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Article| Corporate & Commercial March 2020

AMALGAMATION OF COMPANIES UNDER THE COMPANIES ACT

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Introduction

Amalgamation is the coming together of two or more companies to form a single unified entity. In simple terms, the combined businesses of two or more existing companies, including all assets and liabilities of such amalgamating companies, are subsumed or transferred by the operation of law into an existing company or a new company formed for such purpose. The shareholders of the existing undertakings thereby become the shareholders of the combined (amalgamated) company. One of the innovative features of the Companies Act, No. 7 of 2007, was the introduction of a simple and straightforward method for the amalgamation of Companies.

The law governing "*Amalgamations*" is to be found in Part VIII of the Companies Act. The Act does not however, define the term and accordingly, it should be given its ordinary dictionary meaning. The dictionary [1] defines the term to mean "*combine, or unite to form one organisation or structure*". Amalgamation occurs by mutual understanding between both entities that are to be amalgamated, and is intended to benefit the shareholders of both companies. At this point, it will be relevant to differentiate between acquisitions, and takeovers, in relation to amalgamations. Both of these processes are distinct from amalgamation. Acquisition takes place when one company simply buys out another, and in takeover, the controlling interest of the company is acquired by another company either by friendly or hostile means.

According to Halsbury's Laws of England [2], "amalgamation" is a "*blending of two or more existing undertaking 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 the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation does, not, it seem, cover in the mere acquisition by a company of the share capital of other companies which remain in existence and continue their undertakings, but the context to which the term is used may show that it is intended to include such an acquisition*".

Amalgamation is a voluntary process agreed to by the amalgamating companies and the assets, rights, and liabilities of the amalgamating companies are transferred to the new entity by the operation of law. The judiciary plays no role in the amalgamation process and it is done without the sanction or interference of the courts. However, the courts do have some powers in respect

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of amalgamations, such as under Part X of the Act [3], which empowers the court to order that an amalgamation shall be binding on a Company and such other persons or classes of persons as the court may specify. Moreover, the court also has power to prevent an amalgamation, where the court is satisfied that it is not reasonably practicable to do so.

Amalgamations (Part VIII of the Companies Act)

Now, let us look in detail at the statutory provisions concerning "amalgamations". The entire subject is contained within the bounds of Sections 239 to 245 of the Companies Act. Section 239 begins by stating that *two or more companies may amalgamate and continue as one company, which may be one of the amalgamating companies or may be a new company*. The new entity is a continuation of the old undertakings and possesses all the attributes of the amalgamated entities. As a result, the old undertakings are not extinguished, but continue to exist in the form of the new entity.

Amalgamation Proposal

Section 240 (1) states that every company which proposes to amalgamate shall approve an amalgamation proposal in accordance with the provisions of the said section. These include, among other relevant information, the proposed name of the amalgamated company, directors' details, and share structure of the proposed company.

Approval of amalgamation proposal

Section 241 (1) of the Act, states that before an amalgamation proposal is put to the shareholders for their approval, the board of each amalgamating company must resolve that in its opinion (a) the amalgamation is in the best interest of the company, and (b) that the amalgamated company will satisfy the solvency test immediately after the amalgamation becomes effective. Subsection (2) of the Section, provides that the directors who vote in favour of the resolution must sign a certificate stating that the conditions set out in subsection (1) are satisfied and set out the reasons for reaching that opinion.

The board of each amalgamating company must send to the shareholders of the company, not less than twenty working days before the amalgamation proposal is to take effect, the relevant documents [4]. Moreover, the board of each amalgamating company is also required, not less than twenty working days before the date on which amalgamation is intended to become effective, to send a copy of the amalgamation proposal to every secured creditor of the company, and to give public notice of the proposed amalgamation[5]. This is done by publishing said notices in the Government Gazette, as well as, in the national newspapers in the three languages.

The amalgamation will be effected if the amalgamation proposal is approved (a) by a special resolution of each amalgamating company, in accordance with the provisions of Section 92; and (b) where required, by a special resolution of an interest group. Where a shareholder cast all the votes attached to shares registered in the shareholder's name and having the same beneficial owner against the proposed amalgamation [6], such shareholder shall be entitled to require the

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company to purchase those shares in accordance with Section 94. However, it should be noted that this right of minority buyout will have an impact on the company's finances and may affect the liquidity requirements of the amalgamated Company for the amalgamation to be legally valid.

Power of Court to restructure the amalgamation

Section 241(8) provides that if the court is satisfied that giving effect to an amalgamation proposal would unfairly prejudice a creditor of an amalgamating company or a person to whom an amalgamating company is under an obligation, it may on application made by such person make any order on such terms and conditions as the court thinks fit in relation to the proposal, and may make an order (a) directing that effect shall not be given to the proposal ; (b) directing the company or its board to reconsider the proposal or any part of it.

Short Form Amalgamation

The Act provides for an abbreviated process of amalgamation for companies that satisfy the conditions set out in Section 242. Companies that fall within the ambit of the said Section do not need to prepare an amalgamation proposal or obtain the approval of the shareholders by means of a special resolution. It will be sufficient if the boards of each such amalgamating company adopt resolutions approving the said amalgamation. The respective resolutions, taken together, shall be deemed to constitute an amalgamation proposal that has been approved.

Short form amalgamation can be considered in classes, namely vertical and horizontal short form amalgamation. Section 242 (1) of the Act, deals with the vertical short form of amalgamation and provides for the amalgamation "*of wholly owned subsidiaries*" of the parent company. It states that a company and two or more companies that are directly or indirectly wholly owned by the first company may amalgamate and continue as one company, without complying with the provisions of either Section 240 or of Section 241. The law with regard to horizontal short form amalgamation is contained in Section 242 (2) of the Act. The section provides that two or more companies each of which is directly or indirectly wholly owned by the same company may amalgamate and continue as one company without complying with the provisions of either Section 240 or Section 241.

The directors who vote in favour of a resolution should sign a certificate stating that in their opinion, the conditions set out in the respective subsections 242 (1) or 242 (2) were satisfied, and set out the reasons for reaching that opinion [7]. Furthermore, Section 242 (6) states that for the purposes of the said section, the solvency test should be applied without taking into account the stated capital of the amalgamated company.

Registration of amalgamation proposal

Section 243 states that the approved amalgamation proposal along with other relevant documents should be provided to the Registrar for the purpose of effecting the amalgamation.

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Certificate of amalgamation

Section 244 (1) provides that the Registrar on receipt of the documents that are required to be submitted for registration under Section 243 should issue a certificate of amalgamation, and moreover, if the surviving entity is a new company then should enter the particulars of the said company on the Register and issue a certificate of incorporation.

Section 244 (2) states that if an amalgamation proposal specifies a date on which the amalgamation is intended to become effective, and that date is the same as or later than the date on which the Registrar receives the documents, the certificate of amalgamation, and any certificate of incorporation shall be deemed to have effect on the date specified in the amalgamation proposal. Moreover, Section 244 (3) states that Notice of completion of such amalgamation shall be given to the public by the company.

Effect of certificate of amalgamation

Section 245 declares that the amalgamation becomes effective on the date shown in the certificate of amalgamation. If it has the same name as one of the amalgamating companies, the amalgamated company shall have the name specified in the amalgamation proposal, in which event the Registrar will remove from the Register all particulars relating to the amalgamating companies, other than the amalgamated company.

The significant provision of the said Section is that the amalgamated company succeeds to all the property, rights, powers, and privileges of each of the amalgamating companies [8], as well as, all their liabilities and obligations [9]. Section 245 (f) states that any proceedings pending by or against an amalgamating company may be continued by or against the amalgamated company. Moreover, subparagraph (g) states that any conviction, ruling, order, or judgment in favour of or against an amalgamating company may be enforced by or against the amalgamated company. The stated capital of the amalgamated company shall be the sum certified by the auditor of the amalgamated company [10].

It will be pertinent to consider the effects of amalgamation on the amalgamated company (the company surviving the amalgamation). In R. v. Black & Decker Manufacturing Co [11], the Supreme Court of Canada held that the amalgamated company was liable for criminal acts committed by one of the amalgamating companies before the amalgamation. The court in its judgment stated, "*Upon an amalgamation under the Canada Corporations Act, no "new" company is created and no "old" company is extinguished. According to the Act, the amalgamating companies are "amalgamated and continue as one company*". One of the effects of this is that amalgamating corporations in their new identity as the amalgamated corporation remain liable to prosecution for offences committed prior to the amalgamation. Dickson J. stated, "*The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution*".

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In Carter Holt Harvey Ltd vs. McKernan [12], the shareholders of a subsidiary of Carter Holt Harvey gave personal guarantees in favour of the subsidiary. The subsidiary and Carter Holt Harvey (along with other subsidiary companies) were later amalgamated into a single company. The Court of Appeal held that the guarantors continued to remain liable for their personal guarantees in favour of the subsidiary. The court in its judgment stated, "*Continuance is of the corporate entities, not of the undertakings and operations of those entities. They merge into one corporation, which is to be regarded as their equivalent or, more loosely, their successor. The Act speaks of the amalgamated company succeeding to all the property, rights, etc. and all the liabilities and obligations of each of the amalgamating companies. In a short form amalgamation involving a parent, the entity "succeeds" to property and liabilities, which have been its property and liabilities beforehand, as well as succeeding to those of the other entities. But, as the parent continues and is not deemed to be dissolved, it is clear that "succeeds", a word used in Canadian case law though not in the legislation in that country to which we have been referred, is not to be read as requiring that there be a predecessor and a successor. The merged entity succeeds to the assets and liabilities because that is where they are to be recognised as being or remaining as a result of the continuance of all parties to the amalgamation*". It held further that "*the amalgamated company is to enjoy all advantages previously conferred on any of the amalgamating companies and to have their liabilities. It is not to be treated as a different entity or as a new party to the contractual arrangements. It is not the equivalent of an assignee. Accordingly, in the case of a guarantee, neither amalgamation of the creditor nor of the debtor will discharge the guarantor in respect of post-amalgamation advances, any more than it would discharge pre-amalgamation advances. The amalgamated company simply stands in the shoes of the amalgamating company*".

The Supreme Court of Mauritius in a more recent judgment (2013), referred to the above judgments, in considering the effects of amalgamation in Soniawear Ltd vs. CEB [13]. The facts of the case are simple in that, Soniawear Ltd and Soniastyles Ltd had amalgamated, with Soniawear Ltd being the surviving entity. However, the Central Electricity Board of Mauritius refused to extend the tariff benefits that had been enjoyed by Soniastyles Ltd in favour of the amalgamated company on the basis that it was a separate entity. The court held that the amalgamation was a union of two or more companies and a continuation of the amalgamating companies as a single entity. An amalgamation does not deprive the amalgamated company of all the rights, powers, obligations and liabilities of the amalgamating company, which are effected by the operation of law. As a result, any tariff benefits that were previously enjoyed by Soniastyles Ltd would continue to be available to the surviving company.

Conclusion

Therefore, it is contented that amalgamation is a cost effective way of bringing together two separate companies in to a single entity or restructuring group companies as an effective way of facing the market forces in this evolving era of market uncertainties. The process of amalgamation is intended to enhance the long term profitability and sustainability of both undertakings; that is to focus the strengths of both undertakings as a single entity and minimise the weakness of the combined whole in an uncertain market. The simplicity and effectiveness of amalgamation has prompted more and more companies to combine, or unite to form a single unified organisation.

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4. Section 241 (3) of the Companies Act, No. 7 of 2007
5. Section 241 (4) of the Companies Act, No. 7 of 2007
6. Section 93 of the Companies Act, No. 7 of 2007
7. Section 242 (5) of the Companies Act, No. 7 of 2007
8. Section 245 (d) of the Companies Act, No. 7 of 2007
9. Section 245 (e) of the Companies Act, No. 7 of 2007
10. Section 245 (h) of the Companies Act, No. 7 of 2007
11. R. v. Black & Decker Manufacturing Co., [1975] 1 S.C.R. 411
12. Carter Holt Harvey Ltd vs. McKernan [1998] 3 NZLR 403
13. Soniawear Ltd vs. Central Electricity Board (2013 SCJ 422)

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