



Pre-pack is a type of restructuring in which creditors and debtors collaborate on an informal agreement before submitting it for approval. Micro, Small and Medium enterprises companies are typically run by promoters, making it impossible to resurrect them if the administration is removed under the standard Corporate Insolvency Resolution Process ("CIRP"). The latest ordinance encourages current promoters to participate, with the board maintaining power and the debtor presenting the base resolution package, which will then be put to the bidding process through the Swiss challenge. As a result, pre-packs will assist corporate debtors in reaching an agreement with creditors and addressing the whole liabilities side of the company. The concept of pre-pack has a wide interpretation, but Bo Xie in his book on Comparative Insolvency Law has precisely defined the concept of pre-pack as *"Pre-pack has emerged as an innovative corporate rescue method that incorporates the 65 virtues of both informal (out-of-court) and formal (judicial) insolvency proceedings"*.^[1] Further, Vanessa Finch has given a common man understanding of the process as, *"a troubled company and its creditors conclude an agreement in advance of statutory administration procedures" which "allows statutory procedures to be implemented at maximum speed."*^[2]

The *Insolvency and Bankruptcy Code, 2016* ("Code") was adopted to address India's escalating stress assets in a timely and effective manner. The current code's key feature is its quick method and time-bound operation. As a result, the Code establishes stringent deadlines for completing the CIRP; if a business debt is not settled by these deadlines, it will be forced to liquidate. Certain times, such as those spent in court hearings, have been omitted from the IBC's mandatory deadlines due to statutory precedent.^[3] The pre-pack phase was necessary because the corporate debtor can engage in a management buyout agreement before the pre-pack phase, and transfer assets to some other organization. Even so, such a valuation would not be approved by a court or an adjudicating authority, and it would be subject to challenge by creditors if it included transactions forbidden by the Code, in order to protect creditors' preferences.

Via an Ordinance dated April 4, 2021^[4], the government established a Pre Packaged Insolvency Resolution Procedure ("PPIRP"). The Ordinance amended and added Chapter IIIA to the IBC and provided a *"pre packaged insolvency*

resolution process for corporate persons classified as micro, small and medium enterprises ("MSMEs")." Due to the extreme economic problems posed by COVID-19, the Preamble asserts the importance and urgency of such intervention.

The ordinance sets Rs. 10,00,000 default requirements for an MSME corporate debtor to initiate a pre packaged insolvency resolution process. The modification would alert the minimum default value for starting the settlement process, while the pre packaged insolvency resolution is for defaults up to Rs 1,00,00,000. The ordinance for PPIRP for MSMEs will help the sector in many ways. It is a time and budget insolvency resolution that will trigger minimal market uncertainty, maximize value, protect jobs, and reduce the workload on the NCLT.

International Provisions

Pre-packs are referred to as "*expedited reorganization proceedings*" by the *United Nations Commission on International Trade Law (UNCITRAL)*, because they combine voluntary restructuring negotiations, in which a plan is negotiated and agreed to by the bulk of impacted stakeholders, with reorganization proceedings that are started without delay.[5]

South Korea's Rehabilitation and Bankruptcy Act's[6] pre-packaged plan restructurings scheme has proven to be an effective tool for facilitating insolvent company recovery in a shorter period of time, and it is intended to be commonly used by many distressed firms in need of restructuring and sustainability. The Korean judiciary is also expected to take a far more notable proportion in the pre-packaged deal restructuring by holding consultations with the claimant, lenders, and concerned parties in order to achieve the restructuring's initial target.[7]

In the *United Kingdom*, although the judiciary has embraced the evolution, the Insolvency Act of 1986 did not allow for or control pre-packaging, which has evolved out of commercial practice through business and technical innovation. It's a traditional technique for operating a corporation as a going concern that involves using the executive's incentive to dispose of a corporate resource without the consent of creditors.

Nevertheless, the procedure has raised questions about accountability and transparency, especially when a sale is made to a related party or when the insolvency practitioner has a conflict of interest. In the year 2009, the Insolvency Practitioners Association released the Statement of Insolvency Practice 16 (SIP)[8] to resolve the grievances by regulating pre-pack via administrator control. The SIP lacked any form of transparency for unsecured creditors.

The growing concerns led the British Government to note the restricted usage of the pre-pack pool[9] aimed at giving creditors and other investors trust that a linked entity pre-pack sale is acceptable during a study of the efficacy of voluntary initiatives implemented in 2015. It has introduced new legislation to enable pre-pack transactions to related parties to be scrutinized, building on existing voluntary initiatives and mitigating the negative effects of the pandemic's expanded use of pre-pack transactions.[10] As a result, the pre-package, which began as an informal agreement between the parties, is increasingly becoming more governed in order to resolve emerging concerns.

The pre packaged insolvency proceedings in the *United States of America* and pre-arranged bankruptcy proceedings under Chapter 11 are all permitted under

Section 363 of the United States Bankruptcy Code.^[11] Pre-plan transactions are close to pre-pack sales in the United Kingdom. It enables an insolvency trustee, or administrator in the United Kingdom, to sell all or substantially all of a CD's assets until it begins reorganization proceedings.

It needs the debtor to notify all interested parties, allow them the opportunity to object to the proposed deal and obtain bankruptcy court approval to assure that such businesses are going "free and clear" of any involvement in the assets because they are not made in the normal operating cycle. The legislation does not specify any requirements or criteria for judicial assessments of pre-plan transactions or how a transaction should be conducted. In a pre-packaged bankruptcy case, the CD negotiates the terms of a proposal with core creditors and seeks approval from separate groups of creditors.

It distributes the plan to all creditors along with a disclosure statement. The CD files a Chapter 11 petition after receiving the required votes in favour of the initiative.

In *Canada*, a pre-packaged selling of a financially troubled corporation as a viable business, led by management, is frequently used, with the revenue included to make a plan to creditors. When a company is in a distressed situation, it usually starts looking for a buyer. The debtor company's management then applies for cover under the Company's Creditors Arrangement Act, giving them the breathing room, they need to resume their attempts to sell the company.

Worker security is a key catalyst and component in the court acceptance process, as the business is sold as a going concern rather than a liquidation. When a buyer is identified, the court approves the selling (without shareholder or bulk purchase act approval) and grants an order vesting title in the properties of the buyer free and clear of all liens, protection rights, and encumbrances, which are all added to the proceeds from the sale.

In *Singapore*, the court will authorize a compromise or agreement under Section 211I of the Companies Act, Singapore.^[12] When a corporation and its creditors or a class of creditors propose an agreement or arrangement, the Court may, on the corporation's application, make an order authorizing the resolution, although no conference of the creditors or class of creditors has been authorized. The deal or agreement binds the corporation as well as the stakeholders or a class of creditors who are supposed to be governed by it. While in the COVID-19 situation, the Insolvency, Restructuring, and Dissolution (Amendment) Bill, 2020^[13] introduces a new pre-pack scheme for micro and small businesses. When a corporation is admitted into the program, an immediate moratorium is imposed. It would not be enough to schedule a meeting with the company's creditors. Alternatively, the court will sanction the arrangement if the corporation can show that if a committee had been scheduled, a majority proportion of the creditors comprising at least two-thirds of the total amount of the creditors would have approved it.

Initiation of the PPIRP^[14]

The process of PPIRP can be initiated by any corporate debtor classified as micro, small or medium enterprise under Section 7(1) of the MSME Development Act, 2006 and by any defaulter under Section 4 of the Code, subject to the conditions laid out:

1. Such corporate debtor who has not undergone a PPIRP or CIRP process within three years of the initiation date;
2. Such corporate debtor who is not undergoing a CIRP process;
3. Such corporate debtor against whom there is no order of liquidation under Section 33 of IBC;
4. Subject to Section 240A of the code is eligible to submit a resolution plan under Section 29A of this Code;
5. On the condition that the financial creditors are not its related parties, and represent not less than 66% in value of the financial debt have accepted the proposal (by specified means) of an Insolvency Professional being appointed as Resolution Professional for conducting the PPIRP of such a corporate debtor.
6. There is a declaration made by the majority of the directors or partners of the corporate debtor, stating (as specified) inter alia:
 - The corporate debtor within a period of 90 days will file for initiating the PPIRP;
 - The PPIRP will not be initiated to defraud any person;
 - The approved resolution professional's name;
7. At least 3/4th of the total number of partners of the corporate debtor have passed a special resolution, approving the filing of an application initiating the PPIRP;

The corporate debtor shall furnish the financial creditors with a:

1. declaration as specified in Section 54A(2)(f),
 2. special resolution as specified in Section 54A(2)(g),
 3. a base resolution plan as specified under Section 54K,
 4. any other documents as specified
- in order to obtain approval from its financial creditors (as per the specified form) for filing an application for initiating PPIRP.

Duties of the Resolution Professional (Pre-Initiation of PPIRP)[15]

The Resolution professional from the date of being approved has a series of obligations and duties to fulfill, starting from preparing a report confirming whether the corporate debtor meets the requirements of 54A and file such reports and documents with the board.

The duties of the Resolution Professional will cease if the corporate debtor fails to file an application for initiating PPIRP within the time period as stated in the declaration under 54A(2)(f) or the application for initiating the PPIRP is admitted or rejected by the Adjudicating Authority.

The fees payable to the insolvency professional for the duties performed under Section 54B (1) of the Code, should be determined and borne in such manner as specified and if the application is accepted by the Adjudicating Authority then this fee shall be a part of PPIRP costs. (However, the clause is silent on the payment of fees if the application is rejected by the Adjudicating Authority.)

Application for initiation of PPIRP[16]

The corporate applicant can file an application for initiating the PPIRP only if the corporate debtor has met the requirements under Section 54A of the Code, this application has to be filed in such a manner and form containing the particulars and the fee as prescribed. It is pertinent for the applicant to furnish the following:

1. the declaration, special resolution and the approval for filing an application to initiate the PPIRP;

2. the report as per section 54B(1) of the code, details and written consent of the insolvency professional to be appointed as the resolution professional as under Section 54A(2)(e) of the code;
3. declaration regarding any transaction that falls within the scope of any provisions under Chapter III or fraudulent transaction under Chapter IV
4. information relating to books of account of the corporate debtor;

The Adjudicating Authority within a period of 14 days should either accept or reject the application by passing an order. The PPIRP shall commence from the date of acceptance of the application.

The PPIRP should be completed within a period of 120 days, and the resolution professional should submit the approved resolution plan (by the CoC) to the Adjudicating Authority. If such time period elapses the resolution professional shall file an application for the termination of PPIRP.[\[17\]](#)

On the pre packaged insolvency commencement date, the Adjudicating Authority shall, in conjunction with the order of admission under section 54C, declare a moratorium for the purposes referred to in sub-section (1) read with sub-section (3) of section 14, which shall apply mutatis mutandis to the proceedings under this Chapter; (b) appoint a resolution as named in the application, if no disciplinary action is taken.[\[18\]](#)

Duties of a Resolution Professional (during PPIRP)[\[19\]](#)

The duty of the resolution professional is to conduct the pre packaged insolvency resolution process of a corporate debtor during the pre packaged insolvency resolution process period. The duties that a resolution professional is to undertake are primarily in relation to:

- Confirm the list of claims put forth by the corporate debtor in accordance with the provisions laid down under Section 54G.
- Convey to the creditors the status of their respective claims and duly maintain an updated list of claims as specified by the Act.
- Monitor any developments in the affairs of the corporate debtor and in the advent of any breach of any obligations by the Board of Directors of the corporate debtor, inform the committee of creditors.
- Duly file applications for the avoidance of fraudulent/wrongful trading and any other duty specified.

Powers of a Resolution Professional[\[20\]](#)

The provision also provides for specific powers that shall be exercised by a resolution professional, which namely are:

- Access to all the respective books of accounts and any other relevant information that is available both with the corporate debtor as well relevant documents available with government authorities and statutory auditors.
- Attend meetings pertaining to any relevant proceedings carried out by the board of directors.
- Appoint accountants and legal professionals as per his/her discretion
- Collect all information for determining the financial position of the debtor as well as assessing all information in relation to business operations 2 years prior to the insolvency process.

The personnel of the corporate debtor is to provide any relevant information that is required by the resolution professional. The fees of resolution professional shall be based on the provisions as laid down in the Act.

List of Claims[\[21\]](#)

The corporate debtor is expected to submit the list of claims along with the details of the respective creditors and a preliminary information memorandum

which consists of a resolution plan within two days from the pre packaged insolvency resolution commencement date. Further, if any person has sustained any loss as a result of the omission of any relevant information, a promoter or director shall be responsible to pay the compensation without any prejudice to the individual who has sustained such loss or damage. It is also to be noted that no person is to be held liable if the memorandum was submitted by the corporate debtor without his consent.

Management of Affairs of Corporate Debtor[22]

The Board of Directors shall continue to be responsible for the management of affairs in relation to the corporate debtor. The Board of the corporate debtor shall do everything in their control to ensure and manage the respective operations of the entity as well as preserve the value of the property.

The promoters, directors and all other personnel of the corporate debtor are expected to discharge any obligations and contractual rights pertaining to the corporate debtor.

Role of Committee of Creditors[23]

The Resolution Professional shall within a period of 7 days of the commencement of the pre packaged insolvency resolution period constitute a Committee of Creditors ("CoC") based on the list of claims put forth under Section 54F and the composition of the committee shall be altered according to the updated list of claims. The committee's first meet is to be within seven days of its constitution. Provisions laid down in Section 21 of the Code shall *mutatis mutandis* apply to the PPIRP.

Management of Corporate Debtor with Resolution Professional[24]

The CoC during the insolvency process shall by a vote of not less than sixty-six percent of the voting shares place the management of the corporate debtor with the resolution professional. An application for the same shall be made to the Adjudicating authority by the RP in the manner specified.

Further, if during the pre packaged insolvency process, the Adjudicating Authority feels that the affairs of the corporate debtor have been conducted in a fraudulent manner or there has been gross mismanagement of the affairs of the corporate debtor, it shall accordingly pass an order vesting management of the debtor with the resolution professional. The principle of *mutatis mutandis* would be applicable to the said provision.

Consideration and approval of resolution plan[25]

The base resolution plan as submitted to the financial creditors before the initiation of PPIRP shall be submitted to the RP by the corporate debtor as a base resolution plan within 2 days of the pre packaged insolvency commencement date. The corporate debtor is given an opportunity to revise the base resolution plan by the committee of creditors. Sections 30 (1), (2) and (5) of the Code contain the requirements that need to be confirmed through the resolution plan.

The base resolution plan is approved by the CoC if it does not impair any claims owed by corporate debtor to the operational creditors. When the CoC does not approve a base resolution, plan based on what has been mentioned in (d) the RP shall invite prospective resolution applicants to submit a resolution plan to compete with the base resolution plan. The prospective resolution applicants must fulfill the criteria that will be laid down by the RP with the approval of the CoC.

The basis of evaluation as laid down by the RP as approved by the CoC shall

be provided and other relevant information is referred to in Section 29 of the Code. The CoC confirms the requirement of Section 30(2) of the code as presented by the RP. After evaluation, the CoC selects a resolution plan. If the prospective resolution plan is better than the base resolution plan, then such resolution plan would be selected for approval.

If the resolution plan does not meet the required criteria as laid down by the CoC and is not considered for approval, the prospective resolution shall compete with the base resolution plan as may be specified and one of them shall be selected. If the plan is approved then it is submitted to the Adjudicating Authority, if not the RP shall file an application for termination of PPIRP.

The approval of the base resolution plan shall not be less than 66% vote. While voting the CoC shall consider its feasibility and viability, the manner of distribution proposed taking into account the order of priority under Section 53(1) of the Code including priority and value of the security interest of a secured creditor.

The CoCs may require the promoters and the corporate debtors to dilute their shareholdings or voting or control rights in the corporate debtors if the resolution plan submitted by the corporate debtor provides for impairment of any claims owed by the corporate debtor. If the plan does not provide for dilution then the CoC shall reason for approval. RP shall submit the resolution plan as approved by the CoC to the Adjudicating Authority
Approval of Resolution Plan[26]

When the Adjudicating Authority is satisfied that the resolution proposal has been approved by the CoCs and that it meets the requirements of Section 30(2) of the Code, it must approve the plan within 30 days of receiving it. The Adjudicating Authority must be certain that the resolution plan includes arrangements for its effective execution. The order of approval will have effect according to the provisions provided in sections 31(1), (3) and (4) of this Code.

The Adjudicating Authority shall reject the resolution plan as well as terminate the PPIRP. When the Adjudicating Authority passes an order under 54J (2) along with the resolution plan approved by the CoCs under subsection (4) or (12) of Section 54K does not result in the change in management or the control of the corporate debtor, the adjudicating authority shall pass an order either rejecting the resolution plan, terminating the PPIRP and passing a liquidation order as referred (i), (ii) and (iii) of clause (b) of subsection (1) of section 33 and declaring the PPIRP costs if any as a part of liquidation costs of the corporate debtor.

Appeal against an order under section 54L[27]

The grounds laid down in Section 61(3) of the Code shall be referred to in case of any appeal from an order approving the resolution plan.

Termination of PPIRP [28]

When an application is filed by the resolution professional with the Adjudicating Authority under the proviso of 54K (12) or under 54D (3) the Adjudicating Authority can terminate the PPIRP as well as provide for the manner of proceedings initiated for the avoidance of transactions or proceedings initiated under Chapter IIII of under Section 66 and 67A respectively.

The Adjudicating Authority shall be entitled to terminate the PPIRP if the decision of the CoCs is approved by a vote of 66% of the voting shares in

support of such termination. When an order is passed under subsection (1) by the Adjudicating Authority, the PPIRP costs if any shall be borne by the Corporate Debtor.

The adjudicating authority shall pass an order of liquidation with respect to the corporate debtor as referred to in Section 33 (1) and can declare the costs of PPIRP shall be included as liquidation costs for purposes of liquidation of the corporate debtor.

Initiation of Corporate Insolvency Resolution of Process [29]

Under Chapter II of this code if any corporate debtor is eligible for CIRP then the committee of creditors at any time during the period after the pre packaged insolvency commencement date but before approval of resolution plan may resolve to initiate a CIRP by a vote of 66%. The Adjudicating Authority shall terminate and the PPIRP and initiate the CIRP on the application made by the Resolution Professional within 30 days. The Adjudicating Authority shall also appoint the Resolution Professional as interim resolution professional as well as declare the PPIRP costs for the purpose of CIRP of the corporate debtor.

Under Section 7 of the Code, once the order is passed by the Adjudicating Authority shall be deemed to be an order of admission. The CIRP shall commence from the date of such order the proceedings also initiated for either avoidance of transactions or under Section 66 and 67A of this Code will continue during the CIRP.

Punishment for offenses relating to PPIRP[30]

The punishment is given in Section 77A of the Code, which is an extension given to the already existing section on punishment (Section 77), wherein the punishment is the same for a particular set of offenses corporate debtor and any person who knowingly and wilfully authorised or permitted the furnishing of false material or omission any material fact, knowing it to be material while

1. providing information in the application as under Section 54C or,
2. information provided w.r.t to the list of claims under Section 54G of the code;

shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years or with fine which shall not be less than one lakh rupees, but which may extend to one crore rupees, or with both.

Conclusion

Surprisingly, under multiple sections of the Code[31], the disposition of a pre-pack application has been granted priority over the CIRP application for the same strained MSME, according to certain restrictions. However, if any CIRP approvals are still pending, NCLT will have to resolve these before accepting the PPIRP application for applicable debtors. In that regard, the rules pertaining to pre-pack applications are prospective and overriding. This ordinance takes a mixed algorithm to insolvent MSMEs settlement, combining creditors' needs on the one side with the need to protect MSMEs' independence on the other, in order to better represent all of their interests. The legislation is therefore a well-balanced regulatory attempt to mitigate the chaotic effect of multiple cataclysmic developments flooding the globe in a post-pandemic universe on several businesses of the MSME sector. Only the debtor will be able to initiate the insolvency proceedings, which is intended to result in a significantly quicker settlement and cost savings

than the current CIRP. It will also aid many MSMEs to deal with the chaos wreaked by the pandemic by reducing litigation, which is frequently caused by defaulting promoters seeking to retain ownership of their businesses. Even so, its complete enforcement should be accompanied by the state taking measures to improve the NCLT's still overburdened infrastructure.

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 - [2] Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 453
 - [3] Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Ors, (2020) 8 SCC 531.
 - [4] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 (No. 3 of 2021).
 - [5] UNCITRAL *Legislative Guide on Insolvency Law*, United Nations (2005).
 - [6] Debtor Rehabilitation and Bankruptcy Act (of South Korea), March 2005.
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 - [8] Insolvency Practitioners Association (UK), Statement of Insolvency Practice 16, First issued in 2009, <https://insolvencypractitioners.org.uk/uploads/documents/f30389ce35ed923c06b2879fecdb616a.pdf>
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 - [11] U.S.B.C S 1978.
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 - [13] The Insolvency, Restructuring, and Dissolution (Amendment) Bill (of Singapore), 2020
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 - [14] The Insolvency and Bankruptcy Code (Amended), 2021 § 54A.
 - [15] The Insolvency and Bankruptcy Code (Amended), 2021 § 54B.
 - [16] The Insolvency and Bankruptcy Code (Amended), 2021 § 54C.
 - [17] The Insolvency and Bankruptcy Code (Amended), 2021 § 54D.
 - [18] The Insolvency and Bankruptcy Code (Amended), 2021 § 54E.
 - [19] The Insolvency and Bankruptcy Code (Amended), 2021 § 54F.
 - [20] Ibid.
 - [21] The Insolvency and Bankruptcy Code (Amended), 2021 § 54G.
 - [22] The Insolvency and Bankruptcy Code (Amended), 2021 § 54H.
 - [23] The Insolvency and Bankruptcy Code (Amended), 2021 § 54I.
 - [24] The Insolvency and Bankruptcy Code (Amended), 2021 § 54J.
 - [25] The Insolvency and Bankruptcy Code (Amended), 2021 § 54K.
 - [26] The Insolvency and Bankruptcy Code (Amended), 2021 § Section 54L.
 - [27] The Insolvency and Bankruptcy Code (Amended), 2021 § 54M.
 - [28] The Insolvency and Bankruptcy Code (Amended), 2021 § 54N.
 - [29] The Insolvency and Bankruptcy Code (Amended), 2021 § 54O.
 - [30] The Insolvency and Bankruptcy Code (Amended), 2021 § 77A.
 - [31] The Insolvency and Bankruptcy Code (Amended), 2021 § 7, 9 & 10.

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