Corporate Restructuring and Insolvancy (CRI)

Objective and True / False Questions for Practice

June 2009

1.(b) State whether the following statements are true or false citing briefly relevant provisions of the law :

(i) There is a bar on a company amalgamating with a newly incorporated company.

(ii) A non-profit making company licensed under section 25 can be merged with a profit making company.

(iii) High Court can sanction a scheme of merger of a sick industrial company when a revival scheme is pending before BIFR.

(iv) An appeal can be preferred to the Supreme Court of India against the order passed under section 391/394 sanctioning a scheme of amalgamation.

(v) The court can modify 'transfer date' proposed in a scheme of amalgamation

Answer - 1.(b)

(i) **False** : The Hon'ble Gujarat High Court in Re: Apco Industries Ltd. (1996) 86 Comp Cas 457 (Guj.) has held that there is no bar to a company amalgamating with a fifteen day old company having no assets and business.

(ii) **True** : Amalgamation of a company licensed under Section 25 of the Companies Act with a commercial, trading or manufacturing company could be sanctioned under Section 391/394. (Re. Sir Mathurdas Vissanji Foundation (1992) 8 CLA 170(Bom.) Re: Walvis Flour Mill Company P. Ltd. (1996) 23 CLA 104]. There need not be unison or identity between objects of Transferor Company and Transferee Company. Companies carrying entirely dissimilar businesses can amalgamate. Re: PMP Auto Inds. Ltd. (1994) 80 Comp. Case 291 (Bom.).

(iii) **False** : In similar matter of Tata Motors Ltd. v. Pharmaceuticals Products of India Ltd. and Another (2008) 144 Comp. Case 178 (SC), it was held High Court cannot sanction scheme proposed under section 391/394 of the Act during the pendency of the revival scheme before BIFR under SICA. In terms of Section 26 of SICA, a company court did not have jurisdiction to entertain any application of a sick industrial company for merger under s.391 to 394 of the Companies Act 1956, while the matter was pending before the BIFR or the AAAIFR.

Similarly in Ashok Organic Industries Ltd v. ARCIL, [2008]114 Comp Cas 144 (Bom), the Bombay High Court held that once the Industrial Company makes a reference under Section 15 of the SICA, the Company Court would have no jurisdiction for sanctioning the scheme of arrangement of compromise with its creditors and shareholders and neither will it have jurisdiction to take cognisance of such an application during the pendency of the reference.

(iv) **True** : As per the existing provisions of the Companies Act, 1956, an appeal can be preferred to the Supreme Court of India against the order passed under Section 391/394 sanctioning a scheme of amalgamation.

(v) **True** : The Hon'ble Supreme Court in Marshal Sons & Co. (India) Ltd. v. ITO (1977) 1 Comp LJ P.1, observed that it is true that while sanctioning the scheme, it is open to the Court to modify the said date. But when the Court does not prescribe any specific date, the date specified in the scheme is "the transfer date".

December 2009

New Syllabus

1.(a) State whether the following statements are correct or incorrect citing briefly relevant provisions of the law :

(i) Court cannot refuse to sanction a scheme of arrangement which has been approved by majority of shareholders/creditors of the companies concerned.

(ii) Court would not insist on prior approval of stock exchange(s) while sanctioning a scheme of arrangement.

(iii) The word 'amalgamation' or 'merger' is not defined anywhere in the Companies Act, 1956.

(iv) The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 also apply to acquisition of global depository receipts (GDRs) or American depository receipts (ADRs).

(v) Filing of draft letter of offer with SEBI should be deemed or construed as conclusive evidence that the same has been vetted or approved by SEBI.

(vi) An offer made by the acquirer can be withdrawn unconditionally at any time without any demur or resistance of any party since the acquirer is at liberty to withdraw his offer.

(vii) The order of court sanctioning the scheme of arrangement is final and effective. Companies need not do anything thereafter in respect of courts sanction.

Answer - 1.(a)

(i) **Correct** : When a scheme of compromise/arrangement is sound not opposed to public policy and does not violate any law/statute and nature justice and is supported by majority of shareholders/creditors, the Court would sanction the scheme under Section 391 of the Companies Act, 1956.

(ii) **Correct** : However, pursuant to clause 24 of the listing agreement, all listed companies shall have to file scheme/petition proposed to be filed before any Court/Tribunal under Sections 391, 394 and 101 of Companies Act, 1956, with the stock exchange, for approval, at least a month before it is presented to the Court or Tribunal.

(iii) **Correct** : The word 'amalgamation' or 'merger' is not defined anywhere in the Companies Act, 1956. However Section 2(1B) of the Income Tax Act, 1961 defines 'amalgamation'.

(iv) **Partially Correct** : It applies to the acquisition of Global Depository Receipts or American Depository Receipts provided as long as they are converted into shares carrying voting rights.

(v) **Incorrect** : Filing of draft Letter of Offer with SEBI should not in any way be deemed or construed that the same has been cleared, vetted or approved by SEBI. The Letter of Offer is submitted to SEBI for a limited purpose of overseeing whether the disclosures contained therein are generally adequate and are in conformity with the Takeover Regulations.

(vi) **Incorrect** : As per Regulation 27, no public offer, once made, shall be withdrawn except when-
- (a) the statutory approval(s) required have been refused;
- (b) the sole acquirer, being a natural person, has died; and
- (c) there are such circumstances which in the opinion of SEBI merits withdrawal

(vii) **Incorrect** : Unless the copy of order is filled with ROC within 30 days from the Court's Order, the scheme cannot be treated as effective.

Old Syllabus

1.(b) State, briefly citing relevant provisions of the law, whether the following statements are correct or incorrect :

(i) In case of transfer/sale of undertaking, compliance of section 293(1)(a) is a must.

(ii) Separate petition for amalgamation needs to be filed by the transferee company even when the transferor company (100% subsidiary of transferee company) has already filed the petition.

(iii) SEBI Takeover Code is not applicable to any arrangement or reconstruction including amalgamation or merger or demerger under any Indian/foreign law or regulation.

(iv) The court has power to order winding-up of a company while considering its scheme of arrangement.

(v) Buy-back of shares can be a part of scheme of arrangement.

(vi) Unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as of other unsecured creditors.

(vii) Debentureholders enjoy different position as compared to secured creditors in a scheme of amalgamation.

Answer - 1.(b)

(i) **False** : Under sections 391-394 of the companies act, a unit can be transferred by approving a scheme of arrangement and section 293(1)(a) is not required to be complied with.

(ii) **False** : The joint application/petition by the transferor company and transferee company is maintainable under section 391 and 394 of the companies act, 1956 [Chembra Orchard Produce Ltd . v . 2004 (120) Comp cas1].

(iii) **True** : As per Regulation 3(1) (j) (ii) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, nothing contained in Regulations 10, 11,and 12 of the Takeover Regulations shall apply to any arrangement or reconstruction including amalgamation or merger or demerger under any law or regulation, Indian or foreign.

(iv) **True** : As per section 392 (2) the court can pass winding – up order and such other orders as it may deem appropriate.

(v) **False** : In SEBI v. Sterlite industries (I) Ltd. (2003) 113 comp cas 273 (Bom), it was held that the conditions for a buy-back under section 77A of companies act, 1956 cannot be applied to a scheme under section 100 to104 and section 391 as the two operate separately.

(vi) **True** : Under section 390(c) of the term 'unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors' is quite important. Obtaining decrees or filling suits by an unsecured creditor does not make him a secured creditor.

(vii) **False** : All the secured creditors including the debenture holders enjoy the same status and rights and there is no conflict of interest amongst them.

June 2010

New Syllabus

1.(b) State whether the following statements are correct or incorrect citing relevant provisions of the law:

(i) The scheme of arrangement is to be passed at a meeting with the support of majority in number and three-fourths in value of those present and voting. The creditors or members who are present at the meeting but remain neutral or abstain from voting will be counted in ascertaining the majority in number or value.

(ii) A person who is a transferee of certain shares (yet to be registered) can seek to modify a scheme of arrangement of the company concerned approved by the court.

(iii) A private limited company can amalgamate with a public limited company within few days after its incorporation.

(iv) Court has power to disapprove the scheme of arrangement on the grounds of mismanagement of affairs of the company and withholding of material information from the shareholders and creditors.

(v) Court can modify the scheme of arrangement filed before it on its own.

(vi) Section 394 does not cast an obligation on the 17 court to satisfy the presence of 'public interest' if the scheme is duly approved by the shareholders and creditors of the companies concerned.

Answer - 1.(b)

(i) **Incorrect** : The creditors or members who are present at the meeting but remain neutral or abstain from voting will not be counted in ascertaining the majority in number or value. The language in Section 391(2) requires the counting of those who are present and voting, cumulatively. This was the legal position obtained from the decision in the case of Re, *Hindustan General Electric Corporation*, AIR 1959 Cal 679 at 681.

(ii) **Correct** : As regards the modification of a scheme, an application can be made by any person interested. 'Any person interested' should not be confined to creditor or member or liquidator of the company. Accordingly, any person who has obtained a transfer of shares in the company but has not yet been registered as a member is also to be included therein. [*K K Gupta* v. *K P Jain* (1978) 48 Comp. Cases 342 : AIR 1979 SC 734]. Therefore, a person who is a transferee of certain shares (yet to be registered) can seek to modify a scheme of arrangement of the company concerned approved by the Court.

(iii) **Correct** : In *Electricals (P) Ltd.* (1996) 22 CLA 274 (Guj.) it was held that there can be no objection to a private limited company having its assets revalued by an expert and then amalgamating with a public limited company within a few days after its incorporation.

(iv) **Correct** : In the case of *J S Davar* v. *Dr. S V Marathe* AIR 1967 Bom 456 (DB), it was decided that if the object of the scheme is to prevent investigation or there is failure in the management of the affairs of the company or disregard of law or withholding of material information from the meeting etc. the court will not sanction the scheme..

(v) **Incorrect** : In the absence of any consent on the part of any of the parties who entered into a scheme, especially on the part of the creditors, it is not open to the court to impose conditions or modifications of its own. [*Mihirendra Kishore Dutt* v. *Brahmanbaria Loan Co. Ltd.*, (1935) 5 Com Cases1, 6 : AIR 1934 Cal 816].

(vi) **Incorrect** : It was held in the case of *Union of India* v. *Ambalal Sarabhai Enterprises Ltd.*, (1984) 55 Com Cases 623, 645 (Guj) that consideration of public interest must not be ignored while sanctioning a scheme. Further, it was observed by the Judges of Supreme Court that in *Hindustan Lever Employees Union* v. *Hindustan Lever Ltd.*, (1995) 83 Com Cases 30 that the company court has to apply its mind to the public interest involved in the merger. Further, a scheme which is valid and good may yet be bad if it is against public interest.

Old Syllabus

1.(b) State, with reasons in brief, whether the following statements are correct or incorrect:

(i) A decree-holder unsecured creditor is a separate class.

(ii) If a scheme of arrangement is rejected by secured creditors, then it is deemed to be rejected by all the creditors.

(iii) A worker has no right to oppose scheme of arrangement.

(iv) In the scheme of amalgamation, the transferor company is supposed to be dissolved without winding-up.

(v) In all the schemes of arrangement, a clearance of the Competition Commission of India is must.

Answer - 1.(b)

(i) **Incorrect:** The decree holder creditor is in the same class with other creditors & not a different class. Creditors who have secured a decree were regarded not a separate class from other creditors of the same category. [Hari Charan Karanija v. Ulipur Bank Ltd. AIR1942Cal. 442]

(ii) **Correct** : Where the secured creditors reject the scheme, it is deemed to be rejected by all the creditors &shall be binding on all unsecured creditors. [Auto Steering India P. Ltd.(1977) 47 com cases 257 (Del)]

(iii) **Incorrect** : Where the right of workers get affected they have a right to oppose the scheme. The workers union can raise objection, in such a case. In KEC International Ltd. V. Kamani Employees Union (2000) 36 CLA 124 (Bom), it was held that where any scheme affects the right of employees prejudicially, the employees have a right to oppose it. The Trade Union representing them would have locus standi to raise objections.

(iv) **Correct** : In amalgamation the undertaking comprising property, assets and liabilities, of one (or more) company (amalgamating or Transfering Company) are absorbed by, and the transferred company merges into or integrates with Transferee Company. The former loses its entity and is dissolved, without winding up.

(v) **Correct** : The clearance of Competition Commission is required only where the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises, forming a combination of such enterprises and persons or enterprises, which are above the certain prescribed size in terms of assets or turnover.

December 2010

2.(c) State, with reasons in brief, whether the following statements are true or false :

(i) Provisions of the Specific Relief Act, 1963 override the provisions of sections 391 and 392.

(ii) A scheme, apparently made to merge the profit making company with a loss making company and to take tax advantage, is a valid scheme.

(iii) Amalgamation between two banking companies is governed solely by the Companies Act, 1956.

(iv) The transferee company after effecting merger is able to charge to profit and loss account the expenditure incurred wholly and exclusively for the purposes of amalgamation.

(v) Persons acting in concert (PAC) are individuals/company(ies)/any other legal entities who are acting together for an uncommon objective.

(vi) Under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, it is a voluntary requirement to appoint a merchant banker for acquisition of shares.

(vii) The shares of a target company are deemed as 'frequently traded' for pricing purpose if the annualised trading turnover in those shares is more than 5% (by number of shares).

Answer - 2.(c)

(i) **False** : Provisions of the Specific Relief Act does not override the provision of section 391 & 392 of the companies act. In case of *Divya Vasundhara Financier Limited* v. *KN Samant (1990) 69 Comp. Cases*, it was held that the court while passing an scheme of arrangement under section 391 can also pass order of eviction against a person who prima facie does not have any right, title or interest in the property by issuing suitable directions.

(ii) **True** : In case of *Bihari Mills Ltd. (1985) Comp Cas Guj.*, it appeared to the court that the scheme was by way of, what is known as commercial world as a reverse takeover which means that a profit making company merges itself into a loss making company for the purpose of having advantage for tax purpose of examining that the scheme is not that reason against public interest and for evasion of taxes. On the facts court found that the scheme was bona fide commercial nature, reasonable and fair.

(iii) **False** : Amalgamation of one banking company with another banking company is governed by the provisions of Banking Regulation Act, 1949. Section 44A of the Banking Regulation Act, 1949 provides for procedure of amalgamation of two banking companies.

(iv) **False** : Section 35DD of Income Tax Act, 1961 provides that, expenditure, wholly and exclusively for the purposes of amalgamation, the assessee is only allowed a deduction of an amount equal to 1/5th of such expenditure for each of the 5 successive previous years in which the amalgamation takes place.

(v) **False** : Persons acting in concert (PAC) are acting for common objectives. As per SEBI(Substantial Acquisition of shares and takeovers) Regulations 1997, person acting in concert comprises persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company.

(vi) **False** : It is a mandatory requirement to appoint category I merchant banker who is not associate of or group of acquirer or target company.

(vii) **True** : Shares shall be deemed to be infrequently traded if on the stock exchange, the annualised trading turnover in that share during the preceding six calendar months prior to the month in which the public announcement is made is less than five per cent (by number of shares) of the listed shares. Thus if turnover is more than 5% by number of such shares, it is deemed as frequently traded.

June 2011

1.(b) State whether the following statements are true or false citing briefly relevant provisions of the law :

(i) A company seeking amalgamation with another company, passed a resolution under section 391(2), as per direction of the court and did not file the same with the Registrar of Companies under section 192, on the plea that it is neither an ordinary nor a special resolution but an extraordinary resolution.

(ii) A company called a meeting of members of the company under direction of the court for amalgamation with another company and excluded the proxies for the purpose of counting quorum.

(iii) The date of agreement made by the merchant banker with the acquirer is treated as 'deemed date of offer' for the purpose of acquisition of shares and/or control in the target company.

(iv) The order sanctioning the scheme of amalgamation made by the court should be filed with the Registrar of Companies. If the order is not filed with the Registrar of Companies, it will not have any effect.

(v) Every notice of any meeting called as per orders of court under section 391 shall not include explanatory statement.

Answer - 1.(b)

(i) **True** : A full bench of the Punjab and Haryana High Court in *Hind Lever Chemicals Limited and Another* [2005] 58S CL 211(Punj. & Har.) held that the language of Section 391(2) of the Act is totally unambiguous and a plain reading of this provision clearly shows that the majority in number by which a compromise or arrangement is approved should represent three-fourth in value of the creditors/shareholders who are 'present and voting' and not of the total value of the shareholders or creditors of the company. This is neither an ordinary resolution nor a special resolution within the purview of Section 189 of the Act. This is an extraordinary resolution. A copy of this resolution need not be filed with the Registrar of Companies under Section 192.

(ii) **False** : Proxies are to be counted for the purpose of quorum for the meeting called under direction of the Court for amalgamation with another company. In terms of Section 391, the resolution has to be approved by a majority of members representing three-fourths in value of the creditors or class of creditors or members or class of members as the case may be present and voting either in person or by proxy.

(iii) **False**. The offer under SEBI (SAST) Regulations, 1997 is deemed to have been made on the date of publication of the public announcement in any of the newspapers.

(iv) **True**. As per Section 391(3) of the Companies Act, 1956, the order made by the court under Sub-section (2) of Section 391 should be filed with the Registrar of Companies. If the order is not filed with the Registrar, the amalgamation ordered by the Court shall not have any effect.

(v) **False**. Section 393(1) of the Companies Act, 1956 lays down that where a meeting of creditors or members or any class of them is called under Section 391:

(a) with every notice calling the meeting which is sent to a creditor or a member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effects and in particular, stating any material interests of the directors, managing director or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise and the effect on those interests, of the compromise or arrangement, if, and in sofar as, it is different from the effect on the like interests of other persons; and

(b) in every notice calling the meeting which is given by advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid.

December 2011

1(b) State whether the following statements are true or false citing relevant provisions of the law:

(i) Reorganisation of capital through a scheme of compromise or arrangement under section 391 can cover reorganisation of reserves and surplus.

(ii) Amalgamation cannot be sanctioned by the court when the transferee company's objects do not cover business of the transferor company which the former proposes to carry on after the amalgamation.

(iii) Any dissenting shareholder may apply to the court to seek an order to the effect that the scheme shall not be binding on him despite that it has been accepted by 90% of the shareholders.

(iv) Where a large number of creditors have not been given the notice, the scheme cannot be considered by the court for its sanction even if it has been passed by a three-fourths majority of the creditors who attended the meeting.

(v) The books and papers of a company which has been amalgamated with or whose shares have been acquired by another company shall not be disposed of without the prior permission of the Central Government.

(vi) A public offer once made shall be withdrawn when the statutory approvals required have been refused.

(vii) A promoter of the company may within three working days from the date of creation of pledge on shares of that company held by him, inform the details of such pledge of shares to that company.

Answer - 1.(b)

(i) **True** : Reorganisation of capital through a scheme of compromise or arrangement under section 391 can cover reorganisation of reserves and surplus. Reorganisation of capital through a scheme of compromise or arrangement not only involve reorganisation of hare capital but also reserves and surplus, as reserve and surplus also forms the part of shareholder's funds.

(ii) **False** : The scheme of the amalgamation cannot he with held merely on the ground that the object clause of the transferor to amalgamate. It is not compulsorily or necessary that the object clause of transferor company should have the power to amalgamate. Thus no scheme for amalgamation can be withheld only on the ground that the object clause of transferor company does not contain the power to amalgamate.

(iii) **True:** Any dissenting shareholder may apply to the court to seek an order to the effect that the scheme shall not be binding on him despite that it has been accepted by 90% of the shareholders (Section 395) Even if majority of the shareholders agrees to the amalgamation, it cannot brined the remaining shareholders to deny the amalgamation and apply to court to seek an order to the effect that the scheme shall not be passed.

(iv) **True:** Where large number of creditors have not been given the notice, the scheme cannot be considered by the court for its sanction, even if it has been passed by three fourth majority of the creditors who attend the meeting.

Notice of the meeting is required to be sent under certificate of posting to the creditors/members of the company, at their last known addresses at least twenty-one clear days before the date fixed for the meeting.

The notice should also be accompanied by a copy of the scheme for the proposed compromise or arrangement and of the statement required to by furnished under section 393 setting forth the terms of proposed compromise or arrangement explaining its effect and an explanatory statement in terms of the provision of clause of sub section (I) of section 393 of the Companies Act.

(v) **True:** The books and papers of a company which has been amalgamated with or whose shares have been acquired by another company shall not be disposed of without the prior permission of the Central Government. Section 395 of the Companies Act provided that prior permission of Central Government meads to be obtained in such cases. Before granting such permission government may appoint a person to examine of the commission of an offence in convection with the formation or promotion, or the management of the affairs, if the first mentioned company or its amalgamation or the acquisition of its shares.

(vi) **True:** Yes, a public offer once made can be subsequence withdrawn if statutory approvals required have been refused. Statutory approvals are required to be obtained. As per Regulation 27 of SEBI (Substantial Acquisition of share and takeover) Regulations, 1997 no public offer, once made shall be withdrawn except when the statutory approvals required have been refused, the sole acquirer bring a natural person has died and there are such circumstances which is the opinion of SEBI merits withdraws.

(vii) **False:** According to the provisions of regulation 8 A of SEBI (Substantial Acquisition of shares and takeover) regulations 1997, a promoter of the company may within 7 working days form the date of creation of fledge on shares of that company held by him, informs the details of such pledge of shares to the company.