GUIDELINE ANSWERS
JUNE 2024, EXAMINATION
CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY
GROUP 2 PAPER 6
PROFESSIONAL PROGRAMME
(SYLLABUS 2022)

Question Paper Weblink	https://www.icsi.edu/media/webmodules/examination/june2024/536.pdf

PART- I

Answer to Question No.1 (a)

As per Section 5 of the Competition Act, 2002, Combination is defined as (i) acquisition of control, shares, voting rights or assets; or (ii) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service; or (iii) exceeding financial thresholds stated in it which are required to be mandatorily approved by the Competition Commission of India(CCI).

Regulation 9 of the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 states that it is the responsibility of the acquirer to notify an acquisition or a hostile takeover. In case of a merger or an amalgamation, a joint notice is to be filed by the merging or amalgamating parties. In case of formation of a joint venture, the responsibility to file a notice would lie with all the parties forming the joint venture.

Thresholds For Filing Notice:

		Assets		**Turnover**
	India	> Rs.2000 crore	**OR**	>Rs. 6000 crore
Enterprise Level	Worldwide with	> US$ 1 bn. With at least Rs.1000 crore in India		> US$ 3 bn. With at least Rs.3000 crore in India
OR				
		Assets		**Turnover**
Group Level	India	>Rs. 8000 crore	**OR**	>Rs. 24000 crore
	Worldwide with	> US$ 4 bn With at least Rs.1000 crore in India		>US$ 12 bn. With at least Rs.3000 crore in India

Item 1 of Schedule 1 along with Explanation read with Regulation 4 of the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 states that where acquisition of voting rights or shares under section 5 shall be treated as Combination to be reported under section 6 if the acquirer becomes a member on the Board of Directors of the enterprise and exercise a right to nominate or control Board of Directors of the enterprise though acquisition is less than 25% of shares or voting rights of an enterprise. Acquisition of less than 10% shall be treated solely as an investment.

In the present case, XYZ Limited, the acquirer, has to notify the substantial acquisition or hostile takeover under section 6 of the Act to CCI because as a result of such acquisition, Combination is meeting threshold of combined assets (2700 cr+1500 cr=4400 cr) and it holds the total shares or voting rights of ABC Limited between 10 to 25% and got two directors in the Board of Directors of ABC Limited.

Regulation 5(3)(a) of the CCI(Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 states that the parties to the combination may, at their option, give notice in Form II, as specified in schedule II to these regulations, preferably in the instances where the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services and the combined market share of the parties to the combination after such combination is more than fifteen percent (15%) in the relevant market.

Regulation 5(9) of the CCI(Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 provides that where in a series of steps or individual transactions that are related to each other, assets are being transferred to an enterprise for the purpose of such enterprise entering into an agreement relating to an acquisition or merger or amalgamation with another person or enterprise, for the purpose of section 5 of the Act, the value of assets and turnover of the enterprise whose assets are being transferred shall also be attributed to the value of assets and turnover of the enterprise to which the assets are being transferred.

In the present case, XYZ Limited, the acquirer, has to notify the substantial acquisition or hostile takeover to CCI because as a result of such acquisition, it holds not less than 10% the total shares or voting rights of ABC Limited and got two directors in the Board of Directors of ABC Limited.

As it is meeting threshold criterion for demerger of TRM Limited from assets crossing ₹2000 crore, further acquisition of 51% shareholding by XYZ Limited in TRM Limted is part of the same transaction and market share of product "O" for TRM Limited is crossing 15%. A notice of combination shall be filed by the parties with CCI under section 5 and the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

Answer to Question No.1 (b)

Takeovers that occur without consent of acquired company/ target company are commonly called hostile takeovers. Here earlier attempt by ZYZ Ltd. to give open offer for Controlling stake and onboarding two directors in ABC Ltd. can be termed as hostile. But subsequent agreement and steps taken for demerger of Product O business and then taking 51% stake in TRM Ltd. give narrative of agreed/ friendly acquisition.

Taking of controlling stake in ABC Ltd. only for product O business seems hostile takeover and unnecessarily being saddled with burden of managing of L, M and N product segments of ABC Ltd. when company XYZ Ltd. is really interested in taking product O business of ABC Ltd. Moreover, complexity of compliances/approvals/cross border issues will also increase. Demerger into TRM Ltd. seems more focused approach.

Pursuant to Section 230 of the Companies Act, 2013, a company may propose for compromise or arrangement with its creditors or its members which may include reduction of share capital of the company and NCLT will permit the same under section 230 and 232 of companies Act, 2013, separate compliance under section 66 is not required.

Answer to Question No.1 (c)

In the present case reduction of share capital, demerger, acquisition, notice to Competition Commission of India (CCI) for crossing threshold of asset/turnover, depository receipts attracting Reserve Bank of India (RBI) /Foreign Exchange Management Act (FEMA) & SEBI (SAST) Regulations, 2011 alongwith other sector regulator specific compliance issues are involved. Here both companies i.e., transferor and transferee will have to comply provisions of section 230 to 232 of Companies Act, 2013, SEBI(SAST) Regulations 2011, FEMA, Competition Act, approval of sector regulators (if product L, M, N and O need specific compliance issues to be ensured).

Hence, mere submission of copy of resolution to ROC, NCLT and publishing in newspaper about successful arrangement will not suffice. NCLT will reject such application.

Merger or amalgamation of companies involves various issues including the regulatory approvals. These regulatory approvals are to be obtained not only from the sector in which the company is operating (for example in case of merger of two banks, RBI's approval is needed) but also from other departments like Income Tax, SEBI, ROC, etc. The companies are required to obtain following approvals in respect of the scheme of amalgamation:

(i) Authorisation

- Pre-approval authorisation about appointment of intermediaries, advisors, etc.
- Approval of Valuation Report by Audit Committee.

(ii) Approval of Board of Directors

- Approval of scheme of amalgamation by the Board of both the companies.

- Board resolution should, besides approving the scheme, authorise a Director/Company Secretary/ other officer to make application to Tribunal, to sign the application and other documents and to do everything necessary or expedient in connection therewith, including changes in the scheme.

(iii) Approval of Shareholders/Creditors, etc.

Members' and creditors' approval to the scheme of amalgamation is sine qua non for Tribunal's sanction. This approval is to be obtained at specially convened meetings held as per Tribunal's directions [Section 230(1)]. However, the Tribunal may dispense with meetings of members/creditors [Section 230(9)].

(iv) Approval of the Stock Exchanges

A listed entity desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall file the draft scheme of arrangement, proposed to be filed before Tribunal with the stock exchange(s).

(v) Approval of Financial Institutions

The approval of the Financial Institutions, trustees to the debenture holders and banks, investment corporations would be required if the Company has borrowed funds either as term loans, working capital requirements and/ or have issued debentures to the public and have appointed any one of them as trustees to the debenture holders.

(vi) Approval from the Land Holders

If the land on which the factory is situated is the lease-hold land and the terms of the lease deed so specifies, the approval from the lessor will be needed.

(vii) Approval of the Tribunal

- Both companies (amalgamating as well as amalgamated) involved in a scheme of compromise or arrangement or reconstruction or amalgamation is required to seek approval of the respective Tribunal for sanctioning the scheme.
- Every amalgamation, except those, which involve sick industrial companies, requires sanction of Tribunal which has jurisdiction over the State/area where the registered office of a company is situated.
- If transferor and transferee companies are under the jurisdiction of different Tribunals, separate approvals are necessary.
- The notice of every application filed with the Tribunal has to be given to the Central Government (Regional Director, having jurisdiction of the State concerned).

(viii) Approval of Reserve Bank of India

Where the scheme of amalgamation envisages issue of shares/cash option to Non-Resident Indians, the amalgamated company is required to obtain the permission of Reserve Bank of India subject to conditions prescribed under the Regulations issued by RBI.

(ix) Approvals from Competition Commission of India (CCI)

The provisions relating to regulation of combination as provided under Sections 5 and 6 of the Competition Act, 2002 would also be required to be complied with by companies, if applicable.

Answer to Question No.1 (d)

As per proviso to Section 230(4) of the Companies Act, 2013, 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. Thus, shareholders holding less than 10% or more of the shareholding are not entitled to object to the scheme as matter of statutory right.

Attempt all parts of either Q. No.2 or Q. No. 2A

Answer to Question No. 2 (a)

According to Section 68(1) of the Companies Act, 2013, a company whether public or private, may purchase its own shares or other specified securities (hereinafter referred to as "buy-back") out of:

(i) its free reserves; or
(ii) the securities premium account; or
(iii) the proceeds of any shares or other specified securities.

The buy-back shall be authorised by its articles.

Quantum of Buy-back

(a) Board of directors can approve buy-back upto 10% of the total paid-up equity capital and free reserves of the company and such buyback has to be authorized by the board by means of a resolution passed at the meeting. Free reserve includes share premium also.

(b) Shareholders by a special resolution can approve buy-back up to 25% of the total paid-up capital and free reserves of the company. In respect of any financial year, the shareholders can approve by special resolution up to 25% of total equity capital in that year. Debt equity ratio post buy back should not exceed 2:1.

Provided that no buy-back of any kind of shares or other specified securities shall be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

In case the number of shares or other specified securities offered by the shareholders or security holders is more than the total number of shares or securities to be bought back by the company, the acceptance per shareholder shall be on proportionate basis out of the total shares offered for being bought back.

In the present case, since the paid-up equity capital, share premium and free reserves is Rs. 41,800 crores as per the latest audited financial statement, the Board can authorise through a resolution passed at its meeting the buyback of shares totaling Rs. 4180 crore, which is less than the Rs. 4204.51 crore which company wants to buyback. Shareholders in their meeting can by special resolution approve buyback up to 25% of Paid up capital and free reserves. So, 25% of 41800 crore i.e. Rs. 10450 crore can be bought back.

After the completion of the buyback scheme for Rs. 4204.51 crore, the company's paid up capital and free reserve would drop to Rs 37,595.49 crore (Rs. 41800 crores minus Rs. 4204.51 crore) and total secured and unsecured debts is Rs. 1867 crore. Thus, the debt equity ratio is after by back scheme has been fully completed would be 0.0496, which is less than the stipulated 2:1. Hence, PQR Limited can proceed with the proposed buy back scheme by passing a special resolution passed at the shareholders meeting.

Answer to Question No. 2(b)

The resulting company shall be eligible for tax concessions only if the following two conditions are satisfied:

(i) The demerger satisfies all the conditions laid down in section 2(19AA); and

(ii) The resulting company is an Indian company.

The following concessions are available to the resulting company pursuant to a scheme of demerger:

(a) Amortisation of certain preliminary expenses (Section 35D): The benefit of amortization of preliminary expenses under section 35D of the Income-tax Act, 1961 are ordinarily available only to the assessee who incurred the expenditure. However, the benefit will not be lost in case the undertaking of an Indian company which is entitled to the amortization is

transferred to another Indian company in a scheme of demerger within the 5 years period of amortisation. In that event the deduction in respect of previous year in which the demerger takes place and the following previous year within the 5 years period will be allowed to the resulting company and not to the demerged company.

(b) Treatment of bad debts [Section 36(1)(vii)]: Where due to demerger, the debts of the demerged company have been taken over by the resulting company and subsequently by such debt or part of debt becomes bad such bad debt will be allowed as a deduction to the resulting company. This is based upon the decision of the Supreme Court in the case of *CIT v. Veerabhadra Rao (T.), K. Koteswara Rao & Co.(1985) 155 ITR 152 (SC).*

(c) *Exemption of Capital Gain Tax:* Section 47 of the Income Tax Act, 1961 treats certain transactions from amalgamation as not transfer and hence capital gains tax will not be applicable w.r.t.

- transfer, in a demerger, of a capital asset by the demerged company to the resulting company, if the resulting company is an Indian company.
- any transfer or issue of shares by the resulting company, in a scheme of demerger to the shareholders of
  the demerged company if the transfer or issue is made in consideration of demerger of the undertaking

(d) Expenditure on Amalgamation: Section 35DD of the Income-tax Act, 1961 provides that where an assessee being an Indian company incurs any expenditure, on or after the 1st day of April, 1999, wholly and exclusively for the purposes of amalgamation or demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fifth of such expenditure for each of the five successive previous years beginning with the previous year in which the amalgamation or demerger takes place.

(e) Forward and set off of business losses and unabsorbed depreciation of the demerged company [Section 72A (4) & (5)]: Notwithstanding anything contained in any other provisions of this Act, in the case of a demerger, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall–
(a) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company;
(b) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be.

Answer to Question No. 2(c)

According to Rule 3(2) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, where more than one company is involved in a scheme in relation to which an application under sub-rule (1) is being filed, such application may, at the discretion of such companies, be filed as a joint-application.

Where more than one company is involved in a scheme, such application may, at the discretion of such companies, be filed as a joint-application. In case, the registered office of the companies involved is in different states, there will be two Tribunals having the jurisdiction over those. Both the companies shall have to file separate petition with the respective Tribunals. However, as a matter of practice and smother the process, first registered office of companies may be shifted as per section 12 of the Companies Act, 2013 to a single jurisdiction.

In case of merger application of Dhanrashi Dealcomm Private Limited, Subhshiv Commotrade Private Limited, Touchwin Dealer Private Limited, Trideva Vinimay Private Limited, Dhanganga Commotrade Private Limited, Quality Retailers Private Limited, being the Applicant No. 2, 3, 4, 5, 6, 7 ("Transferor Companies") with Karni Plaza Makers Private Limited Transferee company joint application was admitted by NCLT. The same saves lot of time/cost and provide convenience. Similarly in case of M/s Sun Pharma Medisales Pvt. Ltd. & Others (Joint Application) NCLT Bench: Ahmedabad allowed joint petition.

Answer to Question No. 2(d)

An amalgamation should be considered to be an amalgamation in the nature of merger when Shareholders holding not less than 90% of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) become equity shareholders of the transferee company by virtue of the amalgamation.

Even if we exclude the shares of Y Ltd. already held by X Ltd., consequent to the allotment of shares pursuant to merger, 90% criteria for amalgamation to be classified as merger is being met. Since 90% of the remaining shares i.e., 95% comes out to 85.5% shareholders. Thus, the threshold is being met. Hence the above case will qualify as merger.

OR (Alternative to Question No. 2)

Answer to Question No.2 (A)(i)

(a) Calculation of EBITA (Rs.in Lakhs)

Operational Revenue	Rs. 2150
Less: Cost of goods sold	Rs. 920
Employment Cost	Rs. 340
Managerial Remuneration	Rs. 75
EBITA	**Rs. 815**

(b) Calculation of PAT (Rs. in lakhs)

EBITA	Rs. 815
Less: Finance charges	Rs. 170
Less: Depreciation / Amortization	Rs.70
PBT	**Rs. 575**
Less: Taxes @ 30% =	Rs.172.50
PAT	**Rs. 402.50**

(c) Computation of Super Profit

(i) **Future Maintainable Profit (Rs. in lakhs)**

PBT	Rs. 575
Add: Employment Cost onetime payment not likely to occur future	Rs.40
Less: Increase in Managerial Remuneration	Rs.20
	Rs.595
Less: Taxes @ 30%	Rs.178.50
Future Maintainable Profit	**Rs. 416.50**

(ii) **Super Profit (R in lakhs)**

Future Maintainable Profit	₹ 416.50
Less: Expected return on assets (₹ 900 lakhs*25%)	₹225
Super Profit	₹ 191.50

Answer to Question No. 2A(ii)

To

Xxxxx

Frugal Industries Limited

Dear Sir,

This is to advice that under scheme of arrangement, either in the nature of merger or demerger the Frugal Industries demerged company has to comply with Section 230 to 234 of Companies Act, 2013, international laws applicable to company, such as Swedish Laws, USA laws, RBI, FEMA, Income Tax Act, Compliance with Sectoral Regulations as applicable to the company alongwith SEBI Compliances etc.

While going through the provisions of Section 234 it is evident that same applies to cross border mergers of Indian companies with foreign companies and vice versa and the provisions mention only about the words "Merger" and/ or "Amalgamation" so the Section 234 do not provide for or rather restrict the demerger of the Indian Companies with foreign company.

In addition to the above, Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 is silent on 'Demergers' and mentions only 'Mergers' and 'Amalgamations'. Moreover, Foreign Exchange Management (Cross Border Merger) Regulations, 2018 are applicable to the mergers and amalgamations of the Indian companies with the foreign companies only.

For obtention of Prior approval of RBI for undertaking any cross-border merger, the transferee entity to ensure valuation by a valuer and a declaration is required to be submitted by the transferee company along with the application to RBI for obtaining its approval for the merger.

Procedure as specified in Section 230-232 of the Act are to be undertaken (like as applicable to a domestic merger. In case of outbound merger, foreign entity involved should be from a permitted jurisdiction.

In the Sun Pharma's Scheme of Arrangement NCLT Ahmedabad stated that the Rule 25A is silent on "demergers". The Procedure mentioned in Rule 25A is for Inbound as well as Outbound merger. In absence of clarity over the permissibility of a foreign company demerging its business undertaking to an Indian company or vice versa under the Act, one should not follow the same procedure for cross border demergers.

RBI Foreign Exchange Management (Cross Border Merger) Regulations, 2018 defines Cross Border Merger as:

'Cross border merger' means any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013; Interestingly, the notified FEMA Regulations, 2018 has not included word "Demerger" in the definition of Cross Border Merger. Thus, the NCLT rejected the scheme.

Section 2(19AA) of the Income Tax Act defines the term demerger as "the transfer of one or more undertakings by a demerged company to another company." One of the conditions of section 2(19AA) is the shareholders holding not less than three-fourths in value of the shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger. This section is violated as demerger scheme was approved by majority of equity shareholders. Therefore, taxation benefits available to demerged companies under the Income Tax Act will not be available in this case.

Yours Sincerely

XXKKXXXXX

Company Secretary

Answer to Question No. 2A(iii)

Section 2(42C) of the Income Tax Act, 1961 defines slump sale as a means of transfer of one or more undertakings by any means for a lump sum consideration without values being assigned to the Individual assets and liabilities in such transfer.

The word any means now allows the transfer of a business undertaking not only 'by way of sale' but also 'by way of an exchange' or any other transfer structure defined in Section 2(47) of the Act to be included within its scope. Thus, sale of engineering division is considered as slump sale.

As per section 50B of the Income Tax Act, 1961 any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains from the transfer of long-term capital asset and shall be deemed to be the income of the previous year in which the transfer took place. The gain or loss resulting out of a slump sale shall be a Capital Gain/Loss under the Income Tax Act. The computation has been prescribed as follows:

Amount of Full Value of Consideration - Expenses in relation to transfer =Net Consideration- Cost of Acquisition / net worth =Capital Gain or (Loss)

Sale consideration to be calculated as per the Fair Market Value computation which includes monetary as well as non-monetary considerations.

The capital gain or loss as computed above will be either long term or short-term depending upon the period for which the undertaking is held. If the undertaking is held for more than 36 months, the resulting capital gain or loss shall be long-term and if it is held for less than 36 months, the resulting capital gain or loss shall be short term. Further, there will be no indexation benefit available in the computation of the capital gains.

Tax rates: The rates of tax applicable to the capital gain in a slump sale are as follows:

- Short Term Capital Gain: Normal Rates of taxation and
- Long Term Capital Gain: 20%.

In computing the net worth of the entity, the following points need to be considered:

1. The value of net worth should not take into account any change in the value of the asset or liability resulting from revaluation of such asset or liability.
2. In case of depreciable assets under the Income Tax Act, the Written Down Value of Block of assets as per the Act shall be considered.
3. In case of assets on which 100% deduction has been allowed under section 35AD (specified business), the value of such assets will not be considered.
4. In case of any other asset, value as appearing in the books of accounts shall be considered.

5. After considering the above points, if the resulting net worth is negative, then the cost of acquisition shall be taken as nil for the purpose of computation of capital gains.

6. Value of goodwill of business or profession (other than goodwill acquired by purchase from a previous owner) would need to be taken as NIL.

Answer to Question No.2A(iv)

Documentation is an important aspect in fulfillment of legal requirements and obligations in merger and amalgamation for an effective and successful venture. The quantum of such obligations will depend upon the size of company, debt structure and profile of its creditors, compliances under the corporate laws, controlling regulations, etc. In all or in some of these cases legal documentation would be involved. If foreign collaborators are involved, their existing agreements would need a mandatory documentation to protect their interests if their terms and conditions so require. Secured debenture holders and unsecured creditors would also seek legal protection to their rights with new or changed management of the amalgamating company. Regulatory bodies like the RBI, Stock Exchanges, SEBI, etc. would also ensure adherence to their respective guidelines, regulations or directives. In this way, while drafting the scheme of merger and amalgamation the transferor and transferee would have to ensure that they meet legal obligations in all related and requisite areas.

Stages Involved in Mergers or Amalgamation

In brief, it can be said that there are broadly eight stages involved in merger and amalgamation, which are listed below:

Stage 1— Drafting of the Scheme.

Stage 2 — Obtaining the approval of the Board of Directors of the companies involved.

Stage 3 — Obtaining approval of the stock exchanges in case of listed companies.

Stage 4 — Application / Petition for convening the meeting of members/creditors shall be filed with National Company Law Tribunal.

Stage 5 — Convening meetings of the Shareholders and Creditors and obtaining their consent on. Stage 6—Scheme Approvals or No objection from Regional Director / Official Liquidator.

Stage 7- Filing of final petition with NCLT for approving the Scheme.

Stage 8 - Obtaining order for approval for scheme of merger/amalgamation from the National Company Law Tribunal.

PART-II

Answer to Question No. 3(a)

Core Principles of Valuation: -

- *Ethics*- Valuers must follow the ethical principles of integrity, objectivity, impartiality, confidentiality, competence and professionalism to promote and preserve the public trust.
- *Competency*- At the time the valuation is submitted, valuers must have the technical skills and knowledge required to appropriately complete the valuation assignment.
- *Compliance*- Valuers must disclose or report the published valuation standards used for the assignment and comply with those standards.
- *Basis (i.e., Type or Standard) of Value*- Valuers must select the basis (or bases) of value appropriate for the assignment and follow all applicable requirements. The basis of value (or bases) must be either defined or cited.
- *Date of Value-Effective Date/Date of Valuation* - Valuers must disclose or report the date of value that is the basis of their analyses, opinions or conclusions. Valuers must also state the date they disclose or report their valuation
- *Assumptions and Conditions* - Valuers must disclose significant assumptions and conditions specific to the assignment that may affect the assignment result.
- *Intended Use*- Valuers must disclose or report a clear and accurate description of the intended use of the valuation.
- *Intended User(s)*- Valuers must disclose or report a clear and accurate description of the intended user(s) of the valuation
- *Scope of Work*- Valuers must determine, perform, and disclose or report a scope of work that is appropriate for the assignment that will result in a credible valuation
- *Identification of Subject of Valuation*- Valuers must clearly identify what is being valued.
- *Data*- Valuers must use appropriate information and data inputs in a clear and transparent manner so as to provide a credible valuation.
- *Valuation Methodology* - Valuers must properly use the appropriate valuation methodology (ies) to develop a credible valuation.
- *Communication of Valuation*- Valuers must clearly communicate the analyses, opinions and conclusions of the valuation to the intended user(s).

Answer to Question No. 3(b)

Section 247 of the Companies Act, 2013 and the Companies (Registered Valuers and Valuation) Rules, 2017 Valuation Rules) *inter alia* provides for (a) registration of valuers,

who may be individuals or partnership firms or Companies, with the Central Government for conduct of valuation of different classes of assets under the Companies Act, 2013;

The Central Government delegated its powers and functions under section 247 of the Act to the Insolvency and Bankruptcy Board of India (IBBI) and specified it as the Authority under the said Rules. Only a person registered with the Authority as Registered Valuers can conduct valuations required under the Companies Act, 2013 and the Insolvency & Bankruptcy Code. Subject to meeting other requirements, an individual is eligible to be a Registered Valuer, if he:

(a) is a fit and proper person,

(b) has the necessary qualification and experience,

(c) is a valuer member of a Registered Valuers Organization (RVO),

(d) has completed a recognised educational course as member of an RVO,

(e) has passed the valuation examination conducted by the Authority within three years preceding the date of making the application for registration, and

(f) is recommended by the RVO for registration as a valuer. The individual is required to have either a post-graduate qualification in the specified discipline and three years' experience, or a bachelor's degree in the specified discipline and five years' experience.

Mr. VG is neither qualified, as he has no required experience [Passed in 2022 shows that 3-year experience is not possessed by Mr. VG], nor he is registered with IBBI. Objection of directors is justified/ tenable.

Answer to Question No. 4(a)

Factors Influencing Valuation

Determining the-value of a business is a complicated and intricate process. Valuing a business requires determination of its future earnings potential and the risks inherent to those future earnings. The process arriving at this value includes a detailed analysis of its mix of physical and intangible assets, and the economic and industry conditions. Major factors influencing the valuation of a business include:

- debt equity ratio
- nature of business and its growth history
- customer base
- areas of operations
- audited financial statements
- management team and its competency
- litigation and disputes
- Related Party Transactions, etc.

The other salient factors include:

1. The stock exchange price of the shares of the two companies before the commencement of negotiations or the announcement of the bid.
2. Dividends paid on the shares.
3. Relative growth prospects of the two companies.
4. In case of equity shares, the relative gearing of the shares of the two companies.
5. Voting strength in the merged (amalgamated) enterprise of the shareholders of the two companies
6. Past history of the prices of shares of the two companies.
7. Merger and amalgamation deals can take a number of months to complete during which time valuations can fluctuate substantially. Hence provisions must be made to protect against swings.

Answer to Question No. 4(b)

Valuation Report preparation exercise is based on the observation, inspection, analysis, and calculation. Considering the shareholder's interest and the need for transparency and upholding corporate governance principles and after taking into view aspects of minority interest, transparency and corporate governance the Expert Group of Ministry of Corporate Affairs recommended that the following matters should compulsorily be covered in the Valuation Report, in a clear, unambiguous and non-misleading manner, consistent with the need to maintain confidentiality: Contents of summarised report are as under-

1. Background Information
2. Purpose of Valuation and Appointing Authority
3. Identity of the valuer and any other experts involved in the valuation
4. Disclosure of valuer Interest/Conflict, if any
5. Date of Appointment, Valuation Date and Date of Report
6. Sources of Information
7. Procedures adopted in carrying out the Valuation
8. Valuation Methodology
9. Major Factors influencing the Valuation
10. Conclusion
11. Caveats, Limitations and Disclaimers.

PART-III

Answer to Question No. 5(a)

Supreme Court (SC) division bench in the case of *M/s. Next Education India Pvt. Ltd. Vs. M/s. K12 Techno Services Pvt. Ltd* has settled the law regarding the determination of the limitation period where the Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (I&B Code) has been filed on the basis of several invoices. Supreme Court (SC) division bench held that when a petition is filed under Section 9 of the I&B Code based on several invoices wherein some of the invoices are time-barred, the Adjudicating Authority must consider invoices raised at least three years preceding the date of filing of Section 9 petition to determine limitation. The Supreme Court set aside the orders of the NCLT and NCLAT and while considering the starting point of limitation as 12th March 2011 categorically stated that the NCLT should have taken into consideration the subsequent invoices raised up till at least three years preceding the date of the Company Petition rather than considering the starting point of limitation as 12th March 2011.

Earlier, NCLT had dismissed the Company Petition on the ground of the claim being time barred. The NCLAT after lengthy consideration decided that as the section 9 petition emanates from the Demand Notice issued under section 8, considered the date of default shall in the matter be 12th March 2011 which is time barred as the limitation period expired on 12th March 2014. The said NCLAT order was challenged by way of the present appeal in Supreme Court.

In the given case last date of invoice i.e., 23rd June, 2020 will be considered at least three years preceding date of filing up petition in NCLT for ascertaining limitation period for filing petition.

Answer to Question No. 5(b)

Section 61 of the IBC specifies a 30-day deadline for filing an appeal against an NCLT order, and the NCLAT can only condone a delay of up to 15 days if sufficient cause is shown. Section 61 of the IBC does not require the appellant to wait for the receipt of a certified copy of the order before filing an appeal.

In recently decided case of *Sanket Kumar Agarwal vs. APG Logistics Private Limited (2023),* Hon'ble Supreme Court of India held that the date of pronouncement of the order and time taken to provide certified copy by the Adjudicating Authority would stand excluded from limitation period for filing an appeal before the National Company Law Appellate Tribunal under Section 61(2) of the Insolvency and Bankruptcy Code, 2016.

It was noted that the appeal was filed through the e-portal on 10 October 2022, which was the 46th day following the NCLT order. The Court relied on Section 12(2) of the Limitation Act, 1963 (Limitation Act), Since the certified copy was received by the Appellant on 15th September 2022, the time taken by the court between 5th September 2022 and 15th September 2022 to provide the certified copy should have been excluded when calculating the limitation under Section 61(2) of

the IBC. As a result, the Supreme Court allowed the appeal thereby setting aside the NCLAT's order. Here G [Appellant] can file appeal in NCLAT.

Answer to Question No. 5(c)

Insolvency and Bankruptcy Code, 2016 read with Regulation 37 of CIRP Regulations provides for various measures to resolve the insolvency of the corporate debtor. These measures are detailed as follows:

i. Transfer of all or part of the assets of the corporate debtor to one or more persons.
ii. Sale of all or part of the assets whether subject to any security interest or not.
iii. Restructuring of the corporate debtor, by way of merger, amalgamation and demerger.
iv. The substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons.
v. Cancellation or delisting of any shares of the corporate debtor, if applicable.
vi. Satisfaction or modification of any security interest.
vii. Curing or waiving of any breach of the terms of any debt due from the corporate debtor.
viii. Reduction in the amount payable to the creditors.
ix. Extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor.
x. Amendment of the constitutional documents of the corporate debtor.
xi. Issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose.
xii. Change in portfolio of goods or services produced or rendered by the corporate debtor Change in technology used by the corporate debtor.
xiii. Obtaining necessary approvals from the Central and State Governments and other authorities.
xiv. Sale of one or more assets of corporate debtor to one or more successful resolution applicants submitting resolution plans for such assets and manner of dealing with remaining assets.

Answer to Question No. 5(d)

In the case of *Punjab National Bank Vs. Mr. Kirah Shah*, Interim Resolution Professional of ORG Informatics Ltd. [CA (AT) (Ins) No. 749/2019]-NCLAT held that the Committee of Creditors is not required to record any reason for replacing the RP that may otherwise call for proceedings against such Resolution Professional. Having decided to remove the Resolution Professional with 88 percent of the voting share, the decision of Committee of Creditors was not open to the AA interfering with such decision, till it is shown that the decision of the Committee of Creditors is perverse or without jurisdiction.

Further in case of *Bank of India vs. M/s Nithin Nutrition Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 497 of 2020* (with connected appeals)]-NCLAT observed that neither section 22 nor section 27 of the IBC requires the Committee of Creditors to give any reasons. The reason is that the relationship between the RP and the Committee of Creditors is that of confidence. If there is loss of confidence and the RP continues in the role, the corporate debtor would be put to loss because of the bad relationship between the Interim Resolution Professional/RP and the Committee of Creditors NCLAT held that the Committee of Creditors has the requisite powers to propose changing the Interim Resolution Professional even in meeting/s subsequent to the first one and there is no requirement that they should give particular reasons for the change

Therefore, appointment of RP is valid/proper and Adjudicating Authority cannot reject the application.

Attempt all parts of either Q. No.6 or Q. No. 6A

Answer to Question No. 6(a)

The Insolvency Law Committee (ILC) on Cross Boarder insolvency constituted by the Ministry of Corporate Affairs recommended certain modifications in the existing Insolvency and Bankruptcy Code, 2016 to match with the models of United Nations Commission on International Trade Law (UNCITRAL). The necessity of having Cross Border insolvency framework arises from the fact that many Indian companies have global presence and many foreign companies are operating in India. Inclusion of comprehensive legal laws dealing with cross border insolvency will boost greater confidence among foreign investors, adequate flexibility for seamless integration with the domestic insolvency law and a robust mechanism for international cooperation.

The key recommendations of the ILC are as under:

i. The recommendation will enable Indian companies having foreign assets to proceed and take advantage of the framework of UNCITRAL.
ii. The Committee recommended that the Model Law may be adopted initially on a reciprocity basis. Reciprocity indicates that a domestic court will recognize and enforce a foreign court's judgement only if the foreign country has adopted similar legislation to the domestic country.
iii. Access to foreign representatives- The Model Law allows foreign insolvency professionals and foreign creditors access to domestic courts to seek remedy directly.
iv. The model law will allow recognition of foreign proceedings and provides relief based on this recognition.
v. The model law lays down the basic framework for cooperation between domestic and foreign courts and domestic and foreign insolvency professionals.
vi. The model provides for commencement of domestic insolvency proceedings, when a foreign insolvency proceeding has already commenced or vice versa. It also provides for coordination of two or more concurrent insolvency proceedings in different countries by encouraging cooperation between courts.
vii. Part Z of the recommendation provides for the adjudicating authority may refuse to take action under the Code if it is contrary to public policy.

Thus, the recommendation of the Insolvency Law Committee (ILC) is completely on the lines of UNCITRAL.

Answer to Question No. 6(b)

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act) regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the ordinance enabled banks and financial institutions to manage problems of liquidity, asset liability mismatches and improvement in recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

The SARFAESI Act, 2002 has empowered the Banks and Financial Institutions with vast power to enforce the securities charged to them. The Banks can now issue notices to the defaulters to pay up the dues if they fail to do so within 60 days of the date of the notice, the banks can take over the possession gussets like factory, land and building, plant and machinery etc. charged to them including the right to transfer by way of lease, assignment or sale and realize the secured assets. In case the borrower refuses peaceful hanging over of the secured assets, the bank can also file an application before the District Magistrate or Chief Metropolitan Magistrate for taking possession of assets. The Banks can also take over management of business of the borrower. The bank in addition can appoint any person to manage the secured assets the possession of which has been taken over by the bank. Banks can package and sell loans via "Securitisation" and the same can be traded in the market like bonds and shares.

The other majors are:

- *Securitization of financial assets and issue of security receipt*

  Acquire financial assets by agreements, issuance of debentures or bonds. Redeem the security receipts given to the QIBs after their realization.

- *Reconstruction of financial assets*

  Subject of Varying RBI standards, take actions for proper management, a sale, a debt restructures, a settlement, or to take control.

- *Enforcement of security interest*

  Enforce the secured creditor's security interest without the need of court action.

- *Other Functions*

  Act as a recovery agent for financial Institutions (Fts) or bank, as the manager of the secured assets appointed by the lender, or as the receiver assigned by the court.

Answer to Question No. 6(c)

In the matter of *Small Industries Development Bank of India vs. Tirupati Jute Industries Limited* [CP (IB) 508/KB/18 and connected matters], the Adjudicating Authority(AA) noted that the

resolution plan, which has been submitted for its approval, was subject to extinguishment of all claims (except criminal proceedings) against the Corporate Debtor, exemption of all taxes/dues by the Government/ local authorities, and closure of all proceedings pending against the Corporate Debtor relating to such dues.

The Adjudicating Authority rejected the plan and ordered for liquidation. It observed that such a plan should not have been approved by the CoC, as it was not consistent with the provisions of section 30(2)(e) of the Insolvency & Bankruptcy Code. The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan does not contravene any of the provisions of the law for the time being in force.

AA also observed that the Resolution Professional did not give correct advice when he submitted the plan for approval of CoC and therefore, it would not be proper to appoint him as the Liquidator.

Thus, resolution plan approved by COC and submitted to AA is not fair/just hence its tenability /justifiability is questionable and liable to be rejected.

Answer to Question No. 6(d)

Section 24(3) of the Insolvency & Bankruptcy Code provides that the resolution professional shall give notice of each meeting of the committee of creditors to-

(a) members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5);
(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

In *Consolidated Engineering Company & Another vs. Golden Jubilee Hotels Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 501 of 2018]*, the NCLAT held that the AA has rightly held that 10 percent of total debt for the purpose of representation in the committee of creditors is to be calculated on the basis of the claim as collated and noticed by the RP. It cannot be based on the amount claimed by all the operational creditors until it is verified and compared. If the claim of operational creditors on verification is found to be less than 10 percent, the operational creditors have no right to claim representation in the meeting of the committee of creditors.

However, taking into consideration facts and circumstances of the case, NCLAT allowed the representative of operational creditor only to watch proceedings of the CoC as agreed by the learned counsel for the RP.

So, claims of operational creditors are to be verified by resolution professional and if it is less than 10%, they [operational creditors] will not be given representation in meeting.

Operational Creditors are not legally entitled to attend and vote at CoC if there are two or more than two unrelated Financial Creditors in the Corporate Debtor. They can only watch proceedings if the amount of their aggregated dues is not less than 10% of the debt of the Corporate Debtor.

OR (Alternate Question to Q. No to 6)

Answer to Question No. 6A (i)

The IBBI (Liquidation Process) Regulations, 2016 defines "contributory" means a member of the company, a partner of the limited liability partnership, and any other person liable to contribute towards the assets of the corporate debtor in the event of its liquidation.

Regulation 40 of the Liquidation Process Regulations provides for Liquidator to realize uncalled capital or unpaid capital contribution as follows:

- The liquidator shall realize any amount due from any contributory to the corporate person.
- ReaIisation of uncalled capital and calls in arrear: The liquidator shall be entitled to call and realize the uncalled capital of the corporate person and to collect the arrears if any due on calls made prior to the liquidation commencement date.
- The liquidator shall exercise this power notwithstanding any charge or encumbrance on the uncalled capital of the corporate person.
- A 15 days demand notice shall be served to the contributory to make the payments within fifteen days from the receipt of the notice.

Along with right to serve demand notice to collect dues or calls-in-arrear, the liquidator is vested with the right to hold all moneys so realized subject to the rights, if any, of the holder of any such charge or encumbrance.

Subject to the directions of the Adjudicating Authority, Liquidator under Section 35(1) (h) of Insolvency & Bankruptcy Code shall have power to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor.

No distribution shall be made to a contributory, unless he makes his contribution to the uncalled or unpaid capital as required in the constitutional documents of the corporate person.

According to Section 295(3) of the Companies Act, 2013 in the case of any company, whether limited or unlimited, when all the creditors have been paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set- off against any subsequent call.

Answer to Question No. 6A (ii)

Section 249 of the Companies Act, 2013 lays down provision in which a company cannot apply for strike off the name of the company under Section 248(2) of the Act:

The Company shall not make any application for the strike off of the company, if at any time in the previous 3 months, the company has done any of the below mentioned activities:

i. Has changed its name; or
ii. Has shifted its registered office from one State to another; or

iii. Has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business; or

iv. Has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement; or

v. has made an application to the Tribunal for the sanctioning of a scheme of compromise or arrangement and the matter has not been finally concluded; or

vi. is being wound up under Chapter XX of the Companies Act, 2013 or under the Insolvency and Bankruptcy Code, 2016.

An application for striking off the name of the company under Section 248(2) of the Companies Act shall be withdrawn by the company or rejected by the ROC as soon as the above stated conditions are brought to notice. In case of violation of the above provision, the company shall be punishable with fine which may extend to one lakh rupees.

Answer to Question No. 6A (iii)

The functions and obligations of Insolvency Professional has been enumerated under Section 208 (1) of Insolvency and Bankruptcy Code, 2016 are as under:

(1) Where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters, namely: –

(a) a fresh start order process under Chapter II of Part III;
(b) individual insolvency resolution process under Chapter III of Part III;
(c) corporate insolvency resolution process under Chapter II of Part II;
(a) (ca) pre-packaged insolvency resolution process under Chapter III-A of Part II;
(d) individual bankruptcy process under Chapter IV of Part III; and
(e) liquidation of a corporate debtor firm under Chapter III of Part II.

(1A) Where the name of the insolvency professional proposed to be appointed as a resolution professional, is approved under clause (e) of sub-section (2) of section 54A, it shall be the function of such insolvency professional to take such actions as may be necessary to perform his functions and duties prior to the initiation of the pre-packaged insolvency resolution process under Chapter III-A of Part II.

(2) Every insolvency professional shall abide by the following code of conduct: –

(a) to take reasonable care and diligence while performing his duties;
(b) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
(c) to allow the insolvency professional agency to inspect his records;
(d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
(e) to perform his functions in such manner and subject to such conditions as may be specified.

Answer to Question No. 6A (iv)

Summary Procedure for liquidation

These rules allow following classes of companies to close their business by making a winding- up application to Central Government without going to NCLT.

Companies accepting deposit and having total outstanding deposits	up to Rs.25 lacs*
Companies having total outstanding loan including secured loan	up to Rs.50 lacs*
Companies having total turnover	up to Rs.50 Crores*
Companies with paid-up capital	up to Rs.1 Crore*

*based on latest audited balance sheet.

In addition, companies having book value of assets up to Rs.1 Crore (currently specified under section 361(1) (i)) of the Companies Act, 2013, can also approach Central Government for liquidation.

The provisions of the Rules related to filing and audit of the Company Liquidator's accounts and its procedure (rule 91 to 99 of the rules) and disposing of assets (rule 165 to 167 of the rules) shall be applicable to above class of companies with modification that the word 'Tribunal' shall be considered as 'Central Government'.

Other procedural aspects are as under:

- The rules lay down the process for meeting of creditors and contributories of the company, and specify the scenarios in which creditors can vote.
- The rules make it necessary for all the money lying in the bank account of Company liquidator which is not immediately required for the purposes of winding up, to be invested in government securities or in interest bearing deposits in any scheduled bank.
- The rules lay down the procedure for maintenance of registers and books of accounts by the Company liquidator.
- The rules also outline the procedure for creditors to prove their debts and claims against the company and if the proof of such debt gets rejected by the Company liquidator, there is also a provision and process for creditor to make an appeal to Tribunal.

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