COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS [SECTIONS 230- 240]

Without transfer of Assets & Liabilities (Section No. 230)	Transfer of Assets & Liabilities (Section No. 232)
- Internal Reconstruction - Sacrifice by Shareholder - Sacrifice by Creditors	- Absorption X+Y = X - Amalgamation / Mergers X+Y = XY - Demerger X = X1, X2

1. Important Aspects:-

a) Detailed disclosures to be made during the process of corporate restructuring.
b) Introduction of voting by way of postal ballot.
c) Providing a threshold for the dispensation of creditors meetings.
d) Serving of notices to the various statutory authorities so that participation of various regulators may assist the tribunal to take a informed decision.
e) Provision related to takeover of listed companies through the scheme of compromise or arrangement, emphasis on the pricing guidelines which the SEBI would prescribe ensuring uniformity in law.
f) Prohibits the maintenance of treasury stock.
g) Exit options to shareholders through pre-determined formula or valuation can be given on merger of listed company with an unlisted company.
h) Statement certifying implementation of the scheme shall be given a Chartered Accountant or Company Secretary.
i) Provisions in this chapter are in compliance with the SEBI regulations and guidelines issued by RBI.
j) Enables cross border amalgamations between Indian Companies and Foreign companies.
k) Lays the mechanism under which the transferee company under a scheme or contract can acquire shares of dissenting shareholders.
l) This chapter also provides the process of amalgamation of companies for public interest.
m) Books and Papers of the amalgamating company/ the company in which shares have been acquired by another company shall not be disposed of on prior permission of the Central Government..
n) Liability of the officers of the transferor company on any offence committed under this Act shall be retrospective even after the merger, amalgamation or acquisition.

2. Power to Compromise or Make Arrangements with Creditors and Members [Section 230]

A compromise or arrangement is proposed b/w	Tribunal may, on the application of the
• a co. and its creditors or any class of them; or • a co. and its members or any class of them,	• company, or • of any creditor, or • member of the company, or • of the liquidator (in the case of a co. which is

	being wound up), appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be.

<u>Order a meeting</u> of the creditors or class of creditors, or of the members or class of members, as the case may be, **<u>to be called, held and conducted in such manner as the Tribunal directs</u>**.

<u>Disclosures by applicant:</u>

The company or any other person, **<u>by whom an application is made</u>**, shall disclose to the **<u>Tribunal by affidavit:-</u>**

i) **all material facts** relating to the company:-
- latest financial position
- latest auditor's report on the accounts
- pendency of any investigation or proceedings against the company.

ii) **reduction of share capital** of the company.

iii) **any scheme of corporate debt restructuring** consented to by >75% of the secured creditors in value, including—
- a <u>creditor's responsibility statement</u>
- <u>safeguards for the protection of other secured and unsecured creditors</u>
- <u>report by the auditor</u> that the fund requirements of the company after the corporate debt restructuring as approved shall conform <u>to the liquidity test</u> based upon the estimates provided to them by the Board
- <u>Statement of compliance of RBI Guidelines</u>
- a <u>valuation report</u> in respect of the <u>shares</u> and the <u>property</u> and <u>all assets</u>, by <u>registered valuer</u>.

iv) **Notice of meeting conducted on order of Tribunal:** a notice of such meeting shall be sent to-

• all the creditors or class of creditors, and • to all the members or class of members, • and the debenture-holders of the company,	individually at the address registered with the co.

<u>Annexure with Notice:</u>

- accompanied by a statement disclosing the details of the compromise or arrangement

explaining their effect on	effect of the C&A on any material interests of
• creditors, • key managerial personnel, • promoters and non-promoter members, and • the debenture-holders	• the directors • or the debenture trustees

- a copy of the valuation report, if any
- and such other matters as may be as prescribed under *Rule 6 of the Companies (Compromises, arrangements and amalgamations) Rules, 2016*.

<u>Advertisement of notice:</u>

- such notice and other documents shall also be placed on the website of the company. If any.
- in case of a listed company, these documents shall be sent to
  - SEBI and
  - stock exchange where the securities of the companies are listed.
- published in newspapers in such manner as prescribed under *Rule 7 of the Companies (Compromises, arrangements and amalgamations) Rules, 2016.*

Time period for the receipt of the copies of the compromise or arrangement:

- where the notice for the meeting is also issued by way of an advertisement,
- it shall indicate the time within which copies of the compromise or arrangement shall be made available
- to the concerned persons free of charge from the registered office of the company

Vote to the adoption of the compromise or arrangement:

Manner	Time Limit	Objection by persons holding
A notice shall provide that the persons may vote in the meeting either - Themselves - Through Proxies - By Postal ballot	• within one month from the date of receipt of such notice.	• 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.

Notices to sectoral regulators to make representation, if likely to be affected by the compromise or arrangement:

A notice along with all the documents in such form as may be prescribed shall also be sent to

- CG
- Income Tax Authorities
- RBI
- SEBI
- Respective Stock Exchange
- Official Liquidator
- CCI, if necessary
- Other sectoral regulators or authorities

- To make representations, if any, within thirty days from the date of receipt of such notice,
- Otherwise, it shall/ be presumed that they have no representations to make on the proposals.

Binding order of Tribunal:

In meeting Compromise and Arrangement shall be agreed by	Sanctioned by	Binding on
- ¾ in Value - Majority of Person of the creditors, or class of creditors or members or class of members, as the case may be	such compromise or arrangement is sanctioned by the Tribunal by an order	• creditors, or class of creditors • members or class of members • in case of a company being wound up, on the liquidator, "appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, and • the contributories of the co.

Particulars to be stated in the order:

a) **where the compromise or arrangement provides for conversion of preference shares into equity shares**	⇒	such preference S/H shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable
b) the **protection of any class** of creditors;		
c) if the compromise or arrangement results in the variation of the shareholders' rights,	⇒	it shall be given effect to under the provisions of sec. 48
d) if the compromise or arrangement is agreed to by the creditors	⇒	any proceedings pending before BIFR shall abated.

e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement.

Certificate by the company's auditor filed to the tribunal

To the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

Filing of order of tribunal with registrar: by the company within thirty days of the receipt of the order.

The Tribunal may dispense with calling of a meeting of creditor or class of creditors, having at least 90% value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

3. Power of Tribunal to enforce compromise or arrangement [Section 231]

a) Supervise the implementation of the scheme

b) Give such Direction or modification
- may, at the time of making such order or
- at any time thereafter
- as it may consider necessary for the proper implementation

c) Winding up order by tribunal:
- Tribunal is satisfied that scheme can't be implemented satisfactorily,
- with or without modification
- and the company is unable to pay its debts.

} The provision of this sec. shall apply to Co. where order of C&A has been made before commencement of Act

4. Merger and Amalgamation of Companies [Section 232]

Filing of an application for purpose of reconstruction or companies involving merger/ amalgamation or transfer of undertaking, property etc.:

It is shown to the tribunal that:

the C&A has been proposed for	And under the scheme
- a scheme for the reconstruction of Co. or - Companies involving merger or - the amalgamation of any two or more companies	- the whole or any part of the undertaking, property or liabilities of any company (transferor co.) - required to be transferred to another company (transferee co.) - or is proposed to be divided among and transferred to two or more companies

Tribunal may on application, order a meeting of the creditors or the members, to be called, held and conducted as the Tribunal may direct and sections 230 (3)to (6) shall apply *mutatis mutandis*.

Circulation of information for the meeting by the merging companies / the companies in respect of which a division is proposed:

a)	**draft of the proposed terms of the scheme**	drawn up and adopted by the directors of the merging company
b)	**confirmation that a copy of the draft scheme has been filed**	with the Registrar
c)	a **report adopted by the directors of the merging companies**	Explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties
d)	**the report of the expert**	with regard to valuation
e)	a **supplementary accounting statement**	if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme

Order of tribunal on the agreement of compromise or arrangement:

Tribunal make provision for the following matters:

a) the transfer to the transferee company

- of the whole or any part of the
- undertaking, property or liabilities of the transferor company
- from a date to be determined by the parties
- unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise.

b) the allotment or appropriation by the transferee company

- of any shares, debentures, policies or other like instruments in the company which,

- under the C&A, are to be allotted or appropriated by that company to or for any person.
- **Provided** that a transferee company shall not, as a result of the C&A,
- 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; (Cancellation of Treasury Stock).

c) **the continuation by or against the transferee company of any legal proceedings** pending by or against any transferor company on the date of transfer.
d) **dissolution, without winding-up**, of any transferor company.
e) **the provision to be made for any persons who**, **dissent from the compromise or arrangement**;
f) **the transfer of the employees of the transferor company** to the transferee company.
g) **where share capital is held by any non-resident shareholder**
- under the foreign direct investment norms or guidelines specified by the CG or in accordance with any law for the time being in force
- the allotment of shares to such shareholder shall be in the manner specified in the order.

h) **where the transferor company is a listed company and the transferee company is an unlisted co.**
- the transferee company shall remain an unlisted company until it becomes a listed company.
- if 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 and other benefits in accordance with a pre-determined price formula or after a valuation is made,
- and the arrangements may be made by the Tribunal.
- Amount of payment / valuation as stated above shall not be less than the amount specified by SEBI.

i) **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
- subsequent to the amalgamation;

j) such **incidental, consequential and supplemental matters**

<u>Certificate by the company's auditor filed to the tribunal</u>

To the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

<u>Filing of order of tribunal with registrar:</u> by the company within thirty days of the receipt of the order.
<u>Effective date specified in scheme</u>: The scheme shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date.

<u>Filing of duly certified statement of compliance of scheme with registrar:</u>

- Every Co. in relation to which the order is made shall
- until the completion of the scheme,
- file a statement in such form and within such time as may be prescribed with the Registrar

- every year duly certified by a CA or a CMA or a CS in practice
- indicating whether the scheme is being complied with the orders of the Tribunal or not.

In case of contravention:

On Transferor / Transferee Co.	On its officer / employee
Fine: Rs. 1 Lac to Rs. 25 Lacs	Fine: Rs. 1 Lac to Rs. 3 Lacs, or Imprisonment : Extend to 1 year, or Both

5. Merger and Amalgamation of Certain Companies [Section 233]

Merger/ Amalgamation Between		
2 or more small companies	a holding company and its wholly-owned subsidiary company	such other class or classes of companies prescribed U/R 25 *Companies (Compromises, Arrangements and Amalgamations) Rules, 2016*

1. Subject to the condition that:-

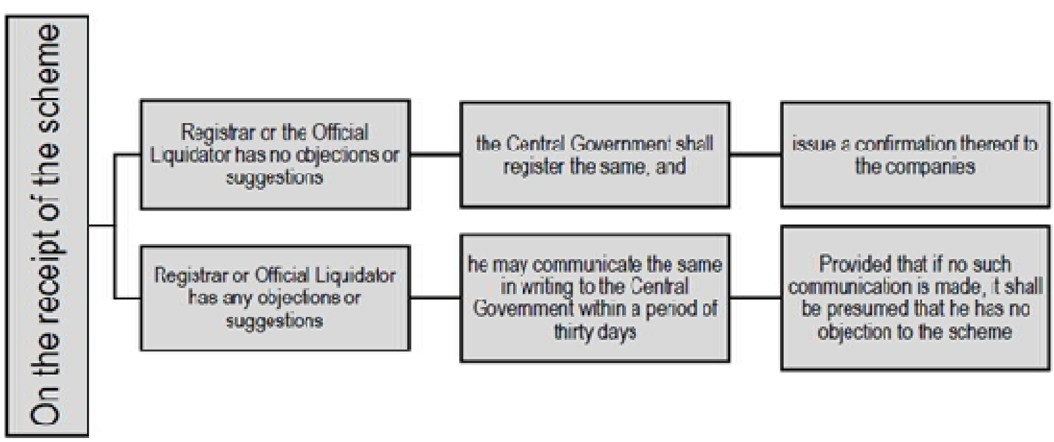
a) a **notice of the proposed scheme inviting objections or suggestions**, if any,
- to the Registrar and Official Liquidators or persons affected by the scheme
- within 30 days is issued by the transferor company or companies and the transferee company;

b) the **objections and suggestions received are considered by the companies**
- in their respective general meetings and the scheme is approved by members
- at least ninety per cent of the total number of shares

c) each of the companies involved files a **declaration of solvency**, with the Registrar.

d) the **scheme is approved by majority representing nine-tenths in value** of the creditors
- in a meeting convened by the company by giving a notice of twenty-one days.

2. Filing of copy of scheme with the Central Government, Registrar and the Official Liquidator
3. **On the receipt of the scheme, objections and suggestions:**



4. **Filing of application by Central government with Tribunal:**
- If the CG after receiving the objections or suggestions or for any reason is of the opinion
- that such a scheme is not in public interest or in the interest of the creditors,

- it may file an application before the Tribunal **within sixty days of the receipt of the scheme,**
- stating its objections and requesting that the Tribunal may consider the scheme under section 232.

5. **Passing of an order of Tribunal:**
- On receipt of an application from the CG or from any person,
- if the Tribunal, for reasons to be recorded in writing, is of the opinion that
- the scheme should be considered as per the procedure laid down in section 232,
- the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit:
6. **Communication of an order to registrar**
7. The registration of the scheme shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.
8. The transferee company shall not, as a result of the M&A,
- 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; (Cancellation of Treasury Stock).
9. **Filing of an application by transferee company with the Registrar:**
- The transferee company shall file an application with the Registrar along with the scheme registered,
- indicating the revised authorised capital and pay the prescribed fees due on revised capital:
- 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
- enhanced by M&A;

6. Merger and Amalgamation of Company with Foreign Company [Section 234]: or Cross Border Merger

Foreign Company with Indian Company	Indian Company with Foreign Company
- A foreign company incorporated O/s India - may merge with an Indian company - after obtaining prior approval of RBI and - after complying with sec. 230 to 232 of the Act and relevant rules.	- A company may merge with a foreign co. - Incorporated in any of the jurisdictions specified by the CG - in consultation with RBI and - after complying of sec. 230 to 232 of the Act and relevant rules.
	Payment of Consideration to shareholder as per drawn scheme in- • Cash, or • In Depository Receipt (DR), or • Partly in Cash and partly in DR

7. Power to Acquire Shares of Shareholders Dissenting from Scheme or Contract Approved by Majority [Section 235]

i) **Basic requirements as to acquisition of shares:**

• The scheme or contract involving the transfer of	• Approval shall be received within 4 months after	• Shares already held at the date of the offer by

shares in a company (the transferor co.) • to another company (the transferee co.) • has been approved by the holders of not less than 9/10th in value of the shares.	making of an offer. • The transferee co. shall express his desire to acquire the remaining shares of dissenting shareholders within 2 months after the expiry of 4 months. • Give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares	- Transferee Co., or - By a nominee of the transferee company or - its subsidiary companies shall not be counted for this purpose.

ii) **<u>Order of Tribunal to acquire shares of dissenting shareholders</u>**:

- Where a notice is given by the transferee company,
- unless on an application made by the dissenting shareholder to the Tribunal,
- within one month from the date on which the notice was given
- the Tribunal thinks fit may order to transferee co. that it is entitled to and bound to
- acquire those shares on the terms on which the shares of the approving shareholders are to be transferred to the transferee company.

iii) <u>Application by dissenting shareholders:</u>

<table>
<tr><td>Where a notice has been given by the transferee company on an application made by the dissenting shareholder and the Tribunal has not, made an order in favour of the company
the transferee company shall, on the expiry of one month from the date on which the notice has been given, or,</td><td>if an application to the Tribunal by the dissenting shareholder is then pending
⇩
after that application has been disposed of</td></tr>
<tr><td colspan="2">• send a copy of the notice to the transferor company <u>together with an instrument of transfer (Omitted if Scheme/contract made before the commencement of Act)</u>, and
• pay or transfer to the transferor company- the amount or other consideration representing the price payable by the transferee company for the shares which that company is entitled to acquire.</td></tr>
<tr><td colspan="2"><u>Transferor Co. shall</u>
a) thereupon register the transferee company as the holder of those shares; and
b) within one month of the date of such registration, inform the dissenting shareholders
- fact of such registration and
- receipt of the amount or other consideration representing the price payable to them by transferee co.</td></tr>
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iv) **Separate Bank account for disbursement to entitled shareholders:** and shall be disbursed to the entitled shareholders within sixty days.

v) <u>Dissenting Shareholder includes:-</u>

- a shareholder who has not assented to the scheme or contract, and
- shareholder who has failed or refused to transfer his shares to the transferee co. as per scheme or contract.

8. Purchase of Minority Shareholding [Section 236]

i. **<u>Notify to company for purchase of minority shareholding:</u>**

an acquirer, or a person acting in concert with such acquirer ⇓ becoming registered holder of 90% or more of the issued equity share capital of a company	any person or group of persons ⇓ becoming 90% majority or holding 90% of the issued equity share capital of a company
Such acquirer, person or group of persons, shall notify the company of their intention to buy the remaining equity shares	

ii. Offer of equity shares to minority shareholders by acquirer
or
Offer to majority shareholder to purchase the minority equity shareholding
⇓
at a price determined on the basis of valuation by a registered valuer in accordance with *Rule 27*.

iii. **<u>Deposit of amount in separate bank account:</u>**

- The majority shareholders shall deposit an amount equal to the value of shares to be acquired
- in a separate bank account to be operated by the transferor company
- for at least one year for payment to the minority shareholders and
- such amount shall be disbursed to the entitled shareholders within sixty days.

iv. **Role of Transferor Company to act as a transfer agent in the event of purchase.**

v. **<u>Transferor company to issue shares:</u>**

- In the absence of a physical delivery of shares by the shareholders within the time specified by the co.
- the share certificates shall be deemed to be cancelled, and
- the transferor co. shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law, and
- Make payment of the price out of deposit made by the majority.

vi. <u>Right of shareholders to make an offer for sale of minority equity shareholding:</u>

- any shareholder or shareholders who have died or ceased to exist, or
- whose heirs, successors, administrators or assignees have not been brought on record by transmission,

Right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of 3 years from the date of majority acquisition or shareholding.

vii. **Sharing of additional compensation:**

- As on or prior to the date of transfer of shares of minority shareholders
- shareholders holding 75% or more
- negotiate on a higher price for any transfer of the shares held by them
- without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation,
- the majority shareholders shall share the additional compensation so received by them
- with such minority shareholders on a pro rata basis.

viii. **On failure of acquisition of shares by majority shareholders:**

- this section shall continue to apply to the residual minority equity shareholders, even though,—
- the shares of the company of the residual minority equity shareholder had been delisted; and
- the period of one year or the period specified in the regulations made by the SEBI had elapsed.

9. Power of CG to Provide for Amalgamation of Companies in Public Interest [Section 237]

i. Central Government may by order provide for amalgamation of 2 or more co. into a single co. in the public interest in such as manner as specified in official gazette (OG).

ii. Continuation by or against the transferee company of any legal proceedings of any legal proceedings pending by or against any transferor company.

iii. **Same Interest Rights or Compensation:**

Every member or creditor, including a debenture holder, of transferor companies shall have, as nearly as may be, the same interest in or rights against the transferee co.	as he had in the company of which he was originally a member or creditor.	in case the interest or rights of such member or creditor in or against the transferee co. are less than his interest in or rights against the original co. He shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the OG

iv. **Appeal by aggrieved person on assessment of compensation:** within a period of thirty days from the date of publication of such assessment in the OG, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

v. **Requirements for passing of an order:** No order shall be made under this section unless—

- a copy of the proposed order has been sent in draft to each of the companies concerned

- the time for preferring an appeal has expired, or where any such appeal has been preferred, the appeal has been finally disposed off; and
- the CG has considered, and made such modifications, if any,
  - in the draft order as it may deem fit
  - in the light of suggestions and objections which may be received by it from any such Co.
  - within such period as the CG may fix in that behalf,
  - not being <2 months from the date on which the copy aforesaid is received by that co., or from any class of shareholders therein, or from any creditors or any class of creditors thereof.

10. Registration of offer of Schemes involving transfer of shares [Section 238]

i) **Registration of circular/ offer involving transfer of shares u/s 235:**

a) every circular containing such offer and recommendation
- to the members of the transferor company by its directors to accept such offer
- shall be accompanied by such information and in such manner as prescribed in *Rule 28.*

b) every such offer shall contain a statement by or on behalf of the transferee co.,
- disclosing the steps it has taken to ensure that necessary cash will be available; and

c) every such circular shall be presented to the Registrar for registration and
- no such circular shall be issued until it is so registered

d) Registrar may refuse, for reasons to be recorded in writing, to register
- which does not contain the information required to be given under clause (a) or
- which sets out such information in a manner likely to give a false impression,
- communicate such refusal to the parties within 30 days of the application.

ii) **Appeal against the order of the registrar:** shall lie to the Tribunal

iii) **In case of failure of registration:**

The director who issues a circular => Fine => Rs. 25000 to Rs. 5,00,000.

11. Preservation of Books and Papers of Amalgamated Companies [Section 239]

- company which has been amalgamated or whose shares have been acquired by another company
- shall not be disposed of its books of accounts, without the prior permission of the CG
- and before granting such permission, Government may appoint a person
- to examine the books and papers for the purpose of ascertaining
- whether they contain any evidence of the commission of an offence
- in connection with the promotion or formation, or the management of the affairs, of the transferor co.
- or its amalgamation or the acquisition of its shares.

12. Liability of Officers in Respect of Offences Committed Prior to M&A etc. [Section 240]

Retrospective effect of liability:
- Notwithstanding anything in any other law for the time being in force,
- the liability in respect of offences committed under this Act by the officers in default, of the transferor co.
- prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.