

CORPORATE RESTRUCTURING AND INSOLVENCY

Time allowed : 3 hours

Maximum marks : 100

NOTE : All references to sections relate to the Companies Act, 1956 unless stated otherwise.

PART A

(Answer Question No. 1 which is compulsory
and any three of the rest from this part)

Question 1

- (a) Big Ltd. prepared a scheme of amalgamation and arrangement with Small Ltd. and Little Ltd. and the scheme has gone through the required formalities and court approved the scheme, in which the swap ratio was provided as under :

- (i) The transferor Company No.1 — Small Ltd. : The shareholders of Small Ltd. will get one equity share of ₹10 each of Big Ltd. for every 2 shares fully paid-up of Small Ltd.
- (ii) The transferor Company No.2 — Little Ltd. : The shareholders of Little Ltd. will get one equity share of ₹10 each fully paid-up for every 5 equity shares fully paid-up of Little Ltd.

There were no other types of shares in the companies on the record date fixed for swap ratio.

The capital structure of the transferee company (amalgamated company) and the transferor companies (amalgamating companies) was as under on appointed date, and there was no change in this regard upto date as aforesaid:

Particulars	Big Ltd.	Small Ltd.	Little Ltd.
Equity share capital (Nos.)	10,00,000	8,00,000	7,00,000
Fully paid-up equity share @ ₹10 each (₹)	1,00,00,000	80,00,000	70,00,000
Reserves and surplus (₹)	50,00,000	70,00,000	50,00,000
Total (₹)	<u>1,50,00,000</u>	<u>1,50,00,000</u>	<u>1,20,00,000</u>

Investments of Big Ltd. :

Equity shares of Small Ltd. of ₹10 each fully paid-up in Small Ltd. —

Equity shares (Nos.)	3,00,000
Nominal value (₹)	30,00,000
Paid-up value (₹)	30,00,000

Equity shares of Little Ltd. of ₹10 each fully paid-up in Little Ltd.

Equity shares (Nos.)	2,00,000
Nominal value (₹)	20,00,000
Paid-up value (₹)	20,00,000

As a Company Secretary and CFO of Big Ltd. (the transferee company), how would you deal with —

(i) *the issues for effecting the allotment of equity shares of Big Ltd. for which shareholders' approval was received under section 81(1A).*
(3 marks)

(ii) *the number of equity shares of Big Ltd. of ₹10 each fully paid-up to be issued to the shareholders of Small Ltd. and Little Ltd.*
(6 marks)

And also state that the total number of issued equity shares of Big Ltd. after such allotment.
(1 mark)

(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 extra-ordinary 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.*
(2 marks each)

(c) *Explain the circumstances where reduction of share capital is done without confirmation by the court.*
(5 marks)

Answer 1(a)(i)

After receiving the order from the Hon'ble Court, a copy of the court order be filed with ROC to make the merger effective in the eye of law.

A Board Resolution to be passed for allotment of equity shares of Rs.10 each fully paid up to the shareholders of the transferor companies and file the necessary e-forms (e-form 2) with Registrar of Companies.

The investment in the Small Ltd. and Little Ltd. to be written off and cancelled from the books of Big Ltd.

Answer 1(a)(ii)

The number of equity shares to be allotted to the shareholders of Small Ltd.

Paid up equity shares (Nos.)	8,00,000
Less : Cross holding (between transferor and transferee company - liable to be cancelled)	3,00,000
Net number of shares to be swapped	5,00,000
Swap ratio	1:2
New shares of Big Ltd. to be allotted	2,50,000 nos.

The number of equity shares to be issued to the shareholders of Little Ltd.

	<i>Little Ltd.</i>
No. of paid equity shares	7,00,000
Less : Cross holding between the transferor and transferee company	2,00,000
Net Shares to be swapped	5,00,000
Swap Ratio	1:5
Net share to be allotted	1,00,000

After the allotment, the total number of issued equity shares stands as under:

	<i>Nos.</i>
Big Ltd. No. of equity shares before merger	10,00,000
Allotted to shareholder of Small Ltd.	2,50,000
Allotted to shareholder of Little Ltd.	1,00,000
Total No. of issued shares	13,50,000

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 so far 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.

Answer 1(c)

Reduction of share capital without sanction of the Court

The following are cases which amount to reduction of share capital but where no confirmation by the Court is necessary:

- (a) *Surrender of shares* – “Surrender of shares” means the surrender of shares already issued to the company by the registered holder of shares. Where shares are surrendered to the company, whether by way of settlement of a dispute or for any other reason, it will have the same effect as a transfer in favour of the company and amount to a reduction of capital.
- (b) *Forfeiture of shares* – A company may if authorised by its articles, forfeit shares for non-payment of calls and the same will not require confirmation of the Court, when it is re-issued.
- (c) *Diminution of capital* – Where the company cancels shares which have not been taken or agreed to be taken by any person [Section 94(1)(3)].
- (d) Redemption of redeemable preference shares.

- (e) Purchase of shares of a member by the company under Section 402.
- (f) Buy-back of its own shares under Section 77A.

Question 2

- (a) *What is the difference between 'compromise' and 'arrangement' ?*
(5 marks)
- (b) *Explain briefly the procedure for making application to court under section 391 for directions to hold meetings of shareholders/creditors.*
(5 marks)
- (c) *What factors will you consider for valuation of shares in merger/amalgamation ?*
(5 marks)

Answer 2(a)**Difference between Compromise and Arrangement**

The meaning of the expression 'arrangement' as given under Section 390(b) of the Companies Act, 1956 includes reorganization of share capital of the company by consolidation of shares of different classes or division into different classes of shares or both. 'Compromise' presupposes the existence of a dispute which it seeks to settle. Nothing like that is implied in the 'arrangement' which has wider meaning than 'compromise'. An arrangement involves an exchange of one set of rights and liabilities for another. All modes of reorganizing the share capital, takeover of shares of one company by another including interference with preferential and other special rights attached to shares can form part of an arrangement proposed with members.

Answer 2(b)**Application to High Court seeking direction to hold meetings**

Rule 67 of the Companies (Court) Rules, 1959 lays down that an application under Section 391(1) of the Companies Act, 1956 for an order seeking direction for convening meeting(s) of creditors and/or members or any class of them shall be by way of Judge's summons supported by an affidavit. A copy of the proposed scheme should be annexed to the affidavit as an exhibit thereto. The summons should be moved ex parte in Form No. 33 of the Companies (Court) Rules, 1959. The affidavit in support of the application should be in Form No. 34.

Answer 2(c)

Determining the value of a business is a complicated and intricate process. Valuing a business requires the determination of its future earnings potential, the risks inherent in those future earnings. Strictly speaking, a company's fair market value is the price at which the business would change hands between a willing buyer and a willing seller when neither are under any compulsion to buy or sell, and both parties have knowledge of relevant facts.

Arriving at the transaction price requires that a value be placed on the company for sale. The process of arriving at this value should include a detailed, comprehensive analysis which takes into account a range of factors including the past, present, and

most importantly, the future earnings and prospects of the company, an analysis of its mix of physical and intangible assets, and the general economic and industry conditions.

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.
(‘gearing’ means ratio of the amount of Issued preference share capital and debenture stock to the amount of issued ordinary share capital.)
- (5) Net assets of the two companies.
- (6) Voting strength in the merged (amalgamated) enterprise of the shareholders of the two companies.
- (7) Past history of the prices of shares of the two companies.

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 such swings.

Question 3

- (a) *Sharad who is a promoter of Grow Good Ltd. holds 20% of paid-up share capital of the company. The shares of the company are listed on National Stock Exchange Ltd., Mumbai. Sharad would like to pledge his shares for obtaining loan. State the requirements for disclosure of pledged shares under the SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2009.* (8 marks)
- (b) *Explain the provisions relating to ‘escrow account’ under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.* (7 marks)

Answer 3(a)

Sharad has to comply with the following requirements :

Disclosure of pledged shares (Regulation 8A)

- (1) A promoter or every person forming part of the promoter group of any company is required to disclose details of shares of that company pledged by him, if any, to that company, within 7 working days from the date of creation of pledge on shares of that company held by him.

A promoter or every person forming part of the promoter group of any company shall, within 7 working days from the date of invocation of pledge on shares of that company pledged by him, inform the details of invocation of such pledge to that company.

Compliance requirements by Growgood Ltd.

- (2) The company shall disclose the information received as above (i.e. from Mr. Sharad) to all the stock exchanges, on which the shares of company are listed, within 7 working days of the receipt thereof, if, during any quarter ending March, June, September and December of any year,:-
- (a) aggregate number of pledged shares of a promoter or every person forming part of promoter group taken together with shares already pledged during that quarter by such promoter or persons exceeds twenty five thousand; or
 - (b) aggregate of total pledged shares of the promoter or every person forming part of promoter group alongwith the shares already pledged during that quarter by such promoter or persons exceeds one per cent. of total shareholding or voting rights of the company, whichever is lower.”

Answer 3(b)

Escrow Account

Regulation 28 requires the acquirer to open an escrow account as a security for performance of his obligations in terms of the public offer. The amount will be refunded or used for timely fulfilment of the obligations and forfeited if offer is not completed. This is a strong deterrent against frivolous takeover offers and secures interest of the public shareholders.

The value of escrow amount shall be 25%, upto Rs.100 crores and 10% above Rs.100 crores, of the consideration payable under the public offer. In case the acquirer has made the offer subject to a minimum level of acceptance and he does not want to acquire minimum of 20% then he has to provide 50% of the consideration payable under the offer in cash in escrow account. The acquirer has the option of keeping differential pricing and if he so opts, he shall deposit in the escrow account, amount calculated with reference to highest price offered. In the event of upward revision of the offer, the acquirer is supposed to enhance the escrow value upto 10% of consideration payable upon such revision.

The acquirer can exercise the option of tendering bank guarantee or approved securities in escrow account instead of cash. Bank guarantee has to be executed by acquirer in favour of merchant banker and has to be valid atleast for a period commencing from the date of public announcement until 20 days after closure of the offer. Similarly, approved securities with appropriate margins are to be deposited with the merchant banker with the authority to realize the value of such escrow account, by sale or otherwise and if any deficit occurs, the merchant banker shall be liable to make good such deficit. If the acquirer deposits cash with a scheduled bank, acquirer has to authorize the bank to act on any instructions given by merchant banker in respect of said account. Merchant Banker is also prohibited from returning the bank guarantee or securities until all the obligations under the offer have been completed by the acquirer. In case, the acquirer offers bank guarantee or approved securities in the escrow account, he shall deposit with a bank atleast 1% of total consideration payable. SEBI has been empowered to forfeit the escrow account, either in full or in part in the event of non-fulfilment of obligations by the acquirer.

Question 4

- (a) *Explain funding through swaps or stock to stock merger.* (5 marks)
- (b) *Draft a suitable Board resolution with respect to takeover for the following :*
- (i) *offer by offeror company; and*
 - (ii) *authorisation to invest in the shares of investee company.* (4 marks each)
- (c) *Sanction to the scheme of amalgamation can be refused by the court on the ground that the transferee company does not have sufficient authorised share capital on the appointed date. Do you agree ? Give reasons.* (2 marks)

Answer 4(a)**Funding through Swaps or Stock to Stock Mergers**

In stock swap mergers, or stock-for-stock mergers, the holders of the target company's stock receive shares of the acquiring company's stock. The majority of mergers during the past few years have been stock-for-stock deals. A merger arbitrage specialist will sell the acquiring company's stock short, and will purchase a long position in the target company, using the same ratio as that of the proposed transaction. (If the purchasing firm is offering a half share of its stock for every share of the target company, then the merger arbitrageur will sell half as many shares of the purchasing firm as he or she buys of the target company.

As with all mergers, stock swap mergers may involve event risk. In addition to the normal event risks, stock swap mergers involve risks associated with fluctuations in the stock prices of the two companies.

The terms of the deal involve an exchange of shares and are predicted on the prices of the two companies' stock at the time of the announcement, drastic changes in the shares prices of one or both of the companies can cause the entire deal to be re-evaluated. Merger arbitrageurs derive returns from stock swap mergers when the spread or potential return justifies the perceived risk of the deal's failing.

Answer 4(b)(i)**Offer by Offeror Company**

RESOLVED THAT an offer be made, to the persons who are the members of..... Ltd. as on....., for acquisition of..... equity shares of Rs. 10/- each representing a.....% of the total issued capital of the.....Ltd.

RESOLVED FURTHER THAT above said offer shall remain open till..... at a price of Rs. each.

RESOLVED FURTHER THAT shares be accepted even if such shares in aggregate are less than the limit mentioned above and in case shares offered exceed the limit, the company shall have an option to accept or reject the same in consultation with the concerned authorities and offer will be accepted according to the order in which they are received and full shareholding of the members accepting the offer be acquired subject to abovementioned limit."

Answer 4(b)(ii)**Authorisation to invest in the shares of investee company**

Board Meeting Resolution under section 372A of the Companies Act, 1956.

Resolved that pursuant to section 372A and other applicable provisions if any, of the Companies Act, 1956 and authorization given by the members of the company at their meeting held on unanimous consent of the Board of Directors be and is hereby given to invest upto equity shares of M/s. ABC Ltd. at a price of Rs..... each.

Answer 4(c)

No, Sanction to scheme of amalgamation cannot be refused on the ground that the transferee company does not have sufficient authorised capital on the appointed date. If the scheme is sanctioned, the transferee company can thereafter increase its authorised capital to give effect to the scheme [*Re: Mahavir Weaves Pvt. Ltd.* (1985) 83 Comp. Cas 180].

Question 5

- (a) *A company has passed a special resolution for 'reduction of capital' and effected the same and applied before the Registrar of Companies (ROC) for issuance of certificate confirming the reduction.*

The ROC issued certificate confirming the reduction. Subsequently, it was found that :

- (i) the company had no authority under its articles to reduce capital; and*
- (ii) the special resolution was invalid one.*

State with brief reasons separately in both the above circumstances, whether the reduction of capital would be allowed. (4 marks)

- (b) *It is a well known fact that to maximise the shareholders value, a company having surplus funds often induced to buy-back its own shares. What are common reasons which usually induces a company to resort to buy-back ?*

(5 marks)

- (c) *A listed company had drafted a special resolution to be passed through postal ballot to buy-back 25% of its paid-up equity share capital. As a Company Secretary, you are required to draft the explanatory statement to the proposed resolution. What factors will you consider to prepare the explanatory statement?*

(3 marks)

- (d) *A company whether listed or not is required to make a 'declaration of solvency' and has to submit to the appropriate authorities before making a buy-back of shares. In view of the statement, you are required to answer where the declaration of solvency is to be submitted in case of —*

- (i) A listed company.*
- (ii) An unlisted company.*
- (iii) A private limited company.*

(1 mark each)

Answer 5(a)**Conclusiveness of certificate for reduction of capital**

Where the Registrar had issued his certificate confirming the reduction, the same was held to be conclusive although it was discovered later that the company had no authority under its articles to reduce capital [*Re Walkar & Smith Ltd.*, (1903) 88 LT 792 (Ch D)]. Similarly, in a case where the special resolution for reduction was an invalid one, but the company had gone through with the reduction, the reduction was not allowed to be upset [*Ladies's Dress Assn. v. Pulbrook*, (1900) 2 QB 376].

Answer 5(b)

Good corporate governance calls for maximizing the shareholder value. When a company has surplus funds for which it does not have good avenues for deployment assuring an average return on capital employed and earnings per share, the company's financial structure requires balancing.

The reasons for buy-back may be one or more of the following:

- (i) to improve earnings per share;
- (ii) to improve return on capital, return on net worth and to enhance the long-term shareholder value;
- (iii) to provide an additional exit route to shareholders when shares are under valued or are thinly traded;
- (iv) to enhance consolidation of stake in the company;
- (v) to prevent unwelcome takeover bids;
- (vi) to return surplus cash to shareholders;
- (vii) to achieve optimum capital structure;
- (viii) to support share price during periods of sluggish market conditions;
- (ix) to service the equity more efficiently.

The decision to buy-back is also influenced by various other factors relating to the company, such as growth opportunities, capital structure, sourcing of funds, cost of capital and optimum allocation of funds generated.

Answer 5(c)

Whereas unlisted companies should obtain shareholders' approval by passing the special resolution only at a duly convened general meeting, listed companies should obtain such approval by postal ballot.

The notice containing the special resolution proposed to be passed should be accompanied by an explanatory statement stating:

- (a) all material facts, fully and completely disclosed;
- (b) the necessity for buy-back;

- (c) the class of security intended to be purchased under the buy-back;
- (d) the amount to be invested under buy-back; and
- (e) the time limit for completion of buy-back [Section 77A(3)].

Answer 5(d)

- (i) In the case of buy-back of listed securities, before making a buy-back, the company must file with the Registrar of Companies and SEBI, a declaration of solvency in the prescribed form.
- (ii) In the case of unlisted companies, a declaration of solvency has to be filed with Registrar of Companies before buy-back of shares.
- (iii) In the case of private Limited Companies, the Declaration of Solvency is to be filed with Registrar of Companies before buy-back of shares.

PART B

(Answer ANY TWO questions from this part.)

Question 6

- (a) *Immunity from certain litigations to 'sick company' is the purpose of the Sick Industrial Companies (Special Provisions) Act, 1985. Discuss with reference to the legal provisions of the Act.* (7 marks)
- (b) *Explain the composition of debt recovery tribunals and explain the procedure for appeal to Appellate Tribunal.* (8 marks)

Answer 6(a)

Immunity from Certain Litigations – Section 22

The protection under Section 22 of SICA is a superior protection as it operates notwithstanding anything contained in the Companies Act, 1956, or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law. The above protection is available in respect of an industrial company when an inquiry under Section 16 is pending in relation to the said industrial company or when any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending.

Where the management of the sick industrial company is taken over or changed in pursuance of any scheme sanctioned under Section 18, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of BIFR or, as the case may be, the Appellate Authority.

Further it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company and no

resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by BIFR.

Answer 6(b)

Composition of Tribunal

The Recovery of Debt Due to Banks and Financial Institutions Act, 1993 provides that a Tribunal shall consist of one person only, to be called the Presiding Officer, to be appointed, by notification, by the Central Government. The Central Government may also authorise the Presiding Officer of one Tribunal to discharge also the functions of the Presiding Officer of another Tribunal. Any person who is, or who has been, or is qualified to be, a District Judge may be appointed as the Presiding Officer, who shall, hold office for a term of five years from the date on which he enters his office or until he attains the age of sixty-two years, whichever is earlier.

The Central Government shall also appoint one or more Recovery Officers and such other officers and employees as the Government may think fit. The Recovery Officers and other officers and employees of a Tribunal shall discharge their functions under the general superintendence of the Presiding Officer.

Appeal to the Appellate Tribunal

Section 20 of the Act provides that any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter. No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties. Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and accompanied by such fee as may be prescribed. Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

Question 7

- (a) *In a voluntary winding-up, all is left to the company, the contributories and the creditors to settle their affairs 'without intervention of the court as far as possible'. Can the court pierce the process, and what is its vested power to pierce the process, and when and where it is being exercised ? Briefly discuss all relevant aspects.* (5 marks)
- (b) *In consequence of winding-up of a limited company, a person becomes both contributory and a creditor almost for the same amount. The person made an application to the liquidator that the amount to be payable as 'contributory' may be set-off against his 'receivable' amount from the company. Shall the person get such relief ? If not, why and on what grounds ?* (5 marks)
- (c) *What is 'non performing asset' (NPA) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ?* (5 marks)

Answer 7(a)

In voluntary winding up it is left to the company, the contributories and the creditors to settle their affairs without intervention of the Court as far as possible. However, the

Companies Act, 1956, contains certain provisions which provide a means of access to the Court with a view to speed up the liquidation proceedings and to overcome the difficulties that may arise in the course of liquidation. The Court will intervene in the voluntary winding up whenever it is satisfied that such an intervention will be just and beneficial. In appropriate cases the Court can be approached for compulsory winding up (Section 440) or winding up being conducted under the supervision of the Court (Section 522).

The Court is vested with the following powers in voluntary winding up:

- (i) To appoint the Official Liquidator or any other person as liquidator where no liquidator is acting [Section 515(1)].
- (ii) To remove the liquidator and appoint the Official Liquidator or any other person as liquidator on justifiable cause being shown [Section 515(2)].
- (iii) To determine the remunerations of liquidator when the Official Liquidator is appointed as a liquidator [Section 515(3)].
- (iv) To amend, vary, confirm or set aside the arrangement entered into between a company and its creditors on an appeal being made by any creditor or contributory within 3 weeks of the completion of the arrangement (Section 517).
- (v) On an application of the Liquidator or contributory or creditor:
 - (a) to determine any question arising in the winding up of a company [Section 518(1)(a)];
 - (b) to exercise, as respects the enforcing of calls, the staying of suits or other legal proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court [Section 518(1)(b)].
- (vi) To set aside any attachment, distress or execution started against the estate or effects of the company after the commencement of the winding up on such terms as it thinks fit on an application made by the liquidator, creditor or contributory if the Court is satisfied that it is just and beneficial to do so [Section 518(3) and (4)].
- (vii) To order public examination of any person connected with promotion or formation of a company or any officer connected with the affairs of the company in regard to matters of promotion or formation or conduct of the business of the company or as to his conduct or dealing as officer thereof. Such an examination can be ordered on a report of the liquidator where he is of the opinion that a fraud has been committed by the persons aforesaid in the formation or promotion of the company or in the conduct of its affairs [Section 519(1)].

Answer 7(b)

A person, who is both a contributory and a creditor of the company (in respect of dividends, profits or otherwise) cannot set off his debts against his liability for calls even if there is an express agreement to do so whether the call was made before or after winding up [*Rameshwar Prasad v. Simla Banking & Industrial Co. etc. Ltd.*, (1955) 25

Comp. Cas. 475]. The principle underlying denial of right of set off is that where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed to participate until he has discharged his obligation [*Re. Peruvian Railway Constructions Co.* (1915) 2 Ch. 442].

Answer 7(c)

Non-Performing Assets [Section 2(1)(o)]

SARFESI Act defines "Non-Performing Asset" as to mean an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset—

- (a) in case such bank or financial institution is administered or regulated by an authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;
- (b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank.

Question 8

- (a) *What is the procedural requirement for recognition of 'foreign proceedings' under the UNCITRAL Model Law ?* (9 marks)
- (b) *Write short notes on the following :*
 - (i) *Lok Adalat*
 - (ii) *Committee of inspection*
 - (iii) *Corporate insolvency.* (2 marks each)

Answer 8(a)

Application for recognition of a foreign proceeding (Article 15)

Article 15 of UNCITRAL Model Law, defines the core procedural requirements for an application by a foreign representative for recognition. In incorporating the provision into national law, it is desirable not to encumber the process with additional requirements beyond these requirements. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. An application for recognition shall be accompanied by:

- (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

The court may require a translation of documents supplied in support of the application for recognition into an official language of State.

The Model Law presumes that documents submitted in support of the application for recognition need not be authenticated in any special way, in particular by legalization.

It further requires that an application for recognition must be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. That information is needed by the court not so much for the decision on recognition itself but for any decision granting relief in favour of the foreign proceeding. In order to tailor such relief appropriately and make sure that the relief is consistent with any other insolvency proceeding concerning the same debtor, the court needs to be aware of all foreign proceedings concerning the debtor that may be under way in third States.

Answer 8(b)(i)

Lok Adalat

The concept of Lok Adalat received prominence due to need for speedy disposal of cases. The Lok Adalat as set up under the Legal Service Authorities Act, 1987 (39 of 1987). Where the borrower and the banker are not able to arrive at a compromise, bringing the case before the forum of Lok Adalat can be helpful. Experience has shown that in many cases, particularly where the amount is not large, Lok Adalat has been successful in bringing the borrower to terms by using some kind of social pressure.

Lok Adalats are being organized at different places under the auspices of local judiciary and voluntary organizations with the object of speedy disposal of disputes of different kinds.

Answer 8(b)(ii)

Committee of Inspection

In creditors Voluntary Winding Up, the creditors may appoint a Committee of Inspection consisting of not more than five members. If such a committee is appointed, the company may also at the same or any subsequent general meeting appoint such number of persons not exceeding five as they think fit to act as members of the committee. In any case, the creditors may resolve that all or any of the persons so appointed by the company ought not to be members of the committee of Inspection, whereupon the persons mentioned in the company's resolution shall not be qualified to act as members of the committee unless the Court otherwise directs. The Act provides that the powers and proceedings of such Committee of Inspection are the same as those of a Committee of Inspection appointed in a winding up by Court (compulsory winding up) and as provided in Section 465 (Section 503).

Answer 8(b)(iii)

Corporate insolvency

Company is a juridical person created under the Companies Act, 1956 and for all practical purposes, the law views a company to be a natural person so as to enable it to hold properties in its name and to be liable for the debts it had incurred. Just as a natural

person can become insolvent, a company can also become insolvent. A company is said to be insolvent when its liabilities exceed its assets which results in its inability to pay off the debts.

In all cases of insolvency of a company, the question is not whether the company can pay all its debts presently due or payable in future and continue to function, but whether it is able to meet its current demands and whether its existing and probable assets would suffice to meet future demands. When a company becomes insolvent it is either wound up or revived. When a company is wound up, its assets are realized and liabilities are paid off from the realisation in the manner provided in the Act.
