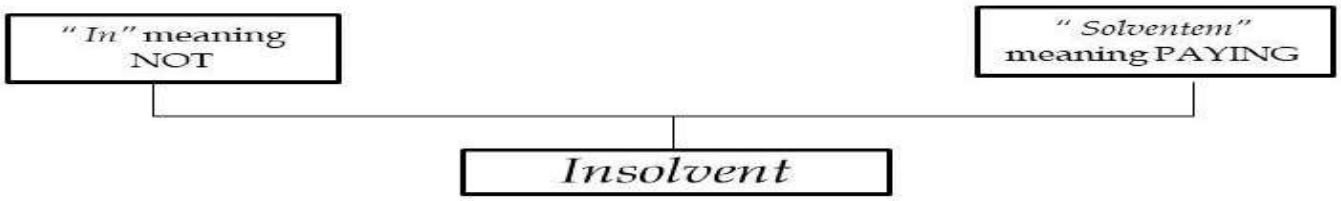
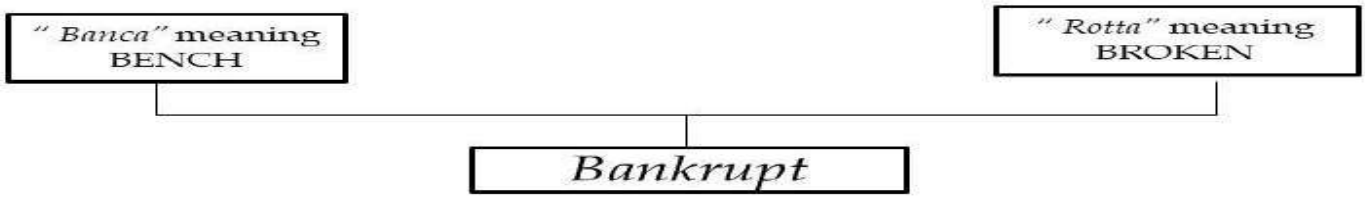
INSOLVENCY AND BANKRUPTCY CODE, 2016 - INTRODUCTION

➢ WHAT IS INSOLVENCY? HOW IS IT DIFFERENT FROM BANKRUPTCY



Insolvent means a person who is unable to pay his/her/its debts as they become due in the ordinary course of business. Insolvency is "*the state of one whose assets are insufficient to pay his debts.*"



The word *Bankruptcy* has its roots in the trade that was carried out on **Ponte Vecchio**, a medieval segmental arch bridge, in Florence, Italy. In medieval Italy, if a banker, who conducted his marketplace transactions on a bench, was unable to meet business obligations and was in debt, his bench was broken in a symbolic show of failure and his inability to continue.

Insolvency	Bankruptcy
• Insolvency is the State of not being able to repay one's debts • It is merely a situation and can be used in respect of individuals as well as corporates.	• Bankruptcy is the legal status accorded to people • It is a formal declaration of insolvency in accordance with the law of the land

Bankruptcy	Liquidation
• Section 79(4) of the Insolvency and Bankruptcy Code, 2016 defines the term "bankruptcy" as the	• Liquidation means closure or winding up of a corporation or an incorporated entity through legal process.

state of being bankrupt. • Under the IB Code, 2016, "bankrupt" means ✓ a debtor who has been adjudged as bankrupt under section 126 ✓ each of the partners of a firm, where a bankruptcy order under section 126 has been made against a firm ✓ any person adjudged as an undischarged insolvent.	• In liquidation process, the assets of the corporate body are sold and its liabilities are discharged • Liquidation results in the dissolution of the company by virtue of which, the company ceases to exist.

➢ WHY NEW LAW?

Following are the reasons that can be attributed to the need of a new law for insolvency in India –

- ✓ There were multiple overlapping laws and adjudicating forums dealing with financial failure and insolvency of companies and individuals
- ✓ The framework did not provide the lenders an effective and timely way of recovery or restructuring of defaulted assets and caused undue strain on the Indian credit system.
- ✓ Individual bankruptcy and insolvency was dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920, which are both about a century old legislations.
- ✓ The liquidation of companies was handled under various laws and different authorities.
- ✓ None of the laws provided for a strict time frame within which the process to resolve insolvency was to be completed.

Keeping in mind these shortcomings of the previous legislation, the Insolvency and Bankruptcy Code, 2016 was enacted with an objective to **"consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner."**

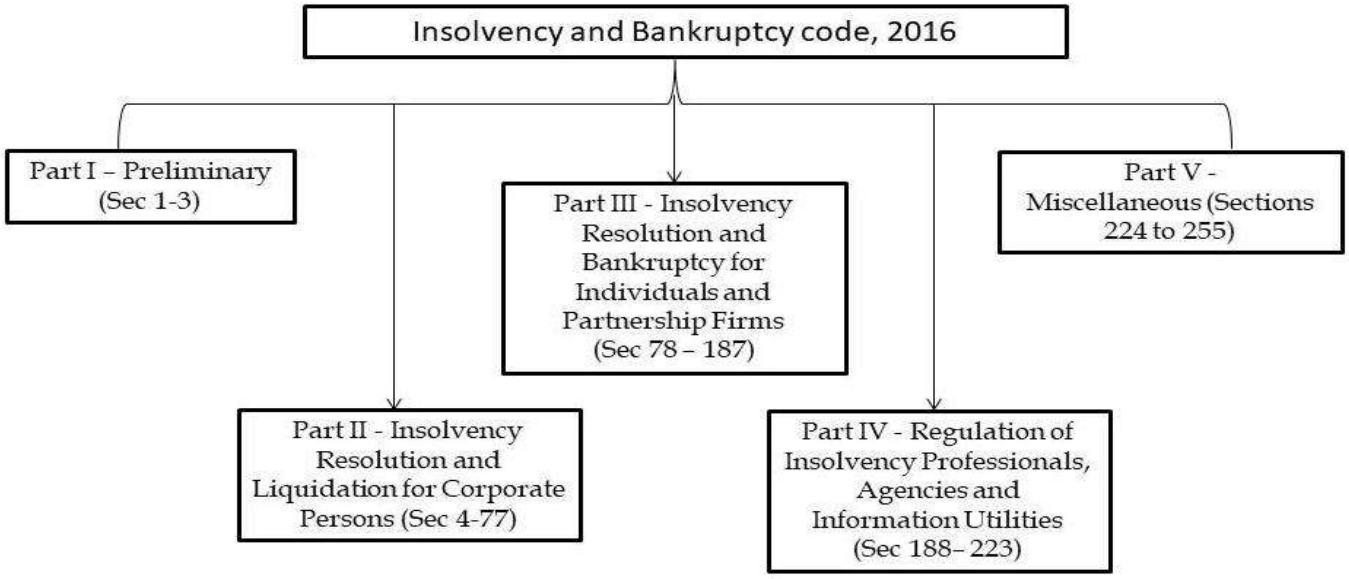
➢ KEY OBJECTIVES OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

- ✓ To consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals
- ✓ To provide for a time bound insolvency resolution mechanism
- ✓ To ensure maximisation of value of assets
- ✓ To promote entrepreneurship
- ✓ To increase availability of credit
- ✓ To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues
- ✓ To establish an Insolvency and Bankruptcy Board of India as a regulatory body
- ✓ To provide procedure for connected and incidental matters.

✓

➢ ORGANISATION OF THE CODE

The Insolvency and Bankruptcy Code, 2016 consists of total **255 sections** organised in **5 Parts**.



➢ THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

IBBI is a body corporate having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

Powers and Functions of the Board –

a. Regulation of Information Utilities;
b. Regulation of Insolvency Professional Agencies and Insolvency Professionals;
c. Regulation making in specific areas about procedural details in the insolvency and bankruptcy process & data collection, research and performance evaluation;
d. Regulating all matters related to insolvency and bankruptcy process.
e. Setting out eligibility requirements of insolvency intermediaries i.e., Insolvency Professionals, Insolvency Professional Agencies and Information Utilities.
f. Regulating entry, registration and exit of insolvency intermediaries.
g. Making model bye laws for Insolvency Professional Agencies.
h. Setting out regulatory standards for Insolvency Professionals.
i. make model bye-laws to be to adopted by insolvency professional agencies etc.

➢ INSOLVENCY PROFESSIONALS (IP)

Insolvency Professionals (IPs) are required to act as intermediaries in the insolvency resolution process. They are a class of *regulated but private professionals* having minimum standards of professional and ethical conduct.

Under the Act, a resolution professional has to –

a. Be a member of any Insolvency Professional Agency (IPA)
b. Be registered as an Insolvency Professional with the IBBI

The IBBI has framed the **IBBI (Insolvency Professional) Regulations, 2016** to regulate the working of Insolvency Professionals

➢ INSOLVENCY PROFESSIONAL AGENCIES (IPA)

Insolvency Professional Agencies are designated to regulate Insolvency Professionals. Their main function is to conduct examinations to enrol Insolvency Professionals and enforce a code of conduct for their functioning.

Currently, there are 3 IPAs registered with the IBBI. They are –

a. ICSI Insolvency Professional Agency.
b. Insolvency Professional Agency of Institute of Cost Accountants of India.
c. Indian Institute of Insolvency Professional of ICAI.

To regulate the working of Insolvency Professional Agencies, IBBI has framed the following Regulations -

a. The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016.

➢ INFORMATION UTILITIES

The main duty of the Information Utilities (IUs) is to collect, collate, authenticate and disseminate financial information. The purpose of such collection, collation, authentication and dissemination financial information of debtors is to facilitate swift decision making in the resolution proceedings.

The Insolvency and Bankruptcy Board of India has framed the **IBBI (Information Utilities) Regulations, 2017.**

➢ ADJUDICATING AUTHORITY

The IB Code, 2016 provides for two Adjudicating Authorities. They are –

a. For Corporate Persons – National Company Law Tribunal
b. For Individuals and Firms – Debt Recovery Tribunal

The Jurisdiction of the Civil Court shave been explicitly excluded by virtue of Section 63 as well as Section 180 of the Code.

➢ KEY DEFINITIONS AND CONCEPTS

Sections **3, 5 and 79** of the Insolvency and Bankruptcy Code, 2016 define important terms used in the Code.
Section 3 - General Important Terms
Section 5 - Terms relating to Insolvency Resolution and Liquidation for Corporate Persons covered in Part II.
Section 79 - Terms relating to Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms discussed in Part III.

➢ *Important Definitions under Section 5-*

"**Corporate Applicant**" means –
(a) corporate debtor; or
(b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
(d) a person who has the control and supervision over the financial affairs of the corporate debtor.

"**Financial Creditor**" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to [Section 5(7)].

"**Financial Debt**" means a debt along with interest, if any, and includes –
(a) money borrowed against the payment of interest;
(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
(c) any amount raised pursuant to the issue of bonds, notes, debentures, loan stock or any similar instrument;
(d) the amount of any liability in respect of any lease or hire purchase contract;
(e) receivables sold or discounted other than any receivables sold on nonrecourse basis; (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation – For the purposes of this sub-clause,

(i) **any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and**

(ii) **the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016**

Important Case Laws –

1) Col. Vinod Awasthy V/s. AMR Infrastructures Ltd (NCLT) – Homebuyers Not Operational Creditors.

2) Nikhil Mehta and Sons v. AMR Infrastructure Ltd. (NCLT) – Homebuyers Not Financial Creditors

"**Initiation Date**" means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process [Section 5(11)].

"**Insolvency Commencement Date**" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be

[Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority]

"**Insolvency Resolution Process Costs**" means –

(a) the amount of any interim finance and the costs incurred in raising such finance;

(b) the fees payable to any person acting as a resolution professional;

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

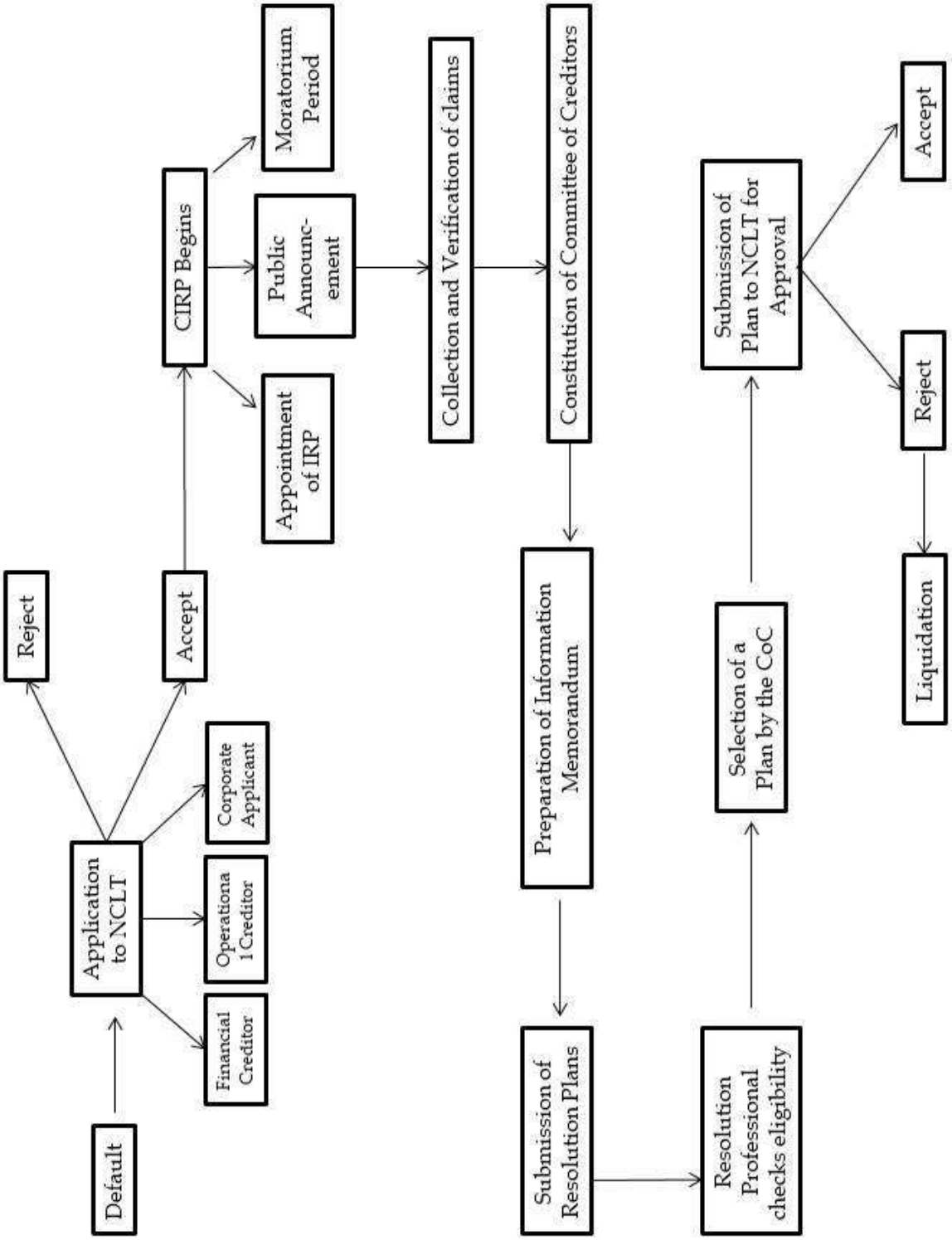
(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and

(e) any other costs as may be specified by the Board [Section 5(13)].

"**Operational Creditor**" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred [Section 5(20)].

"**Operational Debt**" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority [Section 5(21)].

CORPORATE INSOLVENCY RESOLUTION PROCESS


Default
Application to NCLT
Financial Creditor
Operational Creditor
Corporate Applicant
Reject
Accept
CIRP Begins
Moratorium Period
Public Announc-ement
Appointment of IRP
Collection and Verification of claims
Constitution of Committee of Creditors
Preparation of Information Memorandum
Submission of Resolution Plans
Resolution Professional checks eligibility
Selection of a Plan by the CoC
Submission of Plan to NCLT for Approval
Accept
Reject
Liquidation

IBC, 2016 – PART II – CORPORATE INSOLVENCY RESOLUTION PROCESS

➢ PERSONS WHO MAY INITIATE A CIRP

Section 6 of the IB Code, 2016 provides for three categories of people who may initiate a CIRP against a Corporate Debtor. They are –

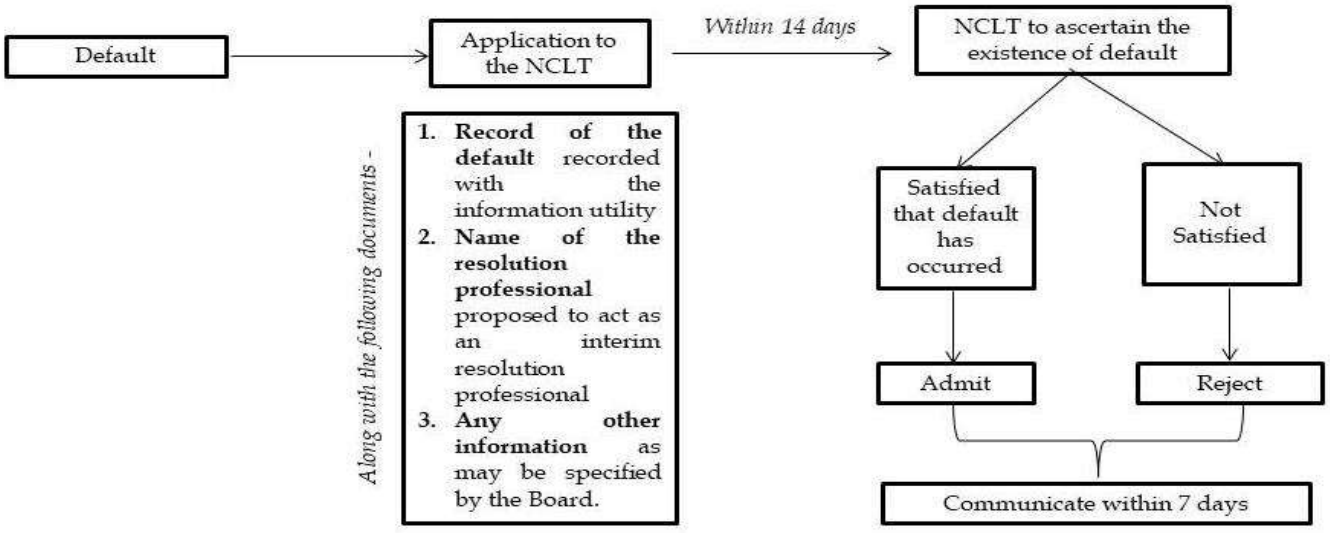
1. Financial Creditors
2. Operational Creditors
3. Corporate Applicant

➢ PROCEDURE FOR MAKING APPLICATION

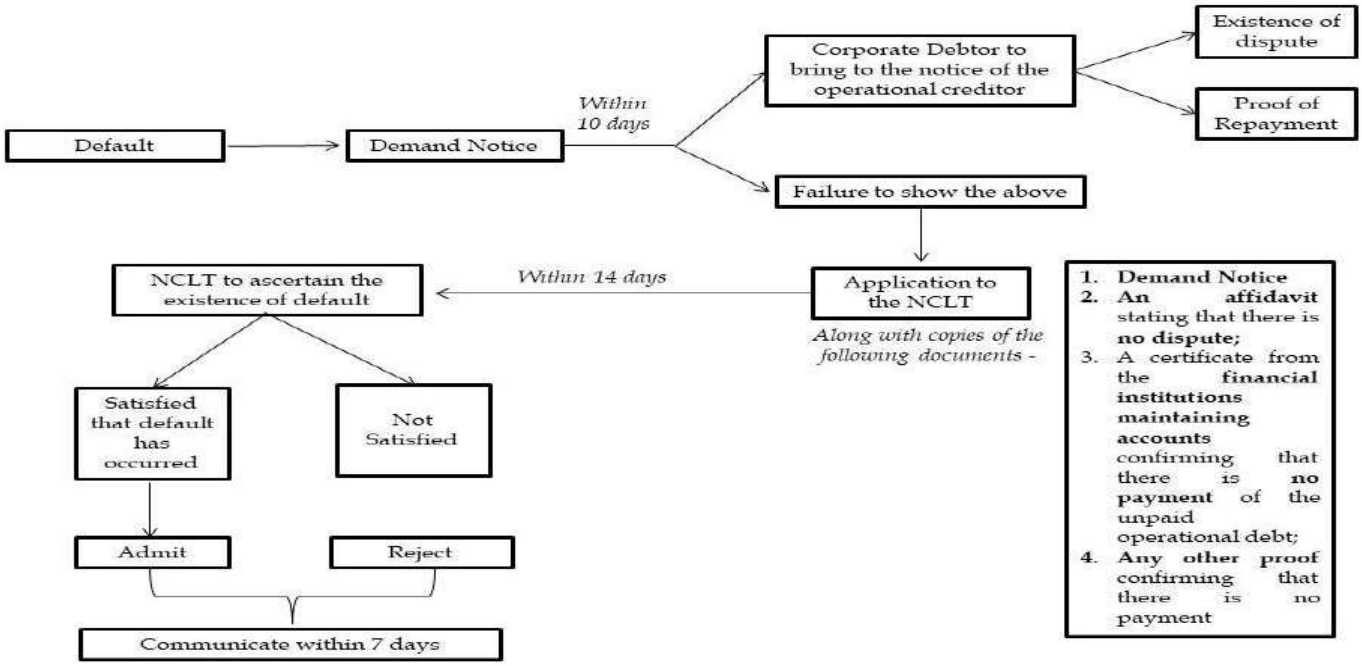
The IB Code, 2016 has envisaged the procedure for initiation of CIRP by different sets of people in different sections. These are -

1. Section 7 – Financial Creditors
2. Section 8 – Operational Creditors
3. Section 9 & 10 – Corporate Applicant

▪ Initiation of Corporate Insolvency Resolution Process by Financial Creditors (Section 7)



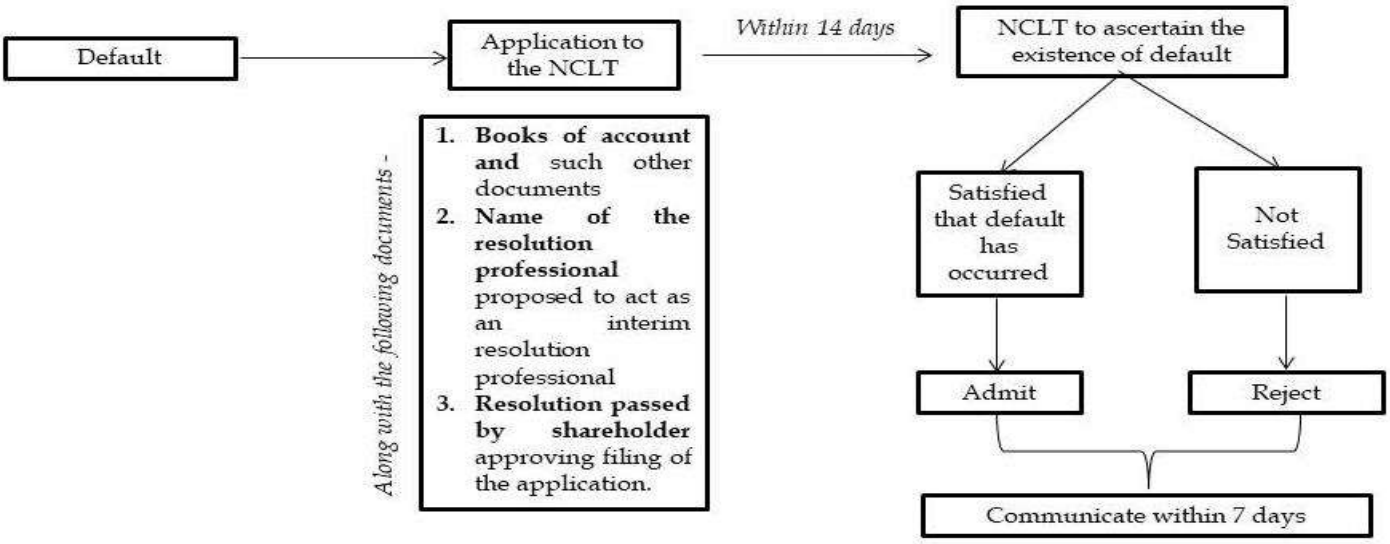
- **Initiation of Corporate Insolvency Resolution Process by an Operational Creditor (Section 8 and 9)**



NOTE –

- ✓ The Applicant under section 9 is not required to mandatorily suggest the name for the interim Resolution Professional.

- **Initiation of Corporate Insolvency Resolution Process by the Corporate Applicant (Section 10)**



NOTE - The Corporate Applicant can only initiate the corporate insolvency resolution process upon the occurrence of a default and not on mere likelihood of inability to pay debts.

➢ PERSONS NOT ENTITLED TO MAKE APPLICATION – SECTION 11

The following persons re disentitled from making an application for the initiation of CIRP against a Corporate Debtor –

1. a corporate debtor undergoing a corporate insolvency resolution process;
2. a corporate debtor having completed a CIRP twelve months preceding the date of making of the application;
3. a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of the application;
4. a corporate debtor in respect of whom a liquidation order has been made.

➢ TIME-LIMIT FOR INSOLVENCY RESOLUTION PROCESS - SECTION 12

Time Limit – The Corporate Insolvency Resolution Process shall be completed within a period of **180 Days** from the **date of admission of the application** to initiate such process.

Extension of time– The Resolution Professional shall file an application to the NCLT to extend the abovementioned period if authorised by a resolution passed at a meeting of the committee of creditors by a vote of 66% of the voting shares. This extension can be granted only once for a maximum period of 90 days.

➢ WITHDRAWAL OF APPLICATION – SECTION 12A

- ✓ This Section was added by the **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.**
- ✓ It provides that the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the Applicant.
- ✓ The application for withdrawal needs the approval of **90%** voting share of the committee of creditors.

➢ WHO IS AN INSOLVENCY PROFESSIONAL?

An Insolvency Professional is one of the mist important functionality brought into existence under the IB Code, 2016. An insolvency Resolution is a person who acts in the following capacities –

a) Interim Resolution Professional (IRP) under Part II
b) Resolution Professional (RP) under Part II
c) Liquidator under Part II
d) Resolution Professional under Part III
e) Bankruptcy Trustee under Part III

➢ FUNCTIONS AND DUTIES OF AN INSOLVENCY PROFESSIONAL

Section 208(2) mandates that every insolvency professional shall abide by the following code of conduct:–

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

➢ IBBI (INSOLVENCY PROFESSIONAL) REGULATIONS, 2016

i. Eligibility Criteria for Insolvency Professionals

Regulation 4 of provides that a person shall NOT be eligible to be registered as an Insolvency Professional if he/she –

a) is a minor
b) is not a person resident in India
c) does not have the qualification and experience specified in rRgulations 5 of the IBBI (Insolvency Professionals) Regulations, 2016

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,

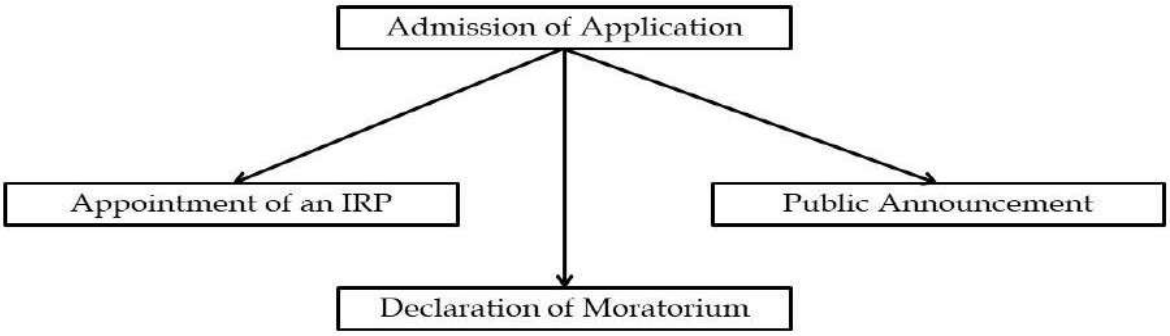
e) is an undischarged insolvent, or has applied to be adjudicated as an insolvent;
f) has been declared to be of unsound mind
g) is not a fit and proper person.

ii. ***Qualification and Experience Required For Insolvency Professionals***

Regulation 5 provides that a person shall be eligible to get registration as an Insolvency Professional if he/she –

a) has passed the Limited Insolvency Examination within twelve months before the date of application for enrolment with the insolvency professional agency
b) has completed a pre-registration educational course, as may be required by the Board, from an insolvency professional agency after his enrolment as a professional member; **and**
c) has-
   - ✓ successfully completed the National Insolvency Programme, as may be approved by the Board;
   - ✓ successfully completed the Graduate Insolvency Programme, as may approved by the Board;
   - ✓ 15 years' of experience in management, after receiving a Bachelor's degree from a university established or recognised by law; **or**
   - ✓ 10 years' of experience as –
     - Chartered Accountant registered as a member of the ICAI
     - Company Secretary registered as a member of the ICSI
     - Cost Accountant registered as a member of the ICMAI
     - Advocate enrolled with the Bar Council

➢ PROCESS AFTER ADMISSION OF APPLICATION INITIATING CIRP



➢ MORATORIUM

Section 14 provides for the Moratorium period and describes its effects.

Moratorium period is a concept whereby it is ensures that the *status quo* of the corporate Debtor is maintained during the CIRP. The following acts are prohibited during the Moratorium Period –

a. institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
b. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein
c. any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002
d. recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor
e. entering into any material contract including contracts which have the effect of a contract for borrowing of money in the form of loan or otherwise.

Date of **Initiation** of Moratorium Period – **Insolvency Commencement Date** (Date of order admitting the Application made under section 7/9/10 or date of appointment of the Interim Resolution Professional, whichever is later)

Date of **Termination** of Moratorium Period – Date of **Completion / Termination of the CIRP**

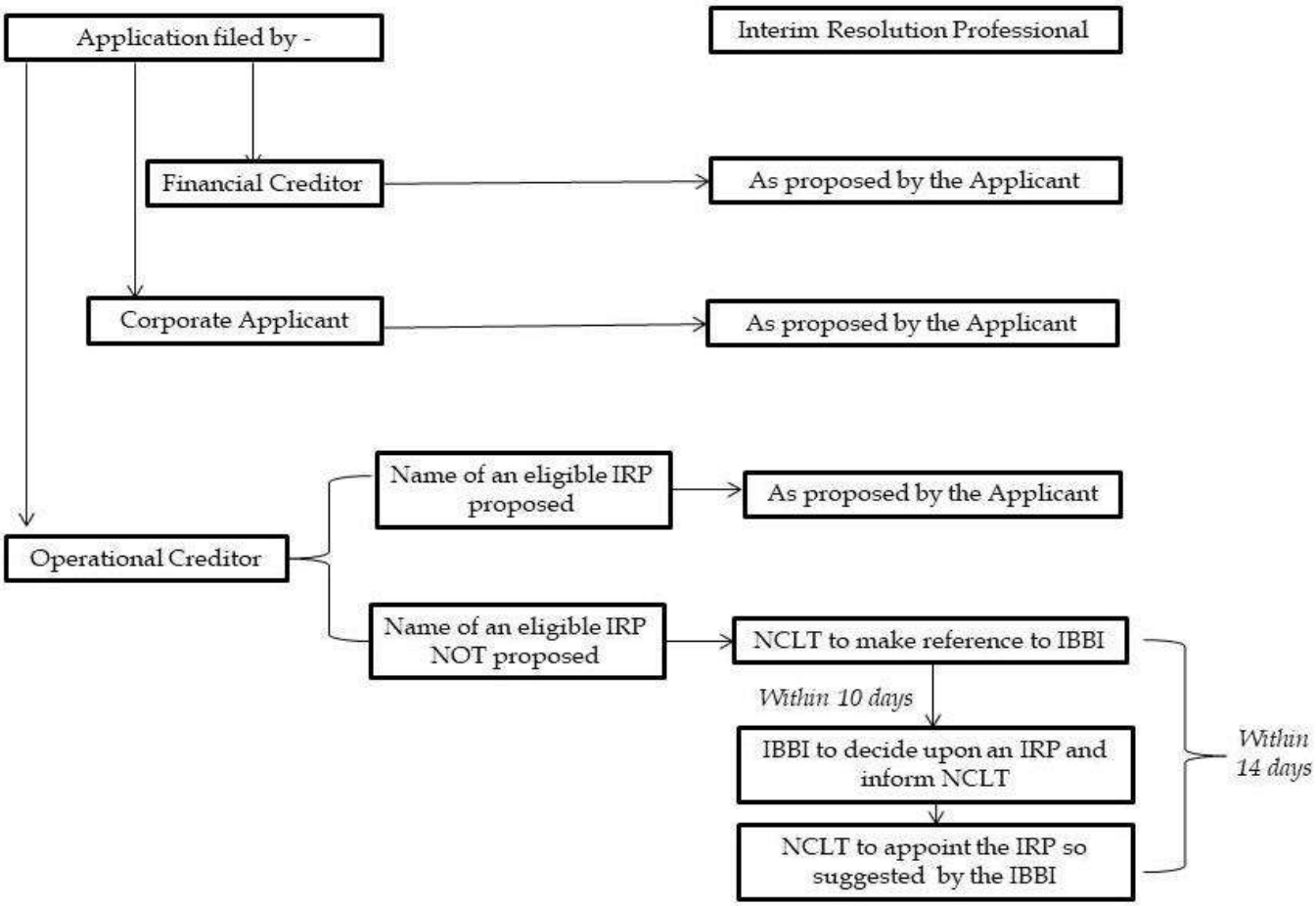
➢ PUBLIC ANNOUNCEMENT OF CIRP

Section 15 lists out the particulars that a public announcement of the initiation of the corporate insolvency resolution process for the corporate debtor shall contain. They are-

a. **Name and address** of the corporate debtor under the CIRP
b. **Name of the authority** with which the corporate debtor is incorporated or registered,
c. **Last date** for submission of claims, as may be specified,
d. Details of the **interim resolution professional**
e. **Penalties** for false or misleading claims,
f. **Date** on which the CIRP **shall close**.

➢ INTERIM RESOLUTION PROFESSIONAL

Section 16 of the IB Code, 2016 provides for the following provisions for appointment of an IRP-



Tenure of the IRP – Till the date of Appointment of the Resolution Professional.

➢ DUTIES OF INTERIM RESOLUTION PROFESSIONAL

Section 18 of the IB Code, 2016 provides that an Interim Resolution Professional shall perform the following duties-

a) **Collect all information**
b) **receive and collate all the claims**
c) **constitute a committee of creditors**
d) **monitor the assets** and **manage its operations**
e) **file information**
f) **take control and custody of any asset** over which the corporate debtor has ownership rights

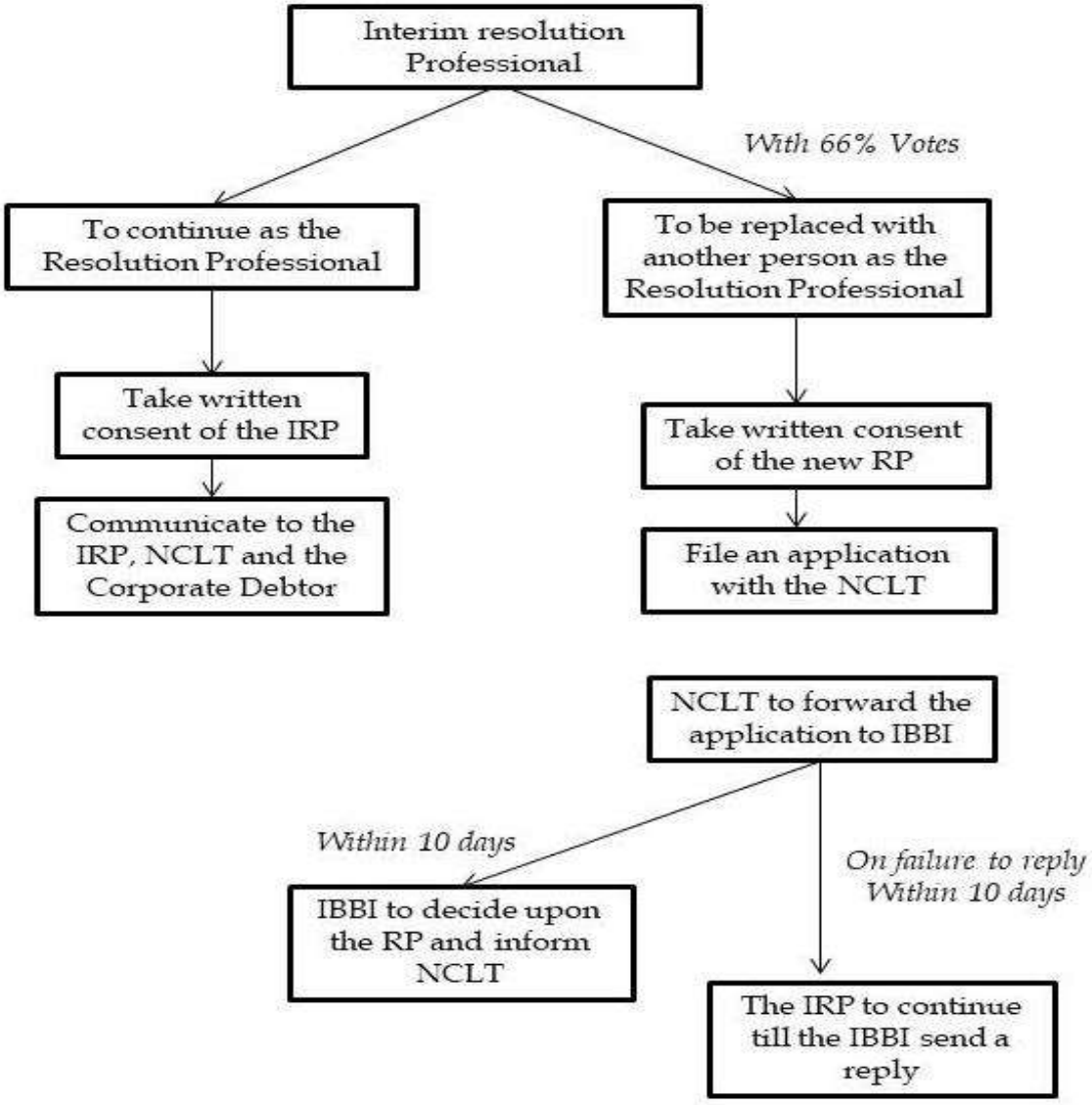
What is Interim Finance?

"Interim finance" means any financial debt raised by the resolution professional during the insolvency resolution process period. Any amount raised as interim finance and the costs incurred in raising such finance is included in the "insolvency resolution process costs".

➢ APPOINTMENT OF RESOLUTION PROFESSIONAL

Section 22 of the Code prescribed that the Resolution Professional all be appointed-

a) By the Committee of Creditors
b) Through a Resolution passed by a minimum 66% of votes
c) In their first meeting
d) Which is to be conducted within *7 days* of the constitution of the Committee.



➢ REPLACEMENT OF RESOLUTION PROFESSIONAL BY COMMITTEE OF CREDITORS

Section 27 provides for the right of the Committee of Creditors to replace the Resolution Professional.

As per the section,

a) The Committee of Creditors may
b) By a resolution passed with minimum 66% majority
c) Resolve to replace the resolution Professional
d) For which, an application has to be made to the NCLT
e) And the procedure laid down under section 16 is to be followed.

➢ ELIGIBILITY FOR RESOLUTION PROFESSIONAL

Regulation 3 lays down a person shall be eligible to be appointed as a Resolution professional of a Corporate Debtor if the individual, and all partners and directors of the insolvency professional entity of which he is a partner or director, are-

a) eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013,
b) not a related party of the corporate debtor;
c) not an employee or proprietor or a partner:
    i. of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor; or,
    ii. of a legal or a consulting firm, that has or had any transaction with the corporate **debtor amounting to five per cent or more of the gross turnover of such firm, in the last three financial years.**

A resolution professional shall **make disclosures** at the time of his appointment and thereafter in accordance with the Code of Conduct.

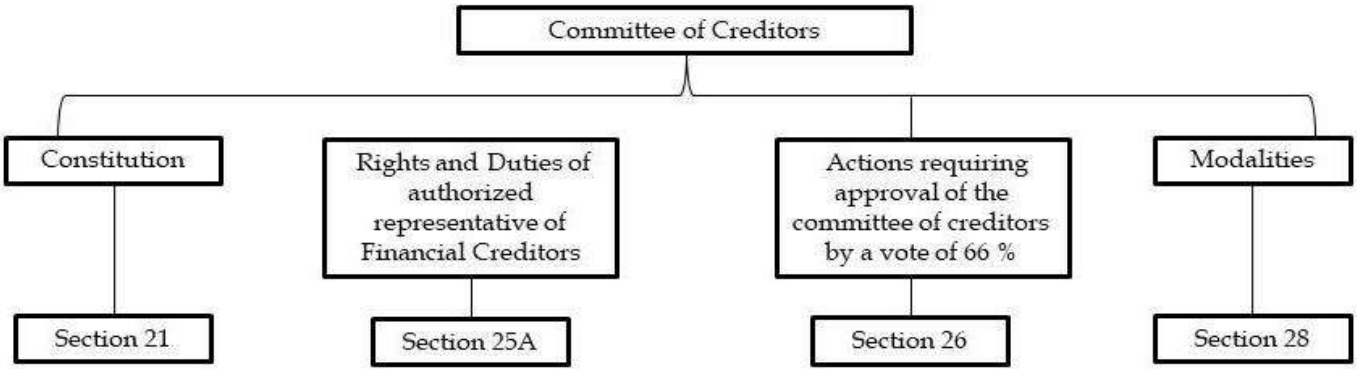
➢ PREPARATION OF INFORMATION MEMORANDUM

Section 29 provides for the duty of the Resolution Professional to prepare a Resolution plan.

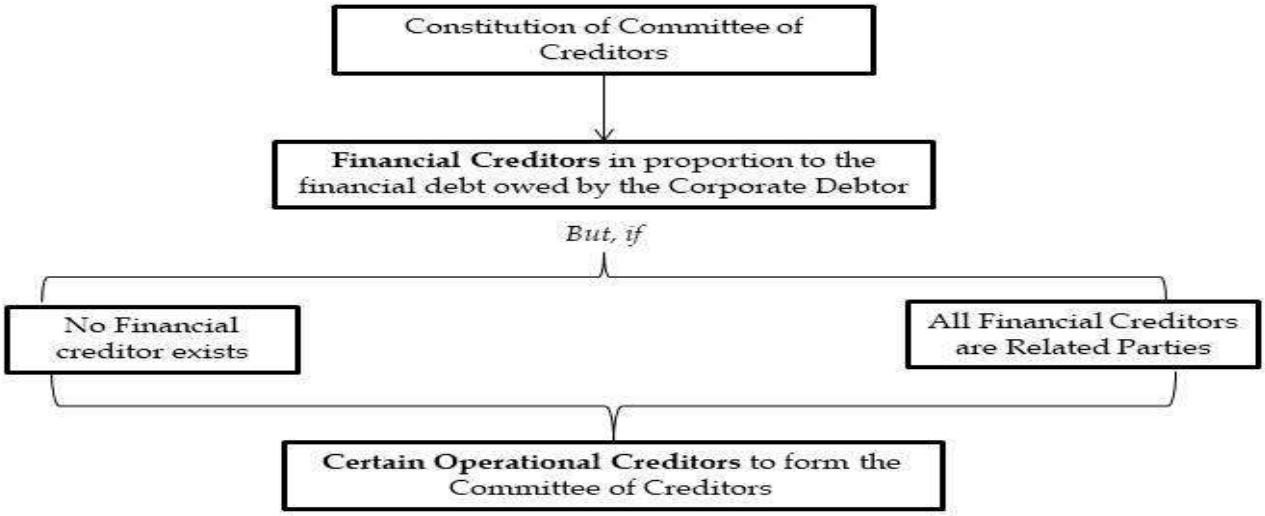
An information memorandum is prepared in order to enable the resolution applicants (market participants) to provide solutions for resolving the insolvency of the corporate debtor.

The section also provides that he Resolution Professional may provide access to the records and documents of the Corporate Debtor to third parties if they undertake to –

a) comply with provisions of law relating to confidentiality and insider trading
b) protect any intellectual property of the corporate debtor
c) not share relevant information with third parties.



➢ CONSTITUTION OF COMMITTEE OF CREDITORS



➢ COMMITTEE WITH FINANCIAL CREDITORS

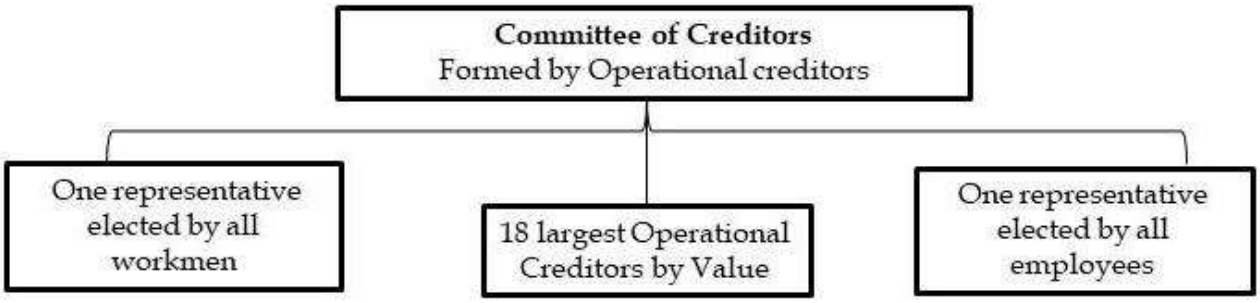
Section 21 deals with the constitution of Committee of Creditors.

The following points need to be kept in mind while constituting the Committee of Creditors –

- ✓ That a financial creditor who is a related party of the Corporate debtor shall not get any right of representation, participation or voting in a meeting of the committee of creditors.
- ✓ The decisions of the Committee of Creditors shall be taken by a vote of minimum 51% of voting shares.
- ✓ The Committee may require the production of any financial information by the Resolution Professional and the RP is bound to provide such information to them within ***7 days***.

➢ COMMITTEE WITH OPERATIONAL CREDITORS

The Committee of Creditors formed by Operational Creditors shall be constituted as follows-



The members of the Committee constituted as above shall have voting rights in proportion to the amount of debt that they represent.

➢ MODALITIES OF THE MEETING OF COMMITTEE OF CREDITORS

When to Conduct the meetings of the Committee of Creditors?

a) The Resolution Professional considers necessary, or
b) A request is made by members of the committee representing 33% of voting rights.

Quorum of the Meetings of the Committee of Creditors?

a) Quorum = members representing at least 33% of the voting rights present either in person or by video conferencing or other audio and visual means
b) If the quorum is not present, the meeting shall automatically stand adjourned at the same time and place on the next day
c) In such an event, the adjourned meeting shall be deemed to be quorate with the members of the committee attending the meeting.

➢ APPROVAL OF COMMITTEE OF CREDITORS FOR CERTAIN ACTIONS

Section 28 lists out the actions which require the prior approval of the committee of creditors by a vote of 66% of the voting shares. These resolution maybe in order to-

- ✓ raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting
- ✓ create any security interest over the assets of the corporate debtor
- ✓ change the capital structure of the corporate debtor
- ✓ record any change in the ownership interest of the corporate debtor
- ✓ give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting
- ✓ undertake any related party transaction
- ✓ amend any constitutional documents of the corporate debtor
- ✓ delegate its authority to any other person
- ✓ dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties
- ✓ make any change in the management of the corporate debtor or its subsidiary
- ✓ transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business
- ✓ make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
- ✓ make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

If the resolution professional takes any of the actions listed above without obtaining the consent of the committee of creditors, such action shall be void. The resolution professional may also be liable to be replaced.

➢ WHAT IS A RESOLUTION PLAN?

A Resolution Plan means a plan proposed by a resolution applicant for insolvency resolution of the corporate debtor as a going concern under Part II of the IB Code, 2016. This Resolution Applicant can be a person, who either individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under the Code.

➢ WHO CAN BE A RESOLUTION APPLICANT?

Section 29A of the IB Code, 2016 deals with the disqualifications of a person from being the Resolution Applicant of a Corporate Debtor.

The section was inserted in the Code by way of an Amendment in the year 2018 and was subsequently amended in the same year. It provides that the a person **CANNOT** act as Resolution Applicants if he/she–

a) is an undischarged insolvent
b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India
c) at the time of submission of the resolution plan, has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset AND at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor

   However, this disqualification can be cured if the Applicant makes payment of the amount due before the submission of the plan

   The above clause shall not apply to the following persons –
   i) Applicant who is a financial entity & is not a related party of the Corporate Debtor
   ii) Applicants who have received the NPAs pursuant to prior resolution plan.

d) has been convicted for any offence punishable with imprisonment –
   i) for two years or more under any Act specified under the Twelfth Schedule; or
   ii) for seven years or more under any law for the time being in force

The ineligibility shall remain in force for a period of 2 years from the date of expiry of the sentence.

e) is disqualified to act as a director under the Companies Act, 2013
f) is prohibited by SEBI from trading in securities or accessing the securities markets
g) 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 has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code
h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part
i) is subject to any disability, corresponding to the abovementioned clauses under any law in a jurisdiction outside India
j) has a connected person not eligible as above.

➢ SUBMISSION OF RESOLUTION PLAN

Section 30 provides for the process to be followed while submitting the Resolution Plans.

It provides that the Resolution Applicants have to submit the Resolution Plans to the Resolution Professional along with an affidavit stating that they are eligible under the Code to act as Resolution Applicant along with the Resolution Plans.

➢ APPROVAL OF RESOLUTION PLAN BY THE RP AND COC

Once the Resolution Professional receives all the Resolution Plans, they shall –

a) check the viability and feasibility of the Resolution plans, and
b) submit all the resolution plan which conform to the criteria in section 30(2), to the committee of creditors.

While examining the viability of the Resolution Plans, the Resolution Applicant shall check and ensure that the Resolution Plan-

a) provides for the payment of insolvency resolution process costs
b) provides for the payment of the debts of operational creditors which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor
c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan

Once the eligible Resolution Plans are submitted to the Committee of Creditors, they are supposed supposed to approve ONE resolution plan by a vote of not less than 66% voting share and file it with the NCLT for approval.

The following points with respect to the approval of resolution plans are worth noting –

a) That the resolution applicant is allowed to attend the meeting in which their plan is being considered, however, without having any right to vote.
b) That if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

➢ APPROVAL OF RESOLUTION PLAN BY THE NCLT

Section 31 provides for the approval of the Resolution Plan by the NCLT. It provides that where –

a) The NCLT is satisfied
b) That the Resolution Plan complies with all the requirements of the Code
c) And can be effectively implemented,
d) They may pass an order approving the same.

If NCLT is satisfied that the Plan does not comply with all the requirements of the Code or that it cannot be effectively implemented, it may reject the Plan.

➢ EFFECT OF ORDER OF APPROVAL/REJECTION PASSED BY THE NCLT –

The Acceptance of the resolution plan by the NCLT results in the following consequences –

a) The Moratorium period comes to an end
b) The RP shall forward all records relating to the conduct of the CIRP and the resolution plan to the Board to be recorded on its database.

If the NCLT rejects the Resolution Plan submitted by the Committee of Creditors, the following events happen-

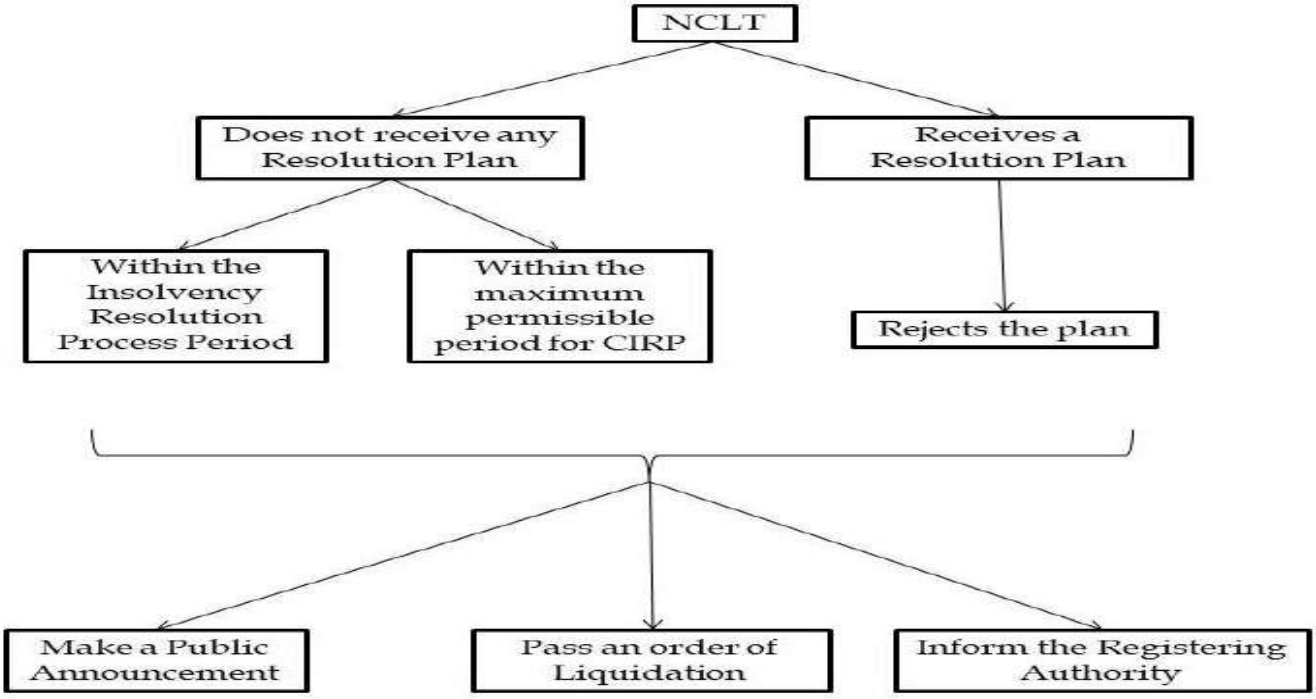
a) An order of liquidation is passed against the Corporate Debtor
b) An Official Liquidator is appointed.

➢ APPEAL

An appeal against an order approving a resolution plan may be filed on the following grounds:

i) That the approved resolution plan is in contravention of the provisions of any law for the time being in force
ii) That there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period
iii) That the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan
iv) That the insolvency resolution process costs have not been provided for repayment in priority to all other debts, or
v) That the resolution plan does not comply with any other criteria specified by the Board

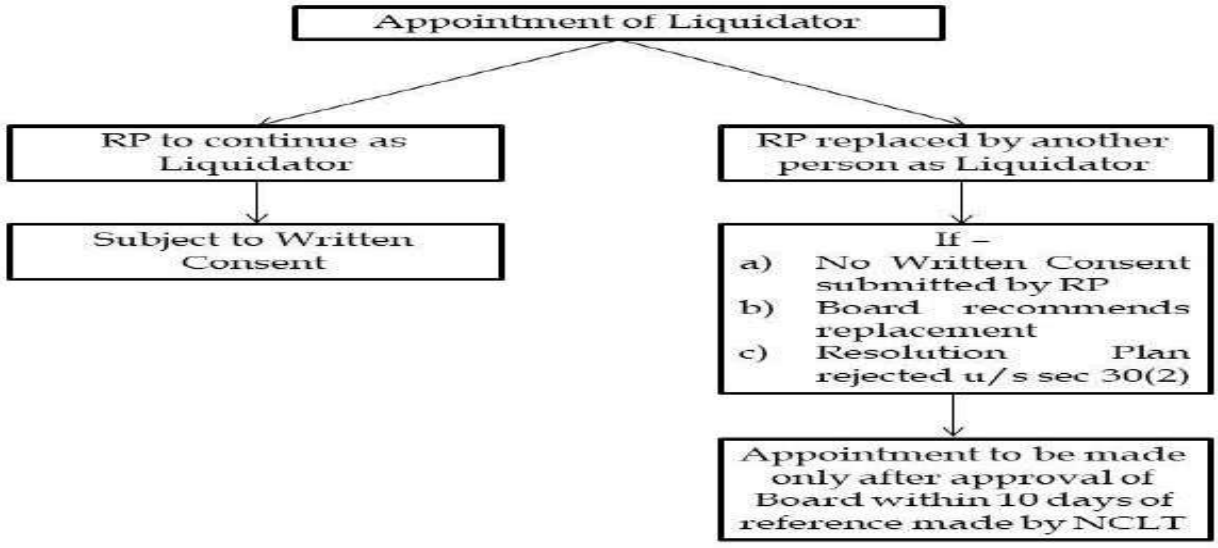
➢ INITIATION OF LIQUIDATION



Section 33 provides for more circumstances where an order of liquidation can be passed against the corporate debtor. They are –

- ✓ When the committee of creditors, during the pendency of the CIRP, resolves to liquidate the corporate debtor with 66% majority shares.
- ✓ Where the resolution plan approved by the NCLT is contravened by the corporate debtor and any person whose interests are prejudicially affected by such an action makes an application to NCLT in this regard.

➢ APPOINTMENT OF LIQUIDATOR AND FEE TO BE PAID



➢ POWERS AND DUTIES OF LIQUIDATOR

Section 35 of the Code enlists a number of powers and duties imposed upon the liquidator. Some of them are –

a) to verify claims of all the creditors
b) to take into their custody or control all the assets, property, effects and actionable claims of the corporate debtor
c) to evaluate the assets and property of the corporate debtor
d) to take measures to protect and preserve the assets and properties of the corporate debtor
e) to carry on the business of the corporate debtor for its beneficial liquidation
f) to draw, accept, make and endorse any negotiable instruments in the name and on behalf of the corporate debtor

[NOTE : This list is a non - exhaustive list and may include other similar acts required to be done by the Liquidator]

➢ LIQUIDATION ESTATE

The concept of Liquidation estate has been envisaged under **Section 36** of the Code, 2016. Liquidation Estate refers to the Estate of those properties of the corporate debtor which are available with the liquidator to be realized in order to discharge its debts. This Estate is held by the Liquidator in behalf if the corporate debtor in fiduciary capacity for the benefit of all the creditors.

The Code provides that the Liquidation estate should comprise of the following assets –

a) assets over which the corporate debtor has ownership rights, as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor
b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets
c) tangible assets, whether movable or immovable
d) intangible assets including but not limited to intellectual property, securities and financial instruments, insurance policies, contractual rights
e) assets subject to the determination of ownership by the court or authority
f) assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter
g) those assets of the corporate debtor in respect of which a secured creditor has relinquished security interest
h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

i) all proceeds of liquidation as and when they are realised.

➢ CONSOLIDATION OF CLAIMS

- ***Time Limit for collection of claims?***

Within a period of **30 days** from the date of the commencement of the liquidation process.

- ***Submission of claim by financial creditor*** ?

By providing a record of such claim with an information utility.

However, where the information relating to the claim is not recorded in the information utility, the claim maybe submitted along with supporting documents required to prove the claim.

- ***Submission of claim by operational creditor***

In such form and in such manner and along with such supporting documents required to prove the claim as may be specified by the Board.

- ***Withdrawal or variation of claims***

Within **14 days** of its submission.

➢ VERIFICATION OF CLAIMS

Section 39 provides that-

i. The liquidator shall verify the claims submitted
ii. within such time as specified by the Board.
iii. The liquidator may require any creditor or the corporate debtor or any other person
iv. to produce any other document or evidence
v. which he thinks necessary for the purpose of verifying the whole or any part of the claim.

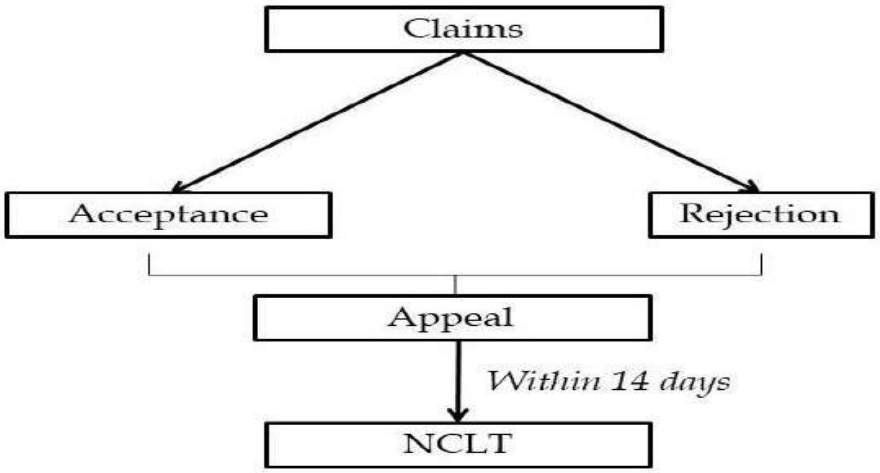
➢ ADMISSION OR REJECTION OF CLAIMS

After proper verification of claims, the liquidator may accept or reject them in accordance with **Section 40**. However, if the liquidator rejects a claim, they shall record in writing the reasons for such rejection.

The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within **7 days** of such admission or rejection of claims. [Section 40(2)]

➢ APPEAL AGAINST THE DECISION OF LIQUIDATOR

Section 41 lays down the following rules for preferring an appeal against the decision made under section 40 -



➢ PREFERENTIAL TRANSACTIONS

- ***What is a Preferential Transaction?***

a) Transfer of properties or any interest thereof given during the **relevant time** to a person for the benefit of a creditor, surety or guarantor on account of antecedent debt or other liabilities
b) Such Transfer having the effect of putting such creditor, surety or guarantor in a better position than the position which they would have been in had the transfer not been made.

- ***What is the Relevant Time?***

For a related party (other than by reason only of being an employee) – **2 years** preceding the insolvency commencement date

For a person other than a related party – **1 year** preceding the insolvency commencement date.

- ***Orders in Case of Preferential Transactions***

Section 44 lays down the types of orders that the NCLT can pass in an application made under section 43 –

a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;
b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;
c) release or discharge of any security interest created by the corporate debtor;
d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, as the NCLT may direct;
e) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order;

It is further provided that any order made under this section shall have no effect on any interest in property acquired in good faith and for value.

➢ UNDERVALUED TRANSACTIONS

Section 45 deals with Undervalued Transactions. As per this section, the following transaction, if entered into during the relevant period, are covered within the ambit of undervalued transactions –

a) a gift to a person;
b) a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, given that the transaction had not been entered into in the ordinary course of business.

Section 46 prescribes that the **Relevant Period** for the avoidance of an undervalued transaction, which is the same as the period provided for preferential transactions.

➢ TRANSACTIONS DEFRAUDING CREDITORS

Section 49 provides that if the NCLT is satisfied that the alleged transaction was deliberately entered into by the corporate debtor for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor, orin order to adversely affect the interests of such a person in relation to the claim,it may pass an order

a) restoring the position
b) as it existed before such transaction
c) as if the transaction had not been entered into; and

d) protecting the interests of persons who are victims of such transactions.

It is, however, provided that any order made under this section shall have no effect on any interest in property acquired in good faith and for value.

➢ EXTORTIONATE CREDIT TRANSACTIONS

The Code does not define an extortionate credit transaction and has rather left it upon the Board to specify the transactions to be covered under the ambit of Extortionate Credit Transactions.

However, **Section 50** provides that where the corporate debtor has been a party to an extortionate credit during the period within **2 years** preceding the insolvency commencement date, the liquidator or the resolution professional may make an application for avoidance of such transaction to the NCLT.

➢ DISTRIBUTION OF ASSETS

Section 53 deals with distribution of assets in liquidation. The section provides that the amount realized from the assets of the corporate debtor shall be distributed in the following order-

a) the insolvency resolution process costs and the liquidation costs in full;
b) the following debts shall rank equally between and among the following
    i. workmen's dues for the period of 24 months preceding the liquidation commencement date; and
    ii. debts owed to a secured creditor in the event such secured creditor has relinquished security
c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
d) financial debts owed to unsecured creditors;
e) the following dues shall rank equally between and among the following: -
    i. any amount due to the Central Government and the State Government in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
    ii. debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
f) any remaining debts and dues;
g) preference shareholders, and
h) equity shareholders or partners.

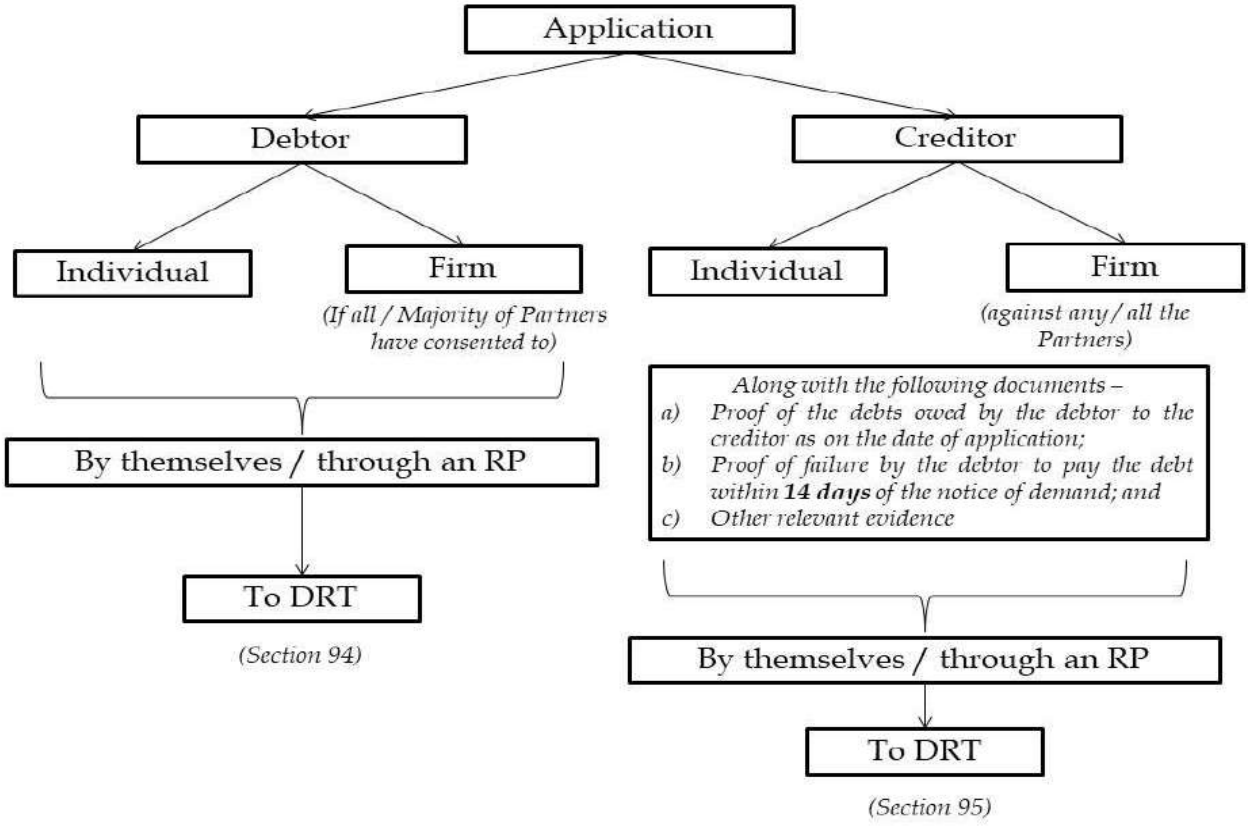
INSOLVENCY RESOLUTION PROCESS UNDER PART III

IBC, 2016 – PART III - INDIVIDUAL / FIRM INSOLVENCY

The Insolvency and Bankruptcy Code, 2016 outlines a separate insolvency resolution process for individuals/partnership firms which is different from that provided for the corporate bodies. Chapter III of Part III provides for insolvency resolution process for individuals and partnership firms.

The Adjudicatory Authority for the process enshrined under this Part is the Debt Recovery Tribunal, constituted under the Recovery of Debts due to Banks and Financial Institutions Act, 1993.

➢ APPLICATION TO INITIATE INSOLVENCY RESOLUTION PROCESS



➢ Who is not entitled to initiate the insolvency resolution process.

Section 94 provides that a debtor shall not be entitled to make an application if he / it is –

a) an undischarged bankrupt;
b) undergoing a fresh start process;

c) undergoing an insolvency resolution process;
d) undergoing a bankruptcy process
e) or, if an application under this Chapter has been admitted in respect of the debtor during the period of **12 months** preceding the date of submission of the application.

➢ DEBTS IN RESPECT OF WHICH APPLICATION CAN BE SUBMITTED

a) liability to pay fine imposed by a court or tribunal;
b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
c) liability to pay maintenance to any person under any law for the time being in force;
d) liability in relation to a student loan; or
e) any other debt as may be prescribed.

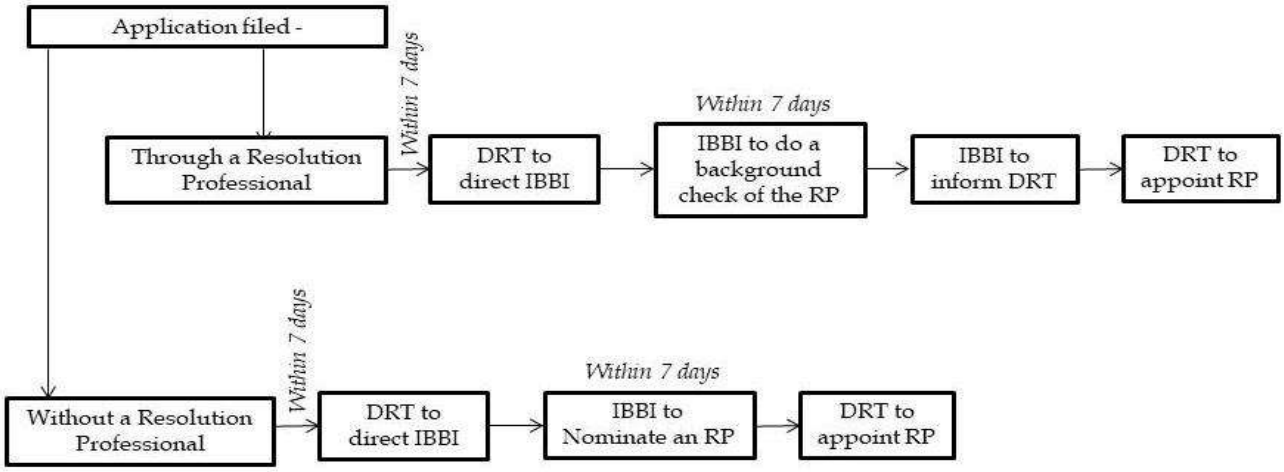
➢ INTERIM-MORATORIUM

- ✓ Date of Commencement - Date of filing of the application
- ✓ Date of Termination - Date of admission of the application.

- ***Effects of Interim Moratorium***

a) any pending legal action in respect of any debt shall be deemed to have been stayed; and
b) the creditors shall not initiate any legal action or proceedings in respect of any debt.

➢ APPOINTMENT OF RESOLUTION PROFESSIONAL



➢ SUBMISSION OF REPORT BY RESOLUTION PROFESSIONAL

Once the resolution professional is appointed, he/she is supposed to make a report under **Section 99,** recommending either acceptance or rejection of the application. The resolution professional is supposed to submit this report within **10 days** of appointment. The Report should contain proper reasons behind the recommendation made by the resolution professional and a copy of the same must be given to the applicant.

The section also provides that if, while preparing the report, the resolution professional finds that the debtor is eligible for a fresh start process, he may make recommendations to that effect and the application shall then be treated accordingly.

➢ ADMISSION OR REJECTION OF APPLICATION

Section 100 mandates that the DRT pass an order either accepting or rejecting the application within a period of 14 days from the date of submission of the report by the resolution professional. A copy of the said order, along with the report of the resolution professional, should be sent to the creditors within **7 days** of the said order.

➢ MORATORIUM

- ✓ Date of Commencement – Date on which the Application is admitted
- ✓ Date of Termination - Date on which an order approving the repayment plan is passed by the DRT **OR** at the expiry of 180 days from the date of admission of the application, whichever is earlier.
  (Section 101)

- ***Effects of moratorium –***

a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
b) the creditors shall not initiate any legal action or proceedings in respect of any debt; and
c) the debtor shall not transfer, alienate, encumber or dispose of any of the assets or his legal right or beneficial interest therein.

➢ PUBLIC NOTICE AND CLAIMS FROM CREDITORS

Section 102 provides that the DRT shall issue a public notice within **7 days** of passing the order admitting the application for initiation of the insolvency resolution process. The Announcement shall be made with an objective of inviting claims from all creditors within **21 days** of such announcement.

The announcement so made shall be-

a) published in at least one English and one vernacular newspaper which is in circulation in the state where the debtor resides;
b) affixed in the premises of the Adjudicating Authority; and
c) placed on the website of the Adjudicating Authority.

➢ REPAYMENT PLAN

The repayment plan is a plan that contains terms as per which the debtor agrees to repay his debts to his creditors. The repayment plan is prepared by the debtor, in consultation with the resolution professional. It is provided that since the creditors are not involved in the preparation of the repayment plan, the plan should contain reasons as to why the creditors can be expected to agree to the repayment plan.

The plan should contain provisions made for the following –

a) justification for preparation of such repayment plan and reasons on the basis of which the creditors may agree upon the plan;
b) provision for payment of fee to the resolution professional;
c) such other matters as may be specified.

Once the repayment plan is prepared, the Resolution Professional is required to prepare a Report and submit the same along with the Plan to the DRT within a period of **21 days** from the last date of submission of claims.

➢ MEETING OF CREDITORS

Section 107 talks about summoning of the meeting of creditors. If the report of the resolution professional suggests that a meeting of the creditors be conducted, then the meeting must be called within a period of not less than 14 days and not greater than 28 days of the date on which such report is submitted.

- ***Conduct of Meeting of Creditors***

The meeting of the creditors, the creditors may decide to approve, modify or reject the repayment plan. However, no modification should be done in the plan without the approval of the debtor.

The resolution professional may, for a sufficient cause, adjourn the meeting of the creditors for a period of not more than **7 days** at a time.

- ***Voting Rights***

The voting right of each creditor is determined by the amount of debt owed to them by the debtor and is proportionate to the amount of debt due to them. However, no voting rights are given to the following creditors –

a) a person to whom a debt for an unliquidated amount is owed,
b) a person who is not a creditor mentioned in the list of creditors, or
c) a person who is an associate of the debtor.

A secured creditor, prima facie, has no right to vote in the meeting of the creditors. However, they acquire a right to vote if they choose to relinquish their security interest.

Section 111 of the Code provides that the repayment plan or any modification to the repayment plan shall be approved by a majority of more than 3/4th in value of the creditors present in person or by proxy and voting on the resolution in a meeting of the creditors

- ***Report of Meeting of Creditors***

The resolution professional is entrusted upon with the duty to prepare a report on the meeting of the creditors. The Report shall contain the following details –

a) whether the repayment plan was approved or rejected and if approved, the list the modifications, if any;
b) the resolutions which were proposed at the meeting and the decision on such resolutions;
c) list of the creditors who were present or represented at the meeting, and the voting records of each creditor for all meetings of the creditors; and
d) such other information as the resolution professional thinks appropriate.

The report, once prepared, is required to be sent to the following people –

a) the debtor; c) creditors, including those who were not present at the meeting; and
b) DRT.

➢ APPROVAL / REJECTION OF REPAYMENT PLAN

On the basis of the report prepared by the resolution professional, the DRT shall pass an order either accepting or rejecting the application. If the Authority deems fit, it may even ask for certain modifications to be made to the plan.

Order of Approval – Plan is binding on all the creditors

Order of Rejection – Debtor and the creditors entitled to file an application for bankruptcy

- ***Implementation and Supervision of Repayment Plan***

The resolution professional is entrusted with the responsibility to supervise the implementation of the repayment plan. The resolution professional shall seek directions from the DRT, if necessary.

➢ PREMATURE END OF THE REPAYMENT PLAN

Premature end of the repayment plan means the situation wherein a repayment plan does not get fully implemented within the period as mentioned in the repayment plan.

If such a situation occurs, the resolution professional shall prepare a report and submit it to the DRT. The report shall include the following information –

a) the receipts and payments made in pursuance of the repayment plan;
b) the reasons for premature end of the repayment plan; and
c) the details of the creditors whose claims have not been fully satisfied.

It is important to note that **NO EXTENSION OF TIME** is granted for implementation of repayment plan under Part III of the IB Code, 2016.

FRESH START PROCESS

A fresh start process is a process wherein the eligible debtors are discharged from certain debts within a specified threshold and can start afresh without any liabilities. The fresh start process has been conceptualized for persons who owe relatively less amount of money and have little or no income or assets to repay their debts.

Once a person makes an application to the DRT and the application gets accepted, they are discharged from the qualifying debts and are not required to repay such debts.

- ***What is a "Qualifying Debt"?***

A "qualifying debt" means **amount due, which includes interest or any other sum due** and does not include

a) an excluded debt;
b) a debt to the extent it is secured; and

c) any debt which has been incurred **3 months** prior to the date of the application for fresh start process.

- ***What is an "Excluded Debt?"***

An "Excluded debt" means –

a) liability to pay fine imposed by a court or tribunal;
b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
c) liability to pay maintenance to any person under any law;
d) liability in relation to a student loan; (e) any other debt as may be prescribed.

➢ ELIGIBILITY FOR MAKING AN APPLICATION

As per **Section 80,** a debtor who fulfills the following criteria is allowed to file an application for initiation of a fresh start process-

a) the gross annual income of the debtor does not exceed Rs. 60,000;
b) the aggregate value of the assets of the debtor does not exceed Rs. 20,000;
c) the aggregate value of the qualifying debts does not exceed Rs. 35000;
d) they are not undischarged bankrupts;
e) they do not own a dwelling unit, irrespective of whether it is encumbered or not;
f) a fresh start process, insolvency resolution process or bankruptcy process is not subsisting against them; and
g) no previous fresh start order had been made in relation to them in the preceding **12 months** of the date of the application for fresh start.

➢ FRESH START PROCESS

The following process is required to be followed once an application for initiation of the fresh start process is filed -

- ***Appointment of Resolution Professional***

The first step is the appointment of a resolution professional who is required to take the process forward.

- ***Examination by Resolution Professional***

Section 83 provides that once the resolution professional is appointed, they are required to examine the application within **10 days** and submit a report to the DRT, either recommending acceptance or rejection of the application.

- ***Recommendation by the Resolution Professional***

After going through the application and the additional information, if any, the resolution professional shall make a recommendation to the DRT to either accept or reject the application.

➢ ADMISSION OR REJECTION BY ADJUDICATING AUTHORITY

Section 84 prescribes that the DRT shall make an order either accepting or rejecting the application for initiation of a fresh start process within **14 days** of submission of report by the resolution professional. If the application is accepted, a fresh moratorium period gets initiated against the debtor.

Duration of Moratorium Period – 180 days

- ***Objections by Creditor***

Section 86 provides that any creditor, amount due to whom, gets discharged as a part of the fresh start order, may file an objection with the resolution application within a period of **10 days** from the date of receipt of the order. However, the objection can be filed only on the following grounds, namely:

a) inclusion of a debt as a qualifying debt;
b) incorrectness of the details of the qualifying debt specified in the order under section.

The resolution professional shall examine the objections and either accept or reject the objections, within **10 days** of the date of the application.

- ***Application against Decision of Resolution Professional***

Any person aggrieved by a decision taken by the resolution professional on an objection filed by them may make an application to the DRT. However, the application must be filed within a period of **10 days** from the date of the decision taken by the resolution professional and shall be filed on the following grounds only –

a) that no opportunity was given to to the debtor or the creditor to make a representation;
b) that the resolution professional colluded with the other party in arriving at the decision;
c) that the resolution professional did not comply with the requirements of section 86.

The DRT is required to decide upon the application within **14 days** of its submission.

➢ REVOCATION OF FRESH START PROCESS ORDER

Section 91 - The resolution professional may make an application seeking revocation of the order admitting application for fresh start process on the following grounds-

a) if due to any change in the financial circumstances of the debtor, the debtor becomes ineligible for a fresh start process; or
b) non-compliance by the debtor of the restrictions imposed; or
c) if the debtor has acted in a mala fide manner and has wilfully failed to comply with the provisions of the Code.

The DRT has to decide upon the application within a period of **14 days** and a copy of the same should be provided to the IBBI for entering into their records.

SARFAESI ACT, 2002

Following are the key features of the Act –

a) It regulates securitisation and reconstruction of financial assets and enforcement of security
b) It enables the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mismatch
c) It helps banks improve recovery by exercising powers to take possession of securities, sell them and reduce NPAs by adopting measures for recovery or reconstruction without the intervention of the court
d) It provides for setting up of asset reconstruction companies

➢ CONSTITUTIONAL VALIDITY OF THE SARFAESI ACT, 2002

The SARFAESI Act, 2002 was challenged in various courts on grounds that it was loaded heavily in favour of lenders, giving little chance to the borrowers to explain their views once recovery process is initiated under the legislation.

In ***Mardia Chemicals Ltd. v. UOI,*** it was urged by the petitioner that

i) there was no occasion to enact such a draconian legislation when there already existed the RDDBFI Act, 1993 for recovery of debts by banks;
ii) no provision had been made to take into account lenders liability;
iii) the mechanism for recovery under Section 13 did not provide for an adjudicatory forum of inter se disputes between lender and borrower; and
iv) that the appeal provisions were illusory because the appeal was not maintainable unless 75% of the amount claimed was deposited with the Debts Recovery Tribunal.

The Court held that –

i) though some of the provisions were a bit harsh for some of the borrowers but the Act could not be said to be unconstitutional in the view of the fact that the objective of the Act was to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general
ii) the Act provides for a forum and remedies to the borrower to ventilate their grievances against the bank or financial institution, inter alia, with respect to the amount of the demand of the secured debt
iii) another safeguard was also available to the borrower within the Act which is to approach the DRT under Section 17

iv) the requirement of deposit of 75% of the amount claimed before entertaining an appealwaunder Section 17 is an oppressive, onerous and arbitrary condition and against all the canons of reasonableness.

➢ ASSET RECOSTRUCTION COMPANIES (ARC)

- ***What is an Asset Reconstruction Company?***

An Asset Reconstruction Company means a company incorporated under provisions of Companies Act, 1956 for purpose of asset reconstruction and registered with the RBI as an Asset Reconstruction Company.

The main objective of asset reconstruction company (ARC) is to-

a) act as agent for any bank or financial institution for the purpose of recovering their dues from the borrowers on payment of fees
b) act as manager of the borrower's asset taken over by banks, or financial institution
c) act as the receiver of properties of any bank or financial institution
d) carry on such ancillary or incidental business with the prior approval of Reserve Bank wherever necessary.

- ***Registration of an ARC***

Section 3 of the SARFAESI Act, 2002 provides for registration of Securitization or reconstruction companies with RBI. It provides that a company cannot act as an ARC without –

a) obtaining a certificate of registration; and
b) having net owned fund of **not less than two crore rupees** or such other higher amount as the Reserve Bank, may, by notification, specify

The registration to an ARC is granted only if the following conditions are satisfied-

a) that the ARC has not incurred losses in any of the 3 preceding financial years;
b) that such ARC has made adequate arrangements for realisation of the financial assets acquired for the purpose of securitisation or asset reconstruction;
c) that the ARC shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified buyers or other persons;
d) that the directors of ARC have adequate professional experience in matters related to finance, securitisation and reconstruction;
e) that none of its directors has ever been convicted of any offence involving moral turpitude;
f) that the sponsor of the ARC is a fit and proper person;

g) that the applicant has complied with or is in a position to comply with prudential norms specified by the RBI, and
h) that the ARC has complied with the conditions as specified in the guidelines issued by the RBI for the said purpose.

Every ARC is required to obtain prior approval of the Reserve Bank for any substantial change in its management or change of location of its registered office or change in its name.

The expression **"Substantial change in management"** means the change in the management by way of transfer of shares of amalgamation of transfer of the business of the company.

- ***Cancellation Of Certificate Of Registration***

Reserve Bank has the power under **Section 4** to cancel the certificate of Registration issued by it to any ARC if it finds out that the ARC has –

a) ceased to carry on the business of securitisation or asset reconstruction; or
b) ceased to receive or hold any investment from a qualified buyer or
c) failed to comply with any conditions subject to which the certificate of registration had been granted to it; or
d) at any time failed to fulfil any of the conditions referred to ection 3; or
e) failed to –
    i. comply with any direction issued by the Reserve Bank under the provisions of this Act; or
    ii. maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank; or
    iii. submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank.

However, before cancelling registration, Reserve Bank shall give ARC, an opportunity of being heard.

- ***Appeal Against Rejection Or Cancellation***

A securitization company or reconstruction company aggrieved by the order of rejection or a cancellation of certificate of registration may refer an appeal to the Central Government, within a period of **30 days** from the date on which such order of rejection or cancellation is communicated to it.

➢ ACQUISITION OF INTEREST IN FINANCIAL ASSETS (SECTION 5)

The ARCs acquire financial assets from the banks and financial institutions in order to reconstruct them and transact with them in accordance with the SARFAESI Act, 2002. The following points are important with respect to the same –

i. The ARCs may acquire such assets by-
   a. issuing a debenture or bond or any other security in the nature of debenture or,
   b. entering into an agreement with such bank or financial institution.

➢ ISSUE OF SECURITY BY RAISING OF RECEIPTS BY ARC

The ARCs are allowed to issue security receipts to qualified buyers or such other category of investors including non- institutional investors as may be specified by the RBI. They may further raise funds from the qualified buyers by formulating schemes for acquiring financial assets.

However, it is to be kept in mind that such ARCs shall keep and maintain separate and distinct accounts in respect of each such scheme for every financial asset acquired.

➢ EXEMPTION FROM REGISTRATION

Section 8 provides that the no security receipt issued by the ARC or any subsequent transfer of it by the receipt holder shall require any compulsory registration.

➢ OTHER FUNCTIONS OF AN ARC

Section 10 provides that apart from the primary function of asset reconstruction, an ARC shall perform the following function –

a) act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fee or charges as may be mutually agreed upon between the parties;
b) act as a manager on such fee as may be mutually agreed upon between the parties;
c) act as receiver if appointed by any court or tribunal.

➢ RESOLUTION OF DISPUTES

Section 11 provides that any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties shall be compulsorily settled by way of arbitration as provided in the Arbitration and Conciliation Act, 1996.

➢ ENFORCEMENT OF SECURITY INTEREST

Section 13- The following steps need to be followed by the creditor/lender under this section –

a) Classification of the asset as a Non performing Asset under the RBI guidelines
b) Demand Notice to the borrower, in writing, seeking discharge of liability within 60 days.
c) The Notice shall contain the following information-
    i. details of the amount payable by the borrower
    ii. the intention to enforce security on non payment
    iii. the secured assets intended to be enforced in the event of non-payment
d) The borrower may make any representation / objection to the lender with respect to the demand notice.
e) The lender has to decide upon the objection and communicate the same to the borrower within 15 days of the receipt of the representation / objection

[Note : No decision taken by the lender under this section shall be brought in question in any court of law]

f) If the borrower repays the amount within the specified time period of 60 days, no right to take any action lies with the lender.
g) If the borrower fails to repay any part of the amount within the period of 60 days, the borrower may –
    i. take possession of the secured assets of the borrower
    ii. take over the management of the business of the borrower
    iii. appoint any person to manage the secured assets the possession of which has been taken over by the secured creditor
    iv. require any person from whom any money is due or may become due to the borrower, to pay such money the lender.
h) The amount received as proceeds of enforcement of security shall be applied in the following order –
    i. payment of costs, charges and expenses incurred by the lender
    ii. in discharge of the dues of the secured creditor.
i) If any amount is left due after taking the abovementioned action, the lender shall file a recovery suit in the DRT.

It is important to note that if the financial assistance had been obtained jointly from more than 1 lender, then such security interest shall be enforced only by taking consent of atleast 60% of such lenders by value.

➢ MANNER AND EFFECT OF TAKEOVER

Section 15 provides that the takeover of the Management of a secured asset shall be done in the following manner and have the following effects –

a) A Notice needs to be published in an English and a Vernacular Newspaper
b) All the directors of the company / administrator of other forms of businesses shall be deemed to have vacated their offices and all their rights and powers shall vest with the people appointed in their place by the lender.
c) However, once the debts are realise din full, the secured creditor is required to restore the management of such businesses.

It is to be noted that no compensation is to be provided to the directors and other offices for the loss of office because of any action taken under this Act.

➢ GRIEVANCE REDRESSAL

Section 17 provides that –

a) Any borrower, aggrieved by the action taken by the secured creditor/lender under section 13 may make an application against the same with the DRT within 45 days of such action being taken.
b) If the DRT finds that the actions taken by the secured creditor were unjustified and illegal, it may –
    i. declare the recourse taken by the secured creditor as invalid;
    ii. restore the possession of secured assets or management of secured assets to the borrower; and
    iii. pass such other direction as it may consider appropriate and necessary
c) to exercise proper authority under this Act, the DRT has been entrusted with the jurisdiction to examine, with respect to any lease/tenancy, that the lease/tenancy –
    i. has expired or stood determined; or
    ii. is contrary to section 65A of the Transfer of Property Act, 1882; or
    iii. is contrary to terms of mortgage; or
    iv. is created after the issuance of notice of default and demand by the Bank

AAny party aggrieved by any decision given by the DRT on an application filed under this section may appeal to the Debt Recovery Appellate Tribunal within 30 days from the date of receipt of the order. However, if the appeal is being preferred by the borrower, they have to ensure that an amount not less than 50% of the amount is deposited by them with the Tribunal.

➢ RIGHT OF THE BORROWER TO RECEIVE COMPENSATION AND COSTS

Section 19 provides that if the Tribunal finds that the action taken by the secured creditor was unjustified and illegal, they may direct the return of such secured asset along with payment of such compensation and costs as may be determined by such Tribunal.

➢ CENTRAL REGISTRY

Section 20 provides for the setting up of a special body known as the Central Registry for the purposes of registration of transaction of securitisation and reconstruction of financial assets and creation of security interest under this Act. A person, called the Central Registrar, who shall be responsible to ensure proper functioning of the Registry shall also be appointed under the Act.

The Act provides that the Registry should maintain Registers to record the following –

a) securitisation of financial assets;
b) reconstruction of financial assets;
c) creation of security interest;
d) every transaction thereof; and
e) any modification therein.

It is to be noted that any registration of transactions of creation, modification or satisfaction of security interest by a secured creditor or other creditor shall be deemed to constitute a public notice from the date and time of filing of particulars of such transaction with the Central Registry.

Non registration of creation of security interest with the Registry shall bar a lender from taking any action against the borrower under this Act.

➢ NON-APPLICABILITY OF THE ACT

As per **Section 31** the provisions of this Act shall not apply to –

a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 or any other law for the time being in force;
b) a pledge of movables within the meaning of section 172 of the Indian Contract Act;
c) creation of any security in any aircraft;
d) creation of security interest in any vessel;
e) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930;

f) any properties not liable to attachment;
g) any security interest for securing repayment of any financial asset not exceeding 1 Lakh rupees;
h) any security interest created in agricultural land; or
i) any case in which the amount due is less than 20% of the principal amount and interest.

➢ SECURITY INTEREST (ENFORCEMENT) RULES, 2002

These Rules have been enacted by the Central Government to ensure smooth functioning of the Act.

- ***Sale of Movable Assets***

The authorised officer may sell the movable secured assets taken possession by adopting any of the following methods—

(a) obtaining quotations from parties dealing in the secured assets or otherwise interested in buying such assets; or
(b) inviting tenders from the public; or
(c) holding public auction; or
(d) by private treaty.

The authorised officer shall serve to the borrower a notice of thirty days for sale of the movable secured assets. Sale by any methods other than public auction or public tender shall be on such terms as may be settled between the parties in writing.

- ***Time Of Sale, Issue Of Sale Certificate And Delivery Of Possession***

a) No sale of immovable property shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers.
b) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation.
c) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent of the amount of the sale price, to the authorised officer
d) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.
e) In default of payment within the period, the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claims.

f) On confirmation of sale, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser.
g) The authorised officer shall deliver the property to the purchaser free from encumbrances
h) The certificate of sale shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.

- ***Procedure for recovery of Shortfall***

An application for recovery of balance amount by any secured creditor shall be presented to the Debts Recovery Tribunal by the authorised officer or his agent or by a duly authorised legal practitioner, to the Registrar of the Bench within whose jurisdiction his case falls or shall be sent by registered post addressed to the Registrar of Debts Recovery Tribunal.

RECOVERY OF DEBTS DURE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 2002

TWO AUTHORITIES UNDER THIS ACT

DEBT RECOVERY TRIBUNALS (DRT)

(33DRTs)

DEBT RECOVERY APPELLATE TRIBUNAL (DRAT)

(5 DRATs)

DEBT RECOVERY TRIBUNAL – COMPOSITION

DRT shall consist of one person only, to be called the Presiding Officer.

Any person who has been, or is qualified to be, a District judge may be appointed as the presiding officer.

Presiding Officer shall hold office for a term of five years or until he attains the age of **sixty-five years**, whichever is earlier.

Each Debts Recovery Tribunal has **two Recovery officers**. The work amongst the Recovery Officers is allocated by the Presiding Officer.

DRAT – COMPOSITION

DRAT shall consist of one person lo be called as the Chairperson of the appellate Tribunal.

Any person, who is or has been or is qualified to be, a judge of a HIGH Court; or has been a member of the Indian Legal service, and has held a post in Grade I of that Service for at least three years; or has held office as the presiding officer of a Tribunal for at least three years, shall be qualified for appointment as the presiding officer of an Appellate Tribunal.

The Presiding Officer of an appellate Tribunal shall hold office for a term of five years or until he attains the age of **seventy years** whichever is earlier.

➢ DEBT RECOVERY TRIBUNAL- JURISDICTION

The DRTs have two different types of jurisdiction – pecuniary and territorial.

PECUNIARY LIMITS:-

The DRT can entertain complaints only where the amount of debt due to any bank or financial institution is Rs. 10 lakhs or more. However, if there is any appeal filed before DRT, it can even

hear the matters where the amount involved is less than 10 lakhs. DRT doesn't have original jurisdiction to hear matters with amount involved less than 10 lakhs. [SC in State Bank of Patiala vs Mukesh Jain].

TERRITORIAL LIMITS:-

The DRT can entertain complaints if any of the defendants ordinarily resides or carries on business or personally works for gain or has a branch office; or the cause of action arises within the local limits of its jurisdiction.

➢ DEBT RECOVERY TRIBUNAL- PROCEDURE SECTION 19

1. Where a Bank or a Financial Institution has to recover any debt from any person, it may make an **application** to the concerned DRT.
2. Further, when a Bank or a financial institution, which has to recover its debt from any person, has filed an application to the Tribunal and against the same person and another bank or financial institution also has a claim to recover its debt, the later bank or financial institution may **join the applicant** bank or financial institution at any stage of the proceeding, before the final order is passed by making an application to that Tribunal.
3. On receipt of application, the Tribunal shall **issue summons** requiring the defendant to show cause within 30 days as to why the relief prayed for should not be granted.
4. The defendants shall, at or before the first hearing or within such time as the Tribunal may permit, present a **written statement** of his defence.
5. Tribunal may, after giving the applicant and the defendant an opportunity of being heard pass such orders on the application as it deems fit to meet the ends of justice.
6. The Tribunal may make **an interim order** against the defendant to debar him from transferring alienating or otherwise dealing with, or disposing of any property and assets belonging to him without the prior permission of the Tribunal.
7. The Tribunal shall send a copy of every order passed by it to the applicant and the defendant. The presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal, to the Recovery Officer for recovery of the amount of debt

specified in the certificate.

➢ APPEAL TO DRAT – PROCEDURE

Section 20 of the Act provides that any person, aggrieved by an order made by Debt Recovery Tribunal may prefer an appeal to Debt Recovery appellate Tribunal. However, on appeal shall lie to DRAT from an order made by DRT with the consent of parties.

The appeal to DRAT shall be filed within a period of **30 days** from the date of receiving the copy of the order of DRT. However, DRAT may entertain an appeal after the expiry of 30 days, if it is satisfied that there was sufficient cause for not filing it within that period.

➢ DEPOSIT OF AMOUNT OF DEBT DUE FOR FILING APPEAL

Where an appeal is preferred by any person from whom the amount of debt is due to a Bank or a Financial Institution or Financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal 50% of the amount of debt so due from him as determined by the Tribunal, provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited.

➢ POWERS OF THE TRIBUNAL AND APPELLATE TRIBUNAL

The DRT shall have the same powers as are vested in the civil court.

Under the Code of Civil Procedure 1908, while trying a suit, in respect of the following matters namely;-

a) summoning and enforcing the attendance of any person and examining him on oath;
b) requiring the discovery and production of documents;
c) receiving evidence on affidavits;
d) issuing commissions for the examination of witnesses or documents;
e) reviewing its decisions;
f) dismissing an application for default or deciding it ex parte;
g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;
h) any other matter which may be prescribed

➢ RECOVERY OF DEBT DETERMINED BY TRIBUNAL

- ***Modes Of Recovery Of Debts***

As per the provision of **Section 25** the Recovery Officer shall on receipt of the copy of the certificate under Section 19 proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:-

a) attachment and sale of the movable or immovable property of the defendant;
b) taking possession of property over which security interest is created or any other property of the defendant and appointing receiver for such property and to sell the same
c) arrest of the defendant and his detention in prison;
d) appointing a receiver for the management of the movable or immovable properties of the defendant
e) any other mode of recovery as may be prescribed by the Central Government.

- ***Appeal Against The Order Of Recovery Officer***

Any person aggrieved by an order of the Recovery Officer made under this Act may; within 30 days from the date, on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

➢ ACT TO HAVE OVER-RIDING EFFECT

Section 34 provides that save as provided under subsection (2), the provisions of this Act shall have effect notwithstanding anything inconsistent herewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

LESSON 01 – TYPES OF CORPORATE RESTRUCTURING

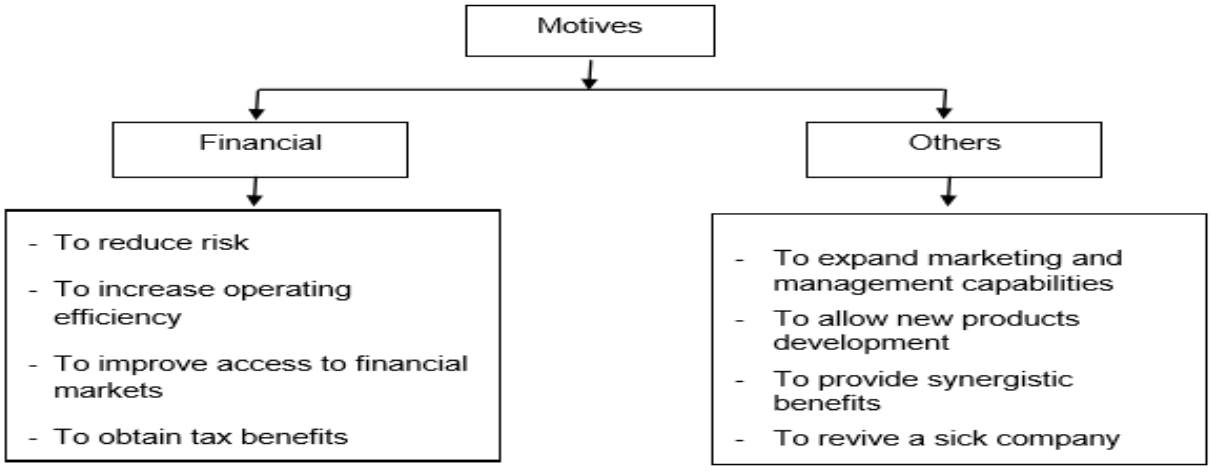
➢ CORPORATE RESTRUCTURING – INTRODUCTION / NEED / SCOPE

Corporate Restructuring is an expression that refers to the restructuring process undertaken by a business enterprise. It is a comprehensive process by which a company can consolidate its business operations and strengthen its position for achieving its short-term and long-term corporate objectives. In a nutshell, Corporate Restructuring means reorganizing a company or its business or its financial structure in such a way so as to make it corporate and work more efficiently.

The various needs for undertaking a Corporate Restructuring exercise and its scope are as follows:-

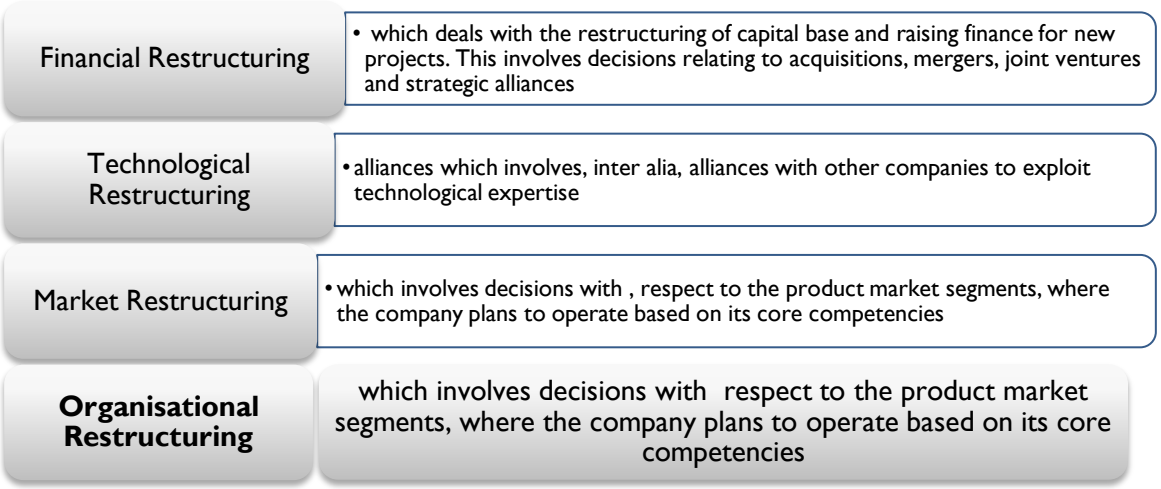
A. To enhance shareholders value
B. Orderly redirection of the firms activities
C. Deploying surplus cash from one business to finance profitable growth in another
D. Exploiting inter-dependence among present or prospective businesses
E. Risk reduction
F. Development of core-competencies
G. To obtain tax advantages by merging a loss-making company with a profit-making company
H. To have access to better technology
I. To become globally competitive
J. To increase the market share

➢ CORPORATE RESTRUCTURING - MOTIVES



➢ KINDS OF RESTRUCTURING

The Restructuring exercise can be classified into different types based on the motive with which it is done. Generally, the different methods of corporate restructuring can be divided into these types -



➢ TOOLS/MODES OF CORPORATE RESTRUCTURING

The Corporate Restructuring exercise can be undertaken with the help of a number of tools. Some of the most commonly used tools are discussed hereunder.

- ***Merger***

A merger can be defined as the fusion or absorption of one company by another. It is understood as an arrangement, whereby the assets of two (or more) companies get transferred to, or come under the control of one company (which may or may not be one of the original two companies).

A merger means absorption of one company by another company, wherein at least one of the two existing companies loses its legal identity after transferring all its assets, liabilities and other properties to the other company.

Mergers may be of the following types-

(i) **Horizontal Merger:** It is a merger of two or more companies that compete in the same industry. It is a merger with a direct competitor and hence expands as the firm's operations in the same industry.

(ii) **Vertical Merger:** It is a merger which takes place upon the combination of two companies which are operating in the same industry but at different stages of production or distribution system. If a company takes over its supplier/producers of raw material, then it may result in backward integration of its activities. On the other hand, Forward integration may result if a company decides to take over the retailer or Customer Company.

(iii) **Co generic Merger:** It is the type of merger, where two companies are in the same or related industries but do not offer the same products, but related products and may share similar distribution channels, providing synergies for the merger.

(iv) **Conglomerate Merger:** These mergers involve firms engaged in unrelated type of activities i.e. the business of two companies are not related to each other horizontally nor vertically. In a pure conglomerate, there are no important common factors between the companies in production, marketing, research and development and technology.

- ***Amalgamation***

Amalgamation is an 'arrangement' or 'reconstruction'. Amalgamation is a legal process by which two or more companies are joined together to form a new entity or one or more companies are to be absorbed or blended with another and as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or the amalgamated company.

Example – Idea - Vodafone, Flipkart – eBay, Bank of Baroda – Vijaya Bank – Dena Bank.

- ***Takeover/Acquisition***

The term takeover is not defined in the Companies Act, 1956. Broadly speaking, takeover refers to acquisition of company by another company. Takeover is an acquisition of shares carrying voting rights in a company with a view to gain control over the management of the company, it takes place when an individual or a group of individuals or a company acquires control over the assets of a' company either by acquiring majority of its shares or by obtaining control of the management of the business and affairs of the company.

Example – Ola – TaxiforSure, Flipkart – Myntra.

- ***Demerger***

Demerger is an arrangement in which a single business is broken into components, either to operate on their own, to be sold or to be dissolved. It is the process whereby some part / undertaking of one company is transferred to another company which operates completely

separate from the original company. The shareholders of the original company are usually given an equivalent stake of ownership in the new company.

Types of Demerger

1. **Divestiture** - Divestiture means selling or disposal of assets of the company or any of its business undertakings/divisions, usually for cash (or for a combination of cash and debt).

2. **Spin-offs** - The shares of the new entity are distributed to the shareholders of the parent company on a pro-rata basis. The parent company also retains ownership in the spun-off entity.

3. **Splits / Divisions -** Splits involve dividing the company into two or more parts with an aim to maximize profitability by removing stagnant units from the mainstream business. Splits can be of two types, Split-ups and Split-offs.
    a. ***Split-ups:*** It is a process of reorganizing a corporate structure whereby all the capital stock and assets are exchanged for those of two or more newly established companies resulting in the liquidation of the parent corporation.
    b. ***Split-offs:*** It is a process of reorganizing a corporate structure whereby the capital stock of a division or subsidiary of corporation or of a newly affiliated company is transferred to the stakeholders of the parent corporation in exchange for part of the stock of the latter.

4. **Equity Carve-Outs -** Equity carve-outs are referred to a percentage of shares of the subsidiary company being issued to the public. Equity carve outs result in publicly trading the shares of the subsidiary entity.

Example – L&t – Ultratech Cement.

- ***Joint Venture***

It is a strategic business policy whereby a business enterprise for profit is formed in which two or more parties share responsibilities in an agreed manner, by providing risk capital, technology, patent, trademark, brand names and access to markets.

Example – Tata Starbucks

- ***Strategic Alliance***

Strategic Alliance means any arrangement or agreement under which two more companies cooperate in order to achieve certain commercial objectives. Strategic alliances are often

motivated by consideration such as reduction in cost technology sharing, product development, market access to capital.

Example – Nike, Puma.

- ***Slump Sale***

Section 2 (42C) of the Income Tax Act, 1961, recognizes 'Slump-sale' as a transfer of an 'undertaking' i.e. a part or a unit or a division of a company, which constitutes a business activity when taken as a whole. It is a transfer of one or more undertakings as a result of sale for a lump sum consideration, without values being assigned to the individual assets and liabilities in such sale. Sale includes transfer of an asset from one person to another for some consideration, where consideration can be in kind or cash.

- ***Reverse Merger***

A reverse merger is a merger in which –

1. a private company becomes a public company by acquiring it
2. a weaker or smaller company acquires a bigger company
3. a parent company merges into its subsidiary
4. a loss-making company acquires a profit-making company

➢ CHAPTER XV- COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS

- ✓ **Section 230** - Power to Compromise or Make Arrangements with Creditors and Members
- ✓ **Section 231**- Power of Tribunal to Enforce Compromise or Arrangement
- ✓ **Section 232** - Merger and Amalgamation of Companies
- ✓ **Section 233** - Merger or Amalgamation of Certain Companies
- ✓ **Section 234** - Merger or Amalgamation of Company with Foreign Company
- ✓ **Section 235** - Power to Acquire Shares of Shareholders Dissenting from Scheme or Contract Approved by Majority
- ✓ **Section 236** - Purchase of Minority Shareholding
- ✓ **Section 237**- Power of Central Government to Provide for Amalgamation of Companies in Public Interest
- ✓ **Section 238** - Registration of Offer of Schemes Involving Transfer of Shares
- ✓ **Section 239** - Preservation of Books and Papers of Amalgamated Companies
- ✓ **Section 240** - Liability of Officers in Respect of Offences Committed Prior to Merger, Amalgamation, etc.

FINANCIAL RESTRUCTURING

Financial restructuring of a company involves a re-arrangement of its financial structure to make the company's finances more balanced. It is an adjustment of debt-equity ratio.

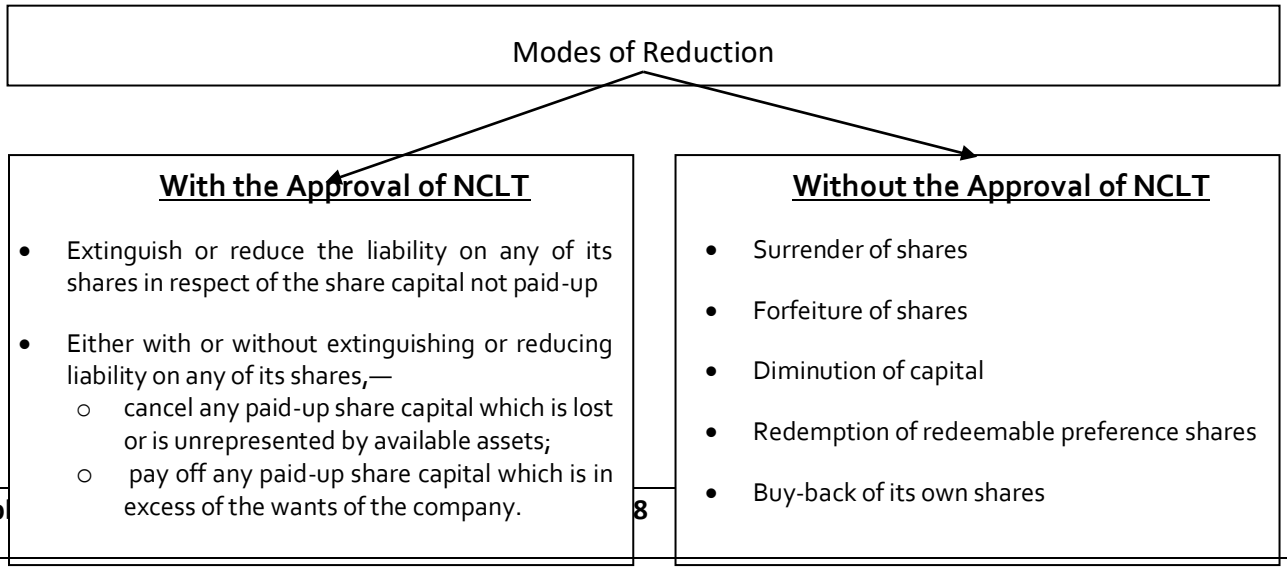
➢ ALTERATION OF SHARE CAPITAL [SECTION 61] :

Section 61 of the Companies Act, 2013 prescribes that a *company may, by an ordinary resolution, alter the share capital of the company in following ways :*

1. Increase in authorised share capital.
2. Consolidation of its shares.
3. Conversion of fully paid up shares into stock.
4. Sub-dividing its existing shares into smaller denominations.
5. Cancellation of share capital.

➢ REDUCTION OF SHARE CAPITAL [SECTION 66] :

Capital Reduction is the process of decreasing a company's shareholder's equity through share cancellations and share repurchases. The reduction of share capital means reduction of issued, subscribed and paid up share capital of the company.



Surrender of shares

As such, Companies Act, 2013 does not contain a provision on surrender of shares. At the same time, there is no restriction also on such surrender of shares. It all depends upon the articles of association of the company whether shares can be surrendered or not. Surrender of shares shall not tantamount to cancellation of share capital.

➢ BUY BACK OF SECURITIES (SEC 68)

Meaning:

Buy back of securities means the company buys its own shares and extinguishes the same before the name of the company is entered in its register of members.

Objectives of buy back:

Buy back of securities is one of the methods of financial reconstruction. Securities may be bought back by the company on account of one or more of the following reasons:

➢ To increase promoters holding
➢ Increase Earnings per share
➢ Restructuring the debt-equity mix
➢ To counter a hostile takeover
➢ To return surplus cash not required by business to shareholders

Sources of buy back:

A company may purchase its own securities out of:

i) its free reserves; or

ii) the securities premium account; or

iii) the proceeds of any shares or other specified securities.

Authority:

1. Buy back of securities shall be primarily authorised by the articles of association of the company.
2. Buy-back can be made with the approval of the Board of directors at a board meeting and/or by a special resolution passed by shareholders in a general meeting, depending upon the quantum of buy back.

Quantum of buy back:

a) Board of directors can approve buy-back up to 10% of the total paid-up equity capital and free reserves of the company.

b) Shareholders, by a special resolution, can approve buy-back up to 25% of the total paid-up capital and free reserves of the company in respect of any financial year.

Conditions for buy back:

1. Debt equity ratio post buy back of securities shall be 2:1. However, in case of government company carrying out a Non-Banking Finance Institution activities and Housing Finance Activities may maintain such ratio upto 6:1 .
2. Securities bought back shall only be fully paid securities.

LESSON 02 – TAKEOVERS

➢ MEANING OF TAKEOVER

The term takeover is not defined in the Companies Act, 2013. Takeover *is* an acquisition of shares carrying voting rights in a company with a view to gain control over the management of the company. It takes place when an individual or a group of individuals or a company acquires control over the assets of a company either by acquiring majority of its shares or by obtaining control of the management of the business and affairs of the company.

➢ ADVANTAGES OF TAKEOVER

1) To affect savings in overheads and working expenses on the strength of combined business.
2) To achieve product development through acquiring firms with compatible products and technological competence.
3) To diversify by acquiring companies with new product lines.
4) To maximize shareholders wealth by optimum utilization of resources.
5) To eliminate competition and to obtain the advantage of economies of scale.

6) To increase market share. To command better bargaining position.

➢ KINDS OF TAKEOVER

- ***Friendly Takeover***

Friendly takeover is with the consent of taken over company. In friendly takeover, there is an agreement between the management of two companies through negotiations and the takeover bid may be with the consent of majority or all the shareholders of the target company. This kind of takeover is done through negotiations between two groups. Therefore, it is also called negotiated takeover.

- ***Hostile Takeover***

When an acquirer company does not offer the target company the proposal to acquire its undertaking but silently and unilaterally pursues efforts to gain control against the wishes of existing management, such acts of acquirer are known as 'hostile takeover'. Such takeovers are hostile on management and are thus called hostile takeover. Hostile takeovers directly made to the shareholders of Target Company has resulted in a multiple defensive strategies-by corporate from being taken over by the company

- ***Bailout Takeover***

Takeover of a financially sick company by a profit earning company to bail out the former is known as bail out takeover. A bail out takeover takes place with the approval of the Financial Institutions and banks since the objective is to revive the financially weak company and banks normally have a charge on the assets of the company.

➢ TAKEOVER OF UNLISTED COMPANIES

Section **235** Of The Companies Act, 2013 talks about the acquisition of shares of dissenting shareholders.

1. A scheme or contract exists under which a transferee company agrees to purchase the shares of the transferor company is prepared by the Boards of both the Companies.

2. The scheme or contract must be in relation to the transfer or shares or any class of shares of the transferor company to the transferee company.
3. The proposed transfer of shares by the transferor company must be approved by the holders of 9/10 in value of the shares whose transfer is involved and this approval should be obtained within 4 months of the offer being floated.
4. Once the acquisition of shares in value, not less than 90% has been registered in the books of the transferor Company, the transferor Company shall within one month of the date of such registration, inform the dissenting shareholders in Form CAA 14.
5. Once the approval is received by the requisite number of shareholders, the transferee company becomes entitled and bound to acquire these shares on the terms on which it acquires under the scheme (the binding provision).

➢ SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 2011

- ***Acquirer [Reg. 2(1) (A)]***

"Acquirer" means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company.

- ***Acquisition [Reg. 2(1) (B)]***

"Acquisition" means, directly or indirectly, acquiring or agreeing to acquire shares or voting rights in, or control over, a target company.

- ***Control [Reg. 2(1) (E)]***

"Control" includes the right to appoint majority of the directors or to control the management or policy decisions exercisable -by a person or persons acting individually or in concert, directly or

indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner:

Provided that a director or officer of a target company shall not be considered to be in control over such target company, merely by virtue of holding such position.

- ***Frequently Traded Shares [Reg. 2(1)(J)]***

"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 made, is at least ten per cent of the total number of shares of such class of the target company:

- ***Identified Date [Reg. 2(1)(K)]***

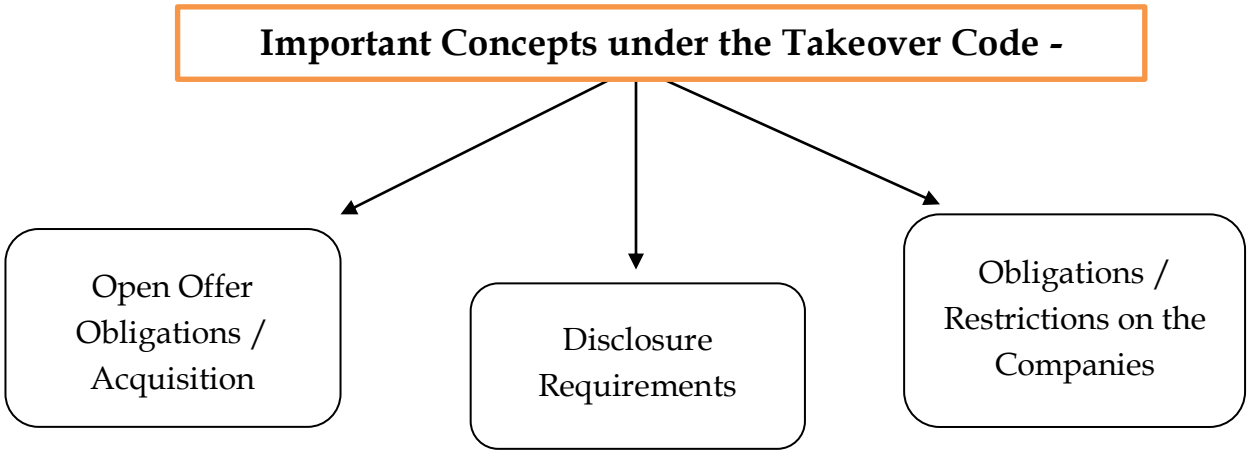
"Identified Date" means the date falling on the tenth working day prior to the commencement of the tendering period, for the purposes of determining the shareholders to whom the letter of offer shall be sent.

- ***Target Company [Reg. 2(1)(Z)]***

"Target Company" means a LISTED INDIAN company/ LISTED INDIAN BODY CORPORATE OR corporation established under a Central legislation, State legislation or Provincial legislation.

- ***Tendering Period [Reg. 2(1)(Za)]***

"Tendering Period" means the period within which shareholders may tender their shares in acceptance of an open offer to acquire shares made under these regulations.



➢ DISCLOSURE OF ACQUISITION AND DISPOSAL [REGULATION 29] – EVENT BASED DISCLOSURES

Regulation 29(1) provides that any acquirer who acquires shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and PACs in such target company, entitle them to 5% cent or more of the voting rights in such target company shall disclose their aggregate shareholding and voting rights in such target company in such form as may be specified.

Regulation 29(2) provides that any acquirer, who together with PACs holds 5% or more of the voting rights in a target -company, shall disclose every acquisition or disposal of shares of such target company representing 2% or more of the voting rights in such target company along with their aggregate shareholding and voting rights.

Regulation 29(3) provides that the above disclosures shall be made within two working days of the receipt of intimation of allotment of shares, or the acquisition of shares or voting rights in the target company to,-

a. every stock exchange where the shares of the target company are listed; and

b. The target company at its registered office.

➢ CONTINUAL DISCLOSURES [REGULATION 30]

Regulation 30(1) provides that every person, who together with PACs holds shares or voting rights entitling {hem to exercise 25% of the voting rights in a target company (substantial shareholder), shall disclose their aggregate shareholding and voting rights as of 31st of March, in such target company in such form as may be specified. Disclosure shall be made within 7 working days from the end of each financial year to,-

a. every stock exchange where the shares of the target company are listed; and

b. The target company at its registered office.

Regulation 30(2) provides that the promoter of every target company shall together with persons acting in concert with him, disclose their aggregate shareholding and voting rights as of the 31s day of March, in such target company in such form as may be specified Disclosure shall be made within 7 working days from the end of each financial year to,-

a. every stock exchange where the shares of the target company are listed; and

b. The target company at its registered office.

➢ DISCLOSURE OF ENCUMBERED SHARES [REGULATION 31]

The promoter of a very target company shall disclose in such form as may be specified:

- details of shares in such -target company encumbered by him or by persons acting in concert with him;
- details of any invocation of such encumbrance; and
- Details of release of such encumbrance.

The disclosures required as above shall be made within **seven working days** from the creation or invocation or release of encumbrance, as the case may be to,-

a. every stock exchange where the shares of the target company are listed; and

b. The target company at its registered office.

➢ ACQUISITION OF SHARES/VOTING RIGHTS/CONTROL

- ***Initial Trigger Threshold [Reg. 3(1)]***

Regulation 3(1) casts an obligation on the acquirer to make a public announcement of an open offer for acquiring shares of any target company where acquirer acquires shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by PACs with him in such target-company, entitle them to exercise 25% or more of the voting rights in such target company; However, regardless of the level of shareholding and acquisition of shares, acquisition of control-over a target company would require the acquirer to make an open offer. **[Regulation 4]**

- ***Creeping Acquisition Trigger [Reg. 3(2)]***

Thus, creeping acquisition can be made at the maximum rate of 5% in any one financial year without complying with the requirement of mandatory public offer by way of public announcement, provided that the post-acquisition shareholding of acquirer together with persons acting in concert with him shall not increase beyond 75%.

The open offer obligation would also apply to acquisition of shares by any person from other persons acting in concert with him such that the individual shareholding of the person acquiring shares equals or exceeds the stipulated threshold of 5% although the aggregate shareholding along with persons acting in concert may remain unchanged. [Reg. 3(3)]

- ***Acquisition Of Control [Regulation 4]***

Regulation 4 provides the following:
Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target, company, in accordance with these-regulations.

➢ OPEN OFFER PROCESS [REGULATIONS 12-23]

- ***Manager To The Open Offer [Regulation 12]***

- ***Timing Of Public Announcement And Detailed Public Statement [Regulation 13]***

Public announcement - **on the same date** as the date of transaction which triggered the open offer.

Detailed public statement - **within a period of 5 working days**

- ***Publication Of Public Announcement (PA) And Detailed Public Statement (DPS) [Reg. 14]***

One English national daily, any one Hindi national daily with wide circulation, and any one regional language daily with wide circulation, at the place where the registered office of the target company is situated.

Regulation 14(4) requires that simultaneously with publication of such DPS to the newspapers, a copy of the same shall be sent to,-

i. the SEBI through the manager to the open offer;
ii. all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall Forthwith disseminate such information to the public; and
iii. The target company at its registered office and the target company shall forthwith place the same before the board of directors of the target company.

- ***Filing Of Letter Of Offer To Sebi [Regulation 16]***

Within 5 working days from the date of the detailed public statement

SEBI shall give-its comments on the draft letter of offer as fast as possible but **not later than fifteen working days of the receipt of the draft letter of offer**. However, in the event SEBI has sought clarifications or additional information from the manager to the open offer, the period for issuance of comments shall be extended to the **fifth working day from the date of receipt of satisfactory reply to the clarification or additional information sought.**

➢ ESCROW ACCOUNT [REGULATION 17]

Atleast 2 days prior to the date of the detailed public statement.

The escrow amount shall be calculated in the following manner:

a. For consideration payable under the open offer up to Rs. 500 crores	25% of consideration payable
b. For consideration payable under the open offer exceeding Rs. 500 crores	25% of Rs. 500 crores and 10% of the balance amount

➢ OTHER PROCEDURES [REGULATION 18]

The acquirer's other obligations are as under:

- The letter of offer shall be **dispatched** to the shareholders whose names appear on the register of members of the target company -as of the identified date, **not later than 7 working days from the receipt of communication of comments from SEBI** or where no comments are offered by the Board, within 7 working days from the expiry of the period of 15 working-days.
- **The acquirer and PACs shall not acquire or sell any shares of the target company during, the period between three working days prior to the commencement of the tendering period and until the expiry of the tendering period.**
- The acquirer shall **issue an advertisement in such form as may be specified, one business day** before the commencement of the tendering period, announcing the schedule of activities for the open offer, the status of statutory and other approvals, Such advertisement shall be,-
  a. published in all the newspapers in which the DPS was made; and

b. simultaneously sent to SEBI, all the stock exchanges on which the shares of the target company are listed, and the target company at its registered office.

- The acquirer shall, **within 10 working days from the last date of the tendering period**, complete all requirements under these regulations and other applicable law relating to the open offer including payment of consideration to the shareholders who have accepted the open offer.

➢ REVISION OF OPEN OFFER

Irrespective of whether a competing offer has been made, an acquirer may make upward revisions to the offer price, and subject to the other provisions of these regulations, to tile number of shares sought to be acquired under the open offer, at any time prior to the commencement of the last three working days prior to the -commencement of the tendering period, to the event of any revision of the open offer, whether -by way of an upward revision in offer price, or of the offer size, the acquirer shall,-

a. make corresponding increases to the amount kept in escrow prior to such revision;
b. make an announcement in respect of such revisions in all the newspapers in which the detailed public statement pursuant to the public announcement was made;
c. simultaneously with the issue of such an announcement, inform SEBI, all the stock exchanges on which the shares of the target company arc listed, and the target company, at its registered office;

➢ TENDERING PERIOD

The tendering period shall **start not later than 12 working days from date of receipt of comments from the SEBI and shall remain open for 10 working days.**

➢ VOLUNTARY OFFER [REGULATION 6]

Shareholders holding shares entitling them to exercise 25% or more of the voting rights in the target company may, without breaching minimum public shareholding requirements under the listing agreement, voluntarily make an open offer to consolidate their shareholding subject to

their aggregate shareholding after completion of the open offer not exceeding the maximum permissible non-public shareholding. [Regulation 6(1)]

The facility to voluntarily make an open offer shall not be available if in the past (preceding 52 weeks), such persons (acquire to and PACs holding 25% or more voting rights) have made acquisitions without open offer within the creeping acquisition limit of *5%*. [The first proviso to Regulation 6(1)]

➢ CONDITIONAL OFFER [REGULATION 19]

An acquirer may make an open offer conditional as to the minimum level of acceptance. Where the open offer is pursuant to an agreement, such agreement shall contain a condition to the effect that in the event the desired level of acceptance of the open offer is not received the acquirer shall not acquire any shares under the open offer and the agreement attracting the obligation to make the open offer shall stand rescinded.

➢ COMPETING OFFFRS [REGULATIONON 20]

Upon a Public Announcement of an open offer for acquiring shares of a target company being made, any person other than the acquirer who has made such public announcement, shall be entitled to **make a public announcement of an open offer within 15 working days of the date of the detailed public statement** made by such acquirer who has made the first public announcement for such target company.

The acquirers making the competing offers shall be entitled to make upward revisions of the offer price at any **-time up 10 working days prior** to the commencement of the tendering period.

➢ PAYMENT OF CONSIDERATION [REGULATION 21]

For the amount of consideration payable in cash, the acquirer shall open a **special account** with a Banker to an Issue and deposit therein such sum as would together with 90% of the amount lying in the escrow account make up the entire sum due and payable to the shareholders as consideration.

The acquirer shall, **within a period of 10 working** days from the expiry of the tendering period, complete all procedures relating to the offer including payment of consideration to the shareholders who have accepted the offer.

➢ WITHDRAWAL OF THE OPEN OFFER [REGULATION 23]

An offer shall be withdrawn only in the following cases:

1. The statutory approvals required have been refused. The statutory approvals would include approval of shareholders as required by -the Regulation or the approval for foreign investment by FBPB or RBI and the like.
2. Where the sole acquirer, being an individual has died.
3. Any condition stipulated in the agreement for acquisition attracting the obligation to make the -open offer is not met for reasons outside the reasonable control of the acquirer.
4. Such circumstance as in the opinion of SEBI merits/requires withdrawal.

An offer can be withdrawn subject to the following conditions:

1. The acquirer will have to make a public announcement in respect of such withdrawal of offer in all the newspapers in which the original public announcement was made.
2. The acquirer shall also simultaneously inform the withdrawal of offer to the SEBI, all the Stock Exchanges where the shares of the company are listed and the target company at its registered office.

➢ OFFER PRICE [REGULATION 8]

Minimum offer price for *direct acquisitions* and *indirect acquisitions deemed to be direct acquisitions* 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 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 **52 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 **26 weeks** immediately preceding the date of the public announcement;

d. **the volume-weighted average market price** of such shares for a period of **60 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;

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

➢ EXEMPTIONS [REGULATIONS 10-11]

- ***General Exemptions [Regulation 10]***

Sub-regulation (I) of Regulation 10 exempts the following, categories of acquisitions from open offer obligations under Regulations 3 & 4 (but not from disclosure obligations under Regulations 28/20) without SEBl's approval:

- Transfers between qualifying parties such as immediate relatives, group companies, promoters, etc. [Regulation 10(1)(3)]
- Certain acquisitions in the ordinary course of business-of stock broker, underwriter, merchant banker, scheduled commercial bank, etc. [Regulation 10(l)(b)]
- Acquisition pursuant to disinvestment in a Government Company. [Reg. 10(l)(c)]

- Acquisitions pursuant to Scheme made under section 18 of SICA, 3985 or scheme of arrangement involving transferor company pursuant to order of Court or other statutory authority under any Indian or foreign law [Regulation 10(l)(d)]
- Acquisition pursuant to SARFAESl Act, 2002 [Regulation 10(l)(e)] Acquisition under SEBI
- Acquisition under SEBI (Delisting of Equity Shares) Regulations [Reg. 10(l)(f)]
- Acquisition by way of transmission, succession or inheritance [Regulation 10(l)(g)]
- Voting rights on preference shares under the Companies Act, 1956 [Reg. 10(l)(h)]
- Acquisition under Corporate Debt Restructuring (as per scheme notified by RBI) not involving change of control provided such scheme authorized by special resolution by postal ballot. (Regulation 10(2)]
- Increase of voting rights to 25% through buy-back provided shareholder reduces his holding below 25% within 90 days from the date of increase, [Reg. 10(3)].
- Acquisition through Rights issue, subject to certain conditions. [Reg. 10(4)(a)&(b)]
- Increase of voting rights through buy-back in excess of threshold under Regulation 3(2), subject to certain conditions. [Regulation 10(4)(c)]
- 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. [Regulation 10(4)(d)]
- Acquisition of shares in Target Company from state-level financial institutions by promoters of the target company. [Regulation 10(4)(e)]
- Acquisition of shares in Target Company by promoters from venture capital fund or foreign venture capital investor. [Regulation 10(4)(f)]

- ***Exemptions By The Sebi [Regulation 11]***

Power of SEBI to grant exemption from open offer obligations in individual cases

Regulation 11(1) provides that SEBI may, on the application made by the acquirer, 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 SEBI deems fit to impose in the interests of investors in securities and the securities market.

➢ DEFENCE STRATEGICS TO TAKEOVER BID

❖ ***Financial Defensive Measures***

✓ ***The "Crown Jewel" Strategy***

The central theme in such a strategy is the divestiture of -major operating unit most coveted by the bidder-commonly known as the "crown jewel strategy". Consequently, the hostile bidder is deprived of the primary intention behind the takeover bid. Such a radical step may however be, self-destructive and unwise in the company's interest

✓ ***The "Packman" Defence***

This strategy, although unusual, is called the packman strategy. Under this strategy, the target company attempts to purchase the shares of the raider company. This is usually the scenario if the raider company is smaller than the -target company and the target company has substantial cash or liquid assets.

✓ ***Targeted Share Repurchase or "Buyback"***

This strategy is one in which the target management uses up a part of the assets of the company on the one hand to increase its holding and on the other it disposes of some of the assets that make the target company unattractive to the raider. The strategy therefore involves a creative use of buyback of shares to reinforce its control and detract a prospective raider

✓ ***"Golden Parachutes"***

Golden parachutes refer to the "separation" clauses of an employment contract that compensate managers who lose their jobs under a change-of-management scenario. The provision usually calls for a lump-sum payment or payment over a specified period at full and partial rates of normal compensation. The provisions which would govern a "golden parachute" employment contract in India would be Sections 318-320 of the Companies Act, 1956 which govern the provisions for compensation for loss of office. Thus, a perusal of the said provisions would show that payment as compensation for the loss of office is allowed to be made only to the managing director, a director holding an office of manager or a whole time director. Therefore, a "golden parachute" contract with the entire senior management, as is the practice in the U.S., is of no consequence in India.

❖ ***Anti-Takeover Amendments or "Shark Renellants"***

✓ ***Supermajority Amendments***

These amendments require shareholder approval by at least two thirds vote and sometimes as much as 90% of the voting power of outstanding capital stock for all transactions involving - change of control.

✓ ***Authorization of Preferred Stock***

The Board of Directors is authorized to create a new class of securities with special voting rights. This security, typically preferred stock, may be issued to a friendly party in a control contest. Thus, this device is a defense against hostile takeover bids, although historically it was used to provide the Board of Directors with flexibility in financing under changing economic conditions.

✓ ***Poison Pill Defenses***

A controversial but popular defense mechanism against hostile takeover bids is the creation of securities called "poison pills". These pills provide their holders with special rights exercisable only after a period of time following the occurrence of a triggering event such as a tender offer for the control or the accumulation of a specified percentage-of target, shares. These rights take several forms but all are difficult and costly to acquire control of the issuer, or the target firm.

LESSON 04- MERGERS AND AMALGAMATION – PROCESS

➢ PREREQUISITES OF MERGER AND ACQUISITION

1. Due Diligence
2. Business Valuation
3. Planning Exit
4. Structuring Business Deal
5. Stage of Integration

➢ GENERAL PRINCIPLES OF BUSINESS VALUATION

1. **Principle of Time Value of Money:** This principle suggests that the value can be measured by calculating the present value of future cash flows discounted at the appropriate discount rate.
2. **Principle of Risk and Return:** This principle believes that the investors are basically risk averse and on the other hand expects higher amount of wealth. Higher the risk, higher may be possibility of return and vice versa.
3. **Principle of Substitution**: This principle believes that understanding the market with competitive forces are very important in order to decide the price consideration. The risk averse investor will not pay more than that of the substitute available in the market.
4. **Principle of Alternatives**: This principle suggests that one should explore the various alternatives available in the market and should not rest only on one option.
5. **Principle of Expectation:** Cash flows are based on the expectations about the performance in future and not the past. In the case of mature companies, we may assume that the growth from today or after some certain period would be constant.
6. **Principle of Reasonableness**: In valuation the principle of reasonableness is most important.

➢ METHODS OF VALUATION

1. **Relative Method**: The Relative Valuation estimates the value of an asset by looking at the pricing of 'comparable assets' relative to a common variable such as earnings, cash flows, book value or sales. In this the profit multiples used are:
2. **Super Profit Method**: The super profits are calculated as the difference between maintainable future profits and the return on net assets.
3. **Contingent Claim Method**: Contingent Claim valuation uses option pricing models to measure the value of assets that have share option characteristics
4. **Accounting Professionals Experts**: The accounting professionals use the various accounting ratios which are beneficial in deriving the swap ratios.

➢ REGULATORY FRAMEWORK FOR MERGERS AND AMALGAMATIONS

The Regulatory Framework of Mergers and Amalgamations covers:

1. The Companies Act, 2013
2. National Company Law Tribunal Rules, 2016.
3. Companies (Compromise, Arrangements and Amalgamations) Rules, 2016
4. Income Tax Act, 1961
5. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015
6. Competition Act, 2002

➢ PROCEDURE FOR MERGER/AMALGAMATION

1. ***Authority In MOA To Amalgamate, Merge Etc***

The memorandum of association of most of the companies contain provisions in their objects clause, authorising amalgamation, merger, absorption, takeover and other similar strategies of corporate restructuring. If the memorandum of a company does not have such a provision in its objects clause, it is recommended that the-company should alter the objects clause.

2. ***Observing Memorandum of Association of Transferee Company***

It has to be ensured that the objects of the Memorandum of Association of the transferee company cover the objects of the transferor company or companies. If not then it will be necessary to follow the procedure for amendment of objects by passing a special resolution at an Extraordinary General Meeting.

3. ***Convening A Board Meeting***

A Board Meeting is to be convened and held to:-

i. Consider and approve the draft scheme of amalgamation.
ii. Authorize filing of application to the Tribunal seeking direction to hold meeting.
iii. Approve and adopt the valuation report.
iv. Approve and adopt the swap ratio to be proposed before the shareholders.

4. ***Preparation Of Valuation Report***

Simultaneously, Chartered Accountants are requested to prepare a Valuation Report and the swap ratio for consideration by the Boards of both the transferor and transferee companies and if necessary it may be prudent to obtain confirmation from merchant bankers on the valuation to be made by the Chartered Accountants.

5. ***Preparation Of Scheme Of Amalgamation/Arrangement***

The Scheme should suitably provide for:

1. Brief details of transferor and transferee companies.
2. Appointed date.
3. Main terms of transfer of assets and liabilities from transferor to transferee, with power to execute on behalf or for transferee, the deed/documents being given to transferee.
4. Effective date of the scheme.
5. Details of happenings and consequences of the scheme coming into effect on effective date.
6. Details of share capital of transferor and transferee company.

Effective Date: This is the date on which the transfer and vesting of the undertaking of the transferor-company shall take effect i.e., all the requisite approvals would have been obtained, i.e., date of filing of Tribunals order with ROC in Form 28.

6. ***Application To Tribunal Seeking Directions To Hold Meetings***

An application under Section 230 for an order seeking direction for convening meeting(s) of creditors and/or members or any class of them shall be made by way of summons supported by an affidavit. A copy of the proposed scheme should be annexed to the affidavit.

If the registered offices of both the companies are situated in the same State, a joint application or separate applications should be moved to the Tribunal having jurisdiction over the State in which registered offices of the companies are situated. However, if the registered offices of the companies involved are situated in different States, they should make separate applications to their respective Tribunals.

7. ***Obtaining Order Of The Tribunal For Holding Class Meeting(S)***

On receiving a petition, the Tribunal may order meeting(s) of the members/creditors to be called, held and conducted in such manner as the Tribunal directs.

Tribunal directions may include the following matters:-

a) fixing time and place for such meetings;
b) appointing a chairman for the meetings;
c) fixing quorum and procedure to be followed at the meetings.
d) notice to be given of the meetings and the advertisement of such notice; and
e) the time within which the chairman of the meeting is to report to the Tribunal the result of the meeting.

After obtaining the Tribunal's order containing directions to hold meeting(s) of members/creditors, the company should make arrangement for the issue of notice(s) of the meeting(s). The notice should be in **Form No. CAA-2.**

8. ***Issue And Content Of Notice Of Meeting***

After obtaining the Tribunals order containing directions to hold meeting(s) of members/creditors, the company should issue the notice.

The notice must be accompanied by:-

a) a copy of the scheme of the proposed compromise or arrangement
b) explanatory statement and
c) A form of proxy

Disclosure of Interest: The act specifically provide that the notice for calling meeting of creditors or members to approve a scheme of compromise or arrangement must also enclose a statement containing inter alia, any material interest of directors or managing director or manager of company whether in their capacity as such or as members or creditors of company or otherwise and the effect on those interest on the compromise and arrangement, if and so far as, it is different from the effects on the like interest of other persons.

9. ***Notice By Advertisement***

The notice of meeting should also be given through newspapers advertisements, such notices are required to be given and published in an English newspaper and in the regional language of the state in which the registered office of the company is situated. The Chairman appointed by the Tribunal has to file an affidavit atleast 7 days before the meeting confirming that the direction relating to issue of notices and the advertisement has been duly complied with.

10. ***Holding Meeting As Per Court's Direction***

a. **Member's/Creditor' Approval** : The Act provides that the scheme of compromise or arrangement is required to be approved by majority in number, representing 3/4th in value of creditors or members, present and voting at the meeting.

   Thus, there are two requirements firstly, **a majority in number** of those members of the class (Whether of creditors or shareholders) who are present and voting at the meeting and secondly it **must be 3/4 th in value of the holding of such person**s.

   Hence, majorities are of those who vote and neither of those entitled to vote nor of those who are present only. Thus, the creditors and members who are not present in person or by proxy or who although present but do not vote shall be ignored.

b. **Proxy**: The act provides for 'voting either in person or, where proxies are allowed under rules, by a proxy'. The relevant rules provides the following:
   - Proxies are counted for the purpose of quorum;
   - Proxies are allowed to speak;
   - The vote must be put on poll

c. **Affidavit to be filed *to* Tribunal**: Rules provide that the Chairman appointed for the meeting shall file an affidavit, not less than 7 days before the date fixed for the meeting showing that the directions regarding issue of notice and advertisement have been duly complied with.

d. **Quorum at the Meeting**: under Rule 69(4), the Tribunal is empowered to give directions as to the quorum and the procedure to be followed at the meeting. Thus the Tribunal would decide the quorum depending upon number of creditors / meeting under each class who are required to be given notice. Hence Quorum could be different for different meetings under section 230 to 232.

e. **Conduct at the meeting**: The relevant rules specifically provides that results of meeting must be ascertained only by taking a poll. The court could also give directions as to how the poll is to be conducted. In the absence of such specific directions in this regard the poll should be conducted, so far as it is relevant.

*11. **Reporting Of The Results To The Tribunal***

The chairman of the meeting shall, **within 3 days** of the conclusion of the meeting or within such time as may be specified by the Tribunal in its directions, report the results thereof in **Form CAA 4** to the Tribunal. The report shall state the number of creditors or members, as the case may be, who were present and who voted at the meeting, either in person or by proxy, their individual values and the way they voted (favor or against) the report shall be as per the Rules.

12. ***Petition To Tribunal For Confirmation Of Scheme***

After submission of report of result of meeting to the court, the company is required to present a petition to the Tribunal seeking order of the Tribunal confirming the scheme of compromise or arrangement. The petition shall be in **form no. CAA 5** along with an affidavit.

*13. **Obtaining Order Of The Tribunal Sanctioning The Scheme***

Upon receipt of petition the Tribunal shall fix a date for hearing of petition after the aforesaid hearing the Tribunal may pass its order on the scheme of compromise or arrangement. The order of the Tribunal shall be in **form CAA 6.** A scheme when sanctioned by the Tribunal has statutory force and shall be binding on the company and all creditors or class of creditors or on all members or class of members, as the case may be.

*14. **Filing Of Copy Of Tribunals Order With Roc***

An order made by the court shall have no effect unless a certified copy of the order has been filed with ROC along with form no INC 28, **within 30 days** from the date of the order of the court or within such time as may be fixed by the court in this behalf.

➢ PROVISIONS OF COMPANIES ACT, 2013 FOR COMPROMISE OR ARRANGEMENTS

Section 230 - Power to compromise or make arrangements with creditors and members

Section 230 lays down in detail the power to make compromise or arrangements with its creditors and members. Under this Section, a company can enter into a compromise or arrangement with its creditors or its members, or any class thereof.

Sub-section (9): The Tribunal may dispense with calling of meeting of creditors
Section 230(9) states that the Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

Section 231 - Power of the tribunal to enforce compromise or arrangement

As per section 231(1) when the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company, it—

(a) shall have power to supervise the implementation of the compromise or arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper implementation of the compromise or arrangement.

Section 232 - Merger and amalgamation of companies

Sub Section (6): Effective date of the scheme - states that the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

Sub-section (7): Annual statement certified by CA/CS/CWA - to be filed with registrar every year until the completion of the scheme.

Sub-section (8): Punishment - states that if a transferor company or a transferee company contravenes the provisions of this section, the transferor company or the transferee company, as the case may be, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of such transferor or transferee company who is in default, shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

Section 233 - Merger or amalgamation of certain companies

Section 233 prescribes simplified procedure for Merger or amalgamation of

- two or more small companies or
- between a holding company and its wholly-owned subsidiary company or
- such other class or classes of companies as may be prescribed;

Section 234: Merger or amalgamation of a Company with a foreign company

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.

Section 235: Power to acquire shares of shareholders dissenting from scheme or contract

Section 235 of the Companies Act 2013 prescribes the manner of acquisition of shares of shareholders dissenting from the scheme or contract approved by the majority shareholders holding not less than nine tenth in value of the shares, whose transfer is involved. It includes notice to dissenting shareholders, application to dissenting shareholders to tribunal, deposit of consideration received by the transferor company in a separate bank account etc.,

Section 236: Purchase of minority shareholding

Section 236 prescribes the manner of notification by the acquirer(majority) to the company, offer to minority for burying their shares, deposit an amount equal to the value of shares to be acquired, valuation of shares by registered valuer etc.,

Section 237: Power of Central Government to provide for amalgamation of companies in public interest

Sub-section 4: Appeal to tribunal

As per Section 237 (4): any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

Sub-section 6:

As per Section 237 (6) the copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.

Section 238: Registration of offer of schemes involving transfer of shares

Section 239: Preservation of books and papers of amalgamated company

As per section 239, the books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under this Chapter shall not be disposed of without the prior permission of the Central Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

Section 240: Liability of officers in respect of offences committed prior to merger, amalgamation, etc.

As per Section 240, notwithstanding anything in any other law for the time being in force, the liability in respect of offences committed under this Act by the officers in default, of the transferor company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.

➢ APPROVALS IN SCHEME OF AMALGAMATION

1. Approval Of Board Of Directors
2. Approval Of Shareholders/Creditors
3. Approval Of The Stock Exchanges
4. Approval Of Financial Institutions
5. Approval Of The Tribunal
6. Approval Of Reserve Bank Of India
7. Approval From The Land Holders
8. Approvals From Competition Commission Of India (Cci)

➢ CHANGES TO THE REGIME OF M & A UNDER THE COMPANIES ACT, 2013

Process of Making application: An application under section 230 (1) of the Act, 2016 for compromise, arrangements or amalgamation may be made before the Tribunal in Form NCLT-1 as provided in the NCLT Rules, 2016.

The same shall be accompanied by the following:

a. A notice of admission in Form No. NCLT-2;
b. An affidavit in Form No. NCLT-6;
c. A copy of scheme of compromise or arrangement; and
d. Such fees as prescribed in the Schedule of fees.

Mode of sending notice: The notice shall be sent by the Chairperson appointed for the meeting, or, if the Tribunal so directs, by the company (or its liquidator), or any other person as the Tribunal may direct, by registered post or speed post or by courier or by email or by hand

delivery or any other mode as directed by the Tribunal to their last known address at least ***one month*** before the date fixed for the meeting.

Dispensation from the meeting: If 90% by value of creditors/members agree by way of affidavit then meeting of creditors/members can be dispensed with by the NCLT.

Manner of voting: Voting in person or by proxy or by postal ballot or by voting through electronic means are permitted.

Notice to statutory authorities: Notice of the meeting shall also be served to the CG, IT authority, RBI, Stock exchanges, CCI, SEBI as may be applicable and to such other regulators as may be directed by the Tribunal. Further, such statutory authorities can also make their representation by sending notice to the Tribunal and to the company within 30 days of receiving the notice.

Time limit within which order sanctioning petition to be filed: Order of NCLT to be filed with RoC within 30 days of receipt of the order. However, that the order shall have no effect until filed, is not provided.

LESSON 12- FAST TRACK MERGERS

➢ LEGAL REGIME

Section 233 of the Companies Act, 2013 has introduced the concept of fast track mergers. It carved out an exception from the regular merger procedure.

It has exempted –

a. small companies and
b. holding and subsidiary companies

➢ MERGER OR AMALGAMATION OF CERTAIN COMPANIES – SECTION 233

1. A notice **CAA 09** of the proposed scheme inviting objections or suggestions from the Registrar and Official Liquidators or persons affected by the scheme within **thirty days** is issued
2. The objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least **90** % of the total number of shares
3. each of the companies involved in the merger files a declaration of solvency **CAA 10** with the Registrar

4. the scheme is approved by majority representing **nine-tenths** in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of **twenty-one days** along with the scheme to its creditors for the purpose or otherwise approved in writing.
5. The transferee company shall file a copy of the scheme so approved along with a Report of the meeting **CAA 11** with the Central Government, Registrar and the Official Liquidator
6. On the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies **CAA 12.**
7. If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of **thirty days**
8. If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application **CAA 13** before the Tribunal within a **period of sixty days** of the receipt of the scheme under subsection
9. On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme.
10. A transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation

➢ SMALL COMPANIES

"Small company'' means a company, other than a public company, -

(i) paid-up share capital of which **does not exceed fifty lakh** rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and

(ii) turnover of which as per profit and loss account for the immediately preceding financial year **does not exceed two crore rupees** or such higher amount as may be prescribed which shall not be more than one hundred crore rupees:

Provided that nothing in this clause shall apply to-

a. a holding company or a subsidiary company;
b. a company registered under section 8; or
c. a company or body corporate governed by any special Act.

LESSON 13- CROSS BORDER MERGERS

➢ TYPES OF MERGERS

The most popular types of mergers are horizontal, vertical, market extension or marketing/technology related concentric, product extension, conglomerate, congeneric and reverse.

However, with respect to cross borer insolvency, these types of mergers are worth noting –

➢ INBOUND MERGER

An Inbound merger is one where a **foreign company merges with an Indian company resulting in an Indian company being formed**.

Following are the key regulations which need to be followed during an inbound merger:

Transfer of Securities

Where the foreign company is a joint venture/ wholly owned subsidiary of an Indian company, such foreign company is required to comply with the provisions of Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004) (ODI Regulations).

Branch/Office outside India

An office/branch outside India of the foreign company shall be deemed to be the resultant company's office outside India for in accordance with the Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2015.

Borrowings

The borrowings of the transferor company would become the borrowings of the resulting company. The Merger Regulations has provided a period of 2 years to comply with the requirements under the External Commercial Borrowings (ECB) regime.

Transfer of Assets

Assets acquired by the resulting company can be transferred in accordance with the Companies Act, 2013 or any regulations framed thereunder for this purpose. If any asset is not permitted to be acquired, the same shall be sold within two years from the date when the National Company Law Tribunal (NCLT) had given sanction. The proceeds of such sale shall be repatriated to India.

Opening of overseas bank accounts for resultant company

The resultant company is allowed to open a bank account in foreign currency in the overseas jurisdiction for a maximum period of 2 years in order to carry out transactions pertinent to the cross-border merger.

➢ OUTBOUND MERGERS

An outbound merger is one where an Indian company merges with a foreign company resulting in a foreign company being formed.

The following are the major rules governing an outbound merger:

Issue of Securities

The securities issued by a foreign company to the Indian entity, may be issued to both, persons resident in and outside India. For the securities being issued to persons resident in India, the acquisition should be compliant with the ODI Regulations.

Branch Office

An office of the Indian company in India may be treated as the branch office of the resultant company in India in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016.

Other changes

(a) The borrowings of the resulting company shall be repaid in accordance with the sanctioned scheme.
(b) Assets which cannot be acquired or held by the resultant company should be sold within a period of two years from the date of the sanction of the scheme.
(c) The resulting foreign company can now open a Special Non-Resident Rupee Account in terms of the FEMA (Deposit) Regulations, 2016 for a period of two years to facilitate the outbound merger.

As per the Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, Merger of an Indian company is permitted only with a foreign company, which is incorporated in specified jurisdictions.

➢ SPECIFIED JURISDICTIONS

(i) whose securities market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding or a signatory to bilateral Memorandum of Understanding with SEBI, or
(ii) whose central bank is a member of Bank for International Settlements (BIS), and
(iii) a jurisdiction, which is not identified in the public statement of Financial Action Task Force (FATF) as:
   a. a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or
   b. a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

➢ PROS AND CONS OF CROSS BORDER MERGERS

Cross Border Mergers provide the following benefits -

(i) **Diversification**: A merger often leads to product diversification, whereas a cross border in addition to offering diversification of products also leads to geographical diversification. This is extremely important for companies which want to make their global presence felt.
(ii) **Achieving cost effectiveness**: When a company seeks to enter new markets, it takes some resources and money to build capacity. Having an existing infrastructure and resources in the new market helps in achieving cost effectiveness.
(iii) **Technological advancement**: Mergers enable both the parties to use each other's intellectual properties hence enhancing technical know-how.
(iv) **Distribution**: Cross border mergers help in creating a large distribution network transcending boundary.

However, there are the following risks in a cross border mergers -

(i) Despite Double Tax Avoidance Agreements, the **tax implications** in the host countries may prove to be complex and tedious.

(ii) **Regulatory landscape**: The laws and regulations in the host country would be different and may be difficult to comply. An unusable regulatory landscape may pose risks to a cross border merger.

(iii) **Political scenario**: It is essential to assess the political situation of the country before one enters into a merger with an entity belonging to that country. Unstable politics may lead to difficulties in carrying out business

LESSON 03 – PLANNING AND STRATEG

➢ MERGERS AND ACQUISITIONS – PRIMARY FACTORS TO BE CONSIDERED

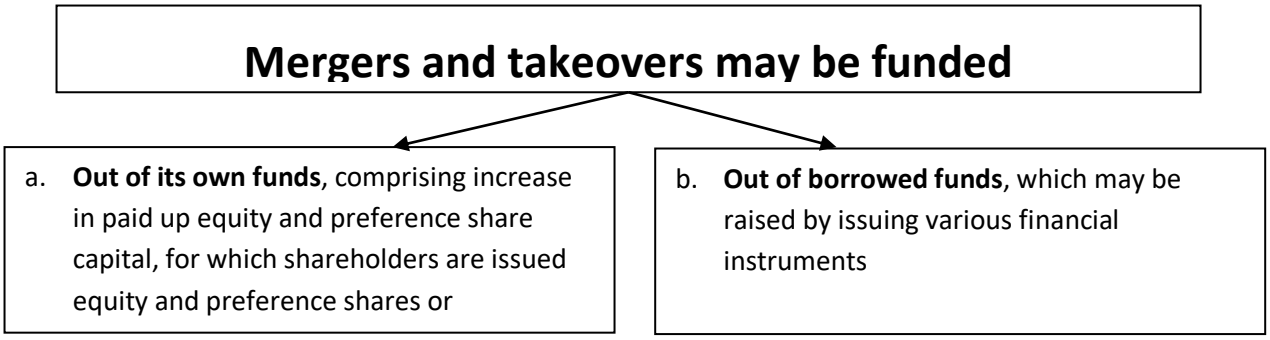
1. Identification of Parties
2. Due Diligence
3. Any third-party consents required?
4. Taxation
5. Risk Sharing
6. Will the transaction impact on existing loan/finance arrangements?
7. Existing Charges / Modifications over the assets to be acquired
8. Guarantees and indemnities (bank or other)
9. Licences
10. Supply contracts

11. What IP is used in the business?

➢ FUNDING OF PROCESSES

Funding or Financing of mergers and takeovers involve payment of consideration money to the seller of shares for acquiring the undertaking or assets or controlling power of the shareholders as per valuation done and exchange ratio between shares of acquiring and merging company arrived at.

➢ SOURCES OF FUNDING



1. Funding through Equity Shares
2. Preferential Allotment of Shares
3. Funding through Preferential Shares
4. Funding through Options or Securities with Differential Rights
5. Funding though Swaps or Stock to Stock Mergers
6. Funding through External Commercial Borrowings (ECBs) and Depository Receipts (DRs)
7. Funding through Financial Institutions and Banks
8. Funding through Rehabilitation Finance
9. Funding through Leveraged Buyouts

✓ ***Equity shares***

The shares other than preference shares are called as equity shares.

Following are the important features of equity shares:

- Availability -of voting rights.
- No fixed dividend.
- No priority in distribution of surplus assets.

The Securities and Exchange Board of India through SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 regulates the issue of securities of such companies.
These regulations apply to:

a) a public issue
b) a rights issue, where the aggregate value of securities offered is 50 lakh rupees or more;
c) a preferential issue;
d) an issue of bonus shares by a listed issuer;
e) a qualified institutional placement by a listed issuer;
f) an issue of Indian Depository Receipts

✓ ***Preferential Allotment***

Preferential allotment, in simple words, is an offer for allotment to a select group of identified persons, and does not include public issue, rights issue, ESOP, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipt

✓ ***Preference shares***

A preference shareholder has the following two rights.

- Preferential right as to payment of dividend in case where a dividend is declared by the company over the equity shares
- Preferential right as to repayment of capital in the event of winding up of the company.

✓ ***Funding through Options or Securities with Differential Rights***

An option gives the holder the right but not the obligation to buy or sell something in the future. There are two types of Options:

(1) **Put option**- is one which gives holder the right to sell particular number of shares (or any other commodity) at a given price and typically one buys put options, if the price of the stock is expected to decline.

(2) **Call option**- gives the holder the right to buy the shares at a predetermined period of time and at a predetermined price.

Section 48 of the Act deals with the variation of shareholders' rights.

1) Approval of class of shareholders –
2) Impact on rights of other class
3) Cancellation of variation - Variation may be cancelled if, holders of not less than ten per cent of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation. They may apply to the Tribunal to cancel the variation

✓ ***Funding through Swaps or Stock to Stock Mergers***

The holders of the target company's stock receive shares of the acquiring company's stock in lieu of the merger.

- ✓ ***Funding through External Commercial Borrowings (ECBs) and Depository Receipts***

ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities. The framework for raising loans through ECB comprises the following three tracks:

- **Track I**: Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years.
- **Track II**: Long term foreign currency denominated ECB with minimum average maturity of 10 years.
- **Track III**: Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years.

ECBs can be raised as:

1. Loans, eg., bank loans, loans from equity holder, etc.
2. Capital market instruments, e.g.
    a. Securitized instruments (e.g. floating rate notes / fixed rate bonds / non-convertible, optionally convertible or partially convertible preference shares/debentures
    b. FCCB
    c. FCEB
    d. Buyers' credit / suppliers' credit.
    e. Financial lease.

Global Depository Receipt means any instrument in the form of a depository receipt or certificate created by the Overseas Depository Banks outside India and issued to non-resident investors against issue of ordinary shares of Indian Company.

A Global Depository Receipt represents a certain number of equity shares. Though Global Depository Receipt is denominated in dollar terms, the equity shares comprised in each Global Depository Receipt are denominated in Rupees.

- ✓ ***Leveraged Buyout (Lbo)***

Leveraged Buyout (LBO) is defined as the acquisition by a small group of investors, financed largely by borrowing. This acquisition may be either of all stock or assets, of a hitherto public company. The buying group forms a shell company to act as the legal entity making the acquisition. This buying group may enter into stock purchase deal or asset purchase deal.

The leveraged buyouts differ from the ordinary acquisitions in two main ways: firstly, a large fraction of purchase price is debt financed through junk bonds and secondly, the shares of LBOs are not traded on open markets.

LESSON 07 – ACCOUNTING TREATMENT

➢ ACCOUNTING ASPECTS OF MERGER AND AMALGAMATION

For the purpose Accounting Standard (AS)-14 amalgamations means an amalgamation pursuant to the provisions of the Companies Act, 2013 and other laws applicable to companies.

Types of Amalgamation:

AS-14 recognises two types of amalgamation:

1. Amalgamation in the nature of merger.
2. Amalgamation in the nature of purchase.

An amalgamation should be considered to be an amalgamation in the nature of merger when all the following conditions are satisfied:

(i) All the assets and liabilities of the transferor company become, after amalgamation, the assets and liabilities of the transferee company.

(ii) Shareholders holding not less than 90% of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) become equity shareholders of the transferee company by virtue of the amalgamation.

(iii) The consideration for the amalgamation receivable by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company is discharged by the transferee company wholly by the issue of equity shares in the transferee company, except that cash may be paid in respect of any fractional shares.

(iv) The business of the transferor company is intended to be carried on, after the amalgamation, by the transferee company.

(v) No adjustment is intended to be made to the book values of the assets and liabilities of the transferor company when they are incorporated in the financial statements of the transferee company except to ensure uniformity of accounting policies.

An amalgamation should be considered to be an amalgamation in the nature of purchase, when any one or more of the conditions specified above is not satisfied. These amalgamations are in effect a mode by which one company acquires another company and hence, the equity shareholders of the combining entities do not continue to have a proportionate share in the

equity of the combined entity or the business of the acquired company is not intended to be continued after amalgamation.

➢ METHODS OF ACCOUNTING FOR AMALGAMATION

There are two methods of accounting for amalgamation:

1. Pooling of Interest Method (applicable in case of Merger method):

a. In this method of accounting, there is no reason to restate carrying amounts of assets and liabilities since merger is a combination of two or more separate business.

b. The assets, liabilities and reserves (whether capital or revenue or arising on revaluation) of the transferor company should be recorded at their existing carrying amounts and in the same form as at the date of the amalgamation.

c. The balance of the Profit and Loss Account of the transferor company should be aggregated with the corresponding balance of the transferee company or transferred to the General Reserve, if any.

d. Both the transferor as well as transferee company shall adopt a uniform set of accounting policy, at the time of amalgamation.

e. The difference between the amount recorded as share capital issued (plus any additional consideration in the form of cash or other assets) and the amount of share capital of the transferor company should be adjusted in reserves.

f. The difference between the issued share capital of the transferee company and share capital of the transferor company should be treated as capital reserve.

g. If consideration exceeds the share capital of the transferor company the unadjusted amount is a capital loss and adjustment must be made, first of all in the capital reserves and in case capital reserves are insufficient, in the revenue reserves. However, if capital reserves and revenue reserves are insufficient the unadjusted difference may be adjusted against revenue reserves by making addition thereto by appropriation from profit and loss account.

2. Purchase Method (applicable in case of amalgamation in the nature of purchase):

a. In this method, while preparing the transferee company's financial statements, the assets and liabilities of the transferor company should be incorporated at their existing carrying amounts or, alternatively, the consideration should be allocated to individual identifiable assets and liabilities on the basis of their fair values at the date of amalgamation.

b. Any excess of the amount of the consideration over the value of the net assets of the transferor company acquired by the transferee company should be recognised in the transferee company's financial statements as goodwill arising on amalgamation. If the amount of the consideration is lower than the value of the net assets acquired, the difference should be treated as Capital Reserve.

c. The goodwill arising on amalgamation should be amortised to income on a systematic basis over its useful life. The amortisation period should not exceed five years unless a longer period can be justified.

➢ IS AS 14 APPLICABLE TO DEMERGERS

The Delhi High Court (the High Court), while approving scheme of arrangement between Sony India and Sony Software in 2012 has clarified that. AS-14 (i.e., accounting standards issued by the Institute of Chartered Accountants) is applicable only to amalgamations and not to demerger.

➢ INDIAN ACCOUNTING STANDARD 103 FOR BUSINESS COMBINATIONS

Ind AS 103 defines business combination which has a wider scope whereas the existing AS 14 deals only with amalgamation. Under the existing AS 14 there are two methods of accounting for amalgamation - The pooling of interest method and the purchase method. Ind AS 103 prescribes only the **acquisition method** for each business combination

IND-AS 103 provides definition of a business. Further a Business Combinations is a transaction or other event in which an acquirer obtains control of one or more businesses. Transactions sometimes referred to as 'true mergers' or 'mergers of equals' are also business combinations as that term is used in this Indian Accounting Standard.

Under IND AS 103, Business Combinations, all business combinations are accounted for using the **purchase method** that considers the acquisition date fair values of all assets, liabilities and contingent liabilities of the acquiree. The limited exception to this principle relates to acquisitions between entities under common control.

LESSON 07 – TAXATION AND STAMP DUTY

➢ TAXATION ASPECTS OF MERGERS AND AMALGAMATIONS

✓ *Set-Off And Carry Forward Of Loss*

Section 72A provides that where there has been an amalgamation of a company with another company, then, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and other provisions of this Act relating to set-off and carry forward of loss and allowance for depreciation shall apply accordingly.

It is to be noted that the amalgamated company will have right to carry forward the loss for a period of **8 assessment years** immediately succeeding the assessment year relevant to the previous year in which the amalgamation was effected.

✓ *Conditions for availing benefits of set-off & carry forward*

The above relaxations shall -be allowed to the amalgamated company only if the amalgamated company:-

a) has been engaged in the business in which the accumulated loss occurred or depreciation remains unabsorbed, for three or more years;
b) has held continuously as on date of the amalgamation at least three fourth of the book value of fixed assets held by it two years prior to the date of amalgamation;
c) Holds continuously for a minimum period of five years from the date of amalgamation at least three-fourths in the book value of fixed assets of amalgamating company acquired in a scheme of amalgamation.
d) Continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation.
e) Fulfills such other conditions as may be prescribed to 'ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose.

✓ *Consequences of non-compliance of conditions*

In case where any of the above conditions are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the amalgamated company shall be deemed to be the income of amalgamated company chargeable to tax for the year in which such conditions are not complied with.

➢ CAPITAL GAINS TAX

Transfer of assets to the transferee company pursuant to a scheme of amalgamation is not a 'transfer' and does not attract capital gains tax under Section 47 of Income tax Act, 1961.

Likewise, shares allotted to shareholders of the transferor company is not a transfer, so it does not attract capital gains tax under Section 47.

Some examples of Capital Gains benefits available to the Amalgamated Company are-

i) **Amortisation of Preliminary Expenses**
ii) **Capital Expenditure on Scientific Research**
iii) **Expenditure on Acquisition of Patent Right or Copyright**
iv) **Expenditure on Amalgamation** - one-fifth of such expenditure for each of the five successive previous years beginning with the previous year in which the amalgamation or demerger takes place.
v) **Expenditure on know-how**
vi) **Expenditure for obtaining Licence to Operate Telecommunication Services**
vii) Deduction for expenditure on prospecting, etc., for certain minerals

➢ TAX ASPECTS ON SLUMP SALE

Slump sale as defined under ***Section 2(42C)*** of the Income-Tax Act, 1961 ***means the transfer of one or more undertaking as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales***.

In other words, Slump sale is a sale where the assessee transfers one or more undertaking as a whole including all the assets and liabilities as a going concern. The consideration is fixed for the whole undertaking and received by the transferor. It is not fixed for each of the asset of the undertaking.

Any sale of a capital asset give rise to a capital receipt and any profit derived may give rise to capital gains in certain cases. When an undertaking as a whole is sold as a going concern (slump sale) there will be liability under the head Capital Gains.

➢ STAMP DUTY ASPECTS OF MERGERS AND AMALGAMATIONS

Stamp duty is levied on "Instruments". Section 3 of the Bombay Stamp Act, 1958 specifies the following essentials for the levy of stamp duty :

(1) There must be an instrument
(2) Such instrument is one of the instruments specified in Schedule I
(3) Such instrument must be executed.
(4) Such instrument must have either —
    (a) not having been previously executed by any person is executed in the 'state' or
    (b) having been executed outside the state, relates to any property situated in the State or any matter or thing done or be done in the state and is received in the state.

✓ ***Stamp Duty On Order Of The Tribunal***

In the famous case of ***Li Taka Pharmaceuticals*** v. ***State of Maharashtra,*** it was decided by the Hon'ble Bombay High Court as follows:

1. An amalgamation under an order of Court under Section 394 of the Companies Act, 1956 is an instrument under the Bombay Stamp Act.
2. States are well within their jurisdiction when they levy stamp duty on instrument of amalgamation.
3. Stamp duty would be levied not on the gross assets transferred but on the "undertaking", when the transfer is on a going concern basis, i.e. on the assets less liabilities. The value for this purpose would thus be the value of shares allotted. This decision has been accepted in the Act and now stamp duty is leviable on the value of shares allotted plus other consideration paid.

➢ AMALGAMATION BETWEEN HOLDING AND SUBSIDIARY COMPANY

An amalgamation between holding and subsidiary company is exempt from payment of stamp duty, if it fulfills the following conditions:

a. where at least 90 per cent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or
b. 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 per cent of the issued share capital of the other, or
c. where the transfer takes place between two subsidiary companies each of which not less than 90 per cent of the share capital is in the beneficial ownership of a common parent company :

Therefore, if property is transferred by way of order of the Tribunal in respect of the Scheme of Arrangement/Amalgamation between companies which fulfill 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 Registrar of Companies.

LESSON 08 – COMPETITION LAW

➢ COMPETITION LAW ASPECTS OF M&A

To any scheme of amalgamation, competition law shall become applicable if it exceeds the limits given under the Act.

➢ KINDS OF COMBINATIONS

1. **Horizontal combinations** Horizontal combinations involve the joining together of two or more enterprises engaged in producing the same goods, or rendering the same services. They may be termed as competitors to each other.
2. **Vertical combinations** Vertical combinations involve the joining together of two or more enterprises where one of them is an actual or potential supplier of goods or services to the other.
3. **Conglomerate combinations** Conglomerate combinations involve the combination of enterprises not having horizontal or vertical connection.
4. **Domestic combinations** Domestic combinations involve the joining together of two or more enterprises located in India only.
5. **Cross-border combinations** Cross-border combinations involve the joining together of two or more enterprises where one or more of them are operating from other countries.

➢ COMBINATIONS

Combination means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has control over another enterprise engaged in competing business, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are unambiguously specified in the Act in terms of assets or turnover in India and abroad. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination would be void. The limits provided are as follows:

Combinations - Thresholds

THRESHOLDS FOR FILING NOTICE				
		Assets		**Turnover**

Enterprise Level	India	>2000 INR crore		>6000 INR crore
	Worldwide with India leg	>USD 1 bn With at least >1000 INR crore in India	**OR**	>USD 3 bn With at least >3000 INR crore in India
OR				
Group Level	India	>8000 INR crore		>24000 INR crore
	Worldwide with India leg	>USD 4 bn With at least >1000 INR crore in India	**OR**	>USD 12 bn With at least >3000 INR crore in India

THRESHOLDS FOR AVAILING OF DE MINIMIS EXEMPTION FOR ACQUISITIONS				
		Assets		**Turnover**
Target Enterprise	In India	≤350 INR crore	**OR**	≤1000 INR crore

➢ NOTICE TO THE CCI DISCLOSING DETAILS OF THE PROPOSED COMBINATION

Section 6(2) envisages that any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination, in the form prescribed and submit the form together with the fee prescribed by regulations. Such intimation should be submitted within **30 days** of:

(a) approval of the proposal relating to merger or amalgamation, referred to in section 5(c), by the board of directors of the enterprise concerned with such merger or amalgamation, as the case may be;
(b) execution of any agreement or other document for acquisition referred to in section 5(a) or acquiring of control referred to in section 5(b).

The Competition Commission of India (CCI) has been empowered to deal with such notice in accordance with the provisions of the Act. The act provides that the Commission may allow the combination if it will not have any appreciable adverse effect on competition or pass an order that the combination shall not take effect, if in its opinion, such a combination has or is likely to have an appreciable adverse effect on competition.

The Act further provides that if the Commission does not, on expiry of a period of 210 days from the date of filing of notice pass an order, or issue any direction in accordance with the provisions the combination shall be deemed to have been approved by the Commission.

Exemptions

The provisions of section 6 do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

➢ INQUIRY INTO COMBINATION BY COMMISSION

Nature of Inquiry

The commission may make an enquiry to determine whether a combination (u/s 5) has caused or is likely to cause an appreciable adverse effect on competition in India.

When can it make an inquiry?

- On its own knowledge or information
- On receipt of a notice from any person or enterprise proposing to enter into a combination.

Period of Limitation

The commission can't initiate any inquiry after the end of one year from the date on which such combination has taken effect.

Factors to be considered to determine whether a combination can have an appreciable adverse effect on competition in the relevant market

- Actual &. potential level of competition through imports in the market
- Extent of entry barriers to the market
- Level of combination in the market
- Degree of counter veiling power in the market
- Likely hood that the combination can result its parties to increase the prices or profit margins significantly & sustainably
- Extent of effective competition likely to sustain in a market
- Market share of the parties to combination
- Likelihood of removal of effective competitors after the combination
- Nature & extent of vertical integration in the market
- Possibility of a failing business
- Nature & extent of innovation
- Contribution to economic development by such combination.
- Whether the benefits of combination are more than its adverse impact

➢ FILING OF NOTICE (FORM)

Notice by filing of Form I:

(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 NOT more than 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 NOT more than 25%

Notice by filing of Form II:

(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 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 25% in the relevant market

The filing fee payable along with Form I or Form II is as follows:

Form I : `15,00,000;

Form II: `50,00,000.

➢ PROCEDURE FOR INVESTIGATING INTO A COMBINATION

(i) The Commission first forms a prima facie opinion that a combination is likely to cause an appreciable adverse effect on competition. Once the Commission has come to such a conclusion then it shall proceed to issue a notice to the parties to the combination to show cause why an investigation in respect of such combination should not be conducted.

(ii) After receipt of the response of the parties to the combination, the Commission may call for the report of the Director General.

(iii) When pursuant to response of parties or on receipt of report of the Director General whichever is later, the Commission is, prima facie, of the opinion that the Combination is likely to cause an appreciable adverse effect on competition in

relevant market, it shall, **within seven days**, direct the parties to the combination to **publish within ten working days**, the details of the combination.

(iv) The Commission may invite any person affected or likely to be affected by the said combination, to file his **written objections within fifteen working days** of the publishing of the public notice, with the Commission for its consideration.

(v) The Commission may, within **fifteen working days** of the filing of written objections, call for such additional or other information as it deem fit from the parties to the said combination and the information shall be furnished by the parties above referred within fifteen days from the expiry of the period notified by the Commission.

(vi) After receipt of all the information and **within 45 days from expiry of period** for filing further information, the Commission shall proceed to deal with the case.

➢ EXTRA TERRITORIAL JURISDICTION OF COMMISSION

Section 32 extends the jurisdiction of CCI to inquire and pass orders in certain other cases:

(a) an agreement has been entered into outside India; or

(b) any party to such agreement is outside India; or

(c) any enterprise abusing the dominant position is outside India; or

(d) a combination has taken place outside India; or

(e) any party to combination is outside India; or

(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

➢ POWER TO IMPOSE PENALTY FOR NON-FURNISHING OF INFORMATION ON COMBINATION

If any person or enterprise who fails to give notice to the Commission, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination. Thus, failure to file notice of combination falling under section 5 attracts deterrent penalty.

LESSON 11- APPEARANCES BEFORE NCLT / NCLAT

➢ NATIONAL COMPANY LAW TRIBUNAL (NCLT)

The Central Government has constituted National Company Law Tribunal (NCLT) under section 408 of the Companies Act, 2013 w.e.f. 1st June 2016 consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

➢ NATIONAL COMPANY LAW APPELLATE TRIBUNAL (NCLAT)

National Company Law Appellate Tribunal (NCLAT) was constituted under Section 410 of the Companies Act, 2013 for hearing appeals against the orders of –

1. National Company Law Tribunal(s) (NCLT
2. the Competition Commission of India (CCI)
3. the National Financial Reporting Authority

The Central Government constituted National Company Law Appellate Tribunal consisting of a Chairperson and such number of Judicial and Technical Members, not exceeding eleven, as the Central Government may deem fit

➢ ORDER OF TRIBUNAL (Section 420)

1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit
2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it,
3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

➢ APPEAL FROM ORDERS OF TRIBUNAL (SECTION 421)

1. Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal
2. No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.
3. Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved

➢ APPEAL TO SUPREME COURT (SECTION 423)

Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order

➢ PROCEDURE BEFORE TRIBUNAL AND APPELLATE TRIBUNAL (SECTION 424)

(1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice,

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016 the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely: —

a. summoning and enforcing the attendance of any person and examining him on oath;
b. requiring the discovery and production of documents;
c. receiving evidence on affidavits;
d. subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;
e. issuing commissions for the examination of witnesses or documents;
f. dismissing a representation for default or deciding it ex parte;
g. setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
h. any other matter which may be prescribed.

3) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, 1860, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. Powers

➢ NATIONAL COMPANY LAW TRIBUNAL RULES, 2016

Sitting hours of the Tribunal

The sitting hours of the Tribunal shall ordinarily be from 10:30 AM to 1: 00 PM and 2:00 P.M. to 4:30 PM subject to any order made by the President.

Working hours of the Tribunal

(1) Except on Saturdays, Sundays and other National Holiday, the office of the Tribunal shall remain open on all working days from 09.30 A.M. to 6.00 P.M.

(2) The Filing Counter of the Registry shall be open on all working days from 10.30 AM to 5.00 P.M.

Listing of cases

An urgent matter filed before 12 noon shall be listed before the Tribunal on the following working day, if it is complete in all respects as provided in these rules and in exceptional cases, it may be received after 12 noon but before 3.00 P.M. for Listing on the following day, with the specific permission of the Bench.

➢ INSTITUTION OF PROCEEDINGS, PETITION, APPEALS ETC.

(1) Every appeal or petition or application petition or objection or counter presented to the Tribunal shall be in English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type written, lithographed or printed in double spacing on one side of standard petition paper with an inner margin of about four centimeter width on top and with a right margin of 2.5. cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form; (

(2) The cause title shall state "Before the National Company Law Tribunal" and shall specify the Bench to which it is presented and also set out the proceedings or order of the authority against which it is preferred.

(3) Appeal or petition or application or counter or objections shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point.

(4) Where Saka or other dates are used, corresponding dates of Gregorian Calendar shall also be given.

(5) Full name, parentage, age, description of each party and address and in case a party sues or being sued in a representative character, shall also be set out at the beginning of the appeal or petition or application and need not be repeated in the subsequent proceedings in the same appeal or petition or application.

(6) The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party.

(7) These numbers shall not be changed and in the event of the death of a party during the pendency of the appeal or petition or matter, his Legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers

(8) Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in.

(9) Every proceeding shall state immediately after the cause title the provision of law under which it is preferred. Particulars to be set out in the address for service (Rule 21)

➢ DRESS CODE

For Male Members:

a. Navy Blue Suit (Coat & Trouser), with CS logo, Insignia or Navy Blue Blazer over a sober colored Trouser

b. Neck Tie (ICSI)

c. White full sleeve Shirt

d. Formal Black Leather Shoes (Shined)

2. For Female Members:

a. Navy Blue corporate suit (Coat & Trouser), could be with a neck tie/ Insignia or

b. Saree / any other dress of sober colour with Navy Blue Blazer with CS logo

c. A sober footwear like Shoes/ Bellies/ Wedges, etc. (shined)

➢ ETIQUETTES

1**. Act in a dignified manner** - During the presentation of the case and also while acting before a Tribunal, an Practicing Company Secretary should act in a dignified manner. He should at all times conduct himself with self-respect.

2. Respect the Tribunal - Practicing Company Secretary should always show respect towards the Tribunal/ court.

3. Not communicate in private - Practicing Company Secretary should not communicate in private to a Judge/Judicial or Technical Member with regard to any matter pending before the judge or any other Judge.

4**. Refuse to act in an illegal manner towards the opposition** - Practicing Company Secretary should refuse to act in an illegal or improper manner towards the opposing counsel or the opposing parties. He shall also use his best efforts to restrain and prevent his client from acting in any illegal, improper manner or use unfair practices in any matter towards the judiciary, opposing counsel or the opposing parties.

5. Refuse to represent clients who insist on unfair means - Practicing Company Secretary shall refuse to represent any client who insists on using unfair or improper means.

7. Refuse to appear in front of relations–The Practicing Company Secretary should not enter appearance, act, plead or practice in any way before a judicial authority if the sole or any member of the bench is related to the Practicing Company Secretary

8. Not appear in matters of pecuniary interest - The Practicing Company Secretary should not act or plead in any matter in which he has financial interests.

9. Not stand as surety for client - The Practicing Company Secretary should not stand as a surety, or certify the soundness of a surety that his client requires for the purpose of any legal proceedings.

➢ ADVOCACY TIPS

1. Clarity: The judge's time is limited, so make the most of it.
2. Credibility: The judge needs to believe that what you are saying is true and that you are on the right side.
3. Demeanour: We don't have a phrase "hearing is believing
4. Eye contact: While pleading, maintain eye contact with your judge.
5. Voice modulation: Voice modulation is equally important. Modulating your voice allows you to emphasize the points you want to emphasize.
6. Psychology: Understand judge's psychology as your job is to make the judge prefer your version of the truth.
7. Be likeable
8. Learn to listen.
9. Entertain your judge