

CORPORATE RESTRUCTURING: ARRANGEMENTS

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Introduction

When a business organization or we can say a company went through several alterations or changes continuously. Sometimes the changes are generally forced to the company by an environment which is exterior like the rising in the competition, evolution of advanced and more well-organized technologies, exposure of advanced competing products, unfolding of new markets and new classification of consumers, changes which happens demographically, the cycle of business, etc. The corporations which are wiser can predict the exchanges which are external as well is advanced and alters themselves correspondingly, on the other hand, the corporations which are not much wiser have to alter or change with the time, if this will not be done then they will fail. There are some organizations which just go far off just being wise enough to make changes in time and make many attempts to change even when there is nothing like an outside force in vision. They usually make dynamic attempts to modify themselves even when they are successful in terms of their performances and relish headship in terms of their businesses. This helps the company to improve quality in the business. These kind of organizations just go through changes to maximize their performance in the competition and improve their headship status so that they can make it impossible for other competitors also and can increase their level more than those other competitors.² When Sumo was launched by Tata Motors and after that Indica was launched, it was said that it is an expansion of the portfolio of its products. Actually it was an expansion of the portfolio of its business, and the commercial vehicles and the passenger cars are the different businesses. These products were actually launched by the the manufacturing capacity of Tata Motors, means by the organic route and not by any sort of acquisition or merger of any other company. Thus, in-spite of just being an expression of the portfolio business it is not going to qualify as the definition of ‘corporate restructuring’. Whereas, the acquisition between Tata Motors and Jaguar Land Rover from Ford by the step down subsidiary, the Jaguar Land Rover Limited was qualified to be called as ‘corporate restructuring’.

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Similarly, like that an acquisition which was happened of the cement division, Larsen & Toubro's (L&T) which is named as UltraTech Cement Limited by Grasim which is in the form of a separate company, by which the cement capacity goes upto 14 million tonnes to 31 million tonnes which was under the control of Grasim, is also a case of 'corporate restructuring' done by Grasim. To the debt equity ratio, generally the capital structure is directed, means the amount of equity and debt of a company in the total capital. The capital structure is used to change almost daily and is never constant. A small form of borrowing that you take as the car finance or availability of the credit packing for the order of the new export order or the retirement through the comprehension of the proceeds relating to the exports or the alternate usage of the facility of cash credit, will continue to altering the equity ratio or debt ratio on a regular basis. Thus, in the general course of business, such alterations are generally set within a range which is planned. Now, an initial public issue or a follow-public issue or by-back of equity shares can change permanently, the capital structure of a company. Those kind of activities which are not relating to the general or we can say ordinary course of business of the company, will be called as 'corporate restructuring'.³ Corporate restructuring can be done by merger also in which two companies merge together to form a new company or business by way of absorption or amalgamation. This builds an positive image in the public about the company, and by this means the company or firm is able to enhance its performance much better and can gain lots of advantages and benefits and this will lead to lots of profits in the business. Sometimes when a company does not able to gain much profits and has a lot of debt on them, so with the motive to repay the debt that company or firm does corporate restructuring like they sells some part of their company or shares or enters into any contract with another company which offers them a large amount of money. And, these are not the only those kind of activities that can be regarded as corporate restructuring. There are also other kind of activities.

Thus, Corporate restructuring is a very wide concept and therefore, there are various forms or types of corporate restructuring. These includes:-

1. Arrangements
2. Takeovers

³ <https://businessjargons.com/corporate-restructuring.html>

3. Demergers
4. Mergers
5. Disinvestment
6. Reverse mergers
7. Franchising
8. Slump sale
9. Joint venture
10. Strategic alliance

But, here in this article we are only going to discuss about arrangement and its scheme which is also a part or form of corporate restructuring along with the concept of corporate restructuring in a more detailed manner. The arrangement generally looks like a negotiation where tribunal acts as a mediator. Arrangement happens in a company or a firm when there is a conflict or a dispute. When an employee does not want to agree with the terms and conditions that the company has made or provided, in that case also arrangement happens. Now, this arrangement is also a very broad term as it includes various processes of changes and most of the concepts like amalgamation which happens when there is a merger of two companies or they come together. Another concept that arrangement includes is reconstruction. This arrangement has been discussed under section 230 and section 231 of the Companies Act, 2013.⁴

1. Growth in corporate restructuring

In corporate restructuring, there are two types of growth:-

1- Organic growth:- It means when you look inside the company means the internal strategies that is when you do not put extra effort into your business to expand it or make it grow, then that kind of growth is called organic growth. In this kind of growth,

⁴ Prasad G. Godbole, MERGERS, ACQUISITIONS AND CORPORATE RESTRUCTURING

there is no outside interference. It can be done by way of financial structuring also. It involves the normal operations or internal operations in a business that is required to grow the business.

E.g.- Demerger, divestment, etc.

It can be also happen by increasing sales in the business and also by maintaining better relations with the customers. Organic growth describes the true potential of the business of a company or a firm. It describes or shows that how the workers or managers of the company uses the assets in the best way possible to increase the revenue. The assets can be physical or intangible assets. The assets can be an equipment and machinery or, can be the skills. Organic growth generally has a positive impression on the company. It gives a good or positive sign that the company is working its best way and more efficiently.

2- Inorganic growth:- It is just the opposite of organic growth. It means when you look outside the company means the external arrangement or strategies like mergers. In this, both the companies are getting something in return. In this, the companies generally are in search of new markets. One of the best example to describe inorganic growth is the opening of a new branch of a company or a firm. We can say that this is an another way of expanding the business.

E.g.- Acquisitions, mergers, etc.

Inorganic growth provides a lot of profits and benefits in the business as there are larger assets. But, there is one thing which shows the disadvantage of inorganic growth and that is risk. As everything is done here in large-scale, so it can may happen that the company's business does not able to get more profits as expected.⁵

2.Characteristics of corporate restructuring

There are various characteristics of corporate restructuring. These characteristics actually manifest the need of corporate restructuring in a company. As every company

⁵ <https://enterslice.com/learning/analysis-of-corporate-restructuring/>

wants an access to better technologies and tax advantages with less amount of risk and this is reason why they come up with corporate restructuring. Corporate restructuring is a great way to earn profits as this is one of its best characteristics, and this is what helps the company to upgrade the balance sheet. And, it is not important to sell the shares which are really important in a company. The company can upgrade its balance sheet through selling the division also which are not profitable. Now, this selling is not only the way, there are many other ways also through which the needs of the company can be fulfilled through corporate restructuring like putting sale on the assets which are underutilized e.g.; brands or patents. Characteristics also involves the settling of the contracts of labour and settling of the responsibility on the restriction of secret profits or instalments. It also involves the advertisements of the organization or the company so that there can be more customers. Corporate restructuring also redirects the business activities like it also allows the business to move in several different directions or fields and helps the business to grow and expand its boundaries. If I explain this characteristic in a much detailed manner then if a company is doing a business of cosmetics and then it gets involve in the business of textiles or accessories then in this way that company moved its hand in a different business activity which not only brought profits but also gain much more fame between the customers making them to buy much more products of that company.⁶ Sometimes it happens that a company is having the proper resources to expand its business but does not have the rights like patents or copyrights to do that and similar thing is with another company that they does not has the resources but has the copyrights, so corporate restructuring helps those companies to work together. If both the company with join their hands then in this way both the company by using each other help i.e., the rights and resources can make profits and do great in the business. So, this corporate restructuring helps in making use of inter-dependence. There is one thing also like when two persons do business together then their competitive power increases for this the best example that we can take is of jio, as when it came in the market many companies suffered loss and to make up to that competition other companies like airtel come up with several offers to attract the customers, so this is what we called core-competence. So, this corporate restructuring also helps in the growth of core-competence. This not only increases competition inside the country but also outside

⁶ <https://www.mbaknol.com/management-concepts/what-is-corporate-restructuring/>

the country that is globally. And, actually it is really very important for a company to mark its name in the international markets because this will give that company a different exposure and this will allow the international companies to invest in that company and this will not only make that company developed but also powerful and, we cannot deny the fact that some business tycoons of a country are also responsible for their developing economy like in India Ambani and Birla has played a major role in the development of our economy. So, to become competitive globally is not only important for a company but it is also for the country to which that company belongs. America is a developed country and if we look towards its business side then its companies has access to global markets and this somehow also helped it to be under SDR(Special Drawing Rights) basket which is generally said to be the currency of International Monetary Fund which only accepts the currencies and put it under the SDR basket which are easily acceptable in the whole world. This helps the country in developing its economy. So, if we see it clearly or more practically so these things are somehow connected with each other in developing the economy of a country and that is why it is really important to be globally competitive.⁷

3.Schemes of Arrangements & Compromise and Arrangements

The Schemes of arrangement or we can also say scheme of reconstruction is a kind of an agreement which is approved by the court which is entered between the shareholders and the company. It can influence or work on amalgamations and mergers and can change the rights of creditor or shareholder.

They are generally used to initiate the alterations in terms of the business structure and are generally used when a reestablishment could not be attained by any other way. Sometimes when the company is not in a good condition and is suffering as there are huge losses and liabilities which the company is not able to fulfill and is not in a condition to face this problem so for that purpose to get rid of that problem, arrangement is done. Reconstruction is also comes under the purview of arrangements where the reconstruction is of two types:- internal and external. If the company will not do compromise and arrangement then it has to go for winding up for which the

⁷ Chandrasekhar Krishnamurti, Vishwanath S.R. , Mergers, Acquisitions and Corporate Restructuring- Text and Cases

company is not getting anything in any way. So in compromise, the creditors generally relinquish their securities or issues shares or debentures. So, we can say this compromise acts as a substitution to save the company from getting winding up. This scheme of arrangement happens between a company and any class of creditors or may be they are secured creditors or unsecured creditors. We can say that arrangement means rearranging the share capital or consolidating the shares or by the sub-division of shares. So what I want to say that this compromise and arrangement happens between company and the creditors or any class of them or company and the members or any class of them.⁸

3.1 The Process

To do the arrangement there must be the approval of NCLT (National Company Law Tribunal). Like when a company wants to do arrangement then for that the Board of directors will do a board meeting and after doing board meeting they will make a scheme of arrangement and approve it and in that scheme it would be written that how much the liabilities of the shareholders is going to be relinquished and how they are planning to pay the liabilities. So all these things would be written in that scheme that how the company is going to do the arrangement, then that scheme is approved by the board of directors. After this, the company will apply to NCLT. Now, there is a Form no. named NCLT 1, which is a kind of application which has to be submitted to NCLT and with Form NCLT 1, two more Forms will be submitted and that will be NCLT 2 which is also called admission form in which that what the company wants is written means what the relief sought and NCLT 6 is the affidavit, now this affidavit is because of this reason that whatever we are submitting is correct or accurate or not, so in NCLT 6 we will declare that everything is correct. A creditor can also submit the NCLT 1 and NCLT 2 along with NCLT 6. A member can also submit it. A liquidator can also submit it under Companies Act, 2013 also and under Insolvency and Bankruptcy code, 2016 too. So, according to the things that I have mentioned, only four people can apply to NCLT. They are:-

1. The company
2. Creditors
3. Members

⁸ <http://www.mondaq.com/india>

4. Liquidators

Along with these applications that would be submitted would be annexed with further three things and that would be:-

The disclosure of the company's latest financial position, latest auditors report and disclosure of any pending investigation by the Central Government if its there. Every person whoever is applying to NCLT has to submit these things.

If there is any reduction of share capital is happening then that also has to be disclose.

If already the creditors or the company is following the CDR(Corporate Debt Restructuring) route under RBI, then it also has to be disclose.

As I have discussed about corporate debt restructuring then I would like to tell you that there is a rule in corporate debt restructuring that atleast 75% of secured creditors must have to get agreed for getting into corporate debt restructuring and if 75% of the secured creditors have got agreed then there is a Form which is CAA 1 has to be submitted to NCLT.

Now, NCLT will give order for a meeting to whom the company is going to do the compromise and arrangement. This whole process of conducting the meeting will be given by NCLT like how to call the meeting, how to held the meeting and how to conduct the meeting. So, in this way the NCLT will give the directions for the meeting and company will call for a meeting by giving the notice and the notice would be individually served to the members and creditors. This notice must be given atleast one month before the meeting in the Form CAA 2. When the notice would be given then it has to be advertised also in two newspapers, one will be an English newspaper and another will be vernacular newspaper means the regional newspaper i.e.; where the registered office of the company is situated. If the company is having the website then it would be advertised on the company's website also. If in a case the company is not having a website then it would not be advertised on the website. If it is a listed company, then it is mandatory for a listed company that one copy of the notice will be given to the SEBI and one will be given to the stock exchanges also so that they can also put the advertisement on their website. When the notice is dispatched by the company one month before a meeting then one copy of the notice in the Form no. CAA 3 will be submitted to the Regulatory authorities also means the Income Tax,

ROC, SEBI, etc. This would be done to make sure that there is no objection with respect to the compromise and arrangement that the company is going to do and for the representation purpose the notice will be there to the Regulatory authorities for another one month.⁹

Now, when the notice are given to members or creditors then they can object also by giving a notice to the company that they are objecting this scheme. The objection can only be done by those members who are having a 10% of shareholding and the objection can only be done by those creditors who are having a 5% of outstanding debt. In the last the tribunal is going to decide the result that it should be objected or not.

When the meeting will be done then in the meeting the scheme of arrangement has to be approved. This scheme will be approved by majority in number representing in 3/4th of the value should be voting in favour. After that, the result would be informed by the Chairman of the meeting along with the objection, if any, to the NCLT in the Form CAA 4 within 7 days then again a petition would be submitted to the NCLT for the approval of the scheme in the Form no. CAA 5. Then the NCLT will appoint a final date of hearing and when the final date of hearing is fixed then before 10 days of that date in the same newspaper in which the advertisement was done, the date of hearing will be printed in those two newspapers. Then on the hearing date that scheme either will be approved or will be rejected.¹⁰

3.2 After approval

When the scheme is approved by NCLT in the Form no. CAA 6. Then this approval has to be submitted to ROC within one month in the Form no. CAA 7 then the scheme of compromise and arrangement would be effective. The date on which it was submitted to ROC, from that date it will become effective. After discussing the section 230, now I would like to mention section 231 of the Companies Act, 2013 which talk about the procedures, functions and rules that is done after the scheme has been approved and then becomes effective. It discusses that after being effective the company is properly following what is written in the scheme or not. For this purpose also the NCLT is having the power to monitor it. So, the company has to comply with

⁹ Dr. G.K. Kapoor, Company- Law and Practice

¹⁰ <https://corporate.cyrilamarchandblogs.com/tag/scheme-of-arrangements/>

rules that has been laid down in the scheme and the company did not complied and for some reasons did not want to comply with it then immediately an order of winding up will be given by the NCLT.¹¹

4. Fast Track Mergers

It is discussed under section 233 of the Companies Act, 2013 and is one of the most important section that can be discussed here. Now, why it is called a fast track merger? The reason is that in this there is no need of the approval of NCLT. But, the route of fast track merger is open between two or more small companies or the route can also be open between holding company and a wholly-owned subsidiary company. For this purpose, there is some procedures and process that has to be followed. They have to pass a Board Resolution at Board Meeting both the transferor company (the selling company) and the transferee company (the purchasing company) in which they have to approve a draft scheme of merger. The director is the one who makes the scheme of merger and do the approval of the scheme firstly that what sort of assets and liabilities would be transferred, what values would be transferred by the transferor company to the transferee company and like how the transferee company will pay the consideration like what will be the mode of consideration, so this all comes under the purview of the scheme and this all is made by the directors and the initial approval will also be done by the directors. If in a case the director does not gave the approval then in that case the approval by shareholders, the approval by creditors and the approval by government cannot be done. Now, after the approval of the scheme by the director, a notice has to be given to the ROC and the official liquidator of the state in which the registered office of the company is situated inviting their objections to the scheme of merger or suggestions as the case may be, within 30 days when the notice has been given. After this, the company will convene a General Meeting in which the scheme should be approved by the shareholders having at least 90% of the shares. The company must be solvent because fast track merger cannot be happen if the company is insolvent, this has to be declared that the company is solvent, and thus this is called the Declaration of Solvency which has to be submitted in the Form no. CAA 10.¹² The notice must be in the Form no. CAA 8 which would be submitted to the ROC and the official liquidator. After the declaration, a notice of 21

¹¹ Dr. G.K. Kapoor, Company- Law and Practice

¹² Dr. G.K. Kapoor, Company- Law and Practice

days has to be given and then have to arrange the creditors meeting and in the creditors meeting the creditors has to vote majority in number representing 90% of the outstanding amount of the creditors. Then once the creditors have approved the scheme then this scheme has to be submitted to :-

The Central Government,

ROC, and

Official Liquidator.

The scheme that would be submitted to the ROC will be in Form no. CAA 11 and GNL-1. This scheme would be submitted to the ROC and the official liquidator because if the ROC and the official liquidator is having any objection then they will communicate to the central government. If there will be no objection then the central government will grant the scheme of merger in the Form no. CAA 12. But, in a case if the central government felt that the scheme of merger is against the public interest or against the creditors or shareholders of the company then the central government will not approve the scheme and then the central government will apply that scheme of merger to the NCLT in the Form no. CAA 13 and then the procedure of section 232 that means the procedure of normal merger will be applied.¹³

¹³ Jennifer Payne, Schemes of Arrangement- Theory, Structure and operation