THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

SUPPLEMENT
PROFESSIONAL PROGRAMME

CORPORATE RESTRUCTURING, INSOLVENCY, LIQUIDATION & WINDING UP

(FOR DECEMBER, 2024 EXAMINATION)

MODULE 2

PAPER 5

Contents

LESSON 1

TYPES OF CORPORATE RESTRUCTURING

Mergers and Acquisitions (M&A)

Mergers and Acquisitions (M&A) is a critical strategy for growth in the new economy. M&A are transactions in which the ownership of companies, other business organizations or operating units are transferred or combined. As an aspect of strategic management, M&A allow enterprises to grow, shrink and change the nature of the business or competitive position. It refers to the consolidation of two companies. The reasoning behind M&A is that two separate companies together create more value compared to being on an individual stand. With the objective of wealth maximization, companies keep evaluating different opportunities through the route of merger or acquisition.

M& A help the aspiring entities to expand geographically and assists them to reach the greater height and become market leaders. Also, M & As would increase the entity's ability to distribute goods or services on a wider scale which allows the entity to reach a wider market of consumers. This also helps to expand brand recognition and increase sales. The consumer also gets competitive products with improved technology.

The terms M & As is a term for company consolidation when two or more companies merge into one entity is called a merger. When we refer the term acquisition, it means to the purchase of one entity by another and in this case, instead of starting a new company, one company becomes part of another company. Mergers and acquisitions are an important part of strategic management that is included in corporate finance. we could also say that it is a type of restructuring of the company with the aim of growing rapidly thereby increasing the profitability and also gaining more market share.

Examples:

Zomato – Blinkit Merger

Zomato and Blinkit have reached an agreement for a merger. The all-stock deal values Blinkit between $700 million and $750 million. Blinkit, formerly known as Grofers, has revamped itself to focus on an instant grocery delivery portal.

Zomato Acquisition of Uber Eats

Zomato acquired Uber Eats for an all-stock acquisition deal during the year 2020. The acquisition deal provided great discounts to customers and it was the most beneficial to the customer during the Covid pandemic time. The stock deal was done by the companies operating in the same line of business. Which resulted Zomato becoming number one in

food marketing and food supply. In other words, Zomato became the megastar of the food business and in turn Uber Eats could invest their money in other growing business.

Amalgamation

In the case of *Religare Finvest Limited {Appellant(S)} vs. State of NCT of Delhi & Anr. {respondent(s)}, Criminal Appeal No(s). 2242 of 2023 with Criminal Appeal No(s). 2243 of 2023, judgement dated September 11, 2023,* Hon'ble Supreme Court reliance placed in the case of *M/s. General Radio & Appliances Co. Ltd. vs. M.A. Khader (dead)* by *LR's* (1986 (2) SCR 607), where in Supreme Court held that after the amalgamation of two companies, the transferor company ceases to have any entity, and the amalgamated company acquires a new status, and it is not possible to treat the two companies as partners or jointly liable in respect of their liabilities and assets.

Further the Apex Court observed that according to Stroud's Judicial Dictionary of Words and Phrases (9thedition), "amalgamation" is ***"welding or blending of two or more concerns into one."*** It also states that ***"where there the companies concerned retain separate entities, there is no amalgamation".*** Black's Law Dictionary, Eleventh Edition defines amalgamation as the ***"act of combining or uniting; consolidation < amalgamation of two small companies to form a new corporation >..."*** The Companies Act, 2013 does not contain any express definition of amalgamation; it rather outlines and regulates the procedure for amalgamation and spells out its legal effect, which results in extinguishment of the corporate identity of the transferor company [read, in this case, LVB]. In *Walker's Settlement* 1935 (1) Ch. D. 567., the term'amalgamation' is defined as:

"The word 'amalgamation' has no definite legal meaning. It contemplates a state of things under which 2 companies are so joined as to form a third entity or one company is absorbed into and blended with another company."

Apex Court observed that every scheme of amalgamation is statutory and sanctioned under the Banking Act. Such amalgamation is to ensure that the interests of the depositors, the creditors and others who had invested, or given credit to in the erstwhile bank, before its sickness, and that the general public are protected. It aims at securing larger public interest and health of the banking industry. Late intervention into the affairs of a bank can result in a "run" on it, resulting in serious loss of confidence in the intricately woven banking and financial system. If one sees this and the overall objective of the scheme, it is to ensure recovery of what are *the bank's dues* and ensuring protection of the creditors. Clause 3 (3) of the scheme, therefore, has to be considered from this backdrop. In this context, the express mention of directors and such other individuals in the proviso means that it is *to that extent only* those prosecutions or other criminal proceedings can continue; in the ordinary sense, criminal liability can neither be attributed to DBS nor its directors, brought in after the amalgamation, whose appointments were approved by the RBI.

In the Case of *Principal Commissioner of Income Tax (Central) – 2 vs. M/S. Mahagun Realtors (P) Ltd* (*Arising out of special leave petition (c) no. 4063 of 2020) Judgement dated April 05, 2022,* Hon'ble Supreme Court inter alia observed that amalgamation, thus, is unlike the winding up of a corporate entity. In the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other

sense of the term, the corporate venture continues – enfolded within the new or the existing transferee entity. In other words, *the business and the adventure lives on but within a new corporate residence, i.e., the transferee company.* It is, therefore, essential to look beyond the mere concept of destruction of corporate entity which brings to an end or terminates any assessment proceedings. There are analogies in civil law and procedure where upon amalgamation, the cause of action or the complaint does not *per se* cease – depending of course, upon the structure and objective of enactment. Broadly, the quest of legal systems and courts has been to locate if a successor or representative exists in relation to the particular cause or action, upon whom the assets might have devolved or upon whom the liability in the event it is adjudicated, would fall.

Merger of HDFC & HDFC Bank

Mergers and Acquisitions (M&A) offers an alternative to organic growth for buyers seeking to achieve their strategic goals, while offering sellers the option to cash in or share the risks and rewards of a newly formed business. A company may grow either by internal expansion or by external expansion. For internal expansion, a company grows gradually over time in the normal course of business. Acquisitions are part of corporate restructuring, or inorganic growth, so companies are looking for opportunities to grow outside rather than keep profits in-house. Indian companies have often outperformed their foreign counterparts in corporate restructuring both within and outside their borders.

The term Merger and Amalgamation (M&A) has not been defined under the Companies Act, 2013. M&A is often known to be a single terminology. However, there is a thin difference between the two. 'Merger' is the fusion of two or more companies, whereby the identity of one or more is lost resulting in a single company whereas 'Amalgamation' signifies the blending of two or more undertaking into one undertaking, blending enterprises loses their identity forming themselves into a separate legal identity.

There may be amalgamation by the transfer of two or more undertakings to a new or existing company. 'Transferor company' means the company which is merging also known as amalgamating company in case of amalgamation and 'transferee company' is the company which is formed after merger or amalgamation also known as amalgamated company in case of amalgamation.

A merger is a legal consolidation of two entities into one entity which can be merged together either by way of amalgamation or absorption or by formation of a new company. The Board of Directors of two companies approve the combination and seek shareholders' approval. After the merger, the acquired company ceases to exist and becomes part of the acquiring company. Some recent examples are PVR/INOX Merger and HDFC LTD/HDFC BANK Merger.

HDFC LTD/HDFC BANK Merger: India's largest housing finance company, HDFC Ltd and the largest private sector bank, HDFC Bank, merged in 2022 in one of the biggest financial deals in India. The $40 billion deal will result in a single entity.

Let us discuss details about HDFC LTD/HDFC BANK Merger.

Brief about the Companies

HDFC Investments Limited (Transferor Company No.1) is a Systemically Important Non-Deposit Taking Non-Banking Financial Company registered with the Reserve Bank of India (RBI) and is primarily engaged in the business of making investments in equity shares, preference shares, venture funds, mutual funds and other securities.

HDFC Holdings Limited (Transferor Company No.2) is also a Systemically Important Non-Deposit Taking Non-Banking Financial Company registered with the RBI and is primarily engaged in the business of making investments in equity shares, preference shares, venture funds, mutual funds and other securities.

Housing Development Finance Corporation Limited (Transferee Company/ Amalgamating Company) is principally engaged in the business of providing finance to individuals, corporates and developers for the purchase, construction, development and repair of houses, apartment and commercial properties in India through its branches in India and overseas offices supported by network of agents for sourcing loans as well as deposits.

HDFC Bank Limited (Amalgamated Company) is registered with RBI as a banking company under the provisions of the Banking Regulation Act, 1949.

Transferor Companies are wholly-owned subsidiaries of the Transferee Company/ Amalgamating Company and that the entire paid-up share capital of the respective Transferor Companies are held by the Transferee Company/ Amalgamating Company. Transferor Companies and Transferee Company/ Amalgamating Company are promoter companies of the Amalgamated Company.

Transferee Company/ Amalgamating Company and the Amalgamated Company are both listed on BSE Limited ("BSE") and National Stock Exchange Limited ("NSE")

Composite Scheme of Amalgamation

Sanction of Composite Scheme of Amalgamation among Transferor Companies, Transferee Company and Amalgamated Company sought before the Hon'ble NCLT under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 and in compliance with the provisions of the Income Tax Act, 196

The Scheme, inter alia, provides for the:

(a) Amalgamation of the Transferor Company No. 1 and the Transferor Company No. 2 (together referred to as the "Transferor Companies") with and into the Transferee Company/Amalgamating Company, with effect from the Appointed Date and the consequent dissolution of the Transferor Companies without being wound up; and

(b) Amalgamation of the Transferee Company/Amalgamating Company with and into the Amalgamated Company, with effect from the Appointed Date and the consequent dissolution of the Transferee Company/Amalgamating Company without being wound up, and the issuance of the New Equity Shares (as defined in the Scheme) to the equity shareholders of the Transferee Company/Amalgamating Company as on the Record Date (as defined in the Scheme) in accordance with the Share Exchange Ratio.

Rationale and Benefits of the Scheme

- the Amalgamation, through the Scheme, shall enable the Amalgamated Company to build its housing loan portfolio and enhance its existing customer base;
- the Amalgamation is based on leveraging the significant complementarities that exist amongst the parties to the Scheme. The Amalgamation would create meaningful value for various stakeholders including respective shareholders, customers, employees, as the combined business would benefit from increased scale, comprehensive product offering, balance sheet resiliency and the ability to drive synergies across revenue opportunities, operating efficiencies and underwriting efficiencies, amongst others;
- the Amalgamated Company is a private sector bank and has a large base of over 6.8 Crore customers. The bank platform will provide a well-diversified low cost funding base for growing the long tenor loan book acquired by the Amalgamated Company pursuant to the Amalgamation;
- the Amalgamated Company is a banking company with a large distribution network that offers product offerings in the retail and wholesale segments. The Amalgamating Company is a premier housing finance company in India and provides housing loans to individuals as well as loans to corporates, undertakes lease rental discounting and construction finance apart from being a financial conglomerate. A combination of the Amalgamating Company and the Amalgamated Company is entirely complementary to, and enhances the value proposition of, the Amalgamated Company;
- the Amalgamated Company would benefit from a larger balance sheet and networth which would allow underwriting of larger ticket loans and also enable a greater flow of credit into the Indian economy;
- the Amalgamating Company has invested capital and developed skills and has set up approximately 464 (Four Hundred and Sixty Four) offices across the country. These offices can be used to sell the entire product suite of both the Amalgamating Company and the Amalgamated Company;
- the loan book of the Amalgamating Company is diversified having cumulatively financed over 90 lakh dwelling units. With the Amalgamating Company's leadership in the home loan arena, developed over the past 45 years, the Amalgamated Company would be able to provide to customers flexible mortgage offerings in a cost-effective and efficient manner;
- the Amalgamated Company has access to funds at lower costs due to its high level of current and savings accounts deposits (CASA). With the amalgamation of the Amalgamating Company with the Amalgamated Company, the Amalgamated Company will be able to offer more competitive housing products;

- the Amalgamating Company's rural housing network and affordable housing lending is likely to qualify for Amalgamated Company as priority sector lending and will also enable a higher flow of credit into priority sector lending, including agriculture;
- the Amalgamation will result in reducing the Amalgamated Company's proportion of exposure to unsecured loans;
- the Amalgamating Company has built technological capabilities to evaluate the credit worthiness of customers using analytical models and has developed unique skills in financing various customer segments. The models have been tested and refined over the years at scale and the Amalgamated Company will benefit from such expertise in underwriting and financing of mortgage offerings;
- the Amalgamated Company can leverage on the loan management system, comprising rule engines, IT tools and rules, agents connected through a central system;
- the Amalgamation is expected to result in bolstering the capital base and bringing in resiliency in the balance sheet of the Amalgamated Company;
- the Transferor Companies are Systemically Important Non - Deposit Taking Non - Banking Financial Companies and are also wholly owned subsidiaries of the Amalgamating Company. The Amalgamation shall result in a simplified corporate structure.
- the Amalgamation would therefore be in the best interest of the shareholders of the respective parties to the Scheme and shall not in any manner be prejudicial to the interests of the concerned shareholders or the creditors or general public at large.

Chronological Events & Regulatory Approvals of Merger

- Board of Directors of the Transferor Company No. 1, the Transferor Company No. 2, the Transferee Company/Amalgamating Company and the Amalgamated Company in their respective meetings held on April 3, 2022, April 3, 2022, April 4, 2022 and April 4, 2022 have approved the proposed Scheme.
- The Transferee Company/Amalgamating Company and the Amalgamated Company had entered into an Implementation Agreement dated April 4, 2022, setting out the manner of effecting the Scheme and the rights and obligations of the respective parties in relation to the Scheme. The principal objectives of the Implementation Agreement are to
    - set out the agreement between the parties in relation to the Scheme;
    - provide the detailed mechanism for giving effect to the Scheme and the related matters upon the Scheme coming into effect or being terminated/withdrawn; and
    - provide appropriate representations and warranties by the parties.
- BSE Limited ("BSE") and National Stock Exchange Limited ("NSE") by their separate letters all dated July 2, 2022 have respectively given their "no adverse observation/ no-objection" to the Transferee Company/Amalgamating Company and the Amalgamated Company to file the Scheme with this Tribunal.

- Transferee Company/ Amalgamating Company and the Amalgamated Company had jointly filed the necessary notification form with the Competition Commission of India on June 20, 2022. The Competition Commission of India vide its letter dated August 12, 2022 has provided its approval to the Scheme.
- Pursuant to the application made by the Amalgamated Company to the RBI, RBI by its letter dated July 4, 2022 has granted its 'no-objection' to the Scheme.
- Hon'ble National Company Law Tribunal, Mumbai Bench, Mumbai on October 14, 2022 in its Order has directed convening of a meeting of the Equity Shareholders of HDFC Bank Limited ("Amalgamated Company") for the purpose of considering, and if thought fit, approving the arrangement embodied in the Composite Scheme of Amalgamation among HDFC Investments Limited and HDFC Holdings Limited and Housing Development Finance Corporation Limited and the Amalgamated Company and their respective shareholders and creditors (hereinafter referred to as the "Scheme") pursuant to the provisions of Sections 230-232 of the Companies Act, 2013 and the other applicable provisions thereof and applicable rules thereunder.
- Meeting of the equity shareholders of the Amalgamated Company held on Friday, November 25, 2022.
- Pursuant to the application made by the Transferee Company/Amalgamating Company under Regulation 59 of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as "SEBI Listing Regulations"), BSE and NSE, by their separate letters both dated December 13, 2022, have granted their in-principle approval under Regulation 59 of SEBI Listing Regulations for transfer of non-convertible debentures issued by Transferee Company/Amalgamating Company to Amalgamated Company.
- The Company Scheme Petition is filed before the Hon'ble NCLT in consonance with Sections 230 to 232 of the Act along with the Order dated October 14, 2022 passed in CA(CAA) No.200/MB/2022 read with Order dated December 16, 2022 passed in CP(CAA) No.243 of 2022 of NCLT.
- The Regional Director, Ministry of Corporate Affairs has filed his Report dated December 21, 2022 setting out his observations on the Scheme. In response to the observations made by the Regional Director, the Transferor Companies, Transferee Company & Amalgamated Company have given necessary clarifications and undertakings by way of a Joint Affidavit dated January 9, 2023.
- Regional Director satisfied with the undertakings given by the Petitioners and states that the Scheme is otherwise not prejudicial to the interests of the shareholders/creditors and the public. The said undertakings are accepted.
- The Official Liquidator had sought for certain clarifications by its letter dated January 4, 2023. The same was replied to by the Transferor Companies/Transferee Company by their letter dated January 9, 2023. The Official Liquidator has duly recorded/ referred to the said reply in its report dated January 12, 2023. Based on the reply given by the Transferor Companies/Transferee Company, amongst others, it has been observed/noticed by the Official Liquidator

in its report that the affairs of the Transferor Companies have been conducted in a proper manner.

- Transferor Companies, Transferee Company & Amalgamated Company have complied with all the requirements as per the directions of NCLT and have filed the necessary affidavits all dated January 7, 2023 before the NCLT showing compliance.

Approval of Scheme by NCLT

Hon'ble NCLT Mumbai Bench, (Court-II) in the Company Scheme Petition No.243 of 2022 connected with Company Scheme Application No.200 of 2022 vide its Order delivered on 17.03.2023 inter alia order that *the Company Scheme Petition appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy.*

The Petitioners are directed to lodge a copy of this Order and Scheme duly certified by the Deputy Registrar, National Company Law Tribunal, Mumbai Bench, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable on the same, if any, within 60 (sixty) days from the date of the Scheme becoming effective in terms of Clause 5.1 (o) of Part B of the Scheme.

Petitioner Companies are directed to file a copy of this Order alongwith a copy of the Scheme with the concerned Registrar of Companies electronically in addition to physical copies within 30 days from the receipt of the certified copy of the order along with additional fees, if any.

Parties are at liberty to apply to this Tribunal for any directions that may be necessary, including for an extension of the above period.

All concerned regulatory authorities to act on a copy of this Order alongwith the Scheme duly authenticated by the Deputy Registrar, National Company Law Tribunal, Mumbai Bench.

HDFC Ltd & HDFC Bank Merge Effective from July 1, 2023

HDFC Bank in its news release dated June 30, 2023 inter alia stated that HDFC Bank, India's leading private sector bank announced the successful completion of merger of HDFC Ltd., India's premier housing finance company with and into HDFC Bank, following the receipt of all requisite shareholder and regulatory approvals. HDFC Bank and HDFC Ltd. had announced a decision to merge on April 4, 2022, subject to obtaining the requisite consent and approvals and had indicated a time frame of 15 to 18 months for the process to be concluded. The Boards of both the companies at their respective meetings held and noted that the merger would be effective from July 1, 2023.

The merged entity inter-alia brings together significant complementarities that exist between both the entities and is poised to create meaningful value for various stakeholders, including respective customers, employees, and shareholders of both the

entities from increased scale, comprehensive product offering, balance sheet resiliency and ability to drive synergies across revenue opportunities, operating efficiencies and underwriting efficiencies…….. .

The merger of India's largest Housing Finance Company, HDFC Ltd. with the largest private sector bank in India combines the strengths of a trusted home loan brand with an institution that enjoys a lower cost of funds. The larger net-worth would allow greater flow of credit into the economy. It will also enable underwriting of larger ticket loans, including infrastructure loans and contribute further to nation building and employment generation.

Source:

1. https://www.hdfcbank.com/
2. https://www.hdfcbank.com/content/bbp/repositories/723fb80a-2dde-42a3-9793-7ae1be57c87f/?path=/Footer/About%20Us/Corporate%20Governance/Composite%20Scheme%20of%20Amalgamation/NCLT-ORDER.pdf
3. https://www.hdfcbank.com/content/bbp/repositories/723fb80a-2dde-42a3-9793-7ae1be57c87f/?path=/Footer/About%20Us/News%20Room/Press%20Release/Content/2023/pdf/Press_Release_HDFC_Ltd_to_merge_into_HDFC_Bank_effective_July_1_2023.pdf

Demerger of Reliance Industries Limited 's Financial Arm

Brief of the Demerger Scheme

Reliance Industries Ltd. announced the demerger of its financial services arm Reliance Strategic Investments, which would be renamed later on as **Jio Financial Services Ltd. (JFSL)**.

The Hon'ble National Company Law Tribunal, Mumbai Bench, vide its order dated June 28, 2023, sanctioned the Scheme of Arrangement between Reliance Industries Limited ("RIL" or "Company") and its shareholders and creditors & Reliance Strategic Investments Limited ("RSIL") and its shareholders and creditors ("Scheme") providing, inter alia, for demerger, transfer and vesting of the Financial Services Business (Demerged Undertaking as defined in the Scheme) from the Company into RSIL on a going concern basis and issue of equity shares by RSIL to the shareholders of the Company, in consideration thereof, in accordance with the provisions of Section 2(19AA) of the Income Tax Act, 1961.

In accordance with provisions of the Scheme, RSIL shall issue and allot 1 (One) fully paid-up equity share of RSIL having face value of Rs 10 (Rupees Ten) each for every 1 (One) fully paid-up equity share of Rs 10 (Rupees Ten) each of the Company to the shareholders of the Company whose names are recorded in the register of members and / or records of the depository as on the Record Date (i.e., Thursday, July 20, 2023).

Brief about the Companies

Reliance Industries Limited (RIL) ***(Demerged Company)***, was incorporated on May 8, 1973, under the provisions of the Companies Act, 1956 under the name 'Mynylon Limited'. This name of 'Mynylon Limited' was subsequently changed to 'Reliance Textile Industries Limited' on March 11, 1977. A certificate of incorporation consequent upon change of name has been issued by the Registrar of Companies, Karnataka, Bangalore. The registered office of the RIL was changed from the State of Karnataka to the State of Maharashtra, and certificates of registration of the order of the Company law Board confirming such transfer of registered office had been issued by the Registrar of Companies, Maharashtra, Bombay on August 4, 1977, and by the Registrar of Companies, Karnataka, Bangalore on August 5, 1977. The name 'Reliance Textiles Industries Limited' was subsequently changed to the present name, 'Reliance Industries Limited' on June 27, 1985. A certificate of incorporation consequent upon change of name had been issued by the Registrar of Companies, Maharashtra, Mumbai.

The RIL, *inter alia,* has multiple undertakings viz., digital services, retail, financial services, advanced materials and composites, renewables (solar and hydrogen), exploration & production and oil to chemicals. The equity shares and non-convertible debentures of the RIL are listed on BSE Limited and National Stock Exchange of India Limited. The global depository receipts of the RIL are listed on Luxembourg Stock Exchange and are traded on the International Order Book (IOB) (London Stock Exchange) and amongst qualified institutional investors on the over-the-counter (OTC) market in the United States of America. The foreign currency bonds of the RIL are listed on the Singapore Exchange Limited, Luxembourg Stock Exchange and India International Exchange (IFSC) Limited.

Reliance Strategic Investments Limited (RSIL) ***(Resulting Company)***, a company incorporated under the provisions of the Companies Act, 1956 and is a wholly-owned subsidiary of RIL. The resulting company is a registered Non-Banking Financial Company (NBFC) (systemically important non-deposit taking non-banking financial company). The name of the Company stands changed from Reliance Strategic Investments Limited to "Jio Financial Services Limited" effective July 25, 2023.

Scheme of Arrangement

Reliance announced the demerger of its financial services arm Reliance Strategic Investments Limited as part of its group restructuring. The Scheme of Arrangement provides for:

(a) demerger, transfer and vesting of the Demerged Undertaking from the Reliance Industries Limited (RIL) into the Reliance Strategic Investments Limited (RSIL) on a *going concern* basis, and issue of 1 (One) fully paid-up equity share of the Reliance Strategic Investments Limited (RSIL) having face value of Rs 10 (Rupees Ten) each for every 1 (One) fully paid-up equity share of Rs 10 (Rupees Ten) each of the Reliance Industries Limited (RIL), in consideration thereof, in accordance with the provisions of Section 2(19AA) of the Income Tax Act; and

(b) reduction and cancellation of the entire pre-Scheme share capital of the Reliance Strategic Investments Limited (RSIL).

The Scheme also provides for various other matters consequent and incidental thereto.

Rationality of Demerged Scheme

(i) The Demerged Company is India's biggest conglomerate with interests in multiple businesses. One amongst the multiple businesses carried on by the Demerged Company is the Financial Services Business which is carried on by the Demerged Company directly and through its subsidiaries and joint ventures.

(ii) Further growth and expansion of the Financial Services Business would require differentiated strategy aligned to its industry specific risks, market dynamics and growth trajectory.

(iii) The nature and competition involved in the financial services business is distinct from the other businesses and it is capable of attracting a different set of investors, strategic partners, lenders and other stakeholders.

Apportionment of Cost of Acquisition of Equity Shares of Reliance Industries Limited and Reliance Strategic Investments Limited

As per the Reliance Industries Ltd.'s stock exchange filings, the company informed the shareholders to apportion pre demerger cost of acquisition of equity shares in the Company in the following manner:

Sr No.	Name of Company	% of Cost of Acquisition of Equity Shares of the Company
1.	Reliance Industries Limited	95.32%
2.	Reliance Strategic Investments Limited	4.68%

For example, suppose a person purchased a share of Reliance Industries Ltd. on February 10, 2021, at Rs 2,000. Then, post-demerger, the cost of acquisition for the share of Reliance Industries Ltd. will be Rs 1,906.4 (95.32 per cent of Rs 2,000), and cost of acquisition for allotted share of Reliance Strategic Investments Limited will be Rs 93.6 (4.68 per cent of Rs 2,000).

Chronological Events & Regulatory Approvals of Merger

1. In October, 2022, Reliance Industries Limited (RIL) has announced that it would demerge and list its financial services business - Reliance Strategic Investments Limited (RSIL) - which will be renamed Jio Financial Services (JFS). Reliance

shareholders would get one share of Jio Financial Services for holding one share of Reliance.

2. The sanction of Hon'ble Tribunal has been sought under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 to the Scheme of Arrangement between RIL and its shareholders and creditors of RSIL and its shareholders and creditors ("Scheme").

3. Observation letters dated February 27, 2023 issued by BSE Limited and dated February 28, 2023 issued by National Stock Exchange of India Limited received by RIL respectively.

4. Application Order passed by Hon'ble Tribunal on March 27, 2023.

5. As per the Scheme "Appointed Date" is closing business hours of March 31, 2023 or such other date as may be approved by the Boards of the Demerged Company and the Resulting Company.

6. As directed by this Hon'ble Tribunal *vide* the Application Order, the meetings of the secured creditors, the unsecured creditors and the equity shareholders of the RIL were duly convened and held on May 2, 2023.

7. A meeting of the equity shareholders, secured creditors & unsecured creditors of the RIL convened on 2nd May, 2023 respectively for approving the Scheme of Arrangement.

8. Meeting of equity shareholders (7), preference shareholder (1), secured creditors (Nil) & unsecured creditor (1) of RSIL was dispensed with due to a smaller number of shareholder and creditors and received consents from all the equity shareholders secured creditors & unsecured creditors in the form of affidavits approving the Scheme.

9. The Chairperson appointed for the said meetings of the secured creditors, the unsecured creditors and the equity shareholders of the RIL has filed his report dated May 4, 2023 showing the conduct and results of the said meetings.

10. Hon'ble Tribunal admitted the Company Scheme Petition on May 12, 2023 and fixed June 22, 2023 as the date for hearing and final disposal of the Company Scheme Petition.

11. The Central Government through the Regional Director has filed its report dated May 30, 2023 and has presented certain information derived from the records of the case and has prayed for kind consideration and disposal of the case as the Hon'ble Tribunal may deem fit and proper.

12. The RIL & RSIL were directed to publish the notice of hearing of the Company Scheme Petition in newspapers on June 2, 2023.

13. RIL & RSIL have also served notice of hearing and final disposal of Company Scheme Petition upon: (i) the Central Government through the Regional Director (ii) the Registrar of Companies (iii) the Income Tax Authorities (iv) Goods & Services Tax Authority.

14. RIL & RSIL have filed an Affidavit dated June 8, 2023 confirming, *inter alia*, the publication of newspaper advertisements and service of notice upon the abovementioned regulatory authorities.

15. Since all the requisite statutory compliances have been fulfilled by the Demerged and Resultant Company & Company Scheme Petition appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy, Hon'ble NCLT has sanctioned the Demerger Scheme vide its Order dated June 28, 2023.

16. The name of the Company stands changed from Reliance Strategic Investments Limited to "Jio Financial Services Limited" effective July 25, 2023 and the certificate of incorporation issued by the Registrar of Companies, Mumbai dated July 25, 2023.

Conclusion

The demerger of Reliance Industries Ltd. of its financial services arm Reliance Strategic Investments, which is now **Jio Financial Services Ltd.,** will accrue the benefits such as creation of an independent company focusing exclusively on financial services and exploring opportunities in the said sector; the independent company can attract different sets of investors, strategic partners, lenders and other stakeholders having a specific interest in the financial services business; a financial services company can have a higher leverage (as compared to the Demerged Company) for its growth; and unlocking the value of the Demerged Undertaking for the shareholders of the Demerged Company. The Scheme is in the interests of all stakeholders of the Demerged Company and the Resulting Company.

References:
https://nclt.gov.in/gen_pdf.php?filepath=/Efile_Document/ncltdoc/casedoc/2709138055732023/04/Order-Challenge/04_order-Challange_004_16885467751197370623 64a52dd7e2cf5.pdf

https://nclt.gov.in/gen_pdf.php?filepath=/Efile_Document/ncltdoc/casedoc/2709138079292023/04/Order-Challenge/04_order-Challange_004_16917339782097152470 64d5cfda82c19.pdf

Demerger of ITC ’s Hotel Business

Case study is based on Scheme of Arrangement amongst ITC Limited (‘Demerged Company’) and ITC Hotels Limited (‘Resulting Company’) and their respective shareholders and creditors under Sections 230 to 232 read with other applicable provisions of the Companies Act, 2013 (‘Scheme’).

The Scheme of Arrangement involves the demerger of the Demerged Undertaking comprising the Hotels Business of the Demerged Company into the Resulting Company on a going concern basis and in consideration, the consequent issuance of equity shares by the Resulting Company to all the shareholders of the Demerged Company in accordance with the Share Entitlement Ratio i.e. *“for every 10 (Ten) Ordinary Shares of face and paid-up value of Re. 1 each held in the Demerged Company, 1 (One) equity share of face and paid-up value of Re. 1 in the Resulting Company”.*

Brief Details of the Company

ITC is one of India's foremost private sector companies and a diversified conglomerate with businesses spanning Fast Moving Consumer Goods, Hotels, Paperboards and Packaging, Agri Business and Information Technology. The Company is acknowledged as one of India's most valuable business corporations with a Gross Revenue of ₹ 69,481 crores and Net Profit of ₹ 18,753.31 crores (as on 31.03.2023). ITC was ranked as India's most admired company, according to a survey conducted by Fortune India, in association with Hay Group.

ITC is the country's leading FMCG marketer, the clear market leader in the Indian Paperboard and Packaging industry, a globally acknowledged pioneer in farmer empowerment through its wide-reaching Agri Business, a pre-eminent hotel chain in India that is a trailblazer in 'Responsible Luxury'. ITC's wholly-owned subsidiary, ITC Infotech, is a specialized global digital solutions provider.

Over the last decade, ITC's new Consumer Goods Businesses have established a vibrant portfolio of 25+ world- class Indian brands that create and retain value in India. ITC's world class FMCG brands including Aashirvaad, Sunfeast, Yippee!, Bingo!, B Natural, ITC Master Chef, Fabelle, Sunbean, Fiama, Engage, Vivel, Savlon, Classmate, Paperkraft, Mangaldeep, Aim and others have garnered encouraging consumer franchise within a short span of time. While several of these brands are market leaders in their segments, others are making appreciable progress.

Established in 1910, ITC Limited is a diversified conglomerate with businesses spanning Fast Moving Consumer Goods comprising Foods, Personal Care, Cigarettes and Cigars, Education & Stationery Products, Incense Sticks and Safety Matches; Hotels, Paperboards and Packaging, Agri Business and Information Technology. The Company was incorporated on August 24, 1910 under the name Imperial Tobacco Company of India Limited. As the Company's ownership progressively Indianised, the name of the Company was changed to India Tobacco Company Limited in 1970 and then to I.T.C. Limited in 1974. In recognition of the ITC's multi-business portfolio encompassing a wide range of

businesses, the full stops in the Company's name were removed effective September 18, 2001. The Company now stands rechristened 'ITC Limited,' where 'ITC' is today no longer an acronym or an initialised form.

In 1975, the Company launched its Hotels Business with the acquisition of a hotel in Chennai which was rechristened 'ITC-Welcomgroup Hotel Chola' (now renamed Welcomhotel by ITC Hotels, Cathedral Road, Chennai). The objective of ITC's entry into the hotels business was rooted in the concept of creating value for the nation. ITC chose the Hotels business for its potential to earn high levels of foreign exchange, create tourism infrastructure and generate large scale direct and indirect employment. The business also launched The two new brands: Mementos by ITC Hotels - A new brand of luxury hotels & resorts that offers those rarest of luxuries i.e Great Memories and Storii by ITC Hotels- A collection of handpicked boutique properties, offering bespoke stays & immersive experiences. Since then ITC's Hotels business has grown to occupy a position of leadership, with over 115 owned and managed properties spread across India under six brands namely, ITC Hotels, Mementos, Welcomhotel, Storii, Fortune Hotels and WelcomHeritage. ITC Hotels recently took its first step toward international expansion with an upcoming super premium luxury hotel in Colombo, Sri Lanka.

Demerged Undertaking comprising the Hotels Business of the Demerged Company ". Hotels Business" includes the business of owning, licensing, operating, managing, servicing, marketing, accommodating and supervising the operations of hotels and includes dining and banqueting services, etc.

Rationale for Demerger

ITC is a diversified company engaged in various businesses including hotels. The Hotels Business of ITC includes ownership/ licensing/ management of several hotel properties and providing services including accommodation, dining, banqueting, etc.

The Hotels Business of ITC has matured over the years and is well poised to chart its own growth path and operate as a separate listed entity in the fast-growing hospitality industry whilst continuing to leverage ITC's institutional strengths, strong brand equity and goodwill. Therefore, the Scheme is being proposed to segregate Hotels Business from Remaining Business of ITC and demerge it into the Resulting Company.

Indicative Timelines & Key Approvals

1. 24 July 2023- In-Principal approval demerger Scheme - The Board of Directors ("the Board") of ITC Limited accorded its in-principal approval to the demerger of the Hotels Business under a scheme of arrangement; with the Company holding a stake of about 40% in the new entity and the balance shareholding of about 60% to be held directly by the Company's shareholders proportionate to their shareholding in the Company.
2. 14 August 2023-Final Board Approval of demerger Scheme

3. September, 2023- Filing of scheme with Stock Exchanges under Regulation 30 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 read with the SEBI Circular dated 13th July, 2023,
4. December 2023 -Receipt of Stock Exchanges approval and filing with NCLT
5. December 2023 -Filing of Scheme with NCLT
6. March 2024- Shareholders / creditors meeting
7. August 2024- NCLT / other regulatory process
8. September 2024-Receipt of NCLT order
9. September 2024-Filing with ROC
10. September 2024- Appointed / Effective date for Demerger
11. November 2024- Issuance and Listing of equity shares of ITC Hotels
12. November 2024- Listing of shares of ITC Hotels

As per ITC, Scheme of demerger is subject to necessary approval from shareholders, creditors, stock exchanges, SEBI, NCLT and other regulatory authorities, as required and Indicative timeline for listing of ITC Hotels is ~15 months.

The proposed Scheme would be in the best interests of the Companies and their respective shareholders, employees, creditors and other stakeholders for the following reasons:

a. The confluence of favourable factors such as rising societal aspirations, strong macro-economic fundamentals of the country, Government of India's thrust on the Travel & Tourism industry and infrastructure creation along with rapid digitalization present immense opportunities for the Hotels Business going forward, though distinct from the other businesses of the Demerged Company.
b. In light of the distinctive profile of the hospitality industry, housing the Hotels Business in a separate listed entity would enable crafting of the next horizon of growth and sustained value creation for shareholders through sharper focus on the business anchored on a differentiated strategy aligned with industry specific market dynamics.
c. The Resulting Company is a newly incorporated entity which will have the ability to raise capital from equity and debt markets towards funding its growth requirements.
d. The Resulting Company as a focused entity would attract the right sets of investors, strategic partners and collaborations, whose investment strategies and risk profiles are aligned more sharply with the hospitality industry.
e. The Scheme would unlock value of the Hotels Business for existing shareholders of the Demerged Company through independent market driven valuation of their shares in the Resulting Company which will be listed pursuant to the Scheme, along with the option and flexibility to remain invested in a pure play hospitality focused listed entity.
f. The Scheme will ensure long term stability and strategic support to the Resulting Company and also enable the leveraging of cross synergies between the two Companies.
Sources:

1. https://www.itcportal.com/about-itc/profile/index.aspx
2. https://www.itcportal.com/about-itc/profile/history-and-evolution.aspx
3. https://www.itcportal.com/about-itc/shareholder-value/pdf/lodr-14aug23c.pdf

Amalgamation of IDFC Ltd with IDFC FIRST Bank

The Board of Directors of IDFC FIRST Bank Limited and IDFC Limited, at their respective meetings held on July 03, 2023, have approved the Scheme of Amalgamation of IDFC limited with IDFC FIRST Bank.

The Scheme is subject to the receipt of requisite approvals from the Reserve Bank of India ("RBI"), Securities and Exchange Board of India ("SEBI"), the Competition Commission of India, the National Company Law Tribunal, BSE Limited and the National Stock Exchange of India Limited (collectively, the "Stock Exchanges") and other statutory and regulatory authorities, and the respective shareholders, under applicable law. The following are the details of the proposed scheme:

1. The Share Exchange Ratio for the amalgamation of IDFC Limited with IDFC FIRST Bank shall be 155 equity shares of face value of ₹ 10/- each fully paid-up of IDFC FIRST Bank for every 100 equity shares of face value of ₹ 10/- each fully paid-up of IDFC Limited.
2. According to the amalgamation scheme, 264.64 crore shares of IDFC FIRST Bank held by IDFC Ltd will get extinguished, and based on the share exchange ratio mentioned above, 248 crore new shares of IDFC FIRST Bank would be issued to the shareholders of IDFC Ltd based on their respective holdings.
3. Consequent to the merger, the standalone book value per share of the Bank would increase by 4.9%, as calculated on audited financials as of March 31, 2023.
4. The key benefits of this amalgamation scheme are as follows:
    a. The merger will result in value unlocking to IDFC Limited shareholders as, after the merger, they will directly hold shares in IDFC FIRST Bank.
    b. The merger will lead to simplification of the corporate structure of IDFC FHCL, IDFC Limited and IDFC FIRST Bank by consolidating them into a single entity and will help streamline accounting and regulatory compliances of the aforesaid entities.
    c. The merger will help create an institution with diversified public and institutional shareholders, like other large successful Indian private sector banks.
    d. Raising equity capital from time to time will become easier in an institution with diversified set of shareholders.

Background:

IDFC Limited, a premier, successful infrastructure Financing Domestic Financial Institution (DFI) since 1997, was granted "in-principle" approval by the RBI to set up a Bank in April 2014, leading to the creation of IDFC Bank Limited. The Bank started its operation in October 2015. The loan assets and liabilities of IDFC Limited, which were

mostly infrastructure and corporate loans, were transferred to IDFC Bank. Capital First Limited was a successful consumer and MSME financing institution since 2012 with a strong track record of growth, profits, and asset quality. On December 18, 2018, the IDFC Bank and Capital First merged, and subsequently renamed IDFC FIRST Bank. As of June 30, 2023, IDFC Limited through its non-financial holding company has 39.93% shareholding of IDFC FIRST Bank.

IDFC FIRST Bank is operating as a full-service universal bank with pan-India presence. The Bank has transformed from infrastructure financing to a universal banking franchise in the last four years. The Bank has built a strong deposit franchise, which has grown at a 4-year CAGR of 36% since the merger to reach Rs. 136,812 crore, by March 31, 2023. The Bank has increased CASA ratio from 8.6% at the time of merger with Capital First in December 2018, to 49.77% (March 31, 2023) and has set up 809 branches and 925 ATMs as of March 31, 2023.

In terms of assets, the Bank has a well-diversified loan book of Rs. 1,60,599 crore with a balance sheet size of Rs. 239,942 crore as on March 31, 2023. The Bank recorded a PAT of Rs. 2,437 crore in FY23, with strong Capital Adequacy of 16.82% as of March 31, 2023.

The Bank maintains high asset quality with Gross NPA of retail loans at 1.65% and Net NPA at 0.55% as of March 31, 2023. At the overall Bank level, GNPA 2.51% and NNPA is 0.86%. Infrastructure financing has higher NPA with GNPA of 25.11% and NNPA of 15.73%, but the infrastructure book is in wind down mode. If we exclude infrastructure financing, at the overall bank level, the GNPA is 1.84%, and NNPA is 0.46%. The PCR, including technical write-off, is 80.29% as of March 31, 2023.

The Bank's long term credit rating was upgraded last month by two rating agencies, CRISIL and India ratings, to AA+.

In summary, with strong foundations of good deposit franchise, customer friendly products, strong capital buffer, profitability, and high corporate governance, we look ahead, beyond the merger, to grow our bank in a safe and steady manner.

We are happy to welcome all shareholders of IDFC Limited to become direct shareholders of IDFC FIRST Bank. We will seek approval from the RBI and all other stakeholders and look forward to completing the exercise within 6 to 9 months.

The Reserve Bank of India approved the reverse merger of IDFC Ltd and its banking unit, IDFC First Bank. In July, the board of IDFC First Bank and IDFC authorized the reverse merger.

Source: https://www.idfcfirstbank.com/merger-of-idfc-ltd-and-idfc-first-bank

Amalgamation of Fincare Small Finance Bank Ltd. – AU Small Finance Bank Ltd

The Reserve Bank of India has sanctioned the Scheme of Amalgamation of Fincare Small Finance Bank Ltd. (Transferor Bank) with AU Small Finance Bank Ltd. (Transferee Bank). The Scheme has been sanctioned in exercise of the powers contained in sub-section (4) of Section 44A of the Banking Regulation Act, 1949. The effective date of the amalgamation shall be April 01, 2024. All the branches of Fincare Small Finance Bank Ltd. will function as branches of AU Small Finance Bank Ltd. with effect from April 01, 2024.

Source: https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=57445

Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 2018

Applicability

Regulation 3 provides that SEBI (Buy-Back of Securities) Regulations, 2018 shall be applicable to buy-back of shares or other specified securities of a company in accordance with the applicable provisions of the Companies Act.

It may be noted that the term *"shares"* shall include equity shares having superior voting rights.

'Specified Securities' includes employees' stock option or other securities as may be notified by the Central Government from time to time.

Conditions and Requirements for Buy-back of Shares and Specified Securities (Regulation 4)

(i) The maximum limit of any buy-back shall be twenty-five per cent or less of the aggregate of paid-up capital and free reserves of the company, based on the standalone or consolidated financial statements of the company, whichever sets out a lower amount:

In respect of the number of equity shares bought back in any financial year, the maximum limit shall be twenty-five per cent and be construed with respect to the total paid-up equity share capital of the company in that financial year.

(ii) The ratio of the aggregate of secured and unsecured debts owed by the company to the paid-up capital and free reserves after buy-back shall, -

a) be less than or equal to 2:1, based on 8 the standalone or consolidated financial statements of the company, whichever sets out a lower amount.

Provided that if a higher ratio of the debt to capital and free reserves for the company has been notified under the Companies Act, 2013, the same shall prevail; or

b) be less than or equal to 2:1, based on 9 [the standalone or consolidated financial statements of the company, whichever sets out a lower amount], after excluding financial statements of all subsidiaries that are non-banking financial companies and housing finance companies regulated by Reserve Bank of India or National Housing Bank, as the case may be.

Provided that buy-back of securities shall be permitted only if all such excluded subsidiaries have their ratio of aggregate of secured and unsecured debts to the paid-up capital and free reserves of not more than 6:1 on standalone basis.

(iii) All shares or other specified securities for buy-back shall be fully paid-up.

(iv) A company may buy-back its shares or other specified securities by any one of the following methods:

a) from the existing shareholders or other specified securities holders on a proportionate basis through the tender offer; b) from the open market through—

i) book-building process,

ii) stock exchange;

Provided that the buy-back from the open market through stock exchanges, based on the standalone or consolidated financial statements of the company, whichever sets out a lower amount, shall be less than: —

(i) fifteen per cent of the paid up capital and free reserves of the company till March 31, 2023;

(ii) ten per cent of the paid up capital and free reserves of the company till March 31, 2024;

(iii) five per cent of the paid up capital and free reserves of the company till March 31, 2025:

Provided further that buy-back from the open market through the stock exchange shall not be allowed with effect from April 1, 2025.

(v) A company shall not buy-back its shares or other specified securities so as to delist its shares or other specified securities from the stock exchange.

(vi) A company shall not buy-back its shares or other specified securities from any person through negotiated deals, whether on or off the stock exchange or through spot transactions or through any private arrangement.

(vii) A company shall not make any offer of buy-back within a period of one year reckoned from the date of expiry of buyback period of the preceding offer of buy-back, if any.

(viii) A company shall not allow buy-back of its shares unless the consequent reduction of its share capital is effected.

(ix) A company may undertake a buy-back of its own shares or other specified securities out of—

(a) its free reserves;

(b) the securities premium account; or

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

(x) No company shall directly or indirectly purchase its own shares or other specified securities:

(a) through any subsidiary company including its own subsidiary companies;

(b) through any investment company or group of investment companies; or

(c) if a default is made by the company in the repayment of deposits accepted either before or after the commencement of the Companies Act, interest payment thereon, redemption of debentures or preference shares or payment of dividend to any shareholder, or repayment of any term loan or interest payable thereon to any financial institution or banking company:

Provided that the buy-back is not prohibited, if the default is remedied and a period of three years has lapsed after such default ceased to subsist.

Compliance and Filing Requirements for Buy-back (Regulation 5)

(i) The company shall not authorise any buy-back (whether by way of tender offer or from open market) unless:

a) The buy-back is authorised by the company's articles;

b) A special resolution has been passed at a general meeting of the company authorising the buy-back: Provided that nothing contained in this clause shall apply to a case where the buy-back is, ten per cent or less of the total paid-up equity capital and free reserves of the company, based on the standalone or consolidated financial statements of the company, whichever sets out a lower amount; and such buy-back has been authorised by the board of directors by means of a resolution passed at its meeting.

c) It has obtained the prior consent of its lenders in case of a breach of any covenant with such lender(s).

Explanation: The letter of offer to be prepared by the company in accordance with these regulations shall contain a specific disclosure of the consent obtained by the company from its lender(s).

(ii) Every buy-back shall be completed within a period of one year from the date of passing of the special resolution at general meeting, or the resolution passed by the board of directors of the company, as the case may be.

(iii) The company shall, after expiry of the buy-back period, file with the Registrar of Companies and the Board, a return containing such particulars relating to the buy-back within thirty days of such expiry, in the format as specified in the Companies (Share Capital and Debentures) Rules, 2014.

(iv) Where a special resolution is required for authorizing a buy-back, the explanatory statement to be annexed with the notice for the general meeting pursuant to section 102 of the Companies Act shall contain mandatory disclosures mentioned therein and the following disclosures:

(a) Disclosures under sub-section 3 of section 68 of the Companies Act—

i) a full and complete disclosure of all material facts;

ii) the necessity for the buy-back;

iii) the class of shares or securities intended to be purchased under the buy-back;

iv) the amount to be invested under the buy-back; and

v) the time-limit for completion of buy-back.

(b) *Additional disclosures such as:*

i. Date of the Board meeting at which the proposal for buy-back was approved by the Board of Directors of the company;

ii) Necessity for the buy-back;

iii) Maximum amount required under the buy-back and its percentage of the total paid up capital and free reserves;

iv) Maximum price at which the shares or other specified securities are proposed be bought back and the basis of arriving at the buy-back price;

v) Maximum number of securities that the company proposes to buy- back;

vi) Method to be adopted for buy-back as referred to in sub-regulation (iv) of regulation 4,

vii) (a) the aggregate shareholding of the promoter and of the directors of the promoters, where the promoter is a company and of persons who are in control of the company as on the date of the notice convening the General Meeting or the Meeting of the Board of Directors;

(b) aggregate number of shares or other specified securities purchased or sold by persons including persons mentioned in (a) above from a period of six months preceding the date of the Board Meeting at which the buyback was approved till the date of notice convening the general meeting;

(c) the maximum and minimum price at which purchases and sales referred to in (b) above were made along with the relevant dates;

viii) Intention of the promoters and persons in control of the company to tender shares or other specified securities for buy-back indicating the number of shares or other specified securities, details of acquisition with dates and price;

ix) A confirmation that there are no defaults subsisting in repayment of deposits, redemption of debentures or preference shares or repayment of term loans to any financial institutions or banks;

x) A confirmation that the Board of Directors has made a full enquiry into the affairs and prospects of the company and that they have formed the opinion

a) that immediately following the date on which the General Meeting or the meeting of the Board of Directors is convened there will be no grounds on which the company could be found unable to pay its debts;

b) as regards its prospects for the year immediately following that date that, having regard to their intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in their view be available to the company during that year, the company will be able to meet its liabilities as and when they fall due and will not be rendered insolvent within a period of one year from that date; and

c) in forming their opinion for the above purposes, the directors shall take into account the liabilities as if the company were being wound up under the provisions of the Companies Act, 1956 or Companies Act or the Insolvency and Bankruptcy Code 2016 (including prospective and contingent liabilities

xi) A report addressed to the Board of Directors by the company's auditors stating thata) they have inquired into the company's state of affairs; b) the amount of the permissible capital payment for the securities in question is in their view properly determined; and c) the Board of Directors have formed the opinion as specified in clause (x)

c) Provided that where the buy-back is through tender offer from existing securities holders, the explanatory statement shall contain the following additional disclosures:

i) the maximum price at which the buy-back of shares or other specified securities shall be made and whether the board of directors of the company is being authorised at the general meeting to determine subsequently the specific price at which the buy-back may be made at the appropriate time;

ii) if the promoter intends to offer his shares or other specified securities, the quantum of shares or other specified securities proposed to be tendered and the details of their transactions and their holdings for the last six months prior to the passing of the special resolution for buy-back including information of number of shares or other specified securities acquired, the price and the date of acquisition.

(v) A copy of the resolution passed at the general meeting under subsection (2) of section 68 of the Companies Act shall be filed with the Board and the stock exchanges where the

shares or other specified securities of the company are listed, within 15[seven working days] from the date of passing of the resolution.

(vi) Where the buy-back is from open market either through the stock exchange or through book building, the resolution of board of directors shall specify the maximum price at which the buy-back shall be made:

Provided that where there is a requirement for the Special Resolution as specified in clause (b) of sub-regulation 1 of regulation 5 of these Regulations, the special resolution shall also specify the maximum price at which the buy-back shall be made.

(via) In case of a buy-back through tender offer, the Board of Directors of the company may, till one working day prior to the record date, increase the maximum buy-back price and decrease the number of securities proposed to be bought back, such that there is no change in the aggregate size of the buy-back.

(vii) A company, authorized by a resolution passed by the board of directors at its meeting to buy-back its shares or other specified securities under the proviso to clause (b) of sub-section (2) of section 68 of the Companies Act, shall file a copy of the resolution, with the Board and the stock exchanges, where the shares or other specified securities of the company are listed, within two working days of the date of the passing of the resolution.

(viii) No insider shall deal in shares or other specified securities of the company on the basis of unpublished price sensitive information relating to buy-back of shares or other specified securities of the company.

(ix) All the filings to the Board shall be made only in electronic mode after being digitally signed by the company secretary or the person authorized by the board of the company.

****

LESSON 2

ACQUISITION OF COMPANY/ BUSINESS

Primary Object of the Takeover Code

In the case of *M/s Nirvana Holdings Private Limited (Appellant) Versus Securities and Exchange Board of India (Respondent), decision dated 8.9.2011*, Securities Appellate Tribunal inter alia observed that the primary object of the takeover code is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a takeover. This right to exit is an invaluable right and the shareholders cannot be deprived of this right lightly. It is only when larger interest of investor protection or that of the securities market demands that this right could be taken away. Therefore, as a normal rule, a direction to make a public announcement to acquire shares of the target company should issue to an acquirer who fails to do that. The Board need not give reasons as to why such a direction is being issued because that is the mandate of Regulations 10, 11 and 12. However, if the issuance of such a direction is not in the interest of the securities market or for the protection of interest of investors, the Board may deviate from the normal rule and issue any other direction as envisaged in Regulation 44 of the takeover code. In that event, the Board should record reasons for deviation. In the case before us no reasons have been recorded for deviating from the normal rule and we find no ground for deviation.

General Exemptions under SEBI(SAST) Regulations, 2011

Regulation 10 of SEBI(SAST) Regulations, 2011 deals with general exemptions. Regulation 10 provides that:

(1) The following acquisitions shall be exempt from the obligation to make an open offer under regulation 3 and regulation 4 subject to fulfilment of the conditions stipulated therefor, —

(a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being, —

(i) immediate relatives;

(ii) persons named as promoters in the shareholding pattern filed by the target company in terms of the listing regulations or as the case may be, the listing agreement or these regulations for not less than three years prior to the proposed acquisition;

(iii) a company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than fifty per cent of the equity shares of such company, other companies in which such persons hold not less than fifty per cent of the

equity shares, and their subsidiaries subject to control over such qualifying persons being exclusively held by the same persons;

Explanation: For the purpose of this sub-clause, the company shall include a body corporate, whether Indian or foreign.

(iv) persons acting in concert for not less than three years prior to the proposed acquisition, and disclosed as such pursuant to filings under the listing regulations or as the case may be, the listing agreement;

(v) shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to filings under the listing regulations or as the case may be, the listing agreement, and any company in which the entire equity share capital is owned by such shareholders in the same proportion as their holdings in the target company without any differential entitlement to exercise voting rights in such company:

Provided that for purposes of availing of the exemption under this clause, —

(i) If the shares of the target company are frequently traded, the acquisition price per share shall not be higher by more than twenty-five per cent of the volume-weighted average market price for a period of sixty trading days preceding the date of issuance of notice for the proposed inter se transfer under sub-regulation (5), as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, and if the shares of the target company are infrequently traded, the acquisition price shall not be higher by more than twenty five percent of the price determined in terms of clause (e) of sub-regulation (2) of regulation 8; and

(ii) the transferor and the transferee shall have complied with applicable disclosure requirements set out in Chapter V.

(b) acquisition in the ordinary course of business by, —

(i) an underwriter registered with the Board by way of allotment pursuant to an underwriting agreement in terms of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

(ii) a stock broker registered with the Board on behalf of his client in exercise of lien over the shares purchased on behalf of the client under the bye-laws of the stock exchange where such stock broker is a member;

(iii) a merchant banker registered with the Board or a nominated investor in the process of market making or subscription to the unsubscribed portion of issue in terms of Chapter XB of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

(iv) any person acquiring shares pursuant to a scheme of safety net in terms of regulation 44 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

(v) a merchant banker registered with the Board acting as a stabilising agent or by the promoter or pre-issue shareholder in terms of regulation 45 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

(vi) by a registered market-maker of a stock exchange in respect of shares for which he is the market maker during the course of market making;

(vii) a Scheduled Commercial Bank, acting as an escrow agent; and

(viii) invocation of pledge by Scheduled Commercial Banks or Public Financial Institutions as a pledge.

(c) acquisitions at subsequent stages, by an acquirer who has made a public announcement of an open offer for acquiring shares pursuant to an agreement of disinvestment, as contemplated in such agreement:

Provided that, —

(i) both the acquirer and the seller are the same at all the stages of acquisition; and

(ii) full disclosures of all the subsequent stages of acquisition, if any, have been made in the public announcement of the open offer and in the letter of offer.

(d) acquisition pursuant to a scheme, —

(i) made under section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 or any statutory modification or re-enactment thereto;

(ii) of arrangement involving the target company as a transferor company or as a transferee company, or reconstruction of the target company, including amalgamation, merger or demerger, pursuant to an order of a court or a tribunal under any law or regulation, Indian or foreign; or

(iii) of arrangement not directly involving the target company as a transferor company or as a transferee company, or reconstruction not involving the target company's undertaking, including amalgamation, merger or demerger, pursuant to an order of a court 38[or a tribunal] or under any law or regulation, Indian or foreign, subject to,—

(A) the component of cash and cash equivalents in the consideration paid being less than twenty-five per cent of the consideration paid under the scheme; and

(B) where after implementation of the scheme of arrangement, persons directly or indirectly holding at least thirty-three per cent of the voting rights in the combined entity are the same as the persons who held the entire voting rights before the implementation of the scheme.

[(da) acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016;

(e) acquisition pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(f) acquisition pursuant to the provisions of the Delisting Regulations;

(g) acquisition by way of transmission, succession or inheritance;

(h) acquisition of voting rights or preference shares carrying voting rights arising out of the operation of sub-section (2) of section 47 of the Companies Act, 2013.

(i) Acquisition of shares by the lenders pursuant to conversion of their debt as part of a debt restructuring implemented in accordance with the guidelines specified by the Reserve Bank of India:

Provided that the conditions specified under sub-regulation (6) of regulation 158 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 are complied with.

Explanation. – For the purpose of this clause, "lenders" shall mean all scheduled commercial banks (excluding Regional Rural Banks) and All India Financial Institutions.

(j) increase in voting rights arising out of the operation of sub-section (1) of section 106 of the Companies Act, 2013 or pursuant to a forfeiture of shares by the target company, undertaken in compliance with the provisions of the Companies Act, 2013 and its articles of association.

(2A) An increase in the voting rights of any shareholder beyond the threshold limits stipulated in sub-regulations (1) and (2) of regulation 3, without the acquisition of control, pursuant to the conversion of equity shares with superior voting rights into ordinary equity shares, shall be exempted from the obligation to make an open offer under regulation 3.

(2B) Any acquisition of shares or voting rights or control of the target company by way of preferential issue in compliance with regulation 164A of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 shall be exempt from the obligation to make an open offer under subregulation (1) of regulation 3 and regulation 4.

Explanation. - The above exemption from open offer shall also apply to the target company with infrequently traded shares which is compliant with the provisions of subregulations (2), (3), (4), (5),(6), (7) and (8) of regulation 164A of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018. The pricing of such infrequently traded shares shall be in terms of regulation 165 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

(3) An increase in voting rights in a target company of any shareholder beyond the limit attracting an obligation to make an open offer under sub-regulation (1) of regulation 3, pursuant to buy-back of shares by the target company] shall be exempt from the obligation to make an open offer provided such shareholder reduces his shareholding such that his voting rights fall to below the threshold referred to in sub-regulation (1) of regulation 3 within ninety days from the date of the closure of the said buy-back offer.

(4) The following acquisitions shall be exempt from the obligation to make an open offer under sub-regulation (2) of regulation 3, —

(a) acquisition of shares by any shareholder of a target company, upto his entitlement, pursuant to a rights issue;

(b) acquisition of shares by any shareholder of a target company, beyond his entitlement, pursuant to a rights issue, subject to fulfillment of the following conditions, —

(i) the acquirer has not renounced any of his entitlements in such rights issue; and

(ii) the price at which the rights issue is made is not higher than the ex-rights price of the shares of the target company, being the sum of,—

(A)the volume weighted average market price of the shares of the target company during a period of sixty trading days ending on the day prior to the date of determination of the rights issue price, multiplied by the number of shares outstanding prior to the rights issue, divided by the total number of shares outstanding after allotment under the rights issue:

Provided that such volume weighted average market price shall be determined on the basis of trading on the stock exchange where the maximum volume of trading in the shares of such target company is recorded during such period; and

(B) the price at which the shares are offered in the rights issue, multiplied by the number of shares so offered in the rights issue divided by the total number of shares outstanding after allotment under the rights issue:

(c) increase in voting rights in a target company of any shareholder pursuant to buyback of shares: Provided that,—

(i) such shareholder has not voted in favour of the resolution authorising the buy-back of securities under section 68 of the Companies Act, 2013;

(ii) in the case of a shareholder resolution, voting is by way of postal ballot;

(iii) where a resolution of shareholders is not required for the buy-back, such shareholder, in his capacity as a director, or any other interested director has not voted in favour of the resolution of the board of directors of the target company authorising the buy-back of securities under 56[section 68 of the Companies Act, 2013; and

(iv) the increase in voting rights does not result in an acquisition of control by such shareholder over the target company: Provided further that where the aforesaid conditions are not met, in the event such shareholder reduces his shareholding such that his voting rights fall below the level at which the obligation to make an open offer would be attracted under sub-regulation (2) of regulation 3, within ninety days from the date of closure of the buy-back offer by the target company, the shareholder shall be exempt from the obligation to make an open offer;

(d) acquisition of shares in a target company by any person in exchange for shares of another target company tendered pursuant to an open offer for acquiring shares under these regulations;

(e) acquisition of shares in a target company from state-level financial institutions or their subsidiaries or companies promoted by them, by promoters of the target company pursuant to an agreement between such transferors and such promoter;

(f) acquisition of shares in a target company from a venture capital fund or category I Alternative Investment Fund or a foreign venture capital investor registered with the Board, by promoters of the target company pursuant to an agreement between such venture capital fund or category I Alternative Investment Fund or foreign venture capital investor and such promoters.

(5) In respect of acquisitions under clause (a) of sub-regulation (1), and clauses (e) and (f) of sub-regulation (4), the acquirer shall intimate the stock exchanges where the shares of the target company are listed, the details of the proposed acquisition in such form as may be specified, at least four working days prior to the proposed acquisition, and the stock exchange shall forthwith disseminate such information to the public.

(6) In respect of any acquisition made pursuant to exemption provided for in this regulation, the acquirer shall file a report with the stock exchanges where the shares of the target company are listed, in such form as may be specified not later than four working days from the acquisition, and the stock exchange shall forthwith disseminate such information to the public.

(7) In respect of any acquisition of or increase in voting rights pursuant to exemption provided for in clause (a) of sub-regulation (1), sub-clause (iii) of clause (d) of sub-regulation (1), clause (h) of sub-regulation (1), sub-regulation (2), sub-regulation (3) and clause (c) of sub-regulation (4), clauses (a), (b) and (f) of sub-regulation (4), the acquirer shall, within twenty-one working days of the date of acquisition, submit a report in such form as may be specified along with supporting documents to the Board giving all details in respect of acquisitions, along with a non-refundable fee of rupees one lakh fifty thousand by way of direct credit into the bank account through NEFT/RTGS/IMPS or online payment using the SEBI Payment Gateway or any other mode as may be specified by the Board from time to time.

Explanation. — For the purposes of sub-regulation (5), sub-regulation (6) and sub-regulation (7) in the case of convertible securities, the date of the acquisition shall be the date of conversion of such securities.

Exemptions by the SEBI

Regulation 11 of SEBI(SAST) Regulations, 2011 deals with general exemptions by Board. Regulation 11 states that:

(1) The Board may for reasons recorded in writing, grant exemption from the obligation to make an open offer for acquiring shares under these regulations subject to such conditions as the Board deems fit to impose in the interests of investors in securities and the securities market.

(2) The Board may for reasons recorded in writing, grant a relaxation from strict compliance with any procedural requirement under Chapter III and Chapter IV subject to such conditions as the Board deems fit to impose in the interests of investors in securities and the securities market on being satisfied that, —

(a) the target company is a company in respect of which the Central Government or State Government or any other regulatory authority has superseded the board of directors of the target company and has appointed new directors under any law for the time being in force, if, —

(i)such board of directors has formulated a plan which provides for transparent, open, and competitive process for acquisition of shares or voting rights in, or control over the target company to secure the smooth and continued operation of the target company in the interests of all stakeholders of the target company and such plan does not further the interests of any particular acquirer;

(ii) the conditions and requirements of the competitive process are reasonable and fair;

(iii) the process adopted by the board of directors of the target company provides for details including the time when the open offer for acquiring shares would be made, completed and the manner in which the change in control would be effected; and

(b) the provisions of Chapter III and Chapter IV are likely to act as impediment to implementation of the plan of the target company and exemption from strict compliance with one or more of such provisions is in public interest, the interests of investors in securities and the securities market.

(3) For seeking exemption under sub-regulation (1), the acquirer shall, and for seeking relaxation under sub-regulation (2) the target company shall file an application with the Board, supported by a duly sworn affidavit, giving details of the proposed acquisition and the grounds on which, the exemption has been sought.

(4) The acquirer or the target company, as the case may be, shall along with the application referred to under sub-regulation (3) pay a non-refundable fee of rupees five lakh, by way of direct credit into the bank account through NEFT/RTGS/IMPS or online payment using the SEBI Payment Gateway or any other mode as may be specified by the Board from time to time.

(5) The Board may after affording reasonable opportunity of being heard to the applicant and after considering all the relevant facts and circumstances, pass a reasoned order

either granting or rejecting the exemption or relaxation sought as expeditiously as possible:

Provided that the Board may constitute a panel of experts to which an application for an exemption under sub-regulation (1) may, if considered necessary, be referred to make recommendations on the application to the Board.

(6) The order passed under sub-regulation (5) shall be hosted by the Board on its official website.

Offer Price under SEBI(SAST) Regulations, 2011

Regulation 8(1) of SEBI(SAST) Regulations states that the open offer for acquiring shares under regulation 3, regulation 4, regulation 5 or regulation 6 shall be made at a price not lower than the price determined in accordance with sub-regulation (2) or sub-regulation (3), as the case may be.

Regulation 8(2) states that in the case of direct acquisition of shares or voting rights in, or control over the target company, and indirect acquisition of shares or voting rights in, or control over the target company where the parameters referred to in sub-regulation (2) of regulation 5 are met, the offer price shall be the highest of, —

a) the highest negotiated price per share of the target company for any acquisition under the agreement attracting the obligation to make a public announcement of an open offer;

b) the volume-weighted average price paid or payable for acquisitions, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the date of the public announcement;

c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty- six weeks immediately preceding the date of the public announcement;

d) the volume-weighted average market price of such shares for a period of sixty trading days immediately preceding the date of the public announcement as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded;

   Provided that the price determined as per clause (d) shall not apply in the case of disinvestment of a public sector undertaking by the Central Government or a State Government, as the case may be:

   Provided further that this proviso shall apply only in case of a change in control in the public sector undertaking.

   It may be noted that –

   "*Disinvestment*" means the direct or indirect sale by the Central Government or any State Government or by a government company, as the case may be, of shares or voting rights in, or control over, a target company, which is a public sector

undertaking. [Regulation 2(1)(g)]

"Public Sector Undertaking" means a target company in which, directly or indirectly, majority of shares or voting rights or control is held by the Central Government or any State Government or Governments, or partly by the Central Government and partly by one or more State Governments [Regulation 2(1)(u)]

"Frequently Traded Shares" means shares of a target company, in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement is required to be made under these regulations, is at least ten per cent of the total number of shares of such class of the target company:

Provided that where the share capital of a particular class of shares of the target company is not identical throughout such period, the weighted average number of total shares of such class of the target company shall represent the total number of shares [Regulation 2(1)(j)]

e) where the shares are not frequently traded, the price determined by the acquirer and the manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies; and

f) the per share value computed under sub-regulation (5), if applicable.

Regulation 8(3) states that in the case of an indirect acquisition of shares or voting rights in, or control over the target company, where the parameter referred to in sub-regulation (2) of regulation 5 are not met, the offer price shall be the highest of, —

a) the highest negotiated price per share, if any, of the target company for any acquisition under the agreement attracting the obligation to make a public announcement of an open offer;

b) the volume-weighted average price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty-six weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

d) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, between the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the public announcement of the open offer for shares of the target company made under these regulations;

e) the volume-weighted average market price of the shares for a period of sixty trading days immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded;

Provided that the price determined as per clause (e) shall not apply in the case of disinvestment of a public sector undertaking by the Central Government or a State Government, as the case may be:

Provided further that this proviso shall apply only in case of a change in control in the public sector undertaking; and

f) the per share value computed under sub-regulation (5).

Regulation 8(4) states that in the event the offer price is incapable of being determined under any of the parameters specified in sub-regulation (3), without prejudice to the requirements of sub-regulation (5), the offer price shall be the fair price of shares of the target company to be determined by the acquirer and the manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies.

Regulation 8(5) states that, in the case of an indirect acquisition and open offers under sub-regulation (2) of regulation 5 where,—

a) the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;

b) the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or

c) the proportionate market capitalization of the target company as a percentage of the enterprise value for the entity or business being acquired;

is in excess of fifteen per cent, on the basis of the most recent audited annual financial statements, the acquirer shall, notwithstanding anything contained in sub-regulation (2) or sub-regulation (3), be required to compute and disclose, in the letter of offer, the per share value of the target company taken into account for the acquisition, along with a detailed description of the methodology adopted for such computation.

Explanation.— For the purposes of computing the percentages referred to in clause (c) of this sub-regulation, the market capitalisation of the target company shall be taken into account on the basis of the volume-weighted average market price of such shares on the stock exchange for a period of sixty trading days preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on

the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period.

Regulation 8(6) states that, for the purposes of sub-regulation (2) and sub-regulation (3), where the acquirer or any person acting in concert with him has any outstanding convertible instruments convertible into shares of the target company at a specific price, the price at which such instruments are to be converted into shares, shall also be considered as a parameter under sub-regulation (2) and sub-regulation (3).

Regulation 8(7) states that, For the purposes of sub-regulation (2) and sub-regulation (3), the price paid for shares of the target company shall include any price paid or agreed to be paid for the shares or voting rights in, or control over the target company, in any form whatsoever, whether stated in the agreement for acquisition of shares or in any incidental, contemporaneous or collateral agreement, whether termed as control premium or as non-compete fees or otherwise.

Regulation 8(8) states that, Where the acquirer has acquired or agreed to acquire whether by himself or through or with persons acting in concert with him any shares or voting rights in the target company during the offer period, whether by subscription or purchase, at a price higher than the offer price, the offer price shall stand revised to the highest price paid or payable for any such acquisition:

Provided that no such acquisition shall be made after the third working day prior to the commencement of the tendering period and until the expiry of the tendering period.

Regulation 8(9) states that, the price parameters under sub-regulation (2) and sub-regulation (3) may be adjusted by the acquirer in consultation with the manager to the offer, for corporate actions such as issuances pursuant to rights issue, bonus issue, stock consolidations, stock splits, payment of dividend, de-mergers and reduction of capital, where the record date for effecting such corporate actions falls prior to three working days before the commencement of the tendering period:

Provided that no adjustment shall be made for dividend declared with a record date falling during such period except where the dividend per share is more than fifty per cent higher than the average of the dividend per share paid during the three financial years preceding the date of the public announcement.

Regulation 8(10) states that, where the acquirer or persons acting in concert with him acquires shares of the target company during the period of twenty-six weeks after the tendering period at a price higher than the offer price under these regulations, the acquirer and persons acting in concert shall pay the difference between the highest acquisition price and the offer price, to all the shareholders whose shares were accepted in the open offer, within sixty days from the date of such acquisition:

Provided that this provision shall not be applicable to acquisitions under another open offer under these regulations or pursuant to the Delisting Regulations, or open market purchases made in the ordinary course on the stock exchanges, not being negotiated

acquisition of shares of the target company whether by way of bulk deals, block deals or in any other form.

Regulation 8(11) states that, where the open offer is subject to a minimum level of acceptances, the acquirer may, subject to the other provisions of this regulation, indicate a lower price, which will not be less than the price determined under this regulation, for acquiring all the acceptances despite the acceptance falling short of the indicated minimum level of acceptance, in the event the open offer does not receive the minimum acceptance.

Regulation 8(12) states that, in the case of any indirect acquisition, other than the indirect acquisition referred in sub-regulation (2) of regulation 5, the offer price shall stand enhanced by an amount equal to a sum determined at the rate of ten per cent per annum for the period between the earlier of the date on which the primary acquisition is contracted or the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the detailed public statement, provided such period is more than five working days.

Regulation 8(13) states that, the offer price for partly paid up shares shall be computed as the difference between the offer price and the amount due towards calls-in-arrears including calls remaining unpaid with interest, if any, thereon.

Regulation 8(14) states that, the offer price for equity shares carrying differential voting rights shall be determined by the acquirer and the manager to the open offer with full disclosure of justification for the price so determined, being set out in the detailed public statement and the letter of offer:

Provided that such price shall not be lower than the amount determined by applying the percentage rate of premium, if any, that the offer price for the equity shares carrying full voting rights represents to the price parameter computed under clause (d) of sub-regulation 2, or as the case may be, clause (e) of sub-regulation 3, to the volume-weighted average market price of the shares carrying differential voting rights for a period of sixty trading days computed on the same terms as specified in the aforesaid provisions, subject to shares carrying full voting rights and the shares carrying differential voting rights, both being frequently traded shares.

Regulation 8(15) states that, in the event of any of the price parameters contained in this regulation not being available or denominated in Indian rupees, the conversion of such amount into Indian rupees shall be effected at the exchange rate as prevailing on the date preceding the date of public announcement and the acquirer shall set out the source of such exchange rate in the public announcement, the detailed public statement and the letter of offer.

Regulation 8(16) states that, for purposes of clause (e) of sub-regulation (2) and sub-regulation (4), the Board may, at the expense of the acquirer, require valuation of the shares by an independent merchant banker other than the manager to the open offer or an independent chartered accountant in practice having a minimum experience of ten years.

Regulation 8 (17) provides that the effect on the price of the equity shares of the target company due to material price movement and confirmation of reported event or information may be excluded as per the framework specified under sub-regulation (11) of regulation 30 of the listing regulations for determination of the offer price under this regulation.

Completion of Acquisition under SEBI (SAST) Regulations, 2011

Under Regulation 22 (1), the acquirer shall not complete the acquisition of shares or voting rights in, or control over, the target company, whether by way of subscription to shares or a purchase of shares attracting the obligation to make an open offer for acquiring shares, until the expiry of the offer period:

Provided that in case of an offer made under sub-regulation (1) of regulation 20 of these regulations, pursuant to a preferential allotment, the offer shall be completed within the period as provided under sub-regulation (1) of regulation 170 of the Securities and Exchange Board of India (Issue of Capital and Disclosure requirements) Regulations, 2018, subject to the non-obstante clause in sub-regulation (4) of regulation 7 of these regulations.

Provided further that in case of a delisting offer made under regulation 5A, the acquirer shall complete the acquisition of shares attracting the obligation to make an offer for acquiring shares in terms of sub-regulation (1) of regulation 3, regulation 4 or regulation 5, only after making the public announcement regarding the success of the delisting proposal made in terms of sub-regulation (4) of regulation 17 of the Delisting Regulations.

Notwithstanding anything contained in sub-regulation (1), subject to the acquirer depositing in the escrow account under regulation 17, cash or providing unconditional and irrevocable bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank, subject to the approval of the Reserve Bank of India, of an amount equal to the entire consideration payable under the open offer assuming full acceptance of the open offer, the parties to such agreement may after the expiry of twenty-one working days from the date of detailed public statement, act upon the agreement and the acquirer may complete the acquisition of shares or voting rights in, or control over the target company as contemplated.

Explanation. - For the purpose of sub-regulation (2), bank guarantee shall only be issued by such scheduled commercial bank having 'AAA' rating from a credit rating agency registered with the Board, on any of its long-term debt instrument.

Provided that in case of proportionate reduction of the shares or voting rights to be acquired in accordance with the relevant provision under sub-regulation (4) of regulation 7, the acquirer shall undertake the completion of the scaled down acquisition of shares or voting rights in the target company.

As per Regulation 22(2A), notwithstanding anything contained in sub-regulation (1), an acquirer may acquire shares of the target company through preferential issue or through the stock exchange settlement process, subject to,-

i. such shares being kept in an escrow account,

ii. the acquirer not exercising any voting rights over such shares kept in the escrow account:

Provided that such shares may be transferred to the account of the acquirer, subject to the acquirer complying with requirements specified in sub-regulation (2).

Under Regulation 22(3), the acquirer shall complete the acquisitions contracted under any agreement attracting the obligation to make an open offer not later than twenty-six weeks from the expiry of the offer period:

Provided that in the event of any extraordinary and supervening circumstances rendering it impossible to complete such acquisition within such period, the Board may for reasons to be published, may grant an extension of time by such period as it may deem fit in the interests of investors in securities and the securities market.

SEBI Takeover Code- Person Acting in Concert interpretation of the term- explained by Hon'ble Supreme Court

In the case of *Daiichi sankyo company ltd v. Jayaram chigurupati & ors [SC] Civil Appeals No.7148 of 2009 & 7314 of 2009 S.H. Kapadia, Aftab Alam, & Swatanter Kumar,JJ. [Decided on 08/07/2010] Equivalent citations: [2010] 157 Comp Cas 380;* the Hon'ble Supreme Court of India observed that , in terms of the definition (given in the Takeover Code), on entering into the SPSSA on June 11, 2008 (with Ranbaxy) Daiichi became the acquirer (directly) of Ranbaxy and also of Zenotech (indirectly, through the acquisition of Ranbaxy). Thus, on the date of the SPSSA both Ranbaxy and Zenotech became "Target Companies" for Daiichi, the acquirer, the former directly and the latter indirectly.

We now proceed to examine the question whether Daiichi and Ranbaxy came together in the relationship of "persons acting in concert" as claimed by the respondents and connected with it the larger question as to the stage when the relationship of "persons acting in concert" must be in existence for the applicability of regulation 20(4)(b) of the Takeover Code. For this, we must first understand what is the true meaning of "persons acting in concert" as defined in regulation 2(e).

To begin with, the concept of "person acting in concert" under regulation 2(e)(1) is based on a target company on the one side, and on the other side two or more persons coming together with the shared common objective or purpose of substantial acquisition of shares etc. of the target company. Unless there is a target company, substantial acquisition of whose shares etc. is the common objective or purpose of two or more persons coming together there can be no "persons acting in concert". For, dehors the target company the idea of "persons acting in concert" is as irrelevant as a cheat with no one as victim of his deception. Two or more persons may join hands together with the shared common objective or purpose of any kind but so long as the common object and purpose is not of substantial acquisition of shares of a target company they would not comprise "persons acting in concert".

The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares etc. of a certain target company. There can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares etc. of the target company. For, dehors the element of the shared common objective or purpose the idea of "person acting in concert" is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition of substantial acquisition of shares etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sin qua non for the relationship of "persons acting in concert" to come into being.

The submission made on behalf of the respondents that on signing the SPSSA Ranbaxy became a person acting in concert with Daiichi overlooks this basic precondition and ingredient of the relationship. The consequential takeover of Zenotech and its acknowledgment are not same thing as the shared common objective or purpose of substantial acquisition of shares or voting rights or gaining control over Zenotech. As stated above, the relationship of "persons acting in concert" is not a fortuitous relationship. It can come into being only by design. Hence, unless it is shown that Daiichi and Ranbaxy entered into the SPSSA for the common objective or purpose of substantial acquisition of shares or voting rights or control over Zenotech they cannot be said to have come in the relationship of "persons acting in concert". This is not even the case of the respondents. The inevitable conclusion, therefore, is that on signing the SPSSA Daiichi and Ranbaxy did not come within the relationship of persons acting in concert within the meaning of regulation 2(e)(1) of the Takeover Code.

We are clearly of the view that for the application of regulation 20(4)(b) it is not relevant or material that the acquirer and the other person, who had acquired the shares of the target company on an earlier date, should be acting in concert at the time of the public announcement for the target company. What is material is that the other person was acting in concert with the acquirer at the time of purchase of shares of the target company.

In light of the discussion made above the inevitable conclusions are that in so far as Zenotech is concerned Ranbaxy was not acting in concert with Daiichi either from the date of the SPSSA or even after becoming a subsidiary of Daiichi and the acquisition of Zenotech shares by Ranbaxy in the month of January 2008 did not come within the ambit of regulation 20(4)(b). The offer price in the public announcement for Zenotech shares made by the appellant was correctly worked out. It follows that the judgment of the Appellate Tribunal is unsustainable and it has to be set aside.

****

LESSON 3

PLANNING & STRATEGY

Cash Deal vs. Stock Deal for acquisition

In a Cash Deal, the acquiring company pays the shareholders of the target company a predetermined amount of cash per share. Here's an example:

Company A, a large tech conglomerate, decides to acquire Company B, a promising startup specializing in artificial intelligence technology, for $100 million in cash.

Company A offers to purchase all outstanding shares of Company B at $10 per share.

Company B's shareholders agree to the deal, and upon completion of the acquisition, they receive $10 in cash for each share they own.

Company A gains full control of Company B's assets, technology, intellectual property, and talent by paying cash to the shareholders.

Advantages of Cash Deals are:

Certainty of payment: Shareholders receive a fixed amount of cash, providing certainty and liquidity.

Simplified valuation: The valuation of the target company is straightforward based on the agreed-upon cash amount per share.

Minimal dilution: Existing shareholders of the acquiring company are not diluted by issuing additional shares.

In a Stock Deal, the acquiring company offers its own shares to the shareholders of the target company as consideration for the acquisition. Here's an example:

Company X, a growing e-commerce platform, plans to acquire Company Y, a smaller online marketplace, through a stock-for-stock transaction.

Company X proposes to exchange 1 share of its stock for every 2 shares of Company Y's stock.

Company Y's shareholders accept the offer, entitling them to receive Company X's stock in exchange for their Company Y shares.

Upon completion of the acquisition, Company Y's shareholders become shareholders of Company X, owning a portion of its equity based on the agreed exchange ratio.

Advantages of a Stock Deal are:

Tax benefits: Depending on the jurisdiction and structure, stock deals may offer tax advantages compared to cash deals.

Flexibility in valuation: Stock deals allow for flexibility in valuation, as the acquiring

company's stock price can fluctuate over time.

Potential for synergies: Aligning interests through stock ownership can foster collaboration and integration between the two companies.

Considerations:

Market conditions: The choice between cash and stock deals may depend on prevailing market conditions, availability of financing, and the relative valuations of the companies involved.

Shareholder preferences: The preferences of both the acquiring company's shareholders and the target company's shareholders play a significant role in determining the structure of the deal.

Regulatory requirements: Regulatory considerations, including antitrust laws and securities regulations, may influence the choice between cash and stock transactions.

Overall, whether a cash deal or a stock deal is preferable depends on various factors, including the strategic objectives of the acquiring company, the financial position of both parties, and the prevailing market dynamics.

****

LESSON 9

COMPETITION ACT

Combination

Section 5 of the Competition Act, 2002 provides that the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

a. any acquisition where—

i. the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have, —

A. either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or

ii. the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—

A. either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or

b. 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, if—

i. the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have, —

A. either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars,

including at least rupees fifteen hundred crores in India; or

ii. the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have, —

A. either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or

c. any merger or amalgamation in which—

i. the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have, —

A. either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or

ii. the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have, —

A. either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or

B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India.

d. value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds rupees two thousand crore:

Provided that the enterprise which is being acquired, taken control of, merged or amalgamated has such substantial business operations in India as may be specified by regulations.

e. notwithstanding anything contained in clause (*a*) or clause (*b*) or clause (*c*), where either the value of assets or turnover of the enterprise being acquired, taken control of, merged or amalgamated in India is not more than such value as may be prescribed, such acquisition, control, merger or amalgamation, shall not constitute a combination under section 5.

Explanation. —For the purposes of section 5 —

a. ***"Control"*** means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—
   i. one or more enterprises, either jointly or singly, over another enterprise or group; or
   ii. one or more groups, either jointly or singly, over another group or enterprise;

b. ***"Group"*** means two or more enterprises where one enterprise is directly or indirectly, in a position to—
   i. exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
   ii. appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
   iii. control the management or affairs of the other enterprise;

c. ***"Turnover"*** means the turnover certified by the statutory auditor on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (*2*) or sub-section (*4*) of section 6 and such turnover in India shall be determined by excluding intra-group sales, indirect taxes, trade discounts and all amounts generated through assets or business from customers outside India, as certified by the statutory auditor on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (*2*) or sub-section (*4*) of section 6;

d. ***"Value of Transaction"*** includes every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation;

e. ***the Value of Assets*** shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed combination falls and if such financial statement has not yet become due to be filed with the Registrar under the Companies Act, 2013 then as per the statutory auditor's report made on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (*2*) or sub-section (*4*) of section 6, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights under the laws provided in sub-section (*5*) of section 3;

f. where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets or turnover or value of transaction as may be applicable, of the said portion or division or business or attributable to it, shall be the relevant assets or turnover or relevant value of transaction for the purpose of applicability of the thresholds under section 5.

Thresholds

In exercise of the powers conferred by sub-section (3) of Section 20 of the Competition Act, 2002, the Central Government vide its Notification dated March 07, 2024 and in consultation with the Competition Commission of India, enhanced, on the basis of the wholesale price index and exchange rate of rupee, the value of assets and the value of turnover, by One hundred and fifty percent for the purposes of section 5 of the Competition Act. The value of assets and turnover after revision is as under:

THRESHOLDS FOR FILING NOTICE				
Enterprise level		**Assets**		**Turnover**
	India	*> 2500 INR Crore*		*> 7500 INR Crore*
	In India or Outside India	*> USD 1.25 bn with at least > 1250 INR Crore in India*	**Or**	*> USD 3.75 bn with at least > 3750 INR Crore in India*
OR				
Group Level		**Assets**		**Turnover**
	India	*> 10000 INR Crore*	**Or**	*> 30000 INR Crore*
	In India or Outside India	*> USD 5 bn with at least > 1250 INR Crore in India*		*> USD 15 bn with at least > 3750 INR Crore in India*

De-Minimis Thresholds: In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 it has also been decided with regards to de-minimis thresholds that the value of assets and turnover be enhanced from INR 350 crore (rupees three hundred fifty crore) to INR 450 crore (rupees four hundred fifty crore) for assets and from INR 1000 crore (rupees one thousand crore) to INR 1250 crore (rupees one thousand two hundred fifty crore) for turnover.

THRESHOLDS FOR AVALING OF DE-MINIMIS EXEMPTION				
		Assets	Or	Turnover
Target Enterprise	In India	< Rs.450 Crore		< Rs.1250 Crore

In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, the Central Government vide Notification S.O. 1131(E) dated March 07, 2024 and in public interest exempted the enterprises being parties to ––

(a) any acquisition referred to in clause (a) of section 5 of the Competition Act;

(b) 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, referred to in clause (b)of section 5 of the Competition Act; and

(c) any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act,

where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees Four hundred and fifty crore in India or turnover of not more than rupees One thousand two hundred and fifty crore in India, from the provisions of section 5 of the said Act for a period of two years from the date of publication of this notification in the Official Gazette.

Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. The value of the said portion or division or business shall be determined by taking the book

value of the assets as shown, in the audited books of accounts of the enterprise or as per statutory auditor's report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indications, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

Form of Notice for the Proposed Combination (Regulation 5)

Regulation 5 of the CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations provides that:

(1) Any enterprise which proposes to enter into a combination shall give notice of such combination to the Commission in accordance with sub-section (2) of section 6 of the Act and these regulations.

(2) The notice under sub-section (2) of section 6 of the Act, shall ordinarily be filed in Form I as specified in schedule II to these regulations, duly filled in and accompanied by evidence of payment of requisite fee by the parties to the combination.

(3) Notwithstanding anything contained in sub-regulation (2) and without prejudice to the provisions of sub-regulation (5), 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-

(a) 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;

(b) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than twenty five percent (25%) in the relevant market.

(3A) The parties to the combination shall give notice in Form I or Form II, as the case may be, in accordance with the notes to Form I and Form II issued by the Commission and published on its official website, from time to time.

(4) Where in the course of inquiry, it is found by the Commission that it requires additional information, the Commission may direct the parties to the combination to file such additional information: Provided that the time taken by the parties to the combination in filing such additional information shall be excluded from the period provided in sub-section (2A) of section 6 of the Act; sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations.

(5) Having due regard to the provisions of sub-regulations (2) and (4), in cases where the parties to the combination have filed notice in Form I and the Commission requires information in Form II to form its prima facie opinion whether the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market, it shall direct the parties to the combination to file notice in Form II as specified in schedule II to these regulations.

Provided that the fee already paid by the parties to the combination while filing notice in Form I shall be reduced from the fee payable for filing notice in Form II:

Provided further that the time period mentioned in sub-section (2A) of section 6 of the Act, sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations shall commence from the date of receipt of notice in Form II.

(6) If the requisite details are not available for any of the columns in Form I or Form II, the date on which they may be submitted should be clearly indicated against those columns, by the parties to the combination.

Provided that the time taken by the parties to the combination to submit the requisite details shall be excluded from the period provided in sub-section (2A) of section 6 of the Act; sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations.

Notice for Approval of Combinations under Green Channel (Regulation 5A)

(1) For the category of combination mentioned in Schedule III, the parties to such combination may, at their option, give notice in Form I pursuant to regulation 5 along with the declaration specified in Schedule IV.

(2) Upon filing of a notice under sub-regulation (1) and acknowledgement thereof, the proposed combination shall be deemed to have been approved by the Commission under sub-section (1) of section 31 of the Act: Provided that where the Commission finds that the combination does not fall under Schedule III and/or the declaration filed pursuant to sub-regulation (1) is incorrect, the notice given and the approval granted under this regulation shall be void ab initio and the Commission shall deal with the combination in accordance with the provisions contained in the Act.

Provided further that the Commission shall give to the parties to the combination an opportunity of being heard before arriving at a finding that the combination does not fall under Schedule III and/or the declaration filed pursuant to sub-regulation (1) is incorrect.

Filing of details of Acquisition under section 6(5) of the Act (Regulation 6)

(1) The details of acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan or investment agreement, shall be filed without any fee in Form III, along with a certified copy of the loan agreement or investment agreement referred to in sub- section (5) of section 6 of the Act.

(2) The duly filled in Form III, along with one copy and electronic version thereof, shall be delivered to the Commission at the address published on its official website.

(3) Without prejudice to the provisions of the Act, where details of acquisition filed in Form III under sub-regulation (1) are received in the Commission beyond the time limit mentioned in subsection (5) of section 6 of the Act, the Commission may admit such details of acquisition in Form III.

Obligation to File the Notice (Regulation 9)

(1) In case of an acquisition or acquiring of control of enterprise(s), the acquirer shall file the notice in Form I or Form II, as the case may be, which shall be duly signed by the person(s) as specified under regulation 11 of the Competition Commission of India (General) Regulations, 2009.

Provided that in case of a company, apart from the persons specified under clause (c) of sub-regulation (1) of regulation 11 of the Competition Commission of India (General) Regulations, 2009, Form I or Form II may also be signed by any person duly authorised by the company.

(2) In case the enterprise is being acquired without its consent, the acquirer shall furnish such information as is available to him, in Form I or Form II, as the case may be, relating to the enterprise being acquired.

Provided that all information required to be filed, relating to the enterprise being acquired shall be filed with the Commission within fifteen days from filing of the notice and in case the acquirer is not in a position to furnish all the required information in Form I or Form II, as the case may be, relating to the enterprise being acquired, the Commission may direct the enterprise being acquired to furnish such information as it deems fit and the time taken by the parties to the combination or the acquired enterprise, as the case may be, in furnishing the required information including document(s) shall be excluded from the period provided in sub-section (2A) of section 6 of the Act; sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of Combination Regulations.

(3) In case of a merger or an amalgamation, parties to the combination shall jointly file the notice in Form I or Form II, as the case may be, duly signed by the person(s) as specified under regulation 11 of the Competition Commission of India (General) Regulations, 2009.

Provided that in case of a company, apart from the persons specified under clause (c) of sub-regulation (1) of regulation 11 of the Competition Commission of India (General) Regulations, 2009, Form I or Form II may also be signed by any person duly authorised by the company.

(4) Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected 26, one or more of which may amount to a combination, a single notice, covering all these transactions, shall be filed by the parties to the combination.

(5) The requirement of filing notice under regulation 5 of these regulations shall be determined with respect to the substance of the transaction and any structure of the

transaction(s), comprising a combination, that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded.

Obligation to Pay the Fee (Regulation 10)

(1) The person or enterprise filing notice under regulation 5 or regulation 8 shall pay the fee as specified under regulation 11 of Combination Regulations. Where the notice is filed jointly, the fee shall be payable jointly or severally.

Prima Facie Opinion on the Combination (Regulation 19)

(1) The Commission shall form its prima facie opinion under sub-section (1) of section 29 of the Act, on the notice filed in Form I or Form II, as the case may be, as to whether the combination is likely to cause or has caused an appreciable adverse effect on competition within the relevant market in India, within thirty working days of receipt of the said notice.

(2) Before the Commission forming an opinion under sub-section (1) of section 29 of the Act, the parties to the combination may offer modification to the combination and on that basis, the Commission may approve the proposed combination under sub-section (1) of section 31 of the Act.

Provided that where modification is offered by the parties to the combination, the additional time, not exceeding fifteen days, needed for evaluation of the offered modification, shall be excluded from the period provided in sub-regulation (1) of this regulation, sub-section (2A) of section 6 of the Act and sub-section (11) of section 31 of the Act.

(3) Where the Commission deems it necessary, it may call for information from any other enterprise while inquiring as to whether a combination has caused or is likely to cause an appreciable adverse effect on competition in India.

Provided that the time taken in obtaining the information from such enterprise(s) shall be excluded from the time, not exceeding fifteen working days, provided in sub-regulation (1) of this regulation.

Procedure for Investigation of Combination

Section 29 of the Act deals with procedure of investigation of Combinations. It provides that:

1) Where the Commission is of the prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within fifteen days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.

(1A) After receipt of the response of the parties to the combination under sub-section

(1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.

(1B) The Commission shall, within thirty days of receipt of notice under sub-section (2) of section 6, form its prima facie opinion referred to in sub-section (1).

2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven days from the date of receipt of the response of the parties to the combination, or the receipt of the report from Director General called under sub section (1A), whichever is later, direct the parties to the said combination to publish details of the combination within seven days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.

3) The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within ten days from the date on which the details of the combination were published under sub-section (2).

4) The Commission may, within seven days from the expiry of the period specified in sub-section (3), call for such additional or other information as it may deem fit from the parties to the saidcombination.

5) The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within ten days from the expiry of the period specified in sub- section (4).

6) After receipt of all information, the Commission shall proceed to deal with the case in accordance with the provisions contained in section 29A or section 31, as the case may be.

7) Notwithstanding anything contained in this section, the Commission may accept appropriate modifications offered by the parties to the combination or suo motu propose modifications, as the case may be, before forming a prima facie opinion under sub-section (1).

LESSON 13

CROSS BORDER MERGERS

A company in one country can be acquired by an entity (another company) from other countries. The local company can be private, public, or state-owned company. In the event of the merger or acquisition by foreign investors referred to as cross-border merger and acquisitions will result in the transfer of control and authority in operating the merged or acquired company. Assets and liabilities of the two companies from two different countries are combined into a new legal entity in terms of the merger, while in terms of acquisition, there is a transformation process of assets and liabilities of local company to foreign company (foreign investor), and automatically, the local company will be affiliated. Since the cross-border M&As involve two countries, according to the applicable legal terminology, the state where the origin of the companies that make an acquisition (the acquiring company) in other countries refer to as the Home Country, while countries where the target company is situated refers to as the Host Country.

Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2023

In exercise of the powers conferred by sub-sections (1) and (2) of section 469 read with section 233 of the Companies Act, 2013, the Central Government amended the Rule 25(5) &Rule 25(6).

According to the amendment Rule 25(5) provides that where no objection or suggestion is received within a period of thirty days of receipt of copy of scheme under sub-section (2) of section 233, from the Registrar of Companies and Official Liquidator by the Central Government and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may, within a period of fifteen days after the expiry of said thirty days, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12: Provided that if the Central Government does not issue the confirmation order within a period of sixty days of the receipt of the scheme under sub-section (2) of section 233, it shall be deemed that it has no objection to the scheme and a confirmation order shall be issued accordingly.

Further Rule 25(6) states that where objections or suggestions are received within a period of thirty days of receipt of copy of scheme under sub-section (2) of section 233 from the Registrar of Companies or Official Liquidator or both by the Central Government and –

(a) such objections or suggestions of Registrar of Companies or Official Liquidator, are not sustainable and the Central Government is of the opinion that the scheme is in the

public interest or in the interest of creditors, it may within a period of thirty days after expiry of thirty days referred to above, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12.

(b) the Central Government is of the opinion, whether on the basis of such objections or otherwise, that the scheme is not in the public interest or in the interest of creditors, it may within sixty days of the receipt of the scheme file an application before the Tribunal in Form No. CAA.13 stating the objections or opinion and requesting that Tribunal may consider the scheme under section 232 of the Act:

Provided that if the Central Government does not issue a confirmation order under clause (a) or does not file any application under clause (b) within a period of sixty days of the receipt of the scheme under subsection (2) of section 233 of the Act, it shall be deemed that it has no objection to the scheme and a confirmation order shall be issued accordingly."

Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022

In exercise of the powers conferred by sub-sections (1) and (2) of section 469 read with sections 230 to 240 of the Companies Act, 2013, the Central Government amended to the Rule 25A (4) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 vide notification of Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022 dated 30th May, 2022.

According to the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022, in case of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under section 230 of the Act.

Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rule, 2016 read as under:

Rule 25A: Merger or amalgamation of a foreign company with a Company and vice versa.

(1) A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules.

(2) (a) A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B after obtaining prior approval of the Reserve Bank of India and after complying with provisions of sections 230 to 232 of the Act and these rules.

(b) The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the

application made to Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.

(3) The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining approvals specified in sub-rule (1) and sub-rule (2), as the case may be.

(4) Notwithstanding anything contained in sub-rule (3), in case of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under section 230 of the Act.

Explanation 1. For the purposes of this rule the term "company" means a company as defined in clause (20) of section 2 of the Act and the term "foreign company" means a company or body corporate incorporated outside India whether having a place of business in India or not:

Explanation 2. For the purposes of this rule, it is clarified that no amendment shall be made in this rule without consultation of the Reserve Bank of India.

****

Lesson 16

Role, Functions and Duties of IP, IRP and RP

Duties of Resolution Professional

Regulation 3A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for assistance and cooperation by the personnel of the corporate debtor as follows:

(1) *Duty to take custody and control*: The interim resolution professional or resolution professional, as the case may be, shall take custody and control as specified under this regulation from the personnel of the corporate debtor,its promoters or any other person associated with the management of the corporate debtor as the case may be, of the following:-

(a) the records of information relating to the assets, finances and operations of the corporate debtor referred in clause (a) of section 18 and such other information required under regulation 36;

(b) the assets recorded in the balance sheet of the corporate debtor or in any other records referred in clause (f) of section 18.

(2) *Obligation of personnel/promoter etc. to provide list of assets and records while handing over their custody and control:* The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall provide to the interim resolution professional or resolution professional, as the case may be**,** a list of assets and records while handing over their custody and control, and the interim resolution professional or resolution professional may, after taking such custody and control, if deemed necessary, identify person(s) in whose possession these assets and records will be held.

(3) *Duty of IRP/RP to prepare list of assets and records:* Where any asset or record has not been handed over or the list has not been provided under sub-regulation (2), the interim resolution professional or resolution professional, as the case may be, shall himself prepare a list of assets and records while taking custody and control of assets and records, and the interim resolution professional or resolution professional may, after taking such custody and control, if deemed necessary, identify person(s) in whose possession these assets and records will be held.

(4) *Signing of list of assets and records:* Each list of assets and records under sub-regulation (2) and (3) shall be signed by the parties present and by at least two individuals who have witnessed the act of taking control and custody of such assets and records.

(5) *Requisition by IRP/RP for information required under the Code but not handed over:* The interim resolution professional or resolution professional, as the case may be, shall requisition from the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor as the

case maybe, the information relating to the assets, finances and operations of the corporate debtor referred in clause (a) of section 18 and such information required under regulation 36 which were required to be maintained by the corporate debtor but have not yet been handed over.

(6) *Requisition by IRP/RP for assets in records but not handed over:* The interim resolution professional or resolution professional, as the case may be, shall requisition from the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor as the case maybe, the assets which are recorded in the balance sheet or in any other records referred in clause (f) of section 18 and whose custody has not been handed over.

(7) An application made under sub-section (2) of section 19 in respect of failure to provide any asset or record as requisitioned under the Code and this regulation, shall show presence of such asset or record in the notice of requisition and absence of such asset or record in the list of assets and records taken in control and custody under sub-regulation (2) and (3).

Eligibility for Registration of Insolvency Professionals

Regulation 4(1) of the IBBI (Insolvency Professionals) Regulations, 2016 provides that no individual shall be eligible to be registered as an insolvency professional if he-

(a) is a minor;

(b) is not a person resident in India;

(c) does not have the qualification and experience specified in Regulation 5 or Regulation 9, as the case may be;

(d) has been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of the sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered;

(e) he is an undischarged insolvent, or has applied to be adjudicated as an insolvent;

(f) he has been declared to be of unsound mind; or

(g) he is not a fit and proper person; Explanation:

For determining whether an individual is fit and proper under these Regulations, the Board may take account of any consideration as it deems fit, including but not limited to the following criteria-

(i) integrity, reputation and character,

(ii) absence of convictions and restraint orders, and

(iii) competence, including financial solvency and net worth.

No insolvency professional entity, recognised by the Board under regulation 13, shall be eligible to be registered as an insolvency professional, if the entity and/or any of its partner or director, as the case may be, is not fit and proper person under clause (g)(i).

Operating separate bank account for each real estate project

According to Regulation 4D, where the corporate debtor has any real estate project, the interim resolution professional or the resolution professional, as the case may be, shall operate a separate bank account for each real estate project.

Application for Certificate of Registration

According to Regulation 6(1) an individual enrolled with an insolvency professional agency as a professional member may make an application to the Board through the insolvency professional agency of which he is a member, in Part – II of Form A of the Second Schedule to these Regulations, along with a nonrefundable application fee of twenty thousand rupees to the Board.

(1A) An insolvency professional entity eligible for registration as an insolvency professional under sub-regulation (2) of regulation 4 may make an application to the Board through the insolvency professional agency of which it is a member, in Part – II of Form AA of Second Schedule to these Regulations, along with a non-refundable application fee of two lakh rupees to the Board. The insolvency professional agency shall acknowledge an application made under this Regulation within seven days of its receipt.

(2A) The insolvency professional agency shall verify and forward the application to the Board within thirty days from the date of payment of fee under sub-regulations (1) or (1A), as the case may be, excluding the time given by the insolvency professional agency to the professional member for submitting additional documents, information, or clarification, as the case may be.

(3) The Board may require the applicant to submit, within reasonable time, additional documents, information or clarification that it deems fit.

(4) The Board may require the applicant to appear, within reasonable time, before the Board in person, or through its authorised representative for clarifications required for processing the application.

Surrender of Certificate of Registration.

Regulation 10A provides that an insolvency professional may surrender its certificate of registration by making a request to the Board, in writing along with the certificate of registration in original.

If the Board is satisfied, it may accept the request for surrender of certificate of registration within thirty days of its receipt and upon acceptance, the registration of such insolvency professional shall stand cancelled.

On and from the date of cancellation of certificate of registration, the concerned person shall not represent itself to be a holder of the certificate for carrying out the activity for which such certificate had been granted.

Special Procedure for Action on Surrender, Expulsion, etc.

According to Regulation 10A (1), while disposing of the matter under this regulation, the Board shall not be bound by the procedure specified in regulation 11.

(2) On receipt of information under clause (e) and (f) of sub-regulation (1) of regulation 10, the Board may issue a notice, if required, to such professional member, calling upon it to explain as to why the certificate of registration, granted under the regulations, should not be cancelled.

(3) The professional member may make written submission(s), if any, within a period not exceeding twenty-one days from the date of service of notice.

(4) On being satisfied with the submission(s) made under sub-regulation (3), the Board may decide to cancel the registration or issue directions to complete the ongoing assignments, make pending compliances including payment of fee, etc.

(5) The Board shall communicate its decision under sub-regulation (4) within thirty days from date of receipt of written submissions under sub-regulation (3).

(6) On receipt of information under clause (g) of sub-regulation (1) of regulation 10, the registration of such insolvency professional with the Board shall be deemed to have been cancelled from the date of demise or winding up or dissolution, as the case may be.

(7) On and from the date of cancellation of the certificate of registration, under this regulation, the legal heirs or assignee of the insolvency professional shall take steps for delivery of any record(s) or document(s) or assets that may be in its custody or control, within the time period and in the manner, as may be required under the relevant regulations or as may be directed by the Board.

Recognition of Insolvency Professional Entities

Regulation 12 of the IBBI (Insolvency Professionals) Regulations, 2016 states that a company, a registered partnership firm or a limited liability partnership may be recognised as an insolvency professional entity, if –

(a) its objective is to provide support services to insolvency professionals or to carry on the activities of an insolvency professional or both.

(b) it has a net worth of not less than one crore rupees;

(c) majority of its equity shares and voting rights are held by insolvency professionals, who are its directors, in case it is a company,

(d) majority of capital contribution is made by insolvency professionals, who are its partners, in case it is a limited liability partnership firm or a registered partnership firm;

(e) majority of its partners or directors, as the case may be, are insolvency professionals;

(f) majority of its whole-time directors are insolvency professionals; in case it is a company; and

(g) none of its partners or directors is a partner or a director of another insolvency professional entity.

It may be noted that 'net worth' means- (i) the net worth as defined under section 2(57) of the Companies Act, 2013 in case of a company; (ii) sum of partners' contribution in the capital account and their undistributed profits net of accumulated losses, if any, in case of a registered partnership firm or limited liability partnership.

Code of Conduct for Insolvency Professional

Integrity and Objectivity

1. An insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships.
2. An insolvency professional must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession.
3. An insolvency professional must act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.

3A. An insolvency professional must disclose the details of any conflict of interests to the stakeholders, whenever he comes across such conflict of interest during an assignment.

4. An insolvency professional appointed as an interim resolution professional, resolution professional, liquidator, or bankruptcy trustee should not himself acquire, directly or indirectly, any of the assets of the debtor, nor knowingly permit any relative to do so.

Independence and Impartiality

5. An insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.
6. In cases where the insolvency professional is dealing with assets of a debtor

during liquidation or bankruptcy process, he must ensure that he or his relatives do not knowingly acquire any such assets, whether directly or indirectly unless it is shown that there was no impairment of objectivity, independence or impartiality in the liquidation or bankruptcy process and the approval of the Board has been obtained in the matter.

7. An insolvency professional shall not take up an assignment under the Code if he, any of his relatives, any of the partners or directors of the insolvency professional entity of which he is a partner or director, or the insolvency professional entity of which he is a partner or director is not independent, in terms of the regulations related to the processes under the Code, in relation to the corporate person/ debtor and its related parties.

8. An insolvency professional shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders entitled to distribution under sections 53 or 178 of the Code, and the concerned corporate person/ debtor as soon as he becomes aware of it, by making a declaration of the same to the applicant, committee of creditors, and the person proposing appointment, as applicable.

8A. An insolvency professional shall disclose as to whether he was an employee of or has been in the panel of any financial creditor of the corporate debtor, to the committee of creditors and to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

8B. An insolvency professional shall disclose its relationship, if any, with the corporate debtor, other professionals engaged by it, financial creditors, interim finance providers, and prospective resolution applicants to the insolvency professional agency of which he is a member, within the time specified hereunder:

Relationship of the insolvency professional with	**Disclosure to be made within three days of**
(1)	(2)
Corporate debtor	his appointment.
Registered valuers / accountants/ legal professionals/ other professionals appointed by him	appointment of the professionals.
Financial creditors	the constitution of committee of creditors.
Interim finance providers	the agreement with the interim finance provider.
Prospective resolution applicant	the supply of information memorandum to the prospective resolution applicant.

If relationship with any of the above, comes to notice or arises subsequently	of such notice or arising.

8C. An insolvency professional shall ensure disclosure of the relationship, if any, of the other professionals engaged by it with itself, the corporate debtor, the financial creditor, the interim finance provider, if any, and the prospective resolution applicant, to the insolvency professional agency of which he is a member, within the time specified as under:

Relationship of the other professional with	**Disclosure to be made within three days of**
(1)	(2)
Insolvency professional	the appointment of the other professional.
Corporate debtor	the appointment of the other professional.
Financial creditors	constitution of committee of creditors.
Interim finance providers	the agreement with the interim finance provider or three days of the appointment of the other professional, whichever is later.
Prospective resolution applicants	the supply of information memorandum to the prospective resolution applicant or three days of the appointment of the other professional, whichever is later.
If relationship with any of the above, comes to notice or arises subsequently	of such notice or arising.

Explanation: For the purposes of clause 8B and 8C above, 'relationship' shall mean any one or more of the following four kinds of relationships at any time or during the three years preceding the appointment of other professionals:

Kind of relationship	Nature of relationship
(1)	(2)
A	Where the insolvency professional or the other professional, as the case may be, has derived 5% or more of his / its gross revenue in a year from professional services to the related party.
B	Where the insolvency professional or the other professional, as the case may be, is a shareholder, director, key managerial personnel or partner of the related party.
C	Where a relative (spouse, parents, parents of spouse, sibling of self and spouse, and children) of the insolvency professional or the other professional, as the case may be, has a relationship of kind A or B with the related party.
D	Where the insolvency professional or the other professional, as the case may be, is a partner or director of a company, firm or LLP, such as, an insolvency professional entity or registered valuer, the relationship of kind A, B or C of every partner or director of such company, firm or LLP with the related party.

8D. An insolvency professional shall ensure timely and correct disclosures by it, and other professionals appointed by it and shall provide a confirmation to the insolvency professional agency of which he is a professional member to the effect that the appointment, if any, of every other professional has been made at arms' length relationship.

9. An insolvency professional shall not influence the decision or the work of the committee of creditors or debtor, or other stakeholders under the Code, so as to make any undue or unlawful gains for itself or its related parties, or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means to achieve any mala fide objectives.

Professional Competence

10. An insolvency professional must maintain and upgrade his professional knowledge and skills to render competent professional service.

Representation of Correct Facts and Correcting Misapprehensions

11. An insolvency professional must inform such persons under the Code as may be required, of a misapprehension or wrongful consideration of a fact of which he becomes aware, as soon as may be practicable.

12. An insolvency professional must not conceal any material information or knowingly make a misleading statement to the Board, the adjudicating authority or any stakeholder, as applicable.

Timeliness

13. An insolvency professional must adhere to the time limits prescribed in the Code

and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan its actions, and promptly communicate with all stakeholders involved for the timely discharge of its duties.

14. An insolvency professional must not act with mala fide or be negligent while performing its functions and duties under the Code.

Information Management

15. An insolvency professional must make efforts to ensure that all communication to the stakeholders, whether in the form of notices, reports, updates, directions, or clarifications, is made well in advance and in a manner which is simple, clear, and easily understood by the recipients.

15A. An insolvency professional shall prominently state in all its communications to a stakeholder, its name, address, e-mail, registration number and validity of authorisation for assignment, if any, issued by the insolvency professional agency of which he is a member.

16. An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. this shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of its decisions and actions.

17. An insolvency professional must not make any private communication with any of the stakeholders unless required by the Code, rules, regulations and guidelines thereunder, or orders of the adjudicating authority.

18. An insolvency professional must appear, co-operate and be available for inspections and investigations carried out by the Board, any person authorised by the Board or the insolvency professional agency with which he isenrolled.

19. An insolvency professional must provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled.

20. An insolvency professional must be available and provide information for any periodic study, research and audit conducted by the Board.

Confidentiality

21. An insolvency professional must ensure that confidentiality of the information relating to the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent it from disclosing any information with the consent of the relevant parties or requiredby law.

Occupation, Employability and Restrictions

22. An insolvency professional must refrain from accepting too many assignments, if he is unlikelyto be able to devote adequate time to each of his assignments.

Clarification: An insolvency professional may, at any point of time, not have more than ten assignments as resolution professional in corporate insolvency resolution process, of which not more than three shall have admitted claims exceeding one thousand crore rupees each.

22A. *Resignation by an Insolvency Professional:* An insolvency professional may resign from the assignment, subject to the recommendation of the committee of creditors in a corporate insolvency resolution process, consultation committee in liquidation process, the debtor or the creditor in the insolvency resolution process of personal guarantor to the corporate debtor, as the case may be, and the approval of the Adjudicating Authority. It is further explained that the insolvency professional shall continue to discharge his duties, functions and responsibilities till the approval of resignation by the Adjudicating Authority.

23. An insolvency professional must not engage in any employment when he holds a valid authorisation for assignment or when he is undertaking an assignment.

23A. Where an insolvency professional has conducted a corporate insolvency resolution process, he and his relatives shall not accept any employment, other than an employment secured through open competitive recruitment, with, or render professional services, other than services under the Code, to a creditor having more than ten percent voting power, the successful resolution applicant, the corporate debtor or any of their related parties, until a period of one year has elapsed from the date of his cessation from such process.

23B. An insolvency professional shall not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment.

For the purposes of this clause, the insolvency professional which is an insolvency professional entity may engage or appoint its partners or directors, as the case may be, for or in connection with any work relating to any of its assignment other than work related to valuation and audit of the debtor.

23C. An insolvency professional shall not provide any service for or in connection with the assignment which is being undertaken by any of his relatives or related parties.

Explanation - For the purpose of clauses 23A to 23C, "related party" shall have the same meaning as assigned to it in clause (24a) of section 5, but does not include an insolvency professional entity of which the insolvency professional is a partner or director.

For the purposes of this clause, the insolvency professional which is an insolvency professional entity may provide any service, other than service related to

valuation and audit, for or in connection with the assignment which is being undertaken by any of its partners or directors, as the case may be.

24. An insolvency professional must not conduct business which in the opinion of the Board is inconsistent with the reputation of the profession.

Remuneration and Costs

25. An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.

25A. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

25B. An insolvency professional shall raise bills or invoices in its name towards its fees, and such fees shall be paid to 86 it through banking channel.

25C. An insolvency professional shall ensure that the insolvency professional entity or the professional engaged by it raises bills or invoices in their own name towards their fees, and such fees shall be paid to them through banking channel.

26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

26A. An insolvency professional shall not accept /share any fees or charges from any professional and/or support service provider who are appointed under the processes.

27. An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.

27A. An insolvency professional shall, while undertaking assignment or conducting processes, exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person complies with the applicable laws.

27B. An insolvency professional shall not include any amount towards any loss, including penalty, if any, in the insolvency resolution process cost or liquidation cost, incurred on account of non-compliance of any provision of the laws applicable on the corporate person while conducting the insolvency resolution process, fast track insolvency resolution process, liquidation process or voluntary liquidation process, under the Code.

Gifts and Hospitality

28. An insolvency professional, or his relative must not accept gifts or hospitality which undermines or affects his independence as an insolvency professional.

29. An insolvency professional shall not offer gifts or hospitality or a financial or any other advantage to a public servant or any other person, intending to obtain or retain work for himself, or to obtain or retain an advantage in the conduct of profession for himself.

In the case of *Pooja Menghani vs. Insolvency and Bankruptcy Board of India & Anr*, judgement dated November 20, 2023, Hon'ble High Court of Delhi inter alia observed that an Insolvency Professional performs very important functions in the insolvency resolution process of a company. An Insolvency Professional virtually takes over the company during the period it goes through the insolvency resolution process. An Insolvency Professional in fact becomes the heart and brain of the company under the insolvency resolution process and a person having slightest of disqualification cannot be permitted to be appointed as an Insolvency Professional otherwise the entire purpose of the IBC will get vitiated.

****

LESSON 18

CONVENING AND CONDUCTING MEETING OF COMMITTEE OF CREDITORS

Replacement of Authorised Representative

Regulation 16A(3A) of the IBBI(CIRP) Regulations 2016 provides that the financial creditors in the class, representing not less than ten per cent. voting share may seek replacement of the authorised representative with an insolvency professional of their choice by making a request to the interim resolution professional or resolution professional who shall circulate such request to the creditors in that class and announce a voting window open for at least twenty-four hours.

Fees Payable to Authorised Representative

The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely: -

Number of creditors in the class	Fee per meeting of the committee (Rs.)
10-100	30,000
101-1000	40,000
More than 1000	50,000

The authorised representative shall be entitled to receive fee for every meeting of the class of creditors convened by him in the following manner, namely: -

Number of creditors in the class	Fee per meeting of creditors in class with authorised representative (Rs.)
10-100	10,000
101-1000	12,000
More than 1000	15,000

Fee of AR to be part of IRP cost: The payment of fee to authorised representative shall be part of insolvency resolution process cost in respect of two meeting with the creditors he represents corresponding to a meeting of the committee of creditors.

Approval of fee of AR: The fee for any additional meeting beyond two meetings corresponding to a meeting of the committee of creditors shall be part of insolvency resolution process cost subject to approval of committee of creditors.

Duties of Authorised Representative

The Duties of Authorised Representative shall: -

(a) assist the creditors in a class he represents in understanding the discussions and considerations of the committee meetings and facilitate informed decision-making;

(b) review the contents of minutes prepared by the resolution professional and provide his comments to the resolution professional, if any;

(c) help the creditors in a class he represents during the consultations made by the resolution professional to prepare a strategy for marketing of the assets of the corporate debtor in terms of sub-regulation (1) of regulation 36C

(d) work in collaboration with the creditors in a class he represents to enhance the marketability of the assets of the corporate debtor in terms of sub-regulation (3) of regulation 36C;

(e) assist the creditors in a class he represents in evaluating the resolution plans submitted by resolution applicants;

(f) ensure that the creditors in a class he represents have access to any information or documents required to form an opinion on issues discussed in the committee meetings;

(g) update regularly the creditors in a class he represents on the progress of the corporate insolvency resolution process;

(h) make suggestions for modifications of the resolution plan as may be required by the creditors in class he represents;

(i) record proceedings and prepare the minutes of the meeting with the creditors in a class he represents; (The provisions regarding minutes of meetings in this regulation shall apply mutatis mutandis to class meetings) and

(j) act as a representative for the creditors in a class he represents in representations before the Adjudicating Authority, National Company Law Appellate Tribunal, and other regulatory authorities.

The creditors in a class may propose any additional responsibility upon the authorised representative in relation to the representation of their interest in the committee.

LESSON 19

PREPARATION AND APPROVAL OF RESOLUTION PLAN

Regulatory Fee

Regulation 31A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that a regulatory fee calculated at the rate of 0.25 per cent of the realisable value to creditors under the resolution plan approved under section 31, shall be payable to the Board, where such realisable value is more than the liquidation value: Provided that this sub-regulation shall be applicable where resolution plan is approved under section 31, on or after 1st October 2022.

Explanation: For removal of doubts, it is hereby clarified that the regulatory fee under this sub-regulation, shall not be payable in cases where the approved resolution plan in respect of insolvency resolution of a real estate project is from an association or group of allottees in such real estate project.

A regulatory fee calculated at the rate of one per cent of the cost being booked in insolvency resolution process costs in respect of hiring any professional or other services by the interim resolution professional or resolution professional, as the case may be, for assistance in a corporate insolvency resolution process, shall be payable to the Board, in the manner as specified in regulation (7)(2) (cb) of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

Approval of Committee for Insolvency Resolution Process Costs

Regulation 31B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that the insolvency professional shall place in each meeting of the committee, the operational status of the corporate debtor and shall seek its approval for all costs, which are part of insolvency resolution process costs.

Fee to be paid to Interim Resolution Professional and Resolution Professional

Regulation 34B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that the fee of interim resolution professional or resolution professional, under regulation 33 and 34, shall be decided by the applicant or committee in accordance with this regulation.

The fee of the interim resolution professional or the resolution professional, appointed on or after 1st October 2022, shall not be less than the fee specified in clause 1 for the period specified in clause 2 of Schedule-II of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations.

Provided that the applicant or the committee may decide to fix higher amount of fee for the reasons to be recorded, taking into consideration market factors such as size and scale of business operations of corporate debtor, business sector in which corporate debtor operates, level of operating economic activity of corporate debtor and complexity related to process.

After the expiry of period mentioned in clause 2 of Schedule-II, the fee of the interim resolution professional or resolution professional shall be as decided by the applicant or committee, as the case may be.

For the resolution plan approved by the committee on or after 1st October 2022, the committee may decide, in its discretion, to pay performance-linked incentive fee, not exceeding five crore rupees, in accordance with clause 3 and clause 4 of Schedule-II or may extend any other performance-linked incentive structure as it deems necessary.

The fee under this regulation may be paid from the funds, available with the corporate debtor, contributed by the applicant or members of the committee and/or raised by way of interim finance and shall be included in the insolvency resolution process cost.

Issue of Information Memorandum, Evaluation Matrix and a Request for Resolution Plans

Regulation 36B (1) of the IBBI(CIRP) Regulations provides that the resolution professional shall, within five days of the date of issue of the final list under regulation 36A (12), issue the information memorandum, evaluation matrix and a request for resolution plans to every resolution applicant in the final list:

Provided that where such documents are available, the same may also be provided to every prospective resolution applicant in the provisional list.

Strategy for Marketing of Assets of the Corporate Debtor

According to Regulation 36C of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the resolution professional shall prepare a strategy for marketing of the assets of the corporate debtor in consultation with the committee, where the total assets as per the last available financial statements exceed one hundred crore rupees and may prepare such strategy in other cases.

Decision of implementing such strategy along with its cost shall be subject to the approval of the committee. The member(s) of committee may also take measures for marketing of the assets of the corporate debtor.

Assessment of Compromise or Arrangement.

Regulation 39BA(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that while deciding to liquidate the corporate debtor under section 33, the committee shall examine whether to explore compromise or arrangement as referred to under sub - regulation (1) of regulation 2B of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 and the resolution professional shall submit the committee's recommendation to the Adjudicating Authority while filing application under section 33

Where a recommendation has been made under sub-regulation (1), the resolution professional and the committee shall keep exploring the possibility of compromise or arrangement during the period the application to liquidate the corporate debtor is pending before the Adjudicating Authority.

****

LESSON 24

LIQUIDATION ON OR AFTER FILING OF RESOLUTION PLAN

Time for Completion of Compromise or Arrangement

Regulation 2B of the IBBI (Liquidation Process) Regulations 2016 provides that where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013, it shall be completed within ninety days of the order of liquidation under section 33.

It is provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement. It is provided further that the liquidator shall file the proposal of compromise or arrangement only in cases where such recommendation has been made by the committee under regulation 39BA of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Provided further that the liquidator shall not file such proposal after expiry of thirty days from the liquidation commencement date.

The time taken on compromise or arrangement, not exceeding ninety days, shall not be included in the liquidation period.

Stakeholders' Consultation Committee

Regulation 31A of the IBBI (Liquidation Process) Regulations, 2016 mandates constitution of Stakeholders' Consultation Committee by the Liquidator, comprising of all creditors of the corporate debtor, within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on matters

(a) remuneration of professionals appointed under regulation 7;

(b) sale under regulation 32, including manner of sale, pre-bid qualifications, reserve price, marketing strategy and auction process.;

(c) fees of the liquidator;

(d) valuation under sub- regulation (2) of regulation 35;

(e) the manner in which proceedings in respect of preferential transactions, undervalued transaction, extortionate credit transaction or fraudulent or wrongful trading, if any, shall be pursued after closure of liquidation proceedings and the manner in which the proceeds, if any, from these proceedings shall be distributed;

(f) review of marketing strategy in case of failure of sale of corporate debtor as a going concern;

(g) continuation or institution of any suits or legal proceedings by or against the corporate debtor;

(h) extension of payment of balance sale consideration as provided in clause (12) of Para 1 of Schedule I, beyond ninety days, to be disclosed in the auction notice.

Exclusion of Certain Assets from the Liquidation Estate

Regulation 46A of the IBBI (Liquidation Process) Regulations, 2016, provides for exclusion of certain assets from the liquidation estate. It specifies that wherever the corporate debtor has given possession to an allottee in a real estate project, such asset shall not form a part of the liquidation estate of the corporate debtor for the purposes of clause (e) of sub-section (4) of section 36.

Early Dissolution

Regulation 14 of the IBBI (Liquidation) Process Regulations, 2016, provides that any time after the preparation of the Preliminary Report, if it appears to the liquidator that-

(a) the realizable properties of the corporate debtor are insufficient to cover the cost of the liquidation process; and

(b) the affairs of the corporate debtor do not require any further investigation;

he shall consult the consultation committee and if it advises for early dissolution, he may apply, along with a detailed report incorporating the views of the consultation committee, to the Adjudicating Authority for early dissolution of the corporate debtor and for necessary directions in respect of such dissolution.

****

Lesson 25

VOLUNTARY LIQUIDATION

IBBI (Voluntary Liquidation Process) Regulations, 2017 apply to the voluntary liquidation of corporate persons under Chapter V of Part II of the Insolvency and Bankruptcy Code, 2016.

Initiation of Liquidation

Regulation 3(1) of the IBBI (Voluntary Liquidation Process) Regulations provides that without prejudice to section 59(2), liquidation proceedings of a corporate person shall meet the following conditions, namely: —

(a) a declaration from majority of

(i) the designated partners, if a corporate person is a limited liability partnership,

(ii) individuals constituting the governing body in case of other corporate persons, as the case may be, verified by an affidavit stating that-

(i) they have made a full inquiry into the affairs of the corporate person and they have formed an opinion that either the corporate person has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the liquidation;

(ii) the corporate person is not being liquidated to defraud any person; and

(iii) the corporate person has made sufficient provision to meet the obligations arising on account of pending matters mentioned in sub-clause (iii) of clause (b).

(b) the declaration under sub-clause (a) shall be accompanied with the following documents, namely: —

(i) audited financial statements and record of business operations of the corporate person for the previous two years or for the period since its incorporation, whichever is later;

(ii) a report of the valuation of the assets of the corporate person, if any prepared by a registered valuer; and

(iii) disclosure about pending proceedings or assessments before statutory authorities, and pending litigations, in respect of the corporate person.

(c) within four weeks of a declaration under sub-clause (a), there shall be-

(i) a resolution passed by a special majority of the partners or contributories, as the case may be, of the corporate person requiring the corporate person to be liquidated and appointing an insolvency professional to act as the liquidator; or

(ii) a resolution of the partners or contributories, as the case may be, requiring the corporate person to be liquidated as a result of expiry of the period of its duration, if any, fixed by its constitutional documents or on the occurrence of any event in respect of which the constitutional documents provide that the corporate person shall be dissolved, as the case may be, and appointing an insolvency professional to act as the liquidator.

It may be noted that the corporate person owes any debt to any person, creditors representing two-thirds in value of the debt of the corporate person shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

As per Regulation3(2), the corporate person shall notify the Registrar and the Board about the resolution under sub-regulation (1) to liquidate the corporate person within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

Subject to approval of the creditors under sub-regulation (1), the liquidation proceedings in respect of a corporate person shall be deemed to have commenced from the date of passing of the resolution under sub-clause (c) of sub-regulation (1).

Reporting

According to Regulation 8(1), the liquidator shall prepare and submit-

(a) Preliminary Report;

(b) Status Report;

(c) Minutes of consultations with stakeholders; and

(d) Final Report in the manner specified under these Regulations.

Completion of Liquidation (Regulation 37)

(1) The liquidator shall endeavour to complete the liquidation process of the corporate person and submit the Final Report under regulation 38 within: -

(a) two hundred and seventy days from the liquidation commencement date where the creditors have approved the resolution under clause (c) of subsection (3) of section 59 or clause (c) of sub-regulation (1) of regulation 3, and

(b) ninety days from the liquidation commencement date in all other cases.

(2) In the event of the liquidation process continuing for more than the period stipulated in sub-regulation (1), the liquidator shall

(a) hold a meeting of the contributories of the corporate person within fifteen days –

(i) from the end of two hundred and seventy days or ninety days, as the case may be, and
(ii) thereafter at the end of every succeeding two hundred and seventy days or ninety

days, as the case may be, as stipulated in sub-regulation (1), till submission of application for dissolution of the corporate person; and

(b) shall present Status Report(s)indicating progress in liquidation, including-

(i) settlement of list of stakeholders,

(ii) details of any assets that remains to be sold and realized,

(iii) distribution made to the stakeholders,

(iv) distribution of unsold assets made to the stakeholders;

(v) developments in any material litigation, by or against the corporate person;

(vi) filing of, and developments in applications for avoidance of transactions in accordance with Chapter III of Part II of the Code; and

(vii) the reasons for not completing the process within stipulated time period and the additional time required for completing the process.

(3) The Status Report shall enclose the audited accounts of the liquidation showing the receipts and payments pertaining to liquidation since the liquidation commencement date.

(4) The liquidator shall file the Status Report with the Board within seven days of the meeting of contributories.

****

CASE LAWS

1. In the case of *Ramkrishna Forgings Limited (Appellant) Vs. Ravindra Loonkar, Resolution Professional of ACIL Limited & Anr.(Respondents), Civil Appeal No.1527 of 2022 judgement November 21, 2023*, Hon'ble Supreme Court inter alia observed that having considered the matter in depth, the Court is unable to uphold the decisions rendered by the Adjudicating Authority-NCLT as also the NCLAT. The moot question involved is the extent of the jurisdiction and powers of the Adjudicating Authority to go on the issue of revaluation in the background of the admitted and undisputed factual position that no objection was raised by any quarter with regard to any deficiency/irregularity, either by the RP or the appellant or the CoC, in finally approving the Resolution Plan which was sent to the Adjudicating Authority-NCLT for approval. Further, the statutory requirement of the RP involving two approved valuers for giving reports apropos fair market value and liquidation value was duly complied with and the figures in both reports were not at great variance. Significantly, the same were then put up before the CoC, which is the decision-maker and in the driver's seat, so to say, of the Corporate Debtor*. K Sashidhar (supra) and Committee of Creditors of Essar Steel India Ltd. (supra)* are clear authorities that the CoC's decision is not to be subjected to unnecessary judicial scrutiny and intervention. This came to be reiterated in *Maharashtra Seamless Limited (supra),* which also emphasised that the CoC's commercial analysis ought not to be qualitatively examined and the direction therein of the NCLAT to direct the successful Resolution Applicant to enhance its fund flow was disapproved of by this Court. Thus, if the CoC, including the FC(s) to whom money is due from the Corporate Debtor, had undertaken repeated negotiations with the appellant with regard to the Resolution Plan and thereafter, with a majority of 88.56% votes, approved the final negotiated Resolution Plan of the appellant, which the RP, in turn, presented to the Adjudicating Authority-NCLT for approval, unless the same was failing the tests of the provisions of the Code, especially Sections 30 & 31, no interference was warranted. In *Kalpraj Dharamshi v Kotak Investment Advisors Limited, (2021) 10 SCC 401,* the Court concluded that '… *in view of the paramount importance given to the decision of CoC, which is to be taken on the basis of "commercial wisdom",* NCLAT was not correct in law in interfering with the commercial decision taken by CoC by a thumping majority of 84.36%.' (Para 27)

2. In the case of *Mr. Shiv Charan & Ors vs. Adjudicating Authority under the Prevention of Money Laundering Act, 2002 & Ors, Writ Petition (L) No.9943 of 2023 along With Writ Petition (L) No.29111 of 2023* judgement dated March 01, 2024, Hon'ble Bombay High Court inter alia observed that Section 32A (2) of the IBC, 2016 protects the property of the corporate debtor from any attachment and restraint in proceedings connected to the offense committed prior to the commencement of the CIRP. Once a resolution plan is approved under Section 31 and a change in control and management is effected under the resolution plan (the same ingredients as set out in Section 32A (1) are stipulated here too), the property of the corporate debtor would get immunity from further prosecution of proceedings. Clause (i) in the Explanation to Section 32A (2) removes all doubt about what the assets are given immunity from. The provision explicitly stipulates that an "action against the property" of the corporate debtor, from which immunity would be

available, "shall include the attachment, seizure, retention or confiscation of such property under such law" as applicable. The reference being to any action against the property under any law would evidently bring within its compass, attachments made under the PMLA, 2002. (Para 18)

Further the Hon'ble High Court in its summary of conclusions inter alia held that the NCLT in its capacity as the Adjudicating Authority under the IBC, 2016 has only interpreted the provisions of Section 32A and applied them to the facts at hand, to declare that the attachment of the Attached Properties by the ED must come to an end. It is possible that in a given case, the application of Section 32A of the IBC, 2016 may have an effect on existing and intended attachments and prosecution by enforcement agencies operating under laws such as the PMLA, 2002. However, since both Section 32A and Section 60(5) are non-obstante provisions, they would prevail, with no room for concern, real or imagined, about any conflict between legislations..…….. {Para 52(viii)}

3. In the case *of Greater Noida Industrial Development Authority Vs. Prabhjit Singh Soni & Anr Civil Appeal Nos.7590-7591 OF 2023 (Arising out of Diary No.3628 of 2023) judgement dated February 12, 2024* Hon'ble Supreme Court of India inter alia observed that ……. a Court or a Tribunal, in absence of any provision to the contrary, has inherent power to recall an order to secure the ends of justice and/or to prevent abuse of the process of the Court. Neither the IBC nor the Regulations framed thereunder, in any way, prohibit, exercise of such inherent power. Rather, Section 60(5)(c) of the IBC, which opens with a non-obstante clause, empowers the NCLT (the Adjudicating Authority) to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the IBC. Further, Rule 11 of the NCLT Rules, 2016 preserves the inherent power of the Tribunal. Therefore, even in absence of a specific provision empowering the Tribunal to recall its order, the Tribunal has power to recall its order. However, such power is to be exercised sparingly, and not as a tool to re-hear the matter. Ordinarily, an application for recall of an order is maintainable on limited grounds, inter alia, where (a) the order is without jurisdiction; (b) the party aggrieved with the order is not served with notice of the proceedings in which the order under recall has been passed; and (c) the order has been obtained by misrepresentation of facts or by playing fraud upon the Court /Tribunal resulting in gross failure of justice.

In a recent decision (i.e., *Union Bank of India vs. Dinakar T. Vekatasubramanian & Ors.),* a five-member Full Bench of NCLAT held that though the power to review is not conferred upon the Tribunal but power to recall its judgment is inherent in the Tribunal and is preserved by Rule 11 of the NCLT Rules, 2016. It was held that power of recall of a judgment can be exercised when any procedural error is committed in delivering the earlier judgment; for example, necessary party has not been served or necessary party was not before the Tribunal when judgment was delivered adverse to a party. It was observed that there may be other grounds for recall of a judgment one of them being

where fraud is played on the Court in obtaining a judgment. This decision of NCLAT was upheld by a two-Judge Bench of Supreme Court *vide order dated 31.07.2023 in Civil Appeal No.4620 of 2023 (Union Bank of India vs. Financial Creditors of M/s Amtek Auto Ltd. & Ors.).*

4. In the case of *Dilip B Jiwrajka{Petitioner(s)} Vs. Union of India & Ors {Respondent(s)}, Supreme Court of India, Writ Petition (Civil) No 1281 of 2021 judgement dated November 09, 2023,* Hon'ble Supreme Court while upholding the constitution validity of Section 95-100 of the Insolvency and Bankruptcy Code (IBC), held that (i) No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC; (ii) The resolution professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application; (iii) The submission that a hearing should be conducted by the adjudicatory authority for the purpose of determining 'jurisdictional facts' at the stage when it appoints a resolution professional under Section 97(5) of the IBC is rejected. No such adjudicatory function is contemplated at that stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review; (iv) The resolution professional may exercise the powers vested under Section 99(4) of the IBC for the purpose of examining the application for insolvency resolution and to seek information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application; (v) There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional; (vi) No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100; (vii) The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 for the purpose of determining whether to accept or reject the application; (viii) The purpose of the interim-moratorium under Section 96 is to protect the debtor from further legal proceedings; and (ix) The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution.

5. in the case of *Sunil Kumar Agrawal (Appellant)vs. New Okhla Industrial Development Authority (Respondent) 12th January, 2023*, National Company Law Appellate Tribunal, Principal Bench, New Delhi Company Appeal (AT) (Ins.) No. 622 of 2022. Hon'ble National Company Law Appellate Tribunal inter-alia observed that Section 14 of the Code deals with the moratorium and Section 14(1)(d) of the Code says that there would be a prohibition from the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor. However, explanation appended to Section 14(1) (d) says that with the prohibition of recovery of any property

by an owner or lessor, a license, permit, registration, quota, concession, clearance or a similar grant or right either given by the Central Govt., State Govt. local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency but there would be a condition for its continuation if there is no default in payment of the dues of such license, permit, registration, quota, concession, clearance or a similar grant or right during the moratorium period. The similar grant or right has to be read in respect of the licence, permit, registration, quota, concession, clearance but it cannot be read as the premium amount or lease rent which has been so ordered by the Adjudicating Authority to be paid by the Appellant to the Respondent.

6. In the case of *Shri Guru Containers(Appellant)vs. Jitendra Palande (Respondent), National Company Law Tribunal, Mumbai Bench Company Appeal (AT) (Insolvency) No.106 of 2023 judgement dated 22/02/2023* Hon'ble National Company Law Tribunal inter alia observed that though the scope of CIRP related work became limited and restricted by the fact that progress got stonewalled due to lack of flow of information and lack of claims, diligence on the part of the IRP in proceeding with the CIRP cannot be found to be wanting. Shifting the entire blame on the IRP on grounds of non-performance of duty and making him the scapegoat does not appear to be justified. It is equally important for the creditors to play a catalytic role in the insolvency resolution process given the present regime of creditor-driven IBC. The rigours of similar standards of discipline should also apply on the creditors. This is clearly a case where the CIRP process was being hindered due to want of cooperation and participation from the creditors. The conduct of the Operational Creditor in the present case is deprecatory in that once the CIRP process had commenced, the Operational Creditor went into a sleeping mode. This position has been further aggravated by the fact that it was the Appellant/Operational Creditor who had triggered this judicial process and then abdicated himself from all responsibilities. That the Operational Creditor did not seem interested in resolution of the Corporate Debtor is evident from the fact that till date no claim has been filed with the IRP.

7. In the matter of *Vallal RCK Vs. M/s Siva Industries and Holdings Limited and Ors. [Civil Appeal Nos. 1811-1812 of 2022]* the Hon'ble Supreme Court in its judgment dated 3rd June, 2022 observed that Section 12A was brought on the basis of the Insolvency Law Committee's Report. Though by the Amendment Act No. 26 of 2018, the voting share of 75% of CoC for approval of the resolution plan was brought down to 66%, section 12A of the Insolvency and Bankruptcy Code, 2016 (Code) which was brought by the same amendment, requires the voting share of 90% of CoC for approval of withdrawal of corporate insolvency resolution process (CIRP).

The provisions under section 12A of the Code have been made more stringent as compared to Section 30(4) of the Code. Whereas under section 30(4) of the Code, the voting share of CoC for approving the resolution plan is 66%, the requirement under section 12A of the Code for withdrawal of CIRP is 90%.

When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stake-holders to permit settlement and withdraw CIRP,

the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC.

This Court has consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts.

The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, and irrational and de hors (outside) the provisions of the statute or the Rules.

8. In the case of *NOIDA vs. Anand Sonbhadra [Civil Appeal No. 2222, 2367-2369 of 2021] Judgement dated 17th May, 2022, Hon'ble* Supreme Court inter-alia observed that a debt is a liability or an obligation in respect of a right to payment. Irrespective of whether there is adjudication of the breach, if there is a breach of contract, it may give rise to a debt. In the context of section 5(8), disbursement has been understood as money, which has been paid. In the context of the transaction involved in such real estate projects, the homebuyers advance sums to the builder, who would then utilise the amount towards the construction in the real estate project.

What is relevant is to attract section 5(8), on its plain terms, is disbursement. While, it may be true that the word 'transaction' includes transfer of assets, funds or goods and services from or to the corporate debtor, in the context of the principal provisions of section 5(8) of the Code, to import the definition of 'transaction' in section 2(33), involving the need to expand the word 'disbursement', to include a promise to pay money by a debtor to the creditor, will be uncalled for straining of the provisions.

'Debt' means a liability or obligation, which relates to a claim. The claim or right to payment or remedy for breach of contract occasioning a right to payment must be due from any person.

In the lease in question, there has been no disbursement of any debt (loan) or any sums by the NOIDA to the lessee.

The subject matter of section 5(8)(d) is a lease or a hire-purchase contract. It is not any lease or a hire purchase contract, which would entitle the lessor to be treated as the financial creditor. There must be a lease or hire-purchase contract, which is deemed as a finance or capital lease. The law giver has not left the courts free to place, its interpretation on the words 'finance or capital lease'. The legislature has contemplated the finance or a capital lease, which is deemed as such a lease under the Indian Accounting Standards.

The Appellant is not the financial lessor under section 5(8)(d) of the Code. Needless to say, there is always power to amend the provisions which essentially consist of the Indian Accounting Standards in the absence of any rules prescribed under section 5(8)(d) of the Code by the Central Government.

Section 5(8)(f) is a residuary and catch all provision. A lease, which is not a finance or a capital lease under section 5(8)(d), may create a financial debt within the meaning of section 5(8)(f), if, on its terms, the Court concludes that it is a transaction, under which, any amount is raised, having the commercial effect of the borrowing.

The lease in question does not fall within the ambit of section 5(8)(f). This is for the reason that the lessee has not raised any amount from the Appellant under the lease, which is a transaction. The raising of the amount, which, according to the Appellant, constitutes the financial debt, has not taken place in the form of any flow of funds from the Appellant/Lessor, in any manner, to the lessee. The mere permission or facility of moratorium, followed by staggered payment in easy instalments, cannot lead to the conclusion that any amount has been raised, under the lease, from the Appellant, which is the most important consideration.

The appeal failed, Supreme Court held that the Appellant is not a Financial Creditor.

However, the Apex court indicated that the Centre can bring a prospective amendment to classify NOIDA as a financial creditor. Hon'ble Justice K.M. Joseph in his initial remark noted that hardly six years old, the Insolvency and Bankruptcy Code (hereinafter referred to as the 'IBC") continues to be a fertile ground to spawn 2 litigation.

9. In the case of *Sunil Kumar Agrawal (Appellant)vs. New Okhla Industrial Development Authority (Respondent) 12th January, 2023,* National Company Law Appellate Tribunal, Principal Bench, New Delhi Company Appeal (AT) (Ins.) No. 622 of 2022, Hon'ble National Company Law Appellate Tribunal inter-alia observed that Section 14 of the Code deals with the moratorium and Section 14(1)(d) of the Code says that there would be a prohibition from the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor. However, explanation appended to Section 14(1) (d) says that with the prohibition of recovery of any property by an owner or lessor, a license, permit, registration, quota, concession, clearance or a similar grant or right either given by the Central Govt., State Govt. local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency but there would be a condition for its continuation if there is no default in payment of the dues of such license, permit, registration, quota, concession, clearance or a similar grant or right during the moratorium period. The similar grant or right has to be read in respect of the licence, permit, registration, quota, concession, clearance but it cannot be read as the premium amount or lease rent which has been so ordered by the Adjudicating Authority to be paid by the Appellant to the Respondent.

10. In the matter of *Ms. Ashish Ispat Private Limited Vs Primuss Pipes & Tubes Ltd.*, NCLAT held that when a withdrawal application u/s 12A of the Code is filed prior to constitution of CoC, the requirement of 90% vote of CoC is not applicable, and the Adjudicating Authority has to consider the application without requiring any approval from CoC. Approval of 90% shall be applicable only when Committee of Creditors is constituted and withdrawal application u/s 12A of IBC has been filed post that.

11. Supreme Court in the matter of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. & Ors.* held that:

- The AA has limited jurisdiction in the matter of approval of a resolution plan. In the adjudicatory process concerning a resolution plan under IBC, NCLT does not have scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by CoC.
- There is no scope for the NCLT or the NCLAT to proceed on basis of perceptions or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors.
- There is no prohibition in the scheme of IBC and CIRP Regulations, that CoC cannot simultaneously consider and vote upon more than one resolution plan at the same time for electing one of the available plans. i.e. CoC can vote upon multiple resolution plans at the same time.

12. The Supreme Court in the matter of *Lalit Kumar Jain Vs. Union of India & Ors*. upheld the validity of notification dated November 15, 2019 enforcing the provisions related to personal guarantor to corporate debtor under the Code. Approval of resolution plan of a corporate debtor undergoing CIRP does not per se operate as a discharge to its surety/guarantor of their liabilities under the contract of guarantee. The nature and extent of liability would depend upon the terms of guarantee.

13. In the matter of *Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited and Others,* Supreme Court held that:

- Any debt due to government (Central/State/Local Authority) including statutory dues is covered under the term "Creditor" and in any other case by the term "Other Stakeholders" as provided u/s 31(1) of IBC,2016 and hence an approved resolution plan is also binding on government.
- After the approval of Resolution Plan no surprise claim should flung upon the successful resolution applicant. Once a resolution plan is approved by an Adjudicating Authority, the claim forming part of Resolution Plan stands frozen and claims not forming part of Resolution Plan stands extinguished and no one would be entitled to initiate or continue any proceeding in respect of the claim which is not part of the approved Resolution Plan.
- An approved Resolution Plan is binding upon the Corporate Debtor, its employees, members, creditors, government (Central/State/Local Authority) and any other stakeholder.

14. In the case of *Vbuiltfine Properties Private Ltd(Appellant) vs. Registrar of Companies, Mumbai (Respondent) Company Appeal (AT) No.27 of 2023,* the appellant's name was struck of from the register of companies and an appeal for restoration of the name was filed by the Appellant before the NCLT. By the impugned order under challenge, NCLT directed the ROC Mumbai to restore the name of the company i.e., Vbuiltfine Properties Pvt Ltd, to the register of Registrar of Companies with imposition of cost of Rs. 5,00,000/- Appellant challenged the imposition of this huge cost.

National Company Law Appellate Tribunal in its judgement dated August 18, 2023 inter alia observed that ongoing through the aforesaid order it is difficult to infer as to under what circumstances the company petition was allowed and direction was issued for restoration of the name of the company along with imposition of costs.

It is evident from the impugned order that the company petition was preferred under Section 252(1) of the Companies Act, 2013. However, since the date of striking off the name of the company is not mentioned. It is difficult to infer as to whether the petition was filed within three years from the striking off the name of the company or not. The order does not reflect any plausible reason for passing an order for restoration. Similarly, nothing has been indicated as to under what circumstances the cost of Rs.5 lakhs was imposed.

On examination of aforesaid provision, it is evident that from the date of striking off the name of the company from the register of Registrar of Companies, one can prefer an appeal within a period of three years from the date of striking off the name of the company. In the order impugned date of striking off under Section 248(5) of Companies Act, 2013 has not been mentioned. On examination of the impugned order, it is evident that though date of striking off was not mentioned, the appeal was preferred after four years. The order on this issue appears to be completely vague. Moreover, if the NCLT was exercising its jurisdiction under Section 252(3) of the Companies Act, 2013, in such situation the appellant was required to satisfy the NCLT that on the date of striking off the company, the company was carrying on business or in operation. There was third condition for passing of the restoration order in case it was otherwise just for restoring the name of the company.

The order does not meet either of the three criteria under Section 252(3) of the Act. Moreover, since the appeal was preferred under Section 252(1) of the Companies Act, 2013 the learned NCLT was required to examine the appeal strictly in accordance with the provision under Section 252(1) of the Companies Act, 2013. In absence of exact date of striking off it would be difficult to approve the impugned order. Moreover, learned NCLT has imposed cost of Rs. 5 lakhs but no plausible reason has been given for imposing such cost. In such view of the matter, we are left with no option but to set aside the order and remit back the matter to the NCLT for passing order afresh after affording opportunity to both the parties i.e., Appellant and ROC.

****