

LEX FAVIOS

ADVOCATES & SOLICITORS

MERGERS & ACQUISITIONS

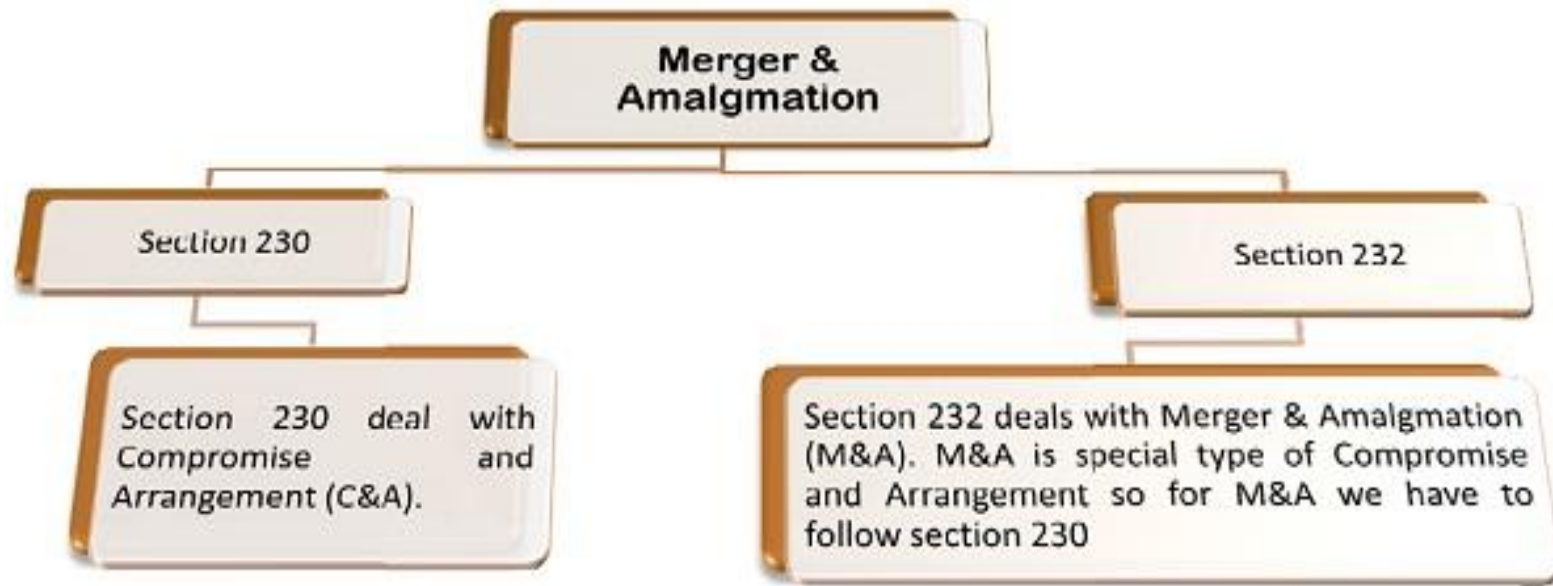


Rationale of Mergers & Acquisitions

- ▶ Increase in Market Capitalization
- ▶ Access Foreign Market
- ▶ Increase growth rate of the Company.
- ▶ Tax Benefits
- ▶ Expansion & Diversification
- ▶ Eliminate Competition

Some companies pursue a merger as a one-time opportunity that arises, whereas others make it an ongoing strategy they utilize to grow their business. Corporate mergers are also referred to as mergers and acquisitions because many times one of the companies involved purchases a majority control of the other and assumes a dominant role from a managerial standpoint after the deal is closed.


Key Provisions of CA13 in Relation to a Merger



The scheme of merger is drawn with respect to a specific date. The merger is normally held to be effective from the date of the scheme.

The amalgamated company would typically issue shares to the shareholders holding shares in the amalgamating Company.

MERGER - PRE - COURT PROCESS

- ▶ Conducting preliminary meetings and discussions towards preparation of a merger scheme;
 - ▶ Preparation of a draft scheme of merger and making revisions to the same as per the requirements of the Company(ies);
 - ▶ Drafting of resolutions, notices (including explanatory statements), and agendas for the meetings of the Board of Directors, and shareholders of the Company(ies) to facilitate the approval of the drafts scheme of amalgamation;
 - ▶ Drafting the Company Application, including related documents sought to be made by the two companies in the respective High Courts to convene with the meeting of shareholders of the two companies.
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Amalgamation

Amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which is to carry on the blended undertaking. There may be amalgamation either by transfer of two or more undertakings to a new company or by the transfer of one or more undertakings to an existing company.

Merger

- ▶ A merger is where two or more business entities combine to create a new entity or company. An amalgamation is where one business entity acquires one or more business entities.
- ▶ A merger happens when two or more companies who share similar operations or are engaged in the same line of business combine to expand their services or diversify their activities. An amalgamation usually takes place when a bigger and financially stronger entity takes over a smaller one.

Key difference between acquisition and merger - An acquisition is the generic term that is used to describe a transfer of ownership, whereas merger is a technical term for particular legal procedure wherein two separate entities merges and one legal entity survives the merger.

Mergers

- ▶ *Merger* is the combination of two or more companies into a single company where one survives and the others lose their corporate existence. The survivor acquires the assets as well as liabilities of the merged company or companies.

Corporate Restructuring

- ▶ *Corporate restructuring* is an action taken by the corporate entity to modify its capital structure or its operations significantly. Generally, corporate restructuring happens when a corporate entity is experiencing significant problems and is in financial jeopardy.

Procedure for M&A

- ▶ Board Meeting for approaching NCLT for M&A
- ▶ Application to the tribunal for M&A (Form No. NCLT-1)
- ▶ Notice of admission (Form No. NCLT-2)
- ▶ Affidavit in form no. NCLT-6
- ▶ Notice of the Meeting to all the creditors and the debenture-holders of the company (Form No. CAA.2)
- ▶ Advertisement of Notice in at least 1 English newspaper +1 vernacular newspaper having wide circulation in the State in which the registered office of the company is situated.
- ▶ Notice in Form CAA-2 to be sent to Statutory Authorities along with copy of Scheme of Arrangement in Form CAA-3.

Procedure for M&A

- ▶ An Affidavit of service of Notice shall be filed before the Tribunal.
- ▶ Meeting of Members, Creditors or a Class of them to accord sanction to the Scheme shall be convened.
- ▶ Acceptance of Scheme of Compromise & Arrangement by - not less than 75% of the secured creditors in value.)
- ▶ Petition shall be filed within 7 days of Meeting in Form CAA-5.
- ▶ Date & Notice of hearing fixed by the Tribunal shall be advertised in the same newspaper in which the Notice was advertised.
- ▶ The Tribunal shall sanction the Scheme in Form CAA-6 which has to be filed with ROC within 30 days.

Implications of Merger

A Scheme of merger entails transfer of all the businesses including transfer of all the assets and liabilities of one or more companies (referred as the amalgamating company) into another company (referred as amalgamated company).

Scheme of Arrangement

- ▶ As per Companies Act, 2013, there are two possibilities of Scheme of Arrangement: -
 - Between a Company & its creditors
 - Between a Company & its members.
- ▶ Scheme of Arrangement provides all the information behind the reason for Merger or Amalgamation. It shall contain all the necessary details about the transaction, its advantages for the organization, its effect on the management or the resources, etc.

Legal Process of Acquisition

- ▶ Legal and Financial Due Diligence of the Company being taken over;
- ▶ Valuation of the Company;
- ▶ Negotiations;
- ▶ Execution of Share Purchase/Share Acquisition Agreement, Non-Compete Agreement, Escrow Agreement.

LEGAL & FINANCIAL DUE DILIGENCE

Legal Due Diligence

- ▶ Company Law compliances – review of all statutory records, necessary filings of with the Registrar of Companies details of Minute Book etc.;
- ▶ Structure of the Company – organizational structure, shareholding pattern etc.;
- ▶ Licenses / Clearances – various approvals and licenses obtained for doing business in India;
- ▶ Employees – number of employees on various positions, compensation of key management personnel, trade union agreements, various schemes such as pension, life insurance, ESOP etc., labour disputes;

Legal Due Diligence

- ▶ Key Contracts Real Estate - properties owned and taken on lease;
- ▶ Litigation – pending litigation filed by and against the Company;
- ▶ various contracts executed by the company;
- ▶ Insurance – details of worker's compensation coverage, products liability coverage, directors', officers' indemnity/liability insurance coverage, key-man insurance policy and other material insurance policies;
- ▶ Intellectual Property – details of Research and Development Agreement, Alliance Agreement, License or Royalty Agreements, intellectual property rights including patents, copyrights, rights in designs, get-up, topography rights, rights in inventions.

Financial Due Diligence

- ▶ The Financial Due Diligence shall include the following:
- ▶ Annual audited accounts for the last three years and unaudited quarterly results;
- ▶ overdrafts, loan facilities (working capital, fund and non-fund based), guarantees, bonds and other financial facilities availed by the Company;
- ▶ mortgages, charges, trust deeds, guarantees, indemnities and other financial security documents issued/created by the Company;
- ▶ Investments or interests in other companies;

Financial Due Diligence

- ▶ Accounts – revenues, expenses, earning per share and Annual Report for the last three years;
- ▶ Various registrations with the tax authorities;
- ▶ income tax and other applicable tax returns and annual returns for the last three years;
- ▶ Special tax clearances/exemptions obtained from the Tax Authorities.

Role of Court

- ▶ The Merger provisions under the Companies Act constitute a comprehensive code in themselves, and under these provisions earlier the Courts and now the Tribunal has full power to sanction any alterations in the corporate structure of a company that may be necessary to affect the corporate restructuring that is proposed. The judiciary has very clearly laid out the parameters within which such schemes of arrangement may be initiated, approved by shareholders and creditors and then accorded the sanction of the court.
- ▶ Under the new Companies Act 2013, the High Court has been replaced by the **Tribunal**.

Role of Court

The court/Tribunal has the following powers under the provisions of the Companies Act:

- Power of the Court to sanction the Scheme.
- Power of the Court to stay proceedings.
- Power of the Court to reject or modify the Scheme.
- Power of the Court to order winding up of the company or companies.

Share Purchase / Share Acquisition Agreement

- ▶ Key provisions include the following:
- ▶ Shareholding pattern
- ▶ Quorum at Board Meetings/Shareholders Meetings
- ▶ Deadlock provisions
- ▶ Lock in period
- ▶ Pre-emptive Rights
- ▶ Transfer of Shares
- ▶ Matters requiring shareholders consent
- ▶ Term/Termination
- ▶ Confidentiality
- ▶ Indemnification
- ▶ Governing Law

Intellectual Property & Confidentiality

- ▶ Intellectual Property Rights – it is essential to ensure that the receiving Shareholders shall treat all information pertaining Intellectual Property disclosed by the disclosing Shareholders, with the same care and discretion to avoid its publication, dissemination or disclosure to others.
- ▶ Confidentiality Issue - Confidentiality issues with regard to the rights and obligations of the acquiring company's confidential information need to be considered. Confidential information can be any communication(s), information(s) or data disclosed, written, visual or oral and other material, including intellectual property rights.

Non-compete Agreement

- ▶ Non-compete issues need to be considered by the acquiring company that the promoters/directors, of the acquirer company shall not enter into any business, trade or occupation, same as and/or similar to or in conflict with any activity carried on by the acquiring company and for the same, non-competition agreement to be executed. A specific time frame needs to be agreed.
- ▶ A fee/consideration for such Non-Compete is also payable in certain case, as acquisition cost.

Interest of Minority Shareholders

To safeguard the interest of the Minority Shareholders, the Companies Act, 2013 introduced section 235 under which it is made mandatory for the shareholders to notify the company regarding their intention of buying the remaining equity shares or by a group of persons holding 90% consent of the registered holder of the company. The Companies Act, 2013 further provides the shares need to be acquired at a price determined on the basis of valuation by a registered valuer in accordance with the rules and the regulations.

Fast Track Merger

The Fast Track merger covered under section 233 of Companies Act, 2013 requires the approval from Shareholders, creditors, Registrar of Companies, Official Liquidator and Regional Director. Under the fast track merger scheme of merger shall be entered between the following types of Companies.

- ▶ Holding Company and its wholly owned subsidiary company.
- ▶ Merger between two or more small companies.
- ▶ Such Other class or classes of companies as may be prescribed.

Benefits of Fast Track Merger

- ▶ No Mandatory approval of NCLT required.
- ▶ No Need of Issuing Public Advertisement.
- ▶ No Court Convened Meeting.
- ▶ Less Administrative Burden.
- ▶ Series of Hearing may be avoided.
- ▶ Registration of scheme shall deemed to have effect of dissolution of transferor companies without the process of winding up.
- ▶ Comparatively less cost.

Procedure for Fast Track Merger

- ▶ Conducting Board Meeting For approval of Scheme.
- ▶ Submission of Notice inviting Objections or Suggestions.
- ▶ Filing Declaration of Solvency.
- ▶ Convening General Meeting of Members or Class of Members.
- ▶ Convening Meeting of Creditors or Class of Creditors.
- ▶ Filing Copy of Scheme and Results of Meeting with Regional Director.
- ▶ Approval of Scheme by the Regional Director.

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