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UNPACKING THE PRE-PACK – A FRESH INSOLVENCY RESOLUTION PROCESS ARRIVES IN INDIA

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ABSTRACT

The recent amendment of the Insolvency and Bankruptcy Code, 2016, that was promulgated by the President of India in August 2021, is being viewed as the most prominent landmark change within the entire insolvency procedure as it has introduced a highly anticipated and wholly new scheme/procedure. The pre-packaged insolvency resolution process and the essential aims of this process are to bring in increased efficiency in terms of time, money, and cost to stakeholders, and is also a comparatively less invasive regime in aiding micro, small and medium businesses and enterprises. The following paper attempts to comprehensively discuss and elaborate on this new regime. Firstly, the author discusses the context in which such regime has been enacted, followed by a detailed comparative analysis of the existing international regimes. Furthermore, a detailed descriptive analysis of the procedure and a comparison of the new process with the older regime of Corporate Insolvency Resolution Process is undertaken. In conclusion, this paper highlights the potential challenges and issues that this new regime could face in the future.

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I. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 [*hereinafter* "**IBC**" or "**the Code**"] which was enacted over half a decade ago, was and continues to be a historic law that has ushered in significant changes to the nation's corporate structure. The objectives of the IBC were to regulate the relations between creditors and debtors; to make the process more efficient; and to resolve the compelling issue of growing stress assets in the country. This was followed by the period between 2008 to 2014, wherein Indian banks were lending money at high risks without due diligence. This culminated into an excessively high percentage of non-performing assets, and the IBC was finally brought in to resolve this.[804]

The IBC lays specific time bound procedures and processes as strict timelines exist for the whole Corporate Insolvency Resolution Process [*hereinafter* "**CIRP**"],[805] however, these timelines do not incorporate the time consumed by judicial or legal proceedings, and thus, practically lead to many processes exceeding the maximum number of days stated within the Code's timeline. Therefore, the most pertinent and relevant change that was required was one to tackle these issues and bring in a quick and effective resolution process, which has been brought in through the most recent amendment to the Code.

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[804] '*12 large NPA cases listed for insolvency yet to come before IBBI*', MINT, (June 19, 2017), https://www.livemint.com/Industry/TDenpfU0nhiXjlqAE6ZtPJ/12-large-NPA-cases-listed-for-insolvency-yet-to-come-before.html.

[805] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, §33.

On 3 August 2021, the Rajya Sabha (Upper House of the Indian Parliament) passed the Insolvency and Bankruptcy Code (Amendment) Bill, 2021, which had already passed by the Lok Sabha (Lower House of the Indian Parliament) on 28 July 2021.[806] Pursuant to these legislative actions, the Insolvency and Bankruptcy Code (Amendment) Act, 2021 [*hereinafter* "**2021 Amendment**"] came into effect, however, as per Section 1(1) of the 2021 Amendment, its provisions would be deemed to have come into force with effect from 4 April 2021.

Prior to the 2021 Amendment, the Government of India had issued a notification in exercise of its powers under Sections 239(1) and 239(2)(fd) read with Section 54C(2) of the IBC as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 (03 of 2021), thereby bringing into effect the Insolvency and Bankruptcy (Pre-packaged Insolvency Resolution Process) Rules, 2021 [*hereinafter* "**Rules**"].[807] Certain regulations[808] for the pre-pack process have also been released by the market regulator, *i.e.*, Insolvency and Bankruptcy Board of India [*hereinafter* "**IBBI**"]. The ordinance was with respect to pre-packaged insolvency resolution process [*hereinafter* "**PIRP**"] for the micro, small and medium

[806] The Insolvency And Bankruptcy Code (Amendment) Ordinance, 2021, No. 3, Acts of Parliament, 2021, https://ibbi.gov.in//uploads/legalframwork/52f66d913dfe1c637b6a38f82d38bcbd.pdf.

[807] Insolvency & Bankruptcy Board of India (Pre–Packed Insolvency Resolution Process) Rules, 2021, https://ibbi.gov.in//uploads/legalframwork/f75906d8657a51f214785c697d9bb296.pdf.

[808] Insolvency & Bankruptcy Board of India (Pre–Packed Insolvency Resolution Process) Regulations, 2021, https://ibbi.gov.in//uploads/legalframwork/2021-04-10-182311-5ngd9-0dd40b82af7a770d5e89c0d9e37bdb45.pdf.

enterprises [*hereinafter* "**MSMEs**"]. Before this, India did not have specialised norms such as the PIRP for MSMEs. However, such mechanisms have been prevalent in some western countries. In fact, in light of the ongoing COVID-19 pandemic, the World Bank and the International Monetary Fund also recommended member states to take measures to brace the inevitable impact of the pandemic on their economies.[809]

The Interim Report of the Bankruptcy Law Reform Committee [*hereinafter* "**BLRC**"] of 2015 discussed the viability of 'pre-packs' for the first time in the Indian context. The discussion was rejected considering the non-viability of out of court settlements in the Indian insolvency regime as it was then deemed to not be a wise step.[810] Owing to COVID-19, the disruption of economic processes in India led to a massive wave of insolvencies, with small businesses and industries bearing the maximum brunt owing to their size and scale. This challenge necessitated a change in India's insolvency regime, in terms of certain interim and transitional measures to flatten the curve of insolvencies and protect the small enterprises, thus leading to the current amendment.

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[809] COVID-19 (Coronavirus) Response, The World Bank, https://www.worldbank.org/en/region/sar/coronavirus; Questions and Answers, The IMF's response to COVID-19, International Monetary Fund, https://www.imf.org/en/About/FAQ/imf-response-to-covid-19.

[810] DEPARTMENT OF ECONOMIC AFFAIRS, MINISTRY OF FINANCE INTERIM REP. OF THE BANKRUPTCY LAW REFORM COMM. (2015), https://msme.gov.in/sites/default/files/Interim_Report_BLRC.pdf.

Part II of this paper analyses and brings an international context to the pre-pack mechanism and how various jurisdictions have implemented the process, followed by Part III which briefly dwells into how MSMEs are relevant in context of PIRP. Part IV extensively and comprehensively lays down India's current PIRP process that has been brought in through the 2021 Amendment; Part V of the paper compares and juxtaposes CIRP with PIRP and analyses the same. Finally, the paper concludes with highlighting the major discussions throughout the paper and analyses the potential challenges and issues that this process might face.

II. COMPARATIVE ANALYSIS WITH INTERNATIONAL MARKETS AND JURISDICTIONS

In this section, legal provisions of countries such as the United Kingdom [*hereinafter* "**UK**"], the United States of America [*hereinafter* "**USA**"], Canada, South Korea and Singapore will be discussed which would aid in contextualising the PIRP. Historically, in the USA, the PIRP mechanism has existed following its Bankruptcy Reform Act of 1978[811] due to rapid growth of its debt-equity practice. According to a research, about 20% of all public bankruptcy in the USA had been pre-packaged by the end of the 19th century.[812] PIRP has thereafter been embraced by many countries such as France, Netherlands, Germany, South Korea, Singapore and the

[811] United States Bankruptcy Act, 11 U.S.C. § 101(1978).
[812] *Vanessa Finch*, CORPORATE INSOLVENCY LAW PERSPECTIVES AND PRINCIPLES 454 (2nd ed. 2009).

UK.[813] Pre-packs are referred to as 'expedited reorganisation proceedings' by the United Nations Commission on International Trade Law [*hereinafter* "**UNCITRAL**"][814], with the rationale that they are a combination of voluntary restructuring negotiations in which the plan is negotiated and agreed upon by all relevant parties and stakeholders, as well as a reorganised process or proceeding that begins almost immediately and without delay.

Although the market and the legal system in the UK have embraced the pre-pack process and its evolution, the applicable laws, the Insolvency Act of 1986[815], did not specifically identify or provide for a managed pre-pack procedure. The process evolved within the UK via commercial practices and business innovations. The administrator in the UK is comparable to the Interim Resolution Professional [*hereinafter* "**IRP**"] in India. Now, thanks to the Enterprise Act of 2002[816], the process of appointing an administrator without a court referral is legal. The administrator is bound and limited by the Statements of Insolvency Practice [*hereinafter* "**SIP**"], as well as the requirement of being a licenced insolvency practitioner.

The main problem raised earlier was the ethical nature of these pre-pack processes and how they are administered, as well as how to cope with

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[813] *Bo Xie*, COMPARATIVE INSOLVENCY LAW: THE PRE-PACK APPROACH IN CORPORATE RESCUE (2016).
[814] UNCITRAL, LEGISLATIVE GUIDE ON INSOLVENCY LAW 25 ¶ 16 (2005), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf.
[815] Insolvency Act, 1986 c. 45.
[816] Enterprise Act, 2002 c. 40.

these difficulties. SIP 16 was published in 2009, and it addressed a number of issues, including: clarifying the relationship between the administrator and the directors of the insolvent company before the administration; and stating that the administrator is only concerned with and acting in the interests of the company, not individual directors. According to SIP 16, the administrator should also assure the creditors that he would act in their best interests. SIP 16 was later amended post recommendations from a committee set up to deal with issues on sale of assets and connected party pre-packs; the amendments increased the transparency within the pre-packs to resolve those concerns and issues.[817] The changes in governance have been increasingly made as recently as 2020. New legislations were also enacted which introduced provisions allowing pre-pack processes or transactions to related parties to be examined, thus aiding in resolving the negative aspects that were caused due to the pandemic wherein extensive use of the pre-pack mechanism was being made.[818] The UK's practice which started through commercial and market aspects, wherein informal agreements were being done, has now progressively turned into a more governed process to resolve the issues that couldn't be relieved through informal means.

[817] Statement of Insolvency Practice (SIP) 16 - Background and Key Amendments, (2015), https://www.icaew.com/-/media/corporate/files/technical/insolvency/regulations and standards/sips/england/sip-16-e-and-w-pre-packaged-sales-in-administrations-2015.ashx.

[818] INSOLVENCY SERVICE (OF UK), PRE-PACK SALES IN ADMINISTRATION REP. (2020), https://www.gov.uk/government/publications/pre-pack-sales-in-administration/pre-pack-sales-in-administration-report.

In the USA, pre-packaged bankruptcy and insolvency procedures along with previously ordered bankruptcy procedures have been clearly explained and set forth in Chapter 11 of the US Bankruptcy Code[819] [*hereinafter* "**US Code**"]. Section 363 of the US Code deliberates upon the permission to carry out both of these proceedings.[820] In the USA, a process known as a pre-plan transaction entails getting rid of all corporate debtor's [*hereinafter* "**CD**"] assets until the entire restructuring process or reorganisation begins. Second, since Chapter 11 also states that the CD will inform or notify all parties involved in the proceeding and give them the opportunity to appeal if they have problems with the ongoing process or the settlement, the CD essentially needs to obtain court approval. As far as legislative involvement is concerned with these pre-planned transactions, there exists no specification with regards to any necessities or criteria that are relevant for judicially assessing the transactions or even how the same needs to be done or conducted. In simple terms, in a typical pre-planned or pre-packaged bankruptcy case, the CD and the core creditors get into a negotiation to plan out the terms of the proposal and then those negotiated proposals need approval or a 'no-objection certificate' from the separate group of creditors. Thereafter, the CD distributes the final plan to all the creditors with a disclosure statement, and then the final petition under Chapter 11 of the US Code after getting all the necessary approvals and votes in favour of the process is filed.[821]

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[819] United States Bankruptcy Code, 11 U.S.C. (1978).
[820] *Id.*
[821] *Id.*

When a business is in debt in Canada, a ready-made sale of that business by company management often occurs as if the business is going through a difficult and worrying time looking for potential buyers. Company management under the Companies' Creditors Arrangement Act [*hereinafter* "**CCAA**"][822] seeks coverage to allow them time and money to resume their efforts to finalize the sale of the company with an eligible buyer.

In South Korea, the relevant legislation is the Debtor Rehabilitation and Bankruptcy Act, 2005,[823] which contains the procedural blueprint of restructuring plans already drawn up, and although it was introduced much later than in the UK or the USA, it has shown to be an important and effective tool to shorten the total duration of the bankruptcy procedure in the country. The intent behind the inclusion was that it would be widely used by any indebted business or corporation in dire need of an efficient path of restructuring and sustainability, and fortunately for the lawmakers, their efforts have been fruitful. Even the South Korean court system is working to take drastic and progressive measures to increase a significant proportion of pre-designed restraining procedures or agreements in order to effectively achieve the original goal.

Under Section 211 of the Singapore Companies Act,[824] the court has the power to approve a compromise or agreement between the

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[822] Companies' Creditors Arrangement Act, R.S.C, 1985, c. C-36.
[823] Debtor Rehabilitation and Bankruptcy Act, (S. Kor.), (No. 7428 of 2005) *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=46315&type=new&key=.
[824] Companies Act, (No. 42 of 1967) (Sing.).

corporate parties and a conference of creditors or group of creditors. If approved, this agreement will be applicable and binding on all parties, and the corporations or the various classes of creditors that are part of this agreement or are regulated by it. However, due to the pandemic, a new amendment law called the Insolvency, Restructuring and Dissolution (Amendment) Act, 2020[825] was passed in the Parliament of Singapore, which introduced a new pre-packaged process within the landscape with a focus on micro and small businesses similar to India. If a company or firm goes through this process, it will be temporarily suspended. It would also not be enough to just have a meeting with the company's creditors; the court's sanction would only be achieved if the corporate could effectively show that if a committee were to be scheduled, an extensive majority of creditors, *i.e.*, two-thirds of the total, would have given approval for it.

III. WHAT IS AN MSME?

Before moving further, it would be interesting to understand what constitutes an MSME, of which, as per India Brand Equity Foundation, over 63 million exist in India,[826] with the number growing expeditiously in the wake of several benefits being introduced from time to time by the Government.

The Micro, Small and Medium Enterprises Development Act, 2005 [*hereinafter* "**MSME Act**"], adopted by the Indian government, classified

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[825] Insolvency, Restructuring and Dissolution (Amendment) Act, (No. 39 of 2020)(Sing.).
[826] *MSME Industry in India*, INDIA BRAND EQUITY FOUNDATION (May 20, 2021), https://www.ibef.org/industry/msme.aspx#login-box.

micro, small, and medium enterprises based on two factors: (i) investment in plant and machinery, and (ii) turnover of the business.

For firms in the manufacturing and service sectors, different thresholds for being designated as an MSME were specified based on the two considerations. However, under the government's "self-reliant India" campaign, popularly known as Aatmanirbhar Bharat Abhiyan, the Ministry of MSME amended MSME categorization by introducing a composite criterion for both plant and machinery investment and yearly turnover of firms in its notice dated 1 June 2020.[827] In addition, the distinction between manufacturing and services industries in the previous MSME definition has been eliminated. This removal will bring the sectors closer together.

In PIRP, instead of a public bidding process, the resolution of a distressed company's debt is made with a direct arrangement between secured creditors and existing owners or outside investors. Financial creditors will agree to terms with the promoters or a possible investor under the PIRP procedure, and the resolution plan will be submitted to the National Company Law Tribunal [*hereinafter* "**NCLT**"] for approval.

The reasons for introduction of PIRP for MSMEs is largely based upon providing MSMEs with a chance to restructure their liabilities and start over while maintaining enough safeguards to ensure that the system is not abused by businesses to avoid making payments to creditors. However, any resolution plan that delivers less than full recovery of dues for

[827] Ministry of Micro, Small and Medium Enterprises, S.O. 1702(E) (Notified on June 01, 2020).

operational creditors is subject to a 'Swiss challenge', a method of public procurement[828], under the PIRP method.

Any third party might propose a resolution plan for the distressed company under the Swiss challenge procedure, and the original application would have to either match the improved resolution plan or forego the investment. The process as a balance between long and informal solution processes offers certain inherent advantages, some of which are: quick resolution; cost effectiveness; boasting of the value; and preservation of employment and judicial convenience, as the time and effort required before the judicial authority would be much less owing to the largely friendly and flexible nature of the procedure. Thus, the process thrives with minimal interference.

IV. INDIA'S CURRENT PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS

A PIRP can essentially be understood as an 'out-of-court arrangement' between the debtor and creditors on a 'restructuring plan'. As per the Merriam-Webster Dictionary, in this form of settlement, the debtor agrees to the terms of the creditors, reducing the time it takes to handle the business at hand.[829] A pre-packaged administration has been defined in the

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828 Pretika Khanna, *What is the Swiss Challenge Method?*, MINT, July 16, 2015, https://www.livemint.com/Politics/HOCSnmCWarO4hpYglBsHBP/What-is-the-Swiss-Challenge-Method.html.

829 *Pre-packaged bankruptcy*, Merriam-Webster.com Legal Dictionary, https://www.merriam-webster.com/legal/pre-packaged%20bankruptcy.

UK as "*an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser before the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment.*"[830]

This mechanism provides an opportunity for the parties to form a consensus over the future of the business of the debtor *ex-ante*, under the interest of all stakeholders. It is based on the principle of 'corporate rescue', rather than imposing punitive liability on the CD. In India, a PIRP now appears in the form of new Sections 54A to 54P under a new Chapter III-A in the IBC, according to the 2021 Amendment.

V. THE AMENDMENT OF 2021: KEY HIGHLIGHTS

Following are the key highlights of the 2021 Amendment for PIRP:[831]

A. INITIATION OF PROCESS:

A PIRP can be initiated only by the CD, unlike in the CIRP which can be filed both by the CD or the creditors.

The following criteria needs to be fulfilled by the CD to be able to file for PIRP, as required under Section 54A of the IBC (as amended by the 2021 Amendment):

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[830] Lorraine Conway, '*Pre-pack Administrations, House of Commons Library, Briefing Paper Number CBP5035*' HOUSE OF COMMONS LIBRARY (2017), http://researchbriefings.files.parliament.uk/documents/SN05035/SN05035.pdf.

[831] The Insolvency And Bankruptcy Code (Amendment) Act, 2021, No. 26, Acts of Parliament, 2021, https://ibbi.gov.in//uploads/legalframwork/0150ec26cf05f06e66bd82b2ec4f6296.pdf.

- The CD must be following the due process of law under Section 29A of the IBC and Section 240A to be eligible to submit a resolution plan;[832]
- The CD must not be undergoing CIRP;
- No order to liquidate the concerned company of the CD should have been passed under Section 33 of the IBC;
- The cooling-off period for initiating a fresh PIRP from completion of the previous CIRP or PIRP is 3 years. Hence, the CD must not have undergone a CIRP or PIRP for three years; and
- The majority of the partners and directors of the CD must have filed a declaration under Form P6[833] as prescribed in Section 54A(2)(f) of the IBC stating that an application for initiating PIRP will be filed by the CD within 90 days of the initiation of the PIRP, and the intent of the process is not to defraud any person. It will also contain the name of the proposed Insolvency Professional to be appointed for executing the process.

B. ROLE OF THE CREDITORS:

The PIRP route for insolvency resolution has to be agreed upon by a minimum of 66% of the financial creditors, not being its related parties representing the value of the financial debt due to such creditors. They form the Committee of Creditors [*hereinafter* "**CoC**"] for this purpose and have

[832] The Insolvency and Bankruptcy Code (Amendment) Act, 2017, No. 8, Acts of Parliament, 2018.
[833] The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, Gazette of India, pt. II sec. 4 (Nov. 30, 2021) (No. 828 of 2016).

to express their consent for initiating PIRP by passing a special resolution. Section 54A(2)(e) of the 2021 Amendment provides that in a situation where the CD does not have any financial creditors, not being its related parties, a proposal and approval shall be provided by such persons as may be specified.

A 'creditor', as defined by Section 3(10)[834] of the IBC, is any individual who is owed a debt, including a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree holder.

C. FILING OF THE APPLICATION:

Once approved by the CoC, the application for PIRP has to be filed through Form P4[835] with the Adjudicating Authority, *i.e.*, the NCLT. The NCLT must approve or reject the application within fourteen days of its receipt. In case any corrections need to be made to the plan, the CD has to be given notice within seven days of applying to rectify the fault.

D. DEFAULT AMOUNT:

The 2021 Amendment has set the upper limit of the default amount at INR 1 crore (USD 134,699). Hence, PIRP can be filed when the defaulted debt ranges from INR 10 lakh (USD 13,470) to INR 1 crore (USD 134,699.70). When all the criteria are fulfilled and the Adjudicating Authority accepts the application submitted, a Resolution Professional [*hereinafter* "**RP**"] is appointed to carry out the process.

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[834] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, §3(10).
[835] *Id.*

E. COMPANY MANAGEMENT:

The administration of the company is retained by the CD, or whoever is appointed by them on their behalf, during the process. Only in cases of the existing management being involved in fraudulent activity is the responsibility to manage the company is transferred to the RP.

F. BASE RESOLUTION PLAN:

The CD is expected to formulate a base resolution plan under Section 54K for debt restructuring and submit it to the RP within two days of the beginning of the process. The CoC may accept it or allow the CD to revise it. In case the base resolution plan is not accepted by the CoC even after revision, the RP is supposed to invite prospective resolution applicants to submit their resolution plans to compete with the base resolution plan.

G. APPROVAL BY COC:

The resolution plans which align with the requirements of Section 30(2) of the IBC are presented to the CoC by the RP. These resolution plans are then evaluated by CoC and one of them is selected under Sub-sections 10, 11 or 12 of Section 54K. It is then submitted to the Adjudicating Authority within 90 days. [836]

H. APPROVAL BY ADJUDICATING AUTHORITY:

Once the resolution plan is filed, the NCLT must approve the plan within 30 days. The entire process has to be finished within 120 days.

[836] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, §54L.

However, NCLT may not approve it and instead pass an order of termination of the PIRP on the following grounds:[837]

- a resolution plan is not submitted to the NCLT within 90 days,
- the resolution plan successful in the competition between the base resolution plan and the selected resolution plan is not approved by the CoC, or
- the CoC passes a resolution seeking termination.

In such cases, the RP is supposed to apply to the NCLT for dissolution of the PIRP.

I. POWER OF TERMINATION BY COC:

According to Section 54N(2) of the IBC, the PIRP can be terminated at any time before approval of the plan if a minimum of two-thirds of the CoC votes to terminate the PIRP. They can also vote to initiate the CIRP instead of the PIRP (in case the CD is eligible for the CIRP) before the approval of the PIRP by the NCLT. In such a situation, they must inform the RP accordingly.

J. COST EFFICIENCY:

The cost of the PIRP has been reduced when compared to the hefty money otherwise required for carrying out the CIRP. It is due to the voluntary form of restructuring with more involvement from the stakeholders that all unnecessary litigations, costs and delays can be avoided.

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[837] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, §54L(3).

The Memorandum Regarding Delegated Legislation of the 2021 Amendment empowers the Central Government and the IBBI to make and amend the rules in respect of matters relating to forms, costs, conditions and restrictions on discharging of the rights of the involved parties.

VI. COMPARATIVE ANALYSIS OF CIRP AND PIRP

The CIRP's main flaw is that it takes an inordinate amount of time to resolve. By the end of March 2021, 79 percent of the 1,723 insolvency resolution proceedings in progress had passed the 270-day mark. This can be attributed to the prolonged litigation by the creditors and shareholders, as well as the practice of virtual hearings in the current scenario. In contrast, the PIRP is limited to a maximum of 120 days with 90 days available to stakeholders to bring a resolution plan for approval before the NCLT.[838] The minimum threshold amount for initiating a PIRP should be between INR 10 Lakh to INR 1 Crore, while the same starts at INR 1 Crore for a CIRP.[839]

While CIRP requires a mandatory involvement of the Adjudicating Authority at all stages, PIRP requires the consent of both the parties to initiate the process and only involves the NCLT in the final stage of submitting the base resolution plan, and hence has a limited role for the Adjudicating Authority to play.[840] A PIRP is hybrid in its approach as it gives space to the CD and financial creditors to come on mutually agreeable

[838] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, §54D(1).
[839] MCA Notification, *supra* note 808.
[840] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, §54D(1).

terms for restructuring of the company, as well as necessitates the intervention of the Adjudicating Authority to implement the plan.

In general, the PIRP provides more freedom and choice to the debtors in terms of making their restructuring plan and further allows making amendments to it based on the recommendations of the CoC. Another significant distinction between the PIRP and CIRP is that in PIRP, existing management keeps control; in CIRP, a RP assumes control of the debtor as a representative of financial creditors. As a result, a PIRP is significantly less disruptive to the business in question. At the same time, a PIRP can only be started by the CD, whereas a CIRP can be started by both the creditors and the debtor.

VII. CONCLUSION

It has been realized through the journey of the PIRP in various other jurisdictions that it is an effective mechanism for a speedy resolution. However, there are also certain challenges in its operation. The first issue is that due diligence may be overlooked in light of the quick completion of the resolution process. If suppliers believe the proper procedure was not followed, the company's reputation may be harmed, and this will cause additional problems if the company is later sold to a third party. Because the court's involvement is minimal, creditors have been known to later claim that their interests were disregarded (since the consent of only 66 percent of financial creditors needs to be taken). Unsecured creditors, in particular, are frequently kept in the dark until the procedure is over, thus making them feel alienated throughout the process.

There is also a concern that since the process is normally confidential and only receives the consent of secured creditors, there is insufficient incentive to conduct extensive marketing that is in the interest of all creditors, especially unsecured ones. Given this, the value due to unsecured creditors may be captured by other stakeholders.[841] There have also been some instances where pre-packages have been used by related parties where the company is only technical and not bankrupt to profit from balance sheet reshuffle, especially to undermine its business competitors.

Under the current Indian regime of IBC, insolvency professionals are still developing the necessary expertise required with time. Just as the law under the UK regime has evolved, the application of pre-packaged insolvency in India will require a much higher degree of expertise of insolvency professionals. In addition, creditors must build trust not only in these liquidators/insolvency professionals, but also in the framework created so that there is an understanding between creditors when negotiating and approving plans. At the same time, CDs must be aware of their worth as they have to identify and execute plans that are fair and reasonable for all. A sense of cooperation between both these parties is of paramount significance as an out-of-court debt restructuring arrangement can only be possible in a scenario where both parties are willing to negotiate.

The key features of the PIRP in the 2021 Amendment have been designed to play an instrumental role in saving the distressed MSMEs from

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[841] Sandra Frisby, *A Preliminary Analysis Of Pre-Packaged Administrations*, III GLOBAL (2007), https://www.iiiglobal.org/sites/default/files/sandrafrisbyprelim.pdf.

going through complete liquidation and bankruptcy, and hence, will hopefully provide them with respite. The revised definition of the MSME sector covers almost 70% of the Indian industries. At the same time, the Supreme Court of India has held in the very recent case of *Silpi Industries* v. *Kerala SRTC*[842] that to seek the benefit of provisions under MSME Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSME Act, no benefit can be sought by such entity, as contemplated under MSME Act.[843] With 90% of MSMEs being unregistered, the judgement can potentially exclude a majority of the MSMEs in India to be eligible to apply for PIRP, hence, this is a challenge that needs to be resolved immediately for effective implementation of the 2021 Amendment.

Recently, the IBBI stated that based on the experience of PIRP for MSMEs, there is a possibility that the scheme will be extended to large companies as well in the future.[844] With the rise of out-of-court settlements, PIRP may become a viable option to CIRP in the near future. However, considering the quantum of such matters in the country, each law and novice system will need to undergo the rigours of such process and pass

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[842] Silpi Industries v. Kerala SRTC, 2021 SCC OnLine SC 439.

[843] Tariq Khan, *Pre-Packs for MSMEs: A Positive Step with Implementation Hurdles,* SCC ONLINE (July 20, 2021), https://www.scconline.com/blog/post/2021/07/20/pre-packs-for-msmes-a-positive-step-with-implementation-hurdles/.

[844] Banikinkar Pattanayak, *IBBI hints at Pre-pack scheme for large firms*, FINANCIAL EXPRESS (Aug. 3, 2021), https://www.financialexpress.com/industry/ibbi-hints-at-pre-pack-scheme-for-large-firms/2302882.

the test of time, to finally decide as to whether or not such a change was indeed useful and worthy.