

# Good Morning and Welcome to the Review of Companies Act, 2013

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# Merger & Amalgamation

# Terms used and their Meanings

**Merger:** Combination of two or more entities into one; the desired effect being not just the accumulation of assets and liabilities of the distinct entities, but organization of such entity into one business.

**Amalgamation:** Combination of two or more independent business corporations into a single enterprise.

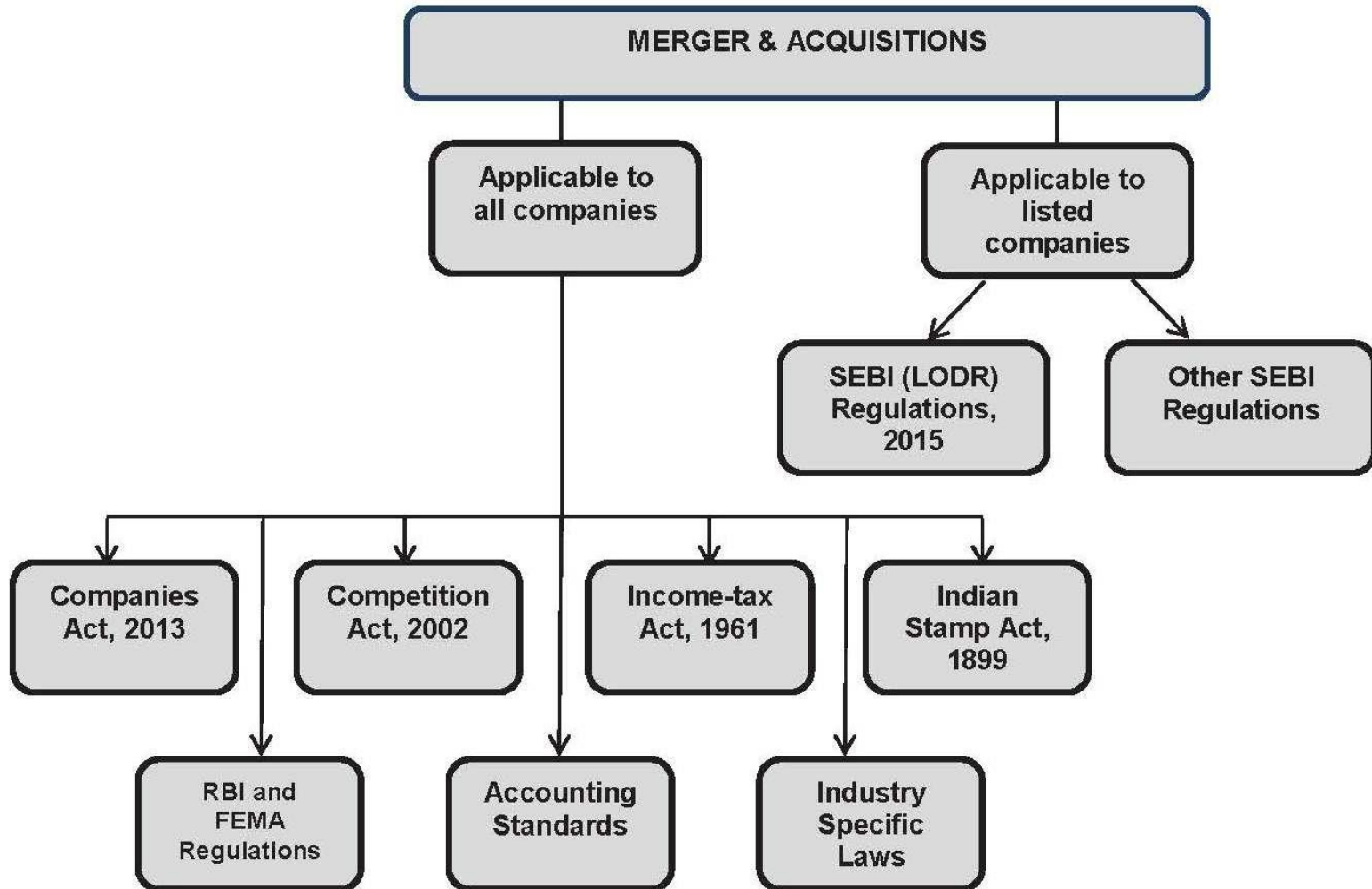
**Demerger:** Transfer and vesting of an undertaking of a company into another company.

**Reconstruction:** Re-organization of share capital in any manner; varying the rights of shareholders and/or creditors.

**Arrangement:** All modes of reorganizing the share capital, including interference with preferential and other special rights attached to shares

# Merger or Amalgamation

## LEGAL FRAMEWORK



# Merger or Amalgamation

**Section 230** deals with the rights of a company to enter into a **COMPROMISE OR ARRANGEMENT**

- (i) Between itself and its creditors or any class of them; and
- (ii) between itself and its members or any class of them.

The arrangement contemplated by the section includes a re-organisation of the share capital of a company by consolidation of its shares of different classes or by sub-division of its shares into shares of different classes or by both these methods.

The section also applies to compromise or arrangement entered into by companies under winding-up.

# Merger or Amalgamation

$A \rightarrow B$  or  $A+B \rightarrow C$  (As per I.T Act: Assets/ Liabilities/ 3/4 Shareholders)

- 232.** (1) Where an application is made to the Tribunal under section 230 for the sanctioning of a **compromise or an arrangement proposed** between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—
- (a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies **involving merger or the amalgamation of any two or more companies**; and
  - (b) that under the scheme, the whole or any part of the **undertaking, property or liabilities** of any company (hereinafter referred to as the transferor company) is required to **be transferred** to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies,
- the Tribunal may on such application, **order a meeting of the creditors or class of creditors or the members or class of members**, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply *mutatis mutandis*.

# Merger or Amalgamation (M&A)

## REASON OF M&A

- Expansion and Diversification
- Optimum Economic Benefit
- De-risking Strategy
- Scaling up of operation for competitive advantages
- Increase the Market capitalization
- Cost reduction by reducing overheads
- Increasing the efficiencies of operations
- Tax benefits
- Access foreign markets

## BASIC DOCUMENTS REQUIRED

- 1.Board Resolution
- 2.Memorandum and Articles of Association
- 3.Audited Financials and Provisional Financials, if any
- 4.SCHEME OF AMALGAMATION / MERGER / RECONSTRUCTION / ARRANGEMENT / REDUCTION OF CAPITAL / REORGANISATION OF CAPITAL / COMPOSITE SCHEME
- 5.Affidavits by the Members or any class of them, of the Companies involved, if pleading for dispensation of requirement of Conducting the Meeting.
- 6.Consents / Affidavits (90% in value) U/s 230 (9) of the creditors or any class of them, if pleading for dispensation of requirement of Conducting the Meeting

# Merger or Amalgamation

## BRIEF PROCESS INVOLVED

**Application in Form NCLT-1:** Together with Notice of Admission (NCLT-2), Affidavit (NCLT-6), Copy of Scheme of M&A, Affidavits, Corporate Debt Restructuring Scheme consented by at least 75% of Secured Creditors (Creditor's Responsibility Statement in CAA-1)

**Calling of Meeting by Tribunal:** Fixing Time, place, Chairperson, Scrutiniser, Quorum, Procedure for Voting, Proxy, etc. Determining Class of Creditors / Members whose Meetings to be held, Notices, fixing time for giving Report to tribunal, any other matters

**Issue of Notice of Meeting:** Who can send, who shall receive, how to send, documents to be enclosed, Explanatory Statement, etc.



# Merger or Amalgamation

## STAGES INVOLVED in M&A

Stage 1 – Drafting of the Scheme

Stage 2 – Obtaining the approval of the Board of Directors of the companies involved

Stage 3 – Obtaining approval of the stock exchanges in case of listed companies

Stage 4 – Application / Petition for convening the meeting of members/ creditors shall be filed with National Company Law Tribunal

Stage 5 – Convening meetings of the Shareholders and Creditors and obtaining their consent on Scheme

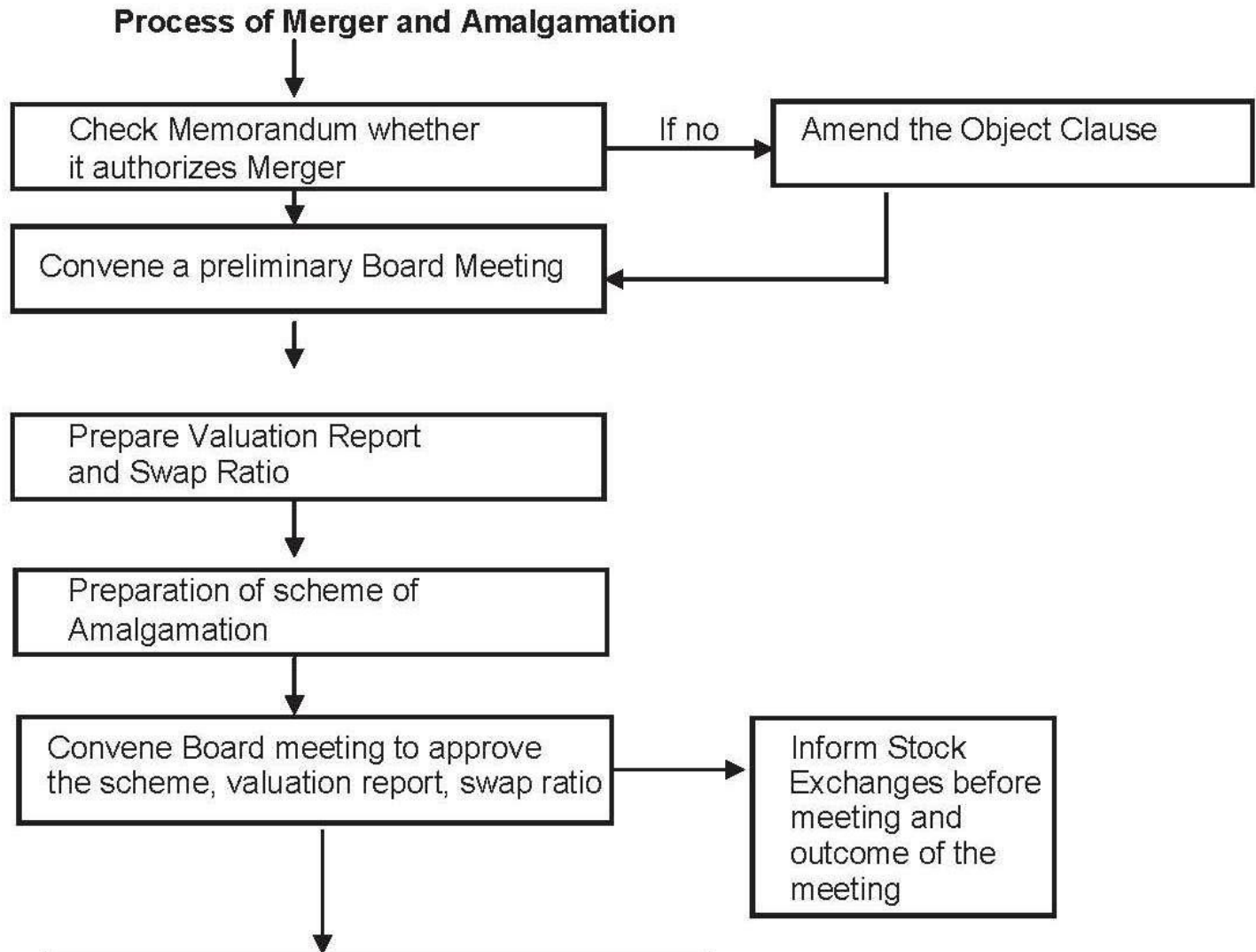
Stage 6 – Approvals or No objection from Regional Director / Official Liquidator

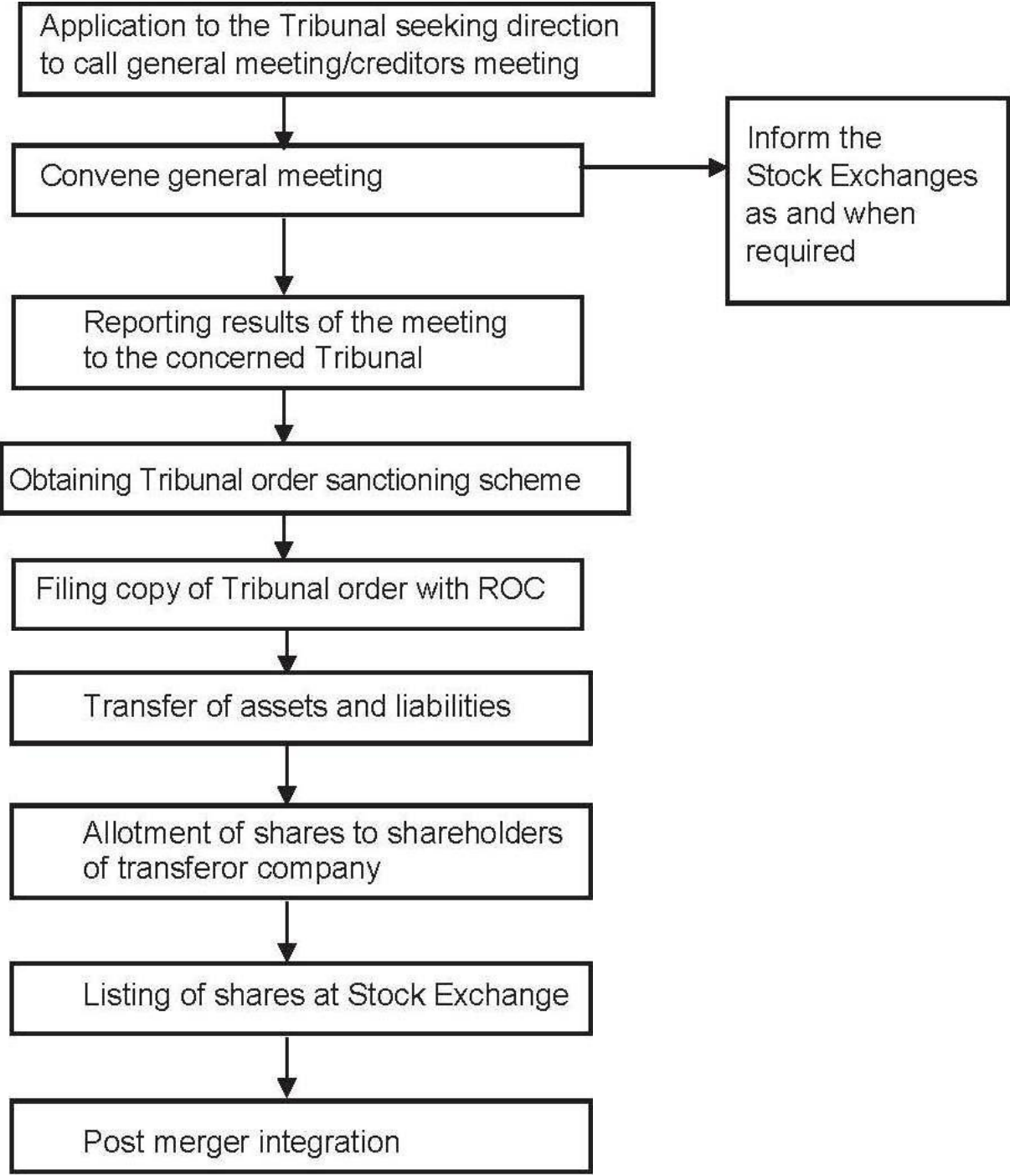
Stage 7 – Filing of final petition with NCLT for approving the Scheme

Stage 8 – Obtaining order for approval for scheme of merger/amalgamation from the National Company Law Tribunal

# Merger or Amalgamation

## STEPS INVOLVED IN MERGER - A FLOW CHART





# Highlights in Brief

- Clubbing of Authorised Capital without any further fee.
- Auditor Certificate to be filed with the Tribunal certifying the compliance of accounting standards
- Appointed Date to be the Effective Date .
- Concept of *merger by absorption* and *merger by formation of a new company* introduced .
- Filing of Annual Statement certified by CS/CA/CWA.
- Shareholders below 10% and Creditors below 5% - not allowed to object to the scheme of amalgamation.
- Creditors Meeting may be dispensed by the Tribunal if 90% in value agree and confirm – {Section 230 (9)}.
- Scheme to be filed with CG, RBI, SEBI along with Notice of amalgamation.
- Voting to be in person or postal ballot or by proxy.
- Valuation Report made one of the documents to be circulated to the members etc.
- No treasury stock permitted: A transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished
- Mergers of listed companies into unlisted companies does not result in automatic listing for the unlisted company

# OPPRESSION AND MISMANAGEMENT

# Shareholders' Democracy

Majority enjoy supreme powers → control affairs / exercise powers of Co.

Limitations: Ultravires MAA/ Violation of any Act/ Fraud on Minority

Principle of Non-interference: Foss Vs. Harbottle

Co. acting through majority can bring action

(Co. is entitled to lodge complaint / If there is irregularity, Co. is entitled to do it regularly/ If there is illegality, Co. is entitled to do legally)

- Recognition of separate legal personality of Co.
- Need to preserve right of majority to decide
- Multiplicity of futile suits avoided
- Minority litigation futile if majority against it

Re: RESC  
Burland Vs. Earle  
Pavlides Vs. Jensen  
Edwar Vs. Halliwell  
Re: Bamford

# Exceptions to Principle of Non-Interference

## Common Law

1. Ultra Vires Acts
2. Fraud on Minority
3. Wrong doer in control
4. Resolution requiring special majority
5. Personal actions
6. Breach of duty
7. Prevention of Oppression & Mismanagement

## Statutory Remedies

1. Variation of Class Rights
2. Schemes of Reconstruction & Amalgamation
3. Oppression & Mismanagement
4. Alternative remedy to Winding up
5. Investigation by government

# Application to Tribunal for relief

CA 2013 provides for provisions relating to oppression and mismanagement under Sections 241-246.

CA 2013 granted additional powers to the Tribunal including to:

- (a) restrictions on the transfer or allotment of the shares of the company;
- (b) removal of the managing director, manager or any of the directors of the company;
- (c) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;
- (d) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company;
- (e) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct; and
- (f) imposition of costs as may be deemed fit by the Tribunal.



# Application to Tribunal for relief

## OPPRESSIVE ACTS

The following acts constitute oppression:

- Company's conduct is against the principles of fair dealing
- Imposition of new and risky objects which are being opposed by the other faction of the shareholders
- Depriving a member of his membership
- Exercise of undue/harsh burden on a member
- Acts of the company are against the provisions of the law

## ACTS OF MISMANAGEMENT

The following acts constitute mismanagement:

- Differences between the directors
- Serving of the office by the director after the expiration of the term
- Neglect/ breach of duty by the director
- Improper appointment of the director
- Group in power intends to defraud

# Application to Tribunal for relief

**241.** (1) Any member of a company who complains that—

- (a) the affairs of the company have been or are being conducted in a manner **prejudicial to public interest** or in a manner **prejudicial or oppressive to him** or any other member or members or in a manner **prejudicial to the interests of the company**; or
- (b) the **material change**, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place **in the management or control of the company**, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, **and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members**,

may **apply to the Tribunal**, provided such member has a right to apply under section 244, for an order under this Chapter.

- (2) The **Central Government**, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it **may itself apply to the Tribunal** for an order under this Chapter.

# Who can apply

## Right to apply under section 241.

**244.** (1) The following members of a company shall have the right to apply under section 241, namely:—

- (a) in the case of a company **having a share capital**, not less than **one hundred members** of the company **or** not less than **one-tenth** of the total number of its members, **whichever is less**, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;
- (b) in the case of a company **not having a share capital**, not less than **one-fifth** of the total number of its members:

**Provided** that **the Tribunal may**, on an application made to it in this behalf, **waive all or any of the requirements** specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

# Powers of Tribunal

- Regulation of conduct of affairs of the company in future
- Purchase of share/interest of member by other members
- Reduction of capital consequent on purchase of shares by co.
- Restrictions on the transfer or allotment of the shares of the company
- Termination/ Modification/ Setting Aside of Agreement  
→ Co. & MD/Dir/Mgr → Other person (Notice + Consent)
- Setting aside fraudulent preferences made within 3 months of application
- Removal/ Appt of Directors/Mgr/persons
- Recovery of damages/imposition of costs
- Any other matter → Just & Equitable

(Check: Oppression or Mismanagement need to be of a continuous nature in order to be eligible for application to Tribunal under these provisions)

REMOVAL OF NAMES OF COMPANIES BY ROC

# Removal of Names of Companies by RoC

## **STRIKE OFF BY ROC**

### **Trigger events for striking off:**

The Registrar of Companies may remove the name of the Company from the register of companies in terms of section 248 (1) of the Act , if he has reasonable cause to believe that :

(a) A company has failed to commence its business within 1 (one) year of its incorporation OR

(b) A company is not carrying on any business or operation for a period of 2 (two) immediately preceding financial years and has not made any application for obtaining the status of Dormant Company.

# Removal of Names of Companies by RoC

**Following categories of companies name shall not be removed by roc:**

- i. Listed Companies;
- ii. Delisted Companies due to non-compliance of listing regulations or listing agreement or any other statutory laws;
- iii. Vanishing Companies\*;
- iv. Companies where inspection or investigations are pending in the Court;
- v. Companies whose actions are pending under Section 206 or Section 207 or Section 208 of the Act before the Court;
- vi. Companies against which prosecution for an offence is pending;
- vii. Companies which have accepted public deposits which are either outstanding or the Company is in default in repayment of the same;
- viii. Companies whose application for compounding is pending before the competent authority for compounding of offences committed by the Company or any of its officers in default;
- ix. Companies whose charges are pending for satisfaction and
- x. Companies registered under Section 25 of the Companies Act, 1956 or Section 8 of the Act.

# Removal of Names of Companies by RoC

## **Notice to be given by RoC**

ROC shall issue a notice to the Company and to all the Directors at their registered address of his intention to remove the name of the Company, requesting them to send their representations, if any along with the copies of relevant documents **within 30 days** from the date of notice.

The notice shall be issued in **form STK-1**. **The Notice shall contain the reasons or grounds** on which the name of the Company is to be removed.



# Removal of Names of Companies by RoC

## **B. VOLUNTARY APPLICATION BY COMPANY FOR STRIKING OFF THE NAME FROM THE REGISTER OF ROC**

**Who can make application** : Any company( other than Section 8 company (non profit organization) may as per section 248(2) of the Act , may voluntarily make an application for striking off the name of the Company from the Register of companies maintained by ROC, after extinguishing all its liabilities , by obtaining approval of 75% members in terms of paid up share capital or consent by way of special resolution on any of the ground that it has not started or commenced its business or it is not carrying on business or operation for a period of two immediately preceding financial years and not made any application for obtaining the status of the company as a dormant company.

A Company which is regulated under a special Act is required to obtain approval of the regulatory body constituted or established under that Act.

# Removal of Names of Companies by RoC

## Procedure of Application

### Board Meeting & Shareholders Meeting

**e-Form STK-2** along with the fees of Rs.10000/-which shall be signed by a Director and with following attachments:

- (a) Indemnity Bond duly notarized by every Director in Form STK-3
- (b) No Objection Certificate from appropriate Regulatory Authority under which the Company may be registered like RBI, IRDA, SEBI and Housing Finance Companies etc.
- (c) Statement of Account containing assets and liabilities of the Company made not more than 30 days before the date of application and duly certified by Chartered Accountant.
- (d) An Affidavit in Form STK -4 by every Director of the Company
- (e) Copy of Special Resolution certified by each of the Director of the Company or consent of 75% of the members of the Company in terms of paid up share capital of the Company.
- (f) Statement regarding pending litigations, if any, involving the Company.

# Removal of Names of Companies by RoC

## **Certification**

Form STK-2 shall be certified by Company Secretary, Chartered Accountant or a Cost Accountant in whole-time practice as the case may be.

## **Publication of Notice**

- a) Placed on official website of MCA.
- b) Published in official Gazette.

## **Undertakings by Directors and Discharge of Liabilities**

- intimation to
- a) Income tax authorities
  - b) Central exercise authority
  - c) Service tax authority

## **Dissolution of Company**

# Thank you

