Mergers Acquisitions and Corporate Restructuring
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Lecture – 31
Legal Aspects of M and A - 1

Hello friends, welcome to another session on mergers acquisition corporate restructuring in this particular module we will be discussing about the legal aspects of mergers acquisitions from different laws point of view. We will be talking about nuances certain salient aspects of different laws of mergers and acquisitions laws that related to mergers and acquisitions particularly in Indian context.

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So this is our; consider you could discuss legal aspects of mergers acquisitions in India. Definition of merger amalgamation as per the companies act 2013. Scheme of merger or amalgamation. Amalgamation process and what are the major changes that has taken place with respect to mergers or amalgamation as far as the companies are 2013 is concerned. Earlier we used to have the companies act 1956 it has been replaced by the new companies act 2013.

So in that there are several changes have taken place with respect different regulations in the companies. One of them that is, affected them how the mergers acquisitions regulated in Indian corporate sector.

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And these are the keywords amalgamating company, amalgamated company, transferor and transferee company, merger by absorption merger by formation new company, merger scheme we have been discussed.

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So when you look at the overall legal aspects the merger or amalgamation that we have is governed by provision different acts. We talked about certain features certain important things in the different act in the first model where you talked about legal environment demanding and general discussion you have in this particular model we will have little more detailed discussion with respect to amalgamation.

So we have the Companies act 2013 where the sections from 230 to 240 deal with different things of merger and acquisitions different regulation regular aspects of merger and acquisitions with respect to companies. Whereas we in the 1956 companies rights this section

390 to 394 used to cover these aspects so anyway since the companies act 1956 no more there and now new companies are so we will be discussing the company's act provisions from the 2013 company point of view.

Then we have the competition act 2002 which is a replacement of the MRTP Monopolies and Restrictive Trade Practices act of India that is replaced by the computation act 2002. Then there are certain provisions income tax act 1961, which also governs the certain aspects of particular tax aspect of M and A then Indian staff act also gets involved they get affected or they affect the M and A process.

Then we have accounting standards Ind AS which is Ind AS is nothing but the new name for the in IFRS that is adopted by India or Indian accountability system. We used to have as earlier recognition that is Ind AS. Then a particular sector may have certain regulator and there may be some sector regulations which can also affect M and A process. So those things so these are the major legal provisions or acts regulations which actually affect the mergers acquisition. We certainly also have SEBI takeover code which also affects the M and A process.

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Then coming to the legal aspects of mergers and acquisitions for the listed companies we have takeover acquisition involving listed companies regulated by, the listing obligations or disclosure requirements when if a merger acquisition process final involves the issue of shares issue of toasters of public shareholder public market. In that case listing the company somehow gets listed because a subsequent M and A process.

Then the listing obligations will be taken care and the SEBI laws will be automatically applicable it is a fallout. Then SEBI has got its own takeover guidelines involving listed company suppose we one company will like to make a open offer to buy this as another company. Then certain takeover guidelines are also there which is prescribed by SEBI. So these are applicable as far as listed companies are concern and the previous one that you talked about they are actually applicable to all the companies listed or unlisted.

Depending on certain threshold limits threshold limit is there then is applicable for example the competition act provisions related to mergers and acquisition will be applicable to such mergers and acquisition involving the companies having a particular turnover or assets size. We will discuss about in detail any subsequent session. So it is not that all regulations are applicable to all the mergers and acquisition certain regulation may or may not be applicable to certain mergers and acquisitions.

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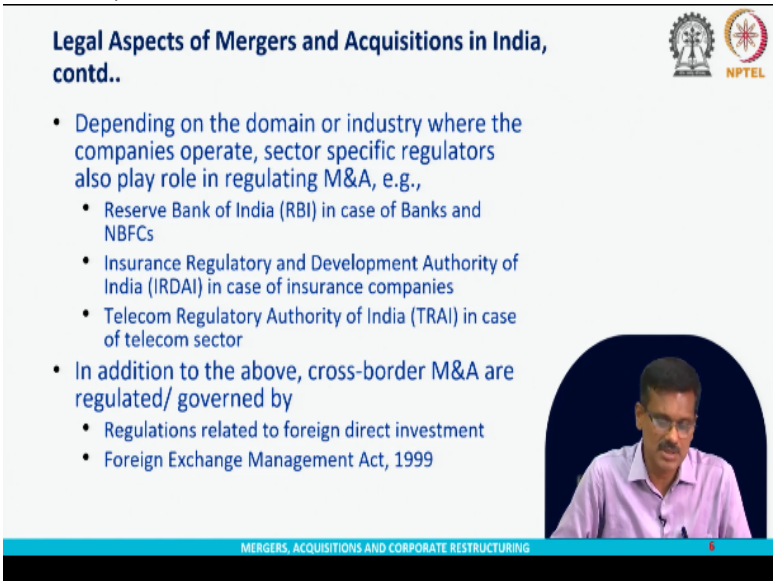

Then depending on the as you discussed of the domain a particular industry that a company belongs to the parties belong to so certain sectoral regulator also may play role. For example, in the banks are getting more then reserve India will have the certain role to regulate the M and A in the banking sector banks and NBFCs RBI certain rules gets invoked. Then if there is a mergers and acquisitions involving insurance companies then certain rules regulations IRDAI are going to be impacting the M and A in insurance sector.

Similarly, you have Telecom Regulatory Authority of India TRAI so TRAI provisions may be applicable when there is a merger between 2 telecom sector companies. In addition to that if there is a cross border M and A is happening besides those regulation that were discussed previously other regulation related to like foreign direct investment. Foreign Exchange Management act FEM 1999 those provisions also get involved because there is a transaction between company in India another company elsewhere so those regulation will be affecting.

So in this particular model we will be talking emphasizing more from the computation act point of view, companies act point of view and SEBI takeover code point of view and the income tax certain aspiration contracts regulation with respect to a M and A. We will not be talking about this sectoral regulatory implication in case of mergers and acquisition we will not talk about the foreign direct investment regulations as far as M and A are concerned.

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So the first thing is that you have got the companies act 2013 which is a replacement of the companies act 1956. So section 230 to 240 of the companies act as well as there is a company's rules which has notified in 2016 with respect to compromises arrangements and amalgamations. So the rules which are there because act, provides a certain sections whereas the rules actually provide the steps procedures as far as execution a particular transaction a company is concerned and what are the specific steps to be followed by the company.

So Companies rule 2016 that provides for the different steps that is involved as far as amalgamation and merger processes concerned involving Indian companies.

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So companies act 2013, defines a merger and amalgamation because all the act will have certain definition of certain key terms. So how is the merger and amalgamation defined it is not very explicitly defined in the space companies at 2013, but if you one reads the different provisions of companies act as well as the company's rules 2016 one can interpret and can say that amalgamation or merger is a legal process by which 2 or more companies are joined together.

To form either a new entity or 1 or more entities to be getting observed or blended another and as a consequence what happens the amalgamating company loses its existence and its shareholders become the shareholders of the new company or the amalgamated company. So there may be amalgamating and amalgamated company the terms may appear little confusing in that case one can simply say that amalgamated company you will be surviving that means it will go as usual.

Whereas amalgamating company is not going to suggest to exist that means the shareholders of the amalgamating company will be given the shares in another new company or the amalgamated company which is actually surviving.

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So further with an example you can have let us say there are 2 companies company A and company B they are merged with so company A is there company B is there and company C is formed. So what happens shares in C is given to the shareholders B in lieu of the shares in the B. Similarly shares in C is given to shareholders of A in lieu of this shares of A. So what happens A and B do not remain C exist. So companies A and B will be taken as amalgamating companies.

Whereas company C is the surviving company which will be known as the amalgamated company that is one there can be another case where new company is not form rather company B let us say is there which is being merged with the company A that means company A will be existing and company B will cease to exist. So shareholders of company B let us say company A company B so shareholders of company B are given shares in company A, B is not going to exist A is going to exist.

So B is known as amalgamating and A is known as amalgamated so these are the specific terms as far as the company laws are concerned. So we cannot use a different term as per our convenience so when you look at a merger scheme document when the company is announced they will be mentioning the amalgamating and, amalgamated company assets in a M and A market let us say normal merger acquisition the talking we talk about acquirer we talk about target in that case amalgamating companies like in target company.

Amalgamate companies nothing but the acquiring company that way one can also generally simplify this but this particular terms as such, but provided the target company is not existing

target company, gets merged with a acquiring company target company does not survive. Then only this amalgamating, amalgamated concepts come otherwise does not come.

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So again section 232 also specified defines little more better so they define the merger, merger is in a scheme involving a merger, where under the scheme the undertaking, the property and the liabilities of 1 or more companies including the company respect of which they compromise or arrangement is proposed are to be transferred to another existing company it is known as merger by absorption that means a company is existing another company's property assets, liability etcetera gets transferred.

So that means 1 company does not exist another company surviving that is called absorption whereas if the particular scheme where the undertaking property, liability so 2 or more companies include the company respect to which the compromise arrangement is proposed are to be transferred to another company that is called a merger by forming a new company. So what we talked in the previously this same thing is defined in another way.

So second case is the new company's form and first case new company not form the old company shares are given to the targets companies. The surviving company shares are given to the survive the company which cease to exist and in lieu of the shares held in that company which is visible cease to exist. So in that way if you look at these particular 2 things as such the first one can be taken as in general takeover market yet a scenario takeover.

But the second one can be taken as a scenario merger or amalgamation one thing let us point out let us emphasize highlight that in a merger amalgamation at least 1 company will cease to exist. Whereas in takeover both the companies acquiring company target company survive and merger can be a follow-up of takeover. So first takeover may take place company a m a takeover 100% shares of company B but can retain the company B as it is, like a holy one subsidiary.

After some time the company A may feel that there is no point keeping company B separate so rather company B is assets and liabilities can be transferred to company A and then the merger can take it. So merger can be the second stage an acquisition can the first stage in the process.

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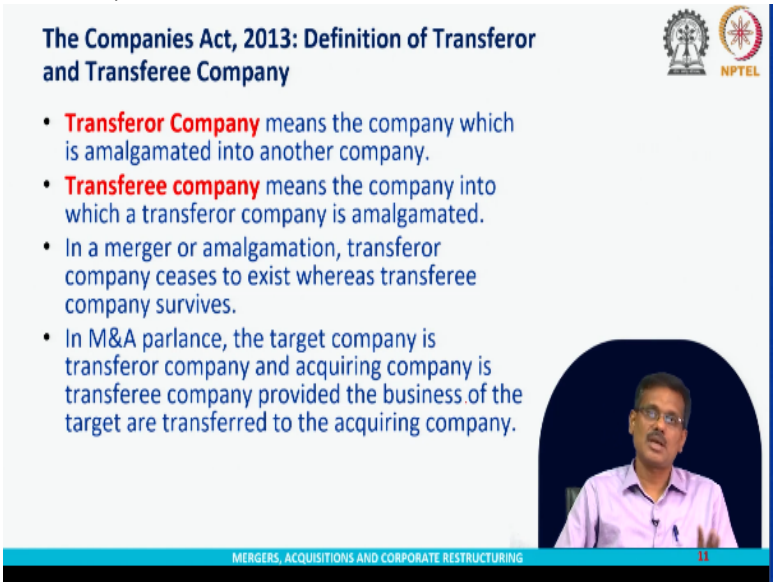

Then another thing transferor company, transferor company means the company which is amalgamated into another company that means transferor company does not exist afterwards. Transferee company means the company into which a transferor company to which company the transferor company gets included their asset liability gets included transferee company. So in a merger or amalgamation transferor companies, ceases to exist whereas transferee company exist or survives.

And that way again, M and A parlance again we can say the target company is a transferor company acquiring company is it transferee company provided the business of the target are transferred to acquiring company. So business of the target is not separately maintained it is clogged with acquiring companies business all assets and liabilities of a target company are

now becoming the assets and liability of the acquiring company in that case target is a transferor whereas acquiring companies are transferee company.

We because in the M and A we look at the M and A scheme these terms are actually used so one should you understand what does it mean what is transferor company what is a transferee company, what is amalgamated in company with the amalgamating because these are the terms used in legal documents as far as the M and A instances are concerned.

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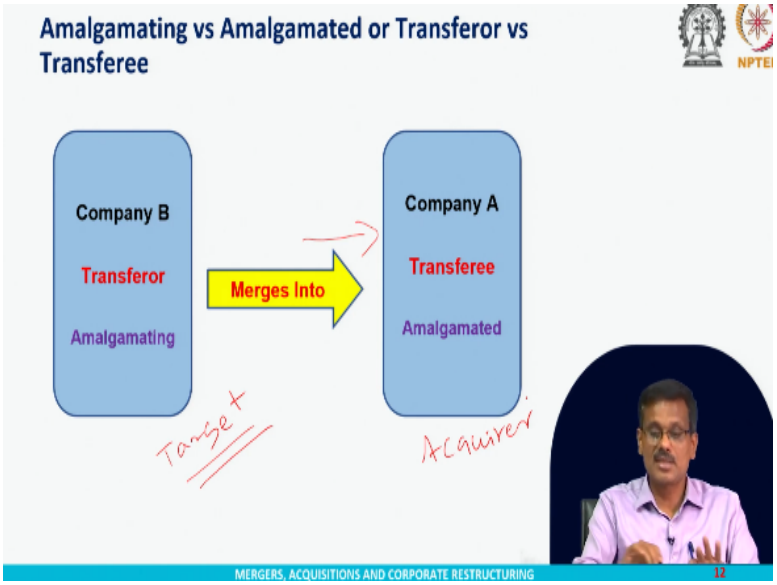

So next in a pictorial representation we can say that let us say company B is there company A is there company B is getting merged into company A. So in that case company B can be also known as transferor company or it can be also known as amalgamating company A will be known as transferee company or it also be known as amalgamate company. So that is another way of explaining that so another way so that way we can say if the company B is not going to exist.

So maybe we can in our M and A strategy we talked about this is the target this may be the acquirer, but one thing is that target does not exist targets business gets transferred to acquirer companies business that has to be that ensure then only this transferor transferee concepts come. If they are staying separate then the transferor transferee company does not because transits and liability have to be transferred then only transferor transferee is coming something has to be amalgamated something has to be merged.

Then only we can say amalgamated or amalgamating assets otherwise we cannot use that will be simply an acquisition of shares and companies kept separately.

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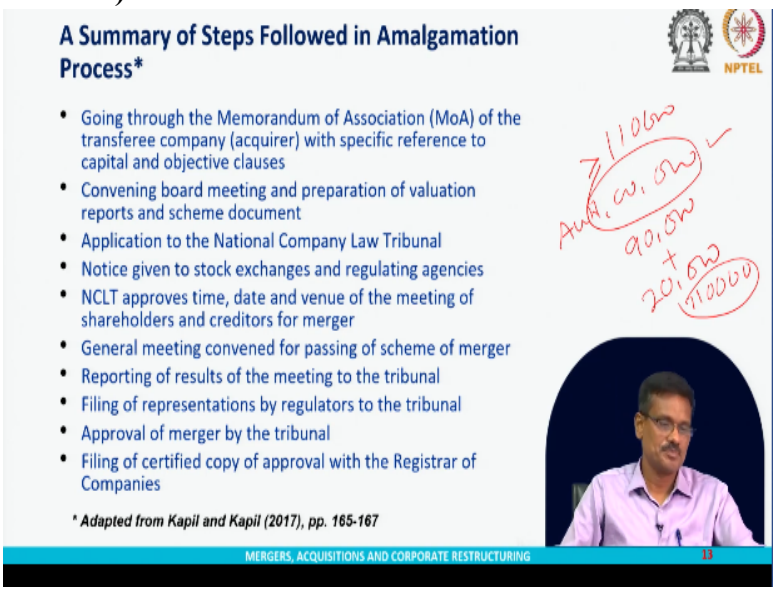

So what is that common step that the company has to follow from the less acquiring community point of view. The first of all what happens so whenever a company A acquiring company B so they have to look at something called memorandum association of the transferee company. Transferee company acquirer company with specific reference to capital objective. So it is possible that because a new company's business is observed by this existing company.

So add the new companies doing as its objective may not be enshrined in the objective specified in the memorandum association when the company is registered we the company has to file or to create develop a document called memorandum association which has different clauses. One of the clause is a objective clause which says what is the objective of this particular business? So it is possible what the company B is doing which is being acquired being merge company A they are not being done by company A.

So company A is objective may not be including those things in that case first the company A has to amend its objective in memorandum association with a special resolution. Then only it can observe another company and that company may have different objective. Similarly, the memorandum association also has one of the; another clause called capital clause what is the authorized share capital of this company. So when the merger takes place since new shares will be issued newer additional shares will be issued in company A in lieu says in company B.

That they are getting good is getting must so that may lead to more number of authorized shares we do not have the authorization limit may be pierced that means maybe the company is authorized to as per the memorandum association company is authorized to issue 100000 equity shares and since new shares are going to be issued let us say it is authorized 100000 shares authorized whereas it has issued by now 90000 but maybe another 20000 shares have to be issued to the company B which is being merged with the company A.

Then what will happen 90 + 20 becomes 110000 it cannot happen because authorized capital is 100000 share. So first the company has to change its authorized company A has to change the authorized capital modify amend that to make it 110000 or more than 110000 then only 20000 extra shares can be additional shares can be issued. Otherwise can other is going to be illegal asset similar objective loss then board meeting is convert and where the valuation reports assume the acquiring company and target company are specified.

And then the scheme document is specific we will talk about scheme what this content will sit subsequently. The scheme document is also presented then earlier high court used to be approving a trade as per companies act 1956. Now it is national company law or tribunal which has got benches in different parts of the country the companies have to approach to the NCLT National Company Law Tribunal. Then NCLT is to notices to the different stock exchange different regulatory agencies as the applicable they will issue.

Then NCLT will also approve the day time and venue for the meeting of the shareholders where the amendment merger or acquisition proposal will be represented. Then general meeting with general body meeting will be convened by the respective companies where this merger scheme will be approved and then once the mergers can approved. The results of the meeting will be passed on to the tribunal then tribunal will approve the merger and then certified copy of the approval is applied filed with register of companies.

Then it becomes effective mergers acquisition merger of the companies become effect so these are the general steps actually there are so many other steps involved in this but in the interest of this particular course we talk about the major steps involved in mergers acquisition process as per legal aspects are concerned.

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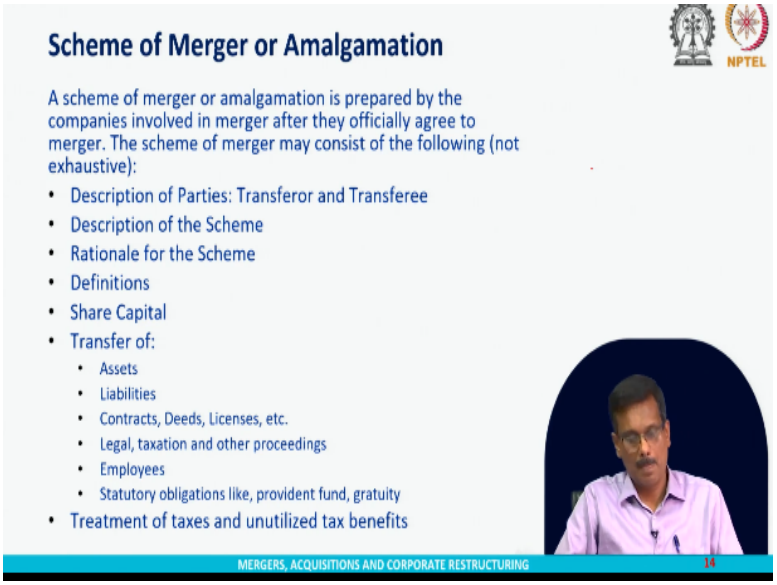

So, what is scheme of merger? Schema merger means how many shares will be stored, what the valuation, what happened after the company, what will happen the assets of the company? All those things have detailed as a merger scheme. So schema merger is prepared by the company involved merger after they officially agree that they will merger and the scheme of merger will consist of this following but not exist. If the scheme of merger can that contains the details can differ from one more than otherwise depending on the case to case basis.

But these are this the different thing that is specifying scheme merger it talks about the part who are the parties who is the transferor company, who is the transferee company? So for example sometime back HCL acquired Glasgow smith cleaning pharmacy some business so, HCL will become the transferee company whereas the Glasgow GSK becomes the transferor. So they have to specify this M and A scheme document.

Then they will talk about general scheme of the what the scheme talks about then they have to also suggest why this M and A is happening what is the reason what is justification for this mergers as such maybe it is becomes synergy by more rationalization many more product more economic scope that we talked about why mergers are going to take place those have to be discussed they are justified why this particular mergers acquisition is taking place and how the stakeholders of the company are going to benefit that of justify.

Then there will be certain definition what is acquire company, what is act? Typically in the law we have different definition. Definitions will be given in one the part of the scheme. So that when the storms come in the scheme, we know how by this term they mean this one only.

Then they will also talk about the existing share capital of acquiring company and the target company. Then they talk about what will happen to assets or the assets are going to be the transferor not obviously transferor.

They will mention here all the assets, update transferor company gets transferor to transferee companies then what happened liabilities? Liability will be transferor to the this company or not then what will happen the contracts, deeds, license acquiring the target company or the companies is being acquired which is being merged with the other company. They will have so many contracts with suppliers, customers, creditors there will be some, deeds there will be some licenses taken from different agencies.

All those things will also automatically become the property of or the obligations of the transferee company that means the company which is surviving automatic that has to be mentioned in that scheme also very specifically. If there is any legal taxation or some proceedings are pending in a come core they also become part of the surviving company one cannot say that the company because the target has certain cases. So (())(24:20) target is not existing so the case is not like the cases will continue.

Now if the courses will be whatever legal cases are pending now it will be name of the surviving company which is also known as transferee company or the acquiring company in a normal sense we can talk about what will happen to employees? Employee also get transferred from 1 company to another company they will remain will talk about the terms and condition may remain the same or then with changes also then their company may have some statutes and they may have their own provident fund they will have that gratuity what will happen?

So they also have to continue because gratuity provident funds a statutory obligations so, the company which is taking over another company they have take care of those oblique they cannot say that it was another company their obligation was not we have to as a company is acquiring they have to take care of those obligations. Then what will happen to taxes and there may be some unutilized tax benefits that is there. So they also become the benefits of the acquiring company surviving, company which they can take advantage of in future subject to the income tax regulations.

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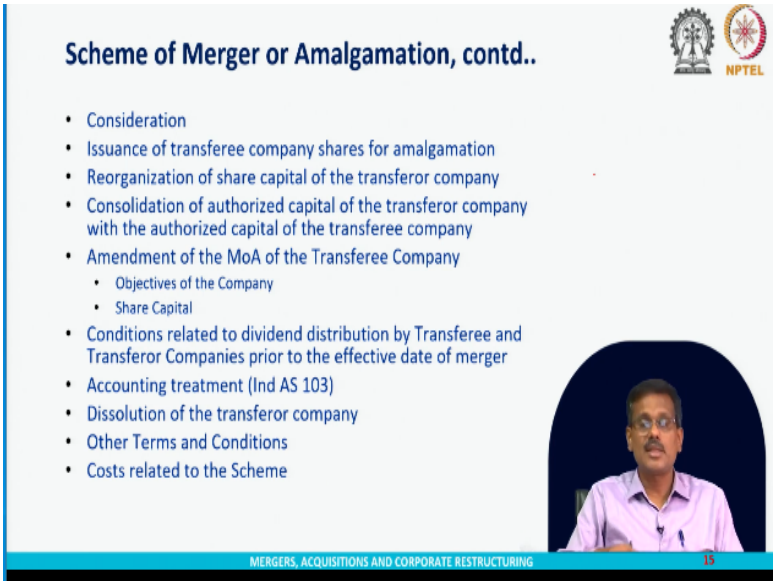

Then what is the how the construction paid how much amount is the final consideration, how many shares of let us say the acquiring companies issued for share of target company so those has to be specified? Then issuance of transferee company shares of amalgamation so there will be new shares will be issued, because of amalgamation in the transferee company that means surviving company or the acquiring company it is possible before the transferor of shares.

The transferor company shares may be reorganized for us example the transferor company shares may face value 10 rupees. So transferee companies shares may be stress value 1 rupee so they may first reorganize transfer or component to make the face value same. Then they talk about how many shares are going to be extends for each share because if face value becomes it becomes easy to deal assets it becomes more simpler.

Then the both the company's authorized capital gates consolidated and new authorized capital is there for that matter the share capital clause will be now amended as per the MoA is concerned and also objectives of the company that M and A also has to be amended. Then in because more than request is announced today but effective date may be something later. So in between what happens the shareholders will be entitled to dividends of dividend cancel.

The shareholders can get the dividend as it is and whether a transferee company declares dividend or transferor company declared dividend transferee companies surviving transferor is not surviving that may target only thing is that. If there is certain shares in the transferor companies as far as separate transferee company has some shares in transferor company in

that case the dividend what is due for them then only paid, but anyway that becomes their company only.

So dividend paid a dividend again the cash becomes part of the cash of once the transferor company is paying dividend transferee company which is having a share suppose before the merger transferee company must act let us simply acquiring company has certain shares in the target company. So they will also get dividend but since the scheme has been announced effective date is little later so they are not going to get dividend because dependent will come to them only and finally the dividend also the cash belongs to them.

Then they have to give the auditor up to give a certificate that case accounting how the accounting is going to be done so Ind AS per the new accounting standard IFRS convergence after conversion Ind AS deals 103 deals with amended accounting. So, which particular accounting treatment is going to be done, because there are certain choices depending on the case to case they have to say which method is going to be followed on that too they have to say this method is the amended accounting rules will be followed they have to certify that.

Then the transferor company gets dissolved then some other terms and condition can be there and if there is this cost involved with respect to this M and A who is going to be what cost acquiring company, the transferor company, transferee company that has to be specified in the scheme also.

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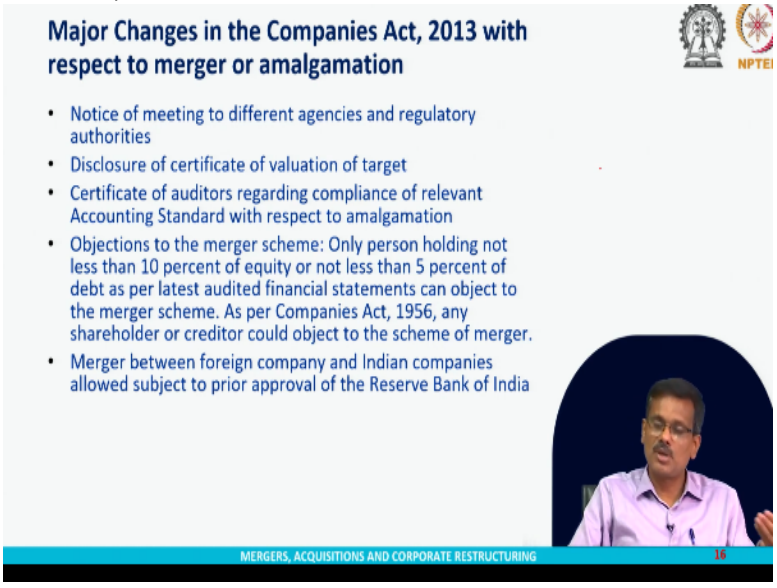

Then in 2013 the certain development which is supposed to be something good development as far as compared to 1956 companies act. So certain things that earlier notation meeting was given to something few agencies but now notice of meetings to given different agency stock exchange regulatory agencies are given. So many people come to know that the M and A the merger is taking place between 2 companies earlier the valuation certificate was not M and A.

Now the disclosure of certificate a valuation has to be the certified valuation I should disclosure that has to the target how the value that has to be disclosure. Then auditor also satisfy that is relevant account like we talked of index 103 which we followed with respect amalgamation certificate has to be given. Then earlier one single shareholder could object to a M and A. Finally, the objection may not be entertained may not be voted out.

But they could object that means any single shareholder can stop the M and A process at put a span in the process and then the meeting takes place and then the M and A may not have problem. So that is a problem can happen, but now if you want to object at least you must be having at least 10% of equity and creators also can object at as long as they have 5% rate. So those up to that if you have at least that much you have then M and A can be objected in the meeting.

Then what to reconcile can discuss with them and what will happen and if the shareholders still remain descending shareholders maybe they will be given cash instead of shares in the acquiring something has to be sorted out and earlier foreign common Indian companies were not approved earlier allowed now merger can take place object to the prior approval Reserve Bank of India, so, for merger between foreign company and Indian companies can take place.

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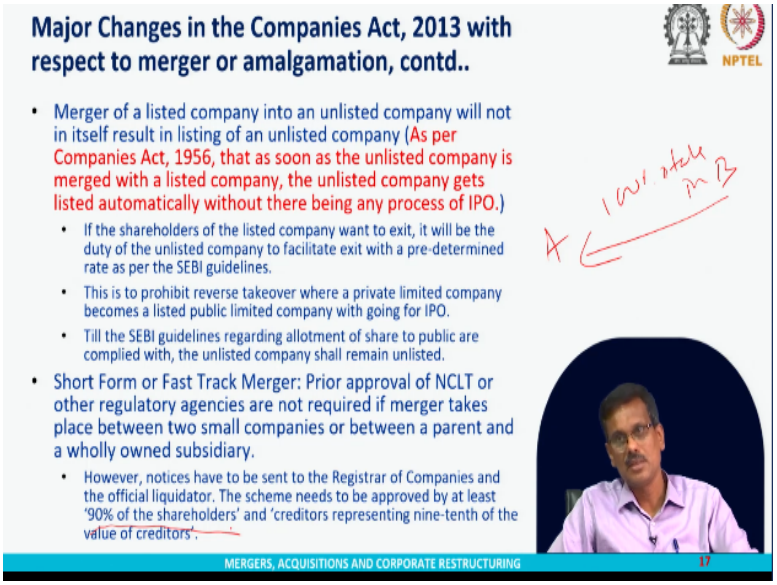

Then another thing is that earlier a listed company can be merged with unlisted company, then what happens unlisted company becomes listed. So that way 1956 companies act as soon as the unlisted companies merge the listed company. The unlisted company gets listed automatically without the going through the process IPO that means if unlisted company even listed then you have to go for initial public offering shares will be issued people will subscribe then visiting take place.

Since that is getting merged with a listed company which may be a small company but if just circumvent the IPO process they used to get merged with a small listed company an automatic an honest company gets listed so this is not now allowed in new companies are 2013. So in that case it will be the and there could be the listed company there could is a descending sale they may not approve that in that case they will be given the cash so that the exit they will be given exit option.

So that they exit from the company and then merger can take place so this is essential to prohibit reverse takeover reverse takeover means a small listed company acquires a big unlisted company and big unlisted company does not go through the rigorous IPO process before the listing takes place so that the circumvent that is not allowed now. Till this SEBI guidelines regarding allotment of share to the public are followed or the specific the issued guidelines are there unlisted companies are remain only.

So this shortcut is now being prohibited in this new companies act then there may be merger involving very small companies or the merger involving a holy one, subsurface company A

has a company B where they have A has 100% stake in B and A once the B to be merged it is a holy one subsidiary. So in that case they do not need the approval NCLT so in that is a fast track model that can the merger can take place quick but this all the states are talked about they are not going to follow in that case within a short period this merger cannot.

Because this is involving a holy one subsidiary for that matter but notices have to be in register of companies and the official liquidator because there is official liquidator is appointed because the liquidation 1 company takes place that company not exist that is required liquidation and the scheme has to be approved by at least 90% of the shareholders and the creditors, representing at least nine tenth of the value operators if they approved.

Then the short form or the fast track merger can take place as far as fully one subsidiary is concerned 90% shareholders is not applied because they themselves have 100% stake in the company and they are approving itself. So that condition does not mean but in case small companies merger these things can, this or 90 % holders have to approve and also nine tenth of creditors value loan value not nine tenth creditors number so nine tenth creditors value interest value they have to also approve the mergers process. Then the short term or short form merger can take place.

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So in conclusion merger and amalgamation process involve considerable number of steps with respect regulatory aspects, several laws have to be followed as per the newly announced rules are their companies act 2013 it has got a big shift because it has made certain things very

simpler easier and particularly the reverse acquisition a unlisted company getting acquired by a small listed company and it becomes listed.

So those things are those loopholes are there in earlier company that has been taken care and it has becoming little simpler the process being little simpler and maybe the more transparency is there compared to earlier provisions and NCLT has the authority now they have specialization company law board as per the companies act and the high courts were also involved in the merger acquisition process. Now company law tribunal there is also then if there is a problem NCLT.

Then, operative analysis there so NCLTs authority is there they have the they will ensure uniformity as well as they try to speed up the overall M and A process. So with this we talked about the regular aspects of the companies act is concerned in the next session will talk about the regulator aspects as per the competition act as well as the SEBI takeover guidelines.

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Thank you and happy learning.