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Contents

Article
Mega merger in insurance on hold – A closer look 2

Notifications & Circulars 5

Ratio Decidendi 7

Article

Mega merger in insurance on hold – A closer look

By **Kanika Shukla**

Background

The complexity surrounding transactions in relation to mergers and acquisitions can never be underestimated. Such transactions undergo a prodigious milieu, which involves discussions, proposals, negotiations and most importantly, regulatory approvals.

HDFC Standard Life Insurance Company Limited[1] (HDFC Life), a joint venture between HDFC Limited and UK based Standard Life PLC established in 2000, with HDFC owning circa 61% and Standard Life owning 35%; the remaining being held by minority shareholders, proposed to merge with Max Life Insurance Company Limited (Max Life). The proposed merger itself was a testament to the challenging landscape of the M&A in a sector that is tightly regulated. Talks surrounding the proposed merger were first made public through a Press Release dated June 17, 2016[2]. Had the merger been concluded, the combined entity would have created a Rs. 255 billion annual premium company, with scale, differentiated portfolio and a wider reach in a growing life insurance sector. However, the merger faced a number of roadblocks which has resulted in the deal currently being put on hold, and HDFC Life opting for an Initial Public Offering (IPO). The article provides an overview and analysis of the key reasons behind the decision to put on hold what would have been the largest M&A transaction in the Indian insurance sector.

Structure of the Proposed Merger

The Insurance Regulatory Development Authority (IRDA/ Authority), which is the nodal body for regulating the insurance sector in India, raised critical regulatory concerns with the proposed merger and consequently struck it down. The merger was proposed in a three-step process. The first step involved the merger of Max Life with its holding company - Max Financial Services Limited (Max Financial Services). The second step was to cause this merged entity to demerge its life insurance undertaking into HDFC Life. Subsequently, in step three, Max Financial Services (holding non-life insurance business) would merge with Max India Limited (the listed entity).[3] The resultant merged entity being the holding company of Max India from the proposed merger between HDFC Life and Max Life, would then become a listed company.

Life Insurance Corporation of India (LIC) currently dominates India's life insurance sector while SBI Life Insurance Company, a JV of State Bank of India and BNP Paribas, and ICICI Prudential Life Insurance are the top two private sector life insurers in terms of premium income. This merger aspired to create the second largest life insurer in India, after LIC. The merger would have seen the promoters of Max Financial Services getting a considerable amount of non-

[1] Joint venture between HDFC Limited and Standard Life PLC

[2] "*HDFC Life, Max Life and Max Financial Services Announces Entering into Exclusivity to Evaluate a Strategic Combination*" Press Release dated July 17, 2016: https://www.hdfclife.com/iwov-resources/pdf/media/press/2016/HDFC-Life-Max-Life-and-Max-Financial-Services-Announces- Entering-into-Exclusivity-to-Evaluate-a-Strategic-Combination.pdf

[3] "*HDFC Life and Max Life Merger*" Press Presentation dated August 8, 2016: https://www.hdfclife.com/iwov-resources/pdf/media/press/2016/Press-presentation-HDFC-Life-Max-Life-Merger.pdf

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compete fee with an upfront payment of Rs. 501 crore, followed by three equal instalments totalling to Rs. 349 crore in return as consideration for its business, as well as the goodwill accumulated over the years. The entities had taken the requisite approvals from their respective shareholders for the proposed transactions. The court-convened shareholder meetings of HDFC Life, Max Life, Max Financial Services and Max India had also resulted in approvals being granted by the shareholders for all aspects of the transaction. In addition to approvals from shareholders and IRDA, the merger would have also required approvals from *inter alia* the Securities and Exchange Board of India and the Competition Commission of India.

Rationale behind the Merger

HDFC Life in its press release listed out certain objectives which the proposed merger was to achieve. Along with a more diversified distribution network, the proposed merger was to see a considerable rise in the market share of the merged entity *vis-à-vis* the erstwhile companies. The merger would facilitate a wider product base along with an enhanced access to bank assurance channels. In addition to the resultant entity being made the largest private player in the insurance sector, it would have carved a path for similar future transactions to take place. Further, the company stated that along with an improved employee value proposition, the proposed merger would result in synergy of revenue and cost to enhance the shareholder value.[4]

Bone of Contention

SEBI and other stakeholders raised their concerns over payment of a high non-compete fee of Rs. 850 crore to the promoters of Max Financial Services as such payment could be detrimental to the interests of minority shareholders. The current regulatory mechanism in case of mergers does not prescribe a limit on payment of non-compete fee as opposed to takeovers wherein such a limit is prescribed. Although, SEBI gave its approval to the proposed merger, it later started revaluating the existing provisions governing the schemes of arrangement to plug such loopholes.

Further, the main bone of contention stalling the deal surrounds Section 35 of the Insurance Act, 1938[5] (Insurance Act) which only permits mergers between insurance companies. Section 35 broadly states that no life insurance business of an insurer can be transferred to any person, or transferred to or amalgamated with the life

[4] Id

[5] Section 35 of the Insurance Act, 1938: *"(1) Notwithstanding anything contained in any other law for the time being in force, no insurance business of an insurer shall be transferred to or amalgamated with the insurance business of any other insurer except in accordance with a scheme prepared under this section and approved by the Authority. (2) Any scheme prepared under this section shall set out the agreement under which the transfer or amalgamation is proposed to be effected, and shall contain such further provisions as may be necessary for giving effect to the scheme. (3) Before an application is made to the Authority to approve any such scheme, notices of the intention to make the application together with a statement of the nature of the amalgamation or transfer, as the case may be, and of the reason there for shall, at least two months before the application is made, be sent to the Authority and certified copies four in number, of each of the following documents shall be furnished to the Authority, and other such copies shall during the two months aforesaid be kept open for the inspection of the members and policy-holders at the principal and branch offices and chief agencies of the insurers concerned, namely:- (a) a draft of the agreement or deed under which it is proposed to effect the amalgamation or transfer; (b) balance sheets in respect of the insurance business of each of the insurers concerned in such amalgamation or transfer, prepared in such forms as may be specified by the regulations; (c) actuarial reports and abstracts in respect of the life insurance business of each of the insurers so concerned, prepared in conformity with the regulations specified in this regard; (d) a report on the proposed amalgamation or transfer, prepared by an independent actuary who has never been, professionally connected; with any of the parties concerned in the amalgamation or transfer at any time in the five years preceding the date on which he signs his report; (e) any other reports on which the scheme of amalgamation or transfer was founded. The balance-sheets, reports and abstracts referred to in Clauses (b), (c) and (d) shall all be prepared as at the date at which the amalgamation or transfer if approved by the Authority is to take effect, which date shall not be more than twelve months before the date on which the application to the Authority is made under this section:*
Provided that if the Authority so directs in the case of any particular insurer there may be substituted respectively for the balance-sheet, report and abstract referred to in Clauses. (b) and (c) prepared in accordance with this sub-section certified copies of the last balance-sheet and last report and abstract prepared in accordance with Sections 11 and 13 of this Act or Sections 7 and 8 of the Indian Life Assurance Companies Act, 1912 (6 of 1912), if that balance-sheet is prepared as at a date not more than twelve months, and that report and abstract as at a date not more than five years, before the date on which the application to the Authority is made under this section."

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insurance business of any other insurer, except in accordance with a scheme prepared under this Section and approved by the IRDA.

Consequently, IRDA expressed its concerns with respect to the last stage of the proposed merger between Max Life and Max Financial Services stating that this would result in violation of Section 35 of the Insurance Act since this meant merging a financial service holding company with a life insurance company. The lack of precedent on the matter led the IRDA to approach the Attorney General of India through the law ministry, who declined to give an opinion on the matter.[6]

However, the representatives of the merging entities maintained that the proposed structure should be considered legally valid *per* the composite scheme of arrangement of the Companies Act, 2013 (2013 Act) which specifies that such amalgamations can be possible if all the stages of the arrangement process are done simultaneously. Being a composite scheme governed by a single order of the court, any stage of the scheme should not be looked in isolation as all steps of the amalgamation process need to be necessarily completed for the implementation of the merger. Chapter XV of the 2013 Act read with other applicable provisions lay down procedural requirements with respect to a composite scheme of arrangement.

New Developments

While putting the merger on hold, HDFC Life through a communication made to the stock exchange, has decided to opt for an IPO instead. The Chief Executive Officer of HDFC Life has stated that the option of a proposed merger has been kept open.[7] Max Life will now file an application with the IRDA for an IPO. As proposed, the two JV partners will see a 20% dilution in their stake as a result of the IPO. The decision of HDFC Life to opt for an IPO doesn't come as a surprise as the move has been hinted at before.[8]

As for the merger, the Chairman of HDFC Limited has stated that the merger has been called off at the moment and HDFC Life is completely focussed on the IPO which is likely to come in by late November or early December, 2017.[9] However, HDFC Life will still have to file an actuarial report and obtain permission from the IRDA as a part of the IPO process. It is also expected that once the IPO gets completed, the entities may opt for the merger with a different structure.

Conclusion

Insurance has always remained a sensitive and heavily regulated sector in India. The issue that new age India faces is lack of precedents as opposed to developed markets which have already had their experiences with complex M&As. In the wake of some of the largest M&As that India has seen in the last couple of years where market consolidation has led to increased business and market share, it has consequently resulted in enhancing shareholder value and better products in terms of goods and services to the consumers in India. India has over a period of time liberalised its stand on several aspects of investment and business including foreign direct investment, regulatory process for mergers and

[6] "*IRDAI reaffirms original position on HDFC Life-Max Life merger*" by Economic Times dated June 8, 2017: http://economictimes.indiatimes.com/industry/banking/finance/irdai-reaffirms-original-position-on-hdfc-life-max-life-merger/articleshow/59054714.cms

[7] "*HDFC Life to go ahead with IPO before merger with Max Life insurance*" by Livemint dated July 18, 2017: http://www.livemint.com/Industry/lHQsVvqXf6YRE9Yuk29d8K/HDFC-Life-to-go-ahead-with-IPO-before-merger-with-Max-Life-I.html

[8] "*HDFC Life may consider listing as merger with Max is delayed*" by VCCircle dated May 25, 2017: https://www.vccircle.com/hdfc-life-may-consider-listing-as-merger-with-max-is-delayed

[9] "*Merger off table, focus is on HDFC Life IPO: Parekh*" by Business Standard dated July 27, 2017 http://www.business-standard.com/article/finance/merger-off-table-focus-is-on-hdfc-life-ipo-parekh-117072700024_1.html.

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acquisitions including recently notifying provisions permitting an Indian company merging into a foreign company, subject to certain conditions. While these are measurable and significant steps to take India to the 'next level', the regulators have treaded cautiously in taking decisions. Although, the HDFC-Max merger may have gone on the back burner for the time being, HDFC is moving forward by taking up the IPO proposal. It would be interesting to see the revised proposal, if and when the two companies take it back to the Authority and the stand they take in light of the legal provisions.

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Notifications and Circulars

Mandatory rotation of Auditors/Audit Firms relaxed: The Ministry of Corporate Affairs ('MCA') has recently amended the Companies (Audit and Auditors) Rules, 2014 ('Auditors Rules') *vide* its Notification dated June 22, 2017 ('June Notification'). Under the Companies Act, 2013 (Act), certain classes of companies are required to mandatorily rotate their auditor/audit firm, upon completion of such auditor/audit firm's term of appointment.

Prior to the June Notification, private limited companies having paid up share capital below Rupees Twenty crores were exempted from the requirement of rotating their auditor/audit firm. Now, the June Notification has significantly relaxed the prescribed threshold of paid up share capital, enabling more private companies to be eligible for this exemption. Henceforth, private limited companies having paid up share capital below Rupees Fifty crores shall be exempted from the requirement of mandatorily rotating and replacing their auditor/audit firm.

Under the Act, the maximum permissible term of appointment for an auditor is five consecutive years whereas the maximum permissible term of appointment for an audit firm is ten consecutive years. In both cases, an outgoing auditor/audit firm would be eligible for re-appointment with the same company only after expiry of a 'cooling-off' period of 5 years.

Code for Independent Directors: The MCA by its Notification dated July 5, 2017 has amended Schedule IV of the Companies Act which prescribes a 'Code for Independent Directors' containing guidelines of professional conduct for independent directors ('Code').

Earlier, an independent director who had resigned or been removed from the board of a company, was required to be replaced by a new independent director within six months from the date of such removal or resignation. With the aim of improving corporate governance standards in India, this period has now been reduced to three months.

The Code also lays down guidelines on, *inter-alia*, the manner of appointment, re-appointment and performance evaluation of independent directors, and certain duties/functions of independent directors such as determination of remuneration levels of Key Managerial Personnel, review of performance of non-independent directors and Board of Directors, to name a few. The July 5 Notification exempts government companies and its independent directors from fulfilling certain requirements/duties, in case these matters have

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been prescribed by the relevant administrative Ministries and are complied with by such government companies.

Independent Directors – Requirement for specific classes of unlisted public companies, relaxed: Companies (Appointment and Qualification of Directors) Rules, 2014 has been amended by Notification dated 5-7-2017. The notification exempts certain classes of unlisted public companies from the mandatory requirement of appointing at least two independent directors. Previously, the Rules stipulated that public companies (though unlisted) having either (i) paid-up share capital of Rupees ten crore rupees or more; or (b) turnover of Rupees one hundred crore (or more); or (c) aggregate loans, debentures and deposits exceeding Rupees fifty crore, must have at least two directors as independent directors.

The latest amendment now carves out an exception for three specific classes of unlisted public companies – i.e. joint ventures, wholly owned subsidiaries, and dormant companies.

The term 'joint venture' was previously not defined in the Companies Act, 2013. However, in the latest Companies Amendment Bill, 2016 (Bill) passed by the Lok Sabha on July 27, 2017, the term has been defined to mean a "joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the management." The Bill is now expected to be tabled before the Rajya Sabha.

Reporting requirements for private companies: The MCA, by its Notification dated June 5, 2015 (Principal Notification), had granted several exemptions to private companies in respect of various compliance requirements under the Act.

Now, with a view to further promote ease of doing business in India, through a notification dated June 13, 2017 (Amending Notifcation-1), private companies have been exempted from additional compliances under the Act. One of these exemptions pertains to reporting requirements under the Act, where an auditor is exempted from reporting on the adequacy of a private company's system for internal financial controls and the operating effectiveness of such controls, if such private company has a *"turnover of less than rupees fifty crores as per latest audited financial statement **or** which has aggregate borrowings from banks or financial institutions or any body corporate at any point of time during the financial year less than rupees twenty five crore."*

This exemption was further amended by MCA in July 2017. As per Corrigendum dated July 13, 2017, a private company will be able to avail of this exemption only if it does not exceed the above-mentioned thresholds in respect of both its turnover and its aggregate borrowings.

The MCA, by a subsequent Circular dated July 25, 2017, has also clarified the financial years in respect of which this exemption is available to private companies. The exemption from reporting requirements shall be applicable for audit reports of financial statements pertaining to financial years commencing on or after April 1, 2016, which are made on or after the date of the Amending Notification-1, i.e. on or after June 13, 2017.

Online filing on SEBI portal: On July 6, 2017, SEBI has introduced an online system for various regulatory filings under the SEBI (Foreign Venture Capital Investors) Regulations, 2000. Prospective Foreign Venture Capital Investors (FVCI) can apply for registration as well as existing SEBI-registered FVCIs can file requisite compliance reports, only through the SEBI Intermediary Portal.

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Similarly, on July 24, 2017, SEBI has also introduced an online system for submission of regulatory filings by Real Estate Investment Trusts and Infrastructure Investment Trusts. Also, on 31-7-2017, an online system for filing related to Alternative Investment Funds (AIF) has been introduced. The online system can be used for application for registration, reporting and filing. Henceforth, any application for registration as AIF and filing compliance reports or application for any request by already registered AIF can be made online only.

Ratio Decidendi

Timelines for insolvency resolution under Insolvency and Bankruptcy Code, 2016 whether mandatory?

Key Points:

1. Time is of the essence under the Insolvency and Bankruptcy Code.
2. National Company Law Tribunal is required to adhere to the timelines prescribed under the Code, except in exceptional circumstances.
3. The 14 days' time limit prescribed under the Code for admission or rejection of an insolvency resolution application by NCLT cannot be ignored, unless sufficient reasons exist for the same and are recorded in writing.

Facts:

On February 10, 2017, an insolvency resolution application was filed under Section 9 of the Code by an operational creditor with the NCLT for initiating an insolvency resolution process against a corporate debtor. The NCLT directed the applicant to rectify certain technical defects in its application and the matter was ordered to be listed on February 28, 2017. On March 09, 2017, the NCLT passed an interim order of *status quo*, directing the debtor to not undertake any sale or alienation of the debtor's assets. Thereafter, the Appellant-debtor filed an appeal against this interim direction before the National Company Law Appellate Tribunal.

The issue before the NCLAT was whether the 14-day time limit prescribed for admission or rejection of an insolvency resolution application under Section 9 of the Code is merely directory or mandatory. As per Section 9(5), within 14 days of receipt of an application for initiation of corporate insolvency resolution process by an operational creditor, NCLT is required to either admit or reject the application. However before rejecting an application, NCLT is required to first give notice to the operational creditor-applicant to enable the applicant to rectify the defects in its application, within 7 days from the date of receipt of such notice.

Contentions:

The dispute regarding maintainability of the petition arose when NCLT failed to pass any final order of admission or rejection of the petition filed under Section 9, despite expiry of more than 60 days from the date of filing of such petition. The Appellant-debtor argued that once the NCLT fails to pass an order admitting or rejecting an application within 14 days of submission of an application under Section 9 of the Code, it can no longer decide the matter and therefore has no power to grant a stay on the sale of debtor's assets. The Respondent-creditor argued that the prescribed timeline of 14 days under Section 9 of the Code is merely directory and not mandatory.

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Appellate Tribunal's Ruling:

The NCLAT deliberated on the nature of certain timelines (timelines for ascertaining of default by NCLT, time period for admission of application etc.), being mandatory or directory, prescribed under the Code.

The NCLAT observed that the 14-day time period prescribed under the Code for admission or rejection of an insolvency resolution application being procedural in nature, was directory. In exceptional circumstances, a petition may be admitted or rejected beyond the prescribed 14-day period, for reasons that are to be recorded in writing. Although such 14-day period stipulation is directory, the NCLT had indeed taken the matter 'lightly' in the instant case. NCLAT observed that the objective behind prescribing a time-period for admission or rejection of application was to prevent delay in hearing of cases. In the instant case, the NCLAT directed the NCLT to reject the petition filed by the operational creditor on grounds of being defective.

Section under the Code	Particulars	Timeline (in days)	Nature of Timeline
7(5)	Ascertainment of default by the NCLT on an application made by financial creditor	14 days from the date of application	Directory
Proviso to section 7(5)	Rectification of defects in in the insolvency resolution application by the financial creditor	7 days from the date of receipt of notice from NCLT	Mandatory
9(5) and 10(4)	Admission and rejection of insolvency resolution application by NCLT made by an operational creditor	14 days from the date of application	Directory
Proviso to Section 9(5)	Rectification of defects in in the insolvency resolution application made by an operational creditor	7 days from the date of receipt of notice from NCLT	Mandatory
12	Completion of insolvency resolution process	180 from the date of admission of application	Mandatory
16(5)	Term of interim resolution professional	30 days from the date of appointment	Mandatory

[*J.K. Jute Mills Company Limited* v. *Surendra Trading Company* - Company Appeal (AT) No. 09 of 2017, Order dated 1-5-2017, National Company Law Appellate Tribunal]

Petition to initiate insolvency resolution process not maintainable if company has already filed a suit before a foreign court

In the instant case, a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 was filed by a bank (Petitioner) against a company registered in India (Respondent), before the National Company Law Tribunal (NCLT) for initiating corporate insolvency resolution process.

The Petitioner-bank had extended credit facilities to a company registered in Sri Lanka (Principal Borrower) which was guaranteed by the Respondent by way of a corporate guarantee

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agreement dated January 14, 2008 (Guarantee Agreement). The Principal Borrower failed to make the payments. However, the Principal Borrower had gone into liquidation. Pursuant to liquidation of the Principal Borrower, the Petitioner contented that the Respondent, being the Corporate Guarantor, was liable to pay the outstanding debt.

Prior to filing the aforesaid Petition, the Petitioner had already filed an application in Debt Recovery Tribunal (DRT), Mumbai and the Respondent had filed a declaratory suit before the High Court in Colombo (Foreign Court) seeking declaration that the corporate guarantee was *void ab initio* and non *est* and for further declaration that the Petitioner was not entitled to initiate any proceedings against the Respondent in any jurisdiction as the suit was still pending.

In light of the same, one of the issues that arose before the NCLT was whether the Petition filed was maintainable, since the substantial plea had already been raised by the Respondent in the earlier proceeding filed before the Foreign Court. NCLT held that since the Respondent had already filed a suit on the same issue before the Foreign Court, the Petition was not maintainable. The NCLT further observed that if the Petition was accepted, then a moratorium order will have to be passed under Section 13 of the Code which would result in prohibition of continuation of pending suits or proceedings against the corporate debtor (in the present case, the Principal Borrower), including execution of any judgment, decree or order. However, such a moratorium order may not be binding on the Foreign Court in so far as the pending proceedings before such Foreign Court are concerned. Hence, the Foreign Court can pass any order in the suit filed before it, in spite of initiation of the corporate resolution insolvency process under the Code and a moratorium order being passed by NCLT.

The NCLT observed that in case the Foreign Court passes an order in favour of the Respondent and meanwhile NCLT admits the Petition, such a situation may lead to a conflict between the order of the Foreign Court and the NCLT. Therefore, it would not be just and proper to hold that the proceedings pending before the Foreign Court were of no relevance to the instant Petition.

NCLT also distinguished between pendency of proceedings in other forums and observed that pendency of any proceedings (in the instant case, before DRT) is no bar for initiation of proceedings under the Code before NCLT, unless it is expressly provided in other enactments, which expressly overrides provisions of the Code.

The NCLT also accepted the Respondent's plea that in the instant case, the Petitioner had accepted the revocation of the Corporate Guarantee and had 'kept quiet' for 2.5 years since, and was thus estopped from recovering any amounts. It was further held that there was no occurrence of default as the Respondent had raised *bona fide* and substantial defences in arguing that it was entitled to revoke the Corporate Guarantee by giving the Petition one month's notice, in accordance with the Guarantee Agreement. In view of the above, the NCLT held that no 'default' had occurred and dismissed the Petition. [*State Bank of India, Colombo v. Western Refrigeration Pvt. Ltd.* – C.P (I.B) No. 17/7/NCLT/AHM/2017, decided on 26-5-2017, NCLT, Ahmedabad]

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