

Countdown to Companies Act, 2013

Impact on Transactions and
Corporate restructuring

August 2013



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Preface

The wait is finally over – The Companies Bill, 2012 is just a step away from becoming an Act. The Bill which was approved by Lok Sabha on 18th December 2012 is approved by Rajya Sabha on 08th August 2013 and will become an Act post President's assent and notification in the Gazette of India.

The new legislation promises to bring easy and efficient way of doing business in India, better governance, improves levels of transparency, enhance accountability, inculcating self compliance and making Corporates socially responsible.

The Companies Bill, 2012 ('the Bill') will replace more than half a century old Companies Act, 1956 with some sweeping changes including those in relation to corporate restructurings, mergers and acquisitions. Some of the key changes to look for are in merger/demerger processes, cross border mergers, fast track mergers between small companies and holding – subsidiaries, and provisions relating to minority shareholders' protection and exit. We believe that the new Act will help in reducing shareholders' litigation and making corporate restructuring process smooth and efficient.



Sneak preview of key provisions relating to Transactions and Corporate restructurings

- **National Company Law Tribunal:** A dedicated forum to deal with company law matters including mergers, demergers, capital reduction, etc. It will facilitate speedy disposal of cases.
- **One person company:** A private company with only one member or director, enjoying exemption from various filings, meetings, compliances etc. This is a welcome move in line with the concept followed globally. It is beneficial for sole proprietors.
- **Restriction on number of investment companies:** Investment through more than two layers of investment companies is not permitted.
- **Fast track merger:** A provision proposing speedy mergers between certain companies, viz., small private companies and holding and wholly-owned subsidiaries.
- **Cross-border mergers:** Merger between Indian companies and foreign companies with prior approval of the RBI is permissible.
- **Purchase of minority shareholding:** **Majority** shareholders who have, inter-alia, acquired majority stake (at least 90%) through amalgamation, share exchange, conversion etc. to compulsorily notify their intention to buy-out minority shareholders.
- **Shareholders' democracy:** Concept of class actions suits introduced. Threshold for raising objections to the scheme of arrangement by minority shareholders'/creditors' has been prescribed.



Section I: Compromise, arrangement and amalgamation (including demerger)

(Clause 230 to 240 of the Bill)

The clauses contain provisions for compromise or arrangement between company and its shareholders and/or creditors including merger or demerger of companies/undertakings. The Bill deals with the following types of merger (including demerger):

- **Merger of companies**
- **Merger of small private companies and merger between holding and its wholly-owned subsidiary (Fast track merger)**
- **Merger of Indian company and Foreign company (Cross Border Merger)**
- **Merger in public interest**

Note: Provisions discussed herein below in relation to merger equally applies to demerger unless otherwise specified.



Merger of companies

Amendments or new provisions	Remarks
Introduction of National Company Law Tribunal for approving mergers, demergers etc.	<ul style="list-style-type: none"> • Single forum to decide on the matters relating to Compromise, arrangement and amalgamation (including demerger) • No more approval of High Court required
Merger / demerger process - Robust and transparent	
Decision of merger or demerger to be considered in a board meeting only	<ul style="list-style-type: none"> • Scheme cannot be approved by Board by passing a 'resolution by circulation'
Dispensation of creditors' meeting possible <ul style="list-style-type: none"> • Discretion available with National Company Law Tribunal to grant dispensation subject to receiving confirmation of at least 90% creditors in value 	<ul style="list-style-type: none"> • Brings uniformity in practice followed by different high courts while granting approval • Consent required by way of affidavit from each creditors • No explicit provision for dispensation from shareholders' meeting
Filing of notice of shareholders' or creditors' meeting with various statutory authorities <ul style="list-style-type: none"> • Notice to be filed with the income tax department, RBI, ROC, OL, CG, SEBI, stock exchanges (wherever applicable), CCI or any other regulators likely to be affected • Regulators to make representation within 30 days - else deemed 'no objection' 	Notice to accompany the following: <ul style="list-style-type: none"> • Copy of Valuation report • Statement explaining details of compromise/arrangement • Statement explaining impact of such compromise/arrangement on stakeholders
Auditors' certificate on accounting treatment	<ul style="list-style-type: none"> • Ensures accounting treatment in the scheme is in compliance with Accounting Standards • Provisions brought in line with those applicable to listed companies as per the listing agreement
Shareholders or creditors can now vote through postal ballot for approval of the scheme of arrangement	<ul style="list-style-type: none"> • Gives equal opportunity of vote to all the stakeholders
Set-off of fees paid on authorised capital by transferor company <ul style="list-style-type: none"> • Set-off of fees paid, if any, on authorised share capital by dissolving transferor against any fee payable by transferee company on its authorised share capital post amalgamation 	<ul style="list-style-type: none"> • Practice followed by different courts codified into law
Minimum threshold for raising objection to the scheme of arrangement	<ul style="list-style-type: none"> • Limits frivolous litigations by few small shareholders or creditors

Amendments or new provisions	Remarks
<ul style="list-style-type: none"> Persons holding at least 10% of shareholding or 5% of the total outstanding debt as per the latest audited financials eligible to raise objections 	<ul style="list-style-type: none"> Will result in efficiency in implementation of the scheme
Protection of shareholders' interest	
National Company Law Tribunal empowered to provide for exit offer to dissenting shareholders	<ul style="list-style-type: none"> National Company Law Tribunal to provide appropriate directions for exit mechanism for dissenting shareholders
Purchase from minority shareholders <ul style="list-style-type: none"> Majority shareholders (holding at least 90% of equity share capital) who have acquired majority stake through amalgamation, share exchange, conversion of securities or for any other reason to compulsorily notify their intention of buying out minority shareholders Purchase price to be ascertained on the basis of the valuation done by a registered valuer 	<ul style="list-style-type: none"> Provides an exit option to minority shareholders in unlisted companies as well SEBI delisting regulations¹ provide that purchase price for minority shareholders should be determined as per reverse book building Instructions may be required to bring uniformity with SEBI delisting regulations
Merger/demerger of listed company with unlisted company	<ul style="list-style-type: none"> Permits mergers subject to exit offer by unlisted transferee company to shareholders' deciding to opt out Pricing to be in accordance with pre-determined pricing formula or at a fair value (shall not be less than price arrived as per the relevant SEBI regulations) Applicability of the SEBI delisting regulations may need to be considered
Companies not to hold shares in their own name or in the name of any trust, whether on its behalf or on behalf of any of its subsidiary or associate companies (Treasury shares)	<ul style="list-style-type: none"> Creation of Treasury shares no longer permissible (i.e., holding shares in trust)
Other relevant amendments	
Buy back in a scheme of compromise or arrangement <ul style="list-style-type: none"> Any buy-back of shares in a scheme of arrangement need to be compliant with the buy-back conditions prescribed under clause 68 of the Bill 	<ul style="list-style-type: none"> May not be possible to exceed limits specified for buyback through scheme of arrangement

¹ SEBI (Delisting of Equity shares) Regulations, 2009

Fast track merger

Amendments or new provisions	Remarks
The Bill provides an option of simplified and fast track process of merger /demerger in cases of specified small companies and between holding and its wholly-owned subsidiary. Under this process merger/demerger will be approved by Central Government and there will be no requirement to approach National Company Law Tribunal.	
Applicability	
Small private companies <i>Small company is defined to mean a 'private company' meeting either of the following requirements:</i> <ul style="list-style-type: none"> • Paid-up capital does not exceed INR 5 million (or higher amount as may be prescribed which shall not be more than INR 50 million or • Turnover as per its last profit and loss account does not exceed INR 20 million (or higher amount as may be prescribed which shall not be more than INR 200 million) 	<ul style="list-style-type: none"> • Benefit of fast track merger or demerger not available to small public companies
Holding and its wholly-owned subsidiary	<ul style="list-style-type: none"> • All types of companies whether public or private eligible
Key conditions	
Notice to ROC and OL or persons affected by the scheme, inviting objections to scheme within 30 days	
Approval of scheme <ul style="list-style-type: none"> • At a general meeting by members holding at least 90% of the total number of shares • By majority representing 9/10th in value of creditors or class of creditors in meeting or approved in writing 	
Merging companies to file a declaration of solvency with ROC	
Registration of scheme by CG. On registration transferor company is deemed to be dissolved.	

Cross-border merger

Amendments or new provisions	Remarks
The Companies Act, 1956 permits merger of foreign companies with companies registered in India but not vice-versa. The Bill permits merger of Indian company with foreign companies as well.	
Applicability	
Between companies registered under this Act and companies incorporated in notified countries	<ul style="list-style-type: none">• List of countries yet to be notified
Approving authority	
<ul style="list-style-type: none">• National Company Law Tribunal• Prior approval of the Reserve Bank of India also required• Other approvals or process same as merger or demerger discussed earlier	
Other amendment(s)	
<ul style="list-style-type: none">• Merger scheme may also provide for consideration in form of cash or Indian depository receipts (IDR) or partly in cash or partly in IDR	

Section II: Capital reduction, buy-back and redemption of shares

Key amendments	Remarks
Capital reduction (clause 66 of the Bill)	
As per the Companies Act, 1956 a company may reduce its share capital subject to confirmation of such reduction by the court. The Bill has made few amendments in relation to this provision as under:	
Approval of National Company Law Tribunal required	Approval of High Court not required
Capital reduction not permitted in case of default in repayment of existing/fresh deposits or any interest thereon	
Requirement for auditor's certificate that accounting treatment on capital reduction is compliant with relevant AS	
National Company Law Tribunal to send notice of application of capital reduction received from the company to CG, ROC and SEBI (whenever applicable) and creditors of the company and consider their representation, if any	
No objection presumed where none of the above persons make any representation within three months of receipt of notice from National Company Law Tribunal	
Penalties imposable for certain non-compliance	
Buy-back (clause 68 of the Bill)	
As per the Companies Act, 1956, companies desiring to buy-back shares from its shareholders may do so up to 25% of its total paid-up equity capital and free reserves in a financial year post obtaining shareholders' approval through a special resolution. However, buy-back of up to 10% of equity shares can be done with the board's approval (in which case next buy-back can be affected after a period of 365 days).	
The key amendments introduced by the Bill are as follows:	
Decision of buy-back to be considered only in board meeting	<ul style="list-style-type: none"> Decision cannot be considered by passing a resolution by circulation
Minimum gap in two buy-back offers <ul style="list-style-type: none"> No offer for buy-back shall be made within a period of one year from the date of preceding 	

Key amendments	Remarks
buy-back	
Buyback not permitted in case of default in repayment of deposits / redemption of debentures, preference shares/repayment of term loans, any interest thereon, etc.	<ul style="list-style-type: none"> Buyback not permitted till expiry of 3 years after such default is remedied
Redemption of preference shares (clause 55 of the Bill)	
Period of redemption <ul style="list-style-type: none"> Preference shares may be issued by companies for more than 20 years for funding infrastructure projects subject to annual redemption of prescribed percentage of shares, at the shareholders' option 	<ul style="list-style-type: none"> Some of Infrastructure projects prescribed are Power generation, trading & distribution of power, Transportation (roads, national highways and other road related services, rails, ports etc.), telecommunications services etc.
Inability to redeem preference shares (or payment of dividend on such shares) <ul style="list-style-type: none"> Companies which are not able to redeem any preference shares (in accordance with terms of issue) or pay dividend due on such shares may redeem the same with further issue of equivalent amount of preference shares (including the dividend due thereon) with the consent of: <ul style="list-style-type: none"> 3/4th in value of such preference shares Approval of National Company Law Tribunal Persons who do not consent to redemption as above needs to be discharged 	<ul style="list-style-type: none"> Redemption of preference shares by companies with inadequate profits may be possible

Section III: Sale or lease of undertaking by a company (*clause 180 of the Bill*)

Amendment or new provision	Remarks
As per the Companies Act, 1956 a public company proposing to dispose of its business undertaking or (substantially the whole of such undertaking) is required to seek prior approval of its shareholders by passing an ordinary resolution. The Bill in this respect has brought the following key changes:	
Applicability	
All types of companies	<ul style="list-style-type: none"> No more exemption to private companies
Definitions/clarifications	
<p>Specific definition of ‘undertaking’ and ‘substantially the whole of the undertaking’ provided in the bill’</p> <ul style="list-style-type: none"> Undertaking defined to mean such undertaking in which the company has investment exceeding 20% of its net worth as per audited balance sheet of the preceding financial year or an undertaking which generates 20% of the total income of the company during the previous financial year ‘Substantially the whole of the undertaking’ in any financial year means 20% or more of the value of the undertaking as per the audited balance sheet of the preceding financial year 	<ul style="list-style-type: none"> Transfer of undertakings not meeting the threshold criteria may not require shareholders’ approval
Approving authority	
<ul style="list-style-type: none"> Approval of members by way of a special resolution 	<ul style="list-style-type: none"> Approval through special resolution instead of ordinary resolution provided under the Companies Act, 1956

Section IV: Shareholders' rights

This section has been divided under the following heads:

- **Preferential issue of shares or convertible securities (clause 62 of the Bill)**
- **Bonus shares and dividend (clauses 63 and 123 of the Bill)**

Amendment or new provision	Remarks
Preferential issue (clause 62 of the Bill)	
As per the Companies Act, 1956 preferential allotment requires shareholders' approval by way of a special resolution. However, these provisions are presently not applicable to private companies.	
The Bill has brought the following key changes :	
Applicable to all companies	<ul style="list-style-type: none">• No more exemption to private companies
Pricing of shares <ul style="list-style-type: none">• In case of preferential allotment pricing needs to be in accordance with valuation report obtained from a registered valuer subject to such conditions as may be prescribed	<ul style="list-style-type: none">• Issue of shares at a price different than that determined by the registered valuer may not be questionable
Bonus shares and dividend (clause 63 and clause 123 of the Bill)	
Specific provision inserted under the Bill on bonus shares <ul style="list-style-type: none">• Bonus shares cannot be issued out of revaluation reserves	<ul style="list-style-type: none">• Provision in line with the SEBI (Issue of Capital and Disclosure requirements) Regulations
No mandatory transfer of profits to reserves prior to declaration of dividend	<ul style="list-style-type: none">• No locking of funds in general reserves

Section V: Loans and investment by companies (*clause 186 of the Bill*)

Key amendments/new provisions	Remarks
<p>As per the Companies Act, 1956, public companies intending to make investments by way of subscription or acquisition of shares or extend loan or guarantee, etc. to other persons may do so with requisite shareholders' approval where the prescribed threshold of higher of either (a) 60% of paid up share capital and free reserves or (b) 100% of free reserves is exceeded.</p> <p>The Bill proposes to bring significant changes under the provision as follows:</p>	
Applicability	
All companies	<ul style="list-style-type: none"> All private companies enjoying exemption under the Companies Act, 1956 from such provisions will now need to comply with it
Restriction on making investment	
<p>Restriction on making investment through more than two layers of investment companies</p> <ul style="list-style-type: none"> Investment through more than two layers of 'investment companies' not permitted (‘investment company’ means a company whose principal business is acquisition of shares, debentures or other securities) <p>Exemptions</p> <ul style="list-style-type: none"> Acquisition of a company incorporated outside India if such overseas company already has investment subsidiaries beyond 2 layers Subsidiary company from having any investment subsidiary for the purpose of meeting the requirement under the law, rules or regulations 	<ul style="list-style-type: none"> Impact on multi-layered holding structures?
Loans and guarantees by companies	
No more exemptions for transactions (loans) between holding and wholly-owned subsidiaries	<ul style="list-style-type: none"> Interest free loans between holding - wholly owned subsidiary not possible irrespective of it being public or private company <p>(Rate of interest on loans cannot be lower than the prevailing yield of one, three, five or ten year Government Security closest to the tenor of the loan)</p>

Section VI: SICK companies (*clause 253-269 of the Bill*)

Amendment or new provision	Remarks
<p>As per the existing applicable provisions, a company can be declared sick if its net worth is eroded completely/ potentially as prescribed under the Sick Industrial Companies Act, 1985 (SICA).</p> <p>The Bill seeks to amend the existing provisions applicable to sick companies and amongst other, has changed the applicability as well as the exiting criteria for determining sickness from 'net worth erosion' to 'inability to pay debt'. Some of the key amendments are:</p>	
Applicable to all companies	<ul style="list-style-type: none"> • Applicable to all companies and not only to industrial undertakings • The power of BIFR will now vest with the NCLT
Criteria to determine sickness <ul style="list-style-type: none"> • A company may be declared sick if it fails to pay the amount of debt on demand by the secured creditors representing 50% or more of the outstanding debt 	
Application for intimating sickness and revival measures - process <p>Sickness application</p> <ul style="list-style-type: none"> • Secured creditor can file an application to NCLT on default (of payment of debt etc.) for determination that the company be declared sick • NCLT to pass order within 60 days from receipt of application - declaring whether the company is a sick company or not. <p>Revival measures</p> <ul style="list-style-type: none"> • Company or any of its secured creditors can make application to the NCLT for determination of revival measures (if the company is declared as sick) • Application to be made within 60 days of sickness order received from NCLT 	

Glossary

NCLT	National Company Law Tribunal
RBI	Reserve Bank of India
ROC	Registrar of Companies
OL	Official liquidator
CG	Central government
SEBI	Securities Exchange Board of India
CCI	Competition Commission of India
BIFR	Board for Industrial & Financial Reconstruction



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