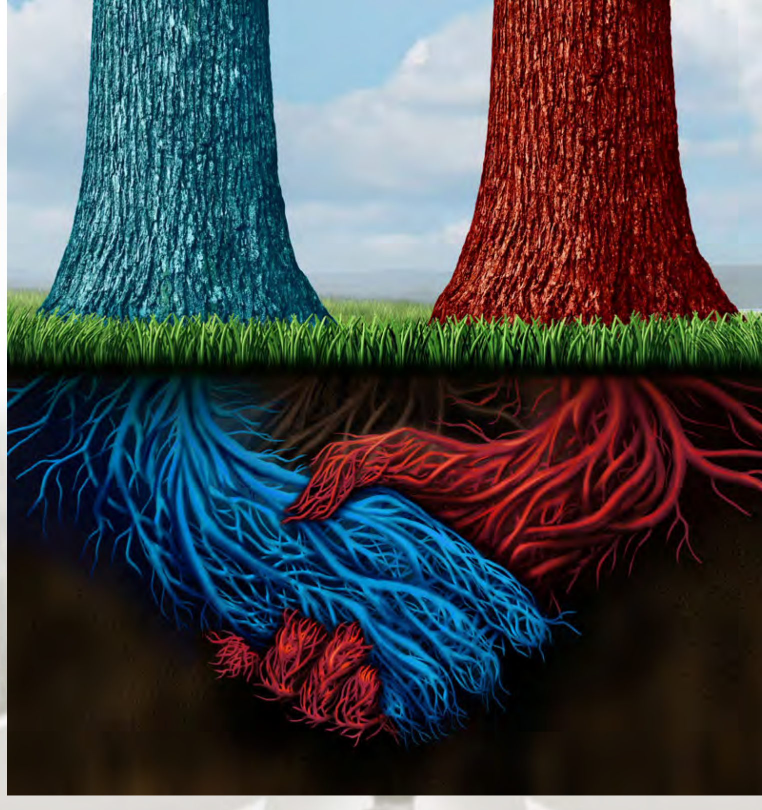

MERGERS AND AMALGAMATIONS UNDER COMPANIES ACT, 2013

FROM THE TEAM OF

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Practising Company Secretaries

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INTRODUCTION

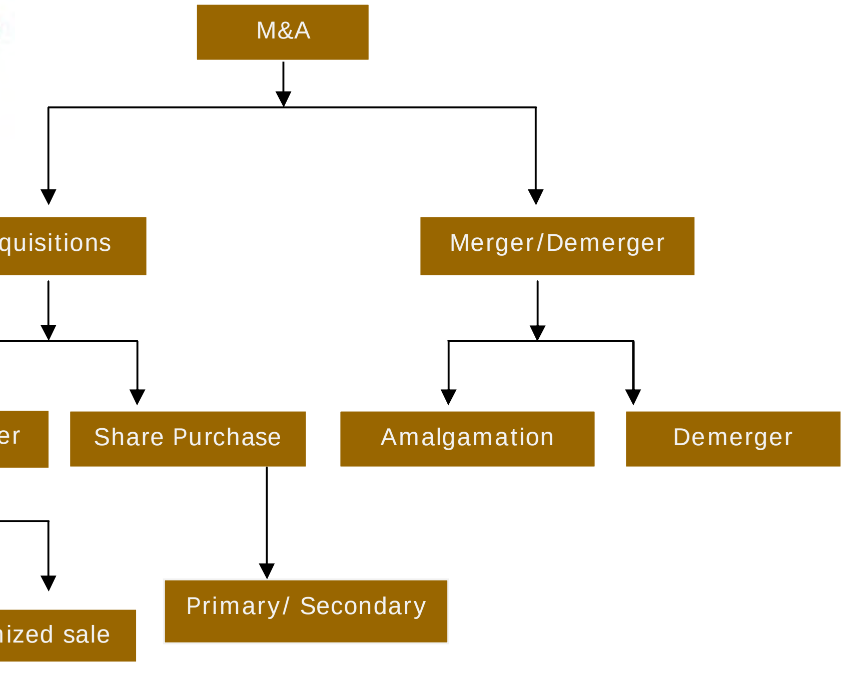
A **Merger or Amalgamation** is an arrangement whereby the assets of two or more companies become vested in one company (which may or may not be one of the original two companies). It is a legal process by which two or more companies are joined together to form a new entity or one or more companies are absorbed by another company and as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of the new or amalgamated company.

De-merger is an arrangement whereby some part /undertaking of one company is transferred to another company which operates completely separate from the original company. Shareholders of the original company are usually given an equivalent stake of ownership in the new company.

De-merger is undertaken basically for two reasons. The first as an exercise in corporate restructuring and the second is to give effect to kind of family partitions in case of family owned enterprises. A de-merger is also done to help each of the segments operate more smoothly, as they can now focus on a more specific task.

Merger and Amalgamations plays an important role in Indian economy. It enables Indian companies to merge, demerge, amalgamate, and undertake compromise or enter into arrangements with other companies. It is one of the ways of achieving inorganic growth.

General Forms of Merger and Amalgamations



TYPES OF MERGERS / DEMERGERS

Mergers and demergers can take various forms depending on the purpose for which they are contemplated and the resultant benefit arising from them. Given below is an illustrative list of some common types of mergers and demergers with a brief explanation.

TYPES OF MERGERS

HORIZONTAL MERGER

This kind of merger exists between two companies who compete in the same industry segment. The two companies combine their operations and gains strength in terms of improved performance, increased capital, and enhanced profits. This kind substantially reduces the number of competitors in the segment and gives a higher edge over competition.

VERTICAL MERGER

A kind in which two or more companies in the same industry but in different fields combine together in business. In this form, the companies in merger decide to combine all the operations and productions under one shelter. It is like encompassing all the requirements and products of a single industry segment.

CO-GENERIC MERGER

A kind in which two or more companies in association are some way or the other related to the production processes, business markets, or basic required technologies. This kind offers great opportunities to businesses as it opens a hue gateway to diversify around a common set of resources and strategic requirements.

CONGLOMERATE MERGER

Conglomerate merger is a kind of venture in which two or more companies belonging to different industrial sectors combine their operations. All the merged companies are no way related to their kind of business and product line rather their operations overlap that of each other. This is just a unification of businesses from different verticals under one flagship enterprise or firm.

TYPES OF DEMERGERS

SPIN-OFF

This type of demerger involves division of company into wholly owned subsidiary of parent company by distribution of all its shares of subsidiary company on Pro-rata basis.

SPLIT-UP

This type of demerger involves the division of parent company into two or more separate companies where parent company ceases to exist after the demerger.

EQUITY CARVE OUT

This is similar to spin offs, except that same part of shareholding of this subsidiary company is offered to public through a public issue and the parent company continues to enjoy control over the subsidiary company by holding controlling interest in it.

DIVESTITURES

These are sale of segment of a company for cash or for securities to an outside party. Divestitures, involve some kind of contraction

REASONS AND BENEFITS OF MERGERS / DEMERGERS

RATIONALE AND BENEFITS OF DEMERGER

- **To focus on core business** - Companies which have more than one business and the smaller business is not recognized in valuations of these companies, demerger helps to separate this investment out of the core business. They can focus on core business and exploit the benefits of core competencies and utilize surplus cash in a productive way.

- **To attract investors** - Demerger of a company can attract specific institutional investors having interest in particular sectors.

- **To improve valuation** - The benefits of a greater focus to each of the businesses does get reflected in the market and it is possible to realize the actual value of each business.

- **Family Settlement** - Split among family members can be reason for demerger.

- Corporate attempt to adjust to changing economic and political environment of the country through demergers.

- Strategy to enable others to exploit opportunity effectively to optimize returns when the parent company is unable to do so.

- To correct the previous investment decisions where the company moved into the operational field having no expertise or experience to run the show on a profitable basis.

- To help finance an acquisition.

- To realize capital gains from the assets acquired at the time when they were under performing and on no better performance, capital gain can be realized.

- To make financial and managerial resources available for developing other more profitable opportunities.

- Selling unwanted and surplus or unconnected parts in the business as a restructuring strategy to get rid of sick part of the company.

RATIONALE AND BENEFITS OF MERGER

- A merger may be accomplished tax-free for both parties.

- A merger lets the target (in effect, the seller) realize the appreciation potential of the merged entity, instead of being limited to sales proceeds.

- A merger allows the shareholders of smaller entities to own a smaller piece of a larger pie, increasing their overall net worth.

- A merger of a privately held company into a publicly held company allows the target company shareholders to receive a public company's stock, despite the liquidity restrictions.

- A merger allows the acquirer to avoid many of the costly and time-consuming aspects of asset purchases, such as the assignment of leases and bulk-sales notifications.

- Of considerable importance when there are minority stockholders is the fact that upon obtaining the required number of votes in support of the merger, the transaction becomes effective and dissenting shareholders are obliged to go along.

METHODS OF VALUATION

Valuation of shares of the companies involved in the scheme of amalgamation / demerger is a very crucial and complex issue. However, the subject of valuation itself is a debatable issue and open to easy criticism.

There is no single prescribed method of valuation for the purpose of valuation of shares of companies involved in a scheme of amalgamation / demerger. Usually, valuation is done under different methods and their mean is taken to arrive at the final valuation to ensure that the value of shares is properly reflected while calculating the exchange ratio. Discussed below are some of the generally followed methods:

Market Value of Shares

- Mean of Stock Exchange quotations for last 6/12 months is taken to arrive at the value

Intrinsic value or Book Value

- Assets and liabilities are valued on the "going concern" premise and difference between them is taken as Networth

Yield Method

- Rate or amount of dividend is compared to the industry rate of return to arrive at value of shares.

Earnings Per Share Method (EPS)

Price of the share is arrived at by multiplying the EPS with the Price Earning Ratio

Earnings Method

Average return of the company is compared with average return in the Industry

RULES AND REGULATIONS

Companies Act

Amalgamation Rules

Income Tax Act

Competition Act

SEBI LODR Regulations, 2015

SEBI Act & Regulations

Stamp Act

AMALGAMATION / MERGER UNDER COMPANIES ACT, 2013

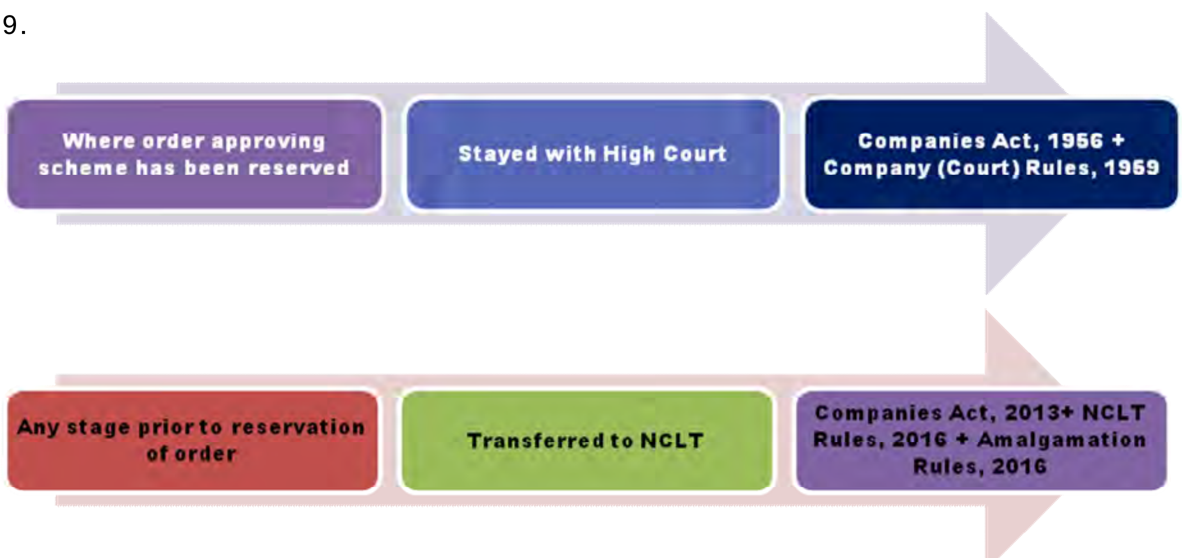
Chapter XV of the Companies Act, 2013 titled "Compromise, Arrangements and Amalgamations" containing Sections 230 to 240 read with the Rules made thereunder, namely, The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 contains the provisions which provide for compromise or arrangements, mergers and amalgamations, Corporate Debt restructuring, demergers, fast track mergers for small companies/holding-subsidiary companies, cross border mergers, takeovers etc.

The provisions of this chapter came into effect from **15th December, 2016** except for Section 234 (Merger or amalgamation of Company with Foreign Company) which came into force w.e.f 13th April, 2017. The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, also came into effect from December 15, 2016.

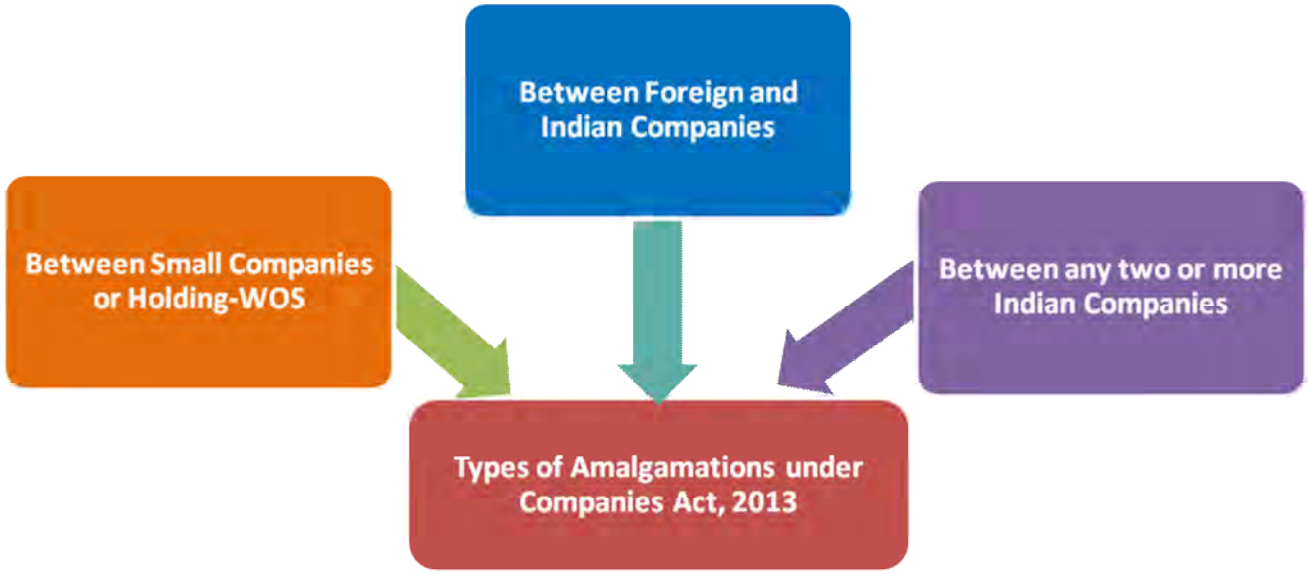
Under the provisions of Companies Act, 2013, applications for sanctioning Schemes of mergers / amalgamations shall be made to the **National Company Law Tribunal** which power was earlier exercised by High Courts under the provisions of Companies Act, 1956.

Transitional Provisions

As per Section 434 and the Companies (Transfer of Pending Proceedings) Rules, 2016, which rules came into force with effect from the 15th December, 2016, all proceedings under the Companies Act, 1956, including proceedings relating to arbitration, compromise, arrangements and reconstruction, other than proceedings relating to winding up on the date of coming into force of these rules shall stand transferred to the Benches of the Tribunal exercising respective territorial jurisdiction. No fee shall be payable in respect of any proceedings transferred to the Tribunal in accordance with the Companies (Transfer of Pending Proceedings) Rules, 2016. However all those proceedings which are reserved for orders for allowing or otherwise of such proceedings shall not be so transferred. Such proceedings which are stayed with the High Courts shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959.



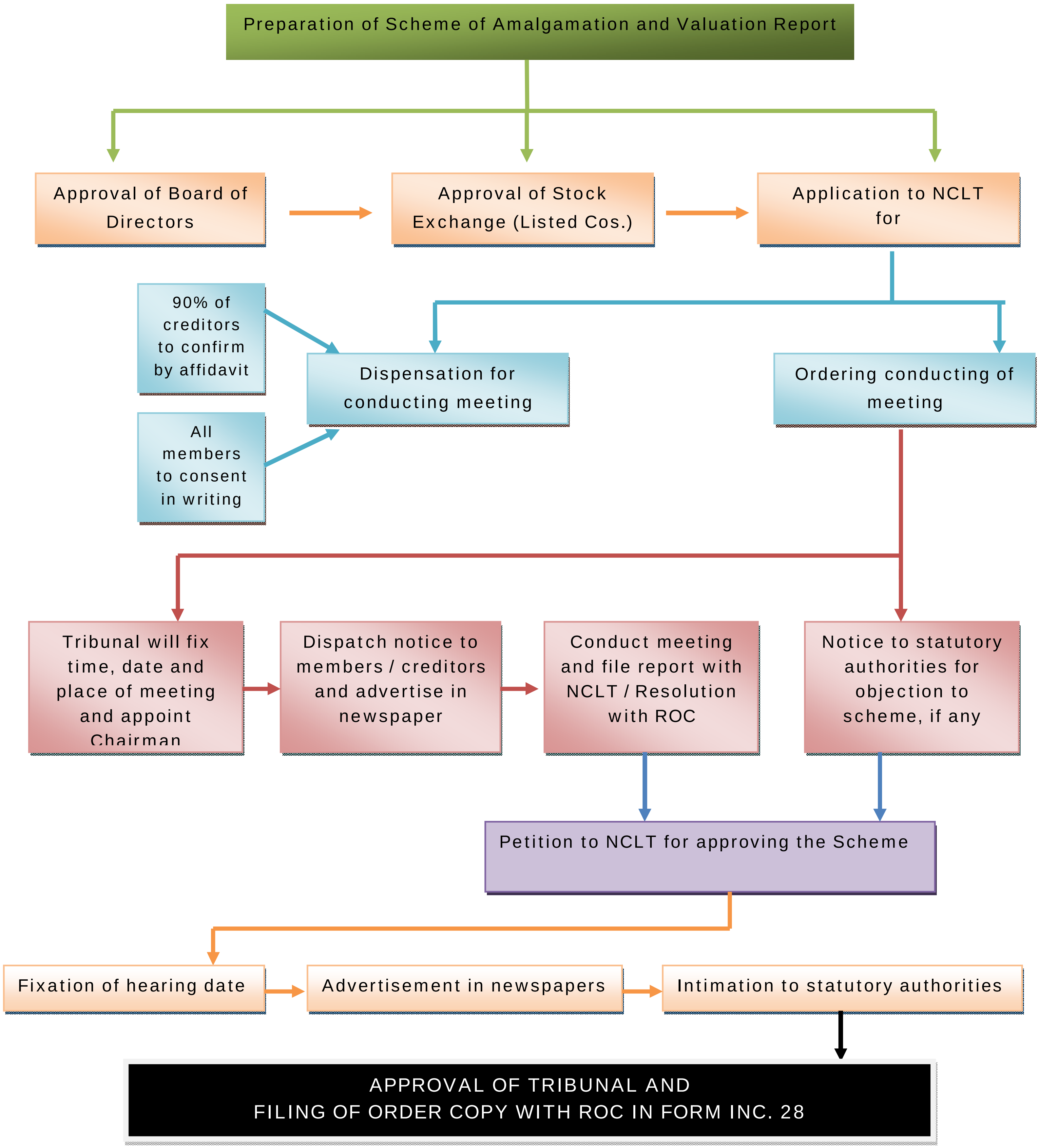
For understanding the procedures and provisions relating to mergers and amalgamations under the Companies Act, 2013, following bifurcation can be made:



SECTIONS OF COMPANIES ACT, 2013 AT A GLANCE

Section	Particulars
230	Power to compromise or make arrangements with creditors and members
231	Power of Tribunal to enforce compromise or arrangement
232	Merger and amalgamation of companies
233	Merger or amalgamation of certain companies
234	Merger or amalgamation of company with foreign company
235	Power to acquire shares of shareholders dissenting from Scheme or contract approved by majority
236	Purchase of Minority Shareholding
237	Power of Central Government to provide for amalgamation of Companies in public Interest
238	Registration of offer of Schemes involving transfer of shares
239	Preservation of books and papers of amalgamated Companies
240	Liability of officers in respect of offences committed prior to merger, amalgamations etc

GENERAL PROCEDURE FOR AMALGAMATION UNDER THE ACT



MERGER / AMALGAMATION OF COMPANIES

Schemes of mergers and amalgamations under Sections 230 and 232 of the Companies Act, 2013 may be filed by any company (including companies covered under section 233) with the NCLT by following the procedure and complying with provisions mentioned below:

Approval of the Scheme by Board of Directors of respective companies

↓

Application to NCLT (NCLT 1) for ordering meeting of creditors / members

Tribunal may order a meeting, or	Dispense with meeting of creditors, if atleast 90% creditors in value approve the scheme

↓

Where meeting needs to be held, atleast 1 month prior to meeting

Notice to be sent to Creditors / members / Debenture holders	Advertisement of notice in newspapers and upload on website

↓

Notice also to be sent to Statutory Authorities

CG	IT	ROC	RBI	SEBI	Stock Exchanges	CCI	OL	Sectoral Regulators

↓

Chairman to file affidavit of service of notices atleast 7 days prior to meeting

↓

Meeting to be held and approval to be sought from creditors and members

Majority of persons representing three-fourths in value to approve	Chairman to submit report to NCLT in form CAA. 4 within 3 days of meeting

↓

Petition seeking approval for Scheme to be filed with Tribunal in form CAA.5 within 7 days of Chairman report

Notice of hearing of petition to be advertised	Notice of hearing to be served on persons who made objections, CG, Other Authorities

↓

Tribunal after hearing all concerned may pass order sanctioning the Scheme in form CAA. 6

↓

Filing of order copy with ROC in form INC. 28 within 30 days

MERGER / AMALGAMATION OF CERTAIN COMPANIES

Section 233 provides for sanctioning of Schemes of mergers or Amalgamations by the **Central Government (Regional Director),** proposed to be entered between

- two or more **small companies**, or
- a **holding Company** and its **wholly-owned subsidiary Company**

Approval of the Scheme by Board of Directors of respective companies

↓

Notices by transferor and transferee companies (Form No. CAA.9) inviting objections / suggestions to the proposed scheme, if any (within 30 days)

ROC	Official Liquidator	Persons affected by the Scheme

↓

Filing of declaration of solvency by all companies involved in the Scheme in Form No. CAA.10 with ROC

↓

Convening general meeting to consider suggestions / objections received and seeking approval of members for the Scheme after receiving report from ROC

Shareholders holding atleast 90% of total number of shares to agree	MGT 14 to be filed within 30 days

↓

Convening meeting of creditors seeking their approval to the Scheme (21 days notice)

Majority representing 9/10th in value to agree	Approval can alternatively be sought in writing

↓

Filing of copy of Scheme along with result of each meeting within 7 days after meeting of members / creditors with

CG in Form No. CAA.11	ROC in Form No. GNL-1 (along with CAA.11)	OL - hand Delivery / Regd. or Speed Post

↓

CG to issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12, provided

No objection/suggestion is received, or	Objection / suggestion received are not deemed sustainable, and	CG opines that scheme is in interest of public / creditors

↓

If the above conditions are not satisfied, CG may forward the matter to Tribunal, for considering the Scheme u/s 232, by filing form Form No. CAA.13 within 60 days

Tribunal may confirm the Scheme or it may direct its consideration u/s 232

↓

Filing of order copy with ROC in form INC. 28 within 30 days

STEPS AND FORMS INVOLVED U/S 230 & 232

Step	Activity	Form
1	Approval of Scheme by Board of Directors	MGT 14 (For public Cos.)
2	Application to Tribunal for ordering meeting / seeking dispensation for holding meeting (if approval received from creditors & members in writing)	NCLT 1 NCLT 2 NCLT 6
3	Sending notice of meeting to creditors and shareholders (Where dispensation is not sought or granted)	CAA.2
4	Copy of Scheme to various Statutory Authorities seeking their suggestions / objections / approvals	CAA.3 GNL 1 (ROC)
5	Convening the meeting and filing of resolution approving Scheme by members with ROC	MGT 14
6	Submission of report on meeting by Chairman with NCLT	CAA.4
7	Petition to NCLT for approval of Scheme	CAA.5
8	Fixation of hearing date	-
9	Advertisement of hearing date in newspapers and intimation to statutory authorities	-
10	Consideration by NCLT and reservation of Order	CAA.6
11	Filing certified copy of order with ROC	INC.28

STEPS AND FORMS INVOLVED U/S 233

Step	Activity	Form
1	Approval of Scheme by Board of Directors	MGT 14 (For public Cos.)
2	Notice inviting objections / suggestions	CAA.9
3	Declaration of solvency	CAA.10
4	Approval of Scheme by Meeting of members/ creditors and filing resolution with ROC	MGT 14
5	Filing copy of Scheme and outcome of meeting to CG / ROC / OL	CAA.11 GNL1
6	Issue of Order confirming scheme by CG	CAA.12
7	Forwarding of matter to NCLT where scheme is not confirmed by CG	CAA.13
8	Filing certified copy of order with ROC	INC.28

AMALGAMATIONS of INDIAN COMPANIES WITH FOREIGN COMPANIES

Section 234 of the Companies Act, 2013 contains provisions relating to merger of a Foreign Company with an Indian Company and vice versa, with the prior approval of RBI.

Section 234 was notified w.e.f 13.04.2017 and corresponding amendments to the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 have also been notified by inserting a new Rule 25A effective on and from 13th April, 2017.

Section 234 of 2013 Act, permits cross border mergers in both ways i.e., –

- a foreign company can merge into an Indian company (Inbound Merger); and
- an Indian company can merge into a foreign company of permitted jurisdiction (Outbound Merger).

"Indian Company" means a company as defined in clause (20) of section 2 of the Act.

"Foreign company" means a company or body corporate incorporated outside India whether having a place of business in India or not.

Highlights of Section 234 and Rule 25A

- Prior approval of RBI is mandatory and only after receiving RBI's approval, an application can be made by the Indian company with the Tribunal.

- Jurisdictions of foreign company into which an Indian company can merge has been notified vide Annexure B of the Rules.

- Sections 230 to 232 of the Act and the corresponding provisions under the Rules have to be complied with in the case of cross border mergers as well.

- The scheme of merger may provide for payment of consideration to the shareholders of the merging company in the form of cash or depository receipts or partly in cash and partly in depository receipts.

- Guidance provided on foreign company's valuer and valuation which is presently applicable only to Outbound Mergers and the law remains silent on such requirement for Inbound Mergers.

Therefore, it is irrespective any type of companies in India, the Scheme of Amalgamation, Merger or Demerger and other type of scheme of arrangements as per Section 230 to 235 of the Companies Act 2013 will benefit the companies for their effective growth and prospect and would produce effective results and attractive returns not only to the shareholders of the Company but also to all the stake holders of Company besides economy of the country at large.

Post your reflections to

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