



FUTURE PATH FOR PRE-PACKAGED INSOLVENCY RESOLUTION IN INDIA

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The Insolvency and Bankruptcy Code (“IBC”), with its enactment in 2016 created a buzz in the economy as it paved the way for restructuring of the dwindling debt laden corporate firms in India. It created a paradigm shift by overhauling the erstwhile haphazard legal framework dealing the matters of Insolvency and Bankruptcy in India, it also turned out to be “*creditor friendly*” as against the previous debtor controlled regime, it benefited both, the creditors and the corporate debtors. The Judiciary and the regulators have been on their toes to maintain the malleability of the law with every amendment and regulations coming since the inception of the Code, and the cases of different magnitudes shaping the framework of Insolvency in India.

The pace with which the adjudicating authorities have functioned to deliver an effective and efficient regulatory framework in the matters of Insolvency and Bankruptcy is unprecedented, but still the statutory time period of 330 days¹ under the Insolvency and Bankruptcy Code is not being achieved in most of the cases. The average time taken in successful resolution is 394 days² and this delay adversely affects the interest of all the stakeholders. Out of total 3312 cases which have been admitted under IBC, 780 have resulted into liquidation while 1961 are still under CIRP. (Table below: Status of CIRPs as on December 31, 2019³)

Status of CIRPs	No. of CIRPs
Admitted	3312
Closed on Appeal / Review / Settled	246
Closed by Withdrawal under section 12A	135
Closed by Resolution	190
Closed by Liquidation	780
Ongoing CIRP	1961

¹ <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbed047c42dbdfd2aca13.pdf>

² <https://ibbi.gov.in/uploads/publication/62a9cc46d6a96690e4c8a3c9ee3ab862.pdf>

³ <https://ibbi.gov.in/uploads/publication/62a9cc46d6a96690e4c8a3c9ee3ab862.pdf>



>270 days	456
> 180 days ≤ 270 days	247
> 90 days ≤ 180 days	537
≤ 90 days	542

It shows that still majority of cases are resulting into liquidation despite of such an effective resolution mechanism which is not be a viable or desirable solution for promoting the welfare of the economy.

What is Pre-Packaged Insolvency Resolution?

Pre-packaged bankruptcy is a quasi formal procedure which integrates the essence of an out of court private restructuring and that of a formal bankruptcy. It is a pre-planned insolvency procedure where a resolution plan is formulated and finalised prior to the initiation of formal proceedings.

Need of Pre-Packaged insolvency resolution

The Corporate Insolvency Resolution Process contemplated under the Insolvency and Bankruptcy Code, 2016 involves participation of the judiciary to a huge extent; no doubt that it elongates the time taken in the process, but the involvement of Adjudicating Authority ensures that the resolution becomes enforceable once it gets approved. So, currently in our country's system, it does not leave any scope for any out of court settlement of bankruptcy. The biggest reason behind it is that the new mechanism in our country to deal with insolvency and bankruptcy is still in its nascent stage and the market has not matured enough for an informal bankruptcy resolution. In countries like USA and UK, the pre pack insolvency resolution is in practice for decades now.

Under Chapter 11 of the United States Bankruptcy Code, a company in financial distress reaches agreement on the terms of a Chapter 11 plan with its key creditors and solicits acceptances for a resolution plan prior to filing for bankruptcy protection and asks the bankruptcy court to confirm the plan and approve the related disclosure statement and solicitation procedures on an expedited basis. A pre packaged insolvency case is not available to every financial distressed companies, it is available for only those cases where the debtor's financial distress primarily is caused by excessive debt levels and the company is not in need of comprehensive restructuring of its business operations.



As per UK laws⁴, A pre-pack is an arrangement whereby the sale of all or part of a company's business and/or assets is negotiated and agreed, before an insolvency practitioner (IP) is appointed with the relevant documentation being signed and implemented, immediately or shortly after the appointment is made. One of the major advantages of pre-pack administration is the speed of sale of the company, resulting into higher returns for creditors when compared with alternative routes into insolvency along with transparency, business continuity, reduced cost of administration, etc.

Looking into the practice of pre-packaged insolvency resolution process and the positive outcome of it in developed nations, it can be adopted in the Indian context as well.

Ground for Pre-Packaged Insolvency In India

During the time when IBC was being formulated, the Bankruptcy Law Reforms Committee in its first report mentioned that "*Speed is of essence for the working of the bankruptcy code*" and observed that "*the most important objective in designing a legal framework for dealing with firm failure is the need for speed*". Now that after almost after 3 and half years of implementation of the Code we are still struggling with the strict adherence of the statutory timeline given under the code, apart from the delays, other issues are there like formal engagement of third-party advisors, direct and indirect costs, etc. Also, the delays cost implicitly to the business by disruption of operation and refusal by service providers, loss of goodwill, etc.

By informal private restructuring, these costs incurred under CIRP may be minimised to a huge extent and since private restructuring are out of court processes which are not bound by any statutory procedure, they can be *custom made* i.e., the resolution plans can be flexible allowing the prospective buyers to conduct their due diligence and minimise the post resolution conflicts and litigations.

However, if we see the past trends in India regarding out of court settlement/restructuring schemes, they have not been so successful. RBI introduced the scheme of Corporate Debt Restructuring (CDR) in 2001 and rolled it back in 2018 owing to its failure, the CDR cell approved restructuring of stressed loans worth ₹ 4 trillion since its inception. Of this, ₹ 84,677 crore worth of loans exited the CDR cell successfully and ₹ 1.84 trillion exited

⁴ <https://www.thegazette.co.uk/insolvency/content/100359>



without success. Nearly ₹ 1.32 trillion worth of bad loans were still undergoing restructuring in the scheme when it was rolled back⁵. RBI also introduced schemes like Scheme for Sustainable Structuring of Stressed Assets (S4A)⁶ which was focused on Resolution of large borrowal accounts which are facing severe financial difficulties, this scheme allowed lenders (mostly banks) to separate a sustainable loan from an unsustainable loan. The banks would convert the unsustainable debt into equity or equity related instruments, the debt burden of the borrower was substantially reduced and on the other hand promoter's equity stake was also reduced. But due to fragmented approach of the various agencies involved, parallel litigations at different statutory authorities, none of the out of court settlement schemes fetched the desired results, ultimately the RBI withdrew all these schemes⁷ and transferred all the cases to IBC.

Benefits of Pre-packaged Insolvency Resolution

- a) **Business continuity:** Carrying out business during insolvency could be a difficult task to attend if there is no funding available, or its too complicated to comply with the regulatory requirements. Pre-packs facilitate a quick and relatively smooth transfer of a business, allowing the business to continue uninterrupted.
- b) **Speed:** A pre pack process involves a lot less time as compared to formal proceedings, as a resolution plan is filed along with initiating statutory resolution framework, a corporate debtor in the United States negotiates the terms of a Chapter 11 restructuring plan and solicits votes on it prior to the bankruptcy filing and Court approvals.
- c) **Smooth Resolution after CIRP:** Once the resolution will take place, it will take lesser time in transfer of business and operations to the buyer which will result in smoother handover of business, also the buyer will take the possession of business and assets without incurring lot of procedural hurdles.
- d) **Confidentiality:** In Indian context there is a social stigma associated with insolvency and if the information of a company undergoing insolvency gets leaked in the market, the value of assets of the plummets, irrespective of the economic value of the assets. In pre packaged framework, the plan of revival of the company is drawn up in a very secret way, this confidentiality preserves the reputation along with the going concern value of the company.

⁵ <https://www.livemint.com/Industry/k2S0MIBwJ1Imv7x6PXPxSJ/RBI-moves-to-wind-up-CDR-system.html>

⁶ https://www.rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=37210

⁷ <https://economictimes.indiatimes.com/news/economy/policy/rbi-withdraws-cdr-sdr-s4a-jlf-schemes-to-restructure-defaulted-loans/articleshow/62891543.cms?from=mdr>



Government's Initiative for Pre-Packaged Insolvency

In March 2019, the Government of India reconstituted the Insolvency Law Committee (ILC) as a standing committee to analyse the functioning and implementation of IBC. Along with other changes in the code, the committee has been working on the ways to incorporate the concept of “Pre-Packaged Insolvency” in the IBC, comments from various stakeholders were invited upon this topic⁸.

Prospects for Pre-Packaged Insolvency Resolution in India

With IBC being one of the fastest evolving law in the recent times, there are chances that the Pre-Packaged Insolvency Resolution might be incorporated in Code, but for that specific provisions and amendments in the Regulations will have to be made as well. Like US and UK, Insolvency Professionals will have a crucial role to play in this framework as the responsibility of the success of it along with balancing the interests of all the stakeholders to mutually benefit them will be on him. Also, with the trend of industry rising towards out of court settlements and arbitrations the pre-packaged insolvency resolution could be an alternate route for saving the stressed corporate firms in India.

⁸ <https://www.financialexpress.com/economy/pre-packaged-insolvency-resolution-govt-seeks-stakeholder-comments/1550354/>