



**Corporate  
Professionals**

# **M&A**

**UNDER THE NEW COMPANY LAW REGIME**

Presented by – **Manoj Kumar**



## Focus Areas

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Overview of M&A Provisions under Companies Act, 2013



NCLT



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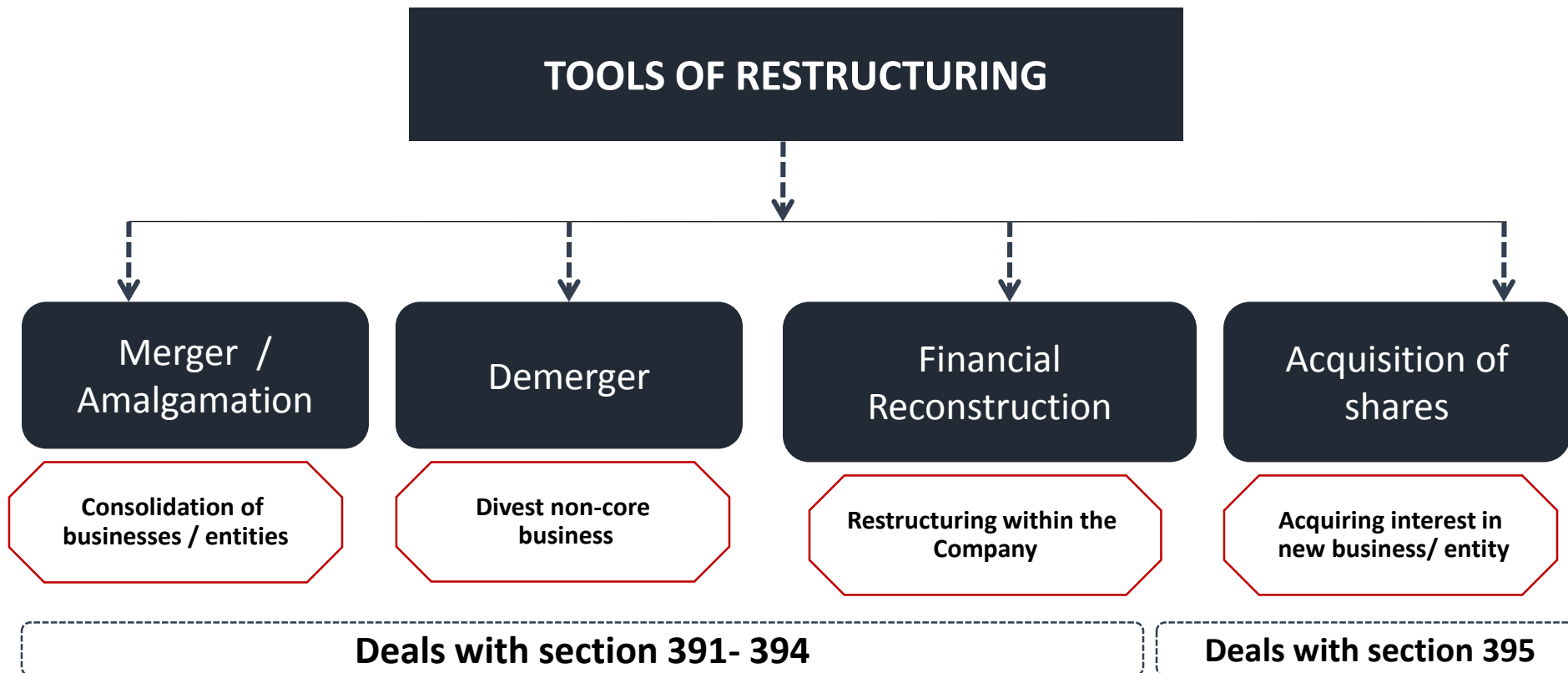
Process & Procedure of New M&A Concepts



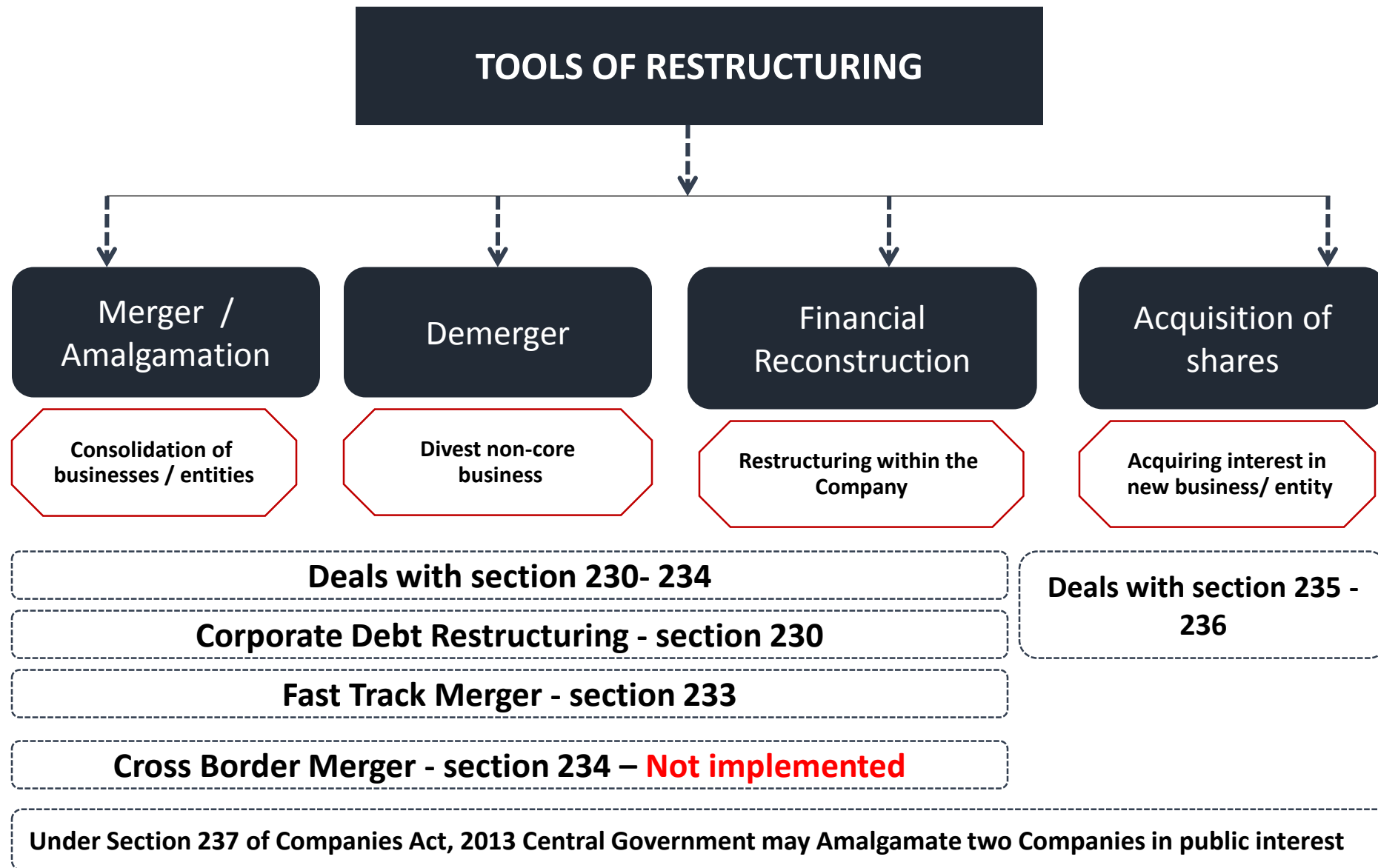
# Overview of M&A in Companies Act, 2013

## Re-organization Provisions as per Companies Act, 1956

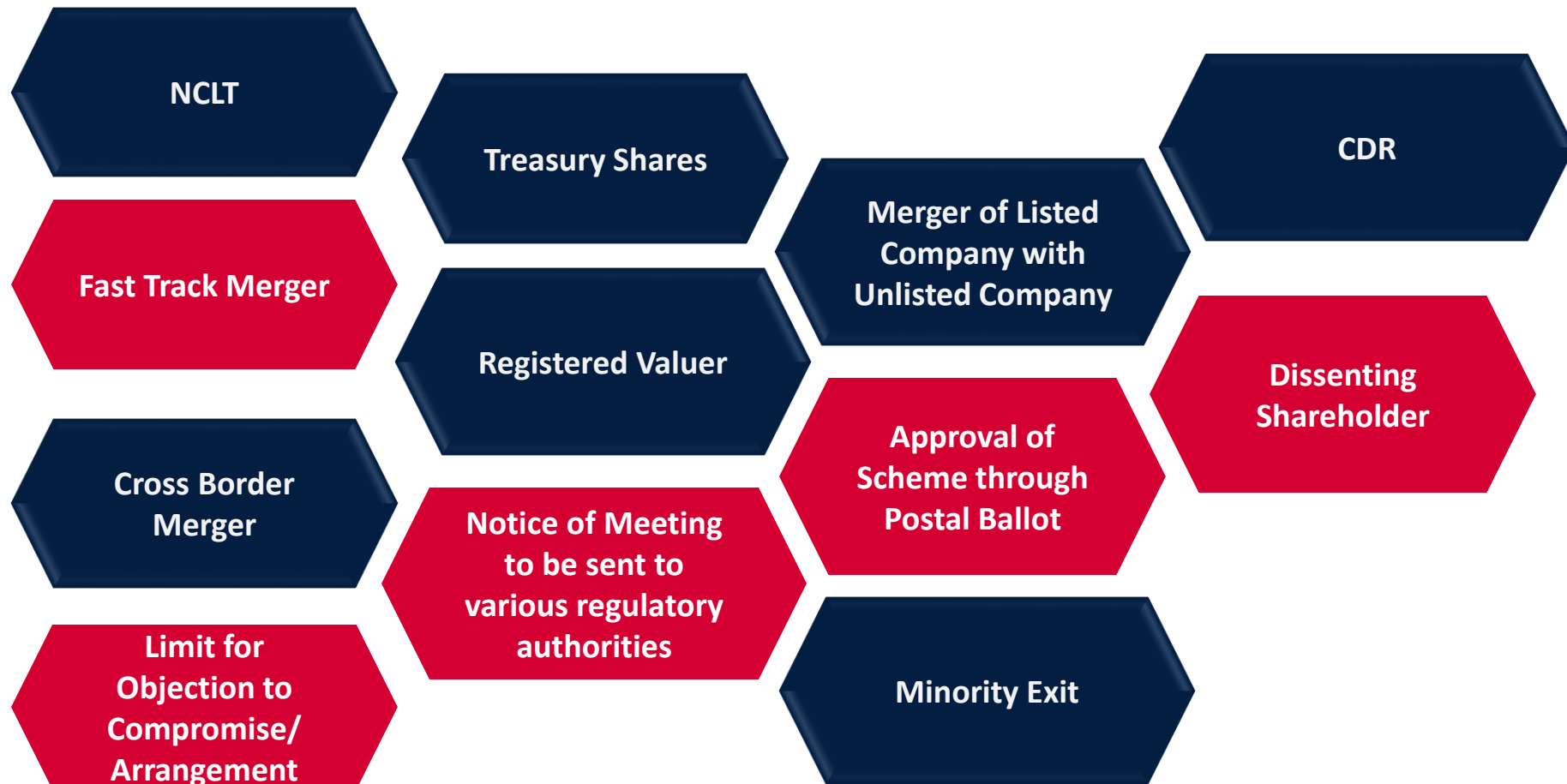
1956 ERA



# Re-Organization Provisions as per Companies Act, 2013



## Pragmatic reforms of M&A

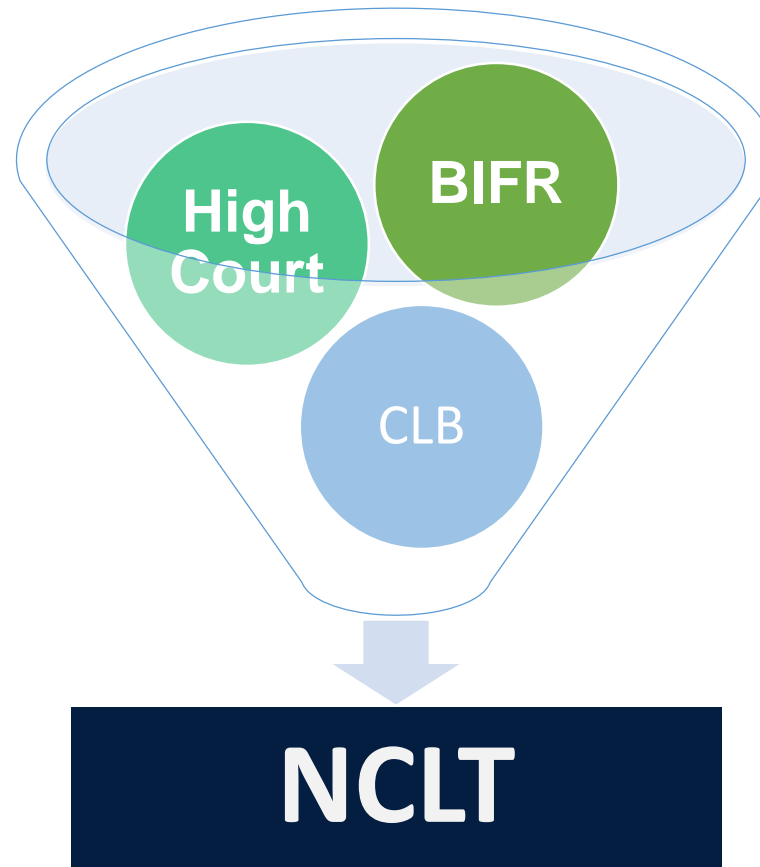




# National Company Law Tribunal (NCLT)

**“SINGLE WINDOW CLEARANCE FOR CORPORATE RE-STRUCTURING”**

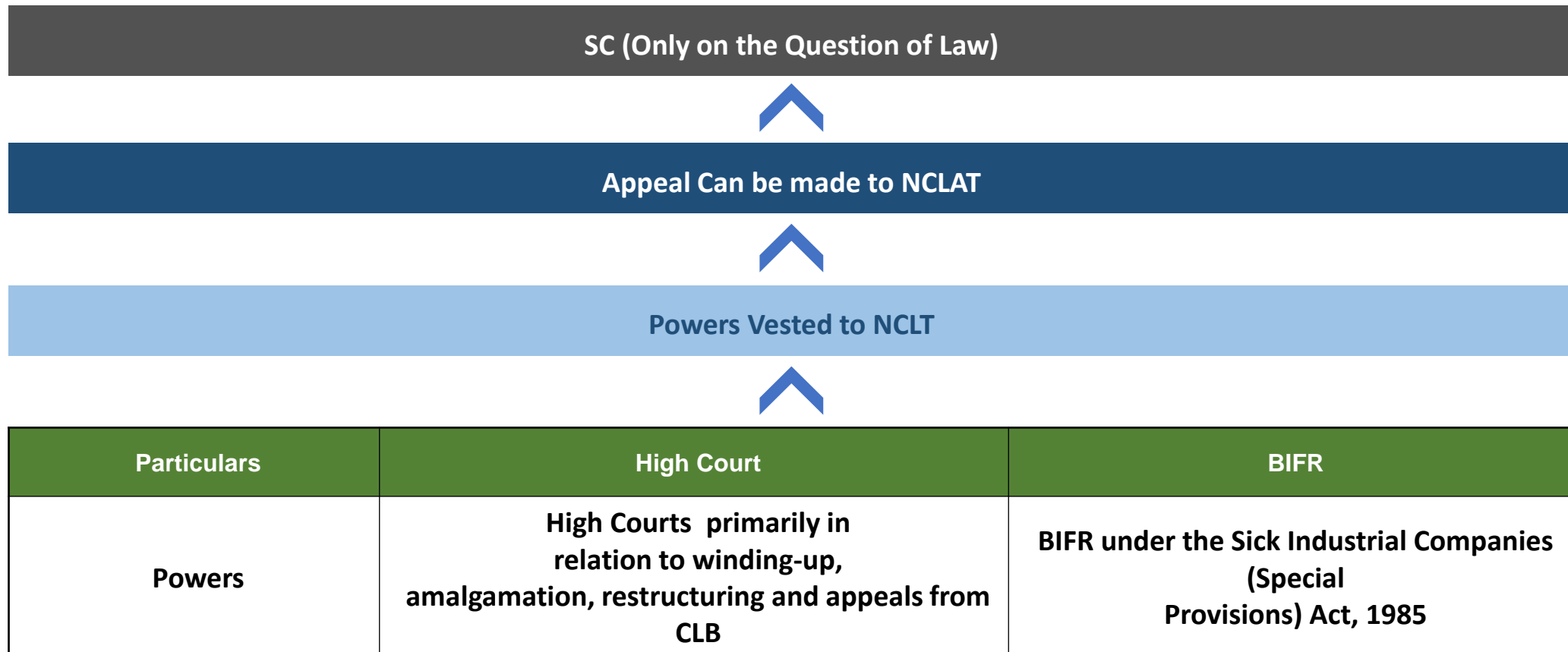
## Introduction of NCLT

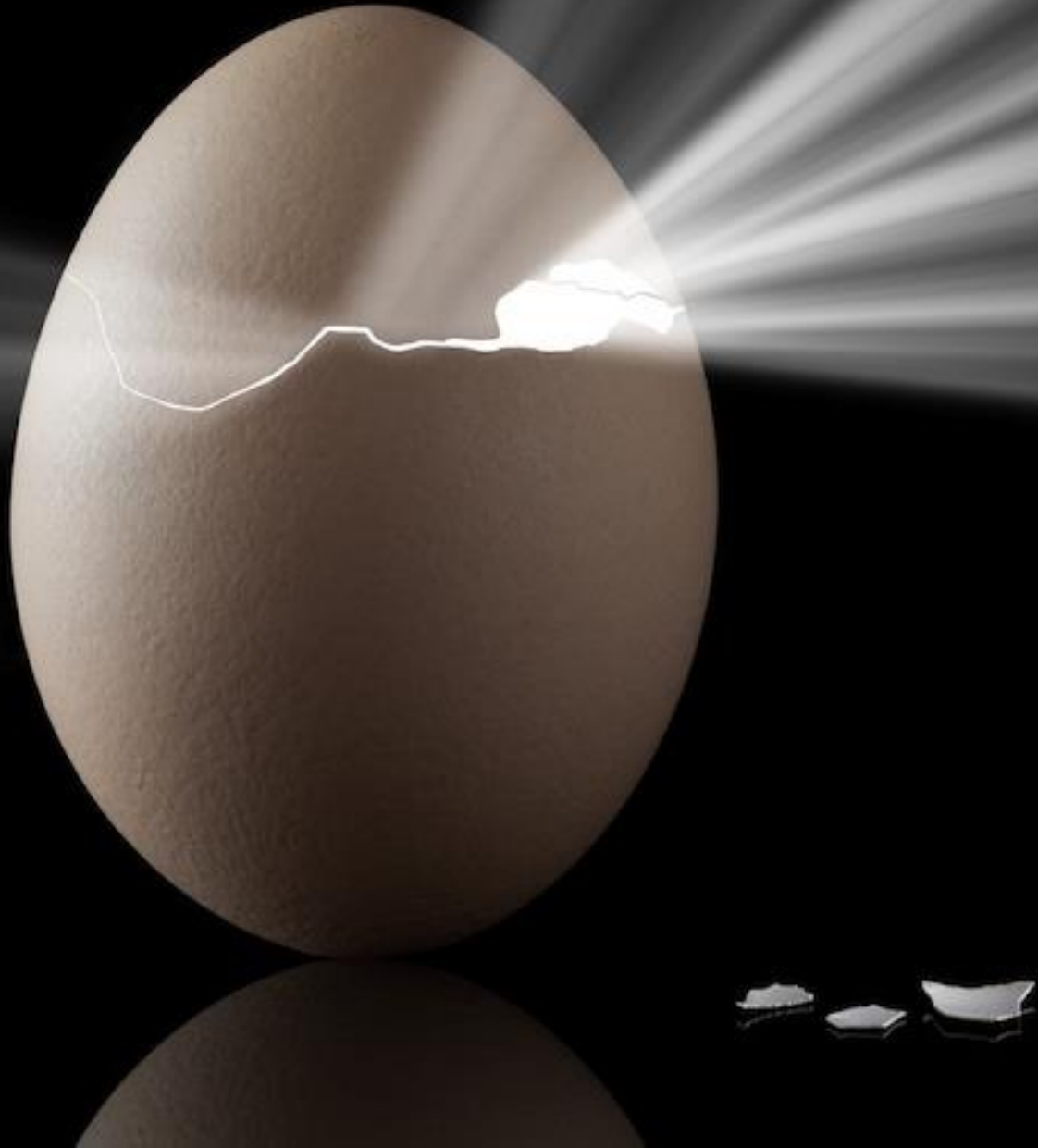


**The creation of a single forum (NCLT) which is dedicated to corporate matters is a welcome move, and removes the problem of multiple regulators.**



## Introduction of NCLT





# **Transitional Provisions**

# Transitional Provisions

**Restructuring Matters at time NCLT becomes operational i.e. 15.12.2016**

>> Transferred from High Court to NCLT and NCLT will continue from the stage and before transfer and complete it.

**M&A Cases (High Court)**

**SICA Cases (BIFR)**

**Any appeal Pending to AAIFR or procedure pending to BIFR under SICA, 1985 before the commencement of Companies Act, 2013 i.e. 01.12.2016**

>> Shall stand abated

>> Fresh reference require to be made to the Tribunal under the Companies Act, 2013 within 180 days from the day this, Act becomes effective.

A paradigm shift in Merger Process

Companies Act, **1956**/**2013**

## Merger Process under Companies Act, 2013

Considering proposal for Merger and Amalgamation by BOD's of Companies



Finalisation of Scheme of Amalgamation, Valuation and Fairness Opinion



Recommendation on Scheme and Valuation report by the Audit committee



Approval of the Scheme and Valuation Report by Board of Directors of the Companies



Filing of Scheme, Valuation report and Fairness Opinion with the designated Stock Exchanges for SEBI approval, if Co. is listed

Uploading of Scheme, Valuation report and Fairness Opinion on website of the Co.



Filing of Application to NCLT (Disclosure through affidavit if reduction of share capital is the part of scheme)



On direction of NCLT, Notice of meeting and copy of Valuation report has to be sent to Shareholders, Creditors and CG, IT, SEBI, ROC, OL, respective stock exchange

(\* Notice shall also provide an option to vote through postal ballot)

Notice also includes the effect of scheme on KMP's, Creditors, Promoters, Non promoters members and also disclose interest of Directors, denture holders



## Merger Process under Companies Act, 2013

Convening of Shareholders and Creditors Meetings for approval of Scheme and discussion on the representation given by regulatory authorities – decision reported to NCLT

If creditors having at least 90% value agree and confirm by way of affidavit to the scheme, then NCLT may dispense creditors meeting.

Notice to Regional Director and Official Liquidator and submission of their NOC with NCLT

Final Hearing by NCLT

Obtaining NCLT Order and filing with Registrar of Companies

NCLT may provide exit opportunity to the dissenting shareholders

Post Merger compliances

## Procedure revamp under Companies Act, 2013

**An application under Section 230 for Compromise / Arrangement / Amalgamation, have to disclose following to the NCLT :-**

- ➔ All material facts relating to the Company ;
- ➔ Latest Financial position of the Company & Latest Auditor's report
- ➔ Any investigation and proceeding against the Company,
- ➔ If Reduction of Share Capital is part of scheme

## Procedure revamp under Companies Act, 2013 (Cont)

Notice of proposed meeting required to be sent to :-

- ➔ All Creditors / Members / **debenture holders (even if right is not affected)**
- ➔ Central Government,
- ➔ **Income Tax Authority**
- ➔ RBI
- ➔ SEBI
- ➔ ROC
- ➔ Respective Stock Exchanges
- ➔ Official Liquidator
- ➔ CCI
- ➔ **Sectoral Regulators or Authorities which are likely to be affected**

**All these authorities will give their  
representation within 30 days of  
receipt of notice.**

## Procedure revamp under Companies Act, 2013 (Cont)

- **Notice shall be accompanied by :-**
  - A statement disclosing details of compromise arrangement i.e. explanatory statement;
  - **A copy of Valuation Report by Registered Valuer**
  - Explaining the effect of Compromise and arrangement on creditors, KMP, Promoter, Non- promoter members, Debenture holders;
  - Any material interest of the Director of the Company and debenture trustee;
  - Expert report on Valuation is needed in case of merger & amalgamation ;
  - Supplementary Accounting statement is also required in case of merger & amalgamation ;
- 

**Dual Notice to SEBI**

Prior to filing with NCLT for obtaining 'No Objection Certificate

Notice of meeting, SEBI may provide its objections, if any.

## Procedure revamp under Companies Act, 2013 (Cont)

Notice shall also provide an option to vote through Postal Ballot

Only those shareholder's can raise objection to the scheme who holds not less than 10% of the shareholding

Only those creditors can raise objection to the scheme who holds 5 % of the total outstanding debt

The tribunal may provide the order for Exit option to dissenting shareholders based upon the valuation by Registered Valuer

Certificate from Statutory Auditor that accounting treatment complies with prescribed accounting standards (Currently applicable to listed Companies)

Every Company has to file a yearly statement with ROC until the completion of the scheme, certifying that compliance is as per an order of tribunal

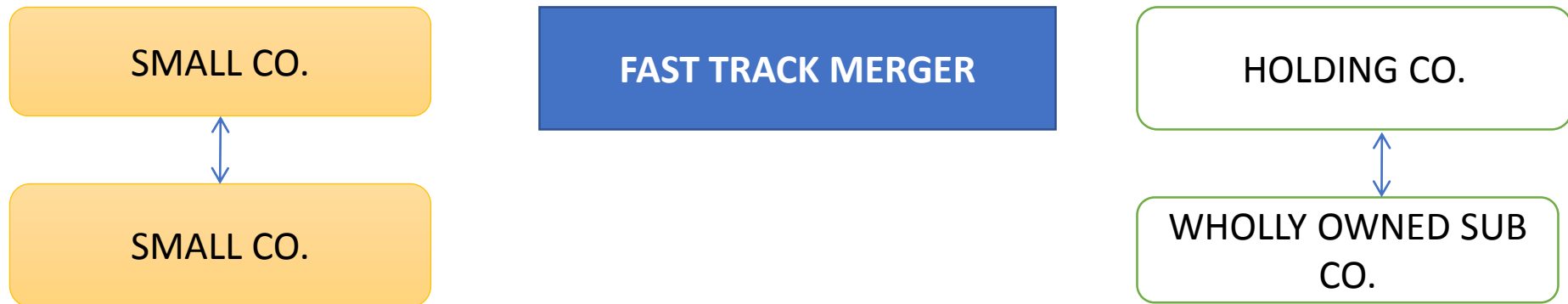


## Procedure revamp under Companies Act, 2013 (Cont)

Now **NCLT** have jurisdiction over CORPORATE DEBT RESTRUCTURING SCHEME also and following are the disclosure with application :-

- ✦ A Creditors Responsibility Statement;
- ✦ Safeguard to the protection of other Creditors;
- ✦ Report by Auditor that fund requirement as approved after CDR will confirm to liquidity test;
- ✦ Statement to the effect, if Company proposes to adopt CDR guideline specified by RBI;
- ✦ Valuation Report of assets by registered valuer

## Fast Track Merger



Small Company means Company other than PUBLIC CO. having PAID Up CAPITAL not more than Rs. 50 Lakh and TURNOVER not more than Rs. 2 Crores. *(Govt. can raise the limits)*  
*Not applicable to Holding -Subsidiary Co., Charitable Co. & Co. Governed by Special Acts*

Central Government has the power to sanction the scheme, no requirement to approach NCLT

# Fast Track Merger Process under Companies Act, 2013

Considering proposal for Merger and Amalgamation by BOD's of Companies



Finalisation of Scheme of Amalgamation



Recommendation on Scheme and CA Certificate by the Audit committee



Approval of the Scheme by Board of Directors of the Companies



Filing of Scheme, CA Certificate, Fairness Opinion and other documents with the designated Stock Exchanges for SEBI approval

Uploading of Scheme, Valuation report and Fairness Opinion on website of the Co.



Notice of Proposed Scheme would be given to ROC, OL and any other person affected through scheme for their objections and suggestions



Filing of Declaration of solvency with the Registrar of Companies (RoC) along with the Scheme of Arrangement



Issue of notice by Transferor and Transferee Company for convening the meeting of the members and creditors and notice

## Fast Track Merger Process under Companies Act, 2013

Meeting of the shareholders and Creditors of the Company for scheme approval with requisite majority



Filing the copy of Scheme along with the result of each meeting with the Central Government by the Transferee Company



Filing a copy of scheme and Notice of Objection and Suggestion to :- ROC and OL



ROC and official liquidator to provide their No Objection or suggestion on the scheme to Central Government within thirty days of receipt.



Central Government to consider the objection and suggestion of ROC and OL and if central government is of the opinion that scheme is in the public interest or in the interest of creditors, the Central Government shall issue a confirmation order.



Central Government may refer the scheme to NCLT for considering the scheme under Section 232 of the Companies Act, 2013 as a normal merger.



File copy of the order with the Registrar of the Companies in e Form INC 28

## Fast Track Merger (Cont.)

### Applicability

- ❖ Scheme of merger between holding company and its wholly-owned subsidiary company; or
  - ❖ Between two or more small companies (*not applicable for listed companies*).
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### Features

- ❖ Section 233 of Companies Act, 2013 provide for the fast paced merger mechanism for the class of companies mentioned above ;
  - ❖ Requirement to go to NCLT for sanctioning of scheme of arrangement has been done away with;
  - ❖ Objections only from Registrar and Official Liquidator (and from no other authority/regulator)are invited as envisaged in the provisions;
  - ❖ if opined to be against public interest, NCLT may order merger in normal course, that is, through NCLT route;
  - ❖ Equally applicable to Demergers and other schemes of arrangement.
-



## Fast Track Merger (Cont.)

### Logic

- ❖ No loss of any interest of any existing shareholder;
  - ❖ No shares are issued as consideration;
  - ❖ Consolidated Balance Sheets are already prepared;
  - ❖ All the shares of the wholly-owned subsidiary company are already held in beneficial interest of shareholders of listed company in same proportion;
  - ❖ All the profits and losses already accrue directly to the listed company;
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## Impact Analysis of Fast Track Merger

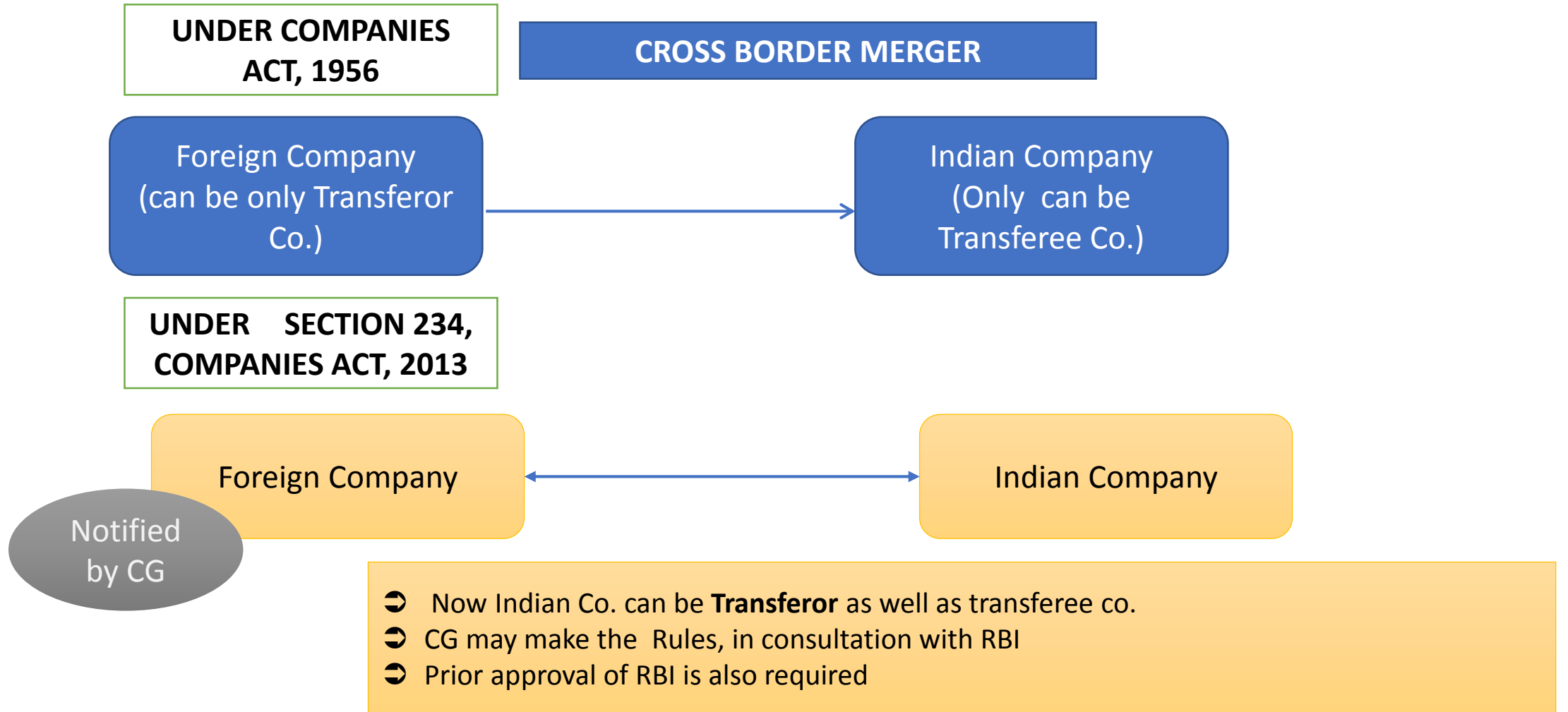


- ▲ Encourage corporate restructurings for small and group companies
- ▲ Will result in faster disposal of the matters
- ▲ Only relevant cases would go to NCLT
- ▲ No need of separate RBI / IT approval
- ▲ Provisions of valuation by Registered Valuer are not specified



- ▲ Approval required from majority of each class of Creditors holding 90% in value, may be difficult especially from trade creditors
- ▲ There is no clarity on which person to be considered as affected by the scheme for giving the notice
- ▲ No clarity, what shall be impact of objections, if any

# Cross Border Merger



# Impact Analysis of Cross Border Merger



- Flexibility for company structuring overseas
- Cross Border restructuring will increase
- Opportunity for Indian companies to form corporate strategies on a global scale



- Scope of inbound mergers may get restricted to notified jurisdictions

# Minority Exit Opportunity

## ACQUISITION U/S 235 / 236

Where acquirer becomes registered holder of 90% or more of the issued shares due to scheme or contract involving transfer of shares or by virtue of an amalgamation, shares exchange, Conversion of Securities, then Acquirer have to buy the minority shares as per following formula for price determination :-

➤ **IN CASE OF LISTED COMPANY**

- ❖ Price as per SEBI Regulations; *[It implies that through Merger a person may go beyond 75%]*
- ❖ Registered valuer to provide valuation report to the Board of Directors of the company justifying the methodology of arriving at such price

➤ **IN CASE OF UNLISTED CO. (INCLUDING PVT)**

- ❖ The highest price paid by the acquirer, person or group of persons for acquisition during last twelve months;
- ❖ fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters



## Impact Analysis of Minority Exit



Provides an exit option to minority shareholders in unlisted companies as well .

### Issues:

- Inconsistency between Companies Act, 2013 and SEBI delisting regulations which provide that purchase price for minority shareholders should be determined as per reverse book building
- Duty is casted but No right to Squeeze out provided for acquirer

## Merger of listed company with unlisted company

- On merger of listed company with unlisted company, the transferee company shall remain an unlisted company until it becomes a listed company
- Provision for an exit route for shareholders of the Transferor Company
- Payment of value of shares and other benefits in accordance with pre-determined price formula or as per prescribed valuation

# Impact Analysis of Merger of listed company with unlisted company



- Streamlined the entire process of merger
- Dissenting shareholder will get exit opportunity

**Issue:** Inconsistency between Companies Act, 2013 and SEBI Delisting Regulations

## Role of SEBI In Mergers & Demergers

- Regulation 37 of SEBI (LODR) Regulations, 2015
  - ➡ Review & Give Observation on Scheme before filing with NCLT
  - ➡ Grant exemption from Rule 19(2)(b) of SCRR for listing of Resulting Company in case of demerger
- As per Companies Act, 2013: **[no provisions in SEBI Laws yet]**
  - ➡ Provide Valuation method for exit of Dissenting Shareholders in case of merger of listed Company with Unlisted Companies
  - ➡ Provide Valuation method for exit of Minority Shareholders in case of Acquirer reaching to 90% or more

## **Role of SEBI in Mergers & Demergers.. Cont.**

**Review & give Observation on Scheme before filing with NCLT:**

- **Scheme should be in consonance with SEBI Regulations**
- **Scheme should not be against the interest of minority shareholders**
- **Valuations should be fair to the shareholders of Listed Company**
- **No undue advantage to the Promoters or KMPs**
- **Proper disclosure of all the facts to shareholders to take informed decision**
- **In case promoters' holding is increasing in Scheme, it is to be approved by Non-promoters through Postal Ballot**

## Role of SEBI in Mergers & Demergers.. Cont.

### Grant exemption from Rule 19(2)(b) of SCRR for listing of Resulting Company in case of demerger

- ✦ Scheme should be sanctioned by the Tribunal (NCLT)
- ✦ The Public Holding should not fall below 25% under the scheme
- ✦ No shares being issued other than as provided in the Scheme
- ✦ No convertible Instrument should be at the time of listing except where it is provided in the Scheme and other their conversion  
the public holding is not falling below 25%
- ✦ Proper disclosure of all the relevant information about the new company and its management in the form of Information Memorandum & Newspaper Advertisement

**That is what learning is, you suddenly understand something  
you have understood all your life, but in a new way**

**..... Doris Lessing**



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