GUIDELINE ANSWERS

JUNE 2024 EXAMINATION

CORPORATE RESTRUCTURING, INSOLVENCY, LIQUIDATION AND WINDING-UP

MODULE 2 PAPER 5

PROFESSIONAL PROGRAMME

(SYLLABUS 2017)

Question Paper Weblink	https://www.icsi.edu/media/webmodules/examination/june2024/435.pdf

PART-I

Answer to Question No. 1 (a)

Corporate Restructuring is the process of significantly changing a company's business model, management team or financial structure to address challenges and increase shareholder value.

Need and Scope of Corporate Restructuring:

- To enhance shareholders value.
- Deploying surplus cash from one business to finance profitable growth in another.
- Exploiting inter-dependence among present or prospective businesses.
- Risk reduction.
- Development of core-competencies.
- To obtain tax advantages by merging a loss-making company with a profit-making company.
- Revolution in information technology has made it necessary for companies to adopt new changes for improving corporate performances.
- To become globally competitive.
- To increase the market share.
- Convertibility of rupee has attracted medium-sized companies to operate in the global markets.
- Competitive business necessitated to have sharp focus on core business activities, to gain synergy benefits, to minimize the operating costs, to maximize efficiency in operation and to tap the managerial skill to the best advantage of the firm.
- By diversification of business activities, the minimization of business risk is possible and it enables the firm to achieve at least the minimum targeted rate of return.
- With the integration of sick unit into the successful unit, the adjustment of unabsorbed depreciation and write off of accumulated loss is possible and thereby the successful unit can have strategic tax planning.

Restructuring aims at improving the competitive position of an individual business and maximizing its contribution to corporate objectives. It also aims at exploiting the strategic assets accumulated by a business i.e., monopolies, goodwill, exclusivity through licensing, etc. to enhance the competitiveness advantages. Thus, restructuring helps in bringing an edge over competitors. In highly competitive world, cost cutting and value addition are very important to get highlighted.

Answer to Question No. 1 (b)

As per the SEBI (SAST) Regulations, 2011, where an Acquirer (with PAC), crosses the threshold limits prescribed in the Takeover Regulations, it shall make Public Announcement for the purpose of Open Offer to the shareholders of the Target Company. Obligations of the target company -

1. When a public announcement of an open offer for acquiring shares of a target company is made, the Board of Directors of the target company shall ensure that during the offer period, the business of the target company is conducted in the ordinary course consistent with past practice:
2. During offer period, (unless shareholders' special resolution by postal ballot) the Board of target company or its subsidiaries shall not:
    a) alienate any material assets whether by way of sale, lease, or otherwise or enter into any agreement therefore outside the ordinary course of business;
    b) effect any material borrowings outside the ordinary course of business;
    c) issue or allot any authorized but unissued securities entitling the holder to voting rights.
    d) implement any buy-back or effect any other change to capital structure of target company.
    e) enter into, amend or terminate any material contracts to which the target company or any of its subsidiaries is a party, outside the ordinary course of business, whether such contract is with a related party, within the meaning of the term under applicable accounting principles, or with any other person; and
    f) accelerate any contingent vesting of a right of any person to whom the target company or any of its subsidiaries may have an obligation, whether such obligation is to acquire shares of the target company by way of employee stock options or otherwise
3. In any general meeting of a subsidiary of the target company in respect of the matters referred to in the above point (2), the target company and its subsidiaries, if any, shall vote in a manner consistent with the special resolution passed by the shareholders of the target company.
4. Target Company is prohibited from fixing any record date for any corporate action on or after third working day prior to commencement of tendering period and until the expiry of the tendering period.
5. Target company shall furnish to the acquirer (within 2 working days from identified date), a list of shareholders as per the register of members of the target company containing names, addresses shareholding and folio number, but the acquirer shall reimburse reasonable costs payable by the target company to external agencies in order to furnish such information.
6. The Board of Directors of Target Company shall facilitate the acquirer in verification of shares tendered in acceptance of the open offer.

7. On receiving detailed public statement, the Board of Target Company shall constitute a Committee of Independent Directors to provide recommendations (with reasons) on the open offer. The Committee may seek external professional advice. The Committee shall provide written recommendations on the open offer to the shareholders of the Target Company Also, the recommendations shall be published in newspapers, and sent to stock exchange(s), Board and the Manager.
8. The Board of Directors of the target company shall make available to acquirers making competing offers, any information and co-operation provided to an acquirer who has made a competing offer.

9. Upon fulfilment by the acquirer, of the conditions required under applicable regulations, the board of directors of the target company shall without any delay register the transfer of shares acquired by the acquirer in physical form, whether under the agreement or from open market purchases, or pursuant to the open offer.

Answer to Question No. 1 (c)

Step 1:

Year	**Cash Flow**	**Discount Factor @ 20%**	**Present Value (PV) of Cash Flow (₹)**
1	700000	0.833	583100
2	900000	0.694	624600
3	1100000	0.578	635800
4	1300000	0.482	626600
5	1500000	0.401	601500
	Sum of PV cash flows		3071600

Step 2:

PV Terminal Value in year of exit

(₹) 1800000* 0.401 =721800

Step 3:

Total Present Value of cash flow of ABC Limited= Sum of PV Cash Flows + PV Terminal Value

= 3071600 + 721800

= (₹) 3793400

Answer to Question No. 1 (d)

A scheme of compromise or arrangement, that leads to either amalgamation, merger or demerger needs to be fair and reasonable and made in good faith, is fit for sanction by the Tribunal.

It was held in the case of *Sussex Brick Co Ltd* that although it might be possible to find faults in a scheme that would not be sufficient ground to reject it. In order to merit rejection, a scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence.

It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies with the basic requirements to the extent of 100 per cent. It is consistent view of the Courts that no scheme can be said to be fool proof and it is possible to find faults in a particular scheme but that by itself is not enough to warrant a dismissal petition for sanction of the scheme.

In the case of *Re Kami Cement & Industrial Co Ltd,* it was held that if the Court is satisfied of the scheme is fair and reasonable and in the interest of the general body of shareholders, there could be no scope for any provision favouring dissentients. For such a provision is not a sine qua non to sanctioning a fair and reasonable scheme, unless any special case is made out which warrants the exercise of court's discretion in favour of the dissentients.

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

Answer to Question No. 2 (a)

Securities and Exchange Board of India (Substantial Acquisition and Takeover) Regulations, 2011 (Takeover Regulations) obliges the Acquirer in case of open offer, to open an escrow account with a scheduled bank and deposit an amount equal to twenty-five per cent of the calculated consideration on the first five hundred crore rupees and on the balance consideration at ten per cent.

Such escrow account cannot be released except in the following manner:

1. The entire amount to the acquirer upon withdrawal of offer in terms of Regulation 23 of SAST Regulations as certified by the manager to the open offer.
2. An amount not exceeding ninety per cent to the special escrow account in terms of Regulation 21.
3. The balance (after transfer of cash to the special escrow account) to the acquirer but after thirty days after completion of payment to shareholders who have tendered their shares in acceptance of the open offer, as certified by the manager to the open offer as certified by the manager to the open offer.
4. The entire amount to acquirer on expiry of thirty days from the completion of payment of consideration to the shareholders who tendered for exchange of other secured instruments.
5. The entire amount to the manager to the open offer, in the event of forfeiture for non-fulfilment of any of the obligations under these regulations.

Answer to Question No. 2 (b)

Calculation of total earnings after merger:

Particulars	Soham Limited	Aham Limited	Total
Outstanding shares	5,00,000	2,50,000	
EPS	5	4	
Total earnings	25,00,000	10,00,000	35,00,000

(i) Calculation of EPS after amalgamation when exchange ratio is in proportion to the relative earnings per share of the two companies-

Total Number of shares after merger
= 5,00,000 + 2, 50,000 X 4/5
= 5,00,000 + 2,00,000
= 7,00,000

	Soham Limited	Aham Limited
EPS before merger	5	4
EPS after merger	35,00,000/7,00,000 = 5	EPS after merger * Exchange ratio on EPS basis = 5 * 4/5 = 4

Calculation of EPS when Exchange ratio is 1:2-
Total earnings after merger = Rs. 35,00,000
Total number of shares after merger = 5,00,000 + (2,50,000 * ½)
= 5,00,000 + 1,25,000
= 6,25,000

EPS after merger = 35,00,000 / 6,25,000
= Rs. 5.60

	Soham Limited	Aham Limited
EPS before merger	5	4
EPS after merger	35,00,000/6,25,000 = 5.60	EPS after merger * Exchange ratio on Share basis = 5.60 * 1/2 = 2.80

(ii) Impact of merger for the shareholders of the two companies under both options:

Under first option, when share exchange ratio is in proportion to relative earnings per share of the two companies, pre and post-merger EPS of shareholders of both the companies remain same.

Impact on shareholders of Soham Limited:

EPS before merger	5
EPS after merger	5.60
Increase in EPS	0.60

Impact on shareholders of Aham Limited:

EPS before merger	4
EPS after merger =5.60*1/2	2.8
Decrease in EPS	1.20

Answer to Question No. 2 (c)

Following are the standard guidelines for presenting an application or petition before NCLT prescribed in National Company Law Tribunal Rules, 2016 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016: -.

1. The petition/application being filed shall fall under the proper territorial jurisdiction of NCLT Bench.
2. The petition/application and all enclosures shall be legibly typewritten in English language. In case it is in some other Indian language, it shall be accompanied by a copy translated in English.
3. The petition/application/appeal/reply shall be printed in double line spacing on one side of the standard petition paper with an inner margin of about 4 cms width on top and with a right margin of 2.5cm left margin of 5 cm and duly paginated, indexed and stitched together in paper book form.
4. The petition/application shall be filed in prescribed form with stipulated fee in triplicate by duly authorized representative of the companies or by an advocate duly appointed in this behalf.
5. The petition shall also be accompanied by an index and memo of the parties.
6. The cause title of the petition/application shall be "Before the National Company Law Tribunal" and it shall also specify the Bench to which it is presented.
7. All the relevant provisions of the Companies Act, 2013/ NCLT Rules, 2016 shall be clearly mentioned in the petition/application.
8. The petition/application shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain a separate fact or point.
9. The foot of petition/application shall have name and signature of the authorized representative.
10. The name of the petitioner/applicant along with complete address, viz, the name of the road street lane and municipal division or ward, municipal door and other number of the house, the name of the town or village; the post office; postal district and pin code shall be mentioned in the petition/application.
11. The fax number, mobile number, valid email addresses of the petitioner / applicant shall also be mentioned.
12. Every interlineation, eraser or correction or deletion in petition/application shall be initialled by the party or his authorized representative.

13. The affidavit verifying the petition in Form NCLT-6 shall be drawn on non-judicial /stamp paper of requisite value duly attested by Notary public/Oath Commissioner.
14. Full name, parentage, age, description of each party, date, address and in case a party sues or being sued in a representative character, has been set out in accordance to Rule 20(5) of the NCLT Rules, 2016.
15. Petition/application/ appeal reply has been drawn in the prescribed form i.e., Form No. NCLT.1 with stipulated fee given in the Schedule of these rules. The fee is to be paid by way of demand draft /PO drawn in favour of the "The Pay & Accounts Officer, Ministry of Corporate Affairs, New Delhi" or can be paid through online at nclt.gov.in.
16. The documents attached with petition/application shall be duly certified by the authorized representative or advocate filing the petition or application.
17. The annexure to the petition/application shall be serially numbered.
18. The *Vakalatnama* shall bear court fee stamp.
19. The documents with regard to shareholding/paid-up capital/latest balance sheet of the petitioner/applicant shall be attached.
20. Document other than in English language shall be duly translated and accordingly a translated copy duly certified shall be attached with petition/application.

Or (Alternate Question to Q. No. 2)

Answer to Question No. 2A (i)

Yes, I do agree with the given statement. A business valuation involves analytical and logical application/analysis of historical/future tangible and intangible attributes of business.

- Valuation is a process to assess the worth of an enterprise or a business.
- In case of corporate restructuring through mergers, amalgamations, takeovers, etc., valuation assumed great importance due to determination of the transaction price.
- Valuation plays a vital role in deriving the share exchange (swap) ratio.
- Determining the value of company/business/share is a complicated, elaborative process.
- Valuation shall be exercised judiciously and diligently. However, it is a more a subjective than objective process, and depends on the skills and perceptions of the valuer/expert.
- It is an application of facts, figures, skills and insight of valuer. It is more an art than science.
- Business valuation involves analytical and logical application/analysis of past as well as future tangible and intangible aspects of business.

Preliminary study to valuation includes:

1. Purpose of valuation,
2. Goodwill/Brand name in the market,
3. Business environment of the entity to be valued,
4. Estimation/forecast of future cash flows as accurately as possible,
5. Is company listed on any stock exchange,

6. If listed, whether shares of the company are traded frequently?
7. The industry to which the concerned entity belongs to,
8. The industry P/E ratio, past and future growth rate,
9. Who are the competitors locally and globally?
10. Whether any similar valuation has been done recently?
11. The technology concerning the enterprise and its probability of obsolescence,
12. The accepted discounting rates,
13. Market capitalization aspects,
14. Identification of hidden liabilities through analysis of material contracts,
15. Last years audited balance sheets.

Answer to Question No. 2A (ii)

	Zen Limited	**Ken Limited**
Profit before Tax (₹)(cr)	20	14
Tax @ 30% (₹)(cr)	6	4.2
Profit after Tax (₹)(cr)	14	9.8
No. of shares(cr)	30	20
P/E ratio	12	10

(i) Market value of the companies

Zen Ltd.= PAT* P/E = 14*12= ₹168 cr

Ken Ltd. = 9.8*10= ₹98 cr

(ii) Value of original shareholders

	Zen Limited	**Ken Limited**
Market value of shares (₹) **(cr)**	168	98
No. of shares **(cr)**	30	20
Price of share i.e. value of original shareholder	168/30 = ₹ 5.6	98/20 =₹ 4.9

(iii) No. of shares after merger

	Zen Limited (cr)	**Ken Limited (cr)**
No. of shares	30	20 * 4 / 5 = 16

Price per share after merger

Combined PAT of entity (₹)	14+9.8=23.8cr
No. of shares after merger	30+16= 46 crores

PE ratio	12
Market value of combined entity	=23.8*12=₹ 285.6 cr
Price per share (after merger)	285.6/46=₹6.2087

Answer to Question No. 2A (iii)

- As per section 230 of the Companies Act. 2013, an application shall be made to Tribunal for sanctioning a scheme of amalgamation.
- The Tribunal has the power to sanction the scheme u/s 231 of the Companies Act, subject to approval in the shareholders meeting(s) and creditors' meeting(s). The resolution shall be passed in the respective meeting through dual majority as given under section 230(6).
- As per section 230(6) of the Companies Act, 2013, compromise or arrangement would require approval by a majority of persons representing three fourths (75%) in value of the creditors, or class of creditors or members or class of members, as the case may be.
- Once the required approval is received in the members and creditors meeting, the scheme of compromise or arrangement shall be sanctioned by the Tribunal. Once the scheme is approved by the Tribunal the same is binding on the company, all the creditors and members.
- In the given case, the proposed scheme was opposed by two shareholders holding 80% shares. Hence, it does not fulfil requirement of Section 230(6) and will not be approved by the Tribunal based upon the reports received from Scrutinizer and Chairman of the meeting.
- Moreover, it is given that A Ltd. was delisted in 2012 and hence it was not required to submit the scheme with SEBI, so observations, if any, from SEBI or stock exchanges were not required.
- The Board of A Ltd. may review the said scheme of arrangement and prepare a revised scheme of arrangement considering the observations of shareholders, if any, and present it for shareholder's approval.

Answer to Question No. 3(a)

Section 2 (s) of the Competition Act, 2002 defines the term “relevant geographic market” to mean a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

Section 2 (t) of the Competition Act, 2002 defines the “relevant product market” to mean a market comprising all those products or services which are regarded interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

Relevant market is the mix of relevant geographic market or relevant product market or both.

Competition (Amendment) Act, 2023 expands the definition of relevant product market to include the perspective of suppliers. As per revised definition "relevant product market" means a market comprising of all those products or services—

i) which are regarded as inter-changeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use; or
ii) the production or supply of, which are regarded as interchangeable or substitutable by the supplier, by reason of the ease of switching production between such products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

Answer to Question No. 3(b)

Amalgamation between Holding and Subsidiary Companies-Exemption from payment of Stamp Duty

The Central Government has exempted the payment of stamp duty on instrument evidencing transfer of property between companies limited by shares as defined in the Indian Companies Act, 1913, in a case:

i) where at least 90 percent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or
ii) where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 percent of the issued share capital of the other, or
iii) where the transfer takes place between two subsidiary companies each of which having not less than 90 percent of the share capital is in the beneficial ownership of a common parent company:

Provided that in each case a certificate is obtained by the parties from the officer appointed in this behalf by the local Government concerned that the conditions above prescribed are fulfilled.

Therefore, if property is transferred by way of order of the High Court in respect of the Scheme of Arrangement/Amalgamation between companies which fulfil any of the above mentioned three conditions, then no stamp duty would be levied provided a certificate certifying the relation between companies is obtained from the officer appointed in this behalf by the local Government (generally this officer is the Registrar of Companies).

A circular was issued in the year 1937 vide which exemption was granted on payment of Stamp Duty when there is an amalgamation/merger between holding and subsidiary company. Delhi High Court in the case of *Delhi Towers Ltd. Vs. GNCT of Delhi* made reference to this circular.

However, stamp duty being a state subject, the above would only be applicable in those States where the State Government follows the above stated notification of the Central Government otherwise stamp duty would be applicable irrespective of the relations mentioned in the said notification.

Answer to Question No. 3(c)

Mergers and takeovers involve payment of consideration for acquiring the properties/shares of the target company. The consideration depends on the target company valuation.

- Funding mergers and takeovers imply the modes of raising finance to service the corporate restructuring strategy
- Funds may be raised through internal sources such as Equity capital Preference Capital, accumulated reserves and profits.
- As per the Companies Act, 2013, an Indian company is permitted issue equity instruments with differential rights as to dividend and or voting Companies may issue non-voting shares
- Such issue gives companies an additional source of fund without dividend cost and without the obligation to repay, as these are other forms of the equity capital. Generally, promoters prefer such securities since there is no loss of control.

A company limited by shares may issue equity shares with differential rights subject to the following conditions:

1. There must be an authority in the Articles of Association of the company,
2. Obtain shareholders' approval through ordinary resolution in general meeting. Provided that where the equity shares of a company are listed on a recognized stock exchange, the issue of such shares shall be approved by the shareholders through postal ballot.

3. The equity capital with differential rights shall not exceed 74% of the total voting power,
   No default in filing annual accounts and annual returns for three years; immediately preceding the financial year in which it is decided to issue such shares;

4. No subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend

5. The company has not defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank that has become repayable or interest payable thereon or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund of the Central Government. Provided that a company may issue equity shares with differential rights upon expiry of five years from the end of the financial Year in which such default was made good.
6. The company has not been penalized by Court or Tribunal during the last three years of any offence under the Reserve Bank of India Act, 1934, the Securities and Exchange Board of India Act, 1992, the Securities Contracts Regulation Act, 1956, the Foreign Exchange Management Act, 1999 or any other special Act, under which such companies being regulated by sectoral regulators.
7. A company shall not convert its existing equity share capital with normal voting rights into equity shares with differential voting rights and vice versa.

Answer to Question No. 3(d)

The trend of cross border mergers increased recently. Cross border mergers have opened up vistas of opportunities. It enables an Indian company to utilise sophisticated levels of technical know-how offered by the foreign collaborator whereas enables the latter to utilise the large market and resources of India.

The benefits anticipated are:

- Expansion of markets
- Geographic and industrial diversification
- Technology transfer
- Avoiding entry barriers
- Industry consolidation
- Tax planning and benefits
- Foreign exchange earnings
- Accelerating growth
- Utilisation of material and labour at lower costs
- Increased customers base
- Competitive advantage.

And Challenges are -

- the risks regarding Tax implications
- Regulatory Landscape and
- Political scenario is to be tackled with confidence.
- Technological difference
- Strategic issues
- Overpayment in the deal
- Failure to integrate
- HR challenges.
- Legal issues in different countries
- Accounting challenges

Answer to Question No. 3(e)

Establishment of NCLT and NCLAT have created plenty of opportunities for Practicing Company Secretaries. Company Secretaries are authorized to appear before the NCLT/NCLAT. Following are the areas of activities for Company Secretary in Practice:

1. Merger/Amalgamation/Compromise - A whole new area of practice opened up for Company Secretary in Practice with respect to advising and assisting corporate sector on merger, amalgamation, demerger, reverse merger, compromise and arrangements. The role of CS starts from the conceptual to implementation level. Company Secretaries in Practice will be able to render services in preparing schemes, appearing before NCLT/NCLAT for approval of schemes and post-merger formalities.
2. Revival of Companies - Where a Registrar of Companies (ROC) have struck off the name of a company u/s 248, a practicing company secretary may assist in revival of such company.

3. Winding up - National Company Law Tribunal has also been empowered to pass an order for winding up of a company. Therefore, Practicing Company Secretaries may represent the winding-up case before the Tribunal. Now Practicing Company Secretaries have been permitted to act as Liquidator in case of winding-up by the Tribunal.
4. Reduction of Capital-As per Section 66 of the Companies Act, 2013, subject to confirmation by the Tribunal, a company limited by shares or a company limited by guarantee and having a share capital can reduce its share capital. Practicing Company Secretaries will be able to represent cases of reduction of capital before the Tribunal.
5. Oppression and mismanagement- Sections 241 and 244 of the Companies Act, 2013 deals with the cases of Oppression and Mismanagement. Section 241 deals with making an application to Tribunal for relief in cases of Oppression, etc. and section 244 describes the Right to apply under section 241.
6. Insolvency and Bankruptcy cases- Insolvency practice is a new field of activity for professionals while improving the quality of intervention at all levels during rehabilitation/winding-up liquidation proceedings. Law has recognized the Insolvency Practitioners as Administrators, Liquidators, Turn around Specialists Valuers, etc. Greater responsibility and authority have been given to Insolvency Practitioners under the supervision of the Tribunal to maximize resource use and application of skills.
7. Company Secretary in Practice as Member of NCLT- A Practicing Company Secretary can be appointed as a Technical Member of NCLT, provided he has 15 years working experience as secretary in whole-time practice.

PART-II

Answer to Question No. 4 (a)

Hon'ble Apex Court in the case of *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & ors,* while upholding the constitutional validity of the Code made, inter alia, important ruling with regard to the role of the Committee of Creditor in the CIR process. It had emphasized the primacy of the commercial wisdom of the committee of Creditors in the resolution process as to whether to rehabilitate the corporate debtor or not by accepting a particular resolution plan. It also states that prior to approving the resolution plan, the Committee is required to assess the "feasibility and viability" of the resolution plan, which takes into account" all the aspects of the resolution plan, including the manner of distribution of funds among various class of creditors." In this regard, the Committee is free to negotiate with the resolution applicant by suggesting modifications in the commercial proposal on a case-to-case basis.

Further, in the case of Kalparaj *Dharamshi and another vs Kotak Investment Advisors Ltd and another,* the Supreme Court observed that the evaluation of proposals to keep the entity as a going concern, including decisions about the sale of business or units, restructuring of debt, etc., are required to be taken by the Committee of the Financial Creditors. The Apex Court further observed that it has been provided, that the choice of the solution to keep the entity as a going concern will be voted upon by the Committee and there are no constraints on the proposals that the resolution professional can present to the Committee. It was held that the NCLT or the NCLAT cannot interfere with the

commercial wisdom of the Committee of Creditors, except within the limited scope under Sections 30 and 31 of the Code. It was further held that the commercial wisdom of the Committee has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the Code. The Court further 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. It was further held that the opinion expressed by the Committee after due deliberations in the meetings through voting, as per voting shares, is a collective business decision.

In view of the above, NCLT cannot reject a Resolution Plan on the basis of viability thus questioning the commercial wisdom of the Committee of Creditors as long as the Resolution Plan is within the scope of section30 and 31 of the Insolvency & Bankruptcy Code.

Answer to Question No. 4 (b)

According to section 5(24) of the Insolvency & Bankruptcy Code, a "related party", in relation to a corporate debtor, means

a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;
b) key managerial personnel of the corporate debtor or a relative of key managerial personnel of the corporate debtor;
c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner,
d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;
e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;
j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement,
k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;

l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor,

m) any person who is associated with the corporate debtor on account of-
   i) participation in policy making processes of the corporate debtor; or
   ii) having more than two directors in common between the corporate debtor and such person; or
   iii) interchange of managerial personnel between the corporate debtor and such person; or
   iv) provision of essential technical information to, or from, the corporate debtor

Explanation to section 5(24A) of the Insolvency & Bankruptcy Code provides
(a) "relative", with reference to any person, means anyone who is related to another, in the following manner, namely: - (iv) father,

In light of definition of relative and clause (e) above, ABC Limited is a "related party" of HRK Limited as Mr. X is a director in HRK Limited and Mr. X together with Mr. Y (father) holds more than 2 percent of the equity share capital of ABC Limited.

Answer to Question No. 4(c)

Section 54N of the Insolvency & Bankruptcy Code dealing with termination of pre-packaged insolvency resolution process. It provides that:

1. Where the resolution professional files an application with the Adjudicating Authority, -
   a) under the proviso to sub-section (12) of section 54K; or
   b) under sub-section (3) of section 54D,

   the Adjudicating Authority shall, within thirty days of the date of such application, by an order, -
   i) terminate the pre-packaged insolvency resolution process; and
   ii) provide for the manner of continuation of proceedings initiated for avoidance of transactions under Chapter III or proceedings initiated under section 66 and section 67A, if any.
2. Where the resolution professional, at any time after the pre-packaged insolvency commencement date, but before the approval of resolution plan under sub-section (4) or sub-section (12), as the case may be, of section 54K, intimates the Adjudicating Authority of the decision of the committee of creditors, approved by a vote of not less than sixty-six per cent of the voting shares, to terminate the pre-packaged insolvency resolution process, the Adjudicating Authority shall pass an order under sub-section (1).
3. Where the Adjudicating Authority passes an order under sub-section (1), the corporate debtor shall bear the pre-packaged insolvency resolution process costs, if any.

(4) Notwithstanding anything to the contrary contained in this section, where the Adjudicating Authority has passed an order under sub-section (2) of section 54J and the prepackaged insolvency resolution process is required to be terminated under sub-section (1), the Adjudicating Authority shall pass an order —

(a) of liquidation in respect of the corporate debtor as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1) of section 33; and

(b) declare that the pre-packaged insolvency resolution process costs, if any, shall be included as part of the liquidation costs for the purposes of liquidation of the corporate debtor.

Answer to Question No. 4(d)

The preamble to the Insolvency and Bankruptcy Code, 2016 (IBC) gives a thrust to provide an effective legal framework for timely resolution of insolvency and bankruptcy. Hence, Section 12 of IBC lays down a time limit for completion of insolvency resolution process.
As per Section 12 (1) of IBC, normally any insolvency resolution process needs to be completed within one hundred and eighty days from the date of commencement of Corporate Insolvency Resolution Process (CIRP)

However, as expected no one and even legislation can bind the time. Keeping this in view Section 12 (2) of IBC enables the resolution professional can seek extension after obtaining instructions by a resolution passed at a meeting of the Committee of Creditors by a vote of sixty-six per cent of the voting share.

Section 12 (3) of IBC enables the Adjudicating Authority to consider such application to grant extension of CIRP duration for further maximum ninety days. It is provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

It is further provided that the CIRP shall mandatorily be completed within three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

Though, the word 'mandatorily' has been struck down by the Court in the decision in Committee of Creditors of Essar Steel India Limited, Supreme Court has only balanced the interest of all concerned, by permitting an enlargement of the time, only in those cases, where the delay occurs not on account of the fault of the players concerned and it is based on the principle of *actus curiae neminem gravabit*, which means that the act of Court shall prejudice no one. The Court has not undermined the timeline fixed by the Legislature and, in fact, it has underlined the importance of conforming to the time limit. Speed, indeed, continues to be of the essence of the Code.

Answer to Question No. 5(a)

The main purpose of SARFAESI Act, 2002 is to enable and empower the secured creditors to take possession of their securities and to deal with them, without the intervention of Court.

- The secured creditors may also authorize any securitization or reconstruction company to acquire financial assets of any bank or financial institution.
- Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 provides for assistance for taking

possession of secured asset from the Chief Metropolitan Magistrate or the District Magistrate.

- The Chief Metropolitan Magistrate or the District Magistrate is empowered to facilitate taking possession of secured asset. The possession of secured asset may be for sale or transferring the asset for recovery of funds.
- For the purpose of taking possession or control of secured assets, the secured creditor may make a written application to the Magistrate (within jurisdiction).
- Such application shall be supported by an affidavit with details such as total financial assistance provided, amount due, nature of security interest existing, proof of default, status of NPA, copy of notice sent to the defaulting party etc.
- On receiving such application & affidavit, the Magistrate shall pass necessary orders (in 30 days) for taking possession of such asset and related documents. Due to any reasons duly written, such order cannot be passed within 30 days, the same may be sent within 60 days.
- The Magistrate may authorize any subordinate officer to take possession of the secured assets and forward the same to the secured creditor.
- The Magistrate is empowered to use force, in case of any wrongful resistance. Any action or order of the Magistrate is not questionable in any court or before any authority.

Answer to Question No. 5(b)

The Adjudicating Authority, in exercise of powers may order for liquidation of the Corporate Debtor. However, keeping in view liquidation is the last resort because revival is the priority for the economy.
Section 33 of the Insolvency and Bankruptcy Code, 2016 provides that the Adjudicating Authority shall pass an order requiring the corporate debtor to be liquidated if:

1) No resolution plan is received under section 30(6) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast-track corporate insolvency resolution process under section 56;
2) the resolution plan under section 31 is rejected by the Adjudicating Authority for non-compliance of the requirements specified therein;
3) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent. of the voting share to liquidate the corporate debtor;
4) Where the resolution plan approved by the Adjudicating Authority under section 31 or under sub-section (1) of section 54L, is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, makes an application to the Adjudicating Authority for a liquidation order and such a contravention is determined by the Adjudicating Authority.

Answer to Question No. 5(c)

Section 59 (6) of the Insolvency and Bankruptcy Code, 2016 provides that the provisions of sections 35 to 53 of Chapter III and Chapter VII shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary.
Though the procedure to be followed for voluntary liquidation proceedings under Chapter V is largely similar to the procedure to be followed for insolvent liquidation under Chapter III of Part II of the Code yet there are marked differences:

1. Section 59 of the Code provides that a corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of Chapter V of the Code whereas Liquidation is ordered under section 33 of the Code by the Adjudicating Authority in case of corporate debtors who have committed default and whose Corporate Insolvency Resolution Process fails.
2. Declaration of solvency and liquidation not intended to defraud any person shall be given by the majority of directors in case of voluntary liquidation whereas Liquidation is ordered in case of corporate debtor which has committed default of threshold limit.
3. Date of passing of special resolution of the members of the corporate debtor approving voluntary liquidation shall be deemed to be the date of commencement of voluntary liquidation whereas the date on which the Adjudicating Authority passes an order of liquidation under section 33 shall be deemed to be the date of commencement of Liquidation.
4. Liquidator is appointed by the Adjudicating Authority for liquidation under section 33 of the Code while Liquidator is appointed by the corporate debtor in case of voluntary liquidation under section 59 of the Code.
5. The Adjudicating Authority gives order under section 33 and then Liquidation commences while in case of Voluntary Liquidation, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person after the affairs of the corporate person have been completely wound up, and its assets completely liquidated,

Answer to Question No. 5(d)

The Insolvency and Bankruptcy Code, 2016 was created to benefit the Financial and Operational Creditors, through the insolvency resolution process. However, it was observed that existing promoters of the Corporate Debtor were directly or indirectly acquiring stake in their own assets through the resolution plan, at a big discount.
Hence, through the resolution process, the existing promoters were regaining control over their assets (directly or indirectly) after a huge hair-cut (discount) from lenders. In other words, re-purchase the same assets at a much lower cost and getting a back-door entry into their company.

To plug this loophole, the IBC was amended though the ordinance of the President of India. The amendment inserted section 29A, which provides for persons ineligible to be a Resolution Applicant. The newly added section 29A declares certain persons ineligible to be a resolution applicant and prohibits such persons from submitting a resolution plan.

As per Section 29A of the Insolvency and Bankruptcy Code, 2016 following persons are not eligible to submit a resolution plan -

(a) applicant is an undischarged insolvent,

(b) wilful defaulters (as defined by RBI and Banking Regulation Act, 1949),

(c) persons whose accounts are classified as NPA for one year or more and are unable to settle their overdue amount (incl. interest), at the time of submission of the resolution plan,

(d) persons convicted for any offence punishable with imprisonment for two years or more (for offences of XII Schedule) or for seven years or more (under any other law) and a period of two years has not been expired from the date of his release from imprisonment

(e) persons disqualified to act as director under the Companies Act, 2013,

(f) persons prohibited by SEBI, from trading in securities or accessing the securities market,

(g) person who has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction (PUFE) has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code except when such PUFE transactions has taken place prior to acquisition of such corporate debtor by resolution applicant and resolution applicant has not contributed in those transactions.

(h) persons who have executed any guarantee to a creditor for the corporate debtor w.r.t. which CIRP application initiated by such creditor has been admitted by the Adjudicating Authority and such guarantee has been invoked by the creditor and remains unpaid in full or part

(i) persons disqualified by any law of other country, for the conditions mentioned in (a) to (h),

(j) has connected person not eligible under clauses mentioned in (a) to (i).

Answer to Question No. 5(e)

Section 36 (3) of the Insolvency and Bankruptcy Code, 2016 (IBC) specifies the assets of the Corporate Debtor that should be taken into custody as Liquidation Estate.

a) In a similar way, Section 36 (4) of IBC illustrates the following assets which shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation assets owned by a third party which are in possession of the corporate debtor, including-
    i) assets held in trust for any third party;
    ii) bailment contracts;
    iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;
    iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
    v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;
d) assets of any Indian or foreign subsidiary of the corporate debtor; or
e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

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

Answer to Question No. 6(a)

Section 24 of the Insolvency and Bankruptcy Code, 2016 (IBC) lays down the procedure for conducting the meetings of the Committee of Creditors (COC).

The resolution professional shall give notice of each meeting of the committee of creditors to:

a) members of committee of creditors, including the authorised representatives referred to in sub sections (6) and (6A) of section 21 and sub-section (5),
b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be,
c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten percent of the debt [Section 24(3)].

The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings. The absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

Section 21of the Code states that the committee of creditors shall comprise all financial creditors of the corporate debtor. It is provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors

Answer to Question No. 6(b)

A debtor may either personally or through a Resolution Professional may apply for "fresh start process" only on fulfilling specified conditions. Section 80 of the Insolvency and Bankruptcy Code, 2016 states that a debtor who is unable to pay his debt, if conditions are fulfilled, shall be entitled to make an application for a fresh start for discharge of his qualifying debt.

"Qualifying Debt" means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time but does 'not' include:

1. An excluded debt;
2. A debt to the extent it is secured;

3. Any debt which has been incurred three months prior to the date of the application for fresh start process.

"Excluded debt" means-

1. Liability to pay fine imposed by a court or tribunal;
2. Liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
3. Liability to pay maintenance to any person under any law for the time being in force;
4. Liability in relation to a student loan; and
5. Any other debt as may be prescribed.

Answer to Question No. 6(c)

Part III of the Insolvency and Bankruptcy Code, 2016 (IBC) provides separate insolvency resolution process for individuals/partnership firms.

- Application to Debt Recovery Tribunal (DRT) for initiating Insolvency Resolution Process may be made by a creditor or the debtor (individual or firm) who has committed default. Such application may be made either personally or through a resolution professional.
- The Debtor shall prepare a Repayment Plan, in consultation with the Resolution Professional. The Repayment plan consists of justification for preparation of repayment plan and reasons on the basis of which the creditors may agree upon the plan.
- It shall be noted that the creditors are not involved in the preparation of the repayment plan. However, creditors have the right to approve, reject or modify the repayment plan.
- The Resolution Professional shall verify the repayment plan for its validity and legal compliance. Further, the Resolution Professional may summon a meeting of creditors to consider the plan.
- Where creditors' meeting is needed, the Resolution Professional shall consider the convenience of creditors in fixing the date and venue of the meeting of the creditors (not less than 14 days and not more than 28 days from the date of submission of report).
- The Resolution Professional shall conduct the meeting of creditors. In the meeting, the creditors may decide to approve, modify or reject the repayment plan. Where modifications are suggested by the creditors, the Resolution Professional shall ensure that consent of the debtor is obtained for each modification.
- A creditor shall be entitled to vote at every meeting of the creditors in respect of the repayment plan as per the voting share assigned to him. A creditor shall not be entitled to vote in respect of a debt for an indeterminate amount.
- However, a creditor shall not be entitled to vote in a meeting of the creditors if he-
  - is not a creditor mentioned in the list of creditors; or
  - is an associate (i.e., related party) of the debtor.

OR (Alternate Question to Q. No. 6)

Answer to Question No. 6A (i)

The Insolvency and Bankruptcy Board of India (IBBI) framed IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP) to regulate insolvency resolution process. Corporate Restructuring process may be governed by the Regulation 37 of the CIRP Regulations. Measures, which the resolution plan may provide, for insolvency resolution of the corporate debtor for maximization of value of its assets including but not limited to the following:

(a) transfer of all or part of the assets of the corporate debtor to one or more persons;
(b) sale of all or part of the assets whether subject to any security interest or not;
(ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;
(c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;
(ca) cancellation or delisting of any shares of the corporate debtor, if applicable;
(d) satisfaction or modification of any security interest
(e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;
(f) reduction in the amount payable to the creditors;
(g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;
(h) amendment of the constitutional documents of the corporate debtor;
(i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;
(j) change in portfolio of goods or services produced or rendered by the corporate debtor,
(k) change in technology used by the corporate debtor; and
(l) obtaining necessary approvals from the Central and State Governments and other authorities.

Regulation 37 of the CIRP Regulations was amended and clauses (ba), and (ca) were inserted facilitating corporate restructuring such as merger, demerger or amalgamation of the Corporate Debtor and cancellation or delisting of any shares, if applicable.
Section 5(26) of the Code defines “resolution plan” which means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. It is provided in the Explanation to the definition that for removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger

Therefore, a resolution plan can include corporate restructuring of the corporate debtor as part of the corporate insolvency resolution process.

Answer to Question No. 6A (ii)

Insolvency & Bankruptcy Code, 2016 (IBC) has enabling provisions to consider the cases of Cross Border insolvency matters involving corporate persons in India and their counter parts in any foreign nation.

Sections 234 and 235 of IBC make provisions to deal with cross border insolvencies. Section 234 of IBC empowers the Central Government to enter into agreements with other countries to deal with or resolve situations pertaining cross border insolvency. The current cross border insolvency framework in India is dependent on India entering bilateral agreements with other countries which is a long-drawn process requiring time consuming negotiations.

Section 235 requires Adjudicating Authority to file Letter of request to court or authority of a country of competent for cross border insolvency as follows:
(1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.
(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such
request.

Jet Airways (India) Ltd Vs State Bank of India & anr is the first case touching the realm of cross border insolvency. In the instant case, Jet Airways (India) Ltd was subjected to parallel insolvency proceedings in India as well as in Netherlands.

Answer to Question No. 6A (iii)

Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 makes provisions for the examination and registration of Insolvency Professionals who can be appointed as an Interim Resolution Professional (IRP), Resolution Professional (RP), Liquidator or Voluntary Liquidator under relevant regulations.

According to Regulation 4 of the IBBI (Insolvency Professionals) Regulations, 2016, 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 regulations 5 or 9 of the IBBI (Insolvency Professionals) Regulations, 2016, 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 order; 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.

****