

“An evaluation of current proposals to amend Companies Ordinance (Cap.32) s.166”

CFRED Student Forum
Minority Shareholder Rights in Hong Kong

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- New court free amalgamation procedure
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I. Evaluation of current CO s. 166

Main Advantages

- Power to bind a dissenting minority
- Supervision and protection by court

Disadvantages

- Time consuming, complex and costly procedure
- Headcount test invites manipulation (share splitting)
- Lack of moratorium in an insolvency situation

II. Proposals in Public Consultation

1. **Statutory (court free) amalgamation procedure** for

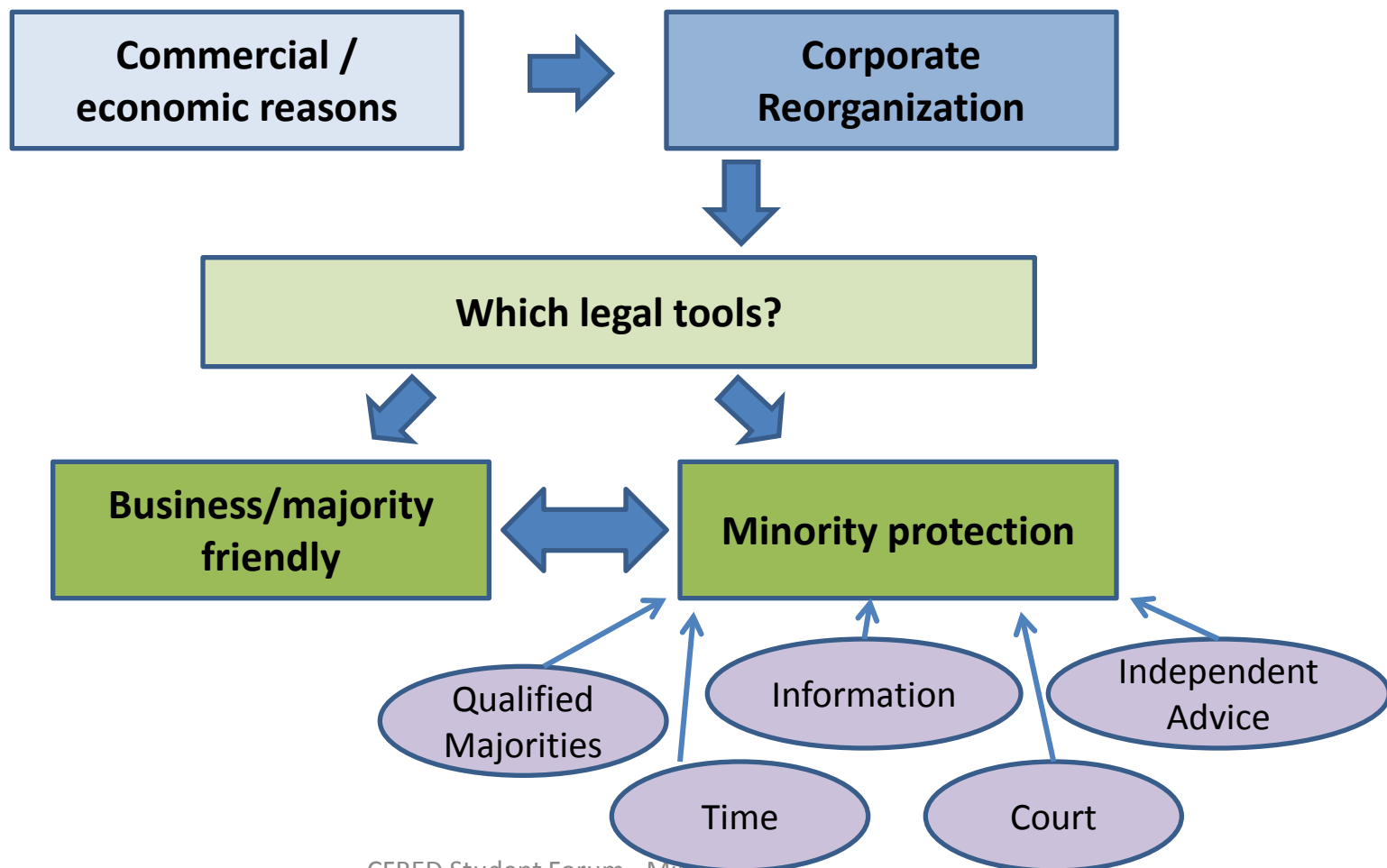
- intra-group amalgamations ("*short form amalgamation*")
- companies not within the same group ("*short form amalgamation*")

2. **Headcount test**

- retaining headcount test;
- retaining headcount test with discretion to the court to apply the test;
- removing headcount test.

III. Court free Amalgamation

1. Which tolls to provide for reorganizations?



III. Court free Amalgamation

2.1 Tools for Company Reorganizations in HK-CO

Schemes of Arrangements

CO s. 166

Variations of shareholder's/creditor's rights:

- Reorganisations of groups of companies
- Mergers
- Friendly takeovers
- Privatisations
- Reconstruction of companies in financial distress

Court-free amalgamation procedure

(CB c. 667 ff.)

Succession in rights, liabilities and obligations of the amalgamating companies

- Transfer of business or parts of business
- Mergers

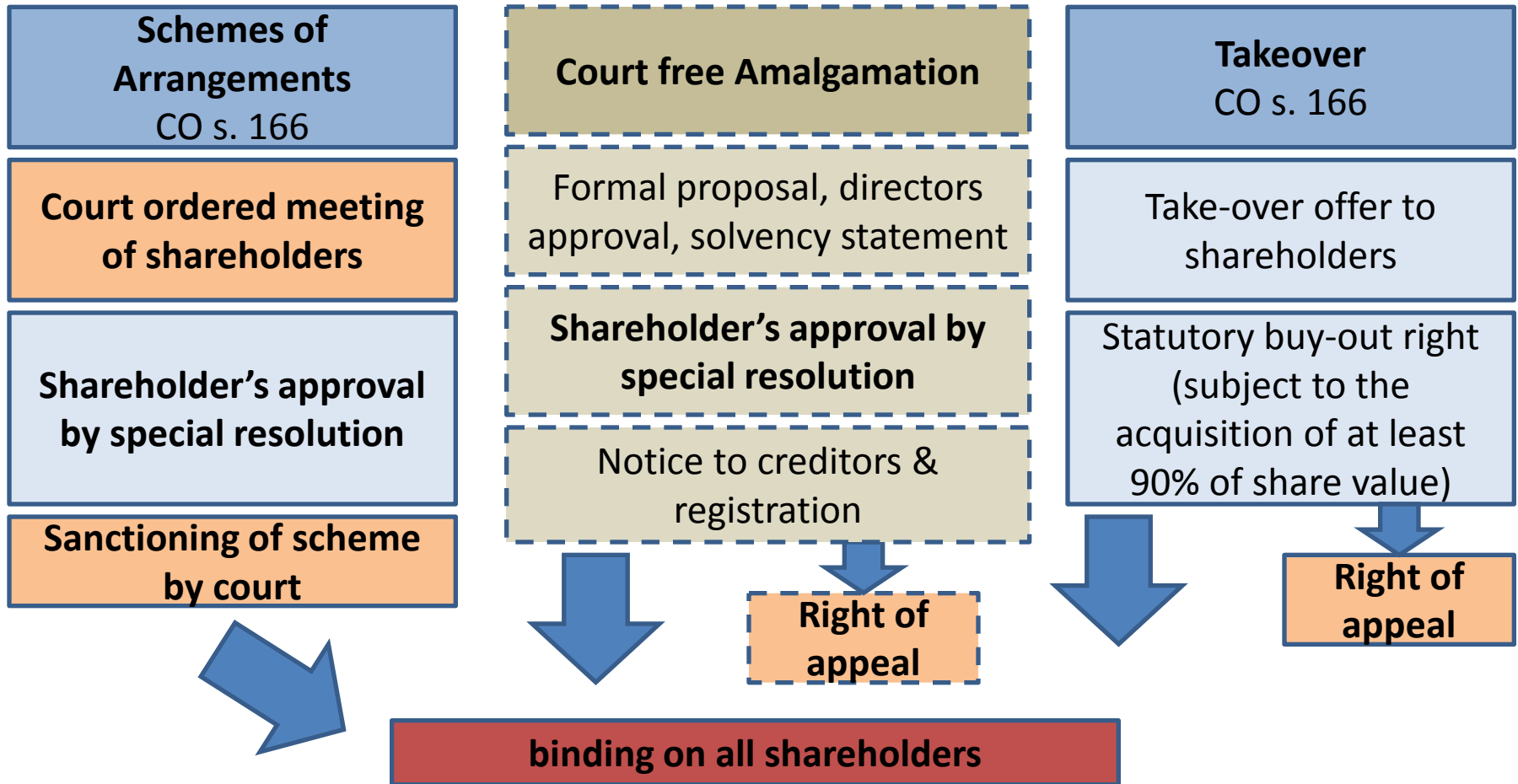
Take-over offer

CO s. 168 / 9th schedule

Take-over of all shares of a company
+
Statutory buy-out right
(90% approval)

III. Court free Amalgamation

2.2 Tools for Company Reorganizations in HK CO



III. Court free Amalgamation

3. Company Reorganizations in other Jurisdictions

UK

(CA 2006)

Court sanctioned Scheme of Arrangements (CO Part 26)

Qualified majority & court sanction (see HKCO s. 166)

Mergers & Divisions of public comp. (CO Part 27)
Qualified majority.

Take-over offer (CO Part 28)
Squeeze-out/Sell-out rights (90% approval)

Singapore

(CA 2005)

Scheme of Arrangements & Reconstructions (CA s. 210)

Qualified majority & court sanction (see HKCO s. 166)

Amalgamation & Merger (long-form & short-form amalgamation) (CA s. 215A – 215J) - Qualified majority.

Take-over offer (CA s. 215)
Squeeze-out rights (CA s. 215)

Switzerland

(Mergers Act)

Mergers & Demergers (MerA art. 3 ff. And art. 29ff.)

Qualified majority.

Transformations (MerA art. 53ff.) Qualified majority.

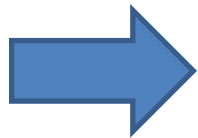
Transfer of Assets (MerA art. 69ff.). Member's vote in case of change of objective.

Take-over offer / Squeeze-out rights (98% approval)

III. Court free Amalgamation

4. Companies Bill 2011

Proposed amendment by Companies Bill 2011



***"Short-form"* amalgamation procedure
for wholly-owned intra-group companies**

IV. Headcount Test

1. Focus of Controversy

Headcount Test

Disadvantages:

- Against the one share one vote principle;
- Does not effectively reflect the preference of shareholders → holdings by nominees and custodians;
- Risk of manipulation.

Advantages:

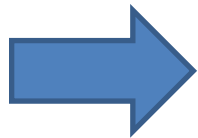
- Minority Protection



IV. Proposed Amendments

1. Companies Bill 2011

Proposed amendments by Companies Bill 2011



- **Retain "headcount test"**
- **Give the court a new discretion to dispense with the test for members' schemes in appropriate circumstances.**

V. Evaluation of proposed amendments

- Modest amendments
- Few new tools for company reorganizations
- Taking account of the special shareholding structure in HK by providing for a strong minority protection

Thank you for your attention!

I. Scheme of Arrangement

1. CO s. 166 – current version

CO s. 166 - Power to compromise with creditors and members

Arrangements and Reconstructions

- (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application [...] order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be [...].
- (2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, [...], present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members [...].

I. Scheme of Arrangement

5. Related Provisions

Rule 2.10 – Takeover Code

Takeover and privatisation by scheme of arrangement or capital reorganisation

Except with the consent of the Executive, where any person seeks to use a scheme of arrangement or capital reorganisation to acquire or privatise a company, the scheme or capital reorganisation may only be implemented if, in addition to satisfying any voting requirements imposed by law:

- (a) the scheme or the capital reorganisation is approved by at least 75% of the votes attaching to the disinterested shares that are cast either in person or by proxy [...]; and
- (b) the number of votes cast against the resolution [...] is not more than 10% of the votes attaching to all disinterested shares.

[...]

I. Scheme of Arrangement

5. Related Provisions

Comparison to CO s. 168 (compulsory buy-out)

CO s. 168 & 9th schedule - Buy-out right in case of a general offer

The offeror has the right to buy-out the minority shareholders if

- he acquired not less than **90% of the shares** for which the offer is made;

CO s. 168B & 13th schedule - Buy-out right in case of a share repurchase by a listed company

The offering company has the right to buy-out the minority shareholders if

- it acquired not less than **90% of the shares** for which the offer is made;