

MERGER & AMALGAMATIONS

Corporate Regulatory Laws Refresher Course
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1

S.SUDHAKAR

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Views expressed are of my own and not of the organisation in which I am employed



Initiatives under
Companies Act, 2013

Pragmatic Reforms in Merger & Amalgamations

- ▶ Some pragmatic reforms were introduced in the Companies Act, 2013 such as –
 - ▶ **Fast-track schemes for small and group companies** which are cost effective and encourage corporate restructuring
 - ▶ **Merger of an Indian company into a foreign company** give impetus to cross-boarder mergers
 - ▶ **Raising threshold limits for raising objections** to a scheme would deter frivolous objections
 - ▶ **Postal ballot approval and e-voting** would ensure a wider participation of the stakeholders
 - ▶ However the new Act introduced the **multi-authority appraisal** of the restructuring schemes **as against a single window clearance** may be a dampener

New provisions

- ▶ Notice of the Meeting for approval of the **Scheme shall be accompanied by the 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
- ▶ **Notice shall also be sent to** Central Government, Income-tax authorities, RBI, SEBI, ROC, CCI(if necessary), other such regulators or authorities which are likely to be effected, and shall require that **representations, if any, shall be made within 30 days** failing which it shall be presumed that they have no representations to make
- ▶ Where a **majority of persons representing three-fourths in value of the creditors or class of creditors or members or class of members shall approve the scheme**
- ▶ If such compromise or arrangement is sanctioned by the Tribunal by an order the same shall be binding on the company, creditors, members etc

New provisions contd.....

- ▶ No compromise or arrangement shall be sanctioned by Tribunal unless a **certificate by the company's auditor** to the effect that the **accounting treatment** if any proposed in the scheme or arrangement is **in conformity with the accounting standards**
- ▶ **Tribunal may dispense with calling a meeting of creditors** where such members or creditors having at least ninety percent value agree and confirm by way of an affidavit to the scheme of compromise or arrangement
- ▶ Transferee company shall not as a result of the compromise or arrangement hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any **such shares shall be cancelled or extinguished**

New provisions contd

- ▶ Where the transferor company is a listed company and the transferee company is an unlisted company
 - ▶ The transferee company shall remain an unlisted company until it becomes a listed company
 - ▶ Provision shall be made for the shareholders of transferor company in case they opt out
 - ▶ Amount of payment or valuation shall not be less than what has been specified by the SEBI regulations
- ▶ Where the transferor company is dissolved the fee, if any, paid by the transferor company on its authorised capital shall be set off against any fees payable by the transferee company on its authorised capital



Compromise & Arrangements

Types of compromise & arrangements

- Amalgamation
- Mergers
- De-mergers
- Spin-offs – slump sale

Types of compromise & arrangements

- ▶ **Amalgamation of companies** – where under the scheme the undertaking, properties and liabilities of one or more companies are to be transferred to a new company, it is a **merger by 'Amalgamation of companies'**
- ▶ **Merger of companies** - where under the scheme the undertaking, properties and liabilities of one or more companies are to be **transferred to an existing company, it is a merger by 'merger of companies by absorption'**
- ▶ **De-merger of companies** – where under the scheme a part of the undertaking, properties and liabilities of one company are to be divided and transferred to another existing company or a new company, it is known as **demerger of companies**
- ▶ **Spin offs – also known as slump sale** - no need for approval of NCLT unless the same is part of a scheme. Under this only a particular business undertaking is sold



Power to make
Compromise & Arrangements

Compromise or Arrangement

- ▶ A compromise or arrangement may be
 - ▶ between a **company and its creditors** or any class of them
 - ▶ between a **company and its members** or any class of them
- ▶ Arrangement includes consolidation of shares of different classes or division of shares into different classes or by both methods
- ▶ Compromise or Arrangement **may include reduction of share capital or corporate debt restructuring**
- ▶ Provisions of section 66 shall not apply to the reduction of share capital effected under this section



Procedure

Application to NCLT for meetings

- Compromise or Arrangement shall require the **approval of Members or Creditors** of the Company
- For convening of Members or Creditors meeting **an application is to be made** by the Company, any member or creditor and in **case the company is in liquidation by the liquidator to NCLT**, to order such meeting
- While making the application, the applicant by way of an affidavit shall disclose to the Tribunal
 - all material facts relating to the company such as the latest financial position of the company,
 - the latest auditor's report,
 - pendency of any investigation proceedings against the company, if any

Notice of the meetings

- ▶ Where a meeting is proposed to be called, in pursuance to the order of the Tribunal,
 - ▶ Notice of such meeting shall be sent to all members, creditors or debenture holders of the company individually, at the addresses registered with the company
- ▶ Such Notice shall be accompanied by a statement disclosing
 - ▶ the details of the compromise or arrangement,
 - ▶ **a copy of valuation report**, if any, explaining their effect on creditors, KMPs, promoters and non-promoter members and the debenture holders of the company
 - ▶ Also the effect of the compromise and arrangement on any material interest of directors or the debenture trustees

Documents to be filed with Tribunal

- ▶ While making application to the Tribunal for ordering or **dispensation of the meetings** the following shall also be submitted
 - ▶ **Draft of the proposed scheme** adopted by the Directors
 - ▶ **Confirmation of filing of draft scheme with ROC**
 - ▶ Report adopted by the company explaining the effect of compromise on each class of shareholders, KMPs, promoter and non-promoter shareholders
 - ▶ Share exchange ratio specifying any special valuation difficulties
 - ▶ **Valuation report** given by a registered valuer
 - ▶ **Supplementary accounting statement** if the last annual accounts are more than six months old

Notice of Meetings

- ▶ Notice and other documents shall be placed on the website of the company, if any and shall be published in the news papers in such prescribed manner
- ▶ In case of a listed company such documents also shall be filed with the stock exchanges and SEBI
- ▶ Any objection to the compromise or arrangement shall be made only by persons
 - ▶ holding not less than ten per cent of the shareholding or
 - ▶ outstanding debt amounting not less than five per cent of the total outstanding debt as per the latest audited financial statement
- ▶ Notice shall also be sent to all regulators such as - Central Government, Income-tax authorities, RBI, SEBI, stock exchanges, OL, CCI (if necessary) and such other sectoral regulators or authorities likely to be effected by such compromise or arrangement

Notice of Meetings contd

- ▶ **Such authorities shall make representations**, if any, within a period of thirty days from the date of receipt of such notice
- ▶ Otherwise it shall be presumed that they have no representation to make
- ▶ A **certificate by the company's auditor** shall be filed with the Tribunal to the effect **that the accounting treatment proposed in the scheme is in conformity with the accounting standards**
- ▶ Unless such certificate is filed the Tribunal shall not give its consent to such scheme

Corporate Debt Restructuring

- ▶ In case of any corporate debt restructuring **the same shall be consented by not less than seventy-five per cent of the secured creditors in value**
- ▶ The **application to the Tribunal in such case shall be accompanied by**
- ▶ A creditor's responsibility statement
- ▶ Safeguards for the protection of other secured and unsecured creditors
- ▶ Report by the auditor that the fund requirements of the company after the debt restructuring shall confirm to the liquidity test based upon the estimates provided by the Board
- ▶ Where the company propose to adopt the corporate debt restructuring guidelines provided by RBI, a statement to that effect
- ▶ A **valuation report by a registered valuer** in respect of the shares, property movable and immovable and all assets tangible and intangible

Approval of compromise & arrangement

- ▶ **Majority of persons** representing **three-fourths in value** of the creditors or **members** voting in person or by proxy or by postal ballot shall approve the resolution
- ▶ The **Order made by the Tribunal** sanctioning the compromise or arrangement **shall be binding on** the company, all members, all creditors of the company
- ▶ The **order shall be filed with the ROC** within a period of thirty days from the date of receipt of the order
- ▶ **Tribunal may dispense with calling of a meeting of creditors**, where creditors having ninety per cent value, agree and confirm by way of an affidavit
- ▶ **No compromise or arrangement in respect of buyback of securities** under this section **shall be sanctioned** unless such buy-back is in accordance with section 68



Listing Regulation compliances

compliances by Listed companies

- ▶ Listed entities desirous of undertaking a scheme shall file the draft scheme proposed to file before the Tribunal with the stock exchanges
- ▶ Listed entities shall obtain an observation letter or No-objection letter from the stock exchanges before filing the scheme with the Tribunal
- ▶ Such observation letter or No-objection letter shall be placed before the Tribunal
- ▶ The above shall be placed before the Tribunal within six months of its issuance
- ▶ Listed entity shall comply with the requirements prescribed by SEBI
- ▶ Upon sanction of the scheme by the Tribunal the same shall be filed with the stock exchanges

Exemptions from Listing regulation compliances

- ▶ For **merger of a wholly owned subsidiary with its holding company** the aforesaid compliance need not be complied with
- ▶ The aforesaid compliances are also not applicable to the restructuring proposal approved as a part of the resolution plan
- ▶ Such details shall be disclosed to the stock exchanges

Transferee company is unlisted

- ▶ Where the **transferor company is listed and the transferee company is unlisted**, the transferee company shall remain unlisted until its shares are listed and it becomes a listed company
- ▶ If the **shareholders of the transferor company decide to opt out** of the transferee company, **provision shall be made for payment of the value** of shares held by them, in accordance with a pre-determined price formula or after a valuation is made
- ▶ The amount of payment or valuation referred to above shall not be less than what has been specified by SEBI under any of its Regulations

Order of the Tribunal

- Order of the Tribunal shall provide for the following matters
- In case the compromise or arrangement pertains to conversion of preference share to equity shares and there was some **arrears of dividend, an option is to be given to the preference shareholders** to obtain the dividend in cash or equity shares equivalent to the arrears of dividend
- Protection of any class of creditors
- **Exit offer to dissenting shareholders**, if any, as is necessary in the opinion of the Tribunal to effectively implement its order
- Transfer of assets and liabilities, legal proceedings, employees
- Dissolution of transferor company without winding up
- **Set-off of fee paid by transferor company on its authorized capital** against any fees payable by the transferee company on its authorized capital post amalgamation
- Such incidental, consequential and supplemental matters as are deemed necessary to secure the scheme is fully and effectively carried out

Implementation of the Order

- ▶ The compromise or arrangement proposal **may include takeover offers** (this sub-section is yet to be enforced)
- ▶ However in case of a listed company such **take over shall be as per takeover regulations**
- ▶ The **scheme shall clearly indicate an appointed date** from which the scheme shall be effective
- ▶ Certified copy of the order **shall be filed with the ROC** within thirty days of receipt of copy of the order
- ▶ Until the completion of the scheme the company shall **file a statement every year duly certified by a chartered accountant** indicating whether the scheme is being complied with in accordance with the order of the Tribunal or not



Power of Tribunal to enforce
the Scheme / Order

Power of Tribunal to enforce the Order

- ▶ On making the order under section 230, the Tribunal has power to supervise the implementation of the scheme
- ▶ While making the order or thereafter, it may give such directions or make modifications to the order, as it may consider necessary for proper implementation of the order
- ▶ If the Tribunal is satisfied that the scheme can't be implemented satisfactorily with or without modifications and the company is unable to pay its debts, the Tribunal may order winding up of the company



Fast track Mergers

233 Merger or Amalgamation of small companies or subsidiaries

- ▶ A scheme of merger or amalgamation of **two or more small companies** or **between a holding company and its wholly-owned subsidiary company** or such other class of companies the following procedure to be complied with
 - ▶ **Notice** of the proposed scheme to be given **to ROC and OL** inviting objections or suggestions, if any
 - ▶ The scheme **shall be approved at a general meeting by members holding at least ninety per cent of the total number of shares**
 - ▶ The scheme shall be **approved by majority representing nine-tenths in value of the creditors** at a meeting convened by the company or otherwise approved in writing
 - ▶ **The transferee company shall file a copy of the approved scheme by members and creditors** with Central Government (RD), ROC and OL

Objections of ROC and OL

- ▶ ROC or OL shall raise objections, if any, within thirty days
- ▶ If there is no communication it shall be presumed that they have no objections
- ▶ Unless ROC or OL raise objections on the scheme RD shall register the scheme and issue a confirmation thereof to the companies
- ▶ After receiving the objections of ROC or OL, the RD is of opinion that such scheme is not in public interest or creditors, may file an application before the Tribunal within a period of sixty days, requesting the Tribunal to consider the Scheme under section 232
- ▶ Tribunal may consider and confirm the scheme or may direct to comply with the procedure laid down under section 232

Approval of the scheme

- ▶ On confirmation of the scheme by RD or Tribunal, the transferee company shall file a copy of the order with ROC
- ▶ ROC shall register the scheme and issue a confirmation there of in writing
- ▶ Such confirmation shall be communicated to the ROC of the transferor company



Effects of the Order

Effects of the Order approving the scheme

- ▶ **Properties and Liabilities** of the transferor company shall become the properties and Liabilities of the transferee company
- ▶ **Charges, if any**, on the property of the transferor company shall be applicable and enforceable as if the charges of the transferee company
- ▶ **Legal proceedings** by or against the transferor company shall be continued against the transferee company
- ▶ **Employees of the transferor c**ompany shall become the employees of the transferee company
- ▶ Where the scheme provides the **purchase of shares of the dissenting shareholders or settlement of debt** due to dissenting creditors, shall be settled by the transferee company

Effects of the Order approving the scheme

- ▶ On merger or amalgamation, a transferee company shall not hold any shares of transferor company in its own name or in the name of any trust and all such shares shall be cancelled or extinguished
- ▶ The transferee company shall file an application with a copy the scheme with ROC indicating the **revised authorized capital** and shall pay the fee due on such capital
- ▶ **Fee paid by the transferor company** on its authorized capital shall be set-off against the fee payable by the transferee company
- ▶ The aforesaid provisions shall also be complied with by merger or amalgamations proposed under sections 230 or 232
- ▶ **Small and wholly-owned subsidiaries may also use the provisions of section 232 instead of 233**



Cross boarder Mergers

Cross Border Mergers

- ▶ In addition to the provisions of Companies Act, 2013, **Cross border merger** shall be governed by Foreign Exchange Management (Cross Border Merger) Regulations, 2018
- ▶ **Under the Companies Act** the same shall be governed by Section 234 of the Companies Act and Rule 25A of the Companies Merger Rules
- ▶ '**Cross border merger**' under FEMA Regulations means "**any merger, amalgamation or arrangement between Indian company and foreign company** in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013"
- ▶ **Foreign company means** any company or body corporate incorporated outside India whether having a place of business in India or not

Inbound & Outbound Mergers

- ▶ **In an Inbound Merger**, a foreign company will merge into an Indian company and accordingly, all properties, assets, liabilities and employees of the foreign company will be transferred to the Indian company
- ▶ This means the resultant company is an Indian company
- ▶ **In an outbound merger**, an Indian company will merge into a foreign company
- ▶ This means the resultant company is a foreign company
- ▶ For the purpose of outbound mergers, **the foreign company should be incorporated in a jurisdiction specified** in the Annexure B to Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

234 Merger of a company with foreign company

- ▶ The **provisions** relating to merger of two Indian companies **shall apply mutatis and mutandis to merger of an Indian company** with a foreign company
- ▶ **Central Government may make rules** in consultation with RBI in connection with such merger schemes
- ▶ Among other things the **scheme may provide payment of consideration to the shareholders of the merging company** in cash or in Depository Receipts or partly in cash and partly in DRs

Merger of a foreign company

- ▶ A foreign company incorporated outside India may merge with an Indian company
- ▶ Approval of RBI shall be obtained and provisions of sections 230 to 232 shall be complied with
- ▶ A company may merge with a foreign company incorporated in certain jurisdictions only as given in the Rule 25A
- ▶ The transferee company shall ensure that valuation is conducted by valuers who are members of a recognized professional body in the jurisdiction of the transferee company
- ▶ Such valuation shall be in accordance with internationally accepted principles on accounting and valuation
- ▶ A declaration to this effect shall be attached with application made to RBI

specified jurisdiction for outbound merger

- ▶ Jurisdictions whose securities market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding or
- ▶ A signatory to bilateral Memorandum of Understanding with SEBI or
- ▶ Whose central bank is a member of Bank for International Settlements (BIS) and
- ▶ A jurisdiction which is not identified in the public statement of Financial Action Task Force (FATF) as;
 - ▶ A jurisdiction having a strategic anti-money laundering or combating the financing of terrorism deficiencies to which countermeasures apply or
 - ▶ A jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the financial action task force to address the deficiencies



FEMA Cross border Regulations

Inbound Merger

- ▶ The Indian company may issue or transfer any security and/or foreign security, to a person resident outside India in accordance with pricing guidelines, entry routes, sectoral caps under FEMA (Transfer or Issue of security by a person Resident outside India) Regulations, 2017
- ▶ The office outside India of the foreign company shall be deemed to be the branch / office outside India of the Indian company
- ▶ Guarantees or outstanding borrowings of the foreign company become the borrowings of the Indian company and they shall confirm to the ECB norms within a period of two years
- ▶ No remittance for repayment of such liability is permitted from India with such period of two years

Inbound Merger contd...

- ▶ The **Indian company may acquire and hold any asset outside India** which an Indian company is **permitted to acquire under the provisions of FEMA, 1999** or Rules or Regulations thereunder
- ▶ Where holding such assets or securities is not permitted by the Indian company, **it shall sell the same within a period of two years**
- ▶ The **sale proceeds shall be repatriated** to India immediately through Banking channels
- ▶ If any liability outside India is not permitted to be held the same may be extinguished from the sale proceeds of such overseas assets within a period of two years
- ▶ The **Indian company may open a bank account** for the aforesaid purposes

Outbound Merger

- ▶ A person resident in India may acquire or hold securities of the foreign company in accordance with FEMA Regulations, 2004
- ▶ A resident individual may acquire securities outside India provided that the fair market value of such securities is within the limits prescribed under FEMA regulations
- ▶ The office of the Indian company in India may be deemed to be a branch office in India of the foreign company and may undertake any transaction as permitted to a branch office
- ▶ Guarantees or outstanding borrowings of the Indian company shall be repaid as per the scheme sanctioned
- ▶ Foreign company shall not acquire any liability payable towards a lender in India in rupees which is not in conformity with the FEMA regulations

Outbound Merger contd.....

- ▶ Foreign company may acquire and hold any asset in India which a foreign company is permitted to acquire and such asset can be transferred in any manner permissible
- ▶ Where **an asset or security can't be acquired** or held by the foreign company the same **shall be sold within a period of two years** from the date of sanction of the scheme
- ▶ **Foreign company may open a special non-resident rupee account** for the aforesaid purpose

Deemed Approvals

- ▶ Any transaction on account of a cross border merger undertaken in accordance with these Regulations shall be deemed to have prior approval of the RBI as required under Rule 25A of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016
- ▶ A certificate from MD / WTD / CS ensuring compliance to the Cross Boarder Regulations shall be furnished along with the application made to NCLT



THANK YOU