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# Cross Border Mergers – Negotiations Skills and Cultural Issues

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# CROSS BORDER MERGER – PRE MERGER PROCESS

- Prior to entering into a merger deal, the companies concerned is require to do a proper due diligence to ensure that merger is a success.

- For, the same, companies concerned must first enter into non-disclosure agreement and non-binding letter of intent for safeguarding their intellectual properties and confidential information.

- Transferee Company must do a commercial due diligence on the Target company (Transferor Company) to know about the commercial strength of the Target.

- Transferee Company must do a legal due diligence to ensure that there are not much non-compliances which may wipe off the benefits of merger.

- Transferee Company must do a financial due diligence on the Target company to know about the financial viability of the merger.

- The companies shall decided about the terms and conditions for merger and shall ensure that such terms and conditions are in accordance with the laws in India, most specifically FEMA, and viable from legal prospective.

- Other legal steps such as entering into Pre-Merger Agreements, Memorandum of Understanding etc. may also be needed depending upon the deal.

# NEGOTIATION SKILLS AND CULTURAL ISSUES AT PRE-MERGER STAGE

Culture is one of the most important components of negotiation and plays a crucial role in cross border M&A. The most challenging issue of the pre-merger stage in M&A is the way culture impacts on elements of negotiation such as individuals, strategies, goals, and outcome. The ability to achieve success in any negotiation depends on a number of factors:

- the leverage a party has in the negotiation,
- the price and other key terms the parties may have already agreed upon at the letter of intent stage,
- the risks a party is willing to take with respect to closing conditions and post-closing liability exposure,
- whether there is competition among bidders for the target company,
- the quality of the lawyers involved, and the skill of the negotiating team,
- communication in negotiation is the means by which negotiators can achieve objectives, build relationships, and resolve disputes.
- communication becomes even more important when negotiations include counterparts that are from different cultures.
- When negotiating with foreign counterparts, you'll confront a variety of obstacles, such as unfamiliar laws, ideologies, and governments etc. One particular obstacle that almost always complicates international negotiations is the cultural differences between the two sides.
- Culture consists of the socially transmitted behaviour patterns, attitudes, norms, and values of a given community, whether a nation, an ethnic group, or even an organization

# WHICH IS MORE IMPORTANT: SIMILARITIES OR DIFFERENCES?

A line of research unique to cross-border M&As in particular is understanding the effect of differences in national culture.

Cultural familiarity theory argues that firms are less likely to invest in organizations in culturally distant countries, and subsequently have poorer performance post integration. The resource-based view of the firm, in contrast, hypothesizes exactly the opposite: that more culturally distant M&As will actually be more successful because the cultural differences enhance potential synergies between the two partners. The research on this issue, however, has been inconclusive.

Culture is often not considered until later in the M&A process, once the deal is complete. However, because ‘‘culture clashes’’ are often blamed for the failure of M&As. It is important that organizations have a clear understanding of their own culture at the beginning of this process when M&A is a primary component of their growth strategy.

Differences in culture complicate business negotiations and relationships in many ways. Three Aspects of International Negotiations

- Creates communication problems.
- Makes it difficult to understand each other’s behaviour.
- Influences the form and substance of the deal.

Four Strategies for Handling Cultural Differences at the Negotiation Table:

- Don’t forget to do your homework about the other party’s culture.
- Show respect for cultural differences.
- Be aware of how others may perceive your culture.
- Find ways to bridge the culture gap.

# CULTURAL INTEGRATION IN M&A

When pursuing a deal, cultural integration should be a core focus, given its ability to disrupt or damage the future viability of a merger post-close. Cultural integration, or a lack thereof, however, will not stop a proposed transaction from taking place. Indeed, culture is often incorrectly named as a catalyst for an unsuccessful merger. “Culture is often cited as the number one reason mergers fail,”.

For a deal to be successful post-close, companies must apply the same rigour to managing and steering cultural integration as they would to any other aspect and this starts with a cultural due diligence.

**Cultural due diligence**

Companies that carry out cultural due diligence are able to investigate, assess and understand the culture of the other party to the deal, and begin to establish a way of assimilating the target, its people and its practice into their own.

**Long-term planning**

Long-term planning is key to the newly merged company’s cultural journey. First and foremost, it is important for the company to have a defined direction and purpose, in order for integration to be successful.

**Adaptability**

Culture is not a static concept. Times change and technology shifts. Organisations should not be afraid to embrace new concepts and establish new cultural norms. Relying solely on a company's 'old' values can be counterproductive. Merging companies should look to create something new and exciting with which employees can actively and enthusiastically engage.

**Measuring cultural integration**

Once a transaction has closed and the integration process is underway, it is vital that the newly combined organization is able to track progress. This requires companies to establish solid communication channels with employees and seek regular feedback on the success of the integration plan. Benchmarking can help companies demonstrate successes and report on progress. This should be done regularly to assist executives and integration teams with gauging the level of buy-in at all levels of the company's structure. It also enables organizations to tweak their integration plan accordingly.

**Do the homework**

M&A transactions are complex and time consuming. They require considerable resources on both sides. Though many factors can ultimately derail a deal, achieving a cultural transformation and integration is among the most difficult tasks and can have one of the most significant impacts. As such, this aspect should not be taken for granted. Acquiring companies and their targets must do their homework: cultural integration requires organizations to take a holistic view and take decisive, early steps to define the culture they want. With adequate leadership and the requisite resources, there should be no reason for cultural integration to fail.

# CROSS BORDER MERGER: POSITION UNDER THE COMPANIES ACT, 1956

- Under the erstwhile Companies Act, 1956, there was no specific concept of ‘cross border mergers’.

- However, pursuant to the provisions of section 394 (4) (b), for the purposes of mergers and amalgamation under section 394, transferee company did not include any company other than a company within the meaning of the Act; but transferor company included any body corporate, whether a company within the meaning of the Act or not.

- This implied that the Companies Act, 1956 provided only for merger of foreign companies with Indian companies but did not provide for merger of Indian companies with foreign companies.

# CROSS BORDER MERGERS – SECTION 234

234. Merger or amalgamation of company with foreign company.— (1) The provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply *mutatis mutandis* to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government:
Provided that the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

(2) Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

Explanation.—For the purposes of sub-section (2), the expression ―foreign company‖ means any company or body corporate incorporated outside India whether having a place of business in India or not.

The provisions relating to Cross Border Mergers have been provided under section 234 of the Companies Act, 2013.

Section 234 of the Companies Act, 2013 has been notified on 13.04.2017 and Rule 25A has been inserted in the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 w.e.f. 13.04.2017 to that effect.

Pursuant to the provisions of Section 234 of the Companies Act, 2013, provisions of sections 230 to 232 of the Companies Act shall *mutatis mutandis* apply to the Scheme of mergers and amalgamations between companies registered under the Companies Act, 2013 and companies incorporated in the jurisdiction of the countries as may be prescribed in this regard.

Pursuant to the provisions of Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, a foreign company incorporated outside India may merge with an Indian Company after obtaining prior approval of RBI and after complying with the provisions of section 230 to 232 of the Companies Act, 2013 and rules made thereunder.

- Further, an Indian company may merge with a foreign company incorporated outside India in the following jurisdiction after obtaining the prior approval of the RBI and after complying with the provisions of section 230 to 232 of the Companies Act, 2013 **[Rule 25A(2)(a)].**
  - whose securities market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatories) 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 counter measures 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.

- 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 and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval **[Rule 25A(2)(b)].**

- The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining RBI approval **[Rule 25A(3)].**

- For the purpose of the Rule 25A, foreign company means a company or body corporate incorporated outside India whether having a place of business in India or not **[Explanation 1 to Rule 25A] (also included in Explanation to Section 243 (2))**

# FEM (Cross Border Merger) Regulations, 2018

- The Reserve Bank of India (RBI) has notified FEM (Cross Border Merger) Regulations, 2018 on 20.03.2018 for assisting the provisions of Companies Act, 2013 and rules made there under in relation to Cross Border mergers.

- The Regulations have categorized the cross border mergers as inbound merger and outbound merger. The said regulations have defined Inbound mergers as a cross border merger in which the resultant company is an Indian Company. Whereas, the outbound mergers have been defined as cross border mergers in which the resultant company is a foreign company.

- Any transaction on account of cross border merger undertaken in accordance with the aforesaid regulations shall be deemed to have prior approval of RBI under Rule 25A of the Companies (Compromises, Arrangement and Amalgamation Rules, 2016. A certificate from the MD/ WTD/ CS of the companies concerned involved in the Scheme ensuring compliance with the aforesaid regulations have to be attached along with the application made to NCLT under the Act **[Regulation 9].**

- The resultant company and/ or the companies concerned shall be required to furnish reports on cross border merger to RBI **[Regulation 8].**

- Compensation by the resultant company, to a holder of a security of the Indian company or the foreign company, as the case may be, may be paid, in accordance with the Scheme sanctioned by the NCLT **[ Regulation 7(1)].**

- The companies involved in the cross border merger shall ensure that regulatory actions, if any, prior to merger, with respect to non-compliance, contravention, violation, as the case may be, of the FEMA or the Rules or the Regulations framed there under shall be completed **[Regulation 7(2)].**

- **Regulation 4 and 5** provides for the treatment of assets and liabilities and issue of securities etc. in case of inbound and outbound merger respectively which has to be done in accordance with the provisions of FEMA and respective rules and regulations made thereunder.

- Pursuant to the said Regulations 4 and 5, if any assets or security is not permitted to be acquired or held by the resultant company under FEMA and rules and regulations made thereunder, resultant company shall sell such assets or security within a period of 2 years from the date of sanction of the Scheme by the hon'ble NCLT and sale proceeds shall be repatriated in or outside India, as the case may be, immediately through appropriate banking channels.

- Where any liability is not permitted to be held by the resultant company, the same may be extinguished from the sale proceeds of such assets within the period of two years.

- The resultant company may open an appropriate bank account for the said purpose.

# CROSS BORDER DEMERGERS – CRITICAL ANALYSIS

In the matter of Sun Pharmaceutical Industries Ltd., the Hon'ble NCLT, Ahmedabad Bench has held that Cross Border Demergers are not allowed pursuant to the provisions of the Companies Act, 2013. The Hon'ble NCLT has contended that section 234 uses the term 'merger' and does not contain the terms 'compromises' and/ or 'arrangement' and/ or 'demerger' and hence the same is not allowed. The said order also mentioned that the word 'demerger' has been specifically deleted from the FEM (Cross Border Merger) Regulations, 2018 which implies that Cross Border Demergers are not intended to be allowed.

**In the matter of Sun Pharmaceutical Industries Ltd, before the National Company Law Tribunal (NCLT), Ahmedabad.**

On 19 December 2019, the Ahmedabad bench of National Company Law Tribunal ("**NCLT**") passed the order in which it rejected an application made by Sun Pharmaceutical Industries Limited ("**Sun Pharma**") for a proposed demerger and transfer of two of its specified investment undertakings to two overseas resulting companies ("**Outbound Demerger Order**"**)**. The order raises an interesting issue as to whether a cross-border demerger is allowed under section 234 of Companies Act, 2013 ("**CA 2013**") read with rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

It is further interesting to note that the Outbound Demerger Order contradicts another order passed by NCLT, Ahmedabad on 31 October 2018 ("**Inbound Demerger Order**") wherein the NCLT had approved an application made by Sun Pharma for inbound demerger involving transfer of a specified undertaking of Sun Pharma Global FZE ("**Global FZE**"), incorporated under the provisions of United Arab Emirates, with Sun Pharma.

# MORE JUDGEMENTS ON CROSS BORDER MERGERS BY HON'BLE NCLT

**In the matter of Bio Energy Venture - 1 (Mauritius) Pvt. Ltd and Tata Chemicals Limited before NCLT, Mumbai.**

The sanction of the Tribunal was sought under section 234, read with 230 to 232 of the Companies Act, 2013 to the Scheme of Amalgamation of a wholly-owned subsidiary, viz., Bio Energy Venture - 1 (Mauritius) Pvt. Ltd. (Transferor Company) with its holding company, viz., Tata Chemicals Limited (Transferee Company) and their respective shareholders. Thus, the Scheme involved in-bound cross-border merger by absorption.

The Scheme envisaged cross-border merger and required to comply with the provisions of section 234 of the Companies Act, 2013 and rule 4 of the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 issued by the Reserve Bank of India (RBI) issued vide Notification No. FEMA.309/2018-RB dated 20 March 2018.

Perusing the communication and considering the compliance certificates presented by the Petitioner/Transferee Company and considering the fact that RBI has not raised any specific objection with regard to the issue of prior approval to the proposed Scheme, the Tribunal was of the view that there is implied Deemed Approval to the Scheme by RBI in terms of regulation 9 of the Cross-Border Regulations. The Petitioner/Transferee Company was directed to comply with all applicable rules and regulations under FEMA and other RBI guidelines and the scheme was sanctioned.

**In the matter of: Ensource Holdings Mauritius Limited and Ors. v. Ensource Consulting Private Limited before NCLT - Bengaluru**

The Scheme was a Cross Boarder Merger and the Transferor Company No. 1 and No. 2 were incorporated in the country of Mauritius and getting amalgamated to the Transferee company viz. M/s Ensource Consulting Private Limited in India. The applicant companies were advised to comply with Section 234 of the Companies Act, 2013 and Rules made thereon including Rule 25A and amendment made thereon.

As per Section 232(6) of Companies Act, 2013, the scheme shall clearly indicate an appointed date from which it shall be effective, and the scheme shall be deemed to be effective from that date and not at a subsequent date. Though in the Scheme appointed date is mentioned as 01.07.2019, no effective date as such is mentioned.

It was stated that the Scheme was in compliance with Section 234 of the Companies Act, 2013. As per the FEMA Regulations, any transaction on account of a cross border merger undertaken in accordance with the FEMA Regulations shall be deemed to have prior approval of the Reserve Bank as required under Rule 25A of the Companies (CAA) Rules, 2016. A Certificate from the Managing Director/Whole Time Director and Company Secretary, if available, of the Company concerned ensuring compliance to these Regulations shall be furnished along with the application made to the NCLT, under the Companies (CAA) Rules, 2016. The Applicant Company had already submitted the Affidavit to the NCLT along with the Application filed before this Tribunal.

With regard to the prior approval of RBI for the merger, it was stated that the merger was in compliance with Section 234 of the Companies Act, 2013 and a Certificate from the Managing Director/Whole Time Director and Company Secretary, if available, of the company concerned ensuring compliance to these Regulations shall be furnished along with the application made to the NCLT under the Companies (CAA) Rules, 2016. The Applicant Company has already submitted the affidavit to the NCLT along with the Application.

After due consideration of the facts of the case as mentioned in the Petition, the Affidavit of the Regional Director, MCA the para wise replies of the Petitioner and the relevant provisions contained in the Companies Act, 2013,the Tribunal was of the opinion that the procedure specified in sub-sections (1) and (2) of section 232 of the Companies Act, 2013 had been complied with, and that the Scheme of Amalgamation, as unanimously approved by all Secured Creditors, can be sanctioned.

**In the matter of Equator Trading Enterprises Private Limited, Panorama Television Private Limited, RVT Media Private Limited And TV18 Broadcast Limited.**

The sanction of the Tribunal was sought under Sections 230 to 232 read with Sections 234 and other applicable provisions of the Companies Act, 2013 to the Scheme of Merger by Absorption of Equator Trading Enterprises Private Limited, Panorama Television Private Limited, RVT Media Private Limited, ibn18 (Mauritius) Limited by TV18 Broadcast Limited and their respective shareholders and creditors.

Reserve Bank of India on 20.03.2018 notified the Foreign Exchange Management (Cross Border Merger) Regulations 2018 (Cross Border Merger Regulations) to regulate cross border merger from an exchange control perspective.

The Cross Border Merger Regulations clarify that cross border merger pending before the RBI for its approval as of 20th March 2018 will be governed by the Cross Border Merger Regulations.

The Present scheme appeared to be governed by said Cross Border Merger Regulations. In terms of Mauritius Companies Act, 2001 only a company holding a category 2 global business license can merge with one or more companies incorporate under the laws of a jurisdiction other than Mauritius where the merger is permitted by the laws of such jurisdiction.

From the material on record, the Scheme appeared to be fair, reasonable and not violative to any provisions of law nor is contrary to public interest,

Hence sanctioned.

**In the matter of Asian Paints Limited and Asian Paints (International) Limited**

The proposed Scheme of Amalgamation between Asian Paints Limited ("Applicant Company" or "Transferee Company") and Asian Paints (International) Limited ("Transferor Company") ("Scheme") provides for the transfer of the entire business of the Transferor Company to, and vesting thereof in, the Transferee Company, as a "going concern", in accordance with the terms of the Scheme and pursuant to the provisions of Sections 230-232 and 234 of the Companies Act, 2013 read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, as amended. The Transferor Company is a foreign company incorporated under the provisions of the Mauritius Companies Act and is a wholly owned subsidiary of the Applicant Company. The proposed Scheme will result in the following benefits:

(a) rationalizing multiple foreign subsidiaries in the group to ensure optimized legal entity structure more aligned with the business by reducing the number of legal entities and reorganizing the legal entities in the group structure so as to obtain significant cost savings and/or simplification benefits;

(b) significant reduction in the multiplicity of legal and regulatory compliances required at present to be carried out by the Transferor Company and the Applicant Company;

(c) elimination of administrative functions and multiple record-keeping, thus resulting in reduced expenditure; and

(d) the amalgamation pursuant to the Scheme will create a focused platform for future growth of the Applicant Company.

The Tribunal held that the Scheme does not affect the rights and interests of the members or creditors of the Applicant Company and does not involve any re-organization of share capital of the Applicant Company. As on date, the assets of the Applicant Company exceed its liabilities and would be sufficient to discharge the said liabilities in future. The assets and liabilities of the Transferor Company will be appropriated under the Scheme by the Applicant Company and the shareholding and other rights of the members of the Applicant Company will remain unaffected as no new shares are being issued and there is no change in the capital structure. Both the Applicant Company and the Transferor Company have a positive Net-worth and the proposed amalgamation will not affect or adversely impact the rights of the creditors of the Applicant Company in view of the strength of the financial position of the Applicant Company and the Transferor Company."

The Applicant Company, pursuant to Section 230(5) of the Companies Act, 2013 read with Rule 8 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, was directed to serve notices along with a copy of the Scheme upon: (i) the Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai Maharashtra, (ii) Registrar of Companies, (iii) Income Tax Authority within whose jurisdiction the Applicant Company's assessment are made, (iv) Securities and Exchange Board of India, (v) BSE Limited, (vi) The National Stock Exchange of India Limited, and (vii) Reserve Bank of India, with a direction that they may submit their representations, if any, within thirty days of the date of receipt of such notice to the Tribunal with copy of such representations shall simultaneously be served upon the Applicant Company, failing which it will be presumed that the aforesaid authorities have no representations to make on the proposals.

# CROSS BORDER MERGERS-PROCESS

Companies must peruse and analysis whether the merger will be in accordance with the provisions of FEM (Cross Border Mergers) Regulations, 2018. If they are not, then obtain the prior approval of RBI for the merger.

The Indian Company shall file and application with Hon’ble NCLT along with the requisite documents seeking convening/dispensation of meetings of shareholders and/or creditors.

Simultaneously, foreign companies must file an application in its jurisdiction with appropriate authorities for appropriate directions in merger.

# MERGER & AMALGAMATION (UNDER THE COMPANIES ACT, 2013)

FORMAT OF APPLICATION

- Application to the Tribunal be filed in Form NCLT-1 along with the following documents **[Rule 3]**
  - A notice of admission in Form NCLT-2
  - An affidavit in Form NCLT-6
  - A copy of Scheme
  - A disclosure in the form of affidavit **[Section 230(2)]**
  - Fee as prescribed by Schedule of Fees.

DISCLOSURE ON AFFIDAVIT BY THE COMPANY

- The application shall disclose to the Tribunal by way of affidavit **[Section 230(2)]**
  - All material facts relating to the company, such as
    - latest financial position of the company,
    - the latest auditor's report on the accounts of the company and
    - the pendency of any investigation or proceedings against the company;
  - Reduction of share capital of the company, if any, included in the scheme;
  - Any scheme of corporate debt restructuring (CDR) consented to by not less than 75% of the secured creditors in value including the
    - A creditors' responsibility statement in Form No. CAA.1 **[Rule 4]**

- ❖ Safeguards for the protection of other secured/unsecured creditors;
- ❖ Auditors' report that fund requirement of the company after the CDR shall confirm to the liquidity test
- ❖ If the company is following CDR guidelines specified by the RBI, a statement to that effect;
- ❖ A valuation report in respect of shares, property and all assets of the company by a registered valuer.

## MEETING(S) OF SHARHEOLDERS & CREDITORS TO BE CALLED/ DISPENSED WITH BY THE TRIBUNAL

- Meeting(s) of the creditors
  - ➢ The Tribunal may dispense with the calling of meeting of creditor or class of creditors
    - ❖ where such creditors or class of creditors, having at least 90% value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement. **[Section 230(9)]**

# CAN TRIBUNAL DISPENSE WITH THE REQUIREMENT OF HOLDING OF MEETING OF SHAREHOLDERS – CRITICAL ANALYSIS

Meeting(s) of the shareholders

No specific provisions in the Act to dispense with the meeting of shareholders

However, in a judgement dated 13.01.2017, the National Company Law Tribunal (Principal Bench, New Delhi), in the case of JVA Trading Private Limited and C & S Electric Limited, has taken a view that Tribunal has no power to dispense with the holding of meeting of members of the companies.

(Reasons Cited: No express provision in the Act or Rules unlike for the creditors and dispensation may be hit by Rule 5).

“Rule 5(a). Directions at hearing of the application.-

Upon hearing the application under sub-section (1) of section 230 of the Act, the Tribunal shall, unless it thinks fit for any reason to dismiss the application, give such directions as it may think necessary in respect of the following matters:-

(a) determining the Class or classes Of creditors or of members whose meeting Or meetings have to be held for considering the proposed compromise or arrangement; or dispensing with the meeting or meetings for any class or classes of creditors in terms of sub-section (9) of section 230;…….”

Contrary view taken by NCLT, Bengaluru Bench

- In Coffee Day Overseas Private Limited judgment dated 02.02.2017, the Bengaluru Bench has dispensed with the shareholders meeting in view of written consents filed with the application.

It has raised an interesting question of law for extensive debate and discussion.

On perusal of the word “may” used in the provisions of section 230 (1) and 232(1), there could be two different interpretations:

- it is the discretion of the Tribunal whether to call the meeting of the creditors or class of creditors or the members or the class of members, as the case may be, or to dismiss the application, or
- The word “may” being a wider term includes, to dispense with meetings, to order meetings or to dismiss the application as the case may be.

**Rule 24**. Liberty of the Tribunal.-

1. At any time during the proceedings, if the Tribunal hearing a petition or application under these Rules is of the opinion that the petition or application or evidence or information or statement is required to be filed in the form of affidavit, the Same may be ordered by the Tribunal in the manner as the Tribunal may think fit.
2. The Tribunal may pass any direction(s) or order or dispense with any procedure prescribed by these rules in pursuance of the object of the provisions for implementation of the scheme of arrangement or compromise or restructuring or otherwise practicable except on those matters specifically provided in the Act.

**Sec-424** Procedure before Tribunal and Appellate Tribunal

(1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) dismissing a representation for default or deciding it ex parte;

(g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—

(a) in the case of an order against a company, the registered office of the company is situate; or

(b) (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860), and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

- Under the Companies Act, 1956 read with Companies (Court) Rules, 1959, there was no specific provisions for dispensation of meeting of shareholders and even of creditors, but the High Court(s) used to dispense with the requirement of convening of meeting of members or creditors upon production of written consent of requisite majority of such members or creditors, particularly when consent was 100% or close to 100%.
- There were cases where dispensation was granted to the Transferee Company where scheme was between holding and wholly owned subsidiaries and on the basis of positive net worth criteria and on the fact that the Scheme is not a compromise or arrangement with the creditors and they will be paid in full as and when their amount falls due.
- Ordinarily, the convening of meetings of members and creditors is must. However, over the years, certain exceptions have been carved out by the courts through various judicial pronouncements.

- Meetings may be dispensed with by the High Court not as a matter of right but at the discretion of the court on the basis of principles of just and fair and doctrine of acquiescence.

- Doctrine of Acquiescence: B.V. Gupta v. Bangalore Plastics, CA No. 1676/1981 (unreported) (Karnataka High Court) applied in S.M. Holding Finance P. Ltd. v. Mysore Machinery Manufacturers Ltd., (1993) 78 Com Cases 432 (Kar).

- The most important part in the said decision of B.V. Gupta, is the reliance upon the doctrine of acquiescence to cloth the court with the power to dispense. It was thus observed: "A third exception to the rule that all the shareholders of a company must cast their votes in a formally called meeting is made by the doctrine of acquiescence. If all the shareholders acquiesce in a certain arrangement, the question of a meeting having been called does not arise at all."

# FOLLOWING THE PRECEDENT SET BY HON'BLE HIGH COURTS

- In the matter of "Jupiter Alloys & Steel (India) Limited & Anr." NCLT, the Special Bench of three members held that the precedents set forth by the Hon'ble High Courts have to be considered while dispensing with the requirements of convening the meeting of shareholders. The said judgement, being the judgement of larger bench paved the way for dispensation with the requirements of convening the meetings of shareholders and/or creditors even when no consents have been obtained in this regard based on the precedents sets by Hon'ble High Courts under the erstwhile Companies Act, 1956 such as merger of wholly owned subsidiary with its holding company, post merger positive net worth etc.

- However, in the matter of DLF Phase-IV Commercial Developers Limited, the Hon'ble NCLT, Chandigarh bench did not consider the judgement passed by the larger bench in NCLT Kolkata and some other related judgments in this regard and asked the Applicants to convene the meetings of shareholders and/or creditors in respect of whom no consent affidavits were submitted.

- The Applicant aggrieved by the said order approached the Hon'ble National Company Law Appellate Tribunal (NCLAT), which set aside the order passed by Hon'ble NCLT Chandigarh refusing dispensation and held that NCLT Chandigarh has to consider the judgement passed by coordinate benches or larger benches in this regard. Later, in view of the order passed by the NCLAT, the Chandigarh Bench of NCLT dispensed with all meetings.

# CALLING OF MEETING BY THE TRIBUNAL

Upon hearing the application, the Tribunal shall, unless it dispenses with the meeting(s) of creditors or any class of them, give such direction/order in respect of the calling of meeting(s), such as

- Fixing the time and place of the meeting;
- Appointment of chairperson and fixing the terms of his appointment;
- Fixing the quorum and procedure to be followed at meeting;
- Determining the value of creditors or any class of them, members or any class of them, whose meetings to be held;
- Notice of the meeting and advertisement of such notice;
- Notice to the statutory authorities;
- The time within which the reporting by chairperson is required;
- Such other matters as may deem necessary **[Rule 5]**

# NOTICE OF THE MEETING – CONTENTS

The notice of the meeting shall be in Form No. CAA. 2 and shall accompanied by following: [Section 230(3)(4), 232(2) and Rule 6]

- A statement detailing the scheme, appointed date, effective date.
- A copy of valuation report;
- Details of capital or debt restructuring, if any;
- Rational for the compromise or arrangement;
- Benefits of the scheme;
- Explanation on effect of scheme on creditors, directors, KMPs, promotors, non-promoters members, debenture-holders, depositors, employees etc.
- Effect of the scheme on any material interest of directors, KMPs, debenture-trustee
- A statement providing that a person may vote either by himself or through proxies or by postal ballot
- Confirmation that a copy of the scheme has been filed with ROC
- A report adopted by the directors of the companies explaining the Statement explaining the effect of scheme on creditors, KMPs, promotors, non-promoters members, debenture-holders, laying out the share exchange ratio, special valuation difficulties;
- Amount due to unsecured creditors;
- Report of expert with regard to valuation, if any;
- A supplementary accounting statement if the last annual accounts of any of the merging companies are older than 6 months;

- A statement disclosing
  - ❖ the details of order of the Tribunal
  - ❖ Details of the company including
    - ➢ CIN
    - ➢ PAN
    - ➢ Name of the company
    - ➢ Date of incorporation
    - ➢ Type of company
    - ➢ Registered office address
    - ➢ Email id
    - ➢ Summary of main objects
    - ➢ details of change of name, registered office and objects during the last 5 years
    - ➢ Name of the stock exchange(s) where the securities of the company are listed;
    - ➢ Details of capital structure of the company
    - ➢ Names of the promoters and directors along with their address
  - ❖ Facts and details of relationship between companies involved in the scheme;
  - ❖ Date of board meeting in which scheme was approved, name of the directors who voted in favour of resolution, against the resolution and who did not vote;
- Details of availability of documents relating to scheme for inspection, obtaining extract or copies etc.
- Details of approvals etc. of regulatory or other governmental authorities

The notice as aforesaid shall be sent at least one month before the date fixed for the meeting **[Rule 6(2)].**

# ADVERTISEMENT OF THE NOTICE

The notice of the meeting shall also to be advertised in Form CAA.2 not less than 30 days before the date fixed for the meeting

- in at least one English newspaper
- in at least one vernacular language newspaper and
- shall also to be placed,
  - on the website of the company, if any, and
  - in case of listed companies also on the website of the SEBI and the recognised stock exchange where the securities of the company are listed. **[Rule 7]**

# NOTICE TO STATUTORY AUTHORITIES

**Section 230(5):** A notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

- A notice of the meeting in Form CAA.3 along with a copy of the scheme of compromise or arrangement, the explanatory statement and disclosures mentioned under rule 6 mentioned above shall be sent forthwith to
  - (i) RD, ROC and IT authorities, in all cases;
  - (ii) RBI, SEBI, CCI and SE, as may be applicable;
  - (iii) other sectoral regulators or authorities, as required by the Tribunal **[Rule 8(1)]**

- Where the authorities referred above desire to make representation under section 230(5), then the same shall be sent to the Tribunal within a period of 30 days from the date of receipt of notice with a copy to the company concerned. **[Rule 8(3)]**

- If no representation is made within the said period of 30 days, then it shall be presumed that the authorities have no representation to make. **[Rule 8(3)]**
  - What if the all the meetings are dispensed with then whether Section 230(5) will be attracted or not? If not then how to issue notice to other authorities?

# AFFIDAVIT OF COMPLIANCE

The chairperson appointed for the meeting of the company or the person directed to issue advertisement and notices of the meeting shall file an affidavit before the Tribunal not less than 7 days before the date fixed for the meeting or the date of first of the meetings stating that the directions have been complied with **[Rule 12].**

# APPROVALS AND OBJECTIONS TO THE SCHEME

- At the meeting, majority of the person representing 3/4th in value of the creditors, or class of creditors or members or class of members as the case may, is required to approve the scheme of merger and amalgamation. **[Section 230(6)]**

- The objections to the scheme shall be made only by the person
  - holding not less than 10% of the shareholding or
  - having outstanding debt amounting to not less than 5% of the total outstanding debt as per the latest audited financial statement. **[Section 230(4)]**

- A report to the Tribunal on the result of meeting in Form CAA.4 shall be submitted by the chairperson
  - within the time fixed by the Tribunal, or
  - where no time has been fixed, within 3 days after the conclusion of the meeting, **[Rule 13 and 14]**

# PRESENTATION OF THE SECOND MOTION PETITION

- Upon approval of the scheme, the company shall, within 7 days of the filing of report by the chairperson, present a petition to the Tribunal in Form No. CAA.5 for sanction of the scheme**. [Rule 15]**

- Upon presentation of petition,
  - the Tribunal shall fix a date for hearing of the petition
  - Order to advertise the notice of hearing in the same newspaper in which the notice of the meeting was advertised, or in such other newspaper as the Tribunal may direct, not less than 10 days before the date fixed for the hearing.
  - Rule 16(2) : The notice of the hearing of the petition shall also be served by the Tribunal to the objectors or to their representatives under sub-section (4) or section 230 of the Act and to the Central Government and other authorities who have made representation under rule 8 and have desired to be heard in their representation**. [Rule 16]**

# SANCTION OF THE SCHEME BY THE TRIBUNAL

- The Tribunal may pass an order in Form No. CAA.7 sanctioning the scheme**.[Rule 20].**

- The Tribunal may make provisions for the following **[Section 230(7)]:**

➢Transfer to the transferee company whole or part of the undertaking, properties or liabilities

➢Allotment or appropriation of any shares, debentures, policies or other like instruments

➢Continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer

➢Dissolution without winding up of transferor company.

➢Provisions for dissenting persons

➢Transfer of employees

➢Setting off the fee, if any, paid on authorised capital by the transferor companies against any fee payable by the transferee company on its authorised capital subsequent to amalgamation

➢In case of merger of listed company with unlisted company

❖Provide that transferee company shall remain unlisted;

❖Provision of dissenting shareholders of transferor company

➢ Other incidental, consequential and supplementary matters;

- It is to be noted that no scheme shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133. **[proviso to section 232(3)]**

- The order of the Tribunal shall be filed with ROC in Form INC-28 by every company involved in the scheme within 30 days of the receipt of the order **[Section 232(5)].**

- Comply with respect to FEM (Cross Border Merger) Regulations, 2018 and/or any other conditions set forth by the Hon'ble NCLT and/ or RBI under the FEMA.

- Comply with the laws of the country concerned with respect to the merger.

# THANK YOU