Pre-Packaged - Integration of Debtor Centric Model with Creditor in Control Model: Indian Insolvency Regime

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Abstract

*The **Insolvency and Bankruptcy Code, 2016 (IBC)** aims to maximize the value of the assets. **COVID-19** can be seen as a negative externality in the system which has arisen due to the endogenous factors within the company, more extremely unidentified exogenous factors that have ultimately led to its inefficiency in terms of competition and innovation. The IBC through a formal framework provides a room for mutual bargain between the creditors and debtors. Additionally, the pre-packaged insolvency process introduced by the Ordinance in 2021 specifically limits itself to the MSMEs and default threshold amount of 10 lakhs onwards. The research paper advocates for the adoption of **Pre-packaged Insolvency Resolution Process (PPIRP)** across all enterprises which will shift the dynamics from creditors-in-control to debtors-in-possession. In pre-packaged insolvency the value of the business might remain same or increase whereas there is a high probability of value erosion after the initiation of Corporate Insolvency Resolution Process (CIRP) due to the inefficient resolution and time taken for resolution. Through **Law and Economic analysis** and the occurrence of several exigencies, the researchers claim that pre-packaged insolvency is efficient as it will decrease the costs involved and the time taken for the resolution. The researchers have also come out with the method of implementation of pre-packaged insolvency after a comparative analysis of the laws present in US, UK and Singapore.*

Introduction

In a market economy, for a company to sustain, it is imperative that it steers its way against the shackles of competition with demanding and novel innovations as ignoring this might make the company unviable. COVID-19 can be seen as a negative externality i.e., internalization of costs is hampered, this has adversely arisen the endogenous factors within the company, more extremely unidentified exogenous factors due to COVID-19 that have led to its inefficiency in terms of competition and innovation. It is rationally expected that these companies will start earning normal profits after the effects of COVID-19 subsides eventually. Therefore, due to the unprecedented circumstances of COVID-19, companies which are though viable are not able to perform well due to negative contingencies and externalities.

So an important question is raised: *What policy should be opted which stands on the true spirit of Insolvency Bankruptcy Code of maximization of values for the benefits of all the stakeholders in it?* The President promulgated the Ordinance of the Insolvency and Bankruptcy (Amendment) Ordinance, 2021 which provided the alternative insolvency resolution process for corporates classified as Micro, Small and Medium Enterprises ("MSMEs").[1]The alternative resolution process is in the nature of pre-packaged insolvency in the wake of unprecedented crisis.

It is important to note that the IBC stresses on the approach of value maximization of assets which is

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[1]The Insolvency and Bankruptcy (Amendment) Ordinance, No. 3, 2021 (India).

reflected in the upgradation of ranking of India from 111 in 2017 to 47 to 2020 in the Global Innovation Index.In catena of judgments, the approach of the Court is to promote and incentivize settlement amongst the creditors and debtors. This is in consonance with some of the essential features of IBC as asserted by Hon'ble Supreme Court in "***Babulal Vardharji Gurjar v. Veer Gurjar Aluminum Industries Pvt. Ltd. & Anr. [CA No. 6347/2019]"*** i.e. (a) CIRP not being adversarial, should promote the interests of the Corporate Debtor (b) A right is set up for the application of IBC after the commission of default (c) It seeks to provide a viable position for corporate debtors and is not merely a "money-making legislation".

Litigation and Court procedure is to be considered a 'transaction cost' which shall be reduced/eliminated at all possible steps. The role of Adjudicating Authorities (AA) against the dispute of Insolvency in India was expounded in "***Univalue Projects Pvt. Ltd. v. The Union of India & Ors. [W.P. No. 5595 (W)/2020 with C.A.N. 3347/2020]"*** which stated that NCLT (National Company Law Tribunal) and NCLAT (National Company Law Appellate Tribunal) have to take into account the principles of natural justice along with regulations and provisions of IBC and the Companies Act, 2013. At the same time, the stringency of the formal procedure taken by Adjudicating Authorities can be seen in "***Bank of Baroda on behalf of the Committee of Creditors of Veda Biofuel Ltd. v. Mr. Sisir Kumar Appikatla, RP for Veda Biofuel Ltd. & Ors. [CA(AT)(Ins) No. 579/2020]"*** in which the Committee of Creditors (CoC) has approved the resolution plan with an overwhelming majority of 96.3% of a resolution applicant who was not disqualified by Section 29A of IBC. However, AA held that the resolution applicant being a former MD was taking undue advantage of the process and hence the plan was quashed. IBC prescribes the maximum time period of 180/270 days; it is hardly followed. Most of the cases do end up taking much more than 180/270 days in their disposal.

Thus, the transaction costs accrued due to litigation can be reduced through mutual bargain amongst the creditors and the debtor which will ensure achievement of maximum possible utility for both the parties. It will also reduce the involvement of time cost as settlement generally takes place speedier than the court procedure. Hence, the objective of the provision permitting withdrawal of the application is dual. On one hand, it ensures that the social cost of a particular case remains the least and on the other hand, it reduces burden on the Tribunals. Less burden on the tribunals will ensure that more cases get disposed of within the prescribed time frame. Due to COVID-19, the formal framework present in IBC has become more gruesome and hence, this paper seeks to resolve this issue.

The article, *firstly* stipulates a mathematical model reflecting the benefits of pre-packaged insolvency over the CIRP. *Secondly,* it seeks to analyze the negative externalities owing to COVID-19 which has compelled the present discourse. *Thirdly,* the provisions of IBC are analyzed (in particular- Section 12A) against the backdrop of which pre-packaged insolvency was needed to be adopted through various case-laws. *Fourthly,* the key provisions of the pre-packaged insolvency process introduced by the Ordinance in 2021 are analyzed. *Fifthly,* the implementation of pre-packs is discussed in light of different jurisdictions- US, UK & Singapore. *Lastly,* the researchers drawing from the result of mathematical model and jurisprudential development of IBC in India have given recommendation for the adoption of pre-packaged insolvency to all the enterprises and not

specifically limiting to the MSME sector so that one may combat the negative externalities in the system.

Model

Let's assume that before initiation of CIRP, high value business is $\overline{V}$ and debt is **D**. Therefore, $\overline{V} > D$. Whereas, due to the CIRP process value has eroded to $\underline{V}$ such that, $\underline{V} < D$.

According to the IBC, the time taken to complete the entire process is either t + 180 days or t + 270 days. However, generally, it has been observed that time taken is more than t + 270 days.[2]

Whereas, in the prepackaged process, let's assume high value business is $\overline{Vp}$. The debtor with support of creditors can come out with a resolution. Hence, in prepackaged mechanism, the value of business remains the same, that is the high value business remains the same. Hence, $\overline{Vp} > D$. Moreover, the time taken in pre-packaged mechanism is t+120 days and Base Resolution Plan (BRP) is better than Best Alternate Plan (BAP) or vice versa, subject to the approval by the Adjudicating Authority (AA). In the prepackaged mechanism, if Swiss challenge occurs then the value of business $\overline{Vp}$ will increase, which will be beneficial for both debtor and creditors.

The current CIRP provides creditors in control model. The dominant power is given to creditors which may have the probability of value erosion of the business due to more time taken i.e., more than t+270 days and no guarantee of resolution in composition prepacked time taken t+120 days and BRP opportunity cost BAP. So, AA approved resolution either BRP or BAP based on principle of fair value.

Whereas, the Prepackaged plan provides debtor an opportunity to resolve insolvency internally and proposed BRP. The debtor has opportunity to put the house or business in order. In fact, it is one-time opportunity for a debtor. Thus, it provides debtor in possession model which can resolve the problem of insolvency as compared to creditor in control model.[3]

India has opted for a mix model of debtor in possession model and creditor in control model to ensure appropriate trade-off between available alternatives. The suitable decision will be taken by involved stakeholders based on opportunity cost and restructuring benefit. Therefore, the implementation of prepackaged mechanism with the existing CIRP framework across all enterprises will certainly improve ease of doing business rank and the resolution framework

Effects of COVID-19: Negative Externality

Due to COVID-19 induced market stress, the President of India had promulgated an Ordinance on June 5, 2020 which seeks to suspend Corporate Insolvency Resolution Proceedings from 25 March, 2020 for a period of six months to one year which was later extended to one year.

The MSMEs were hard hit due to COVID-19 pandemic which were earlier grappling with the adverse after-effects of the introduction of GST and demonetization. The MSMEs contribute approximately 30-35% of GDP wherein 99% by the micro enterprise, 0.52% by the small enterprise and 0.01 by the medium enterprise.

Section 16 of the Micro, Small, Medium Enterprises Development Act, 2006 implies that if the buyer doesn't pay the requisite amount to the supplier, the buyer is required to pay the amount in addition to the compound interest to the supplier at three times the Bank rate notified by RBI. Another important step taken by the Government is the amendment of the definition of MSMEs which lowers the apprehension in the MSMEs that they won't be able to avail the benefits of different packages of Government due to lower threshold limit. Therefore, the investment has been increased to 1 crore rupees for micro enterprise, 10 crore rupees for small enterprise and 50 crore rupees

[2]Singh, R., & Thakkar, H. (2021). Settlements and Resolutions Under the Insolvency and Bankruptcy Code: Assessing the Impact of Covid-19. The Indian Economic Journal, 69(3), 568-583.

[3]Deb, S., & Dube, I. (2020). Insolvency and Bankruptcy Code 2016: revisiting with market reality. International Journal of Law and Management.

for medium enterprise. Along with that the turnover has been augmented to 5 crore rupees for micro enterprise, 50 crore rupees for small enterprise and 250 crore rupees for medium enterprise. According to the new definition, there won't be any difference between the manufacturing and service sector that existed under MSMED Act, 2006.

The COVID-19 Regulatory Package was issued by RBI on 27 March 2020 and 23 May 2020 which has both increased the moratorium by three months respectively which will prevent MSMEs from being burdened by the responsibility to pay off their debts which may have arisen due to the unprecedented circumstances of COVID-19. The Resolution Framework 2.0 permitted the restructuring of the MSME account whose plan will be finalized by the lending institution and borrower. The existing loans to MSMEs classified as standard may be restructured subject to conditions as specified in the August 6, 2020 RBI notification of MSMEs - Restructuring of Advances. The borrowing entity is required to be GST registered unless exempted and the aggregate expenditure should not exceed Rs. 25 crores as on March 1, 2020.

RBI has further brought out certain modifications to its Restructuring Version 2.0 vide circular dated 4th June 2021. The eligibility conditions for restructuring of MSME account as per RBI circular has been increased from Rs. 25 crore rupees to Rs. 50 crore rupees as on 31 March, 2021.

Additionally, RBI also directed that the "*asset classification of borrowers classified as standard may be retained as such, whereas the accounts which may have slipped into NPA category between April 1, 2021 and date of implementation may be upgraded as 'standard asset', as on the date of implementation of the restructuring plan*."

COVID-19 as a negative externality has affected the economy adversely and a proper policy framework is needed to facilitate internalization of costs. The economic activity has been halted due to COVID-19 and some have compared the global recession to the Great Depression which happened in the 1930s. The International Monetary Fund (IMF) has projected that the Indian economy will contract by approximately 10.3%. The GDP reflected the decrease by 23.9% in Q1 of 2020-2021 as compared to growth of 5.2% in Q1 2019-2020. In the survey's history, the Business Assessment Index of Q1 in 2020-2021 has decreased to the lowest point of all time. In May 2020, due to the lockdown, the unemployment rate was approximately 21.73% which has decreased to approximately 6% in September 2020. The table below reflects the unemployment rate during the adverse months of COVID-19 in India.

Months (2020)	Unemployment Rate
January,2020	7.22 %
February, 2020	7.76 %
March, 2020	8.75%
April, 2020	23.52 %
May, 2020	21.73%
June, 2020	10.18%
July, 2020	7.4%
August, 2020	8.35%
September, 2020	6.67%
October, 2020	7.02%
November, 2020	6.5%
December, 2020	9.06%

Table 1: Unemployment Rate (Jan- Sep 2020)[4]

Further, in the contemporary times, a problem arose due to COVID-19 when there was dearth of resolution applicants who were willing to submit

[4]Statista Research Department, 'Impact on Unemployment Rate due to coronavirus (COVID-19) lockdown in India from January 2020 to January 2021', Statista (Web Page, February 2021) <https://www.statista.com/statistics/1111487/coronavirus-impact-on-unemployment-rate/>.

their resolution plans which neither maximized the value of assets or relieved the stress. Plus, another factor that needs to be taken into account is that after the initiation of CIRP, the shift is from 'debtor in possession' to 'creditor in control' where instead of Corporate Debtor, the fate of the company lies in the hand of Insolvency Professional which raises both the direct and indirect costs that is directly proportional to the time period for which the corporate debtor is insolvent. Currently in India, there exists both court-supervised [(a) CIRP in IBC (b) Section 230 of the Companies Act] and out of court settlement options [(a) RBI Prudential Framework (b) Informal options] for resolving the insolvency. During COVID-19, the efficacy of all these four options is put in question as the interests of some of the stakeholders are being compromised which is not leading to maximization of value. So, an equilibrium was sought to be developed between both the formal and informal means through pre-packaged insolvency.

At this juncture, it is also pertinent to evaluate Section 12A, IBC which allows the withdrawal of the CIRP application if 90% of votes is reached by the CoC. Also, Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, allows the withdrawal of the application by the financial creditors, operational creditor or the corporate debtor before its admission. Whereas Regulation 30A in IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019, says that the application of the withdrawal can be made before the constitution of CoC or after the constitution of CoC provided that reasons must be provided if the Expression of Interest (EOI) has been invited.

The Insolvency and Bankruptcy Ordinance, by virtue of Section 4 of the Ordinance has increased the threshold limit from Rs. 1 lakh to Rs. 1 crore. However, this step has attained mixed reviews as in many cases one can find that MSMEs are itself operational creditors for claims less than one crore and therefore, to recover such claims, they have to be dependent on civil courts which will augment the burden on the courts[5]. Even, in "***Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors*** (2019 SCC Online 1005)", the Hon'ble Supreme Court of India has stated that the low default threshold in case of IBC is required so that the small enterprises can also avail benefit under the Code, by invoking the CIRP, let alone the larger institutions. This has some way defeated the purpose of IBC[6]. At the same time, amendment in Section 4, IBC may prevent MSMEs from any sort of frivolous claims which may arise during COVID-19. Although, the recent enactment of Pre-packaged Insolvency Resolution Process (PPIRP) provided confidence to the involved stakeholders in the MSMEs sector, in case default of Rs. 10 lakh or more will be addressed as per the rules and regulation of PPIRP.

Overview of Section 12A, IBC

IBC did not hitherto contain any provision for withdrawal of the application. "Rule 8 of The Insolvency and Bankruptcy (Adjudicating Authority) Rules 2016 allows the NCLT to permit withdrawal of application on request before admission."In "***Swiss Ribbons Pvt Ltd. v. UOI"***, the Hon'ble Supreme Court of India has held that before the constitution of CoC after the appointment of IRP, a party can also directly approach NCLT under Rule 11 of NCLT rules for withdrawal or settlement. However, earlier there was no provision for withdrawal post admission of CIRP application, the scope of these rules was very

[5]Jha, & Sahni, 'Government's Covid-19 insolvency relief may be a double-edged sword'. The Economic Times. (Web Page, May 2020) <https://economictimes.indiatimes.com/small-biz/legal/governments-covid-19-insolvency-relief-may-be-a-double-edged-sword/articleshow/76103653.cms?from=mdr>.

[6]Kattadiyil. (2020, May), 'Pandemic Priorities: Increased insolvency threshold and its economic impact', (2020) 9(5) International Journal of Multidisciplinary Educational Research 11.

restricted, hence, they did not prove to be beneficial in this aspect.

In the case of "***Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Managers LLP",*** when the NCLAT refused to exercise Rule 11 of NCLT Rules, 2016, the Hon'ble Supreme Court using Article 42 of the Indian Constitution set aside the NCLAT order and permitted a settlement between the corporate debtor and the creditors.

In the case of "***Uttara Foods and Feeds Private Limited v. Mona Pharmachem",*** Hon'ble Supreme Court of India held that it is pertinent to amend the rules to incorporate inherent powers to the tribunal which will prevent unnecessary appeals through recourse of Article 142 of the Indian Constitution.

In view of the above Hon'ble Supreme Court Judgments Section 12A, IBC was inserted via amendment which allows withdrawal of application with "approval of 90% voting share of CoC". This has to the read in conjunction with "Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which states that the application for withdrawal under Section 12A, IBC has to be submitted to the IRP/RP before issuance of invitation for EOI under Regulation 36A. This implies that the application filed could be withdrawn before the issue of invitation for EOI."

At the same time, a question is raised on the acceptance of withdrawal application after EOI or acceptance of Resolution Plan by the CoC.

NCLAT in the case of "***Navaneetha Krishnan v. Central Bank of India, Coimbatore & Another"*** has held that the withdrawal application by an applicant can be considered even during the stage of liquidation. However, the Court did not specify if it can also be withdrawn after the issuance of EOI by the Resolution Professional (RP).

Further in the case of "***Satyanarayan Malu v. SBM Paper Mills Ltd***."NCLT Mumbai allowed one-time settlement for which CIRP application was withdrawn, during the stage where after the acceptance of Resolution Plan by CoC, it was pending before the NCLT for approval.

In "***Vimal Chandrunwal v. Brilliant Alloys Private Limited",*** NCLT Chennai stated that "*Regulation 30A envisages that an application for withdrawal under Section 12A shall be submitted to the RP before the issue of invitation for EOI under Regulation 36A*", thereby dismissing the application. The Hon'ble Supreme Court allowed a settlement and set aside the order of NCLT, Chennai providing that the Regulation 30A when read with Section 12A contains no such stipulation. The Hon'ble Supreme Court in the case of "***Brilliant Alloys Pvt. Ltd v. S Rajgopal"*** which was reiterated in "***Swiss Ribbons & Anr. v Union of India & Ors",*** stated that "*Regulation 30A (1) is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36A*."

In light of catena of judicial decisions, it is reflected that Regulation 30A has been used by AA to allow withdrawal applications even after issuance of invitation of EOI. Hence, Regulation 30A was amended in July, 2019 specifying the process for withdrawal of applications, before & after the constitution of CoC. It also provided for withdrawal before the issuance of EOI and after the issuance of EOI, stating necessary reasons for the same. The discretionary power lies with the Adjudicating Authority, hence Section 12A, IBC cannot be used arbitrarily, as NCLT/NCLAT can set aside the withdrawal/ settlement under Section 60, IBC.[7]

Concerns raised against Section 12A, IBC

An application under Section 12A can only be filed by a person who filed an application under Section 7, 9 and 10 of the IBC. The NCLT in "***Anurutan Textiles v. Sarveshwar Creations"*** has dismissed the application of Section 12A as it wasn't filed by the applicant. Further, this mechanism cannot be availed of by the Resolution applicant. At the same time, a strong apprehension is raised that the 90% threshold as stipulated in Section 12A makes the provision redundant. This 90% of voting is in consonance with the BLRC report which says that "*all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.*" Whereas, Section 30(4) of the IBC provides that the resolution plan may be accepted if 66% of the votes are present of financial creditors in the committee of creditors.So, a question is raised if the threshold of 90% of voting shares is very high? The relevance of this question can be adjudged through the data given below and the COVID-19 circumstances.

Period	CIRP Withdrawal under Section 12A, IBC	Approval of Resolution Plan	Commencement of Liquidation
Jul - Sep 2018	26	32	83
Oct - Dec 2018	36	13	78
Jan - Mar 2019	27	14	73
Apr - Jun, 2019	31	26	96
Jul - Sep, 2019	43	33	155
Oct - Dec, 2019	43	40	150
Jan - Mar, 2020	46	36	135
Apr - Jun, 2020	21	20	25
Jul - Sep, 2020	12	22	68
Total since 2016	299	277	1025

Table 2: CIRP Statistics[8]

From the above data, it is reflected that the commencement of liquidation is greater than the approval of the Resolution plans after the initiation of CIRP. Further, the withdrawal using Section 12A, IBC is higher than the approval of the Resolution Plan. During COVID-19, the dependency on Section 12A, IBC won't be a viable option as the threshold of 90% is too high to be achieved and the companies are already in the position of being commercially unviable.

Let's assume if 'A' reflects that the course of IBC is leading to resolution and if 'B' reflects that company is saved from bankruptcy and is in the state of insolvency. Then **P(A|B) * creditor's cost > P (~A|B) * debtor's cost**. Wherein P(A|B) reflects the probability that resolution is successful when the company approaches the mechanism to make it viable and P (~A|B) reflects that the Pre-Packs are successful thereby making the company viable. Here, the creditor's cost is directly proportional to the

[7]Thakkar, H. (2021). "NPAs Legislations in India: Law & Finance Series", Himalaya Publishing House.

[8]Insolvency and Bankruptcy Board of India, 'The Quarterly Newsletter of Insolvency and Bankruptcy Board of India' (Newsletter, September 2020) <https://ibbi.gov.in/uploads/publication/411436dab58c1265aacb015b6b43a215.pdf >.

time and the cost undertaken for the CIRP. Moreover, the limited expertise of the Insolvency Professionals (IPs) also add on to the cost. Whereas the debtor's cost may be low that is present in restarting the company. But as the value erosion is less, adopting pre-packaged insolvency will be sufficient to make the companies viable which is the objective of IBC.

Pre-packaged Insolvency Resolution Process (PPIRP)

The Insolvency and Bankruptcy (Amendment) Ordinance was promulgated on 4th April, 2021 to introduce Pre-Packaged insolvency process for MSMEs as provided under Section 7 of the MSMED Act. Section 54A of the IBC Code provides that the application for initiation of pre-packaged insolvency process can be initiated when a default is committed as per Section 4 of the IBC. Certain conditions are however attached which are as follows:- (a) No Pre-packaged insolvency process or CIRP should have taken place in the last three years; (b) CIRP should not be in process; (c) No liquidation order should have been passed as per Section 33 of the IBC; (d) Section 29A of the IBC is not applicable; (e) The unrelated financial creditors have proposed a name for the appointment of insolvency professional after following the due process; (f) A declaration has to be provided by the majority of the partners and directors of the corporate debtor which approves the initiation of pre-packaged insolvency; (g) A special resolution of three-fourths of the total number of partners should approve the initiation of the pre-packaged insolvency. The corporate debtor is also required to take the approval of 66% of the unrelated financial creditors for filing the application of the pre-packaged insolvency.

Section 54C(5) of the IBC provides that the pre-packaged insolvency process will be initiated when the application is admitted as per Section 54C(4)(a). Section 54E provides that on the commencement of the pre-packaged insolvency process, the AA is supposed to declare a moratorium, appoint a resolution professional, and also cause a public announcement for the initiation of the pre-packaged insolvency process.

Interestingly, in the pre-packaged insolvency process as per Section 54H, the management of the affairs of the corporate debtor will continue to vest in the Board of Directors which will seek to protect the value of the property. However, a CoC will be constituted within 7 days after the pre-packaged insolvency commencement date. The CoC is empowered to vest the management of the affairs of the corporate debtor to the Resolution Profession if there exists 66% of the voting shares which is subsequently approved by the AA. Such decisions can be taken if there has been gross mismanagement by the corporate debtor or if the affairs have been managed in a fraudulent manner.

Section 54G provides that the corporate debtor is required to submit the base resolution plan within two days after the commencement of the pre-packaged insolvency process which shall be presented to the CoC as per the requirements of Section 54K. Section 54K(4) provides that the plan may be approved by the CoC if no rights of the operational creditors are impaired. If there are any discrepancies in the base resolution plan, then the Resolution Professional may invite prospective resolution applicants to submit a resolution plan. The CoC is required to select a resolution plan which are presented to it. The selected resolution plan has to be subsequently approved by the AA within 30 days as per the requirements laid down in Section 54I.

Section 54D mandates that the pre-packaged insolvency has to be completed in 120 days after the commencement of the same. This implies that in 90 days the resolution plan has to be approved by the

CoC and if no resolution plan is submitted within the stipulated time, the RP may file an application for the termination of pre-packaged insolvency process.

Therefore, the pre-packaged insolvency process may be closed if (a) resolution plan has been approved within 120 days; (b) on the expiry of 90 days when no resolution plan is submitted to the AA; (c) on the rejection of resolution plan by the AA; (d) on termination of the pre-packaged insolvency process by the AA after the CoC has approved the same with 66% of the voting share; (e) when the resolution plan does not result in the change of management, where the AA has vested the management of the property of the corporate debtor with the RP according to Section 54 of the IBC. Moreover, the application PPIRP of M/s GCCL Infrastructure Projects Ltd. stands admitted under Section 54C of the Code in 14 September, 2021. It has begun new era of PPIRP for MSMEs and possibly in near future it can be incorporated to even beyond MSMEs, which will provide competition, as well as trade-off between CIRP and pre-packaged as hybrid model.

Implementation of Pre-Packaged Insolvency During Covid-19

The framework of the pre-packaged insolvency in the preceding section highlights that India has adopted a hybrid framework of pre-packaged insolvency. The researcher has done a comparative analysis of three jurisdictions namely - USA, UK and Singapore vi-a-vis the pre-packaged insolvency process initiated in India after the promulgation of the Ordinance in 2021.

USA

The USA Model is often referred as debtor-in-possession wherein reorganization of the corporation, partnership or sole proprietorship is the primary aim. The entire process is monitored by the US Trustee where the debtor-in-possession has to satisfy certain mandatory requirements such as disclosing monthly income, operation expenses, payment to employees, setting up new accounts etc. failing to do this will either dismiss the application or conversion of the case to another model. During the process, a committee of creditors is also constituted which ordinarily consists of unsecured creditors. However, the constitution of the committee of creditors varies if there is insufficient representation and no active involvement of the creditor in case of small businesses. For the resolution, only the debtor is allowed to file the reorganization plan within 120 days of the filing of the petition whether voluntary or involuntary (after the order is entered). This may be extended further depending on the case. If the debtor fails to propose a viable plan or gather acceptance for it, the creditors or the committee of creditors may propose a plan, and the plan which is more viable may be accepted if there is a conflict of interest. In some situations, under Chapter 11 even the liquidation plans are allowed if it is economically advantageous. The confirmation of the plan discharges the debtor and new contractual rights and interest are created. The acceptance of such a plan is confirmed when the impaired class of either claims or interests holds ⅔ in amount and are more than ½ in number. A non-impaired class is deemed to have accepted the plan and subsequently a class of claims or interests who don't receive or retain the property is deemed to have rejected the plan. After the reorganization plan, it is bound by the respective bankruptcy court to all the stakeholders based on commercial expediency.

UK

The statement of Insolvency practice 16 has defined pre-packages as "*pre-packaged sale' refers to an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator and the administrator effects the sale immediately on, or shortly after, appointment*." Thus, we see that in the

UK, pre-packaged insolvency is more concerned with sale rather than reorganization which is contrary to the main objective of IBC. An insolvency practitioner is appointed which plays an important role as an advisory. Unlike the USA, prepackaged insolvency is developed as a matter as a practice rather than having its base in statutes. After the acceptance of the option pre-packaged by the board of directors, the administrator gets the external values and statement of affairs is prepared to prepare a "newco" plan. The various offers are evaluated, and depending on the efficiency, a new company may buy the assets of the existing company which is in a hostile condition. After eight weeks, Insolvency Professional will call the CoC meeting to see the outcome of hostile company status and is liquidated.

Singapore

In Singapore, Pre-pack is defined as "*involving a plan that was pre-negotiated and agreed between the debtor and its major creditors before formal court proceedings commence, whereupon the Pre-Pack 'is then presented to the court for approval*"[9]. One can see that this is similar to USA Chapter 11 which requires court's approval contrary to UK pre-packs. Section 211 of the Companies Act of Singapore, allows the approval of the compromise put forth by the company or its creditors even without a formal meeting giving a wide discretionary power to the court.

Thus, after comparing, one can see that in IBC Pre-packs, the approval of court should be mandated such as that of NCLT as it provides a major flexibility in case of restructuring and this will also prevent any potential abuse to the minority dissenters. Plus, the mode of pre-packs and the definition of pre-packs is varying from one jurisdiction to another as can be seen in the UK, USA, Singapore.

With regard to India, it is important to note that till now the pre-packaged insolvency process is limited to the MSMEs. It can neither be regarded as an informal process nor a formal process. The pre-packaged insolvency process initiated in India is a hybrid process which blends both the creditor-in-control and debtors-in-possession model. The rigor and discipline of the CIRP is still present in the pre-packaged insolvency process. This proves to be beneficial in the uncertain during times of COVID-19, where a strong apprehension could be raised about the efficacy and implementation of pre-packs in India. It is required that the pre-packs should be finely tuned with the spirit of IBC.[10]

However, there are several issues in the present framework of pre-packaged insolvency introduced in India. Firstly, there might be challenges with respect to the timely completion of the pre-packaged insolvency process in 120 days. Secondly, the introduced pre-packaged insolvency process still mandates the approval of the AA which might further delay the approval of the resolution plan due to high pendency in the tribunals.[11] The Swiss Challenge process after the invitation to the prospective resolution applicants may be cumbersome as due to the ongoing pandemic, less number of resolution plans might be available which will adequately balance all the stakeholders. Moreover, the present ordinance limits the application of the pre-packaged insolvency process to the MSMEs.

The researcher believes that such benefits should also be extended to other enterprises. However, at the same time, a legitimate concern can be about the continuous experimentation during these times which may further augment the problem of insolvency in India by raising the ex-ante costs. So, a safer approach could be tuning Section 12A of IBC in a

[9]Wee, 'Whither the scheme of arrangement in Singapore: More Chapter 11, less scheme?' SSRN (Article, February 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922956>.

[10]Singh, R. & Thakkar, H. (2021). Settlements and Resolutions Under the Insolvency and Bankruptcy Code: Assessing the Impact of Covid-19. *The Indian Economic Journal*, *69*(3), 568–583.

[11]Rowchoudhary, R, & Mohitee, R. (2021). Pre-Packaged Insolvency Process for MSMEs. *Mondaq.* https://www.mondaq.com/india/insolvencybankruptcy/1132276/pre-packaged-insolvency-process-for-msmes

way that may implement the spirit of pre-packaged insolvency.

This can be done by reducing the voting threshold as done in Chapter 11 of USA where the class of either claims or interests holds ⅔ in amount and are more than ½ in number for accepting the plan or the threshold of 66% voting rights should be opted for as in the case of acceptance of the Resolution Plan. This will balance the interests of the corporate debtor and the promoters of the company who have more skills and information for making the company efficient which came in hostile state due to negative contingencies of COVID-19. A further approach that can be opted in IBC, is making sub-provisions of different types of sectors. For instance, the MSMEs were affected drastically as the COVID-19 surged in India when India was already experiencing a crunch in demand wherein the MSMEs had to tackle both the supply shocks and the labor shocks[2] (Singh, 2020). To curtail this, the Government has amended IBC via Ordinance by increasing the threshold of default from 1 lakh to 1 crore with the increase in ambit of the definition of MSME in MSMED Act, 2016. So, in MSMEs, the voting threshold for withdrawal of CIRP can be lesser than those of other companies. This is said in the view of the gravity of the problem in MSME and the potential risk associated when one opts for a more informal process. The discretionary powers as present in Singapore can be made robust wherein proper guidelines and conditions are made which states the instances in which the application under Section 12A may not be accepted which is still absent in the IBC. Further, allowing the withdrawal of the application will help to prevent unemployment as the company will have an option to withdraw the CIRP when the company is in the initial stage of distress. Therefore, given the nascent stage of IBC and adverse effects of COVID-19, it is appropriate that the 'pre-pack' applicability in MSMEs for 10 lakh default size, along with applicability all enterprises required, are continued which can take into account the value maximization of all the stakeholders.[12]

Conclusion

Pre-packaged insolvency proves to be an efficient process for making the companies viable which have been grappled by the negative externalities present in the system due to COVID-19. India, while combating COVID-19 has resorted to the higher degree of Pigouvian Model which has severely affected the employment, supply chains and production. Owing, to the uncertainty prevalent in the system, the demand of the people was also drastically diminished. Further, the competitiveness present in the market, added an extra burden on the Companies.

Presently, there is a dearth of adequate numbers of Resolution Applicants and at the same time, questions are raised against the efficiency of Insolvency Professionals. The normal CIRP as incorporated in the IBC will not prove to be efficient in this miserable situation. The researchers as an alternative have then revisited Section 12A, IBC which might serve as a 'middle pack'. The high voting threshold of 90% was not viable to be dependent upon. The solution of pre-packs can help India to reduce the negative externalities and ensure that Marginal Benefits are greater than Marginal Cost. This is because the time and costs involved in the resolution will be less which will not lead to value erosion.

Pre-packaged insolvency proves to be an efficient method as the high value of business will be at least equal to or higher than the previous high value of business (V_p) and the time taken is t+120 days whereas in the case of normal CIRP, the high value of

[12]Das, A., Agarwal, A. K., Jacob, J., et al. (2020). Insolvency and Bankruptcy Reforms: The Way Forward. Vikalpa, 45(2), 115-131.

business is $\frac{V}{\ } < D$, and the time taken is more than t+270 days. This clearly supports the contention that debtor in possession model due to pre-packaged insolvency is more efficient than the creditors in control model of CIRP.

The next question is raisedabout the procedure of implementation of pre-packs in India. For this the researchers have done a comparative analysis of laws present in the United States, United Kingdom and Singapore to suggest some policy measures so that the apprehensiveness and uncertainty prevalent in the public regarding pre-packs is reduced.

Therefore, it is suggested that the pre-packaged insolvency process may be extended to other enterprises, by keeping in view the model proposed by the researchers.

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