

Recent trends in IBC

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 - Based out of Kolkata, New Delhi & Mumbai
- We are a team of consultants, advisors & qualified professionals having over 30 years of practice.

Our Organization's Credo:

Focus on capabilities; opportunities follow

AGENDA

- 01** Story of IBC so far
- 02** Recent trend in IBC
- 03** Pre pack Insolvency
- 04** Assignment of NRRRA
- 05** Group Insolvency
- 06** Going Concern Sale
- 07** Recent amendments and rulings

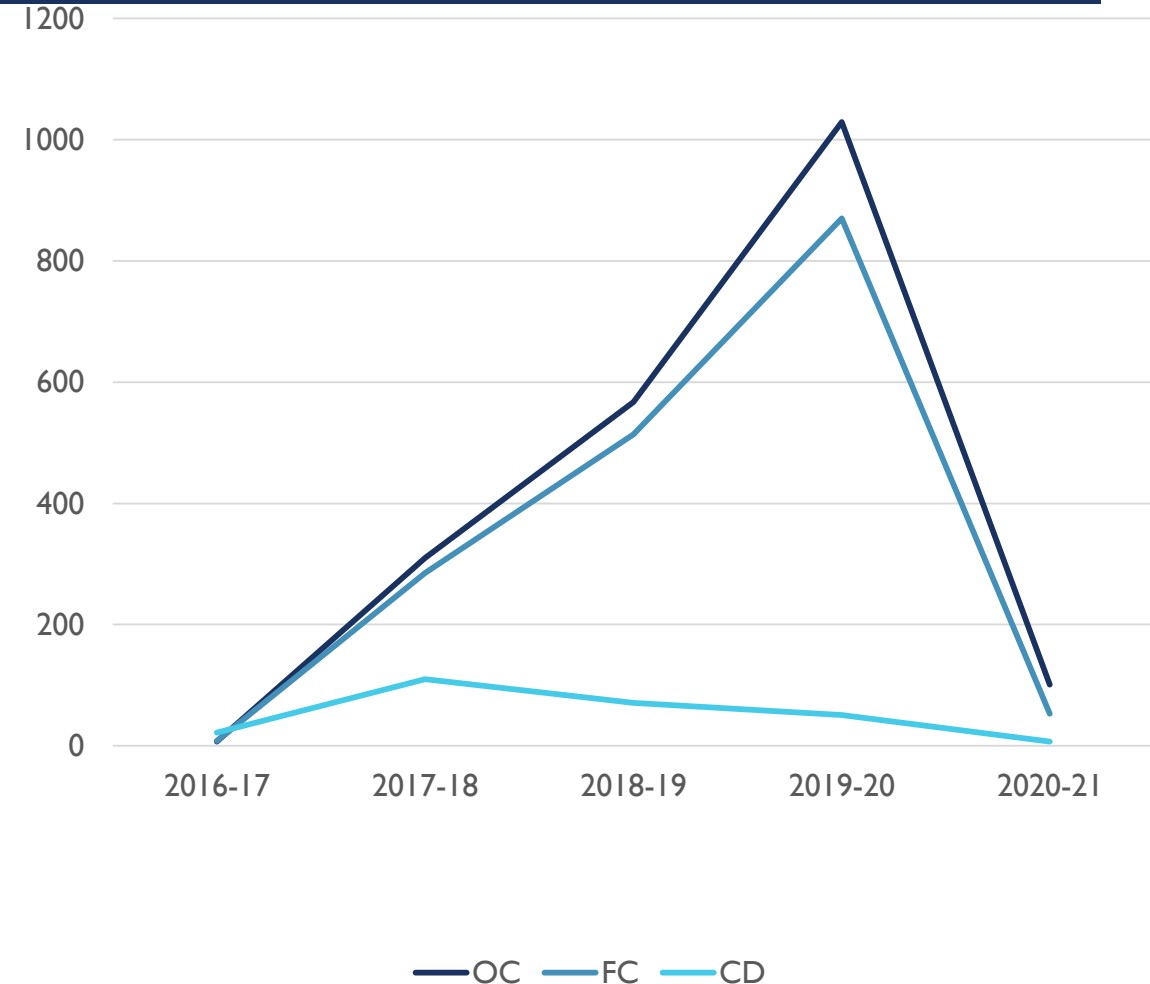
Story so far

Quarter	CIRPs in the beginning of quarter	Admitted	Closure by				CIRPs at the end of quarter
			Appeal/ review/ settled	Withdrawn u/s 12A	Res. Plan	Liq.	
2016-17	0	37	1	0	0	0	36
2017-18	36	705	90	0	20	90	541
2018-19	541	1152	141	95	80	306	1071
2019-20	5534	1953	224	16	135	536	6429
Apr-June, 2020	1966	81	7	21	20	25	1974
July-Sep, 2020	1974	80	10	12	22	68	1942
Total	N.A.	4008	473	291	277	1025	1942

Story so far

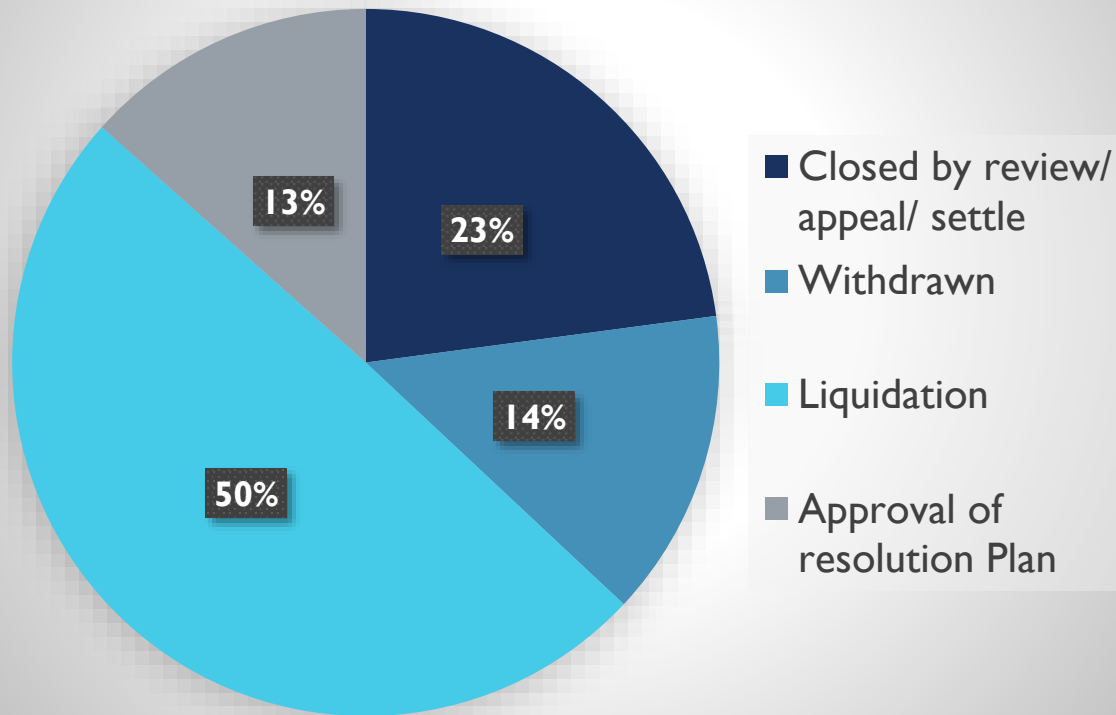
No. of CIRPs initiated till 30.09.2020

Quarter	No. of CIRPs initiated			
	Operational Creditors	Financial Creditors	Corporate Debtors	Total
2016-17	7	8	22	37
2017-18	310	285	110	705
2018-19	567	514	71	1152
2019-20	1029	870	51	1953
Apr-Jun, 2020	51	25	5	81
Jul-Sep, 2020	50	28	2	80
Total	2017	1730	261	4008



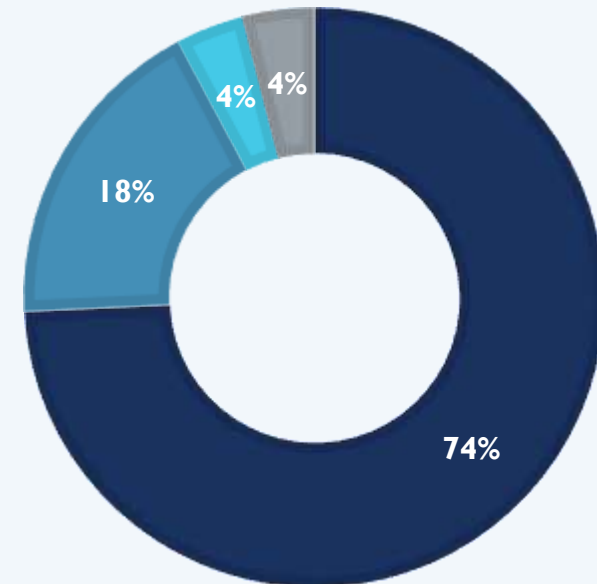
Story so far

Status of CIRP cases as on 30.09.2020



Time taken in ongoing cases

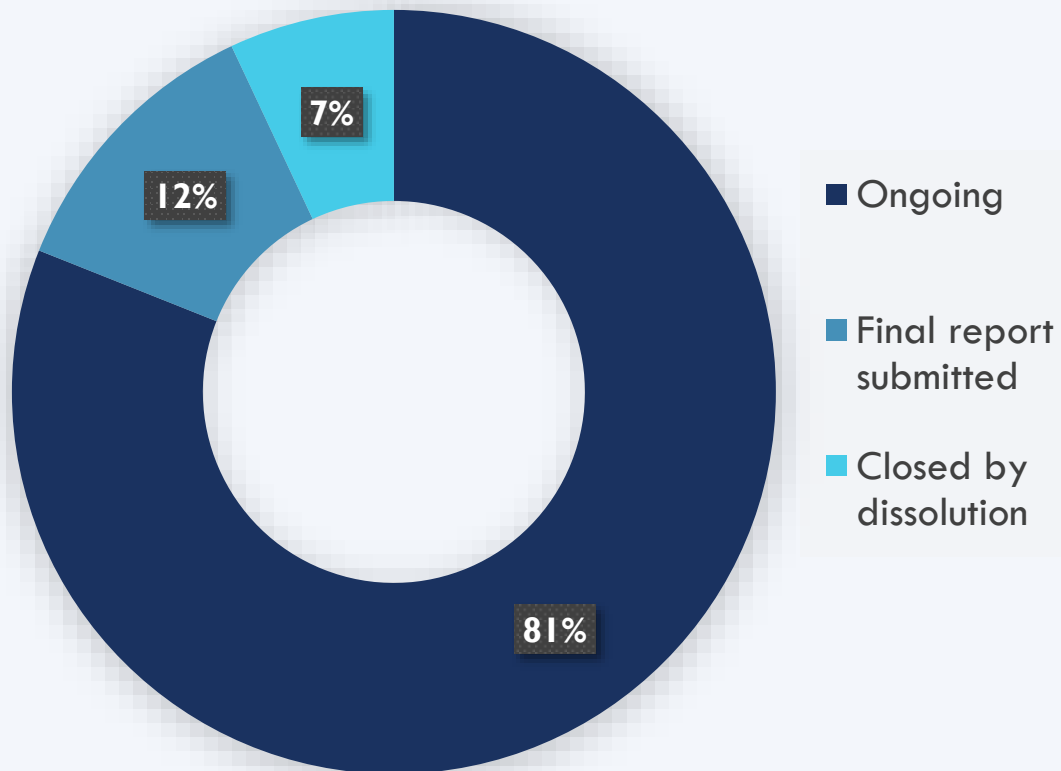
- > 270 days
- > 180 days < 270
- > 90 days < 180 days
- < 90 days



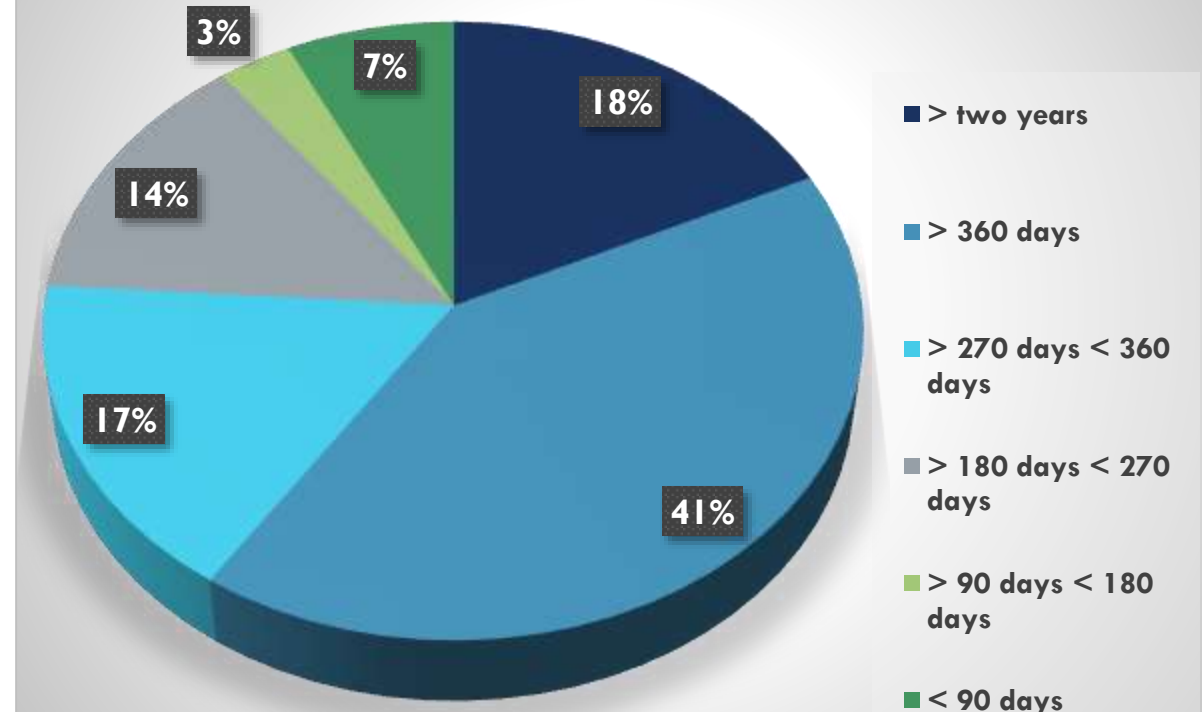
NCLT has approved record no. of resolution plans, i.e, 78 in the course of 9 months

Story so far

Status of liquidation cases on 30.09.2020



Time taken in ongoing cases





DEVELOPMENTS IN IBC



DEVELOPMENTS IN IBC

Amendments due
to COVID 19

Separate
insolvency process
framework for
MSMEs

Expected
introduction of pre
pack insolvency
framework

Assignment of
NRRA

Group Insolvency

Developments in
Going Concern
Sale

Other recent
amendments &
judicial
developments



AMENDMENTS DUE TO COVID 19



Amendments due to COVID 19

IBC

- **Insertion of S.10A of the Code:**
 - Suspension of initiation of CIRP of the CD
 - For any default arising on or after 25.03.2020 for a period of one year which has now been extended till 25.03.2021
 - *Vide* notif. Dated 22.12.2020

Liquidation Regulations Amendment dated 29.03.2020

- Insertion of reg. 40A for relaxation of timeline during lockdown

CIRP Regulations

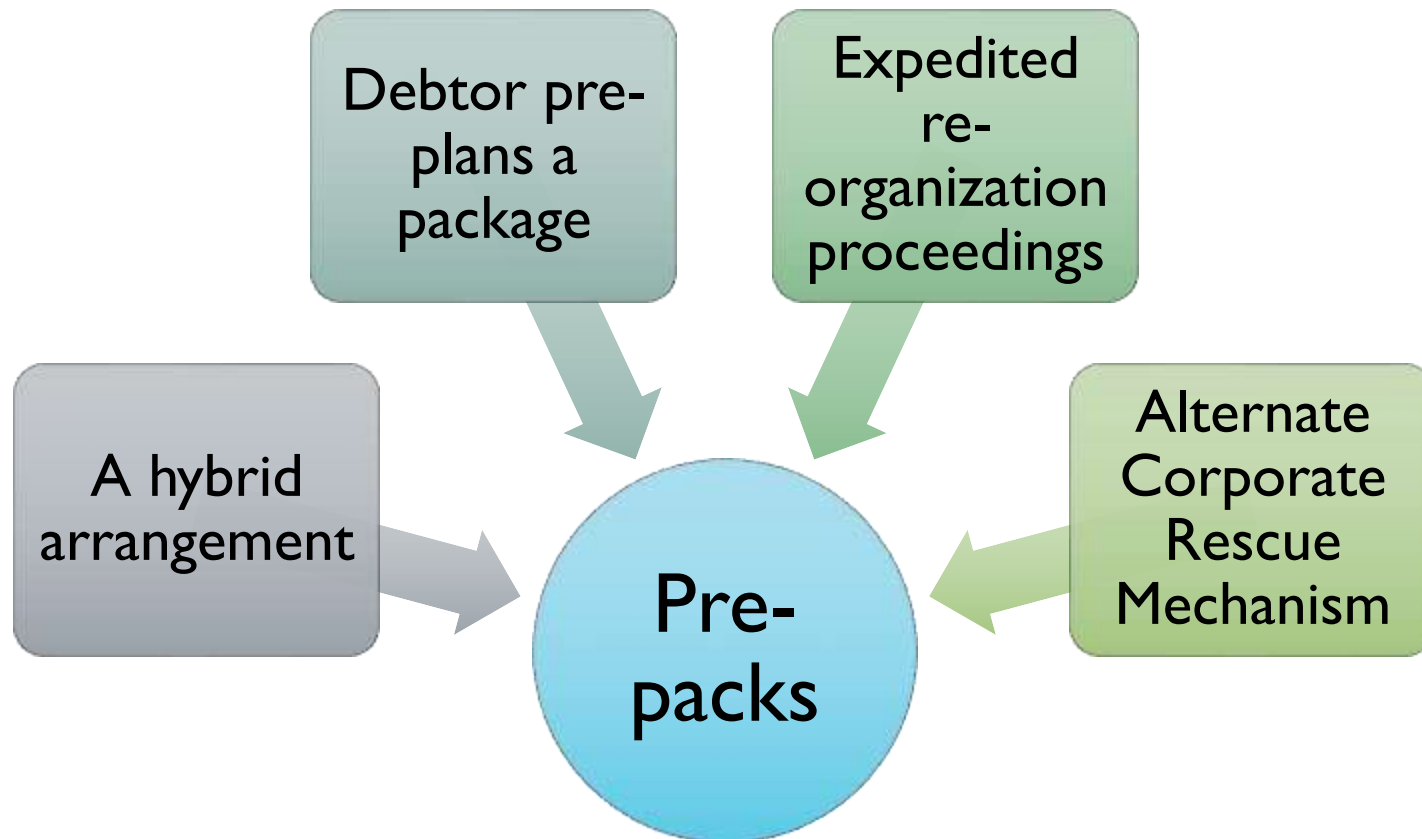
- Insertion of reg. 40A for relaxation of timeline during lockdown



PRE-PACK INSOLVENCY IN INDIA



Introduction- Defining features of Pre-packs



- As nomenclature suggests, 'pre'-pack is an arrangement where debtor plans a package prior to initiation of formal insolvency process;
- A hybrid arrangement of
 - Out-of-court settlement
The re-organisation plan is prepared (in some cases voted upon) prior to initiation of formal insolvency process;
 - Formal Proceedings
After finalisation of plan, the same is presented to the court for final seal of approval

Variants of Pre-packs Arrangements (1/2)

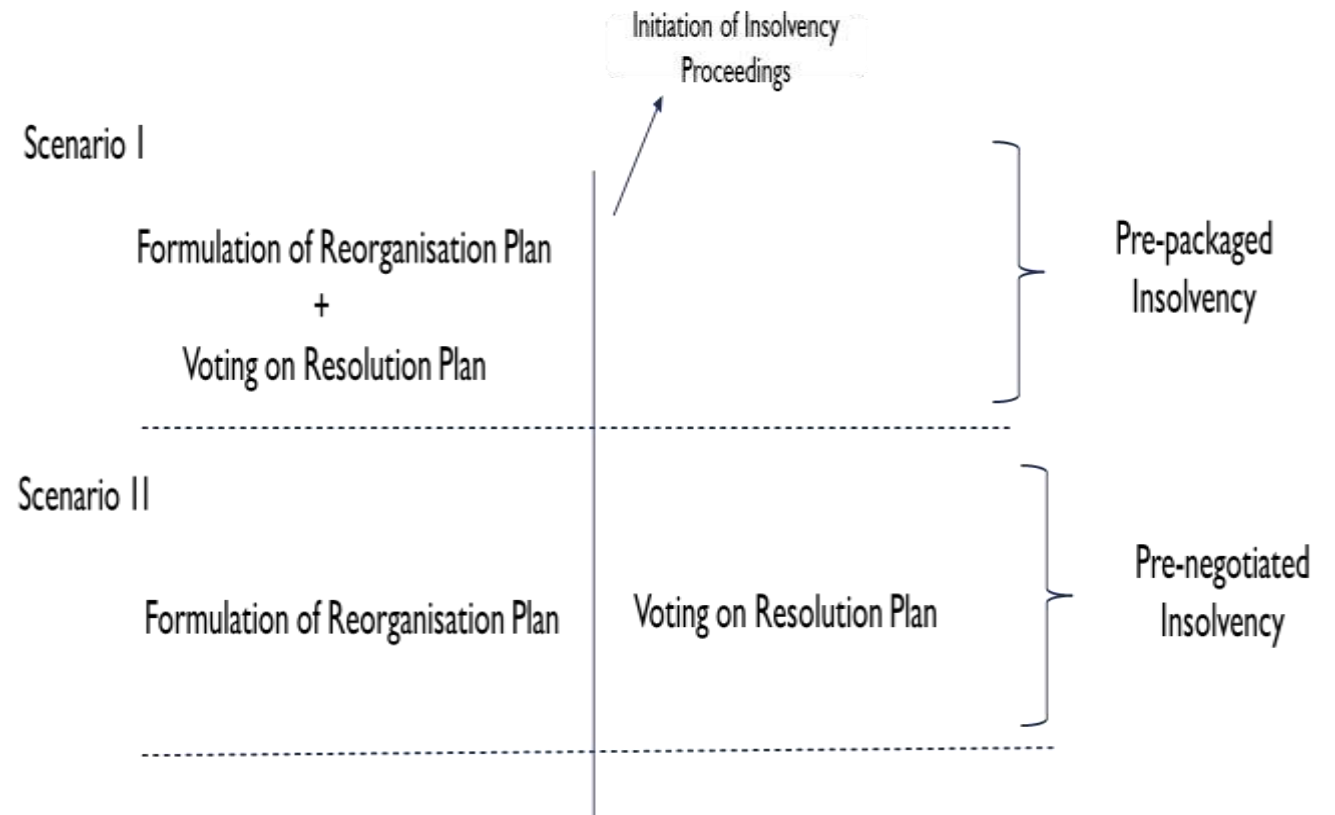
In *Orderly & Effective Insolvency Procedures*, the International Monetary Fund observes two variants of pre-packs in general –

A. Pre-Packaged Plan

Both the negotiation and voting for the plan take place prior to commencement of the rehabilitation procedure and court approval is sought immediately upon commencement.

B. Pre-Negotiated Plan

Plan can be negotiated prior to commencement but formal voting takes place once the proceedings have commenced.



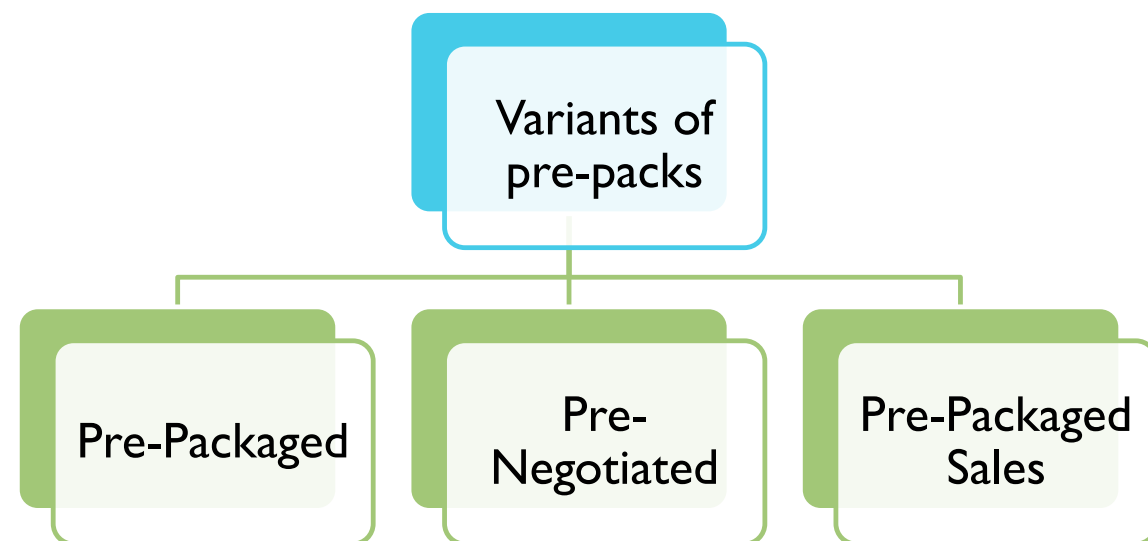
Variants of Pre-packs Arrangements (2/2)

Another type of arrangement, mostly prevalent in the UK is **Pre-Packaged Sales**

Statement of Insolvency Procedure – 16 (UK) defines it as-

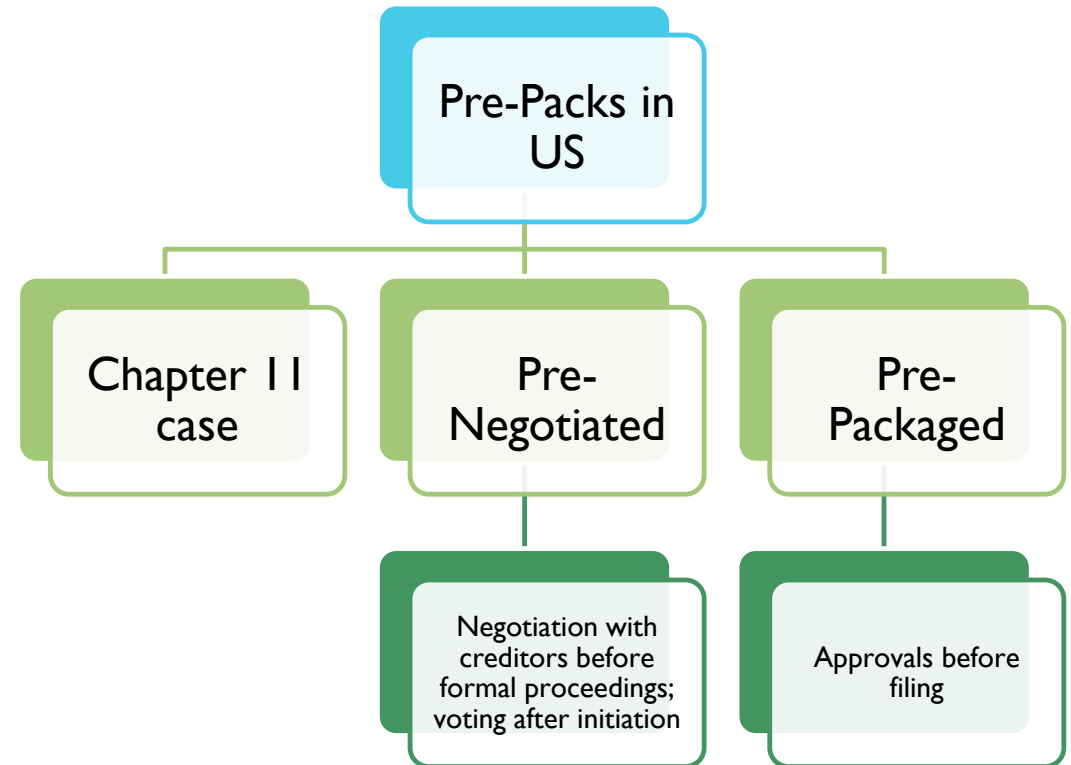
“an arrangement under which the sale of all or part of a company’s business or assets is negotiated with a purchaser prior to the appointment of an administrator and the administrator effects the sale immediately on, or shortly after, appointment”.

About 29% of all administrations in UK are prepacks of which nearly half are sold to existing management or related persons



U.S.- The Birthplace of Prepacks

- The regime of pre-packs was introduced in 1978 in the United States;
- Pre-Pack arrangements are recognized under the formal legal framework;
- Pre-packaged arrangements are facilitated under US Bankruptcy law (that is, Title 11 of the US Code) in Chapter 11;
- Very common in the US

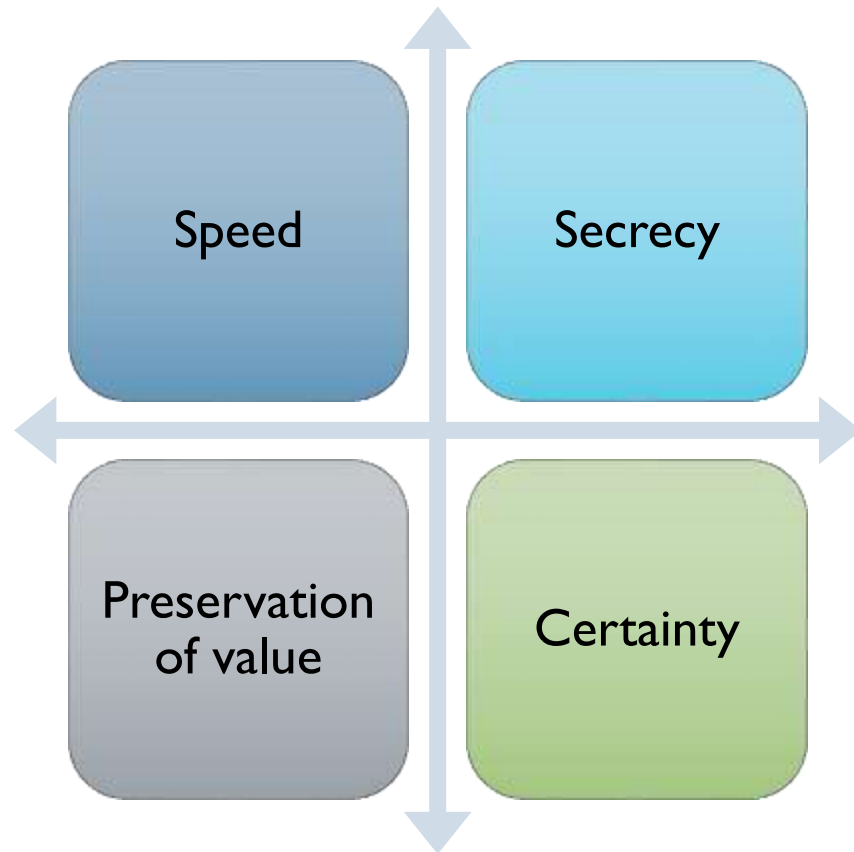


Pre-packs in UK

History in UK

- Not borne out of statutory provisions- developed out of practice;
- Courts too, have supported pre-packs;
- In UK, pre-pack arrangements are largely dominated by **Pre-Packaged Sales**
 - An insolvency practitioner sells all or a part of assets of the company, where the preparatory work is undertaken before the appointment of the administrator.
- Pre-packaged sales raised wide-spread concerns with respect to transparency and accountability
 - Particularly where sales were made to connected persons
- Hence, Statement of Insolvency Practice- 16 (SIP-16) was issued in January, 2009
 - In line with recommendations made in the *Graham Review*
 - Sought to address several concerns relating to ‘connected party sales’, by way of-
 - Independent opinion from pre-pack pool,
 - Viability review by the connected party,
 - Adherence to fundamental principles of marketing

Advantages of Pre-packs



In general, pre-packs have several advantages, including the following –

- Pre-packs are generally seen as **time and cost saver**, for all.
- Pre-pack can save the day for **potentially ill firms**, which apprehend default. Early action would generally lead to saving value.
- As the court comes into picture at a considerably later stage, a great deal of **confidentiality** is ensured. It thus, helps to **prevent value destruction**.
- There is a lot of **certainty** involved as against proceedings where the process of finding a patron begins after the court steps in.

Concerns Regarding Pre-packs

- Firstly, the pre-pack framework will have to blend with the existing IBC framework, including-
 - distinction between financial and operational creditors;
 - Ineligibility of certain persons to submit plans ;
 - ablation of offences on resolution, etc
- Also, vulnerable to potential abuse-
 - Pre-pack can be (mis)used to repackage ‘broken’ businesses and sending them back out into the market to take more credit before failing again;
 - Might involve ‘serial’ pre-packing which defies the purpose of being a rescue vehicle but becomes a debt-avoidance tactic

Concerns Regarding Pre-packs	Proposed Mitigation Measures
Unfavourable harm to chunk of creditors	It may be provided that the committee of creditors for approval of plan, be constituted as a multi- stakeholder committee to ensure representation of shall creditors. However, voting percentage should be computed on the basis of number of creditors were present and voting
Heavy dependence on committee of creditors	It is the resolution professional, who shall be subject to questions and justifications at several stages. Thus it becomes very important that the resolution professional so appointed, carries out duties and functions with utmost diligence and vigilance and not treat the process as merely ticking check-boxes.
No moratorium benefit for debtor	No moratorium is made available. Hence, it may be provided that the once the creditors enter into negotiation, no action to recover dues outside such procedure can be taken.
Influence of promoter	Specific guidelines and principles may be drawn for participation in pre-packs.

Increasing need of Out-of-court settlement

- IBC has been fairly successful- however, most cases exceed the moratorium, and still end up in liquidation;
- Leads to increased cost, and lowering values;
- Further, Sec 10A introduced-
 - Filing of fresh insolvency cases stands suspended till 25th March, 2021.

Hence, out of court settlement needs to be encouraged

Pre-packs vis-à-vis Existing Restructuring Mechanism

Basis	Pre-packs	Debt-Restructuring
Benefits of IBC	Reorganisation Plan ensures benefits of provisions of IBC like, <ul style="list-style-type: none"> • Section 32A: washout of previous liab. • Its binding nature on all stakeholders • Relaxation from compliances under other laws for actions to be taken pursuant to the plan 	Benefits under IBC cannot be availed in case of a CDR
Initiation	Debtor-initiated The corporate debtor initiates negotiation with creditors for resorting to the process	Creditor-initiated As per the RBI guidelines w.r.t. framework for resolution of stressed assets, the lenders are required to identify the loan accounts which classify as a SMA occurrence of default
Intervention of the Courts	Falls within the folds of formal procedure. The plan is given the formal seal of approval by NCLT.	Outside purview of the courts
Result of failure in implementation	Formal insolvency proceedings	Application for insolvency- optional, not mandatory
Binding on other stakeholders	Binding on all stakeholders forming part of the plan	Binding only on the creditors party to the scheme of restructuring
Change in management	The management may generally change and vest in the hands of the applicant, unless plan is submitted by the existing promoters/ directors, or the plan provides them to retain as such	Debt restructuring helps the company to reorganise liabilities, with a view to make it more feasible. Hence, management does not change.

Some Aspects to Pre-Packs in India (1/5)



Would section 29A apply to pre-packs



Would prepacks involve shareholders



Can pre packs be initiated in case of no default



Who should appoint RP



Should only financial creditors be a party to pre-packs



Other Aspects



Some Aspects to Pre-Packs in India (2/5)

Applicability of section 29A?

- Dilemma of applicability of s. 29A on prepacks will arise only when the account has been classified as NPA.
- The prepack arrangement will anyway be free of s. 29A where
 - Where the default is only *anticipated*, and
 - No other clause of s. 29A is attracted,
- Applying s. 29A will bar continuation of wilful defaulters, etc. from being in the management of companies.
- Except where exceptions are available from s. 29A under s. 240A (i.e. to MSMEs), the management may actually avoid a pre-pack arrangement.

Should pre-pack arrangements involve shareholders?

- Initiation of pre-pack arrangement should be with shareholder consent.

Insolvency Code triggers w/o default?

- If pre packs are allowed to be initiated w/o default being triggered
 - Will the benefits of IBC still apply?

Some Aspects to Pre-Packs in India (3/5)

Who should appoint RP?

- There would be an obvious conflict of interest between debtor and creditors
 - As the Code presently provides, in case of self-filing under s. 10, it is mandatory to recommend an RP.
- Therefore, RP should be appointed by the debtor;
 - However, the CoC should have the right to replace the RP on grounds of material irregularity.

Should only financial creditors be a party to pre-packs?

- Two possible aspects-
 - (a) Whether the pre-packs should involve all creditors or can be limited to a class of creditors;
 - (b) Any scenario, what should be the extent of rights resting with the creditors
- Pre-packs can follow the same of CoC constitution-
 - In case of MSMEs, creditors mostly comprise of Ocs
 - Hence, the CoC composition may include Ocs, subject to certain criteria.
- As regards decision-making by the creditors, the framework can follow the same rules as there in the Code
 - The creditors can take decision by 66% majority (in value)

Some Aspects to Pre-Packs in India (4/5)

If there is a distribution under pre-pack arrangement, should that necessarily adhere to section 53?

- Section 53 imbibes the concept of vertical comparison and liquidation value – hence, should be used a benchmark
- There can be voluntary compromises by the creditors;
 - However, creditor cannot be compelled to have a value lesser than the liquidation value.
- The contractual priorities within a class of creditors should be preserved in such arrangements too.

Will a sanctioned pre-pack arrangement entail the same benefits as available to a resolution plan

- Sanction of resolution plan by the NCLT has the following important benefits-
 - Plan becomes binding on stakeholders involved in the plan
 - Section 32A comes into play and absolves the corporate debtor from all the past offences
 - *If the resolution plan results in change in management*

Both the above benefits should be made available

Some Aspects to Pre-Packs in India (5/5)

How can we avoid the use of prepack as a ‘repackaging’ or ‘debt-avoidance’ tool?

- The framework can be introduced with sufficient safeguards in place. For instance-
 - Pre-pack once contravened should enable the creditors to apply for formal insolvency proceedings/liquidation of the corporate debtor.
 - Similar to UK’ s concept of ‘Viability review’, where the connected party writes a viability review of the ‘new company’, the Code provides for demonstration that the plan addresses the cause of default, it is feasible and viable, it has provisions for effective implementation and the resolution applicant has the capability to implement the plan.
 - The same should apply to a pre-pack arrangement as well.

Proposed framework under Pre-packaged & Pre-negotiated Arrangements

PRE-PACKAGED		PRE-NEGOTIATED	
May be preferable for: <ul style="list-style-type: none"> - small companies - small base of creditors - less litigated debts - certainty of creditor consensus, etc. 		May be preferable for: <ul style="list-style-type: none"> - large companies - large and varied base of creditors - uncertainty of creditor consensus - several litigations, etc. 	
1.	Can be initiated on default/anticipated default. Reasonable grounds should exist.	1.	Can be initiated on default/anticipated default. Reasonable grounds should exist.
2.	Initiation by corporate debtor/proposal by creditor.	2.	Initiation by corporate debtor/proposal by creditor.
3.	CD appoints RP.	3	CD appoints RP.
4.	RP constitutes CoC (of financial creditors only). <ul style="list-style-type: none"> - Moratorium should begin from this date. - the debt owed to each creditor as appearing in the books of the CD can form a basis. 	4.	CD, through involvement of RP, negotiates with creditors.
5.	RP to perform all functions as envisaged under the Code, including market analysis, valuations, preparation of information memorandum, etc.	5.	RP to perform all functions as envisaged under the Code, including market analysis, valuations, preparation of information memorandum, etc.

6.	Submission of plans by applicants	6.	Submission of plans by applicants
7.	Examination of plans by RP, including s. 29A eligibility check, etc. (as usual under the Code).	7.	Examination of plans by RP, including s. 29A eligibility check, etc. (as usual under the Code).
8.	Consideration of prepack plans by CoC, on similar parameters as are there for resolution plans (priority, commercial viability, feasibility, etc.)	8.	Selection of the best plan by RP.
9.	Approval of CoC	9.	Application to NCLT
10.	Application to NCLT	10.	Public announcement, moratorium.
11.	Public announcement	11.	Submission and verification of claims
12.	Submission and verification of claims	12.	RP constitutes CoC (of financial creditors only).
13.	Changes, if any, required under in the plan on account of claims received. Approval of CoC to modified plan.	13.	Approval of CoC.
14.	Sanction of plan by NCLT.	14.	Sanction of plan by NCLT.
15.	Implementation of plan in accordance with the procedures stated in the plan itself.	15.	Implementation of plan in accordance with the procedures stated in the plan itself.

Recent Developments

- MCA had constituted the sub-insolvency law Committee, chaired by Dr. M.S. Sahoo, in June, 2020
- The Committee has submitted its report to the MCA on prepack insolvency proposing to cover the insolvency proceedings within 90 days- not yet on public domain
- On 8.10.2020, the UK Gov. issued a report on the state of pre pack insolvency, reviewing a positive change, although the creditors have no say in such sale.
- In view of the same and the current global scenario, draft regulations were proposed by the Insolvency Service as produced below:
 - the consent of the company's creditors to the substantial disposal ; or*
 - the connected person seeking to purchase the company's assets obtaining a report in respect of the substantial disposal from an independent third party, referred to as an evaluator. The administrator must consider the evaluator's report but it does not prevent the administrator from going ahead with the sale, as long as they can justify their decision. The report has to be sent to both the creditors of the company and Companies House.*
- The Draft Regulations are to be considered by UK Parliament before June 2021.



SEPARATE INSOLVENCY FRAMEWORKS FOR MSME



Separate Insolvency Process Framework For MSMEs (1/2)

Parameter	Our Comments
Validity	<ul style="list-style-type: none"> • May be continued for atleast six-months beyond the abatement period under the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 ('Ordinance')
Applicability	<ul style="list-style-type: none"> ▪ Determination of the Corporate Debtor as MSME may be as per latest data (say, not prior to 15 days of making the application) which can be certified by a professional
Trigger Event	<ul style="list-style-type: none"> ▪ Application may be allowed for apprehended default- similar to a prepack arrangement ▪ Section 4 of the Code be made subject to section 240A such that MSMEs shall be allowed to proceed (as creditors) under the previous threshold (Rs. 1 lakh, instead of Rs. 1 crore)
Trigger Process	<ul style="list-style-type: none"> ▪ Certification of eligibility may be given by a different professional- not the proposed RP ▪ Consent of 25% FCs must not be required- notice may be given to creditors (either financial, or financial and operational both) upon filing of application, and objections if any may be raised thereupon.
Admission by AA	<ul style="list-style-type: none"> ▪ Proposed RP must give Report on the application- AA shall consider admission on such Report
Trigger Restriction	<ul style="list-style-type: none"> ▪ Option to initiate CIRP under normal process, in between an on-going CIRP under special process must be retained.
Timeline	Extension, not exceeding 30 days, may be provided for by the AA subjects to merits of the case.
Appointment of RP	<ul style="list-style-type: none"> ▪ There should be no requirement of obtaining creditor consent for appointing RP. ▪ Replacement of RP may only be considered if there is any material irregularity in the process.
Public Notice	<ul style="list-style-type: none"> ▪ Public notice by way of newspaper advertisement along with website of CD and IBBI must be provided for.

Separate Insolvency Process Framework For MSMEs (2/2)

Parameter	Our Comments
Claims	<ul style="list-style-type: none"> ▪ Excessive reliance on Information Utilities, especially for MSME-Operational Creditors, would be very ambitious. ▪ The CD must furnish a list of creditors to the RP on the first day of commencement of CIRP- based on such list the CoC must be formed. ▪ Any other claims, as may be received by the RP shall be considered accordingly
Management of the CD	<ul style="list-style-type: none"> ▪ Complete vesting of decision making-powers to the CoC would be an oxymoron to Debtor-in-Possession approach.
Constitution of the CoC	<ul style="list-style-type: none"> ▪ Presence of operational creditors is warranted- in pursuance of section 240A of the Code (which allows application of the provisions of the Code with requisite modifications), may provide for including operational creditors in the CoC, subject to certain value-based threshold or ranking-based parameter which may be suitably decided upon.
Interim Finance	<ul style="list-style-type: none"> ▪ Cannot be made mandatory upon the creditors of the MSME-CD; Provision may however be made to ensure super-priority to the interim-finance providers, so as to motivate such funding ▪ The approval threshold must not be increased to 3/4th or 75%- it should be 66% only.
Interim Resolution Process Cost	<ul style="list-style-type: none"> ▪ Despite the fact that day-to-day activities would be carried out by the management, the same should be included within the scope of IRPC to the extent the same is incurred for ensuring the going-concern status of the CD
Information Memorandum	<ul style="list-style-type: none"> ▪ While the IM may be preliminarily prepared by the management, it must be subject to strict scrutiny by the RP to ensure that the contents therein represent a true picture of assets of the CD.
Avoidance Transactions	<ul style="list-style-type: none"> ▪ It is strongly suggested that the claw-back period for fraud be removed. ▪ It is also suggested to introduce provisions to protect RPs in case such transactions are present, but could not be identified by the RP due to shortage of time.
Early Termination	<ul style="list-style-type: none"> ▪ Vesting of powers of early termination, solely upon the CoC may lead to misuse by the CoC, as early termination shall lead to direct liquidation of the CD
Liquidation	<ul style="list-style-type: none"> ▪ Mandating liquidation upon failure of a special framework with a limited time-frame of 90 days (with no extension) is likely to push more and more stressed MSMEs into liquidation ▪ It may instead be provided that application may be made to initiate insolvency proceedings under the normal course
Applicability of section 32A	<ul style="list-style-type: none"> ▪ The Special Framework should be explicitly subjected to section 32A



ASSIGNMENT OF NRRA



Meaning

Assets which cannot be readily disposed of by the liquidator including –

Sundry debts

Refunds from Gov. and its agencies

Contingent receivables

Disputed receivables

Sub-judice receivables

Assets underlying avoidance transactions

Issues Pertaining to Assignability

- Assignability of a right can be curtailed by way of explicit provisions in the contract itself.
- It is critical to identify whether the rights and obligations under the contracts are severable or otherwise.
- Determining the assets to be NRRRA is based on the discretion of the liquidator, while the views of SCC are invited but the same may not be binding

Determination of NRRRA

Inherent nature of the asset

Multiple sale attempts

Avoidance transaction is not concluded

No or bleak chances of conciliation or settlement of receivables

Mode of Assignment

- Absolute assignment
- Recompense facility
- Assignment of rights by the office holders/trustee/liquidator is excluded from doctrine of champerty
- *Stein v. Blake* [1996] 1 AC 243: a claim being brought by the insolvent is subject to a counter-claim which will not of itself stop it from being assigned. The counter-claim will, though, affect the value of the claim and, therefore, the value of the consideration that the official receiver may receive for the assignment. The trustee may assign the right to the net balance like any other chose in action.
- *Ramsey v. Hartle* [1977] 1 WLR 686, wherein it was held that even a bare right of action was property which the trustee was entitled to assign. His statutory duty to realise the estate excluded the doctrines of maintenance and champerty which would otherwise struck down an assignment.

Amended Regulations

(vide notif. dated 13.11.2020)

- 37A (1) A liquidator may assign or transfer a not readily realisable asset through a transparent process, in consultation with the stakeholders' consultation committee in accordance with regulation 31A, for a consideration to any person, who is eligible to submit a resolution plan for insolvency resolution of the corporate debtor.
- Explanation. — For the purposes of this sub-regulation, “not readily realisable asset” means any asset included in the liquidation estate which could not be sold through available options and includes contingent or disputed assets and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions referred to in sections 43 to 51 and section 66 of the Code

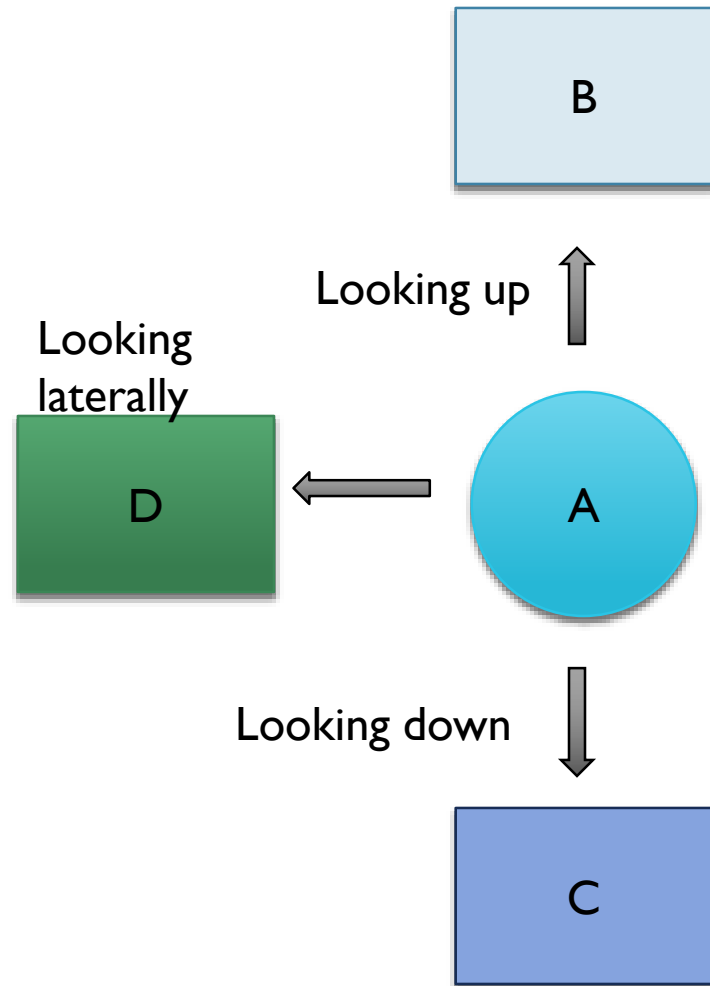
Possible Lacunas in the Assignment of NRRA

- Reduction in the price of the NRRA shall be at the discretion of the liquidator in case of failed auction
- Distribution after dissolution of the corporate debtor should be addressed by the parties mutually entering into the arrangement. The arrangement should clearly specify the modus of distribution
- Should there be a common pool of NRRA's maintained by the Board?
- What shall be the applicability of S.29A in this regard?
- Where the cause of action is a consequential right accompanying the right to receive certain monies, the assignee may continue the proceedings so as to enjoy the recoveries thereof. However, since the subject matter sought to be assigned is a 'right', the assignee cannot be 'obligated' to continue with the proceedings.
- Is it mandatory to first attempt the assignment by way of auction or direct arm's length basis can be approached?

Group Insolvency



Entity vs. Enterprise- Relevance

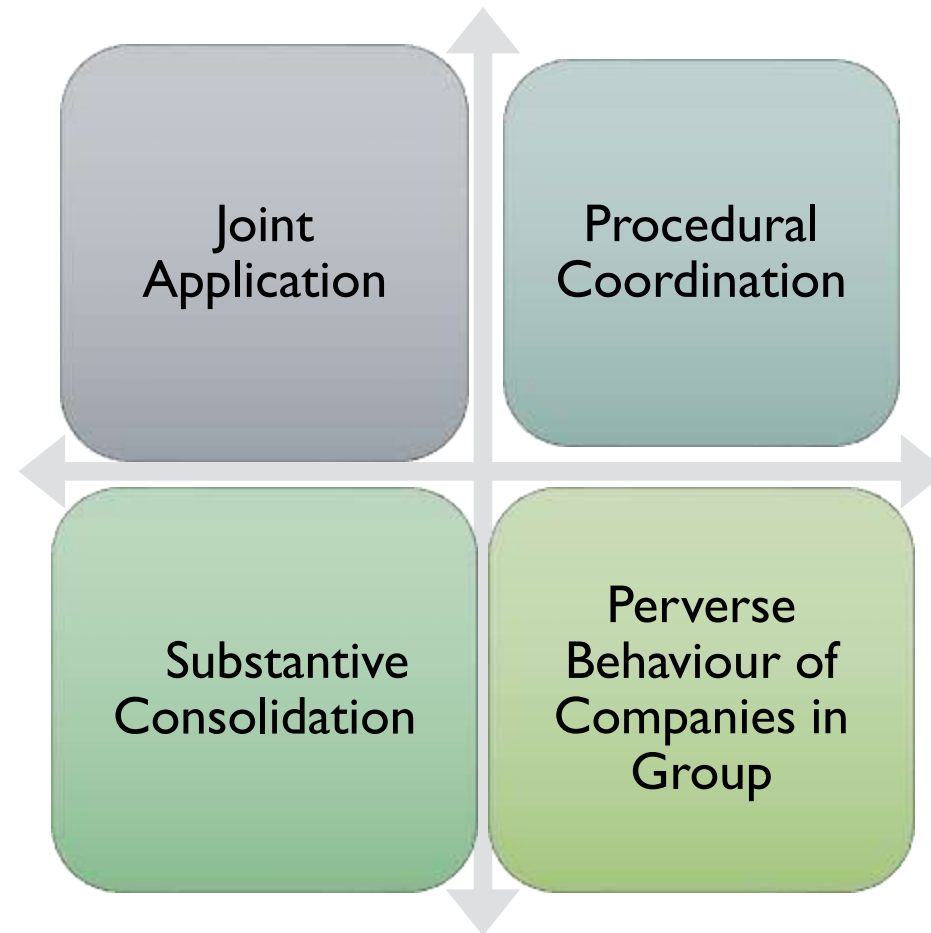


- Entity approach: *Salomon vs. Salomon*
- Present scenario in insolvency laws – “entity” focused
- Changing business dynamics
 - Localisation to MNCs
 - Enterprise value being scattered across entities
 - Holding-SPV structures
- Accounting standards
- Securities market regulators

Identification of a Group

- UNCITRAL Model law 'Enterprise Group'-
 - Two or more enterprises interconnected by '**Control**' and '**Significant Ownership**'
 - Includes other form of entities- such as special purpose entities (SPE), joint ventures, offshore trusts, income trusts and partnerships
 - Significant ownership- ability to control, holdings in the company.
 - Rebuttal presumption for lower holding and conclusive presumption for higher holding.
- Article 2(13) of the Regulation (EU) 2015/848
 - '**a parent undertaking and all its subsidiary undertakings**'.
- Working Group
 - Holding, Subsidiary and Associate company as defined in CA, 2013
 - Companies intrinsically linked as to form part of a 'group' in commercial understanding – on application to AA.

Modes of Grouping (1/3)



Modes of Grouping (2/3)

Mode of Grouping	Working Group Recommendations
Joint Application	<ul style="list-style-type: none"> ▪ Permitted applicants- Group members; creditors of any member ▪ When the joint application is accepted by the AA, it may order for a single public announcement to be made for all companies.
Procedural Co-ordination	<ul style="list-style-type: none"> ▪ Preferred mode of “grouping” over substantial consolidation. ▪ Framework is enabling, voluntary. Provisions relating to communication, cooperation and information sharing mandatory for IPs, AAs, and CoCs. ▪ May be allowed at any stage of the insolvency resolution or liquidation process for companies. ▪ Common AA & IP ▪ Coordinated Resolution Plan ▪ Group CoC may be formed; ▪ Group co-ordination proceedings ▪ Timelines <ul style="list-style-type: none"> ▪ For completion of process - 420 days including the additional extension of period up to 90 days and time taken in litigation
Substantive Consolidation	Prefers procedural consolidation to substantive consolidation

Procedural vs. Substantive

Procedural coordination

- **Coordinates the ‘procedures’** of insolvency and assets of each group company separate.
- **Purpose:** to make the administration of proceedings easier and inexpensive.
- **Separate legal entity INTACT.**
- Does NOT effect the **substantive rights of creditors.**
- **Inter-entity claims not impacted**

Substantive Coordination

- Consolidation of assets and liabilities of different group companies- treated as **single insolvency estate.**
- **Purpose:** equitable remedy against corporate disregard.
- **OVERTURNS** separate entity.
- Affects the **substantive rights of creditors.**
- Inter-entity claims vanish.



GOING CONCERN SALE



Going-concern sale under liquidation

Meaning of Going-concern

- Meaning provided in AS-I, as analysed by Insolvency Law Committee-

The phrase “as a going concern” imply that the corporate debtor would be functional as it would have been prior to initiation of CIRP, other than the restrictions put by the code

- Meaning given by IBBI-

Going Concern means all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity which may be whole or a part of the business of the corporate debtor without values being assigned to the individual asset or resource.”

See discussion in- [Enabling Going Concern sale in Liquidation](#)



Aims at value preservation of the undertaking including tangible assets

The acquirer who acquires the undertaking will have smooth transition

As the legal entity survives as going concern, the value of intangibles will be preserved

Helps achieving synergy as collective value of the assets would be higher than salvage value if disposed separately

Enabling Going-Concern Sale

- Application has to be made upon commencement of the Liquidation
 - Application to be made by the liquidator
 - Sale must be complete within 90 days of LCD
 - Failing which, liquidator may sell the assets in other manners provided in Liq. Regulation
- Identification of assets and liabilities
 - Must be identified by the CoC;
 - Where CoC has not identified, the liquidator may identify
- Upon Application, order may be given by AA w.r.t.
 - a. Sale of the corporate debtor to the intended buyer as a going concern;
 - b. Transfer of shares of the corporate debtor to the intended buyer
 - c. Transfer of the going concern of the corporate debtor to the buyers
 - d. Continuation of the authority, powers and obligations of the Liquidator to complete the liquidation process as provided under the Code and the regulations
 - e. Payment to stakeholders in accordance with Section 53 from the liquidation bank account; and
 - f. Protection of the intended buyer from all claims and liabilities pertaining to the period prior to the sale of the corporate debtor as a going concern

CD as a going-concern vs. Business of CD

Sale of CD as a going-concern

(Reg. 32 (e))

- The business operates under the existing brand and structure of the CD
- Legal entity of CD itself will be retained
- CD will not be dissolved; it will be transferred along with assets

Sale of business of CD as a going-concern

(Reg 32 (f))

- The business **does not** operates under the existing brand and structure of the CD
- Business of the CD is transferred along with assets
- Legal entity of the CD is not retained; it dissolves

Indicators of Going-concern Sale

Continuity of former business

- Even if the business has scaled down because of financial difficulties, there may still be a TOGC (See *Baltic Leasing v. CCEVATTR 2088*)

Stock

- Transfer of stock is an essential part of transfer of business

Premises

- Firstly, when the businesses are very closely linked
- Secondly, if goodwill is attached to the premises such that their transfer is a good indication of TOGC

Plant & Equipment

- If equipment is required to carry on the business, its transfer would be an indication of TOGC

Staff

- Another possible indication could be that the acquirer takes over contracts of existing staff

Business name

- Transfer of business name, although not mandatory is considered as an indication of goodwill being sold and hence, TOGC

Goodwill

- Transfer of goodwill is an important indicator

Requisites of GSC

Retention of legal entity

Capital contribution by the acquirer

Variation in terms of employment

Transfer to be carried out by a slump sale, not itemized sale

Liabilities of the CD must be treated in terms of the Code

Idea must be to run the business

Tax Implications in a Going-concern Sale (1/2)

To determine whether GST is applicable on going-concern sale, the Authority for Advance Ruling in Karnataka, in Rajshri Foods Pvt. Ltd. considered the following:

(i) 'Supply' under section 7 (1)

- includes activities such as sale, transfer, barter, exchange etc made for a consideration **in the course or furtherance of business**
- **Therefore the activity to be called as supply should be such that undertaking that activity shall amount to conduct of business or enhancing the business**
- The word 'includes' in Section 7(1), implies that the scope of supply goes beyond the meaning of the expression 'in the course or furtherance of business'
- As such, even though sale on going-concern basis does not constitute an activity as being in furtherance of business, the activity may still qualify to be termed as a supply.

Tax Implications in a Going-concern Sale (2/2)

(ii) Sl. No. 4 (c) of Schedule II of the CGST Act states that-

- *Where any person ceases to be a taxable person, then any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, **unless-***
- **(i) the business is transferred as a going concern to another person; or**
- **(ii) the business is carried on by a personal representative who is deemed to be a taxable person**

(iii) Notification No. 12/ 2017- Central Tax (Rate)

- It was clarified that Services by way of transfer of a going concern, as a whole or an independent part thereof shall not be liable to GST.

Hence, in the Rajshri Ruling, it was established that GST shall not be applicable in GCS

Tax on Going-Concern Sale prior to GST

- Earlier judgements during sales tax/ VAT regime also held that going concern sale/ or sale of an independent unit thereof, would also be free of Sales tax/ VAT liability-
- See:
 - Monsanto Chemicals of India (P.) Limited vs. The State of Tamil Nadu [1982 (51) STC 278]- Hon'ble High Court of Madras
 - DCST vs. Dat Pathe (supra) [1985 (59) STC 374]- Hon'ble High Court of Kerala

Differentiating factor b/w different ways of sale

Points of discussion	Piecemeal	Slump Sale	CD as GC	Business of CD as GC
Transfer	Any one or more assets	Assets gets transferred as a whole	CD itself gets transferred	Any one or more business of the CD gets transferred
Equity shareholding of CD	As per sec. 53	As per sec 53	Equity holding gets transferred	As per sec 53.
Retention of business	Liquidator may carry on business for beneficial liquidation	Liquidator may carry on business for beneficial liquidation	Acquirer is expected to carry on business	The business that is transferred is expected to be continued
Discharge of employees	Liquidation amounts to automatic discharge	Liquidation amounts to automatic discharge	Although discharge may have happened, for smooth transition, employees must be reinstated	Although discharge may have happened, for smooth transition, employees must be reinstated
Liabilities	As per sec. 53	As per sec. 53	As per sec. 53	As per sec. 53
Encumbrance on assets	Asset sold after relinquishment. Hence, no question of encumbrance	Asset sold after relinquishment. Hence, no question of encumbrance	After relinquishment of security interest by sec. creditors, there is no question of encumbrance	After relinquishment of security interest by sec. creditors, there is no question of encumbrance
Dissolution of legal entity	CD gets dissolved	CD gets dissolved	CD does not dissolved	CD gets dissolved

Recent Developments

- In the matter of *Invest Asset Securitisations & Reconstruction Pvt. Ltd. v. Mohan Gems & Jewels Pvt. Ltd.*, the Hon'ble Principal Bench stated that
 - ***“what could be liquidated is the assets of the debtor company, this concept of liquidation of assets shall not be construed as inclusion of sale of the company ”***
- The matter has been taken before NCLAT- order pending

SNAPSHOT OF THE RECENT AMENDMENTS AND JUDGEMENTS



RECENT AMENDMENTS

- Amendment in section 4-
 - Min. default increased from Rs. 1 lakh to Rs 1 Crores on 24th March, 2020
- Proposed framework for insolvency of MSMEs introduced- not yet enforced.
- Voting by CoC on all eligible resolution plans shall now be required
- Insertion in Reg. 30A and 37A in the Liquidation Reg. w.r.t. assignability of NRRA *vide* circular dated 13.11.2020
- Exclusion of persons disqualified u/s 29A from being party to any scheme during liquidation
 - From NCLAT orders in Jindal Steel and Power Limited v. Arun Kumar Jagatramka & Gujarat NRE Coke Limited
 - Sale outside liquidation
 - To be time-bound
 - Cannot be made to persons disqualified u/s 29A
 - Contribution of Corporate Liquidation Account

Recent Rulings (1/3)

- In Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. the question of whether the limitation period gets extended with ack. of liability in the books of the CD?
 - The SC denied the benefit of S.18 of the Limitation Act to the creditor;
 - It was observed that limitation period is extendable only by application of S. 5 of the Limitation Act.
- In State Bank of India v M/s Accord Life Spec Private Limited through Directors & Ors., the Hon'ble SC held that
 - A resolution plan may not necessarily provide for a value equal to or greater than the liquidation value arrived at in the manner provided for in Reg. 35 of CIRP Regulations
- In M/s. Radha Exports (India) Pvt. Limited Vs. K.P. Jayaram & Anr., the Hon'ble SC held that
 - personal loan to a promoter or a director of a company cannot trigger the CIRP.
 - Further “the payment received for shares, duly issued to a third party at the request of the payee as evident from official records, cannot be a debt, not to speak of financial debt.”

Recent Rulings (2/3)

- In *The Karad Urban Cooperative Bank Ltd.Vs. Swwapnil Bhingardevay & Or*, the Hon'ble NCLAT rejected the res. Plan on the following grounds:
 - Issues of viability and feasibility
 - The value mentioned in the res. Plan tallied with that of the liq.Value
 - EOI invited interest for outright sale of the CD as a going concern, in violation of regulation 36A of the CIRP Regulations.
 - The Hon'ble SC however set aside the Order stating:
 - *factors that need to be taken into account for determining whether the CD can be kept running as a going concern have been placed before the CoC and it has taken a conscious decision to approve the resolution plan, then the AA will have to switch over to the hands off mode*

Recent Rulings (3/3)

- In Vivek Bansal Vs Barda Druck India Pvt Ltd., the Hon'ble NCLAT held that out of court settlement during ongoing insolvency is possible
- In Rita Kapur v Invest Care Real Estate LLP, the Hon'ble NCLAT held that conversion of debt into capital cannot be considered to be a financial debt
- In Kiran Gupta Vs SBI, the Hon'ble NCLAT held that
 - Proceedings under SARFAESI can be initiated against the Personal Guarantor during CIRP process of the Principal Borrower
- In Anubhav Anilkumar Agarwal Vs Bank of India & Anr., the Hon'ble NCLAT held that
 - Power of review has not been expressly conferred upon NCLAT under Rule 11 of NCLAT Rules
 - The power vested upon Appellate Tribunal under Rule 11 can only be exercised for correction of a mistake.
- The Delhi High Court in Venus Recruiters Private Limited v Union of India held that the avoidance applications relating to preferential transactions cannot survive beyond CIRP period