

ICSI IIP - IBC KNOWLEDGE CAPSULE 26

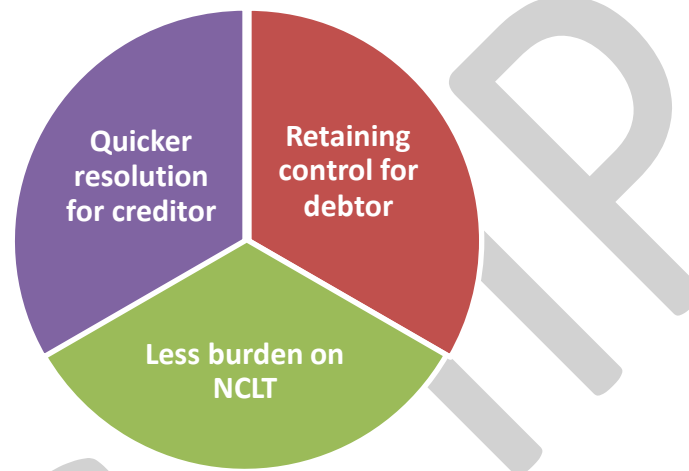
HIGHLIGHTS: THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2021

The Central Government has promulgated Insolvency and Bankruptcy Code(Amendment) Ordinance 2021 to allow pre-packaged insolvency resolution process for corporate debtors classified as micro, small or medium enterprises under the Micro, Small and Medium Enterprises Development Act, 2006.

A pre-packaged insolvency process is an informal plan worked out by the creditor and debtor for debt resolution. Simplistically looking, the process in very brief will be as follows:



The process will also prove to be beneficial for all the stakeholders involved.



The Ordinance allows the approval of such informal plans by the National Company Law Tribunals. A separate chapter, Chapter IIIA, has been inserted in the principal Act to deal with pre-packaged insolvency resolution process.

WHY NOW?

As per the text of the Ordinance, it is considered necessary to urgently address the specific requirements of micro, small and medium enterprises relating to the resolution of their insolvency, due to the unique nature of their businesses and simpler corporate structures. It is considered expedient to provide an efficient alternative insolvency resolution process for corporate persons classified as micro, small and medium enterprises under the Insolvency and Bankruptcy Code, 2016, ensuring quicker, cost-effective and value maximizing outcomes for all the stakeholders, in a manner which is least disruptive to the continuity of their businesses and which preserves jobs. Therefore, in order to achieve these objectives, it is considered expedient to

introduce a pre-packaged insolvency resolution process for corporate persons classified as micro, small and medium enterprises.

The following table shows the highlights of the amendments made by way of Insolvency and Bankruptcy Code (Amendment) Ordinance 2021.

<u>Provision to be amended/ insterted</u>	<u>Extracts form the Ordinance</u>	<u>Remarks</u>
Section 4	<i>Provided further that the Central Government may, by notification, specify such minimum amount of default of higher value, which shall not be more than one crore rupees, for matters relating to the prepackaged insolvency resolution process of corporate debtors under Chapter III-A</i>	The Ordinance amends the Insolvency and Bankruptcy Code 2016 to allow the Central Government to notify such pre-packaged process for defaults up to Rupees One Crore. The limit of default has been kept similar to the default limit for Corporate Insolvency Resolution Process.
Section 5	<i>“base resolution plan” means a resolution plan provided by the corporate debtor under clause (c) of sub-section (4) of section 54A;’</i>	The section for definitions has seen a number of changes wherein definitions have been inserted as well as existing definitions of ‘corporate applicant’, ‘initiation date’ and ‘interim finance’, ‘resolution professional’ etc. have been amended to include pre-packaged insolvency resolution process
Section 5	<i>‘(23A)“preliminary information” means a memorandum submitted by the corporate debtor under clause (b) of sub-section (1) of section 54G;</i> <i>(23B)“pre-packaged insolvency date” means the date of admission of an application for initiating the pre-packaged insolvency resolution process by the Adjudicating Authority under clause (a) of sub-section</i>	<p>These definitions have been inserted <i>via</i> the Amendment Ordinance for definitions specific to the pre-packaged insolvency process.</p> <p>The definition for <i>pre-packaged insolvency resolution process costs</i> will prove to be important for deciding the total cost incurred in the process and avoid ambiguity.</p>

	<p><i>(4) of section 54C;</i></p> <p><i>(23C) “pre-packaged 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 and any expenses incurred by him for conducting the pre-packaged insolvency resolution process during the prepackaged insolvency resolution process period, subject to sub-section (6) of section 54F; (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern pursuant to an order under sub-section (2) of section 54J; (d) any costs incurred at the expense of the Government to facilitate the pre-packaged insolvency resolution process; and (e) any other costs as may be specified; (23D) “pre-packaged insolvency resolution process period” means the period beginning from the pre-packaged insolvency commencement date and ending on the date on which an order under sub-section (1) of section 54L, or sub-section (1) of section 54N, or sub-section (2) of section 54-O, as the case may be, is passed by the Adjudicating Authority;’;</i></p>	
<p>Section 11</p>	<p><i>“(aa) a financial creditor or an operational creditor of a corporate debtor undergoing a prepackaged insolvency resolution process; or”</i></p> <p><i>“(ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or”</i></p>	<p>This insertion restricts anyone who has undergone pre packaged insolvency process 12 months prior to not make an application for initiating the process again.</p>

<p>Section 11A</p>	<p><i>“11A. (1) Where an application filed under section 54C is pending, the Adjudicating Authority shall pass an order to admit or reject such application, before considering any application filed under section 7 or section 9 or section 10 during the pendency of such application under section 54C, in respect of the same corporate debtor. Disposal of applications under section 54C and under section 7 or section 9 or section 10.</i></p> <p><i>(2) Where an application under section 54C is filed within fourteen days of filing of any application under section 7 or section 9 or section 10, which is pending, in respect of the same corporate debtor, then, notwithstanding anything contained in sections 7, 9 and 10, the Adjudicating Authority shall first dispose of the application under section 54C.</i></p> <p><i>(3) Where an application under section 54C is filed after fourteen days of the filing of any application under section 7 or section 9 or section 10, in respect of the same corporate debtor, the Adjudicating Authority shall first dispose of the application under sections 7, 9 or 10.</i></p> <p><i>(4) The provisions of this section shall not apply where an application under section 7 or section 9 or section 10 is filed and pending as on the date of the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021”</i></p>	<p>This provision has been inserted to make clarifications about the acceptance of applications for pre packaged insolvency process when there is an interplay or overlap with applications for corporate insolvency resolution processes.</p>
<p>Chapter III A</p>	<p>A new Chapter was inserted titled PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS and contained Sections 54A to 54P to detail out the process to be followed by stakeholders in the Pre-Packaged Insolvency Resolution Process.</p> <p>Some highlights from this chapter include:</p>	

- ❖ An application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor, subject to certain conditions such as it is not undergoing a corporate insolvency resolution process, no order requiring it to be liquidated is passed under section 33, it is eligible to submit a resolution plan under section 29A, the members of the corporate debtor have passed a special resolution, or at least three-fourth of the total number of partners, as the case may be, of the corporate debtor have passed a resolution, approving the filing of an application for initiating pre-packaged insolvency resolution process etc.
- ❖ The corporate debtor shall obtain an approval from its financial creditors, not being its related parties, representing not less than sixty-six per cent in value of the financial debt due to such creditors, for the filing of an application for initiating pre-packaged insolvency resolution process, in such form as may be specified.
- ❖ The financial creditors of the corporate debtor, not being its related parties, shall propose the name of the insolvency professional to be appointed as resolution professional for conducting the pre-packaged insolvency resolution process. The financial creditors of the corporate debtor, representing not less than sixty-six per cent in value of the financial debt due to such creditors, have approved such proposal.
- ❖ The Resolution Professional proposed shall prepare a report to check if the debtor fulfills criteria under Section 54A and also that the base resolution plan conforms to the requirements as specified in Section 54K (Section 54K mentions that the requirements of a resolution plan mentioned in Section 30(2) and 30(5) of the Act will apply mutatis mutandis to the process under Chapter IIIA) .
- ❖ **The Resolution Professional appointed will have to maintain and update the list of claims, monitor management of the affairs of the corporate debtor, constitute the committee of creditors and convene and attend all its meetings, prepare the information memorandum on the basis of the preliminary information memorandum, file applications for avoidance of transactions etc. as per duties mentioned in Section 54F.**
- ❖ The pre-packaged insolvency resolution process shall be completed within a period of one hundred and twenty days from the pre-packaged insolvency commencement date.

- ❖ The moratorium shall be available from the pre-pack commencement date till the closure of the process, whether by approval of the resolution plan or not.
- ❖ The corporate debtor shall remain under the control and possession of the current promoters and management during the pre-pack process. However, the COC by sixty six percent vote may make the resolution professional file an application for taking over the management of the corporate debtor in cases of mismanagement or fraud etc. as mentioned in Section 54J
- ❖ The Ordinance allows appeal against an order approving the pre-packaged resolution plan on the grounds laid down in sub-section (3) of section 61 of IBC and amendments have also been made to Section 61 to accommodate the same.
- ❖ As per Section 54N, the process may be terminated either on approval of resolution plan by COC or in case of no approval, an application for termination of the process being made to Adjudicating Authority (NCLT).
- ❖ COC by approval of sixty six percent may prefer an application to move the debtor to the corporate insolvency process, if the corporate debtor is eligible for it. This can only be done before any resolution is approved. In a situation where within 30 days CIRP is initiated against the corporate debtor, the pre package insolvency costs will be included as part of the CIRP costs.
- ❖ The provisions of Chapters VI and VII of this Part shall, mutatis mutandis apply, to the pre-packaged insolvency resolution process subject to some exceptions mentioned in Section 54P.

Section 67A	<p><i>67A. On and after the pre-packaged insolvency commencement date, where an officer of the corporate debtor manages its affairs with the intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may, on an application by the resolution professional, pass an order imposing upon any such officer, a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.</i></p>	<p>A penal provision has been inserted to keep fraudulent management of corporate debtor during prepackaged insolvency resolution process in check.</p>

Notes:**Abbreviations used:**

IBBI: Insolvency and Bankruptcy Board of India
 IPA: Insolvency Professional Agency
 ICSI IIP: ICSI Institute of Insolvency Professionals
 IP: Insolvency Professional
 CIRP: Corporate insolvency resolution process
 IRP: Interim Resolution Professional
 AR: Authorised Representative
 COC: Committee of Creditors
 CD: Corporate Debtor

FC: Financial Creditor

OC: Operational Creditor

Code: Insolvency and Bankruptcy Code, 2016

PIRP: Pre Packaged Insolvency Resolution Process

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