

KEY CONCEPTS

- Mergers and Acquisitions – Primary Factors
- Funding through financial instruments
- Preferential allotment
- External Commercial Borrowing (ECB)

Learning Objectives

To understand:

- Reason for Mergers and Acquisitions
- Process of Funding
- Preferential allotment
- Option is a derivative contract
- Funding through stock swaps
- Funding through ECB
- Funding through leveraged buyout (LBO)
- Protection of Minority Interest

Lesson Outline

- Planning for mergers and acquisitions
- Process of Funding
- Funding through various types of Financial Instruments
- Funding Through Equity Shares
- Preferential Allotment
- Funding through Preference Shares
- Funding through Options or Securities with
- Differential rights
- Funding through Swaps or Stock to Stock Mergers
- Funding through Financial Institutions and Banks
- Funding through Rehabilitation Finance
- Funding through Leveraged Buyouts
- Minority and 'Minority Interest' under the Companies Act, 2013
- Legal Provisions of the Companies Act, 2013
- Protection of Minority Interest
- Case Laws/ Judicial pronouncements
- Family holdings and their management
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings

REGULATORY FRAMEWORK

- The Companies Act, 2013
- The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016
- SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018

PLANNING AND STRATEGY FOR MERGER AND ACQUISITIONS

Strategies play an integral role when it comes to mergers and acquisitions. A sound and effective strategic decision and procedure is very important to ensure success and fulfilling of expected desires. Every company has a different culture and follows different strategies to define their merger and acquisition appetite. There are various strategic reasons for companies to consider making an acquisition and a successful takeover can help companies achieve their strategic synergy objectives as well as increase cost effectiveness within the business.

The process of merging with another company or acquiring a company is complex. In addition to the legal ramifications, companies must be aware of the potential tax implications as well as ensuring that the terms of the deal benefit both parties. Often companies rely on strategic advisors, lawyers and professionals to negotiate on their behalf in order to obtain the best possible deal within the framework of the applicable laws.

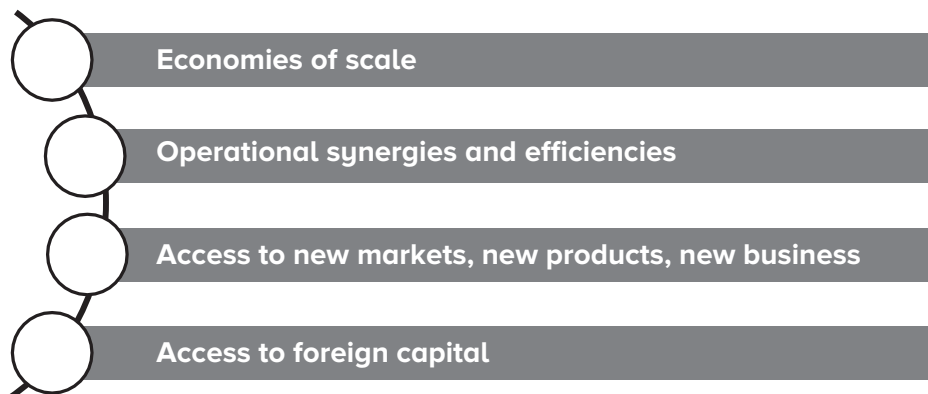
Although many companies consider mergers and acquisitions as opportunities for growth, they can provide a viable business solution for companies attempting to downsize or companies which are looking for an effective exit strategy. By divesting company assets, the company can reduce costs and streamline its operations leading to an increase in efficiency and profitability. If companies have an underperforming subsidiary, they can rely on mergers and acquisitions to dispose of or merge the asset effectively and in to achieve overall business synergy.

Strategic assessments of companies, industry expertise, due diligence, merger integration, and operational improvements represent areas where knowledge and skills are required for the success of a merger or acquisition.

The Indian business environment is undergoing massive change with almost all relevant corporate laws/regulations in India having been revamped in the last few years, be it the Takeover Code, delisting guidelines, Companies Act, Accounting, Competition Law, Tax laws, Foreign Exchange Management Act (FEMA) regulations, impacting both inbound and outbound investments.

With the opening up of the economy and the government's thrust on various initiatives, such as AtmaNirbhar, Make in India and Digital India, inbound M&A activity is only going to be on the rise. Further global outlook towards India has become positive than ever before with an improved ranking in World Bank's Ease of Doing Business ranking and in the World Economic Forum's Global Competitiveness Index. India is seen as a growing economic superpower across the globe and is one of the best performing emerging markets even in the face of global financial meltdowns.

Whatever may be the reason for any M&A, the benefits are multifold, to enumerate a few:



Mergers and Acquisitions – Primary Factors to be considered

Merger or amalgamation is undertaken for acquiring cash resources, eliminating competition, saving on taxes or influencing the economies of large-scale operations. Therefore, there are host of factors, which require consideration before initiating a merger or amalgamation exercise. A detailed list of the primary factors requiring consideration before initiating a merger or amalgamation from the economic, commercial and legal perspective is explained as follows:

(i) Identification of Parties

Will one or more businesses be transferred to an existing firm or a newly formed entity? Consider drafting heads of terms, do you require a confidentiality agreement? Do you require an exclusivity agreement? Review financial liability of the parties - undertake appropriate searches and enquiries.

(ii) Due Diligence

Carry out legal, commercial, tax and financial due diligence on the parties entering into the transaction. This will help in identifying risk areas along with any necessary consent you will need to obtain.

(iii) Any third-party consents required?

Ascertain if any third-party consents or no objections would be required such as from banks, business contracts, partner/shareholder consents. These should emerge from due diligence. Consider also regulatory consents/licences that may be required.

(iv) Taxation

It will be necessary to ascertain the most suitable tax structure for the transaction and, in particular, the way in which the consideration should be structured, at an early stage, therefore consider consulting tax advisors.

(v) Risk

Sharing of risk – What kind of indemnities/warranties/representations be considered? Should there be a cap on such indemnities and warranties?

(vi) Will the transaction impact on existing loan/finance arrangements?

Check loan documents and constitution documents to see whether any proposed borrowing would be a breach of any existing funding. What will happen in relation to third party funding of the Seller business? Confirm that there are no restrictions on the disposal of the target business or any of its assets. How will the merged business be funded?

(vii) Existing Charges/Modifications over the assets to be acquired

Are there any mortgages, charges or debentures over any of the business assets? If yes, obtain copies and consider how they are to be satisfied/discharged. If there are floating charges, obtain certificates of non-crystallisation/release. Whether there is any pledge on shares? Obtain a Search Report from a Practicing Company Secretary.

(viii) Guarantees and indemnities (bank or other)

Has the Seller given or received any guarantees or indemnities in relation to the business? If yes, then obtain copies (including details of arrangements) and consider in particular, how to ensure the business continues to have the benefit of relevant guarantees.

(ix) Licences

Will the Buyer have all other licences which it needs to operate the business?

(x) Supply contracts

Will supply contracts be transferred or need to be terminated? How will this be done?

(xi) What IP is used in the business?

Obtain a full list of trademarks, service marks, patents, designs, domain names, copyright and other registered and unregistered intellectual property used in the business. Carry out trade mark and patent searches as may be appropriate through an IPR Attorney.

PROCESS OF FUNDING

The process of funding in the case of mergers and takeovers may be arranged by a company in a number of ways. It may be from its own funds, consisting of further issue of equity and preference share capital, through raising of borrowed funds by way of issuing various financial instruments like Non-Convertible Debentures. A company may borrow funds through the issue of debentures, bonds, external commercial borrowings, issue of securities, loans from Central or State financial institutions, banks, etc. Broadly we can divide them into three categories as described below:

Internal accruals: The retained earnings and free reserves accumulated over a period of time by well-managed companies may be utilized for the purpose of restructuring.

Borrowings: The required funds could be raised from banks and financial institutions or through external commercial borrowings or by issue of debentures.

Issue of securities: Funds may also be raised through issue of equity shares, preference shares and other securities, depending upon the quantum and urgency.

Cash deal vs. Stock deal for acquisition

In a Cash Deal, the acquiring company pays the shareholders of the target company a predetermined amount of cash per share. Here's an example:

Company A, a large tech conglomerate, decides to acquire Company B, a promising startup specializing in artificial intelligence technology, for \$100 million in cash.

Company A offers to purchase all outstanding shares of Company B at \$10 per share.

Company B's shareholders agree to the deal, and upon completion of the acquisition, they receive \$10 in cash for each share they own.

Company A gains full control of Company B's assets, technology, intellectual property, and talent by paying cash to the shareholders.

Advantages of Cash Deals are:

Certainty of payment: Shareholders receive a fixed amount of cash, providing certainty and liquidity.

Simplified valuation: The valuation of the target company is straightforward based on the agreed-upon cash amount per share.

Minimal dilution: Existing shareholders of the acquiring company are not diluted by issuing additional shares.

In a Stock Deal, the acquiring company offers its own shares to the shareholders of the target company as consideration for the acquisition. Here's an example:

Company X, a growing e-commerce platform, plans to acquire Company Y, a smaller online marketplace, through a stock-for-stock transaction.

Company X proposes to exchange 1 share of its stock for every 2 shares of Company Y's stock.

Company Y's shareholders accept the offer, entitling them to receive Company X's stock in exchange for their Company Y shares.

Upon completion of the acquisition, Company Y's shareholders become shareholders of Company X, owning a portion of its equity based on the agreed exchange ratio.

Advantages of a Stock Deal are:

Tax benefits: Depending on the jurisdiction and structure, stock deals may offer tax advantages compared to cash deals.

Flexibility in valuation: Stock deals allow for flexibility in valuation, as the acquiring company's stock price can fluctuate over time.

Potential for synergies: Aligning interests through stock ownership can foster collaboration and integration between the two companies.

Considerations:

Market conditions: The choice between cash and stock deals may depend on prevailing market conditions, availability of financing, and the relative valuations of the companies involved.

Shareholder preferences: The preferences of both the acquiring company's shareholders and the target company's shareholders play a significant role in determining the structure of the deal.

Regulatory requirements: Regulatory considerations, including antitrust laws and securities regulations, may influence the choice between cash and stock transactions.

Overall, whether a cash deal or a stock deal is preferable depends on various factors, including the strategic objectives of the acquiring company, the financial position of both parties, and the prevailing market dynamics.

An all cash, all stock offer is an offer by one company to purchase all of another company's shares from its shareholders for cash. In this type of proposal, one way for the acquiring company to try to get uncertain shareholders to agree to a sale is to offer a premium over the price for which the shares are presently trading. The acquired company's shareholders may earn a capital gain if the combined entity realizes cost savings.

The prices of the shares of the company being acquired may rise, particularly if the company was bought at a premium. Premium is offered for making the deal lucrative for the seller company and is beneficial for the acquirer in the long run.

For example, the acquirer may announce cost savings from the acquisition, which typically means reducing staff count or removal of redundant technology and systems. Although layoffs are bad for the employees, for the combined company, it means enhanced profit margins through lower costs. It can also mean a higher stock price for shareholders of the acquired company and perhaps the acquirer as well.

Also, if the acquired company's stock price has been low, shareholders might have the opportunity to exit and that too at a premium if the acquired company's stock surges on the news of the acquisition.

The acquiring company may not have all of the cash on its balance sheet to make an all cash, all stock acquisition. In such a situation, a company can tap into the capital markets or creditors to raise the necessary funds.

If the acquiring company was not a publicly-traded company already, it could issue an IPO whereby they would issue shares of stock to investors and receive cash in return. Existing public companies could issue additional shares (by way of preferential issue or otherwise) to raise cash for an acquisition as well.

Limitations to All Cash, All Stock Offers

Although cash transactions can appear to be an easy, straightforward way of acquiring another company, it is not always the case. All stock offer for shareholders is a taxable event. Even if they sell their shares to the acquirer at a premium, taxes may take a significant chunk of their earnings if the sale price is higher than the acquisition price investors paid when they initially purchased their shares. However, all shares of stock that are made at a price higher than the stock's cost basis constitutes a taxable event, so this particular sale is not that different from a tax standpoint from a normal sale on the secondary market.

Another possible acquisition method would be for the acquiring company to offer shareholders an exchange of all the shares they hold in the target company for shares in the acquiring company. These stock-for-stock transactions are not taxable. The acquiring firm could also offer a combination of cash and shares.

The main distinction between cash and stock transactions is that, in cash transactions, acquiring shareholders take on the entire risk that the expected synergy value embedded in the acquisition premium will not materialize. In stock transactions, that risk is shared and diversified with selling shareholders. More precisely, in stock transactions, the synergy risk is shared in proportion to the percentage of the combined company the acquiring and selling shareholders each will own.

FUNDING THROUGH VARIOUS TYPES OF FINANCIAL INSTRUMENTS

Funding may be made through various types of financial instruments. Funding may be done through any of the following modes:

- Funding through Equity Shares.
- Funding through Preferential Shares.
- Funding through Options or Securities with Differential Rights.
- Funding through Swaps or Stock to Stock Mergers.
- Funding through External Commercial Borrowings (ECBs) and Depository Receipts (DRs).
- Funding through Financial Institutions and Banks.
- Funding through Rehabilitation Finance.
- Funding through Leveraged Buyouts.

FUNDING THROUGH EQUITY SHARES

Equity share capital- It can be considered as permanent capital of the company. Equity needs no servicing as the company is not required to pay to its equity shareholders the fixed amount return in form of interest which would be the case if a company were to borrow by issue of bonds or other debt instruments.

Raising money from the public by issue of shares or bonds or debentures is a time consuming process and involves huge costs. It would require numerous things to be in place and several rounds of discussion would be required to take place between the directors and key promoters having the controlling stake, between the Board of Directors (BOD) and consultants, analysts, experts, Company Secretaries, Chartered Accountants & lawyers. Furthermore, it requires several legal compliances.

Thus, planning for an acquisition by raising funds through public issue may be complicated and long drawn process.

Issue of securities for listed companies

The Securities and Exchange Board of India (the “SEBI”) is the nodal authority regulating entities that are listed and to be listed on stock exchanges in India. SEBI through SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (“SEBI ICDR”) regulates the issue of securities of such companies.

These regulations apply to:

- (a) a public issue;
- (b) a rights issue, where the aggregate value of specified securities offered is fifty lakh rupees or more;
- (c) a preferential issue;
- (d) an issue of bonus shares by a listed issuer;
- (e) a qualified institutional placement by a listed issuer;
- (f) an issue of Indian Depository Receipts

PREFERENTIAL ALLOTMENT

Before preferential allotment, let us first look at the various options of raising further capital for companies under Companies Act, 2013. Section 62 of the Act has listed some of the possible options.

Some of the common requirements of IPO and rights issue have been listed below:

Rights Issue

Section 62(1)(a) of Companies Act 2013

- Issue where new shares are offered to existing shareholders proportionately

Preferential Offer

Section 62(1)(c) of Companies Act 2013

- Issue of shares or other securities to any select person or group of persons on a preferential basis, whether or not those persons include the persons referred to in clause (a) of clause (b), either for cash or consideration other than cash.

Preferential allotment, in simple words, is an offer for allotment to a select group of identified persons, and does not include public issue, rights issue, ESOP, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities.

The provisions of preferential allotment are laid under section 62(1)(c) read with Rule 13 of Chapter IV- The Companies (Share Capital and Debentures) Rules, 2014. This further leads us to follow provisions of Section 42 read with Rule 14 of the Chapter III-Companies (Prospectus and Allotment of Securities) Rules, 2014, which deals with private placement. Hence, for any preferential offer, we need to compulsorily follow the provisions of private placement.

Further, listed companies have to comply with the provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 for the preferential allotment. Listed companies may also raise funds by way of qualified institutional placement. Qualified institutional placement is the special type of the preferential allotment made only to the qualified institutional buyers (QIB).

Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 is applicable for preferential allotment in case of listed companies. Listed companies in addition to Companies Act, 2013 also need to follow these regulations. Some of its important features have been mentioned below:

Sl. No.	Particulars	Description
1.	Definition of preferential issue	It means an issue of specified securities by a listed issuer to any select person or group of persons on a private placement basis. It does not include an offer of specified securities made through a public issue, rights issue, bonus issue, employee stock option scheme, employee stock purchase scheme or qualified institutions placement or an issue of sweat equity shares or depository receipts issued in a country outside India or foreign securities.
2.	Preliminary conditions	A listed company can make preferential issue only if following conditions are satisfied: (a) a special resolution has been passed by its shareholders; (b) all the equity shares, if any, held by the proposed allottees in the issuer are in dematerialised form; (c) the issuer is in compliance with the conditions for continuous listing of equity shares as specified in the listing agreement with the recognised stock exchange where the equity shares of the issuer are listed; (d) the issuer has obtained the Permanent Account Number of the proposed allottees.
3.	Restriction	The issuer shall not make preferential issue of specified securities to any person who has sold any equity shares of the issuer during the six months preceding the relevant date.
4.	Allotment	Allotment pursuant to the special resolution shall be completed within a period of fifteen days from the date of passing of such resolution.

FUNDING THROUGH PREFERENCE SHARES

One more source of funding a merger or the takeover may be through the issue of preference shares, but unlike equity capital, issue of the preference share capital as purchase consideration to the shareholder of merging company mostly includes the payment of fixed preference dividend at a fixed rate.

Thus, before deciding to raise funds for this purpose, by an issue of preference shares, the Board of the company has to ensure that the merged company or Target Company would be able to yield sufficient profits for covering additional liability in respect of the payment of preference dividend. A company that is funding its merger or takeover proposal through an issue of preference shares is required to pay a dividend to such shareholders as per agreed terms.

Examples of Indian companies issuing preference shares are as under:

Tata Motors, one of India's leading automobile manufacturers, has issued preference shares to raise capital for various purposes, including expansion, working capital requirements, and debt restructuring. These preference shares often come with fixed dividend rates and priority over common shareholders in terms of dividend payments and asset distribution in the event of liquidation.

HDFC Bank, one of India's largest private sector banks, has issued preference shares as part of its capital-raising efforts. These preference shares typically offer investors a fixed dividend rate and may also come with conversion rights into common shares under certain conditions. HDFC Bank has utilized preference shares to strengthen its Tier I capital base and support its growth initiatives.

Reliance Industries Limited (RIL), a diversified conglomerate with interests in petrochemicals, refining, telecommunications, and retail, has issued preference shares in the past. These preference shares have been used to raise funds for investment in its various business segments, including the expansion of its digital services platform, Jio Platforms. RIL's preference shares may offer investors attractive dividend rates and priority in capital repayment.

ICICI Bank, one of India's leading private sector banks, has issued preference shares to strengthen its capital position and support its growth plans. These preference shares typically offer investors fixed dividend rates and may also include conversion options into common shares at predetermined terms. ICICI Bank has used preference shares as a strategic tool for optimizing its capital structure and enhancing its financial flexibility.

Adani Ports and Special Economic Zone (APSEZ), India's largest port operator, has issued preference shares to fund its expansion projects and acquisitions in the port and logistics sector. These preference shares may offer investors preferential dividend rates and priority in dividend payments. APSEZ's preference shares have been instrumental in raising capital for its ambitious growth plans and infrastructure development initiatives.

Issue and redemption of preference shares:

Section 55 of the Act read with Rule 9 and Rule 10 of the Companies (Share Capital and Debentures) Rules, 2014 deals with the procedure involved in issue and redemption of preference shares. SEBI regulations shall be followed, in case a company intends to list its preference shares on a recognized stock exchange.

Some of the features pertaining to issue and redemption of preference shares have been listed in the following table:

Sl. No.	Particulars	Description
1.	Issue of irredeemable preference shares	Not permitted, after the commencement of Companies Act, 2013.

Sl. No.	Particulars	Description
2.	Maximum period of redemption	<p>Preference shares shall be redeemed within a period not exceeding twenty years from the date of their issue.</p> <p>However, a company may issue preference shares for a period exceeding twenty years but not exceeding thirty years, for infrastructure projects, subject to the redemption of a minimum ten percent of such preference shares per year from the twenty first year onwards or earlier, on proportionate basis, at the option of the preference shareholders.</p> <p>The term “infrastructure projects” means the infrastructure projects specified in Schedule VI. [For Schedule VI, refer to Annexure-I, at the end of this chapter]</p>
3.	Authority to issue	Yes, authorization to issue preference shares is required in Articles of Association of Company. Further it also requires the approval of shareholders in general meeting through special resolution.
4.	Particulars of resolution	<ul style="list-style-type: none"> (a) the priority with respect to payment of dividend or repayment of capital vis-a-vis equity shares; (b) the participation in surplus fund; (c) the participation in surplus assets and profits, on winding-up which may remain after the entire capital has been repaid; (d) the payment of dividend on cumulative or non-cumulative basis. (e) the conversion of preference shares into equity shares. (f) the voting rights; (g) the redemption of preference shares.
5.	Explanatory statement	<p>The explanatory statement shall provide complete material facts concerned with the issue of such shares, including-</p> <ul style="list-style-type: none"> (a) the size of the issue and number of preference shares to be issued and nominal value of each share; (b) the nature of such shares i.e. cumulative or non - cumulative, participating or non-participating, convertible or non - convertible; (c) the objectives of the issue; (d) the manner of issue of shares; (e) the price at which such shares are proposed to be issued; (f) the basis on which the price has been arrived at; (g) the terms of issue, including terms and rate of dividend on each share, etc.; (h) the terms of redemption, including the tenure of redemption, redemption of shares at premium and if the preference shares are convertible, the terms of conversion; (i) the manner and modes of redemption; (j) the current shareholding pattern of the company; (k) the expected dilution in equity share capital upon conversion of preference shares.
6.	Preconditions for issue	Shall not have any subsisting default in the redemption of preference shares issued either before or after the commencement of the Act or in payment of dividend due on any preference shares.
7.	Preconditions for redemption	Such shares shall be fully paid, before redemption.

Sl. No.	Particulars	Description
8.	Manner of redemption	Redemption shall be done out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption. A company may redeem its preference shares only on the terms on which they were issued or as varied after due approval of preference shareholders under section 48 of the Act. Preference shares may be redeemed: (a) at a fixed time or on the happening of a particular event; (b) any time at the company's option; or (c) any time at the shareholder's option.
9.	Inability to redeem or pay dividend	A company if is not in a position to redeem any preference shares or to pay dividend, if any, it may, with the consent of the holders of three-fourths in value of such preference shares and with the approval of the Tribunal on a petition made by it in this behalf, issue further redeemable preference shares equal to the amount due, including the dividend thereon.
10.	Transfer to Capital Redemption Reserve Account	A sum equal to the nominal amount of the shares to be redeemed shall be transferred to CRR account from profits, if such shares are proposed to be redeemed out of the profits of the company.
11.	Impact on share capital	Issue of further redeemable preference shares or the redemption of preference shares shall not be deemed to be an increase or a reduction, in the share capital of the company.
12.	Register of Members	Register of Members maintained under section 88 shall contain the particulars in respect of such preference shareholder(s).

FUNDING THROUGH OPTIONS OR SECURITIES WITH DIFFERENTIAL RIGHTS

Companies can also restructure their capital through derivatives and options as the means of raising funds. Indian companies are allowed to issue derivatives or options plus the shares and quasi-equity instruments with differential rights as to dividend and/or voting. Companies may also issue non-voting shares or the shares with differential voting rights to shareholders of Transferor Company. Such issue gives companies an additional source of fund without interest cost and without the obligation to repay, as these are other forms of the equity capital.

The promoters of the companies may be interested in such form of consideration as it does not impose any kind of obligation and there is no loss/dilution of control in case of non-voting shares.

Option is a derivative contract: An option gives the holder the right but not the obligation to buy or sell something in the future.

There are two types of Options:

1. Put option- is one which gives holder the right to sell particular number of shares (or any other commodity) at a given price and typically one buys put options, if the price of the stock is expected to decline.
2. Call option- gives the holder the right to buy the shares at a predetermined period of time and at a predetermined price. Typically, one buys call options if the price of the underlying stock is expected to rise.

Definition given by the Securities Contracts (Regulation) Act, 1956 (SCRA):

The term derivative has been defined under section 2(ac) in Securities Contracts (Regulation) Act, 1956 as follows:

- (a) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;
- (b) a contract which derives its value from the prices, or index of prices, of underlying securities.
- (c) commodity derivatives; and
- (d) such other instruments as may be declared by the Central Government to be derivatives.

Further in terms of section 2(d) of the Securities Contracts (Regulation) Act, 1956 “option in securities” means a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes a *teji*, a *mandi*, a *teji mandi*, a *galli*, a put, a call or a put and call in securities.

Section 20 of the SCRA which had dealt with prohibition of options in securities had been omitted by the Securities Laws (Amendment) Act, 1995. It means that the options in securities were permitted after the omission of the Section 20 of SCRA.

Securities with Differential Rights:

Section 48 of the Companies Act, 2013 deals with the variation of shareholders’ rights. This section deals with the procedure involved, when a company intends to vary rights attached with any class of shareholders. The features have been explained below:

1. **Approval of class of shareholders** - The rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class —
 - (a) if provision with respect to such variation is contained in the memorandum or articles of the company; or
 - (b) in the absence of any such provision in the memorandum or articles, if such variation is not prohibited by the terms of issue of the shares of that class.
2. **Impact on rights of other class** - The section provides that if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.
3. **Cancellation of variation** - Variation may be cancelled if, holders of not less than ten per cent of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation. They may apply to the Tribunal to cancel the variation, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal. The decision of the Tribunal on any such application shall be binding on the shareholders. The company shall, within thirty days of the date of the order of the Tribunal, file a copy thereof with the Registrar.

Equity shares with differential rights:

Companies may issue equity shares with differential rights as to dividend, voting or otherwise in compliance with Rule 4 of the Companies (Share Capital and Debentures) Rules, 2014 Some of its important features are listed below:

Sl. No.	Particulars	Description
1.	Authority to issue	The articles of association of the company authorizes the issue of shares with differential rights.

Sl. No.	Particulars	Description
2.	Approval of shareholders	The issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders: Provided that where the equity shares of a company are listed on a recognized stock exchange, the issue of such shares shall be approved by the shareholders through postal ballot.
3.	Impact on post-issue capital	The shares with differential rights shall not exceed seventy-four per cent of the total post-issue paid up equity share capital including equity shares with differential rights issued at any point of time.
4.	No default in statutory filings	The company has not defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year in which it is decided to issue such shares.
5.	No default in payment of statutory dues	The company has no subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend.
6.	No default in repayment of borrowings	The company has not defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank that has become repayable or interest payable thereon or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund to the Central Government. Provided that a company may issue equity shares with differential rights upon expiry of five years from the end of the financial Year in which such default was made good.
7.	No penalization	The company has not been penalized by Court or Tribunal during the last three years of any offence under the Reserve Bank of India Act, 1934, the Securities and Exchange Board of India Act, 1992, the Securities Contracts Regulation Act, 1956, the Foreign Exchange Management Act, 1999 or any other special Act, under which such companies being regulated by sectoral regulators.
8.	No conversion	The company shall not convert its existing equity share capital with voting rights into equity share capital carrying differential voting rights and vice versa .
9.	Disclosure in Board report	The holders of the equity shares with differential rights shall enjoy all other rights such as bonus shares, rights shares etc., which the holders of equity shares are entitled to, subject to the differential rights with which such shares have been issued.
10.	Register of Members	Register of Members shall contain all the relevant particulars of such shares along with details of the shareholders.

Tata Motors issued DVR shares to the public, providing shareholders with reduced voting rights compared to ordinary shares. These shares allowed Tata Group to raise funds while maintaining control over strategic decisions.

Bharti Airtel issued non-voting equity shares to investors, allowing them to participate in the company's growth and profitability without having voting rights in shareholder meetings.

Infosys issued Compulsorily Convertible Preference Shares to investors, which are convertible into equity shares of the company at a predetermined conversion price. These shares allow investors to participate in the company's growth while providing them with fixed dividends until conversion.

FUNDING THROUGH SWAPS OR STOCK TO STOCK MERGERS

Funding through stock swaps is a very common method. Under this method of funding, the holders of the target company’s stock receive shares of the acquiring company’s stock in lieu of the merger.

The share exchange ratio is mutually determined by the Board of Directors of both the companies on the basis of the valuation report prepared by the professionals.

Stock swap mergers might involve risk. Along with the normal risks, stock swap mergers consist of the risks associated with the fluctuations in the stock prices of two companies. The terms of deal involve an exchange of shares and are predicted on prices of the two companies’ stock at the time of the announcement, drastic changes in shares prices of one or both of companies can cause an entire deal to be re-evaluated.

FUNDING THROUGH EXTERNAL COMMERCIAL BORROWINGS (ECBs) RECEIPTS

ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters apply in totality and not on a standalone basis. The framework for raising loans through ECB comprises the following three tracks:

- **Track I:** Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years.
- **Track II:** Long term foreign currency denominated ECB with minimum average maturity of 10 years.
- **Track III:** Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years.

Various types of ECB: ECBs can be raised as:

1. Loans, e.g., bank loans, loans from equity holder, etc.
2. Capital market instruments, e.g.
 - (a) Securitized instruments (e.g. floating rate notes/fixed rate bonds/non-convertible, optionally convertible or partially convertible preference shares/debentures)
 - (b) FCCB
 - (c) FCEB
4. Buyers’ credit/suppliers’ credit.
5. Financial lease.

However, ECB framework is not applicable in respect of the investment in non-convertible debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPIs).

Available routes for raising ECB: Under the ECB framework, ECBs can be raised either under the automatic route or under the approval route. For the automatic route, the cases are examined by the Authorised Dealer Category-I (AD Category-I) banks. Under the approval route, the prospective borrowers are required to send their requests to the RBI through their ADs for examination. While the regulatory provisions are mostly similar, there are some differences in the form of amount of borrowing, eligibility of borrowers, permissible end-uses, etc. under the two routes. Except FCEBs which can be issued only under the approval route, all other forms of borrowings mentioned above can be raised both under automatic and approval routes.

Eligible Borrowers: The list of entities eligible to raise ECB under the three tracks is set out in the following table :

Track I	Track II	Track III
(i) Companies in manufacturing and software development sectors.	(i) All entities listed under Track I.	(i) All entities listed under Track II.

<ul style="list-style-type: none"> (ii) Shipping and airlines companies. (iii) Small Industries Development Bank of India (SIDBI). (iv) Units in Special Economic Zones(SEZs). (v) Export Import Bank of India (Exim Bank) (only under the approval route). (vi) Companies in infrastructure sector, Non-Banking Financial Companies - Infrastructure Finance Companies (NBFC-IFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies (CICs). Also, Housing Finance Companies, regulated by the National Housing Bank, Port Trusts constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908. 	<ul style="list-style-type: none"> (ii) Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (INVITs) coming under the regulatory framework of the Securities and Exchange Board of India (SEBI). 	<ul style="list-style-type: none"> (ii) All Non-Banking Financial Companies (NBFCs) coming under the regulatory purview of the Reserve Bank. (iii) NBFCs-Micro Finance Institutions (NBFCs-MFIs), Not for Profit companies registered under the Companies Act, 1956/2013, Societies, trusts and cooperatives (registered under the Societies Registration Act, 1860, Indian Trust Act, 1882 and State-level Cooperative Acts/ Multi-level Cooperative Act/State-level mutually aided Cooperative Acts respectively), Non-Government Organisations (NGOs) which are engaged in micro finance activities. (iv) Companies engaged in miscellaneous services viz. research and development (R&D), training (other than educational institutes), companies supporting infrastructure, companies providing logistics services. (v) Developers of Special Economic Zones(SEZs)/ National Manufacturing and Investment Zones (NMIZs).
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ECB Framework

It has been decided, in consultation with the Government of India, to rationalise the extant framework for ECB and Rupee Denominated Bonds in light of the experience gained to improve the ease of doing business. The new framework is instrument neutral and would further strengthen the AML/CFT framework.

Salient features of the revised ECB guidelines are as under:

- (i) *Merging of Tracks*: Merging of Tracks I and II as “Foreign Currency denominated ECB” and merging of Track III and Rupee Denominated Bonds framework as “Rupee Denominated ECB”.
- (ii) *Eligible Borrowers*: This has been expanded to include all entities eligible to receive FDI. Additionally, Port Trusts, Units in SEZ, SIDBI, EXIM Bank, registered entities engaged in micro-finance activities, viz., registered not for profit companies, registered societies/trusts/cooperatives and non-government organisations can also borrow under this framework.
- (iii) *Recognised Lender*: The lender should be resident of FATF or IOSCO compliant country. Multilateral and Regional Financial Institutions, Individuals and Foreign branches/subsidiaries of Indian banks can also be lenders.
- (iv) *Minimum Average Maturity Period (MAMP)*: MAMP will be 3 years for all ECBs. However, for ECB raised from foreign equity holder and utilised for specific purposes, as detailed in the Annex, the MAMP

would be 5 years. Similarly, for ECB up to USD 50 million per financial year raised by manufacturing sector, which has been given a special dispensation, the MAMP would be 1 year.

- (v) *Late Submission Fee (LSF) for delay in Reporting:* Any borrower, who is otherwise in compliance of ECB guidelines, except for delay in reporting drawdown of ECB proceeds before obtaining LRN or Form ECB 2 returns, can regularize the delay by payment of LSF as per the laid down procedure.

Masala Bonds: In 2017, RBI revised the norms for masala bonds. Masala bonds are rupee denominated bonds sold to offshore investors, who take the foreign exchange risk to earn higher interest rates compared with dollar- denominated overseas bond sales. After a review, the RBI declared that from October 3, 2017 masala bonds will no longer form part of the limit for Foreign Portfolio Investment (FPI) investments in corporate bonds and it will form part of ECB.

The proceeds of these bonds can be used for all purposes except for the following:

- (a) Real estate activities other than for development of integrated township/affordable housing projects;
- (b) Investing in capital market and using the proceeds for equity investment domestically;
- (c) Activities prohibited as per the Foreign Direct Investment (FDI) guidelines;
- (d) On-lending to other entities for any of the above objectives; and
- (e) Purchase of land.

‘Depository Receipt’ means a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction on the back of permissible securities issued or transferred to that foreign depository and deposited with a domestic custodian and includes ‘Global Depository Receipt’ as defined in section 2(44) of the Companies Act, 2013 as any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts.

The rules relating to the GDR are contained in Depository Receipts Scheme, 2014, which was issued *vide* Notification No. F. No. 9/1/2013-ECB dated 21st October, 2014.

Eligibility:

1. The following persons are eligible to issue or transfer permissible securities to a foreign depository for the purpose of issue of depository receipts:
 - (a) any Indian company listed or unlisted, private or public;
 - (b) any other issuer of permissible securities;
 - (c) any person holding permissible securities; which has not been specifically prohibited from accessing the capital market or dealing in securities.
2. Un-sponsored depository receipts on the back of listed permissible securities can be issued only if such depository receipts:
 - (a) give the holder the right to issue voting instructions; and
 - (b) are listed on an international exchange.

Issue: The following is the procedure for the issue of depository receipts:

- A foreign depository may issue depository receipts by way of a public offering or private placement or in any other manner prevalent in a permissible jurisdiction;
- An issuer may issue permissible securities to a foreign depository for the purpose of issue of depository receipts by any mode permissible for issue of such permissible securities to investors;

- The holders of permissible securities may transfer permissible securities to a foreign depository for the purpose of the issue of depository receipt, with or without the approval of issue of such permissible securities through transactions on a recognized stock exchange, bilateral transactions or by tendering through a public platform.

Limits: The aggregate of permissible securities which may be issued or transferred to foreign depositories for issue of depository receipts, along with permissible securities already held by persons resident outside India, shall not exceed the limit on foreign holding of such permissible securities under the Foreign Exchange Management Act, 1999.

Pricing: The permissible securities shall not be issued to a foreign depository for the purpose of issuing depository receipts at a price less than the price applicable to a corresponding mode of issue of such securities to domestic investors under the applicable laws.

FUNDING THROUGH FINANCIAL INSTITUTIONS AND BANKS

Banks and Financial Institutions may provide end-to-end advisory services to the client in mergers and acquisitions involving target search, analysis of the target and potential synergies for the client, value analysis, pricing strategy, review of the transaction documents, negotiation support, documentation and closure of the transaction.

Funding of a merger or takeover with the help of loans from financial institutions, banks, etc. has its own merits and demerits. Takeover of a company could be achieved in several ways and while deciding the takeover of a going concern, there are matters such as the capital gains tax, stamp duty on immovable properties and the facility for carrying forward of accumulated losses. With parameters playing a critical role, the takeover should be organized in such a way that best suits the facts and circumstances of the specific case and also it should meet the immediate needs and objectives of the management. While discussing modes of acquisition, certainly there would be a planning for organizing the necessary funding for the acquisition. If borrowings from domestic banks and financial institutions have been identified as the inevitable choice, all the financial and managerial information must be placed before the banks and financial institutions for the purpose of getting the necessary resources.

The advantage of funding is that the period of such funds is definite which is fixed at the time of taking such loans. Therefore, the Board of the company is assured about continued availability of such funds for the predetermined period. On the negative side, the interest burden on such loans is quite high which must be kept in mind by the Board while deciding to use borrowed funds from financial institution. Such funding should be thought of and resorted to only when the Board is sure that the merged company or the target company will give adequate returns i.e., timely payment of periodical interest on such loans and re-payment of the loans at the end of the term for which such loans have been taken.

FUNDING THROUGH REHABILITATION FINANCE

The Insolvency and Bankruptcy Code, 2016 (IBC) seeks to consolidate the existing multiple framework by creating a single law for insolvency and bankruptcy. This law is a one stop solution for insolvency of corporates, individuals, partnerships and other entities. It received the President's assent on 28 May, 2016 and is operation from December 2016.

With the enactment of The Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Sick Industrial Companies (Special Provisions) Act, 1985 came to an end with effect from the 1st December, 2016 and with this BIFR and AIFR also stand dissolved.

Section 252 of the Insolvency and Bankruptcy Code, 2016, which has been notified w.e.f. November 1st, 2016 states that the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 shall be amended in the manner specified in the Eighth Schedule. This Eighth Schedule provides that in section 4, for sub-clause (b) of the Repeal Act, the following sub-clause shall be substituted, namely—

(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 shall stand abated:

Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause.”

Accordingly, whatever matters were pending before the BIFR/AAIFR under the SICA were also abated and could make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016. Part II of the Code consisting of Sections 4 to 77 deals with the Insolvency Resolution and Liquidation for Corporate Persons.

The Code has become a potential generator for mergers and acquisitions as it opens up stressed asset acquisition opportunities and borrowings/internal accruals may be used as rehabilitation financing by the investors/ resolution applicants to effect the acquisition.

FUNDING THROUGH LEVERAGED BUYOUTS (LBOs)

Leverage is an investment strategy of using borrowed money, specifically, the use of various financial instruments or borrowed capital to increase the potential return of an investment. When one refers to something (a company, a property or an investment) as “highly leveraged,” it means that item has more debt than equity.

A Leveraged Buyout (LBO) is the acquisition of a company in which the buyer puts up only a small amount of money and borrows the rest. The buyer can achieve this desirable result because the targeted acquisition is profitable and throws off ample cash used to repay the debt. The expectation with leveraged buyouts is that the return generated on the acquisition will more than outweigh the interest paid on the debt, hence making it a very good way to experience high returns whilst only risking a small amount of capital.

In 2000, a landmark deal was witnessed in the Indian corporate history, when Tata Tea acquired the UK brand Tetley for 271 million pounds. This deal was the largest cross border acquisition by any India Company. Apart from the size of the deal, what made it particularly special was the fact that it was the first ever leveraged buy-out by any Indian company.

Structure of the deal:

Tata Tea created a Special Purpose Vehicle (SPV)-christened Tata Tea (Great Britain) to acquire all the properties of Tetley. The SPV was capitalised at 70 mn pounds, of which Tata tea contributed 60 mn pounds; this included 45 mn pounds raised through a GDR issue. The US subsidiary of the company, Tata Tea Inc. had contributed the balance 10 mn pounds.

Tata Motors Acquisition of Jaguar Land Rover

Tata Motors acquired the UK based Jaguar and Land Rover for USD 2.3 billion from the US based Ford Motors. The deal was a part of the long term strategy of Tata Motors to increase its international presence and consolidating its position in terms of product diversification and Research and Development capabilities. The economic slowdown in Europe and American markets posed a risk to the future of the company amidst tough market conditions along with the funding risks and the currency risks associated with the deal. Tata Motors

raised USD 3 billion from banks that included JP Morgan, Citibank and State Bank of India. This deal used Leveraged Buy-Out (LBO).

The purpose of a LBO is to allow an acquirer to make large acquisitions without having to commit a significant amount of capital. A typically transaction involves the setup of an acquisition vehicle that is jointly funded by a financial investor and management of the target company. Often the assets of the target company are used as collateral for the debt. Debt capital comprises of a combination of highly structured debt instruments including prepayable bank facilities and/or publicly or private placed bonds commonly referred to as high-yield debt.

This deal has provided the Leverage to Tata Group in many ways to repay the amount for the deal:

- Rs. 1.92 Billion underwriting agreement with J M financial Consultants.
- Rs.1.75 Billion was raised through a deposits scheme from the Public.
- Additional subscriptions by promoter companies such as TATA sons, TATA Capital and Investment.
- TATA was leveraged by British Government also.

Nirma – Lafarge Holcim Deal: Gujarat-based soda ash, soap and detergent manufacturing company Nirma Ltd signed an agreement to acquire Lafarge India Pvt. Ltd's assets for ₹ 9,400 crore (\$1.4 billion). Of the ₹ 9,400 crore that Nirma needs to pay LafargeHolcim, nearly ₹ 7,500 crore was raised through debt. In other words, nearly 80% of the total deal value was paid through borrowed funds, making it a textbook LBO.

What Companies Make Good LBO Targets?

Considering that the buyer will put a large amount of debt on the company, it is critical that the company be stable and able to pay off its future debts otherwise it will likely default and go into bankruptcy. With that in mind, below are some types of companies that make good targets:

- Stable, strong cash flow business.
- Company with low debt levels.
- Non-cyclical businesses.
- Companies with large economic moats.
- Companies with good existing management teams.
- Companies with a large asset base that can be used for collateral.
- Distressed companies in good industries.

MINORITY AND 'MINORITY INTEREST' UNDER COMPANIES ACT, 2013

The term "minority" and "minority interest" are not clearly defined in the Companies Act, 2013 or rules made thereunder. However, in various provisions of the Act, members are given various collective statutory rights which can be exercised even if they are not in majority (i.e. holding more than 50% of the numbers/shares/voting rights). In another way, minority can be identified as those members who are not in the control or management of the affairs of the company.

The following are some of the provisions where minority interest is recognised in the Act:

1. At present as per Section 244 of the Companies Act, 2013, in case of a company having share capital, not less than 100 members or not less than 1/10th of total number of members, whichever is less or any member or members holding not less than 1/10th of issued share capital have the right to apply to NCLT in case of oppression and mismanagement. In case of companies not having share capital, not less than 1/5th of total number of members has the right to apply.
2. To reflect the interest of the "Minority", 10% criteria in case of companies having share capital and 20% criteria in the case of other companies is provided for in the Act. To help the Minority shareholders, proviso to Section 244(1) of the Companies Act, 2013 empowers NCLT to allow

application by shareholders who are not otherwise eligible (i.e. holding less than 10%-20% as aforesaid). This really opens up possibility of minority actions in deserving cases of oppression and mismanagement.

Oppression and Mismanagement

Although Companies Act, 2013 gives power to the voting decision made by the majority shareholders in general meetings but at the same time it also empowers the minority shareholders by protecting their interests and rights. Section 241 - 246 of the Act has laid down such provisions which will be discussed in detail in the following paras.

Oppression: Remedy against oppression is available in section 241(1)(a) of the Act. Oppression may be defined as conducting the company's affairs in a manner prejudicial to public interest or in a manner oppressive to any member or members or prejudicial to the interests of the company.

Mismanagement: Remedy against mismanagement is available in Section 241(1)(b) of the Act. Mismanagement may be defined as any change which takes place in the management or control of the Company, which will not be in the interests of members.

Few more points relevant in this context are:

1. If an application is made to the Tribunal, then it may waive all or any of the requirements specified in the aforementioned table for an eligible member.
2. Any share or shares held by two or more persons jointly, shall be counted only as one member.
3. Any one or more members may make the application on behalf of other members.

Powers of Tribunal

If an application is made under Section 241 of the Act to the Tribunal and it is of the opinion that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company and that winding-up the company would unfairly prejudice such member or members, then the Tribunal may pass relevant order to resolve the complaint. Orders may provide for the following:

- regulation of conduct of affairs of the company in future
- purchase of shares or interests of any members of the company by other members thereof or by the company
- in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital
- restrictions on the transfer or allotment of the shares of the company
- the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case
- the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e)

In ***S.P. Jain v. Kalinga Tubes Ltd (AIR 1965 SC 1535)***, the Supreme Court expounded the principles determining the concept of oppression, i.e. that the conduct must be burdensome, harsh and wrongful, involving lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. Further, a mere lack of confidence between the majority and minority shareholders would not be enough, unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs.

In ***Needle Industries India Ltd. v. Needle Industries Newey (India) Holdings Ltd. (1981 3 SCC 333)***, the Supreme Court held that an illegal act will not in and of itself be treated as oppressive, unless it is accompanied by a mala fide intention or if otherwise such an act was harsh, burdensome and wrongful. However, where there has been a series of illegal acts directed against a person, it would be justifiable to conclude that they are a part of the same object of committing oppression.

In ***V.S. Krishnan v. Westfort Hi-Tech Hospital Ltd., (2008 3 SCC 363)***, the Supreme Court relied on the Needle Industries case, and ruled that the test to gauge whether an action is oppressive – is not whether it is illegal, but rather, whether the act of oppression entailed the absence of probity, good conduct, or an act that was mala fide, harsh burdensome and wrong or for a collateral purpose. Going further, it observed that although the ultimate objective of such an action may be in the interest of the company, the immediate purpose would result in an advantage for some shareholders vis-à-vis others.

In ***Tata Consultancy Services Ltd. v. Cyrus Investments (P) Ltd., (2021 SCC OnLine SC 272)***, Mr. Cyrus Mistry was removed from the position of Executive Chairman of Tata Sons Limited, and also removed from directorship in various companies of the Tata Group, by resolutions passed at various board and shareholder meetings. Considering the removal and the manner thereof as being oppressive to minority shareholders, viz. Cyrus Investments Pvt. Ltd. and Sterling Investment Corporation Pvt. Ltd. (shareholders of Tata Group of Companies and in which Mr. Mistry had a controlling stake), this minority group filed a complaint alleging prejudice, oppression and mismanagement before the NCLT. The NCLT ruled against the minority group. The NCLAT ruled in favour of the minority group and held that the removal of Mr. Mistry was oppressive/ prejudicial, and hence it ordered the reinstatement of Mr. Mistry as the Executive Chairman of Tata Sons and as the Director of the various companies. Tata Sons, challenged the NCLAT order before the Supreme Court, which finally held that the act of Mr. Mistry's removal as Executive Chairman of Tata Sons was not in fact, prejudicial and/ or oppressive to the interests of the minority group. Further, it noted that in the factual matrix of the case, the requisite standard to justify the winding up of the company was not met, Further and specifically in the context that the majority shareholding of Tata Sons (Private) Limited was held by philanthropic Trusts and not individuals or corporate entities, the NCLAT's decision that it was just and equitable to wind up Tata Sons was flawed as it would only result in those charitable Trusts starving to death.

CLASS ACTION

On June 1, 2016, the Ministry of Corporate Affairs, notified section 245 of the Companies Act, 2013, enlisting the provisions of class action suits in India. A class action suit is one where the shareholders or depositors of a company collectively institute a suit against the company in Tribunal.

The requirement for this provision was felt in 2009 when the Satyam scam occurred. The shareholders in Satyam Computers Services Limited ("SCSL") were unsuccessful in claiming damages (worth millions) due to the absence of the provision for filing a class action suit under the Companies Act, 1956. While the Indian shareholders suffered a loss, the American investors were able to claim their part of damages in the US courts through a class action suit against SCSL. It was felt class action suits will safeguard the interests of shareholders, whenever the company or its directors participate in any fraudulent, unlawful act, or commit an act which is against the interest of the shareholders. In fact, such suits would be the most effective remedy for raising the voice of the company's shareholders.

The legal framework for class action suits is covered in section 245 of Companies Act, 2013 as well as National Company Law Tribunal Rules, 2016.

After going through section 241 and 245 of the Act, we can question as to why a separate provision was required for class action, although both the provisions look similar.

Section 245 is much wider in scope and a major difference is the option of getting monetary compensation or damages owing to the fraudulent actions of a company.

The provisions of class action come under the head of oppression and mismanagement but there are some differences between the remedies sought under class action under Section 245 and under the general provisions

of oppression and mismanagement under Section 242. While under Section 242 the NCLT can order acquisition of the company's shares, restrict transferability or allotment of shares, removal of managing director and other directors of the company, in class action, the orders will mainly be restraining orders. An added advantage of the provisions on class action suit is that they cover depositors also.

RIGHTS OF MINORITY SHAREHOLDERS DURING MERGERS/AMALGAMATIONS/ TAKEOVERS

Power to compromise or make arrangements with creditors and members –

1. Approval of Tribunal is required in case of corporate restructuring (which, *inter-alia*, includes, mergers/ amalgamations, etc.) by a company. Where a compromise or arrangement is proposed—
 - (a) between a company and its creditors or any class of them; or
 - (b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

The Scheme is also required to be approved by shareholders, before it is filed with the NCLT. The scheme is circulated to all shareholders along with statutory notice (Form No. CAA-2) of the Tribunal convened meetings and the explanatory statement under section 230(3) of the Act read with Rule 6 of Companies (Compromise, Arrangements and Amalgamations) Rules, 2016 for approving the scheme by shareholders.

2. As per proviso to Section 230(4) of the Act, it is provided that any objection to the compromise or arrangement shall be made by persons holding 10% or more of the shareholding or having 5% or more of the total outstanding debt as per latest audited financial statement. Thus, shareholders holding less than 10% or more of the shareholding are not entitled to object to the scheme as matter of statutory right.

There are other built in safeguards in the matter of approval of the scheme of compromise and arrangements. The notice convening the meetings and also the notice of hearing of the petition (in Form CAA- 2) is required to be published in the newspaper as per the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. The notice is also required to be given to various statutory authorities, sectoral regulators, etc.

Though there may not be any express protection to any dissenting minority shareholders to file their objections as a matter of right on this issue, the Tribunal, while approving the scheme, may follow judicious approach more particularly in view of the publication of the public notices about the proposed scheme in the newspapers. Any interested person (including a minority shareholder) may appear before the NCLT. There have been, however, occasions when shareholders holding miniscule shareholdings, have made frivolous objections against the scheme, just with the objective of stalling or deferring the implementation of the scheme. The courts have, on a number of occasions, overruled their objections. In view of this, proviso to Section 230(4) of the Act has put some limit for the objectors.

3. In case of Takeovers, as per SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, SEBI has powers to appoint investigating officer to undertake investigation, in case complaints are received from the investors, intermediaries or any other person on any matter having a bearing on the allegations of substantial acquisition of shares and takeovers. SEBI may also carry out such investigation *suo moto* upon its own knowledge or information about any breach of these regulations. Under section 235 of the Act, a transferee company, which has acquired 90% shares of a transferor company through a scheme or contract, is entitled to acquire shares of remaining 10% shareholders.

Dissenting shareholders have been provided with an opportunity to approach Tribunal. For this purpose, there is no threshold applicable i.e. even a single dissentient shareholding holding one share may also approach Tribunal. In such case, further acquisition of shares by the transferee company will be subject to the outcome of the decision of the NCLT.

Section 230(12) provides that an aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Purchase of Minority Shareholding

Section 236 of the Companies Act, 2013 states that:

- (1) In the event of an acquirer, or a person acting in concert with such acquirer, becoming registered holder of ninety per cent. or more of the issued equity share capital of a company, or in the event of any person or group of persons becoming ninety per cent. majority or holding ninety per cent. of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares.
- (2) The acquirer, person or group of persons under sub-section (1) shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a price determined on the basis of valuation by a registered valuer in accordance with such rules as may be prescribed.
- (3) Without prejudice to the provisions of sub-sections (1) and (2), the minority shareholders of the company may offer to the majority shareholders to purchase the minority equity shareholding of the company at the price determined in accordance with such rules as may be prescribed under sub-section (2).
- (4) The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them under sub-section (2) or sub-section (3), as the case may be, in a separate bank account to be operated by company whose shares are being transferred for at least one year for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within sixty days:

Provided that such disbursement shall continue to be made to the entitled shareholders for a period of one year, who for any reason had not been made disbursement within the said period of sixty days or if the disbursement have been made within the aforesaid period of sixty days, fail to receive or claim payment arising out of such disbursement.

- (5) In the event of a purchase under this section, company whose shares are being transferred shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be.
- (6) In the absence of a physical delivery of shares by the shareholders within the time specified by the company, the share certificates shall be deemed to be cancelled, and company whose shares are being transferred shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law and make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by despatch of such payment.
- (7) In the event of a majority shareholder or shareholders requiring a full purchase and making payment of price by deposit with the company for any shareholder or shareholders who have died or ceased to exist, or whose heirs, successors, administrators or assignees have not been brought on record by transmission, the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of three years from the date of majority acquisition or majority shareholding.

- (8) Where the shares of minority shareholders have been acquired in pursuance of this section and as on or prior to the date of transfer following such acquisition, the shareholders holding seventy-five per cent. or more minority equity shareholding negotiate or reach an understanding on a higher price for any transfer, proposed or agreed upon, of the shares held by them without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation, understanding or agreement, the majority shareholders shall share the additional compensation so received by them with such minority shareholders on a pro rata basis.

Explanation.—For the purposes of this section, the expressions “acquirer” and “person acting in concert” shall have the meanings respectively assigned to them in clause (b) and clause (e) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

- (9) When a shareholder or the majority equity shareholder fails to acquire full purchase of the shares of the minority equity shareholders, then, the provisions of this section shall continue to apply to the residual minority equity shareholders, even though,—
- (a) the shares of the company of the residual minority equity shareholder had been delisted; and
 - (b) the period of one year or the period specified in the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, had elapsed.

Purchase of minority shareholding held in demat form

Rule 26A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provides that:

- (1) The company shall within two weeks from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under section 236 of the Act, verify the details of the minority shareholders holding shares in dematerialised form.
- (2) After verification under sub-rule (1), the company shall send notice to such minority shareholders by registered post or by speed post or by courier or by email about a cut-off abcaus.in date, which shall not be earlier than one month after the date of sending of the notice, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specified in such notice, before the cut-off date.
- (3) A copy of the notice served to the minority shareholders under sub-rule (2), shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situated and also be uploaded on the website of the company, if any.
- (4) The company shall inform the depository immediately after publication of the notice under sub-rule (3) regarding the cut-off date and submit the following declarations stating that:
 - (a) the corporate action is being effected in pursuance of the provisions of section 236 of the Act;

It may be noted that Corporate Action means any action taken by the company relating to transfer of shares and all the benefits accruing on such shares namely, bonus shares, split, consolidation, fraction shares and right issue to the acquirer.
 - (b) the minority shareholders whose shares are held in dematerialised form have been informed about the corporate action a copy of the notice served to such shareholders and published in the newspapers to be attached;
 - (c) the minority shareholders shall be paid by the company immediately after completion of corporate action;

- (d) any dispute or complaints arising out of such corporate action shall be the sole responsibility of the company.
- (5) For the purposes of effecting transfer of shares through corporate action, the Board shall authorise the Company Secretary, or in his absence any other person, to inform the depository under sub-rule (4), and to submit the documents as may be required under the said sub-rule.
- (6) Upon receipt of information under sub-rule (4), the depository shall make the transfer of shares of the minority shareholders, who have not, on their own, transferred their shares in favour of the acquirer, into the designated DEMAT account of the company on the cut-off date and intimate the company.
- (7) After receiving the intimation of successful transfer of shares from the depository under sub-rule (6), the company shall immediately disburse the price of the shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty, which shall be paid by the company, on behalf of the minority shareholders, in accordance with the provisions of the Indian Stamp Act, 1899 (2 of 1899).
- (8) Upon successful payment to the minority shareholders under sub-rule (7), the company shall inform the depository to transfer the shares of such shareholders, kept in the designated DEMAT account of the company, to the DEMAT account of the acquirer.

Explanation. -The company shall continue to disburse payment to the entitled shareholders, where disbursement could not be made within the specified time, and transfer the shares to the DEMAT account of acquirer after such disbursement.

- (9) In case, where there is a specific order of Court or Tribunal, or statutory authority restraining any transfer of such shares and payment of dividend, or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996 (22 of 1996), the depository shall not transfer the shares of the minority shareholders to the designated DEMAT account of the company under sub-rule (6).

Explanation. -For the purposes of this rule, if “cut-off date” falls on a holiday, the next working day shall be deemed to be the “cut-off date”.

Determination of price for purchase of minority shareholding

Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provides that for the purposes of sub-section (2) of section 236 of the Act, the registered valuer shall determine the price (hereinafter called as offer price) to be paid by acquirer, person or group of persons referred to in sub-section (1) of section 236 of the Act for purchase of equity shares of the minority shareholders of the company, in accordance with the following rules:

- (1) In case of a listed company;
- (i) The offer price shall be determined in the manner as may be specified by the Securities and Exchange Board of India under the relevant regulations framed by it, as may be applicable; and
 - (ii) The registered valuer shall also provide a valuation report on the basis of valuation addressed to the board of directors of the company giving justification for such valuation.
- (2) In the case of an unlisted company and a private company,
- (i) the offer price shall be determined after taking into account the following factors:-
 - (a) the highest price paid by the acquirer, person or group of persons for acquisition during last twelve months;
 - (b) the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of

shares, earning per share, price earning multiple vis-à-vis the industry average, and such other parameters as are customary for valuation of shares of such companies; and

- (ii) the registered valuer shall also provide a valuation report on the basis of valuation addressed to the board of directors of the company giving justification for such valuation.

LEGAL PROVISIONS OF THE COMPANIES ACT, 2013 AND DECIDED CASE LAWS

Chapter XV, comprising of sections 230 to 240 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, deals with Compromises, Arrangements and Amalgamations. The relevant sections with brief details and relevant case laws are mentioned below:

Section 230: Power to compromise or make arrangements with creditors and members.

Section 230 provides powers to Tribunal to make order on the application of the company or any creditor or member or in case of company being wound-up, of liquidator for the proposed compromise or arrangement including debt restructuring, etc., between company, its creditors and members.

The word 'arrangement' interpreted under the various judicial pronouncements is as under:

'Arrangement', as occurring in section 390(b) of the 1956 Act [corresponding to Explanation to section 230(1) of the 2013 Act] is something by which parties agree to do a certain thing notwithstanding the fact there was no dispute between the parties. [*Navjivan Mills Co. Ltd., In re [1972] 42 Comp. Cas. 265 (Guj.)*]

The word 'arrangement' as set out in section 390(b) of the 1956 Act is an inclusive definition and contemplates all arrangements and not only reorganisation of the share capital. This is all the more clear, because the word used is 'includes'. [*Investment Corpn. of India Ltd., In re [1987] 61 Comp. Cas. 92 (Bom.)*]

Any scheme, other than a scheme by way of compromise or reconstruction, which affects the rights of the creditors and the members of the company or any class of them, would fall within the term, 'arrangement'. [*Bank of India Ltd. v. Ahmedabad Mfg. & Calico Printing Co. Ltd. [1972] 42 Comp. Cas. 211 (Bom.)*]

The word 'arrangement' in section 391 of the 1956 Act is of wide import. By section 390 of the 1956 Act, 'arrangement' includes reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or both these methods. [*Hindusthan Commercial Bank Ltd. v. Hindusthan General Electrical Corpn. [1960] 30 Comp. Cas. 367 (Cal.)*]

The word 'class' interpreted by the Gujarat High Court in a case is as under:

Those who are offered substantially different compromises each will form a different class. Even if there are different groups within a class, the interests of which are different from the rest of the class or who are to be treated differently in the scheme, such groups must be treated as separate classes for the purpose of the scheme. The group styled as a class should ordinarily be homogeneous and must have commonality of interest and the compromise offered to them must be identical. (See section 391(1) of the 1956 Act) [*State Bank of India v. Engg. Majdoor Sangh [2000] 27 SCL 103 (Guj.)*]

Section 231: Power of Tribunal to enforce compromise or arrangement

The section provides powers to Tribunal to enforce compromise or arrangement with creditors and members as ordered under section 230. Section also provides that, if the Tribunal is satisfied that such compromise or arrangement cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding-up of the company.

Interpretation of the words 'At time of making such order or at any time thereafter' in Section 231(1)(b) of the 2013 Act:

Clause (b) of sub-section (1) of section 392 of the 1956 Act [corresponding to section 231(1)(b) of the 2013 Act] makes it abundantly clear that the powers conferred by section 392 may be exercised 'at the time of making such order or at any time thereafter'. The provisions, therefore, envisage exercise of power at the very point of time of making the order, meaning thereby, 'before' the order is passed. The expression which follows, namely, 'at any time thereafter' lends further support to this construction, namely, that before the order is signed the power can be exercised under the earlier part of the provision and after order is signed, the power can be

exercised under the second part of the provision. The expression 'or at any time thereafter' leaves no room for doubt that the preceding part contemplates exercise of power at a point of time prior to the making of the order. **[Bhavnagar Vegetable Products Ltd., In re [1984] 55 Comp. Cas. 107 (Guj.)]**

Interpretation of the word 'Modification' used in Section 231(1)(b) of the 2013 Act: In the context of section 392(1)(b) of the 1956 Act [corresponding to section 231(1)(b) of the 2013 Act], 'modification' would mean addition to the scheme of compromise or arrangement or omission therefrom solely for the purpose of making it workable. **[S.K. Gupta v. K.P. Jain [1979] 49 Comp. Cas. 342 (SC)]**

Section 232: Merger and amalgamation of companies

This section corresponds to section 394 of the Companies Act, 1956 and came into force with effect from 15th December, 2016.

This section provides powers to the Tribunal to order for holding meeting of the creditors or the members and to make orders on the proposed reconstruction, merger or amalgamation of companies. The section provides for manner and procedure in which the meeting so ordered by the Tribunal to be held.

For meaning of the expression "reconstruction/amalgamation", used in the section, the Calcutta High Court opined that there is no particular meaning in the word 'reconstruction' or in the word 'amalgamation'. It has to be found out from the scheme read as a whole whether it is a case of reconstruction or whether it is a case of amalgamation. See section 394 of the 1956 Act. **[Inland Steam Navigation Workers' Union v. Rivers Steam Navigation Co. Ltd. [1968] 38 Comp. Cas. 99 (Cal.)]**

In the case of **Sesa Industries Ltd. v. Krishna H. Baja, Civil Appeal Nos. 1430-1431 of 2011, February 7, 2011**, the Supreme Court opined that the Court before whom scheme of amalgamation is placed for sanction is not expected to put its seal of approval on scheme merely because majority of shareholders have voted in favour of scheme. Since the scheme which gets sanctioned by Court would be binding on dissenting minority shareholders or creditors, Court is obliged to examine scheme in its proper perspective together with its various manifestations and ramifications with a view to find out whether scheme is fair, just and reasonable to concerned members and is not contrary to any law or public policy.

In the case of **Lotus Nikko Hotels Travel (P.) Ltd. v. Ashok Chopra & Co., EFA (OS) NO. 2 OF 2011, February 16, 2017**, High Court of Delhi opined that, where scheme of arrangement providing for demerger stood confirmed and was made binding, it bound creditor whether or not they might have specifically consented to such scheme.

In the case of **Wiki Kids Ltd. v. Avantel Ltd. (21.12.2017)**, a non-listed company Wiki Kids Limited (Transferor Company), wished to amalgamate with Avantel Limited, a listed company (Transferee Company). The entities (collectively referred to as Appellants) had proposed a scheme of amalgamation and approached the Andhra Pradesh High Court. Pursuant to the directions of the High Court, the Scheme was approved by the shareholders of the Transferee Company. In the meantime, in view of constitution of NCLT vide a notification dated December 7, 2016, the case was transferred to the NCLT. The Appellants, accordingly, filed a second motion before the Hyderabad Bench of the NCLT.

The NCLT observed that the Appellants had common promoters such that the promoters of the Transferee Company held 99.90% of the shareholding of the Transferor Company. Thus, the NCLT, in light of its analysis, held that the entire scheme was designed in a manner to extend financial benefit of INR 12 crores (as per the exchange ratio the eligible number of shares to be issued by the Transferee Company to the shareholders of the Transferor Company was worked out to approximately 4 lakh shares, the market value of which is almost 12.4 Crores) only to the common promoters even though the Transferor Company had no business and little net worth/value. In view of such observations, the NCLT held the scheme to be against the public interest and refused to approve the same. The NCLAT upheld the order of the NCLT rejecting a scheme of amalgamation, as it resulted in undue advantage to the promoters of the amalgamating company.

Section 233: Merger or amalgamation of certain companies

This section came into force from 15th December, 2016. This section seeks to provide for merger or amalgamation between two small companies or between a holding company and its wholly owned subsidiary or prescribed

class or class of companies by giving a notice of the proposed scheme inviting objections or suggestions by both the transferor and the transferee company from Registrar, Official Liquidator or persons affected by the scheme.

The powers of the Central Government are delegated to Regional Directors at Mumbai, Kolkata, Chennai, New Delhi, Ahmedabad, Hyderabad and Shillong.

Section 234: Merger or amalgamation of company with foreign company

This section came in force with effect from 13th April, 2017 and has no corresponding section with the Companies Act, 1956.

This is a new section and provides the mode of merger or amalgamation between companies registered under the Companies Act, 2013 and companies incorporated in the jurisdictions of such companies as may be notified from time to time by the Central Government. The Central Government may, in consultation with Reserve Bank of India make rules for the purpose of merger or amalgamation provided under this section.

Section 235: Power to acquire shares of shareholders dissenting from scheme or contract approved by majority

- (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has, within four months after making of an offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved, other than shares already held at the date of the offer by, or by a nominee of the transferee company or its subsidiary companies, the transferee company may, at any time within two months after the expiry of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

The transferee company shall send a notice to the dissenting shareholder(s) of the transferor company, in **Form No.CAA.14** at the last intimated address of such shareholder for acquiring the shares of such dissenting shareholders.

- (2) Where a notice under sub-section (1) is given, the transferee company shall, unless on an application made by the dissenting shareholder to the Tribunal, within one month from the date on which the notice was given and the Tribunal thinks fit to order otherwise, be entitled to and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.
- (3) Where a notice has been given by the transferee company under sub-section (1) and the Tribunal has not, on an application made by the dissenting shareholder, made an order to the contrary, the transferee company shall, on the expiry of one month from the date on which the notice has been given, or, if an application to the Tribunal by the dissenting shareholder is then pending, after that application has been disposed of, send a copy of the notice to the transferor company together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferor company and on its own behalf by the transferee company, and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which, by virtue of this section, that company is entitled to acquire, and the transferor company shall—
 - (a) thereupon register the transferee company as the holder of those shares; and
 - (b) within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee company.
- (4) Any sum received by the transferor company under this section shall be paid into a separate bank account, and any such sum and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sum or other

consideration were respectively received and shall be disbursed to the entitled shareholders within sixty days.

- (5) In relation to an offer made by a transferee company to shareholders of a transferor company before the commencement of this Act, this section shall have effect with the following modifications, namely: —
- (a) in sub-section (1), for the words “the shares whose transfer is involved other than shares already held at the date of the offer by, or by a nominee of, the transferee company or its subsidiaries,” the words “the shares affected” shall be substituted; and
 - (b) in sub-section (3), the words “together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferor company” shall be omitted.

Explanation.—For the purposes of this section, “dissenting shareholder” includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract. The words ‘Four months’ used in section 235(1) have been interpreted by the Chandigarh High Court. According to it ‘Four months’ is the maximum period within which the offer is to be accepted; section 395(1) of the 1956 Act [corresponding to section 235(1) of the 2013 Act] does not require that the offer must be kept open for at least four months. *Western Mfg. (Reading) Ltd., In re [1957] 27 Comp. Cas. 144 (Ch.D.)*

The words ‘Four months’ used in section 235(1) have been interpreted by the Chandigarh High Court. According to it ‘Four months’ is the maximum period within which the offer is to be accepted; section 395(1) of the 1956 Act [corresponding to section 235(1) of the 2013 Act] does not require that the offer must be kept open for at least four months. [*Western Mfg. (Reading) Ltd., In re [1957] 27 Comp. Cas. 144 (Ch.D.)*]

In the case of ***Radhey Shyam Agarwal v. Bank of Rajasthan Ltd. Company Appeal No. 1 of 2012, September 20, 2013***, the High Court of Rajasthan observed that the prayers which has been made before the Company Law Board has been incorporated in the appeal and as regards prayer of the petitioner appellant for investigating the affairs of the respondent company i.e. Bank of Rajasthan, after the Bank of Rajasthan stood finally merged under the Scheme of Amalgamation and approved by the RBI under sub-section (4) of sec.44A of the Banking Regulation Act, 1949 and finally confirmed by the Apex Court on writ petition preferred by the petitioner, the question of investigating the affairs of the transferor, Bank of Rajasthan does not survive any further and the Company Law Board in its impugned order dt.30.9.2011 has taken note of the approval being granted by the RBI and the order of the Apex Court dated 13-9-2011 rejecting the writ petition preferred by the petitioner assailing the merger on multifarious grounds. The CLB has further noticed that apart from what is being raised in the company petition, the petitioner has also filed civil suit pending before the District Court Bhilwara and when he failed to succeed in getting interim injunction and also from the High Court on appeal being preferred his company petition on the facts brought on record has rendered infructuous. [Para 6]

After the primary grievance of the appellant being finally crystallized, investigating the affairs of transferor Bank of Rajasthan does not survive any further and the Court is also of the view that the Company Law Board has not committed any error in disposing of the company petition preferred by the appellant vide its order dated 13-9-2011 as having been rendered infructuous and apart from it there is no question of law which emerges from the order of the Company Law Board which may be open for the Court to examine under section 10F of the 1956 Act (Corresponding to section 465 of the 2013 Act). [Para 7]

Section 236: Purchase of minority shareholding

This section came into force with effect from 15th December, 2016. This section corresponds to section 395 of the Companies Act, 1956.

This section provides the procedure and manner in which the registered holder of at least 90 per cent shares of a company shall notify the company of their intention to buy the remaining equity shares of minority shareholders,

by virtue of an amalgamation, share exchange, conversion of securities, etc. This section provides the procedure to be followed for acquiring shares held by minority shareholders.

Section 237: Power of Central Government to provide for amalgamation of companies in public interest

This section corresponds to section 396 of the Companies Act, 1956 and came into force from 15th December, 2016.

This section provides power to the Central Government to provide for amalgamation of two or more companies in public interest by passing an order to be notified in the Official Gazette.

In the case of, *Moons Technologies Ltd. v. Union of India*, the High Court of Bombay opined that final amalgamation order of NSEL with its holding company FTIL passed by Central Government under section 396 was not in violation of principles of natural justice and fair play and was a balanced as well as proportionate decision of Central Government.

Section 238: Registration of offer of schemes involving transfer of shares

This section came into force with effect from 15th December, 2016. The Prescribed fee for Appeal is Rs.2,000 under the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

This section provides mode of registration of offer of schemes or contract involving the transfer of shares. Every circular containing such offer and recommendation and containing a statement shall be accompanied by requisite information and must be registered with the ROC before issue.

Section 239: Preservation of books and papers of amalgamated companies.

Corresponds to section 396A of the Companies Act, 1956 and came into force with effect from 15th December, 2016.

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

Section 240: Liability of officers in respect of offences committed prior to merger, amalgamation, etc.

This section came into force with effect from 15th December, 2016. No corresponding section to Companies Act, 1956.

This section provide that notwithstanding anything in any other law for the time being in force, the liability in respect of offences committed under this Act by the officers in default, of the transferor company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.

PROTECTION OF MINORITY INTEREST

Section 232(3)(e) authorises the Tribunal to make provision for any person who dissent from the scheme. Thus, the Tribunal has to play a very vital role. It is not only a supervisory role but also a pragmatic role which requires the forming of an independent and informed judgment as regards the feasibility or proper working of the scheme and making suitable modifications in the scheme and issuing appropriate directions with that end in view [*Mafatlal Industries Ltd. In re. (1995) 84 Comp. Cas. 230 (Guj.)*].

The Tribunal considers minority interest while approving the scheme of merger

As per existing provisions of the Act, approval of Tribunal is required in case of corporate restructuring (which, *inter-alia*, includes, mergers/amalgamations, etc.) by a company. The Scheme is also required to be approved by shareholders, before it is filed with the Tribunal. The scheme is circulated to all shareholders along with

statutory notice of the court convened meeting and the explanatory statement under section 230(3) read with Rule 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 of the Act for approving the scheme by shareholders.

The notice of hearing of petition (in form CAA-2) is also required to be published in the newspaper. As per proviso to Section 230(4) of the Act, members holding 10% or more of the shareholding are entitled to file their objection before NCLT as a matter of right.

CASE STUDIES/JUDICIAL PRONOUNCEMENTS

There have been occasions when the minority shareholders have raised objections and have succeeded in preventing the implementation of a scheme of arrangement. A lone minority shareholder of **Tainwala Polycontainers Ltd (TPL), Dinesh V Lakhani**, had apparently forced the company to call off its merger plans with *Tainwala Chemicals and Plastics (India) Ltd.* (TCPL). Lakhani had opposed the proposed merger on several grounds including allegations of willful suppression of *material facts* and *malafide* intention of promoters in floating separate companies (TPL and TCPL).

In case of Parke-Davis India Limited

In 2003, Parke-Davis India Limited and Pfizer Limited were considering implementation of a Scheme of Merger. The Minority shareholders of Parke-Davis India Ltd objected to the Scheme on the grounds that the approval from the requisite majority as prescribed under the Companies Act, 1956 had not been obtained. They filed an urgent petition before the division bench of the Bombay High Court. The division bench of the Bombay High Court by its order executed a stay order in March 2003 restraining the company from taking further steps in the implementation of the scheme of amalgamation, which was further extended till September 2003. The dissenting shareholders filed a Special Leave Petition with the Supreme Court. The turmoil came to an end when the Supreme Court dismissed the petition filed by the shareholders. Parke- Davis then proceeded to complete the implementation of the scheme of amalgamation with Pfizer.

In case of Tomco with HLL Merger

Similarly, in the case of the merger of Tomco with HLL, the minority shareholders put forward an argument that, as a result of the amalgamation, a large share of the market would be captured by HLL. However, the court turned down the argument and observed that there was nothing unlawful or illegal about it.

Fair and reasonable Scheme made in good faith

Any scheme which is fair and reasonable and made in good faith will be sanctioned if it could reasonably be supported by sensible people to be for the benefit to each class of the members or creditors concerned.

In **Sussex Brick Co. Ltd., Re, (1960) 1 All ER 772 : (1960) 30 Com Cases 536 (Ch D)** it was held, *inter alia*, that although it might be possible to find faults in a scheme that would not be sufficient ground to reject it. It was further held that in order to merit rejection, a scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence.

It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies with the basic requirements to the extent of 100 per cent. It is the consistent view of the Courts that no scheme can be said to be fool-proof and it is possible to find faults in a particular scheme but that by itself is not enough to warrant a dismissal of the petition for sanction of the scheme. If the court is satisfied that the scheme is fair and reasonable and in the interests of the general body of shareholders, the court will not make any provision in favour of the dissentients. For such a provision is not a *sine qua non* to sanctioning a fair and reasonable scheme, unless any special case is made out which warrants the exercise of court's discretion in favour of the dissentients. [**Re, Kami Cement & Industrial Co. Ltd., (1937) 7 Com Cases 348, 364-65 (Bom)**].

Minority Protection:

Majority Rule: In order to redress a wrongdoer to a company or to recover monies or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. [*Foss v. Harbottle [1843] 2 Hare 461 (Ch.)*]

Exception to the Rule:

- Ultra vires acts: If the majority of shares are controlled by those against whom the relief is sought, the complaining shareholders may sue in their own names, but must show that the acts complained of are of a fraudulent character or beyond the powers of the company. There is no need to consult the views of the majority before instituting the suit, if from the allegations in the plaint it would appear that the act complained of was ultra vires. [*Dhaneswari Cotton Mills Ltd. v. Nilkamal Chakravarthy [1937] 7 Comp. Cas. 417 (Cal.)*]
 - Fraud on Minority: Where a minority shareholder files a suit alleging fraud, suit should be tried even if majority has affirmed the transactions. [*Cook v. Deeks [1916] 1AC 554 (PC.)*]
- Wrongdoer in Control: Where majority is wrongdoer and pocket property of company, an individual shareholder has right to file a suit. [*Menier v. Hooper's Telegraph Works [1874] 9 Ch. App. 350 (CA)*]
- A minority of shareholder in saddle of power cannot be allowed to pursue a policy of venturing into a litigation to which the majority of the shareholders were opposed. [*Life Insurance Corp of India v. Escorts Ltd [1986] 59 Comp Cas.548 (SC.)*]

Oppression:

- Mere lack of confidence between majority shareholders and minority shareholders would not be enough unless lack of confidence springs from oppression of a minority by a majority in management of company's affairs. [*Shanti Prasad Jain v. Kainga Tubes Ltd. [1965] 35 Comp Cas. 351 (SC)*]
- A series of illegal acts can lead to conclusion that they are part of same oppressive transaction. [*Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd. [1981] 51 Comp Cas. 743 (SC)*]
- When a complaint is made as regards violations of statutory or contractual right, shareholder may initiate a proceeding in a civil court but a proceeding under section 397 would be maintainable only when an extraordinary situation is brought to notice of court keeping in view wide and far-reaching power of court in relation to affairs of the company and in this situation, it is necessary that alleged illegality in conduct of majority shareholders is pleaded and proved with sufficient clarity and precision. [*Sangramsingh P. Gaekwad v. Shantadevi P. Gaekwad [2005] 57 SCL 476 (SC.)*]

FILING OF VARIOUS FORM IN THE PROCESS OF MERGER/AMALGAMATION

Various forms filed in the process of merger/amalgamation are appended below:

Form No.	Relevant Section	Rule*	Particulars
CAA 1	Section 230(2) (c)(i)	Rule 4	Creditor's Responsibility Statement
CAA 2	Section 230 (3)	Rule 6 and 7	Notice and Advertisement of notice of the meeting of creditors or members
CAA 3	Section 230(5)	Rule 8	Notice to Central Government and other Regulatory Authorities
CAA 4		Rule 13(2) and Rule 14	Report of result of meeting by Chairperson
CAA 5	Section 230	Rule 15(1)	Petition to sanction compromise or arrangement
CAA 6	Section 230(7)	Rule 17(3)	Order on petition

CAA 7	Section 232	Rule 20	Order under section 232
CAA 8	Section 232(7)	Rule 21	Statement to be filed with Registrar of Companies
CAA 9	Section 233(1)	Rule 25(1)	Notice of the scheme inviting objections or suggestions
CAA 10	Section 233(1) (c)	Rule 25(2)	Declaration of solvency
CAA 11	Section 233(2)	Rule 25(4)	Notice of approval of the scheme of merger
CAA 12	Section 233(5)	Rule 25(5)	Confirmation order of scheme of merger or amalgamation
CAA 13	Section 233(5)(6)	Rule 25(6)	Application by the Central Government to the Tribunal
CAA 14	Section 235(1)	Rule 26	Notice to dissenting shareholders
CAA 15	Section 238(1)	Rule 28	Information to be furnished along with circular in relation to any scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company
CAA 16	Section 230	Rule 25A(4)	Declaration on compromise or arrangement or merger or demerger between an Indian company and a company or body incorporated which has been incorporated in a country which shares Land border with India.

FAMILY HOLDINGS AND THEIR MANAGEMENT

For any family-owned business, transition is a crucial aspect that every founder or owner should keep in mind while pursuing the strategic business objectives of growth, diversification, expansion or sale. In the present context, passing the baton is clearly a priority for family business owners since the succession can make or break a family business and can have serious implications on the family as well. Thus, a structured approach in determining the transition plan and its communication to stakeholders is essential for managing the succession and survival of the family business and family from generation to generation.

Whether selling the business, keeping the business in the family or transitioning leadership to identified heirs or a non-family stakeholder, the issues are immense and certainly not simple. As a result, 95% of family businesses do not survive the third generation of ownership.

In terms of ownership and governance protocols for family members, typically, a trust or similar entity form becomes pivotal to the succession plan since it can provide a good balance between owners' desires, professional management, responsible business decision matrix and healthy family dynamics. The following are some of the key benefits of succession planning under a trust structure for continuing business legacy and smooth transition of the business from the hands of one generation to another:

Continuity planning: Consolidation of ownership and control under a trust allows the founder/owner and the family to set a clear vision and ensure commitment from the next generation of family members. This results in continued planning from one generation to another, resulting in harmony between goals, objectives, targets, etc., between generations, thereby reducing conflicting objectives/interests between family members.

Generational change: Family-owned firms can struggle to keep pace with global mega trends like demographic shifts and digital technology without the involvement of the new generation. At the same time, the current generation may not always have confidence in the ability of the new generation to take over the business, and may also have limitations relating to their ideas of change and growth. This calls for professionalization of the family firm by introducing external talent, leading to better governance

and a more rigorous decision-making process in areas like finance, wealth management and personal expenses.

Conflict management: A trust would lay out specific protocols governing decision making and, in the case of any difference of opinion or deadlock, the process to manage the conflict. This ensures that the business does not suffer even during a phase where family members are not aligned.

Security of family/personal assets: A trust structure can also facilitate ring-fencing of family assets, protecting them from a creditor's claims as well as providing safeguards against claims from family members upon disability, divorce/ partition, etc.

Pooling and simplicity: A trust also serves as a means for pooling of assets and funds under a common control. This can provide heirs the benefit of property without loss of control and helps to avoid the probate or court process in the event of death. It can also simplify asset holding for legal heirs in multiple jurisdictions.

A typical family-owned business, with more than one family constituent, should have a two-tier trust structure where consolidation of the family wealth and control can be achieved under a 'master trust'. The business should be tailored to incorporate an appropriate governance structure that ensures consensus of all family members and stakeholders and deals appropriately with conflict situations. This would also ensure that individual family constituents cannot unilaterally deal with common family assets and provide benefits of consolidation of control. The family and sub-trusts would typically be set up as discretionary trusts and would be customised to meet individual requirements of each family situation.

ANNEXURE I

SCHEDULE VI

(See sections 55 and 186)

INFRASTRUCTURE PROJECTS/INFRASTRUCTURAL FACILITIES

The term "infrastructural projects" or "infrastructural facilities" includes the following projects or activities:—

1. Transportation (including inter modal transportation), includes the following:—
 - (a) roads, national highways, State highways, major district roads, other district roads and village roads, including toll roads, bridges, highways, road transport providers and other road-related services;
 - (b) rail system, rail transport providers, metro rail, roads and other railway related services;
 - (c) ports (including minor ports and harbours), inland waterways, coastal shipping including shipping lines and other port related services;
 - (d) aviation, including airports, heliports, airlines and other airport related services;
 - (e) logistics services.
2. *Agriculture*, including the following, namely:—
 - (a) infrastructure related to storage facilities;
 - (b) construction relating to projects involving agro-processing and supply of inputs to agriculture;
 - (c) construction for preservation and storage of processed agro-products, perishable goods such as fruits, vegetables and flowers including testing facilities for quality.
3. *Water management*, including the following, namely:—
 - (a) water supply or distribution;
 - (b) irrigation;

- (c) water treatment.
- 4. *Telecommunication*, including the following, namely:
 - (a) basic or cellular, including radio paging;
 - (b) domestic satellite service (i.e., satellite owned and operated by an Indian company for providing telecommunication service);
 - (c) network of trunking, broadband network and internet services.
- 5. Industrial, commercial and social development and maintenance, including the following, namely: —
 - (a) real estate development, including an industrial park or special economic zone;
 - (b) tourism, including hotels, convention centres and entertainment centres;
 - (c) public markets and buildings, trade fair, convention, exhibition, cultural centres, sports and recreation infrastructure, public gardens and parks;
 - (d) construction of educational institutions and hospitals;
 - (e) other urban development, including solid waste management systems, sanitation and sewerage systems.
- 6. *Power*, including the following: —
 - (a) generation of power through thermal, hydro, nuclear, fossil fuel, wind and other renewable sources;
 - (b) transmission, distribution or trading of power by laying a network of new transmission or distribution lines.
- 7. *Petroleum and natural gas*, including the following: —
 - (a) exploration and production;
 - (b) import terminals;
 - (c) liquefaction and re-gasification;
 - (d) storage terminals;
 - (e) transmission networks and distribution networks including city gas infrastructure.
- 8. *Housing*, including the following: —
 - (a) urban and rural housing including public/mass housing, slum rehabilitation, etc.;
 - (b) other allied activities such as drainage, lighting, laying of roads, sanitation and facilities.
- 9. Other miscellaneous facilities/services, including the following: —
 - (a) mining and related activities;
 - (b) technology related infrastructure;
 - (c) manufacturing of components and materials or any other utilities or facilities required by the infrastructure sector like energy saving devices and metering devices;
 - (d) environment related infrastructure;
 - (e) disaster management services;
 - (f) preservation of monuments and icons;
 - (g) emergency services (including medical, police, fire and rescue).
- 10. Such other facility service as may be prescribed.

LESSON ROUND-UP

- Mode of payment for mergers and acquisition to be selected from an optimum mix of available modes of payment of consideration.
- Selection of financial package depends on many considerations such as: to suit the financial structure of acquirer and acquiree, to provide a desirable gearing level, to be acceptable to vendors. Further it should prove economic to acquirer.
- Preferential offer is also a source of funding wherein shares are offered to a closed group of identified persons.
- Funding through preference share capital, unlike equity share capital, involves the payment of fixed preference dividend like interest on debentures or bonds or a fixed rate of dividend.
- Funding through shares with differential voting rights gives the companies an additional source of fund without interest cost and without an obligation to repay, as these are other form of equity capital.
- Funding can also be done through swaps and employees stock option scheme. The share capital that may be raised through the scheme of employees' stock option can only be a fraction of the entire issue.
- External commercial borrowings are permitted by the Government as a source of finance for Indian corporate for expansion of existing capacity as well as for fresh investment.
- The other modes of funding are through financial institutions and banks, rehabilitation finance and management and leveraged buy outs. All these have got its own merits and demerits.
- At present, in case of a company having share capital, not less than 100 members or not less than 1/10th of total number of members, whichever is less or any member or members holding not less than 1/10th of issued share capital have the right to apply to NCLT in case of oppression and mismanagement.
- Section 232(3)(e) authorises the Tribunal to make provision for those who dissent from the scheme.
- As per proviso to Section 230(4) of the Act, objection to compromise or arrangement shall be made only by person holding 10% or more of the shareholding or having 5% or more of the total outstanding debt as per the latest audited financial statement.

GLOSSARY

Acquirer: Acquirer means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company.

Designated stock exchange: Recognised stock exchange in which securities of an issuer are listed or proposed to be listed and which is chosen by the issuer as a designated stock exchange for the purpose of a particular issue of specified securities.

Issuer: It means any person making an offer of specified securities.

Relevant Date: It means date of the board meeting in which the proposal for change in objects or variation in terms of a contract, referred to in the prospectus is approved, before seeking shareholders' approval.

Rights Issue: "rights issue" means an offer of specified securities by a listed issuer to the shareholders of the issuer as on the record date fixed for the said purpose.

Target Company: "target company" means a company and includes a body corporate or corporation established under a Central legislation, State legislation or Provincial legislation for the time being in force, whose shares are listed on a stock exchange.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation).

1. “Financing of mergers and acquisitions is a crucial exercise requiring utmost care.” Elaborate.
2. Write short note on the various sources of funding in the case of merger/takeovers.
3. Discuss and compare the nature and procedural requirements of preferential offer and private placement and why the terms are used interchangeably.
4. Funding through Leveraged Buyouts is an innovative method of financing. Elucidate.
5. Describe remedies available to shareholders and depositors under section 241-244 and 245 of Companies Act, 2013 and why there was a need for a separate provision of class action?

LIST OF FURTHER READINGS

- Guide To Takeovers and Mergers – 4th Edition by PH Arvind Pandian and N R Sridharan
- Creating value from Mergers and Acquisitions by SudiSudarsanam, Prentice Hall
- Mergers and Acquisitions: Strategy, Value and Integration by G H Ray, PHI
- Master Guide to Mergers and Acquisitions in India - Tax & regulatory - Ernst & Young