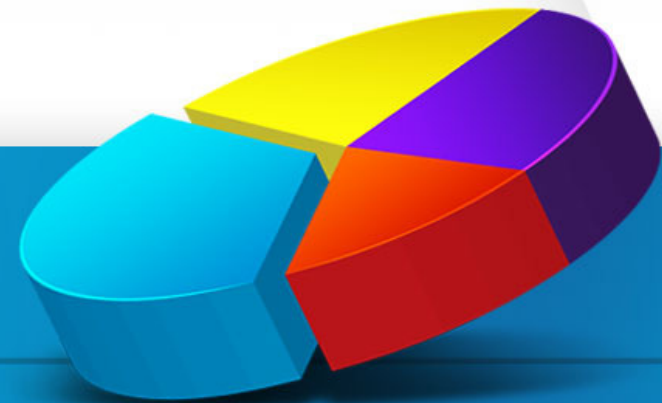


Role of CMA in NCLT
ICAI-WIRC
23rd April 2016

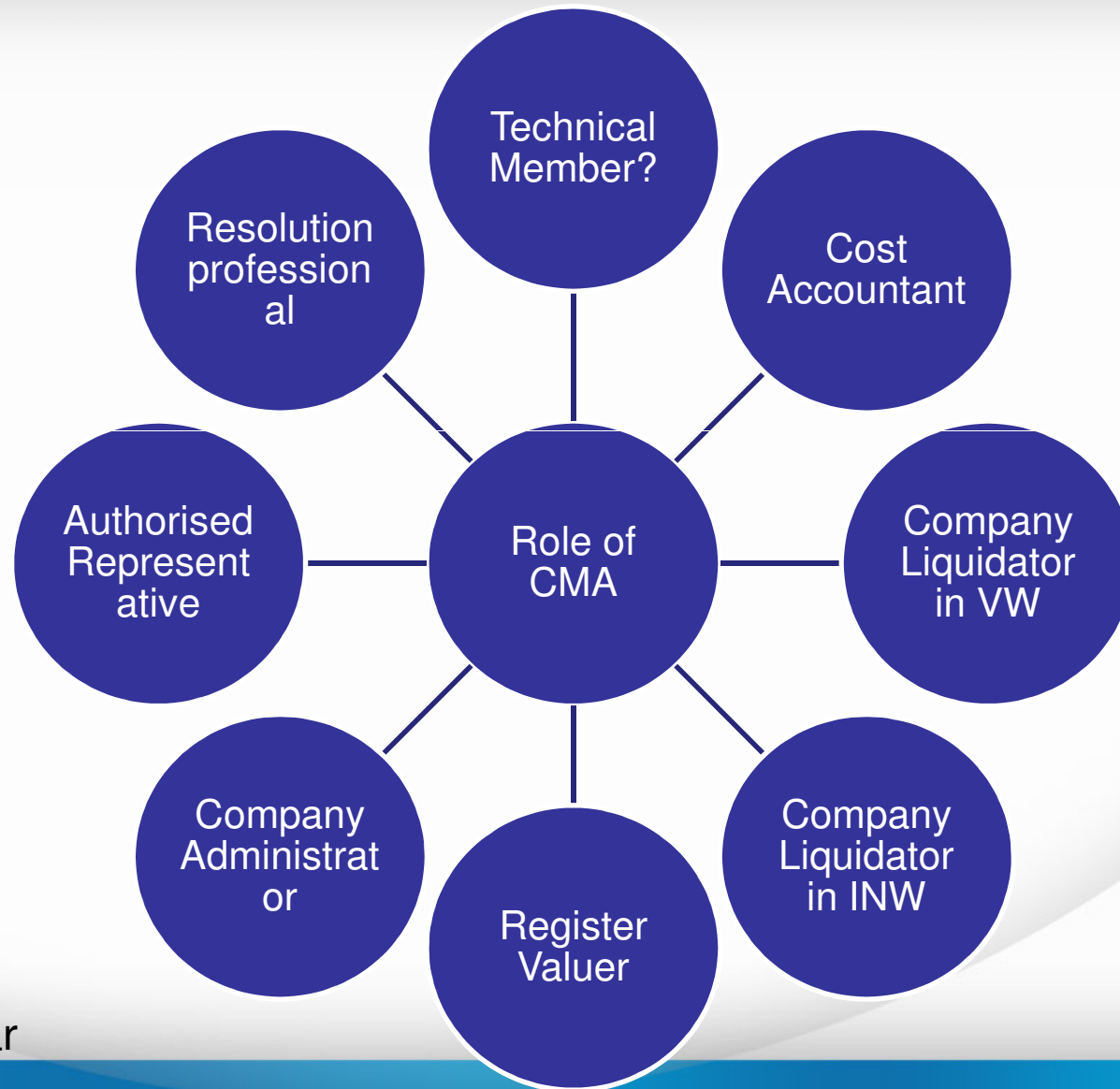
NCLT & NCLAT

Adv. Prachi Manekar-Wazalwar
Corporate Lawyer



Please provide your inputs at
prachimanekar@gmail.com

Role



NCLT & Acts

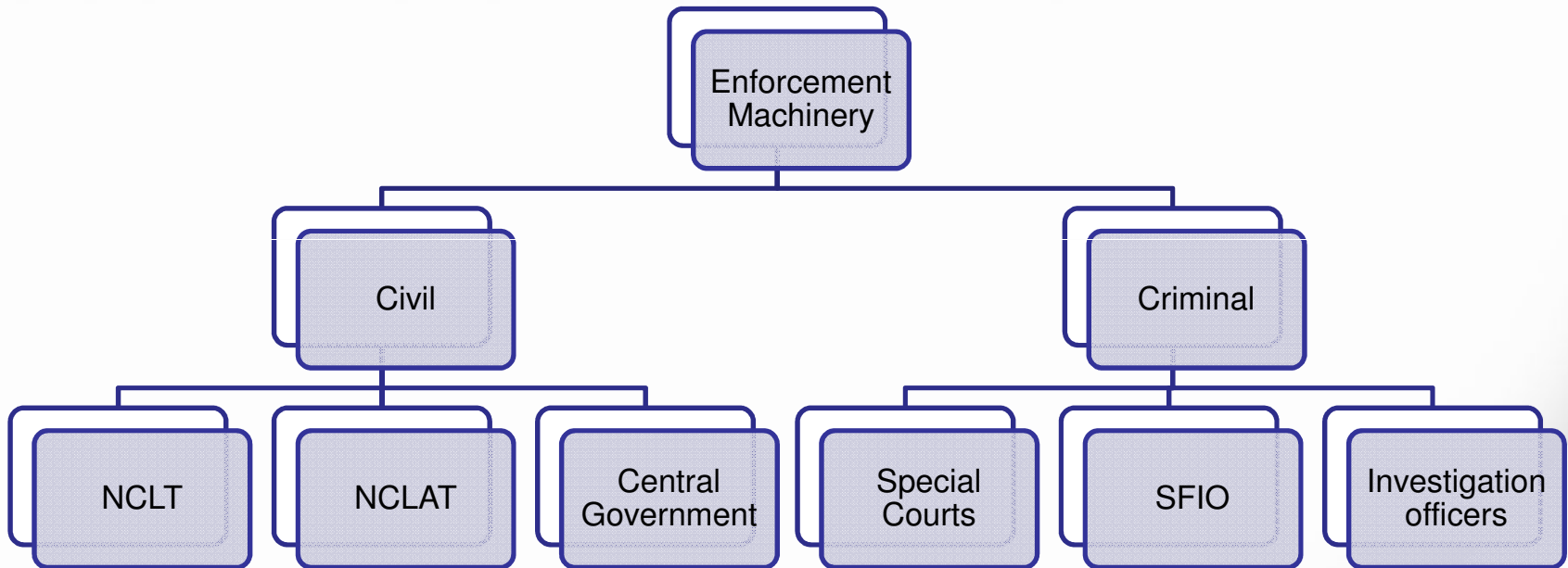
Companies
Act

LLP Act

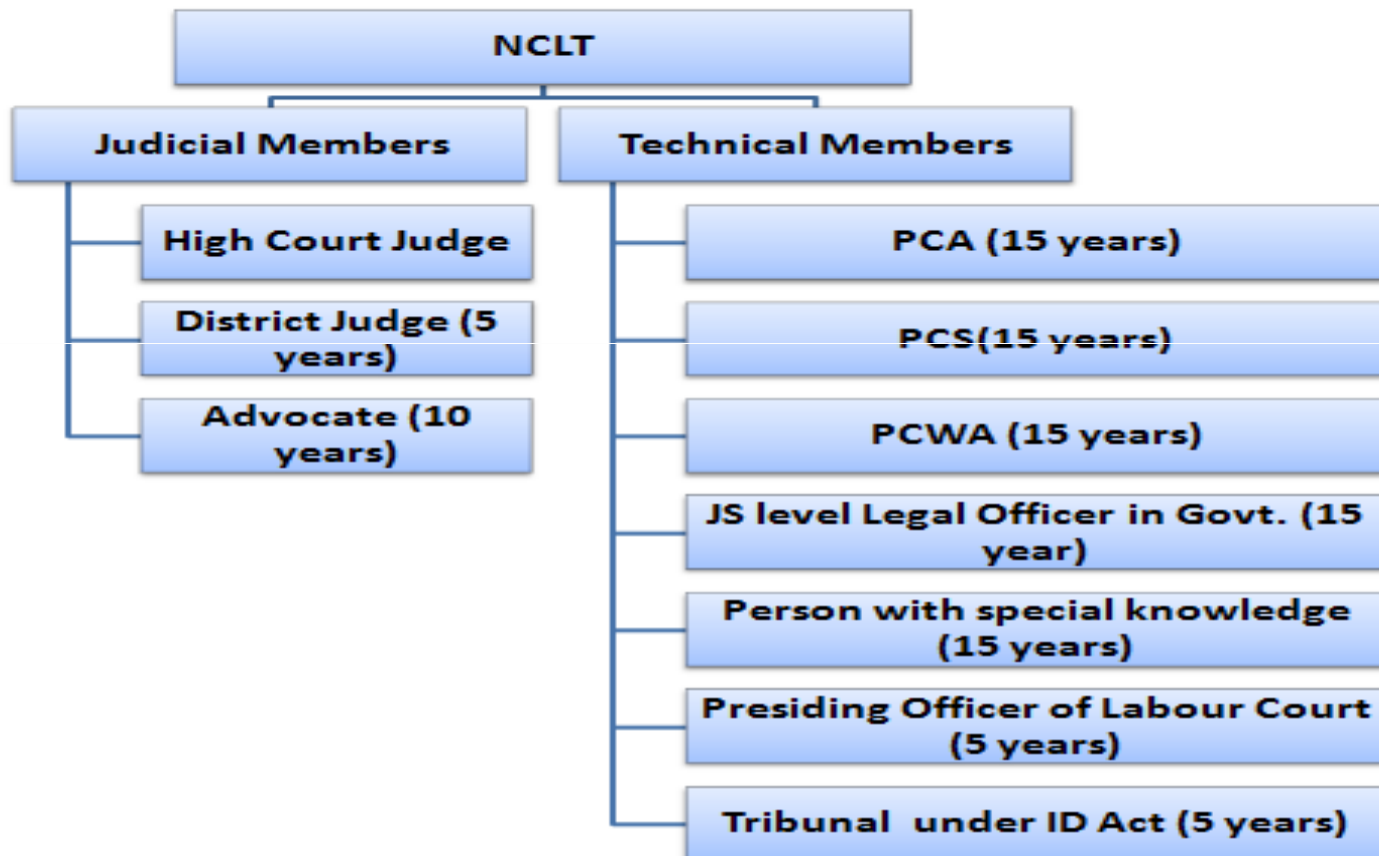
IBC

RBI ACT

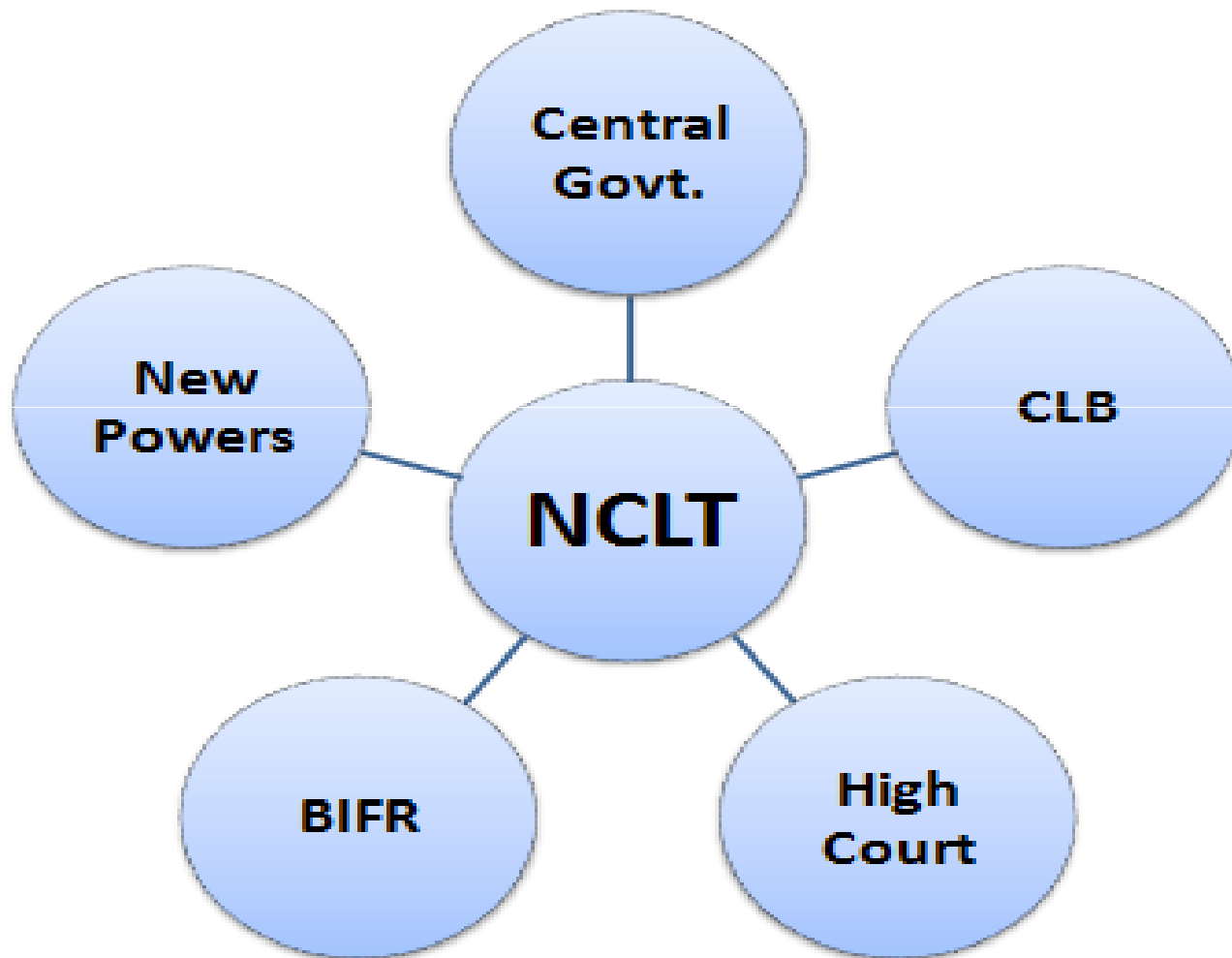
Why Tribunals



Constitution of Tribunals



Nature of Powers enjoyed by Tribunals



High Court

- Winding Up
- Compromise and Arrangement
- Reduction of Capital
- Revival of Defunct Companies
- Variation of rights

CLB

- Oppression and Mismanagement
- Compounding
- Refusal to transfer/transmit shares
- Cal AGM/EOGM
- Inspection
- Investigation
- Restriction of shares and debentures
- Freezing of assets
- Restriction on Transfer of securities

BIFR

- Revival and Rehabilitation of Sick Cos.

New Powers

- Class action;
- Deregister a company and determine other incidental matters;
- Remove auditor of a company;
- Reopen of books of accounts
- Revise books of accounts
- Additional powers in case of non-payment of deposits
- Certain Powers in case of Fast Track Merger

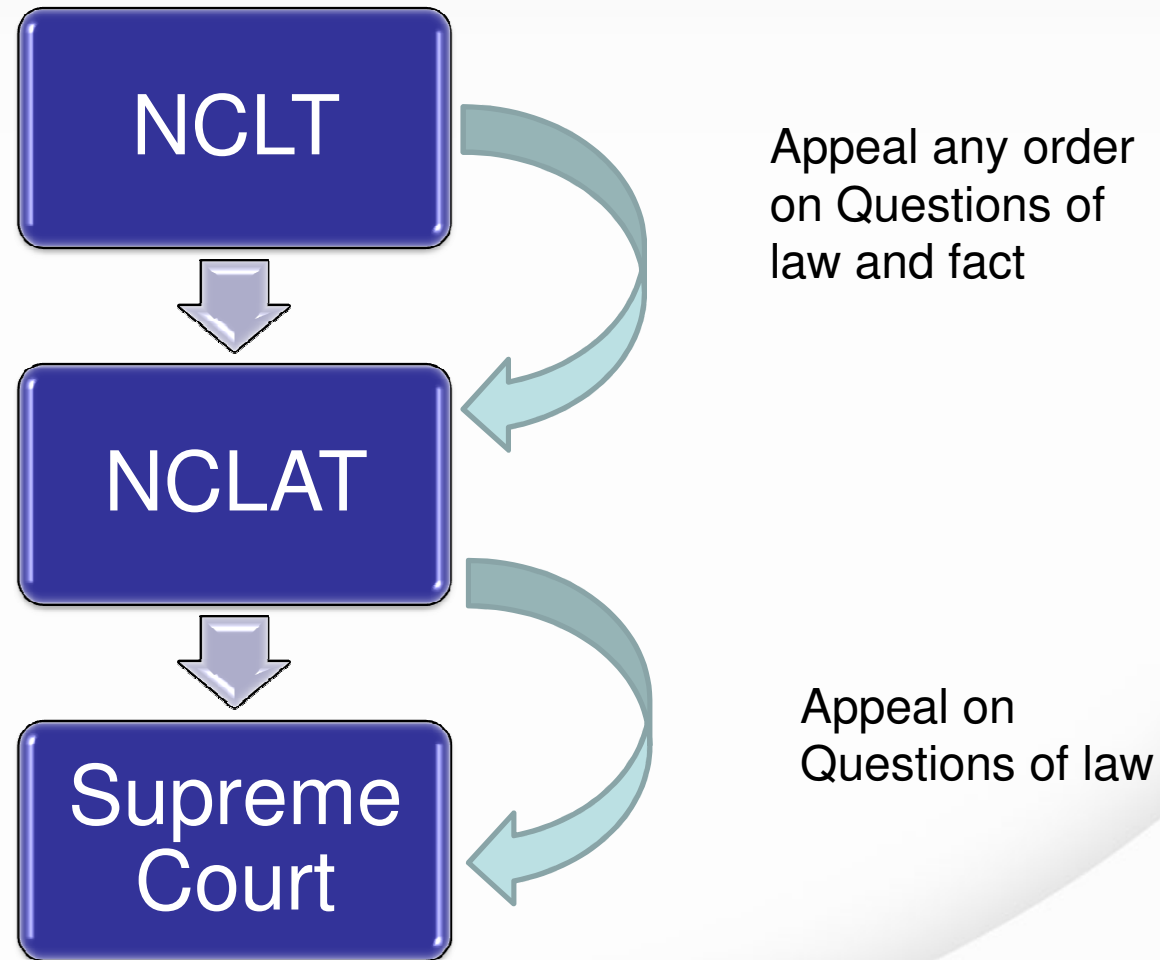
Important Questions

- Is it a mere transfer of powers to NCLT
- What are the powers of NCLT
- Have the processes for the corporate actions changed?
- Are there other authorities to support NCLT

CLB vs. NCLT

- Jurisdiction
- Scope of powers
- Nature of general powers
- Matters that can be taken up
- Nature of authority
- Limitation period

Remedies for Person Aggrieved by Order



What are the general powers

Powers of Civil Court

- summoning and enforcing the attendance of any person
- requiring the discovery and production of documents;
- receiving evidence on affidavits;
- subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document
- issuing commissions for the examination of witnesses or documents.
- dismissing a representation for default or deciding it *ex parte*.
- setting aside any order of dismissal of any representation

Powers of Civil Courts continued

- granting stay or order status quo;
- ordering injunction or cease and desist;
- appointing commissioner (s) for the purpose under the Act;
- exercising limited power to review its decision to the extent of correcting clerical or arithmetical mistakes or any accidental slip or omission as provided in rule 189 of these rules;
- passing such order or orders as it may deem fit and proper in the interest of justice.

General Powers of Tribunals

- Contempt of Court
- Review
- Execution of orders
- Assistance of Magistrate or Collector
- Powers of Civil Court
- Power to Determine Procedure
- Inherent Power
- Power to dispense with procedure

Mergers and Amalgamations

From Court to Tribunal

Types of Schemes

- Reduction
- Buy Back
- Takeover
- Mergers
- Demergers

Definition of company

Under the old Act, company for the purpose of compromise and arrangement included any company which is liable to be wound up under this Act. This definition is dropped in the new Act. Thus, under the new Act, the merger can take place only between companies. Earlier merger was possible even with partnership and other entities that were liable to be wound up under the old Act

Changes in Procedures

Intimation to authorities

The law mandates that notice of the Scheme should be provided, not only to Central Government, but also to a range of other sectoral regulatory authorities. Unless they raise objections to the scheme within 30 days, their approval will be deemed to have been received.

- Central Government;
- Income Tax Authorities;
- RBI, SEBI, ROC
- SE
- OL
- CCI
- Such other statutory regulators or authorities

Disclosure requirements

Disclosure requirements have been enhanced.

- CDR related disclosures
- Financial details
- Investigation proceedings
- Valuation report
- Impact interest of various officers and promoter in the scheme must be compulsorily disclosed.

Companies in CDR

If a company is under Corporate Debt Restructuring wherein the corporate debt restructuring is consented to be not less than seventy-five percent of the secured creditors in value, then it must, *inter alia*, provide the following details:

- Scheme of approved corporate debt restructuring;
- A creditor's responsibility statement in prescribed form;
- Details of the safeguards provided for protection of other secured and unsecured creditors;
- Report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;
- Where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and
- A valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

Valuation of shares

Under the new Act, valuation has to be conducted by a registered valuer and his report should be made available to the stakeholders.

Approval

Approval of the scheme

The scheme is deemed to be approved if it is approved by majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot.

3/4th of what?

The old Act required approval from 3/4th of the persons 'present and voting'. The new Act, however, provides for two modes of casting a vote viz.

- in person (or through proxy)
- and postal ballot.

Thus, for 3/4th in value shall be reckoned with respect to value of shares of persons who have cast a vote in any manner

Dispensation of Creditors' meeting

- Creditor meeting (or class of meeting) can be dispensed only where 90% is value approve the scheme.
- However, there right to object to the scheme is only with creditor to whom company owes more than 5% of the total debt.

Shareholders' Objections

Only a shareholder holding 10% shares capital and creditors holding 5% of the outstanding debt can object.

Auditor's certificate

The company must furnish an auditor's certificate, certifying that accounting treatment of the scheme is in conformity with the prescribed accounting standards. This certificate can be filed at the time of filing application or at any time thereafter before the scheme is sanctioned. Under the new Act, it is a pre-requisite for sanctioning any scheme.

Treasury shares

- Thus, transferee company is not allowed to 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. This prohibition was not previously provided in case of mergers and amalgamation and it was used by companies to hold shares in trust for their shareholders. The new Act prohibits holding such treasury shares

Squeeze out rights

The transferee company is entitled to buy out the dissenting shareholders in certain cases. In case of takeovers also the acquirer can make an offer to the minority shareholders.

Merger of a listed company with unlisted company

If a listed company is getting merged into an unlisted company, it can provide that the unlisted company will continue to remain unlisted. In such a case, dissenting shareholders are entitled to opt out. The Tribunal may direct the transferee company to make provision for paying off dissenting shareholders. They shall be paid in accordance with a pre-determined price formula or in accordance with the valuation arrived at. In any case, such price shall not be less than the price that can be arrived at under any regulation of SEBI.

Minority Interest

- **Power to acquire shares of dissenting shareholders - Section 235**
- In a scheme / contract [that involves the transfer of shares or any class of shares in a company (transferor company) to another company (transferee company)] has been approved by the holder of not less than 9/10 in value of the shares whose transfer is involved then, in that event, transferee gets rights to acquire minority holding. However, this right is available only if the scheme / contract is approved within a period of four months of the offer having been made by the transferee company.
- The transferee company may, at its discretion, notify the dissenting shareholders its desire to acquire their shares. This may be done at any time within two months from the expiry of the aforesaid four months period mentioned above.
- However, dissenting shareholders who do not want to give up their shares, can approach the Tribunal. They can apply within one month of receiving the offer from the transferee company. The Tribunal may at its discretion, prohibit such acquisition or dismiss the application. The transferee company shall have a right to acquire the shares of such dissenting shareholder(s) unless the Tribunal has prohibited the acquisition.

Filing the order of Tribunal

The final order approving the scheme has to be filed with ROC within of thirty days from the receipt of the order. No time limit was specified under section 391 of the old Act for filing the order (it was however provided in section 394 of the old Act)

Observation:

Section 391 of the old Act provided that the order sanctioning the scheme shall not have effect until a copy of the order is filled with ROC. This clause is omitted. The impact of this provision is unclear. From when will the scheme be effective? Will it be effective from the date the order is passed by the Tribunal? Or from the date provided in the scheme as being the effective date? Or will the Tribunal specify a date from which the scheme will be effective? The Act provides not clear answers under section 230.

Contractual Mergers

Which types of compromise or arrangement?

Which companies can opt for this route?

Procedure

- *Notice to ROC and OL.*
- *Notice to person affected*
- *Consideration of objections at GM*
- *Approval* – ‘90% of the total number of shares’
- *Declaration of solvency*
- *Creditors’ approval* – 9/10th in value of the creditors.
- *Filing with CG. ROC and OL*
- *ROC and OL – Confirmation /Objections*
- **CG to confirm the scheme – 60 days**
- **Tribunal to hear objection**
 - Who can apply?
 - Discretion of tribunal
- **Order to be registered**
- **Effect of registration of scheme**

Cross border mergers

Section 234 permits cross border mergers or amalgamations between Indian companies and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. The said merger is permitted with the foreign company irrespective of whether it has an established place of business in India.

Sick Companies

SICK COMPANIES

PARTICULARS	SICA, 1985	COMPANIES ACT, 2013
Tribunal/Appellate Tribunal	BIFR/AAIFR	NCLT/NCLAT
Applicability of Chapter	Only on Industrial Companies	Any Companies
Sick Company	<ul style="list-style-type: none"> ▪ Any Industrial Company (being a company registered for not less than 5 years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth. [section 3(o)] ▪ No such power to BIFR/ AAIFR to determine the company 	<ul style="list-style-type: none"> ▪ The term 'Sick Company' is not defined in the Act. ▪ Indicator of Sickness (symptoms) is given u/s 253(1). ▪ But the power of determining the company is Sick or not has been given to the tribunal.

PARTICULARS	SICA,1985	COMPANIES ACT,2013
Indicator of Sickness	Here no prior indication is required as the company shall be declared as Sick when it fulfils the above mentioned definition Sick Company.	The Inability of the company to pay or secure or compound the payment on demand by its secured creditors representing 50% of the outstanding debts within 30 days of the Notice of demand. The secured creditors of the company in such an event may file an application to the tribunal for determination of company as sick.[section 253(1)]
Potential Sick Industrial Company	Section 23 specifies that if the accumulates losses of an industrial company, as at the end of any financial year have resulted in erosion of 50% or more of its peak net worth during	No Such Provision

PARTICULARS	SICA,1985	COMPANIES ACT,2013
<p>Stay on pending proceeding</p>	<ul style="list-style-type: none"> ▪ Once a reference is admitted in BIFR all the proceeding shall stand suspended as prescribed under section 22 ▪ No time period for stay of order 	<ul style="list-style-type: none"> ▪ Only on application under section 253(2) the tribunal may order to stay any proceeding as specified under section 253(2) w.r.t the company. ▪ The stay should be operative for 120days. ▪ Under New Act, the stay shall not be given for guarantee in respect of any loans or advance granted to the company.
<p>Non disposable obligation.</p>	<ul style="list-style-type: none"> ▪ BIFR may by order in writing, direct the sick company to not dispose of its assets, except with the consent of BIFR. (refer section 22A) 	<p>On filing an application, the company shall not;</p> <ul style="list-style-type: none"> • dispose of any assets, or; • otherwise enter into any obligation with regard to, its properties or assets <p>except, if done in the normal course of business.</p>

PARTICULARS	SICA,1985	COMPANIES ACT,2013
Limitation period	No such provision.	Stay order period shall be excluded in calculation of the period of limitation.(section255)
Applicants who can apply for determination of Sickness	No such provision.	<ul style="list-style-type: none"> ▪ Secured Creditor(s) ▪ Debtor Company ▪ Central Government ▪ Reserve Bank of India ▪ State Government ▪ PFI/SLI/Scheduled Bank
Reference/ Application for determination of measures	<p>As per section 15, the reference:</p> <ul style="list-style-type: none"> ▪ shall be made by the BOD ▪ within 60 days of the date of the finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company . ▪ Reference is made to the 	<p>As per section 254, the application</p> <ul style="list-style-type: none"> ▪ may be made by the secured creditor or the debtor company ▪ within a period of 60 days from the date of determination of company as the Sick Company by the tribunal under section 253

PARTICULARS	SICA,1985	COMPANIES ACT,2013
Overriding effect of the SARFAESI Act	<p>Here the overriding effect is in the case when:</p> <ul style="list-style-type: none"> ▪ no reference shall be made to board when financial assets have been acquired by any securitisation company or reconstruction company u/s 5(1) of the Act ▪ Where reference pending, such shall abate if secured creditors representing 75% in value of the amount out standing against financial assistance disbursed to the borrower have taken measures to recover their secured debt under section 13(4) of SARFEARI Act. 	<p>Here the criterion for overriding is that, if the secured creditors representing 75% in value of the amount out standing against financial assistance disbursed to the borrower have taken measures to recover their secured debt under section 13(4) of SARFEARI Act:</p> <ul style="list-style-type: none"> ▪Such reference shall abate when reference have been made and scheme for Revival & Rehabilitation submitted, or ▪ no reference shall be made.
Appointment of Interim Administrator(Section 256)	<p>An operating agency(OA) was appointed by BIFR to undertake an enquiry into the affairs of the Company</p>	<p>Once declared as a sick company on receipt of application for revival and rehabilitation the Tribunal</p>

PARTICULARS	SICA,1985	COMPANIES ACT,2013
Duties & Powers of the Interim Administrator	No such powers with the BIFR to direct the OA to takeover the management of the company on the ground that there is no scheme of revival and rehabilitation (Scheme of the Company filed by the company along with the application.)	<ul style="list-style-type: none"> ▪To convene meetings of the creditors within 45 days. ▪To provide report to the Tribunal within 60days. ▪To takeover the management of the company, if directed by the Tribunal. (section256) ▪ Shall appoint the committee of creditors and shall hold, decide the procedure and the appointments of the said meeting.
Committee of Creditors	No such provision.	The IA shall appoint a committee of creditors before calling the meeting of creditors with maximum 7 members representing each class of creditors for

PARTICULARS	SICA,1985	COMPANIES ACT,2013
Company Administrator	No such Provision.	On the date of hearing fixed by the Tribunal and after considering the report of the IA, the Tribunal if thinks it feasible to revive or rehabilitate the company, then it shall appoint a company administrator (CA). (section258)
Preparation of the Scheme by a Company Administrator	No such provision in SICA. However the OA appointed by BIFR is responsible to prepare the Scheme.	CA, shall prepare or cause to prepare a scheme of revival and rehabilitation after considering the measures, if any as recommended by the creditors in their meeting.(section258)
Takeover of the Sick Company	No such Provision.	Takeover of the sick company by any other solvent company may form

PARTICULARS	SICA, 1985	COMPANIES ACT, 2013
Appointment of Administrators (section 259)	No such provision. BIFR normally appoints an institution as the OA which are generally banks and financial institutions.	<ul style="list-style-type: none"> ▪ The administrators appointed by the Tribunal shall be appointed from a data bank to be maintained by the CG or any institution or agency authorized by CG in a prescribed manner. ▪ The data bank will consist of Company Secretaries, Chartered Accountant, Cost Accountant and such other professionals as may be specified by CG.
Approval of the Scheme by the Secured Creditors and Unsecured Creditors	No such provision.	The revival and rehabilitation through a scheme will now be only possible if the scheme in a meeting convened by the CA is approved by: <ul style="list-style-type: none"> ▪ 75% of secured creditors and; ▪ 25% of unsecured creditors. (section 262(2))

PARTICULARS	SICA,1985	COMPANIES ACT,2013
Process for approval of the Scheme	No such provision.	Process is defined in section 262 of the New Act. <ul style="list-style-type: none"> ▪ Meeting within 60 days of the appointment of CA. ▪ Maximum extension by Tribunal-120days. ▪ Separate meetings for secured and unsecured creditors.
Scheme to be binding. (section 263)	No such provision.	The Tribunal shall sanction the scheme within 60days from the receipt of the scheme with such modifications, if any. The said sanctioned scheme shall be binding on the: <ul style="list-style-type: none"> ▪ Sick Company ▪ Transferee Company or as the case may be ▪ employees, shareholders, creditors and guarantors of

PARTICULARS	SICA,1985	COMPANIES ACT,2013
Monitoring the Scheme.	OA appointed by BIFR was responsible for monitoring the Scheme.	The CA appointed by the Tribunal shall on order by the Tribunal monitor the implementation of the Scheme.(section264(2)).
Winding up of the Company if the Scheme is not approved by the Creditors.	Winding up powers are with BIFR.	If the Scheme is not approved, the CA shall file its report with the Tribunal and then the Tribunal shall conduct the proceedings of the winding up under Chapter XX of the New Act. (section265)
Winding up of the Company if the approved Scheme fails to implement.	No creditors approval was required, the OA in case where the Scheme is not implementable may seek for the change in management (“COM”) of the company and if the COM does not takes place then winding up is recommended to the	<ul style="list-style-type: none"> ▪Winding up by the Tribunal if 75% of secured creditors agree to it.(section258(a)). ▪Tribunal may modify the terms of the scheme.

PARTICULARS	SICA,1985	COMPANIES ACT,2013
Fund	Rehabilitation Fund	Rehabilitation and Insolvency Fund. (section269)
Punishment/ Penalty (section 267)	<ul style="list-style-type: none"> ▪Whoever violates the provisions of this Act and; •whoever makes a false statement, or; •gives false statement to the board or the Appellate Authority shall be punishable with imprisonment upto 3 years and which may be along with fine. ▪No cognizance by any court of any offence mentioned above, except on a complaint by such persons. 	<ul style="list-style-type: none"> ▪Whoever violates the provisions of chapter XIX, or; ▪makes a false statement, or; ▪Gives false evidence before the Tribunal or the Appellate Tribunal, or; ▪Attempts to tamper with the records of reference or appeal filed under this Act. Shall be punishable with imprisonment upto 7 years and fine which may extend to Rs.10Lacs. ▪No such provision for cognizance.

Challenges-Revival and Rehabilitation



- Transitional provision
 - Any appeal, reference or proceedings pending before BIFR/AAIFR shall stand abated. Company is allowed to make reference to the Tribunal within 180 days from the commencement of the New Act.(section434)
- Overriding powers of SICA over other Rules/Acts/Statue/Legislation etc., missing in the New Act.
- Unsecured creditors–how far protected?
- Reporting under CARO in respect of erosion of the networth will continue.
- Stipulated timelines–whether mandatory or directory?



Qualification criteria for administrators.

- Having special knowledge or experience in matters related to revival and rehabilitation of sick companies or insolvency for **at least 10 years;**
- Total receipts, from rendering of professional services, **not less than 15 lakh rupees in each of the previous 3 years according to the audited financial statements;**
- free from any professional or other misconduct, past and present, committed under the respective statute under which he is governed;

Class Action Suit

What is Class Action

A lawsuit filed or defended by an individual or small group acting on behalf of a large group

Do we have the concept of Class action in India

Do we have the concept of class action in Companies Act, 1956

O& M is a type of class action

Class actions world wide

- [Bank of America](#) has agreed to settle a class-action lawsuit brought by investors who claimed they were misled by its Countrywide unit into buying risky mortgage securities. Bank of America acquired Countrywide Financial, a California-based lender, in July 2008 for \$2.5 billion, but analysts have put the effective cost at more than [\\$40 billion](#), taking into account the post-purchase lawsuits, loan buybacks and write-downs.

Companies Act

The concept of class action suits has been introduced giving right to a group of shareholders or depositors to move NCLT if they believe that the management or conduct of the affairs of the company are prejudicial to them, such concept is already permitted in the US.

Who can sue

Shareholders & Depositors

What can they claim

Compensation

Compensation for What

Damages for any fraudulent,
unlawful or wrongful act or
conduct or any likely act or
conduct on his part

Compensation From

- Company
- Directors
- Experts
- Advisors

Can investor seek recourse to
Section 245 for wrongdoings
prior to enactment of new
Companies Act

Class Action Suit vs. Arbitration

Biggest Scams

Old Scams analysed in new light

Rs 14,000 crore Satyam scam

- Ramalinga Raju confessed he had cooked up the accounts of Satyam Computers and that the cash and bank balances were inflated by Rs 5,040 crore (Rs 50.40 billion), after a failed attempt to acquire Maytas.
- Satyam Computers has since been acquired by Tech Mahindra.

Ponzi Schemes

- The Saradha group ran a wide variety of collective investment schemes that collected money from the public.

The ponzi scheme collapsed and caused an estimated loss of Rs 4,000 crore (Rs 40 billion) with 1.4 million investors affected, mostly small savers. The Union government launched a multi-agency probe to investigate the scam.

- Sudipta Sen, promoter of Saradha group is the key accused in the scam.

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The Companies Act, 2013 is a milestone in the second generation reforms that is set to change the face of the Indian corporate world. It has brought forth a new regime of investor protection and sets new standards of corporate governance. It is a strategic shift in the regulatory framework that will not only affect every company but also impact every entity associated with companies, be it a promoter, director, employee, shareholder, creditor, banker, consultant, financial advisor and so on.

Insights into the New Company Law provides a multi-dimensional view to enable the company and its stakeholders to better understand their modified role and responsibilities, privileges and liabilities. This is a thematic book that focuses on concepts and principles, balances theory with practice and explores the earlier situations in new light along with consequent transitional issues. It provides an incisive analysis aimed at understanding the essence of the new law.

This book will be invaluable to students pursuing courses of law, company secretary, and chartered accountancy, to companies, boards and senior management needing a clear overview of the new company law and is a good first point of reference for practitioners.

Prachi Manekar is a qualified company secretary and lawyer and an alumnus of the Indian Law Society. She is an advocate at the Bombay High Court and handles a variety of corporate cases at forums like the Supreme Court, High Courts, Company Law Board, Competition Commission and Arbitral Tribunals. She has represented the State in several matters at the aforesaid forums.

She specializes in corporate, commercial, constitutional and infrastructure law advising domestic and multi-national companies on a variety of corporate matters including M&A, company structures, corporate actions, joint ventures, commercial contracts and national and international arbitrations.

She has authored a book titled "*Management of Special Economic Zone*" and regularly contributes articles to magazines and journals. She is a prolific writer and frequent speaker at several conferences and seminars organized by leading professional institutes, associations and chambers on subjects like Company Law, M&A, Arbitration, Construction Contracts and SEZs.

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ISBN: 978-93-5143-006-3



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Law, Practice and Procedure

(Releasing Shortly)

Thank you

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