

# Practical Aspects of Mergers & Amalgamations



# Disclaimer

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## Effect of Transition of Scheme matters from High Court to NCLT

- Practising Professionals other than Advocates got opportunity to pursue career at NCLT
- Precept for transferred matter for listing
- No dispensation from Dec'2016 to Jan'2019 from shareholder meetings
- First Dispensation on 11<sup>th</sup> March, 2019 in the matter of Malti Securities Private Limited
- NCLAT judgment on dispensation of meetings in the matter of DLF Limited
- Amalgamation cannot be stopped, if nothing contrary to law is established. (in Idea Cellular Limited, AHM Bench)



MERGERS &  
AMALGAMATIONS  
U/S 230-232

## Stages of the Amalgamation/Demerger process

**Stage 1: Prerequisite to decide whether the case is fit for Amalgamation and/or Demerger**

**Stage 2: Estimation of Cost involved in the process**

**Stage 3: Arranging for Prerequisites required for filing Application with NCLT**

**Stage 4: Filing of First Motion Application with NCLT**

**Stage 5: Course of action after filing of First Motion Application with NCLT**

**Stage 6: Course of action after passing of First Motion Order by NCLT**

**Stage 7: Filing of Petition with NCLT (2<sup>nd</sup> Motion)**

**Stage 8: Hearing of Petition**

**Stage 9: Course of action after sanction of Scheme**

## Stage 1: Prerequisite to decide whether the case is fit for Amalgamation and/or Demerger

- Understanding the necessity and objective of Merger/Demerger.
- Financial Statements and Annual Return of the Companies.
- Details of immovable assets, if any.
- Details of cross holding and Reduction of share capital, if any.
- Income Tax Provisions w.r.t. Demergers to be considered.
- Swap/exchange ratio.
- Goodwill/Capital Reserve.
- Details of pending litigation between the Company and shareholders and/or Company and its Creditors.
- Qualifications, if any in the Auditor's Report.
- Jurisdiction of the Company (across the states).
- Statutory Compliances and records.
- Sectoral Regulators.
- Provisional Financial Statements.
- Defining “**UNDERTAKING**” and Statement of Assets and Liabilities in case of Demerger.

## Stage 2: Estimation of Cost involved in the process

### COST AND FEES

- Statutory fees (Bharat Kosh)
- Fees for Filing First Motion Application with NCLT.
- Auditors fees
- Advertisement Cost
- Professional Fees for Valuation Report
- Chairman & Scrutinizer fees (in case meetings are held)
- Payment of cost to Regional Director and Official Liquidator, if Ordered
- Stamp Duty on transfer of Assets of the Company
- Other incidental expenses like printing, stationery etc.
- Professional fees



## Cost calculation sheet

Sr. No.	Particulars	Amount in Rs.
1.	Professional fees	XXXXXXX
2.	Professional fees to Registered Valuer	XXXXXXX
3.	First Motion Application to NCLT	Rs. 5000
4.	Auditor's fees (for Transferor Companies only)	Average of last 5 years
5.	Advertisement Cost	Rs. 25,000 to Rs. 40,000
6.	Payment to RD as per the direction of NCLT	If Ordered
7.	Payment to Official Liquidator as per the direction of NCLT	If Ordered
8.	Stamp Duty	XXXX
9.	Chairman & Scrutinizer fees (in case meetings are held)	As per NCLT direction
10.	Other incidental charges (printing, notary, franking, stationery , conveyance etc.)	XXXX



## Stage 3: Prerequisites for filing an application to NCLT

### First Motion

- Preparing Checklist.
- Drafting Scheme of Amalgamation/Demerger.
- Conducting Board Meetings.
- Appointment of the Registered Valuer for finalising the swap ratio.
- Consent of Shareholders & Creditors, if can be made available.
- Auditor's Certificate for accounting treatment u/s 133. (UDIN)
- Authority to Professional to file First Motion Application and appear before NCLT.

## Stage 4: Filing of Application with NCLT

- Preparation and submission of Application to NCLT
- Joint /Separate Application in Form NCLT-1.
- Synopsis in Paragraph Form
- List of date and events (Separately)
- NCLT checklist.
- Notice of Admission in Form NCLT-2.
- Board Resolutions.
- Scheme of Amalgamation / Arrangement
- Latest Audited financial Statements.
- Provisional Financial Statements.
- NCLT President have powers to consolidate applications of different jurisdiction

## Stage 4: Filing of Application with NCLT

- Valuation Report for Swap Ratio (need not be attached to Application)
- List of Directors, shareholders and creditors.
- Consent on affidavit from Shareholders and Creditors.
- Updated Memorandum and Articles of Association.
- Certificate of Accounting Treatment issued by Auditors.
- Single side printing on Standard Legal paper and restriction upto 300 pages per volume.
- Margin: Top/Bottom -4 cm, Right – 2.5 cm & left 5 cm and Double line Spacing
- Signature/Initials on each and every page.
- 3 copies in paper book form (Brown Files). One Original and 2 photo copies duly stitched in green thread.
- Affidavit verifying Application & Memorandum of Appearance
- Covering letter with office copy
- Two copies of Bharatkosh payment receipt.

## Stage 5: Course of action after filing application with NCLT

- Follow up in the Registry for removal of Office objection, if any & the numbering of the application accompanied with details of Court room allocation after about two working days.
- Check the Cause List of all the courts on daily basis for the date of First hearing.
- Preparation for hearing.
  - Proper Attire - Blazer (Preferably Black or dark blue) and Tie for Men & Blazer with any sober attire for Women.
  - Fact Sheet/Summary of the case to be kept handy with page numbers.

### [3. Fact Sheet.pdf](#)

- Preparation of Minutes of Order. [(CIN, PAN and ward number of Income Tax, Appointed Date, Business of the Company, Rationale etc.)(Contents of Minutes differ from courtroom to courtroom)]
- Obtaining the details of Auditor appointed by the NCLT.
- Soft Copy of Minutes of Order and Application.
- Extra Copy of Application.
- Follow up for the order in case hearing is completed and matter is Reserved for Order.
- Once Order is pronounced, make application for CTC of Order.
- Preparation and Submission of Documents w.r.t. RD's Query Letter.

### [4. RD query letter sml.pdf](#)

## Stage 6: Course of action after admission of Application in case of dispensation of meetings of Shareholders/creditors

- Arranging documents and information from the Company as per the Auditor's Checklist.
- Service of Notice to the Sectoral regulators
  - Registrar of Companies
  - Regional Director
  - Official Liquidator
  - Income Tax for all Companies separately by hand delivery quoting PAN
  - Other Regulators wherever applicable.
- Filing of affidavit of Service to NCLT containing acknowledgements of service as directed.
- Inspection of documents and conducting of Audit by Auditors appointed by the NCLT.

.....Contd.

## Stage 6: Course of action where meetings are held

- Arranging documents and information from the Company as per the Auditor's Checklist.
- Service of Notice to the sectoral regulators
  - Registrar of Companies
  - Regional Director
  - Official Liquidator
  - Income Tax for all Companies separately by hand delivery quoting PAN
  - Other Regulators wherever applicable.
- Issue of Notice to Shareholders/creditors atleast 30 days before the date of meeting (in case dispensation is not granted by the NCLT).
- Advertisement of Notice of Meetings in at least one English newspaper and in at least one vernacular newspaper as directed by NCLT in its Order.
- File the Affidavit of Service to NCLT.
- Convening the meeting(s).
- Filing of Chairman's Report with NCLT on Affidavit in case of meeting of Shareholders/Creditors along with Scrutinizer's Report.
- Inspection of documents and conducting of Audit by Auditors appointed by the NCLT.

# Stage 7: Filing of Petition with NCLT

## Second Motion

- Preparation and submission of petition to NCLT.
  - Synopsis in Paragraph Form.
  - List of date and events (separately).
  - Updated Memorandum and Articles of Association.
  - Latest Audited Financial Statements.
  - Board Resolution(s).
  - Scheme of Amalgamation / Arrangement.
  - Copy of Order Passed by the Hon'ble NCLT allowing the application.
  - Certificate of Accounting Treatment as issued by the Auditors.
  - Affidavit of Service
  - Chairman's Report
  - Affidavit verifying Petition
  - Memorandum of Appearance



## Stage 8: Hearing of Petition

- Attend hearing and press for admission of Petition and seek date for final hearing.
- Publish advertisement for final hearing.
- Issue notice to regulatory Authorities again intimating them the date of final hearing.
- File Affidavit of Service.
- Check OL and RD report for specific observations.
- File affidavit in reply to RD's Report.
- Obtain Supplementary Report from RD

## First Motion Application Order

Affidavit of Service

Affidavit of Service, Chairman

Chairman's Report



## Second Motion Petition Admission Order

Publication of Final Hearing Notice

Affidavit of Service



## Final Hearing Order

Obtaining Certified Copy of Order with Scheme

Filing with ROC and Stamp Office

## Representation by Authorities to NCLT

Registrar of  
Companies



Regional Director

Auditor's Appointed  
by NCLT



Official Liquidator



Minutes of  
Order to be  
initialed from  
RD



National Company Law  
Tribunal

## Stage 9: Course of action after approval of Scheme

- Filing an application for the CTC of Order immediately upon pronouncement of Order.
- Payment of cost to Regional Director & Official Liquidator through bharatkosh portal online, if Ordered.
- Transferor Companies should not have any pending SRN with RoC.
- The Transferor Company should not file any other form with ROC except Form INC-28 once the final hearing is completed.
- Filing of CTC of Order with ROC in Form INC-28 within 30 Days from the date of receipt of CTC of Order.
- Application/Letter to ROC for combining the Authorised Share Capital for attaching in Form INC 28 of Transferee Company.
- Filing of Order with Stamp Authority within 60 days from the date of Passing Order or as specified in the Order.

# OBSERVATIONS OF REGIONAL DIRECTOR

## STANDARD OBSERVATIONS:

1. *Compliance of applicable Accounting Standards.*
2. *Appointed Date (compliance of circular No.7/12/2019/CL-1 dated 21.08.2019 issued by the MCA)*
3. *Compliance with section 232(3)(i) of the Companies Act, 2013.*
4. *Service of Notice u/s 230(5) of the Companies Act, 2013 upon concerned authorities*

## **SPECIFIC OBSERVATIONS**

- 1. Applicant Companies does not have any business***
- 2. Applicant Companies to serve notice upon RBI (50/50 test)***
- 3. Qualified remarks of Auditors***
- 4. To undertake filing of application for compounding of offence***
- 5. Company have negative networth***
- 6. How the stated Rationale/objective will be achieved as the Company does not have any business***
- 7. Appointed date is too old***
- 8. Sectoral regulators NOC is required viz RERA,***
- 9. Too many Open Charges on MCA portal***
- 10. Change of Name***

## **Other Judgements.**

### **1. Kumaka Industries Limited. (CP/190/MB/2017)**

*In the instant case, the NCLT, Mumbai Bench approved an Scheme of Arrangement wherein the Petitioner in guise of an Scheme was contemplating ratification of illegal reduction of share capital done in the year 1998 despite objection raised by the RD and one Minority shareholder.*

#### **The Scheme contemplated:**

- *Ratification of Reduction of Share Capital w/o High Court approval.*
- *Regularisation of Allotment of shares in IPO against terms of Issue.*
- *Issue of Bonus shares to public shareholders with Promoters foregoing their rights.*

#### **Observation of NCLT:**

- *The term arrangement is a term capable of widest import.*
- *Arrangements can take on multiple hues and a bewildering assortment of forms.*
- *The fairness of the Scheme qua the objecting has also to be kept in view inline with the celebrated SC judgment of Mihir Mafatlal vs Mafatlal Industries.*



- *Objections of Regional Director are more on the procedural aspect than anything else and it has not raised any objection regarding illegality in the Scheme or against public policy and hence they are overruled.*
- *The objecting shareholder holds only 15 shares (0.00012%) and thus lacks locus standi to object and even on merits the objections are unsustainable. [Kumaka NCLT Order.pdf](#)*

**Appeal to NCLAT by Minority Shareholder (Company Appeal (AT)136/2020).**

*Mr. Ashish O. Lalpuria, the minority shareholder holding only 15 shares filed an appeal against the impugned Order of NCLT.*

### **Observation of NCLAT:**

- *Proposed Scheme of C&A should not be violative of any provisions of law or contrary to public policy.*
- *Past records show irregularities and non compliances due to which action was taken against the Company.*
- *Objections raised by RD need to be given weightage and seem to be just and reasonable for dismissing the Petition.*

- Duty of NCLT to ensure that before sanctioning of Scheme all procedural aspects to be complied failing which a wrong precedent would be set by which companies would violate the law and have it ratified by the court under the "UMBRELLA OF SCHEME".
- Compliance of law in itself is a part of public policy.
- No actions must be pending against the Company by the public authorities before sanctioning of the Scheme under section 230 of the Act.
- NCLT should encourage compliance and not default.

The Appellate Tribunal set aside the decision of NCLT and rejected the Scheme of Arrangement.

[Kumaka Industries NCLAT Order.pdf](#)

## Judgements.

### 2. *Baramati Agro Limited and Ors. [CP(CAA)996/MB/2020]*

*The Scheme contemplated Scheme of Amalgamation and Arrangement between group Companies.*

#### *One of the Rationale for the Scheme was:*

- The Transferee Company is having 21,675 Shareholders holding A Class Equity Shares. Out of 21,675, approximately 21,000 are shareholders holding small amount of equity shares in the Transferee Company. The smaller shareholders of the Transferee Company have been requesting for regular dividends on their investments since they are not interested in seeking management control or running the operations of the Transferee Company. Considering the shareholding pattern of the Transferee Company it is difficult to pass on the benefit of dividend to these small shareholders. The Transferee Company had received requests from some of its smaller shareholders to redeem their investments within a fixed timeframe and also to start paying dividends on such investments on a regular basis. In view of this, it is proposed to convert certain A class Equity Shares into 9% non-cumulative optionally convertible redeemable Preference shares of Rs 10/- each.*

[Order Baramati CP 996 NCLT highlighted.pdf](#)

**Besides standard observations RD also referred to observation of ROC, Pune who pointed out:**

*Part D of the Petition contains conversion of equity shares into preference shares which is not permissible to issue Redeemable Preference Shares against existing equity shares as its value, terms, rights are different and cannot be terms as same kinds of shares to exchange in ratio for consideration. Further , Ministry vide letter no, 03/08/2019. CL V, dated 27th July, 2020 has stated that one litigation in on going w.r.t. conversion of equity shares into preference shares and vice versa whereby reclassification of such type was rejected by ROC, Delhi and has also asked for comments on the conversion of Equity shares into preference shares or vice versa. It is submitted that the equity shareholders are having rights different to that of the preference shareholders which include voting rights. Further, the instant scheme is placed before member of the transferee company having only 48.45% of value which is not representing majority. Hence such conversion may be considered undesirable.*



### ***The Company in its reply stated that:***

*The interpretation and reference of the ROC Pune is incorrect. The Petitioner Companies further state that the conversion of shares from one type to another, for example from Equity shares to Preference Shares, is not barred by any provision of the law, and in fact and in law, such conversion only amounts to reorganization of the Share Capital of the Companies which is permissible under section 61 of the Companies Act 2013. In accordance with the relevant provisions of the law and the judicial precedents being relied upon by the Petitioner Companies, a Scheme of Compromise or Arrangement may involve increase, consolidation, or sub-division of shares or reduction of share capital. Therefore, the conversion of equity shares into preference shares as sought by the Petitioners under the Scheme cannot be deemed to be impermissible. In reply to the comments of o/o ROC Pune the Petitioner Companies submit as follows:*

- Pursuant to section 43 of the Companies Act, 2013 both equity share capital and preference share capital appear in the balance sheet under "Share Capital" and as per provisions of Section 43 of the Companies Act 2013 there can be only two classes of shares viz. Equity and Preference and combination of two depict the total share capital. When shares of one class are converted into another class (for instance, equity shares into preference or vice versa) and value of the paid-up share capital does not undergo any change, the subscribed and paid-up capital remains unchanged; only the nomenclature of shares undergo change.*

The Company further stated that under section 230 of the Act, a scheme of Compromise or Arrangement may be in the form of reorganization of share capital of a company and the Explanation appended to subsection (1) gives an inclusive definition of the expression 'arrangement' as including 'reorganization of share capital'.

**The Company also cited one judgement of SC wherein it was held that** *"Courts are not to act upon principal that every procedure is to be taken as prohibited unless it is expressly provided for by the Code , but on the converse principal that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principal prohibition cannot be presumed"* [SLP No 984 of 2006 **Rajendra Prasad Gupta verses Prakash Chandra Mishra & Ors**]

**In continuance to above, the Company also stated w.r.t MCA circular referred by ROC Pune, that as per the settled principle by the Hon'ble Supreme court in several cases the said letter cannot be binding on the court or Tribunal or Petitioner companies unless the same are made part of substantive law or delegated legislation and in support of the same the Petitioner Companies cited a few case laws; (page 12)**

*Regional Director in its Supplementary report was satisfied w.r.t. reply pertaining to standard observations given by the petitioner Companies. However, RD was not convinced with the reply filed by the Companies w.r.t. MCA letter referred by ROC, Pune.*

*The Hon'ble Tribunal did not find merit in the arguments of RD and went on to sanction the Scheme and held that the Company cannot be restricted to reorganise its paid up share capital by converting its Equity Shares into Preference Shares or vice versa as a part of Scheme of Compromise or Arrangement as the same is permissible under the section 43 and 61 of the Companies Act, 2013.*



## Recent Judgement

### Patel Hydro Power Private Limited (COMPANY APPEAL (AT) No. 137 of 2021)

#### NCLAT observed:

To reiterate, we observe that the rights and liabilities of Secured and Unsecured Creditors were not getting affected in any manner by way of the proposed scheme as no new shares are being issued by the 'Transferor Company' and no compromise is offered to any Secured and Unsecured Creditors of the 'Transferee Company'. Therefore, we are of the considered view that when the 'Transferor and Transferee Company' involve a parent Company and a Wholly Owned Subsidiary the meeting of Equity Shareholders, Secured Creditors and Unsecured Creditors can be dispensed with as the facts of this case substantiate that the rights of the Equity Shareholders of the 'Transferee Company' are not being affected. Therefore, we hold that obtaining 90% consent Affidavits from its unsecured Creditors is not required keeping in view the facts of the attendant case.

[Patel Hydro.pdf](#)

## Recent Judgement

**Accelyst Solutions Pvt Ltd (COMPANY APPEAL (AT) No. 15 of 2021)**

**Whether Appointed date can be changed by Tribunal?**

**NCLT Mumbai** modified the Appointed date from 07.10.2017 to 01.04.2018 on the ground that considerable time has lapsed from the Appointed date as mentioned in scheme and the Board Resolution of the Scheme is dated 27.03.2018 and Valuation Report is dated 22.03.2018.

**NCLAT Observed after relying on various judgements:**

We are of the considered view that the exercising jurisdiction by the NCLT Mumbai to modify the Appointed date from 07.10.2017 to 01.04.2018 in the facts of this case was unwarranted. Thus, the impugned order so far as the modification of Appointed date is concerned is set aside and the Appointed date as per the scheme is fixed 07.10.2017, which is approved by the shareholder of the Appellant Company. [Accelyst Solutions\\_NCLAT Final Judgement \(24.03.2021\).pdf](#)

# FAST TRACK MERGER (U/S 233)

# Eligibility for Fast Track Merger

**Following Companies are eligible for Fast Track Merger**

- **Holding and its wholly-owned subsidiary Company.**
- **Between the small companies.**
  - **Company having paid-up share capital of which does not exceed fifty lakh rupees;**
  - and**
  - **Turnover of which as per its last profit and loss accounts for the immediately preceding financial year does not exceed 2 crore rupees.**

## Procedure for Fast Track Merger

- Drafting of the Scheme of merger.
- Convening the Board Meeting for the approval of scheme.
- Filing of notice along with the copy of scheme of merger for inviting objections or suggestions, if any, in Form CAA-9 to:
  - Registrar of Companies in E-Form GNL-1.
  - Official Liquidator.
  - or persons affected by the scheme.
- Filing of declaration of solvency with Registrar of Companies in Form CAA-10 in E-form GNL-2 alongwith:
  - Copy of board resolution.
  - the Statement of assets and liabilities.
  - Auditor's report on the statement of assets and liabilities

# Fast Track Merger

- Issuing notice of the meeting of Shareholders alongwith scheme of the Company.
- Issuing notice alongwith the scheme to the Creditors of the Company.
- Convening General Meeting of Shareholders and obtaining the approval of shareholder holding at least 90% of the total number of shares irrespective of those present in the meeting.
- Convening General Meeting of Creditors and obtaining the approval of the creditors majority representing 9/10th in value if the creditors irrespective of those present in the meeting.
- Transferee Company has to file the approved scheme and Report of the results of the meetings in Form CAA-11 along with the notice earlier sent to the:
  - Regional Director in Form RD-1 (within 7 days).
  - Registrar of Companies in form GNL-1.
  - Official Liquidator.

# Fast Track Merger

- The Registrar of Companies and Official Liquidator may give objections or suggestions if any to the Regional director within 30 days of the receipt of the scheme.
- In case of no objection is received, the Regional Director shall register the same and issue the confirmation thereof to the Company in Form CAA-12.
- In case of any objections or suggestions from ROC & OL or if RD is of the opinion that the scheme is not in public interest, it may file an application before the Tribunal in form CAA-13 for consideration within a period of sixty days from the date of receipt of the scheme.
- Filing of the Order passed by the Regional Director approving the scheme in Form INC-28 with ROC within 30 days.



# FREQUENTLY ASKED QUESTIONS (FAQS)

1. How do I prepare for hearing?
2. In the application we have prayed for convening meeting of creditors and shareholders. However, now we want to seek dispensation. Is it possible?
3. An order for convening meetings of Creditors and Shareholders has been passed. Is there still a possibility of seeking dispensation?
4. I have filed a merger application long time ago but same is not being listed for hearing. What should I do?
5. Is it mandatory to send notice to all the creditors?
6. The auditor appointed by OL is asking for documents from the Transferee Company. Whether he is entitled for the same?
7. The auditor appointed by OL has been prolonging his report on one pretext or the other. What should I do?

8. Can objections from The Income Tax department stop the merger? Whether NOC from The Income Tax Department is mandatory?
9. Can I change the appointed date after filing the petition/Application?
10. How do I apply for the certified copies of the final order? Any cost to be paid for the same?
11. What precautions should be taken while filing form INC-28?
12. What can be the issues in approval of form INC-28?
13. I could not file form INC-28 on time. What do I do?
14. After filing form INC-28. Do I need to file any form for Transferor Company?

**THANK YOU...!!!!**

**Ashish O. Lalpuria & Co.**

**Practising Company Secretary**

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