

New Companies Bill: Restructuring Provisions



- Anup P. Shah

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Borivali Central CPESC & WIRC

All Arrangements Incl'd Mergers

Clauses 230-231

Chapter XV

Disclosure to NCLT / High Court

- Approval not by a Circular Resolution of BoD
 - Now, must be passed in a BM
 - Currently Disclosures required in Scheme
 - All material facts, such as:
 - Latest Financial Position
 - Latest Auditor's Report
 - Pendency of Investigation u/ss. 235 - 251
-

Disclosure to NCLT

- **Additional to be disclosed under Bill:**
 - Reduction included in Scheme
 - **CDR** approved by min. **75%** of Secured Creditors
 - Safeguards for all Creditors
 - Auditor's Report : Fund requirements after CDR, based on estimates of BoD, shall conform to Liquidity Test
 - Valuation Report of all Shares, Property, IPR, etc. by a Registered Valuer
-

Valuation Report & Notice

- **EGM Notice to all Creditors & Members**
 - **Valuation Report to be attached to Notice**
 - Explain effects on Creditors, Key Mgmt, Promoters, Members, Debenture holders
 - Effects on Material Interests of Directors, Deb. Trustees
 - **Currently, Val. Report only available for Inspection**
 - **Not sent to Members & Creditors**
 - **Upload Docs. on Website of Co., SEBI / St. Ex.**
 - **Publish in Newspapers – to be prescribed**
 - **Whether only Notice or Abstract of all Docs?**
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Valuation Report

■ Hindustan Lever Ltd (SC)

- Court would'nt disturb a valuation unless grossly unfair
- Valuation approved by FIs, SH ~ Fairness presumed
- SC enumerated all methods such as Market Price, NAV, Yield and stated that a combination may have to be adopted in a case

■ Associated Hotels (Cal) / Industrial Co. Ltd. (Bom)

- CG objection to Valuation ~ SH approving the scheme
 - Court sanctioned the Mergers
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Valuation Report

- **Hindustan Ciba-Geigy (Bom)**
 - Ratio by CAs upon consideration of various factors & approved by majority ~ Court will not disturb it
 - **Asian Coffee Ltd. (AP)**
 - Mathematical calculation of Swap Ratio is a detailed & technical problem - best left to Experts
 - SH need not be given detailed Calculations
 - **Nods Worldwide Ltd. (Mad)**
 - DCF valid for Merger of IT / Internet Cos.
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Valuation Report

- **Miheer Mafatlal v. Mafatlal Indst. (SC)**
 - **Court cannot substitute Swap Ratio**
 - **Valuation is a technical & complex problem**
 - **Best left to experts in the field of accountancy**
 - **4 factors which should be considered :**
 - **Capital cover**
 - **Yield**
 - **Earning Capacity**
 - **Marketability**
-

Registered Valuers

- Valuation of:
 - Property, Stocks, Securities, Goodwill, etc.
 - Net worth / Liabilities of Co.
 - To be done by Registered Valuer
 - Qualifications & Experience of Regd. Valuer
 - To be prescribed by MCA ~ **Would it be a CA?**
 - Cannot undertake valuation of assets in which he has Direct / Indirect interest at any time
-

Registered Valuers

- **Role under New Law:**
 - **Preferential Issue (similar to s.81(1A))**
 - **Non-cash transactions involving Directors**
 - **Arrangement / Merger**
 - **Minority Squeeze-out**
 - **Compulsory Winding-up ~ Valuation of assets**
 - **Voluntary Winding-up ~ Declaration of Solvency to be accompanied with Valuation of assets**
-

Notice

- **Voting can be by Postal Ballot also**
 - PB applicable to both Listed & **Unlisted Cos.** Unlike current provision where only for Listed
 - **Notice to be also sent to:**
 - MCA, RBI, IT, RoC, OL,
 - SEBI, CCI, St. Ex., if applicable
 - Sectoral Regulators ~ TRAI, DGCA, MIB
 - No Provisions in Act for sending individual Notices:
But Notices under L/A – St. Ex, NBFCs-RBI
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Notice

- **Notice to be also sent to Regulators:**
 - Representations within 30 days of Notice
 - **Else, deemed consent**
 - **Competition Act, 2002**
 - S.6(2A) gives 210 days to CCI for passing an Order
 - & 30 days limit not applicable to CCI?

Approval

- **3/4th Majority in value of Creditors or Members**
 - Person, Proxy **or Postal Ballot**
 - Same currently, except no PB
 - **If 90% Creditors give Affidavit – No meeting**
 - **Currently done but Court process: Subjective**
 - **Opposition to Scheme**
 - Only by persons holding **min. 10% SH** or **min. 5% total debt** as per latest Audited A/c.
 - Currently, **No such thresholds** – any one can object
 - Good Provision
-

Auditor's Certificate

- **No Sanction unless Auditor's Certificate :**
A/c Treatment in Scheme as per AS
 - **AS-14: Accounting for Amalgamations**
 - **Hindalco Indst. (Bom) : S.211 expressly permitted**
Deviation from AS subject to disclosures
 - **L/A requires Auditor's Certificate for Listed Cos.**
 - **Q. What about Demerger – No AS?**
 - **Q. What about Arrangement – No AS?**
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Auditor's Certificate

- **Some Innovative Accounting Treatments on Merger:**
 - Capital Reserve credited to Securities Premium
 - Capital Reserve credited to General Reserve
 - Capital Reserve credited to Reserves available for Distribution as Dividend
 - Goodwill set-off against Securities Premium
 - **What would now happen to these?**
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Scheme Involving Other Rest.

- **Scheme involving Buyback of Securities**
 - **Must be as per Cl.68 relating to Buyback**
 - **Position under Cos. Act**
 - **S.77A and ss.391-394 operate in independent fields**
 - **S.77A does not usurp Court's Power to sanction a Scheme involving buyback**
 - **Compulsory buyback by Cos. under Scheme allowed**

Scheme Involving Other Rest.

■ Takeover Offer

- Must be made as prescribed
- For Listed Cos. as per SEBI Takeover Regs.
 - In **Larsen & Toubro (Bom)** a Takeover of Ultra-tech Shares by Grasim was under a Scheme - **avoided TOR**

■ Reduction

- Cl.66 relating to Reduction NA if done under Ch. XV
 - Currently, even u/ s.391 reference made to s.100
 - But s.100 NA if no payment to any SH & Reduction consequent to Demerger
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Order

- **NCLT's Order to provide for:**
 - **Conversion of RPS into Eq.**
 - **Option for Arrears of Dividend in Cash or Eq. Shs. In lieu**
 - **Protection of Creditors**
 - **Variation of SH Rights**
 - **If min. 10% object, they can apply to NCLT for cancellation of variation of rights**
 - **Currently, no provision for Dissenting SH**
 - **Pending proceedings before BIFR shall abate**
 - **Exit offers to Dissenting SH**
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Effect of Order

- **Copy of Order to be filed with RoC within 30 days**
 - **Currently, same provisions but Order not effective unless filed with RoC – Effective Date**
 - **If Scheme found problematic later – don't file with RoC**
 - **This portion dropped – Important Provision**
 - **All Schemes immediately effective whether filed with RoC or not**
 - **Further, now no need to annex Order to every copy of M/A after filing with RoC**
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Mergers

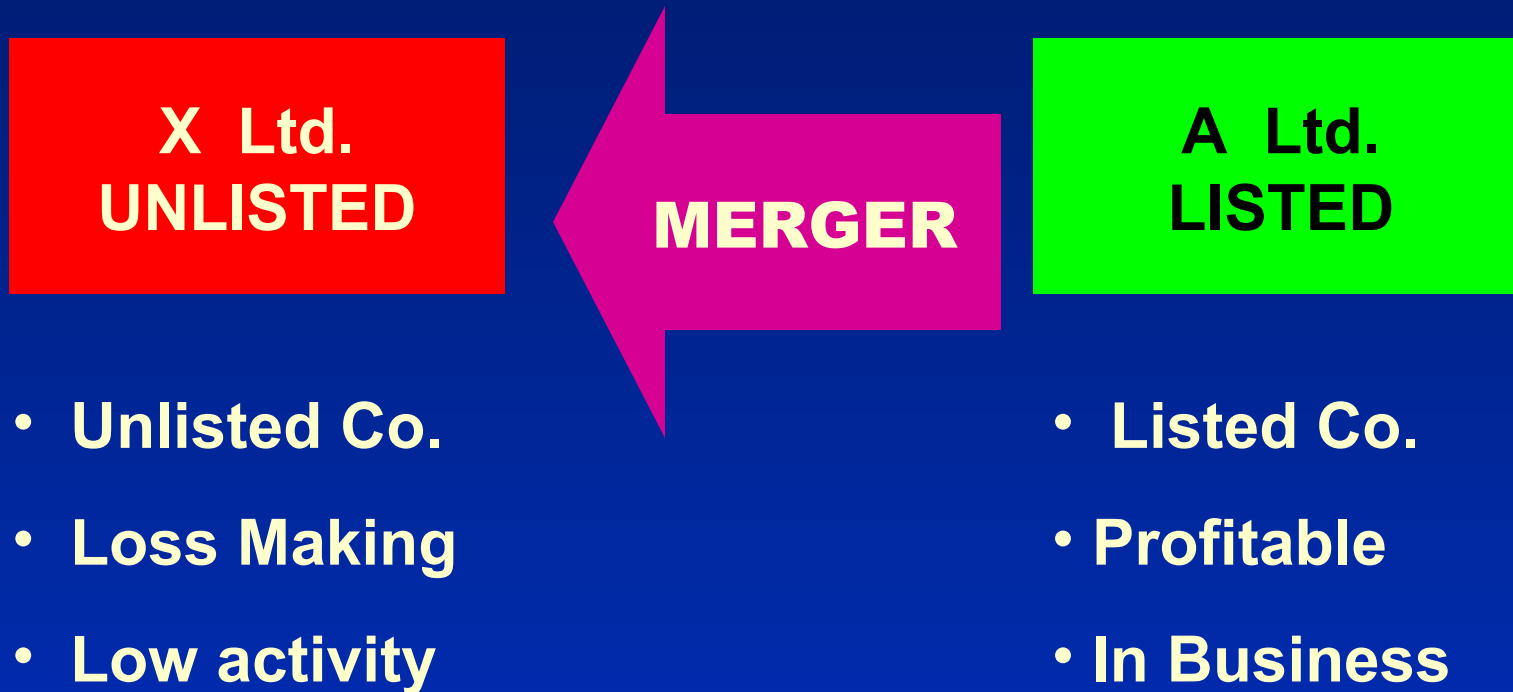
Clauses 232, 235-240

Chapter XV

Additional Filings

- **Circulate to Creditors & Members**
 - **Draft of T&C of Scheme**
 - **Report adopted by BoD laying out Swap Ratio and any Special Valuation Difficulties**
 - **Expert's Report on Valuation**
 - **Suppl. A/c Statement if last A/c. more than 6 mts. Before date of Meeting**
 - **File Draft Scheme with RoC**
 - **Currently, none of the above are required**
-

Reverse Merger



Q. Listing of X Ltd. possible?

Reverse Merger

- **Currently Listing possible:**
 - **SEBI's approval required**
 - 25% SH with Public
 - Lock-in requirements
 - **Justification : as in any merger**
 - **Under a Court Scheme of Merger / Demerger**
 - **Procedural matters**
 -
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Reverse Merger

■ Benefits:

- C/f Losses & UAD continue with merged entity since compliance with s.72A not required
- Gains of Listing without Pains of IPO
- SH can sell Long-term shares on St. Ex. – Gains exempt from Tax

Reverse Merger

- **Provision under Bill:**
 - Tee shall **remain an Unlisted Co.** until it becomes a Listed Co.
 - **Negates SEBI's Reverse Merger route?**
 - **Shuts backdoor listing route altogether**
 - **SH of Tor given an Exit Option**
 - **Payment of Value of Shares as per pre-determined formula or as per Valuation**
 - **Arrgmt. to be made by NCLT**
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Reverse Merger

- SH of Tor given an Exit Option
 - What if more than 25% of SH of Transferor choose Exit Option?
 - S.2(1B) of Income-tax Act
 - SH holding 75% in Tor Co. must become SH in Tee Co.
 - Condition Not satisfied
 - Hence, not an amalgamation under IT?
 - Not Tax-neutral?
-

Appointed Date

- **Appointed Date must be specified under Bill**
 - **Date from which Scheme is effective**
 - **Marshall Sons & Co. (SC)**
 - **Appointed Date: Date fixed by Court or else Date in Scheme**
 - **Date from which all A&L vest in Transferee**
 - **Date from which P&L of Transferor is that of Transferee**
 - **Transferor carries on business for Transferee**
 - **Effective Date: Date when Scheme filed with RoC and becomes effective – Now modified by Bill**
 - **AD only relevant for Taxation**
-

House Keeping

- Fees paid by Tor on Auth Cap. Can be s/o against Fees payable by Tee on Increase in Cap. subsequent to merger
 - Sets at rest RD's constant Objection
 - Favourable Decisions of several HCs:

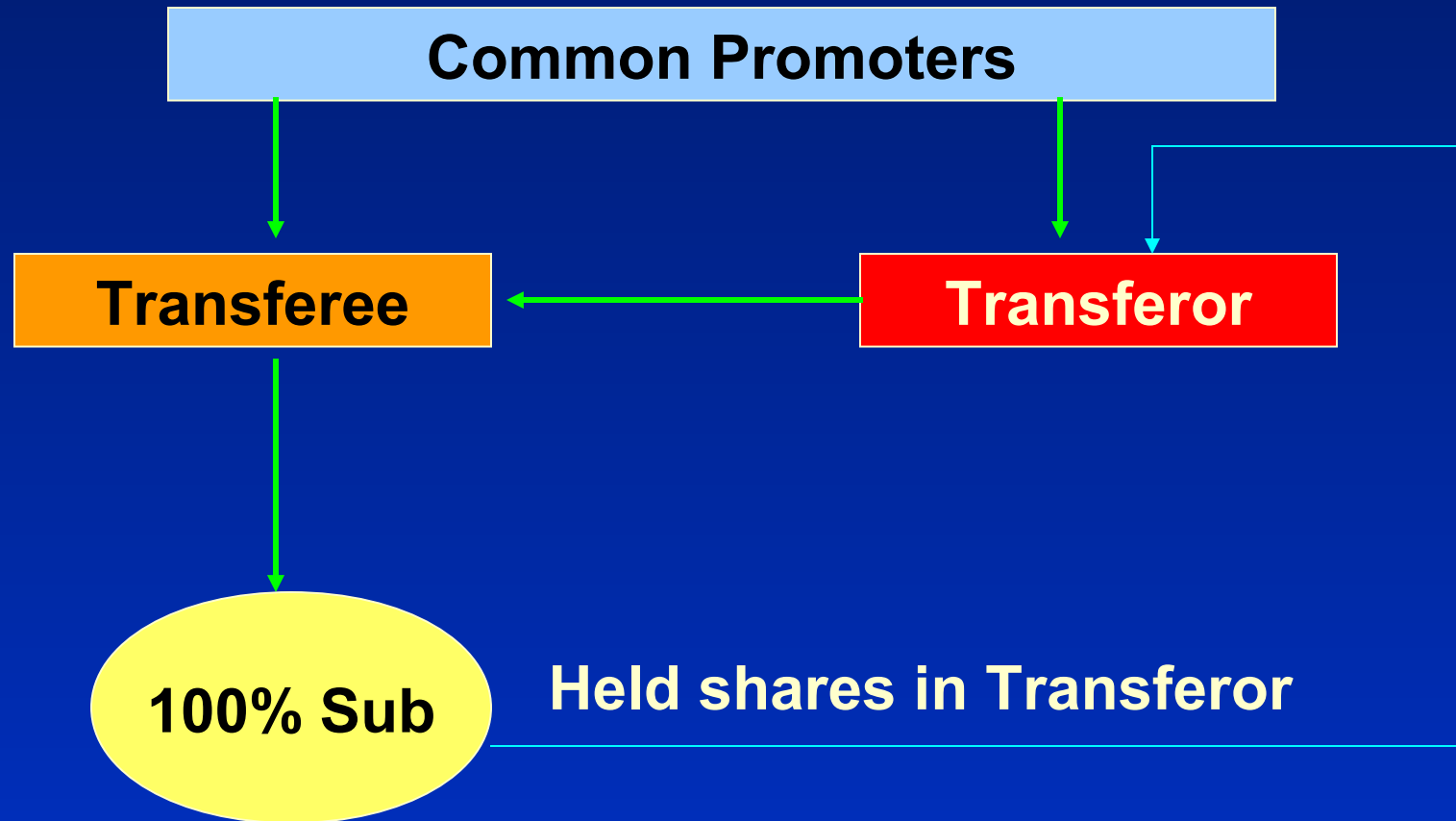
House Keeping

- **Every Co. for which Order is passed shall:**
 - **Until completion of Scheme**
 - **File a Statement with RoC**
 - **Form and Time to be prescribed**
 - **Certified by CA / CS / CMA**
 - **Indicating that Scheme is being complied as per Order of NCLT**
- **Penalty:**
 - **Company: Fine of Rs. 1 to 25 lakhs**
 - **Officer: Term of 1 yr and / or Fine Rs 1 to 3 lakhs**

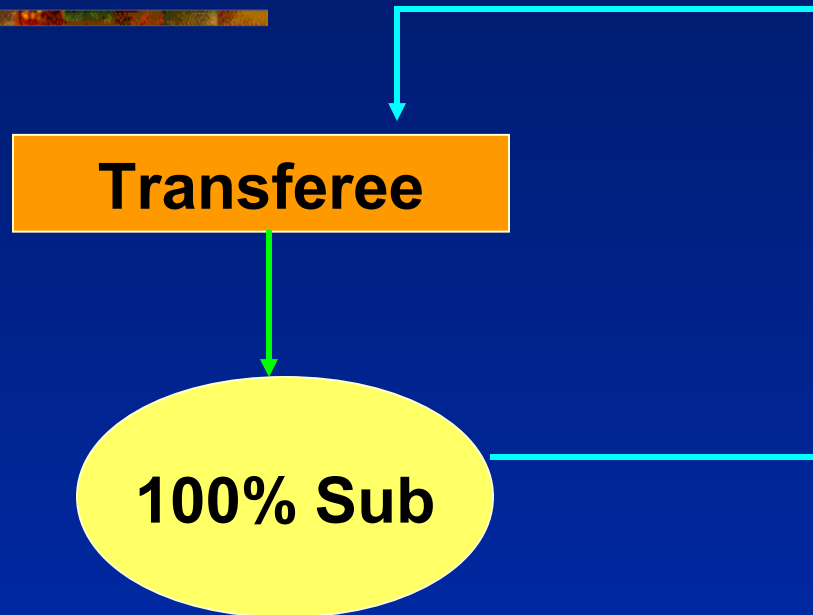
Minority Squeeze Out

- Majority (**90%+**) SH's Notice to buy out Minority SH
 - Majority bound to accept all shares
 - Valuation by Regd. Valuer
 - If **75%+ of Minority** bargain for a Higher Price then pro-rata Increase for all Minority
 - Majority to deposit sum payable in Escrow A/c
 - Distributed to SH within 60 days
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Cross Holdings & Merger



Cross Holdings & Merger



- Subsidiary owning shs. in Holdco
- Cancellation of Shs. required
 - Alternative to Cancellation of Shares?

Cross Holdings & Merger

■ Examples :

- Reliance Industries & Reliance Petroleum
- HFCL Infotel & ITI
- ICICI & ICICI Bank : Trf to SPV
 - Sale of ICICI Bank shares by the Trust
 - Sale of 16% stake for Rs. 1318 cr.

New Provision

- **Transferee Co. cannot Hold shares:**
 - In its own name
 - Under Trust for benefit of itself / Sub./ Associate
 - Shares must be cancelled or extinguished
- **No such Treasury Stocks**

Q. What happens to existing Treasury Stock?

Q. What if shares in Trust for benefit of SH of Transferee Co.?



Fast-Track Mergers

Clause 233
Chapter XV

Fast Track Mergers

- Only for “**Small Cos**” or “**Holdco & WOS**”
- Small Companies (Both Tor & Tee ~ Small):
 - Only Private Company; and
 - 1-by-2 Conditions:
 - Paid-up Cap < Rs. 50 lakhs. MCA can prescribe higher cap but not more than Rs. 5 cr.
 - Turnover < Rs. 20 lakhs. MCA can prescribe higher cap but not more than Rs. 2cr.
- Holdco & WOS can be Public Cos. also

Fast Track Mergers

- Notice to RoC & OL
- Place their Objections & Suggestions before EGM
- File Declaration of Solvency
- 90% Majority of Members and Creditors
- Tee to file approved Scheme with CG, ROC & OL
- If ROC & OL have no objections:
 - CG would Confirm.
- Once confirmed by CG
 - RoC registers Scheme
 - Registration – end of process of Merger

Fast Track Mergers

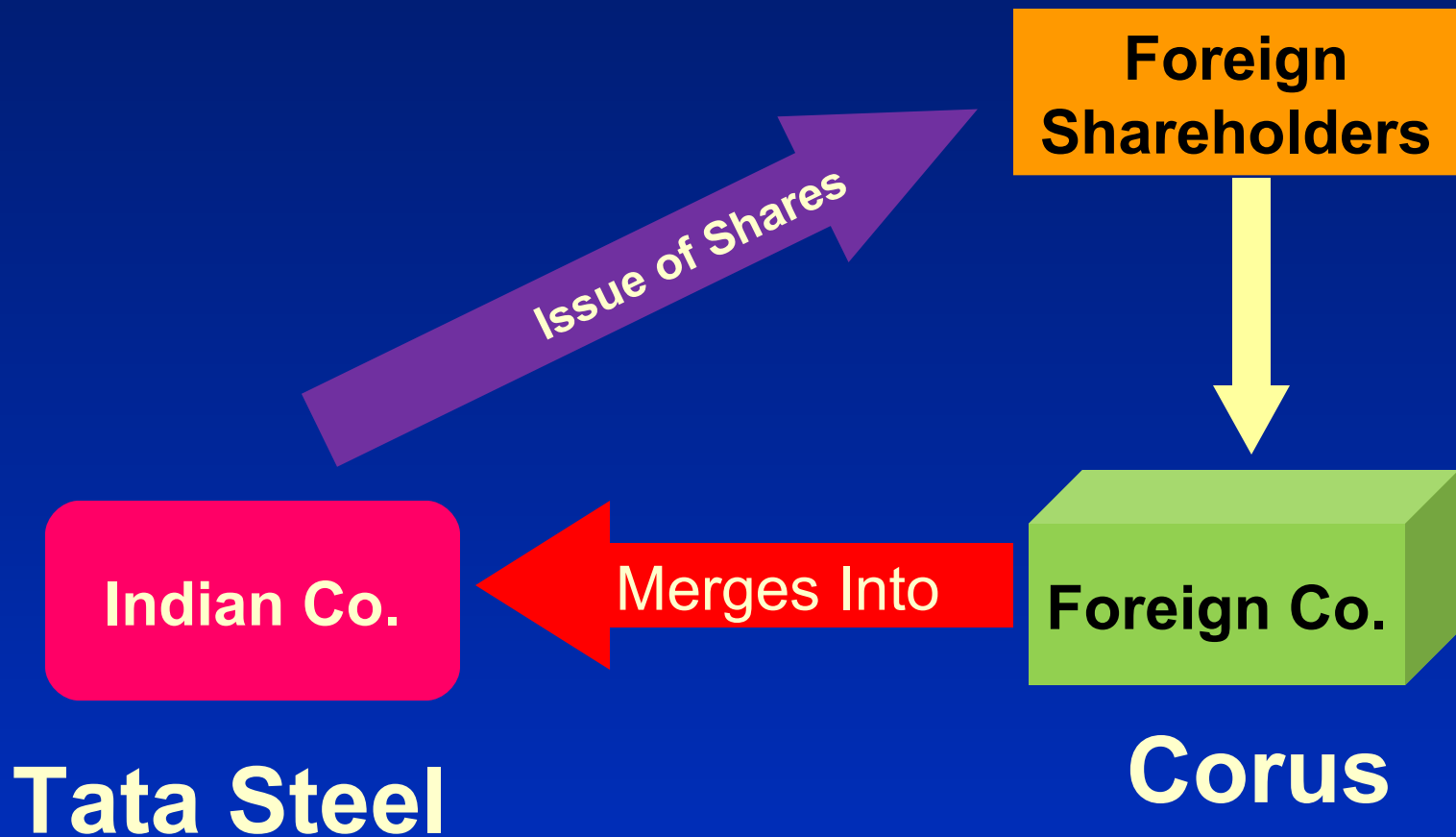
- RoC & OL deemed to confirm within 30 days
 - If objections, CG to apply to NCLT in 60 days
 - **NCLT** would then **Decide** ~ Confirm or Reject?
 - If NCLT Confirms - RoC shall Register Scheme
 - Fees S/o by Tor against Fees by Tee on Auth Cap
 - Fast Track is **Optional** and Cos. **can select Normal Tribunal Route** if they so desire
-



Cross-Border Mergers

Clause 234
Chapter XV

Merger of Foreign into Indian Co.



Merger of Foreign into Indian Co.

- **Can a Foreign Company merge into an Indian Company?**
- **Shares issued by Indian Company to Shareholders of Foreign Company**
 - **E.g., Corus merging into Tata Steel and Tata Steel issues shares to Shareholders of Corus residing in UK, Europe, etc.?**

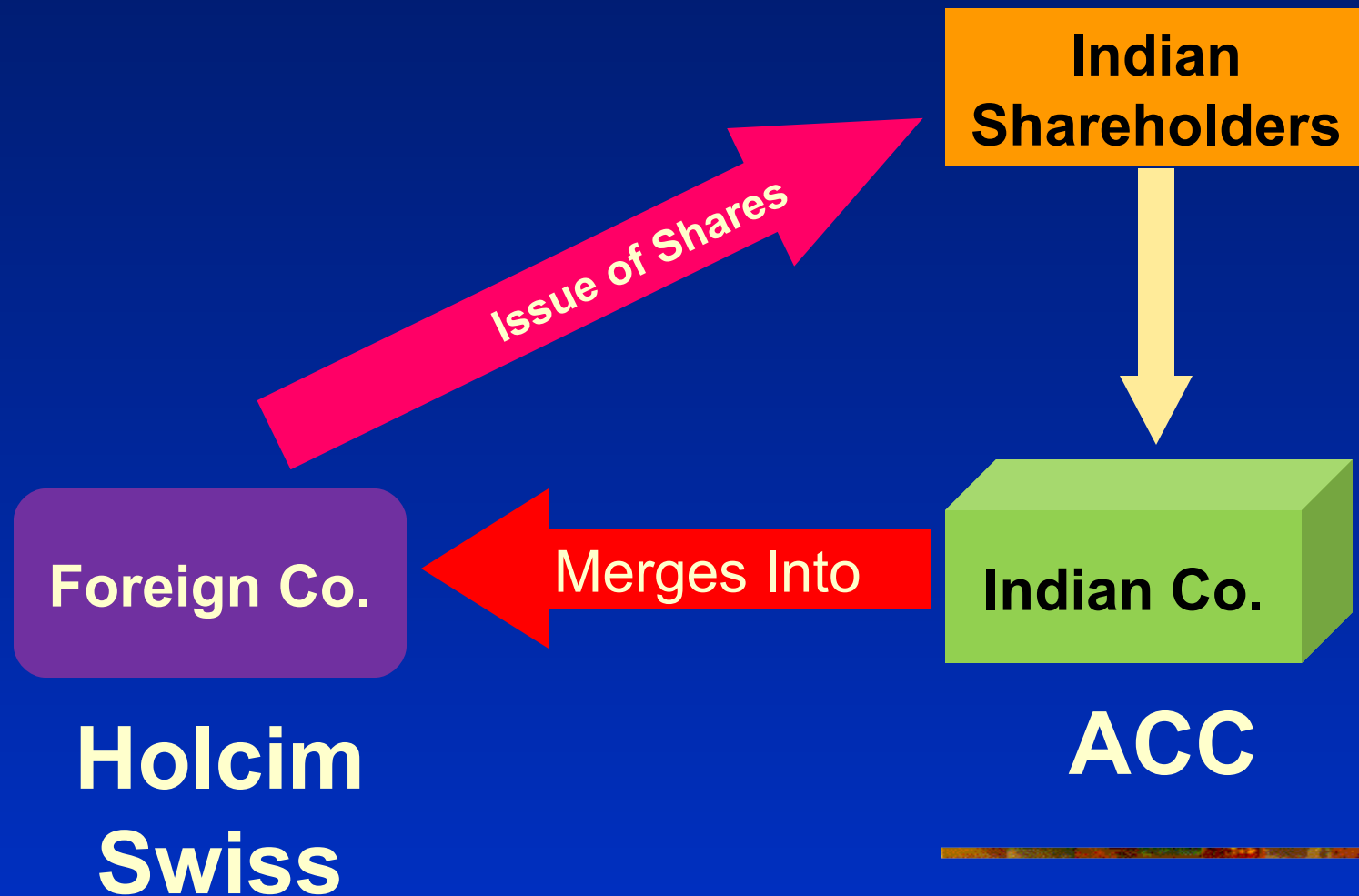
Merger of Foreign into Indian Co.

- **S.394 of Cos. Act?**
 - Moschip Semiconductor (AP)
 - Adani Enterprises (Guj)
 - Bombay Gas (Bom)
- **New Cos. Bill permits?**
 - Only if from **specified Jurisdictions**
 - Why restrict?
- **Permission, if any, under Foreign Laws**
 - Certain jurisdictions disallow Foreign mergers

Merger of Foreign into Indian Co.

- **Permission of Foreign St. Ex if Transferor listed abroad, e.g., requirements of SEC, USA**
 - **US: State + Federal Law – comply with both**
 - **FIPB's approval? RBI may make Rules**
 - **SEBI Takeover Regs. applicable**
 - **CCI / Foreign Competition Law**
 - **Income-Tax**
 - **Exemption u/s. 47**
-

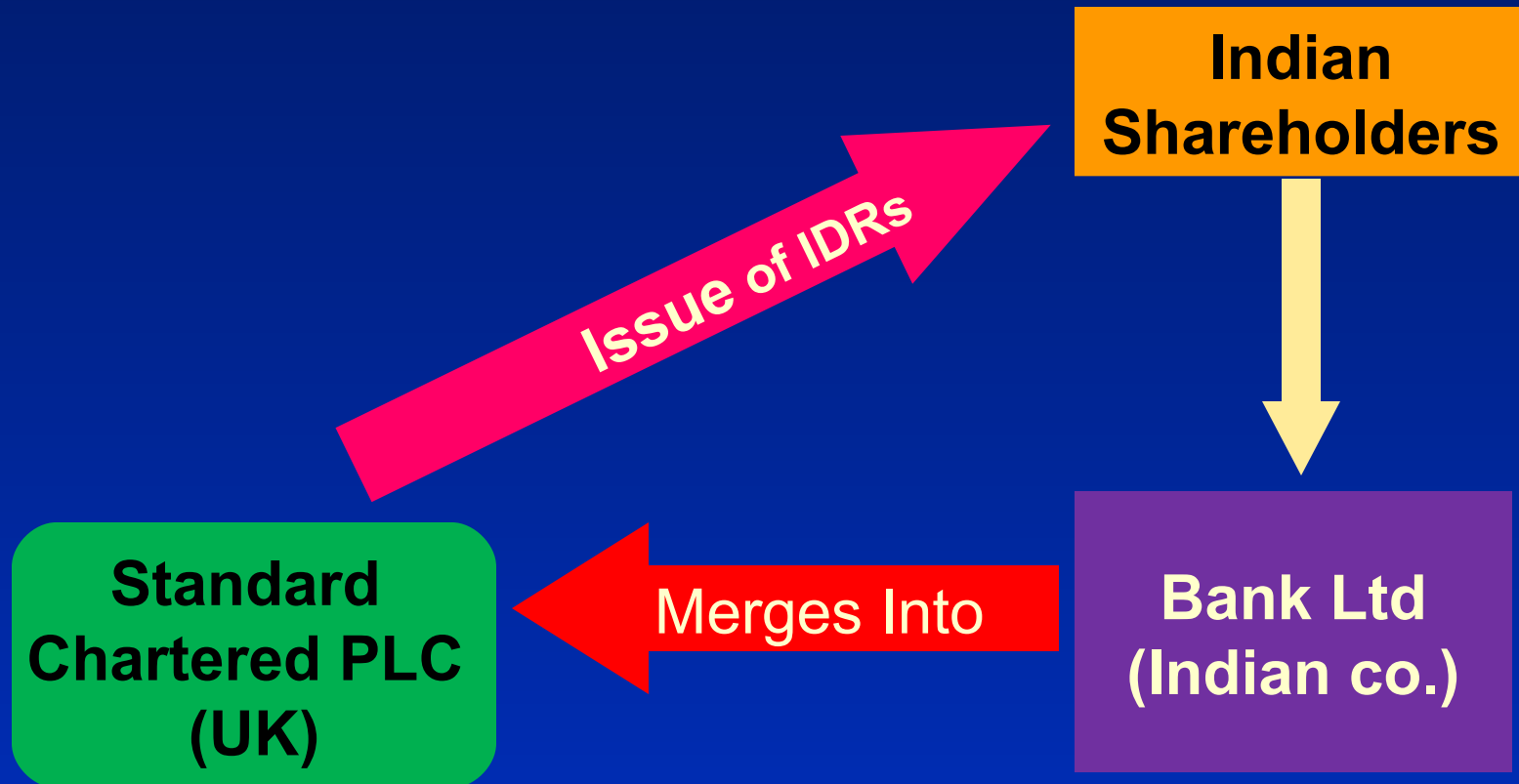
Merger of Indian into Foreign Co.



Merger of Indian into Foreign Co.

- Is it possible u/s.394 of Companies Act?
 - Possible under new Companies Bill?
 - **Consideration:** Cash or IDRs
 - Not Foreign Shares
 - RBI's Permission? Required under FEMA
 - Tax
 - No exemption u/s. 47?
 - Is Amalgamation a Transfer?
-

Merger of Indian into Foreign Co.





Slump Sale

Clause 180

Chapter XII

Slump Sale

- **Sale / lease of Whole / Substantially whole of Undertaking**
 - Currently, requires only **Ordinary Resolution**
 - PB for Listed Cos.
 - **Now Requires Special Resolution of SH for all Cos.**
 - PB now for all Cos. Hence, may come even for U/L Cos.
- **Undertaking now defined:**
 - As per Audited B/S of preceding FY:
 - Investment In Und. > **25% of Net Worth** of Co.; or
 - Income of Und. > **20% of Total Income** or Co.

Slump Sale

- **NW: Sh. Cap + Reserves of Profit + Premium**
 - **Substantially the whole of Undertaking**
 - **20% +** of value of undertaking as per last FY's A/c
 - **Undertaking u/ss. 2(19AA) & 2(42C) of IT Act**
 - **Must constitute a Business Activity**
 - **Not mere Assets & Liabilities or combination**
 - **Yet applicable for deciding whether slump sale u/s.50B**
-

Slump Sale

Q. Would shares constitute an Undertaking?

- If shares are a Controlling Interest
- Holding of Invst. Is a business activity?
- **RC Cooper (SC):**
“consists of assets, rights & obligations of a going concern”



Loans & Invst.

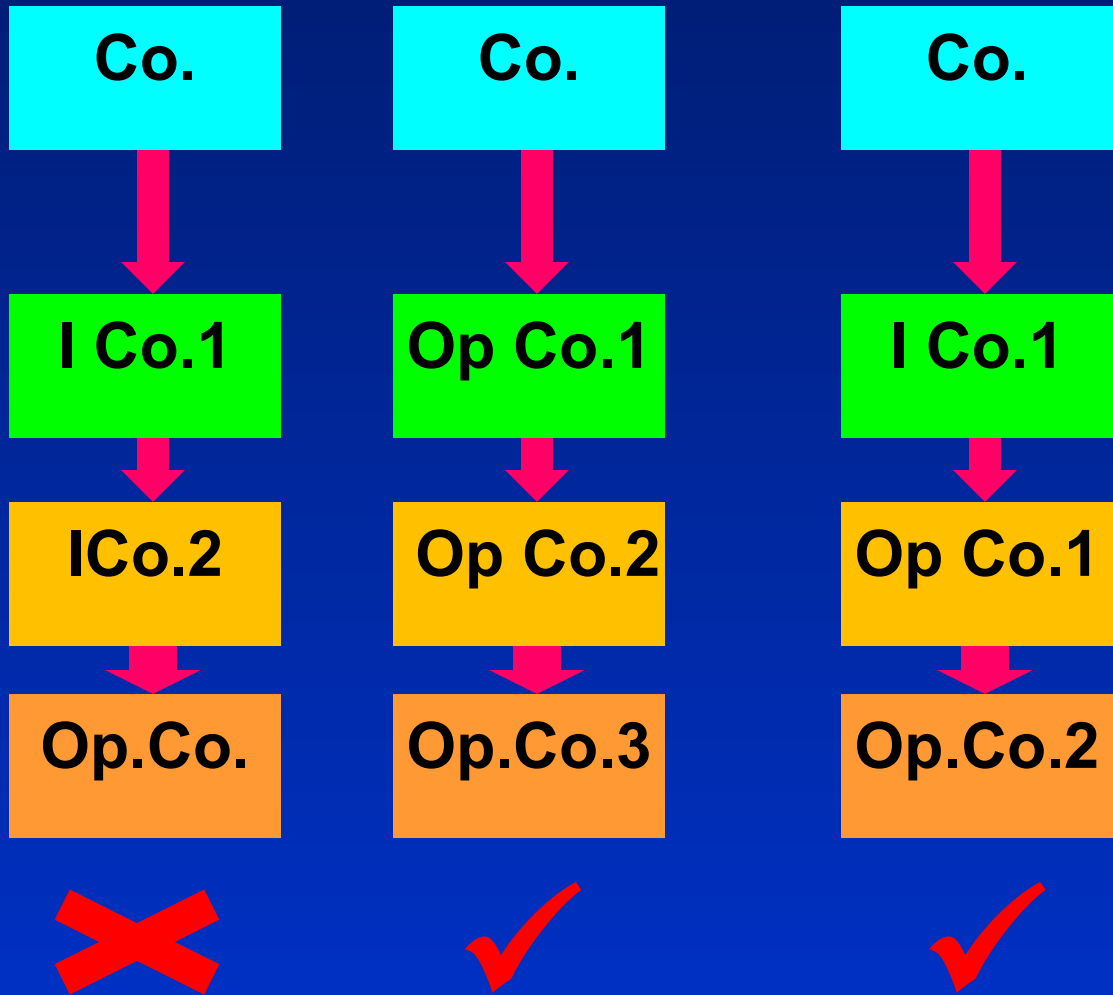
Clause 186

Chapter XII

2 Layers of ICos.

- **Max. 2 layers** of Investment Cos.
 - NA to ODI ~ RBI frowns upon multi-layer structures
 - NA if Subsidiary has Invst. Sub. under any Law
 - Applicable even to **Investment NBFCs**
 - Thus, would even apply to **CICs**
 - Applicable even to **Private Ltd Cos.**
 - Investment Cos ~ Co. whose Principal Business is acquisition of SH / Deb / Securities.
 - No such restriction in Current Act
-

2 Layers of ICos.



L & I Provisions

- **Co. Cannot:**
 - Give loan / guarantee to **any person**
 - Currently, restricted to any body corporate
 - **Now covers any person ~ Ind. / Firm / HUF / AOP/ Trust**
 - Invest in securities of any Body Corporate
 - Exceeding 60% of Cap + Free Reserves + Premium or 100% of Free Reserves + Premium
 - Free Reserves ~ Excludes:
 - Revaluation
 - Changes in Carrying Amt. / Measuring @ FMV of A/ L
-

Inter-corporate L & I

- No loan @ Rate < Yield on 1 / 3 / 5 / 10 Yr G-sec closest to Tenor of Loan
 - Currently, Not below Bank Rate (9.50%)
 - Exemption available to Pvt Co. dropped
 - Disclosures in A/c:
 - **Purpose** for which loan / guarantee / security would be used by recipient
 - Cannot give loan / guarantee if default in Deposit repayment
-

Inter-corporate L & I

- **Foll. SEBI Intermediaries:**

- **Stock Broker**
- **R&T Agent**
- **Banker / Registrar to Issue**
- **Merchant Banker**
- **Underwriter**
- **PMS / Investment Advisor**

Cannot take ICDs exceeding prescribed limits

- **Q. Logic? Why in Act when SEBI not providing**
-

Exemptions

S. 372A Companies Act, 1956	Cl. 186 Companies Bill, 2012
Entire Section NA to Private Co.	Applicable to Private Co
Entire Section NA to Invst. Co.	2 Layer also for Invst. Co. Exemption only for Acqn. by Invst
NA to Loan by Holdco to WOS	Now Applicable even to such Loan
NA to Guarantee by Holdco to WOS	Applicable even to such Guarantee
NA to Investment by Holdco in securities of WOS	Applicable even to such Investment
No exemptions for Investment NBFC	Invst. NBFC exempt except 2-layer

Penalty

S. 372A Companies Act, 1956	Cl. 186 Companies Bill, 2012
Co.: Rs. 50,000	Co. : Rs. 25000 – 5 lakhs
Officer: Rs. 50,000 OR a term of up to 2 yrs	Officer: Rs. 25000 – 1 lakh AND a term of up to 2 years
If loan / guarantee repaid in full, no jail. If repaid partially, jail term reduced pro-rata.	Relief Removed
Persons knowingly party to default liable to make good the same	Removed



Preference Shares

Clause 55

Chapter IV

Tenure of Preference Shares

- **PS for a Max. Tenure of 20 years**
 - **Not Applicable for Infrastructure Projects**
 - Redemption of specified % of shares on Annual basis at option of Preference SH
 - **Infrastructure Projects:**
 - Transport ~ Air / Water / Rail / Road
 - Agri ~ Storage / Preservation
 - Telecom
 - **Real Estate Development** / Tourism / Urban Devlp.
-

Tenure of Preference Shares

- **Infrastructure Projects:**
 - Power
 - Petroleum
 - Housing
 - **RPS of tenure more than 20 years**
 - Domestic PE Funding in Real Estate
 - Redemption after more than 20 years
 - Not useful for FDI in Real Estate
 - FDI requires CCPS
-

Redemption of RPS

- **Redemption up to Face Value**
 - Transfer to CRR
 - **Premium on Redemption**
 - Meet out of Profits or Securities Premium A/c.
 - **Certain prescribed Cos. + A/c comply with AS**
 - **Can only use Profits for Premium** on Redemption
 - For RPS issued under New Act
 - Cannot use Securities Premium
 - Very Important Restriction
-

Redemption of RPS

- **Co. unable to Redeem RPS or pay Dividend**
 - **Special Resolution** of RPS Holders
 - 3/4th Majority
 - **NCLT's** Approval
 - Issue further RPS equal to such amount
 - RPS deemed to have been redeemed
 - Fresh Issue Not deemed to be an Increase in or Reduction of Share Capital of Co.
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Reduction of Capital

Clause 66

Chapter IV

Reduction

- NCLT's permission required
- Not possible if in arrears in repayment of Public Deposits or Interest on same
- Notice to CG, RoC, SEBI, Creditors
 - Must make representations within 3 months
 - Else, deemed permission
- No Sanction unless Auditor's Certificate :
A/c Treatment in Scheme as per AS

Q. Which Standards?

Reduction

- **Co. must publish NCLT's Order**
 - Failure: Fine of Rs. 5 to 25 lakhs
- **Co. must file Order with ROC within 30 days**
- **If Officer conceals name of Creditor**
 - Liable for fraud
 - Term of up to 2 years and /or fine of Rs. 1 - 5 lakhs
- **Discretionary Powers of Tribunal removed:**
 - Dispense with Creditor's consent
 - Add the words "and Reduced" to name of Co.



Transfer of Shares

Clause 58

Chapter IV

Restrictions on Transfer

- **Restrictive Covenants in Articles**
 - **Valid against Co. only if part of Articles, else remains a Private Contract**
 - **Whether Valid in a Public Listed / Unlisted Co.?**
 - **No pre-emptive rights allowed in Public Cos.?**
 - **Pre-emptive rights possible in Public Cos.?**

Restrictions on Transfer

■ New Companies Bill

- Securities in Public Co. freely transferable
 - But **Contract** in respect of **transfer of securities in Public Co.** shall be **enforceable**
 - Gives legal sanctity to **Pre-emptive Rights** in a Public Co.
 - & can even be in Listed Cos. ~ Bharti / UTV / Biocon / Dainik Jagran / Patni
 - Sets at rest a big controversy
-



Securities Premium A/c

Clause 52

Chapter IV

Use of Securities Premium A/c

Certain Prescribed Companies whose Accounts comply with AS	Other Companies
Paying up unissued equity shares as Bonus shares	Issue of unissued shares as Bonus shares
Writing off Exp / Commission / Discount on issue of Equity Shares	W/o Exp / Commission / Discount on issue of Shares or Debentures
Buyback of Securities	Buyback of Securities
--	Premium on Redemption of RPS
--	W/o Preliminary Exp. of Company

Balance Sheet Clean-up

- **Share Premium used for**
 - **Writing-off DRE, Misc. Expenditure, Goodwill**
 - **Court Process u/s. 100 r.w. 78**
 - **Same would continue under New Companies Bill**
 - **Examples:**
 - **Tata Motors**
 - **Voltas**
 - **M&M**
 - **HFCL**
 - **Reliance Communications**
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Buyback of Shares

Clauses 67-70

Chapter IV

Buyback

- **Not much change:**
 - **Board Approved: 10% of Eq. Cap + Free Res.**
 - **Spl. ResIn.: 25% of Paid-up Cap + Free Res.**
 - **Max. 25% of Eq. Cap. / FY**
 - **Free Reserves Defn.:**
 - **Earlier reference to s.372A**
 - **Includes Securities Premium - Now Wider**
 - **Odd lot buyback under Act dropped**
 - **SEBI G/L yet contains**
-

Buyback

- **Min. Gap between 2 Buybacks: 1 Year**
 - **Currently only for Board approved Buybacks**
 - **Now for both Board & EGM Approved?**
 - **Placement of Proviso**
 - **Can now buyback even if:**
 - **Co. defaulted in Deposit / RPS / Loan to FI**
 - **Provided default is Rectified; and**
 - **At least 3 years have elapsed since Rectification**
-

Buyback

- **No Buyback allowed if Default in Dividend provisions**
- **Penalty increased:**
 - **Co.: Rs. 1 – 3 lakhs**
 - **Officer: Term up to 3 years &/or fine of Rs. 1-3 lakhs**

Purchase of Own Shares

- No financial assistance for purchasing own / Holdco's shares
 - NA to loans to Employees
 - Other than Directors or Key Management Personnel
 - **Currently only applies to Directors**
 - Loan Limited to 6 months salary ~ same as today

Purchase of Own Shares

- NA to Scheme for purchase of shares in Co. / Holdco by Trustees of EWT
 - Spl. Resl. Now required for such a Scheme
 - SEBI ESOP G/L now do not allow EWT to buy shares from Market. EWT must be issued Shares by Co. alone
 - No limit on loan as currently
 - Penalty:
 - Co. : Rs. 1 – 25 lakhs
 - Officer: Term 1-3 yrs and Fine Rs. 1 – 25 lakhs
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Thank You !!
