in the Act to rules which may be prescribed to implement and operational.

New Initiative and changes:

1. **Simplifying procedures for restructuring** [section 230-232] To provide for a simpler and faster process of mergers and acquisitions, the new Company Act provides following initiative like:

   - **Fast track merger** [section 233]: In 2013 Act contains provisions that merger process between 2 or more ‘small companies’ and between a holding company and require approval of ROC, OL, members holding at least 90% of total number of shares and majority of creditors representing 9/10th in value. This will taking less in the High Court (NCLT under 2013 Act) process and will facilitate easy completion of the process.

   - **Multilayer investment subsidiaries** [section 186]: In 2013 Act One of the measures adopted to prevent money laundering and to ensure transparency is to restrict one’s ability to set up multiple investment companies.

2. **Outbound merger**: 2013 Act introduced provision for an Indian company to be merged with a foreign company and vice versa which will require prior approval of RBI under FEMA rule.

3. **New types of companies permitted**: One person company (OPC) whose paid-up share capital does not exceed INR 0.5 crore or whose turn over does not exceed INR 2 crore would be a private company. These companies enjoy more choices and flexibility.

4. **Objection by minority**: Objection to the compromise or arrangement can be made only by persons holding not less than 10% of the shareholding or having outstanding debt of not less than 5% of total outstanding debt as per the latest audited balance sheet which will save the companies from being dragged in long drawn court (NCLT under 2013 Act) process by minority holders who is holding even single share. Threshold will ensure that merger / demerger etc. process moves smoothly and swiftly in accordance with the law.

5. **Postal Ballot** Voting by Postal ballot through post / electronic mode is made applicable to all companies.

6. **Buy-back of securities**: To provide to shareholder in a joint venture an exit in a tax efficient manner or to reward shareholders Buy-back of security has often been used. Under 1956 Act, it is possible to carry out more than 1 buy-back in a financial year as long as conditions were complied with. 2013 Act has restricted the ability of a company to do multiple buy-backs of securities.
7. Other changes:

- Approval threshold i.e. Compromise or arrangement would require approval by a majority representing 3/4th in value of the creditors and members.
- The scheme of compromise and arrangement need to be compliant with the Accounting Standards and Auditor’s Certificate to that effect needs to be filed with NCLT in accounting treatment.
- Valuation report to be given to shareholders / creditors along with notice convening meeting for a compromise or arrangement.
- The notice for compromise or arrangement need to be given to CG, Income tax, RBI, SEBI, Stock exchanges, ROC, OL, CCI, if necessary, and other sectoral regulators / authorities, to enable them to make representations.
- Participation and resolution for compromise or arrangement need to be passed through Postal ballot.
- Treasury stock: Holding of shares in its own name or in the name of trust whether through subsidiary or associate companies by the transferee company as a result of the compromise or arrangement will not be allowed and any such shares shall be cancelled / extinguished.
- Takeover Offer may be included as a part of compromise and arrangement in the manner as may be prescribed in rules issued by SEBI.
- Merger of listed into unlisted company: In case of compromise / arrangement between a listed transferor company and an unlisted transferee company, NCLT may provide that the transferee can dispense with the tribunal.
- Dispensation of meeting of creditors: Meeting of creditors can be dispensed only if 90% of the creditors in value agree to the scheme by way of affidavit.
- Combining authorized capital on amalgamation
- Minority shareholders Exit route:

Comparison analysis:

1. For outbound cross-border deals The Companies Act, 1956 does not permit. The Companies Act, 2013 allows, subject to RBI approval, both inbound and outbound cross border mergers and amalgamations between Indian and foreign companies.

2. The Companies Act, 2013 states that an application need for the Tribunal to make compromise or arrangement involving CDR, with matters like (a) A report by the auditors of the company about fund requirements after the CDR will conform to a liquidity test (b) A valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer. The Companies Act, 1956 does not contain any specific provision regarding a high court approval of a CDR scheme.

3. Under the Companies Act, 2013, the Tribunal will not sanction a scheme of capital reduction, merger, acquisition or other arrangement unless the accounting treatment prescribed in the scheme is in compliance with notified AS and a certificate to that effect by the company’s auditor has been filed with the Tribunal. Currently, SEBI has done this job.

4. The Companies Act, 1956 does not prohibit companies from creating treasury shares under the scheme. The Companies Act, 2013 prohibits such practices.

5. The Companies Act, 2013 clarifies that the merger of a listed company into an unlisted company will not automatically result in the listing of the transferee company. There are no such provisions under the Companies Act, 1956.

6. Under the existing Companies Act, 1956 any shareholder, creditor or other interested person can raise objection. However, under the Companies Act, 2013, only persons holding not less than 10% of the shareholding or having outstanding debt not less than 5% of the total outstanding debt, can raise objections to the scheme.

7. The Companies Act, 2013 empowers the Tribunal to dispense meeting of creditors if 90% or more of such creditors or class of creditors (in value terms) agree to scheme through affidavit. Though the Companies Act, 1956 does not provide such action.

8. Under the Companies Act, 1956 the terms “undertaking” and “substantially the whole of undertaking” are not explicitly defined. Under the Companies Act, 2013 provide the specific definitions of above.

9. The Companies Act, 2013 prohibits a company from making investments through more than two layers of investment companies subject to certain exceptions. There is no such restriction under the Companies Act, 1956.

10. The Companies Act, 2013 includes specific provisions requiring the company to send a notice.
of the scheme inviting objections/suggestions from inter alia the Income tax authorities, RBI, Competition Commission of India and such other sectoral regulators or authorities likely to be affected by the scheme. Currently, the Companies Act, 1956 does not require such notification to regulators/authorities.

11. The Companies Act, 1956 does not have specific entrenchment provisions (akin to veto rights). However, the Companies Act, 2013 stipulates that the articles of the company can include entrenchment clauses.

12. The Companies Act, 2013 also includes specific provision stating that contracts or arrangement between two or more persons as regards share transfer be enforceable as contracts. There are no such specific provisions under the existing Companies Act, 1956.

13. Under the Companies Act, 1956 preference shares are mandatorily redeemable within a period of 20 years. However, the Companies Act, 2013 will permit companies with infrastructure projects to issue preference shares, which are redeemable beyond 20 years.

14. The Companies Act, 2013 introduces the well-recognized internationally concept of class action suits in India

Steps for improvement

To improve and to make efficient the M&A regulation, there needs to be address the interests of wider stakeholders including financial institutions, minority stake holders, employees, customers, vendors, regulators and the society at large. Effective system having following points

- Effective, diversified and independent board that is able to challenge management on its strategic choices
- Clearly defined roles for board and management
- Constructive board meetings

Robust monitoring of business performance
- Management assurance like management controls, internal and external audit
- Openness and transparency in dealings with stakeholders
- A constant effort to improve accountability and drive better performance by focusing on the most substantive issues
- The ability of the board and management to work together in defining the optimum business model for success
- The ability to identify, access and manage emerging risks

Conclusion

With rapidly changed global environment, there is a requirement for adopting and sustaining good Governance practices for value creations and building corporations of the future which contains the measures practices regarding merger & acquisition fast track process, protection of shareholders interest etc. The Companies Act, 2013, adds robust and progressive new provisions with investor-friendly regulation and also retains the old provisions. The 2013 Act features some new provisions in the area of mergers and acquisitions, apart from the existing provisions by simplifying and rationalising the procedures involved and ensuring higher accountability for the company. It is definitely take some time for implementation from which we can derive further more relevant information and result of company act. There are some part of this act which is still need to be relooked but overall while compare with other globally accepted company law like Japanese model, European model and American Anglo-Saxon model. Whereas no model/rule/regulation are perfect and better but the initiative taken for improvement must be considered as the first step towards growth and flourishing keeping the view of current changing scenario.

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