

Designing a Framework for Pre-Packaged Insolvency Resolution in India | Some Ideas for Reform

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1. Executive Summary

Two years since the implementation of the provisions of the Insolvency and Bankruptcy Code, 2016 (“Code”), Late Shri Arun Jaitley, the then Finance Minister of India, at a conference organised by Vidhi in collaboration with the Insolvency and Bankruptcy Board of India (“IBBI”), had noted that, going forward, after the initial tide of cases filed under the Code had subsided and the balance in the creditor-debtor relationship was restored in the background of the Code, there would be a “need for marrying” the statutory process for resolution of corporate insolvency under the Code, and the schemes of out-of-court debt restructuring mechanisms prescribed by the Reserve Bank of India (“RBI”).¹ Both empirical and anecdotal evidence suggest that the Code has rebalanced the relationship between debtors and creditors to a large extent and is leading to more responsible decision-making by both debtors and creditors, which is encouraging a large number of out-of-court workouts.²

However, given that the outcomes under those workouts do not have the same legal sanctity as resolution plans under the Code, there are some question marks about their validity in the long run. Secondly, given this lack of legal certainty, certain types of work-outs (despite their efficiency benefits for all affected stakeholders) are not being considered at all. We believe that there is a need to introduce hybrid processes, that can marry the advantages of an informal workout—which are characterised as speedy, economic, and flexible processes—with the statutory protection that is accorded to formal proceedings. A pre-packaged or a pre-arranged insolvency resolution process (“pre-packs”) is one such mechanism, where the resolution plan is formulated and finalised prior to the commencement of formal proceedings.

In this Report, we propose three modes of pre-packs: a pre-packaged insolvency resolution process, a pre-

arranged insolvency resolution process and a pre-arranged sale. While our proposals have their roots in similar mechanisms in other jurisdictions, they have been uniquely designed, taking into account the unique features of the Code and other aspects of the Indian context. However, since there is no prevailing market practice or regulatory experience with respect to pre-packs in India, we propose that any new framework for pre-packs should be implemented in a phased manner, starting with small debtors or others with no complications in their debt structure. The following discussion provides a broad overview of our proposals.

Pre-Packaged Insolvency Resolution Process

In a pre-packaged insolvency resolution process, a corporate debtor, or a financial creditor to whom a specified percentage of the total outstanding debts of the debtor are owed, may initiate the process by appointing an independent insolvency professional. Note that in our proposals, the debtor may propose a pre-pack only before the occurrence of a default. The insolvency professional should conduct the pre-packaged insolvency resolution process keeping in mind the objectives of the Code and with a view to maximise the value of assets of the corporate debtor. To ensure transparency and accountability, an insolvency professional would be held liable *ex post*, if there is any proof of misconduct on her part.

During the pre-commencement stage, the insolvency professional should invite plans from prospective resolution applicants, and undertake adequate marketing measures to ensure that the resolution plan offering the best possible consideration is submitted.

1 Arun Jaitley, ‘Speech by Shri Arun Jaitley, Hon’ble Union Minister of Finance and Corporate Affairs at the Conference on ‘Insolvency and Bankruptcy Code, 2016: A Roadmap for the Next Two Years’ at New Delhi on 18th December, 2018’ (2018) <https://ibbi.gov.in/uploads/resources/Vidhi_Speech_FM.pdf> accessed 19 February 2020

2 See Anup Roy, ‘Fearing Insolvency Proceedings, Promoters Line up to Pay Their Dues’ *Business Standard* (Mumbai, 4 July 2018) <https://www.business-standard.com/article/companies/fearing-insolvency-proceedings-promoters-line-up-to-pay-their-dues-118070301213_1.html> accessed 19 February 2020; Ms. Nirmala Sitharaman, *Rajya Sabha Debates* (27 July 2019) <http://164.100.47.5/newsynopsis/Englishsessionno/249/Suppl.%20Synopsis%20_E_%20dated%2029.07.pdf> accessed 19 February 2020; CRISIL, ‘Strengthening the Code’ (May 2019) 25 < <https://www.crisil.com/content/dam/crisil/our-analysis/reports/Ratings/documents/2019/april/strengthening-the-code.pdf>> accessed 19 February 2020;

In this Report, we propose three modes of pre-packs: a pre-packaged insolvency resolution process, a pre-arranged insolvency resolution process and a pre-arranged sale. Given that there is no prevailing market practice or regulatory experience with respect to pre-packs in India, we propose that any new framework for pre-packs should be implemented in a phased manner.

In this regard, it is proposed that existing promoters of the corporate debtor should be permitted to submit resolution plans, in order to incentivise them to cooperate with creditors at an early stage of distress.

After the submission of plans, the insolvency professional should call upon the Committee of Creditors (“CoC”) to approve a plan. Thereafter, the insolvency professional should file the approved resolution plan, along with other relevant documentation evidencing the procedural steps undertaken during the pre-commencement stage, with the Adjudicating Authority. This would be followed by a public announcement disclosing the details of the pre-packaged insolvency resolution process and the proposed plan, in order to provide an opportunity to any affected stakeholder to object to the proposed pre-packaged plan. However, to ensure certainty of process, the Adjudicating Authority should consider objections that are solely related to the procedure undertaken by the insolvency professional and should disregard any challenge to the commercial decisions taken by her. After hearing objections from stakeholders, if any, the Adjudicating Authority may approve the plan.

In order to ensure swiftness and certainty, it is proposed that if the Adjudicating Authority fails to approve or reject a pre-pack plan within a specified period of time after the date of filing, the Adjudicating Authority should be deemed to have approved the plan. Lastly, where an exhaustive claims collection process

would not be feasible during the pre-commencement stage, the claims collection process may be initiated after the public announcement is issued. As in such a case the resolution applicant would not be in a position to distribute the plan consideration among various classes of claimants, the plan proceeds should be distributed as per the liquidation waterfall under Section 53 of the Code.

Pre-Arranged Insolvency Resolution Process

In addition to pre-packaged insolvency resolution process, an alternate mode of pre-pack is also being proposed, for cases where it may not be feasible for the CoC to approve a plan at the pre-commencement stage.

The insolvency professional would have the same duties during a pre-arranged insolvency resolution process as under a pre-packaged insolvency resolution process. Primarily, she should conduct an adequate marketing exercise for inviting resolution plans for the corporate debtor and work towards maximising the returns of creditors. After identifying a plan which, in her opinion, would be in the best interest of the creditors and likely to be approved by the CoC, she should file an application before the Adjudicating Authority for initiation of formal proceedings under the Code, which would be followed by a public announcement disclosing the essential details of the proposed plan.

The insolvency professional should conclude the claims collection process within 21 days from the date of commencement of proceedings and, thereafter, proceed to convene a meeting of the CoC, to consider the pre-arranged resolution plan. If the CoC approves the plan, it should be placed before the Adjudicating Authority for its approval.

Pre-Arranged Sale

A third mode of pre-pack is also proposed, specifically for time-sensitive cases where a quick going-concern sale would be the most value-maximising option. In a pre-arranged sale, the insolvency professional would conduct a sale of all or substantially all the assets of the corporate debtor during the pre-commencement stage without requiring the prior approval of creditors.

However, prior to conducting a pre-arranged sale, the insolvency professional should determine the necessity of such a sale, in light of the financial position of the corporate debtor and other relevant factors. Thereafter, to prevent the existing management from unduly influencing the process, she should take over the management of the corporate debtor for conducting the pre-arranged sale. She should prepare an information memorandum and conduct an adequate marketing exercise to ensure that the highest potential bid from the relevant market is submitted. After identifying the highest bidder, she should finalise the necessary documentation and execute the sale.

However, as the insolvency professional will play a central role in a pre-arranged sale and as the profession of insolvency professionals is still at its nascent stage, it is proposed that pre-arranged sales should

be enabled only after the profession has sufficiently developed such that creditors and other stakeholders can adequately repose trust and confidence in the professional competence of insolvency professionals to conduct time-sensitive sales independently, efficiently and according to the core principles of the Code. Further, it is proposed that when pre-arranged sales are permitted under the Code, only such insolvency professionals should be permitted to conduct them who have sufficient professional experience and qualification. Further, to ensure that the insolvency professional acts in the best interest of the creditors, her fees and the expenses borne by her during the course of the sale should be deposited in a separate escrow account. If any misconduct or procedural impropriety is proved after the transaction is publicly disclosed, the Adjudicating Authority may withhold the amount and distribute it in favour of the creditors whose interests were prejudiced.

2. Introduction

In May 2016, the Code was enacted with the aim to “consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons”.³ Widely regarded as one of the most important structural reforms in recent times, the Code provides for a time-bound process for resolution of insolvency.⁴ The formal insolvency resolution process under the Code—termed as Corporate Insolvency Resolution Process (“CIRP”)—can be commenced only upon the occurrence of default by the debtor, when the existing management’s right of control is suspended and a CoC is constituted for selecting and approving a resolution plan submitted by prospective bidders.

In a pre-pack, the resolution plan, which is negotiated and finalised between the creditors and the debtor before the commencement of statutory proceedings, is ultimately sanctioned under the statute.

While the Code does not provide any framework for resolution of insolvency prior to the occurrence of default, creditors of the debtor may privately engage with the debtor for resolution of financial distress at an earlier stage. However, such informal workouts, by virtue of being outside the purview of the Code, would not be scrutinised and approved by the Adjudicating Authority under the Code. Thus, there is no framework for an out-of-court resolution plan being recognised under the Code.

This Report proposes a hybrid framework through which out-of-court resolution plans can be recognised under the Code. The most prevalent form of such a hybrid framework is a ‘pre-packaged’ insolvency resolution process, wherein a resolution plan, which is negotiated and finalised between the creditors and the debtor before the commencement of statutory proceedings, is ultimately sanctioned under the statute.⁵ The first part of this Report discusses the essential elements of a pre-packaged insolvency resolution process and analyses the need for such a framework in India. It also highlights the advantages of adopting the framework and the concerns associated with it. Thereafter, this Report briefly outlines the existing frameworks for pre-packaged insolvency resolution in the USA and the UK. Lastly, this Report proposes a detailed framework for a pre-packaged insolvency resolution process in India.

3 Insolvency and Bankruptcy Code, 2016, Long Title

4 Shreya Prakash, Pulkit Gupta and Rob Downey, ‘Insolvency and Bankruptcy Code: The Journey So Far and the Road Ahead’, (2018) Vidhi Centre for Legal Policy and Ernst & Young <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/IBC_Thejourneysofarandtheroadahead_Dec18.pdf> accessed 19 February 2020; Dipak Mondal, ‘IBC Delivering Results; a Reform Modi, Jaitley Should be Proud of’ *Business Today* (10 April 2019) <<https://www.businesstoday.in/current/economy-politics/ibc-delivering-results-a-reform-modi-jaitley-should-be-proud-of-story/335953.html>> accessed 19 February 2020

5 Jose M. Garrido, *Out-of-Court Debt Restructuring* (World Bank Study 2012) paras 97-99 <<http://documents.worldbank.org/curated/en/417551468159322109/pdf/662320PUB0EPI00turing09780821389836.pdf>> accessed 19 February 2020

3. What is the Case for a Pre-Packaged Insolvency Resolution Process in India?

3.1 Background

The Code was enacted to provide a timely and efficient mechanism for resolution of the ever-growing number of stressed assets in India. Highlighting the importance of a swift and time-bound resolution process, the Bankruptcy Law Reforms Committee (“BLRC Report”), observed that “*the most important objective in designing a legal framework for dealing with firm failure is the need for speed.*”⁶ The Code provides for strict time-lines for completion of CIRP: if a corporate debtor is not resolved within this time-frame, it would have to be compulsorily liquidated.⁷ However, by way of judicial interpretation, certain periods, including the time taken during legal proceedings, have been excluded from the mandatory time-lines prescribed under the Code.⁸ As a result, the time taken to complete CIRP often exceeds the timeline originally envisaged under the Code. For example, as per the data available till December 2019, it took, on an average, 394 days to successfully resolve 190 cases, which far exceeds the time-line of

330 days currently provided under the Code.⁹ Delays in resolution can cause serious detriment to the going-concern value of the debtor by significantly impacting the realisable value of its assets.¹⁰

Apart from delays, formal insolvency proceedings also involve other direct and indirect costs. The direct costs include payment of court fees, engaging with third party advisors such as lawyers, accountants etc.¹¹ The indirect costs include the costs of disruption of business such as those resulting from the refusal of counterparties to continue their relationship with the debtor, loss of goodwill, etc.¹²

Some of the aforesaid costs associated with CIRP under the Code may be minimised in an out-of-court restructuring process. By virtue of being an informal, out-of-court process, a private restructuring mechanism is not bound by any statutory procedure, which makes it a flexible mechanism that can provide “*tailor-made*” solutions.¹³ Specifically, as an out-of-

6 Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) Executive Summary <http://ibbi.gov.in/BLRCReportVol1_04112015.pdf> accessed 19 February 2020

7 Insolvency and Bankruptcy Code, 2016, Section 33(1). Section 12 of the Code had originally required CIRP to be concluded within 270 days from the date of commencement. Subsequently, in light of judicial precedents that excluded the time taken for litigation from this time-line, Section 12 was amended, vide Insolvency and Bankruptcy Code (Amendment) Act, 2019, to expressly provide that corporate insolvency resolution process ought to be completed within 330 days, including “*the time taken in legal proceedings*”.

8 *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v Satish Kumar Gupta & Ors*, Civil Appeal Nos. 8766-67 of 2019. Decision date - 15 November 2019; *ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta* (2019) 2 SCC 1; *Quinn Logistics v. Mack Soft Tech*, 2018 SCC OnLine NCLAT 233 : [2018] 208 CompCas 432.

9 Insolvency and Bankruptcy Board of India, *Insolvency and Bankruptcy News* (The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India, Vol. 13, 2019) 18 <<https://ibbi.gov.in/uploads/publication/62a9cc46d6a96690e4c8a3c9ee3ab862.pdf>> accessed 19 February 2020

10 Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing 2016) 22-25; Pratik Datta, ‘Value Destruction and Wealth Transfer under the Insolvency and Bankruptcy Code, 2016’, (2018) NIPFP Working Paper No. 247 <https://www.nipfp.org.in/media/medialibrary/2018/12/WP_247.pdf> accessed 19 February 2020

11 Lemma W. Senbet and Tracy Yue Wang, ‘Corporate Financial Distress and Bankruptcy: A Survey’ (2010) 5(4) *Foundations and Trends in Finance* 243, para 3.1.3 <<http://dx.doi.org/10.1561/0500000009>> accessed 19 February 2020

12 Stuart Gilson, Kose John and Larry H.P. Lang, ‘Troubled Debt Restructurings: An Empirical Study of Private Reorganization of Firms in Default’, (1990) 27 *Journal of Financial Economics* 315-353, para 2.2.1 <https://www.hbs.edu/faculty/Publication%20Files/Troubled%20Debt%20Restructurings_40d4a53b-5ecb-478e-88d1-d6dc1498e14d.pdf> accessed 19 February 2020

13 Jan Adriaanse, *Restructuring in the Shadow of the Law: Informal Reorganisation in the Netherlands*, (2005), para 2.5.1 <https://openaccess.leidenuniv.nl/bitstream/handle/1887/9755/Dissertation_Adriaanse.pdf;sequence=1> accessed 19 February 2020

court workout does not need to comply with statutory time-lines, parties have the liberty to conduct an elaborate due diligence exercise which can minimise the chances of *ex post* disputes concerning the nature of information disclosed or the mode of valuation conducted.¹⁴ Further, the negotiations in an informal workout generally remain private and confidential which allows the parties to freely negotiate without attracting the stigma associated with insolvency.¹⁵

However, purely out-of-court restructuring processes have not been very successful in India. For instance, in 2001, RBI had set up a Corporate Debt Restructuring (“CDR”) mechanism to institutionalise a voluntary and out-of-court restructuring mechanism for resolution of stressed debts.¹⁶ However, according to one study, which looked at 114 firms which were referred to the CDR process, the degree of financial distress of firms deteriorated after being referred to the CDR process and banks tended to extend greater amounts in favour of firms which were relatively worse off.¹⁷ By the time the CDR scheme was withdrawn by RBI in 2018, stressed assets worth over INR 4 trillion had been referred to the CDR process. However, out of these, debts worth only INR 84,677 crores were restructured successfully; debts worth nearly INR 1.84 trillion exited the CDR process without meeting any success.¹⁸

One of the primary causes for the failure of the CDR

process was the provision of regulatory forbearance on asset classification, which exempted participating lenders from classifying their stressed assets as non-performing loans.¹⁹ This led to a culture of ‘pretend and extend’ among lenders, as they initiated the CDR process merely to prevent an adverse classification of their debts, instead of trying to successfully resolve them.²⁰

To prevent misuse of the CDR process, RBI rolled back the provision for regulatory forbearance in 2015²¹ and subsequently formulated a revised framework for resolution of corporate distress, wherein the lenders of distressed firms were required to come together and form a ‘Joint Lenders’ Forum’ for exploring a ‘Corrective Action Plan’.²² Subsequently, with a view to remove delinquent promoters from the management of defaulting debtors, RBI introduced a scheme for ‘Strategic Debt Restructuring’ (which was later modified as the ‘Scheme for Sustainable Structuring of Stressed Assets’), which empowered lenders to take over the controlling stake of a debtor, as a part of the restructuring package.²³

Despite the several attempts undertaken by RBI, such schemes failed to provide a robust mechanism for resolving financial distress. One of the probable causes for this was the fact that these out-of-court schemes operated in the presence of a fragmented legal regime for insolvency resolution that resulted in

14 For example, in the CIRP of Amtek Auto Ltd., the successful resolution applicant refused to implement the resolution plan by alleging “*blatant discrepancies in the condition of machineries, valuations and representations made in the Information Memorandum and Valuation Reports*”. See *Committee of Creditors of Amtek Auto Ltd. through Corporation Bank v. Mr. Dinkar T. Venkatasubramanian & Ors.*, Company Appeal (AT) (Insolvency) No. 219 of 2019. NCLAT. Decision date- August 16, 2019

15 Jose M. Garrido, *Out-of-Court Debt Restructuring* (World Bank Study 2012) para 15 <<http://documents.worldbank.org/curated/en/417551468159322109/pdf/662320PUBOEPI00turing09780821389836.pdf>> accessed 19 February 2020

16 Reserve Bank of India, *Corporate Debt Restructuring*, (RBI Circular No. DBOD.BP.BC.15 /21.04.114/2000-01) <<https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=440&Mode=0>> accessed 19 February 2020

17 Rajeswari Sengupta & Anjali Sharma, ‘Bank Financing of Stressed Firms’, (Ideas for India, 7 June 2017) <<https://www.ideasforindia.in/topics/money-finance/bank-financing-of-stressed-firms.html>> accessed 19 February 2020

18 Gopika Gopakumar, ‘RBI Moves to Wind up CDR System’, *LiveMint* (Mumbai, 26 July 2018) <<https://www.livemint.com/Industry/k2S0MIbWJ1lmv7x6PXPxSJ/RBI-moves-to-wind-up-CDR-system.html>> accessed 19 February 2020

19 See Nilesh M Kharche ‘An Overview of Corporate Debt Restructuring’ (2016) <<https://taxguru.in/company-law/overview-corporate-debt-restructuring-cdr.html>> accessed 19 February 2020

20 See Reserve Bank of India, *Reserve Bank of India Annual Report 2014-15* (2015), 1-2, <<https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/00A157C1B5ECBE6984F6EA8137C57AAEF493C.PDF>> accessed 19 February 2020; K C Chakrabarty, ‘Corporate Debt Restructuring – issues and way forward’, (2012) Corporate Debt Restructuring Conference 2012 <<https://www.bis.org/review/r120814a.pdf>> accessed 19 February 2020

21 Reserve Bank of India, *Review of Prudential Guidelines on Restructuring of Advances by Banks and Financial Institutions* (RBI Circular No. RBI/2012-13/514) <https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?id=8008> accessed 19 February 2020

22 Reserve Bank of India, *Early Recognition of Financial Distress, Prompt Steps for Resolution and Fair Recovery for Lenders: Framework for Revitalising Distressed Assets in the Economy* (2014) <<https://rbidocs.rbi.org.in/rdocs/content/pdfs/NPA300114RFF.pdf>> accessed 19 February 2020

23 Anand Adhikari, ‘Why RBI’s Strategic Debt Restructuring Scheme has Turned out to be a Damp Squib’ *Business Today* (29 January 2017) <<https://www.businesstoday.in/magazine/buzztop/buzztop-feature/rbi-one-size-fits-all-strategic-debt-restructuring-scheme-is-turning-out-to-be-a-damp-squib/story/243750.html>> accessed 19 February 2020; See Reserve Bank of India, *Scheme for Sustainable Structuring of Stressed Assets* (RBI Circular No. RBI/2015-16/422) <<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT422B1EE9DF2D4B5484487065B8FB94B5EC9.PDF>> accessed 19 February 2020

“parallel proceedings, conflicts between different statutes and uncertainty for creditors over their recovery”.²⁴ A comprehensive and effective insolvency law is one of the pre-requisites for the success of informal workouts.²⁵ In the absence of such a law, promoters of defaulting firms had little incentive to cooperate with creditors in good faith and promptly comply with restructuring packages.²⁶ Further, being non-statutory and voluntary processes, they suffered from the threat of minority dissenting creditors jeopardising the negotiation process by initiating legal proceedings against the borrower.²⁷

Recognising this, RBI withdrew all the existing schemes for debt restructuring upon the enactment of the Code, which was widely seen as an effective legal regime that could boost out-of-court processes.²⁸ To align with the scheme of the Code, RBI formulated a new scheme for resolution of financial distress that could operate in the shadow of the legal framework of the Code.²⁹ Anecdotal evidence suggests that the presence of a strong legal framework has compelled responsible behaviour on the part of defaulting promoters who now fear losing control over their own businesses.³⁰ By imposing personal liability on directors for wrongful trading and disqualifying promoters from participating in the CIRP, the Code

One of the causes for the failure of out-of-court debt restructuring mechanisms in India was the presence of a fragmented legal regime for insolvency resolution. In the absence of an effective insolvency law, promoters of defaulting firms had little incentive to cooperate with creditors in good faith and to promptly comply with restructuring packages.

has also contributed to the adoption of higher standards of corporate governance by borrowers.³¹ Significantly, reports suggest that the Code has been successful in encouraging defaulting debtors to voluntarily settle their outstanding dues.³² However, despite this, there is no statutory recognition of voluntary debt restructuring schemes (other than schemes of arrangement). As a result, a restructured

- 24 Aparna Ravi, 'The Indian Insolvency Regime in Practice-An Analysis of Insolvency and Debt Recovery Proceedings' (2015) Vol. 50, Issue No. 51 Economic & Political Weekly 46, 52 <https://www.epw.in/system/files/pdf/2015_50/51/Indian_Insolvency_Regime_in_Practice_0.pdf> accessed 19 February 2020
- 25 Claessens, Stijn, *Policy Approaches to Corporate Restructuring Around the World: What Worked, What Failed?* (2005) in Michael Pomerleano and William Shaw (eds) *Corporate Restructuring: International Best Practices* (1st edn., The World Bank, 2005), 19 <<http://documents.worldbank.org/curated/en/628221468323363903/pdf/344150PAPER0Co101OfficialUseOnly1.pdf>> accessed 19 February 2020; Michael Pomerleano, *Introduction: Toward Better Practices in Systemic Corporate Restructuring* in Michael Pomerleano and William Shaw (eds) *Corporate Restructuring: International Best Practices* (1st edn., The World Bank, 2005), xxxvii <<http://documents.worldbank.org/curated/en/628221468323363903/pdf/344150PAPER0Co101OfficialUseOnly1.pdf>> accessed 19 February 2020 (“An effective insolvency framework is the prerequisite for efficient corporate restructuring and, indeed, is an important support for financial intermediation...Effective insolvency systems serve as a disciplinary force in establishing a deterrent against which voluntary corporate restructuring takes place, both in and out of court.”)
- 26 See Raghuram G. Rajan, 'Note to Parliamentary Estimates Committee on Bank NPAs' (2018) <<https://www.thehindubusinessline.com/money-and-banking/article24924543.ece/binary/Raghuram%20Rajan%20Parliamentary%20note%20on%20NPAs>> accessed 19 February 2020
- 27 Anant Khandelwal, 'The phenomenon of corporate debt restructuring in India: How far can it go to prevent insolvency?' (2015) 58 Eurofenix 20 <https://www.insol-europe.org/uploads/files/documents/Eurofenix_58_Final.pdf> accessed 19 February 2020
- 28 See *Swiss Ribbons Pvt. Ltd. & Anr. v Union of India & Ors.*, Writ Petition no. 99 of 2018, para 86. Decision date - 25 January 2019. (“These figures show that the experiment conducted in enacting the code is proving to be largely successful. The defaulter’s paradise is lost.”)
- 29 Reserve Bank of India, *Resolution of Stressed Assets – Revised Framework* (RBI Circular No. RBI/2017-18/131) <<https://www.rbi.org.in/Scripts/NotificationUser.aspx?ld=11218>> accessed 19 February 2020. However, this framework was later declared unconstitutional by the Supreme Court in *Dharani Sugars and Chemicals Ltd v Union of India & Ors.*, Transfer Petition (Civil) No.1399 of 2018. Subsequently, a new framework for resolution of stressed assets was issued by the Reserve Bank of India. See Reserve bank of India, *Prudential Framework for Resolution of Stressed Assets* (RBI Circular No. RBI/2018-19/203) <<https://www.rbi.org.in/Scripts/NotificationUser.aspx?ld=11580>> accessed 19 February 2020
- 30 CRISIL, 'Strengthening the Code' (May 2019) 25 <<https://www.crisil.com/content/dam/crisil/our-analysis/reports/Ratings/documents/2019/april/strengthening-the-code.pdf>> accessed 19 February 2020; Ajay Shah, 'How the IBC Changes the Game' *Business Standard* (31 December 2018) <https://www.business-standard.com/article/opinion/how-ibc-changes-the-game-118123100024_1.html> accessed 19 February 2020
- 31 U. K. Sinha et al, 'Frontiers of Corporate Governance – an Aid to Insolvency Framework' (2019) *Insolvency and Bankruptcy Code: A Miscellany of Perspectives* 35 <<https://www.ibbi.gov.in/uploads/whatsnew/2019-10-11-191223-exc18-2456194a119394217a926e595b537437.pdf>> accessed 19 February 2020; Suharsh Sinha, 'A wake-up call for Promoters' *Business Standard* (10 June 2019) <https://www.business-standard.com/article/opinion/a-wake-up-call-for-promoters-118060900745_1.html> accessed 19 February 2020
- 32 Anup Roy, 'Fearing Insolvency Proceedings, Promoters Line up to Pay Their Dues' *Business Standard* (Mumbai, 4 July 2018) <https://www.business-standard.com/article/companies/fearing-insolvency-proceedings-promoters-line-up-to-pay-their-dues-118070301213_1.html> accessed 19 February 2020; Ms. Nirmala Sitharaman, *Rajya Sabha Debates* (27 July 2019) <http://164.100.47.5/newsynopsis1/Englishsessionno/249/Suppl.%20Synopsis%20E_%20dated%2029.07.pdf> accessed 19 February 2020

Despite the relative success of informal workouts operating in the shadow of the Code, there is no statutory recognition of voluntary debt restructuring schemes (other than schemes of arrangement). As a result, a restructured deal negotiated between a debtor and its creditors, is susceptible to being reneged by any of the parties.

deal negotiated between a debtor and its creditors, is susceptible to being reneged by any of the parties. Further, unlike a resolution plan approved under the Code, there is no threat of initiation of liquidation proceedings if the debtor fails to fulfil its obligations under the restructured debt agreement.

Additionally, the regulatory and statutory exemptions provided to a CIRP under the Code are not available for such a process. For example, one of the reasons for the failure of the out-of-court resolution process for Jet Airways was the lack of availability of certain regulatory exemptions. Even prior to the occurrence of default, the management of the troubled airline had initiated negotiations with Etihad Airways, which had expressed its interest in increasing its investments in the airline subject to certain pre-conditions. Crucially, one of the said pre-conditions was that Etihad Airways should be exempted from issuing an open offer under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.³³ As the lenders could not assure such a waiver, Etihad Airways' offer could not materialise. Etihad Airways would have been exempted from such an obligation, had it made the

offer as a part of a resolution plan under the Code³⁴

Given this, a hybrid framework for corporate rescue that combines “the advantages of private restructuring with some of the properties of the formal procedure”³⁵ is needed. A pre-pack is one such hybrid framework in which a plan for the insolvency resolution of a company “is agreed in principle before the company goes into a formal insolvency process.”³⁶ As the negotiations take place at the pre-commencement stage, the existing management plays a key role in the process. They are incentivised to initiate proceedings at an early stage of default as creditors often agree to retain the existing management.

3.2 What is a Pre-Pack?

In a pre-pack, “a troubled company and its creditors conclude an agreement in advance of statutory administration procedures” which “allows statutory procedures to be implemented at maximum speed.”³⁷

The practice of pre-packs was first developed in the USA, following the enactment of the Bankruptcy Reform Act of 1978. Soon after its introduction, it became so widely popular that in 1993, nearly one-fifth of all public bankruptcies were pre-packaged.³⁸ Essentially, a pre-pack involves the filing of a reorganisation plan along with the bankruptcy petition itself. The plan is “is negotiated, circulated to creditors, and voted on before the case is filed”.³⁹ In some cases however, while the plan is negotiated and circulated to the creditors to obtain their in-principle approval prior to the bankruptcy filing, the formal voting process takes place after the bankruptcy filing. This is called a ‘pre-arranged’ resolution process. In both types of processes, the plan is required to be approved by the Court. In addition to this, the US Bankruptcy Code permits the debtor to sell all or substantially all its assets prior to confirmation of a reorganisation plan, if

33 Shrimi Choudhary, ‘Debt-Laden Jet Airways Accepts Etihad Bailout Plan, May Sign MOU Soon’, *Business Standard* (New Delhi, 1 February 2019) <https://www.business-standard.com/article/companies/debt-laden-jet-airways-accepts-etihad-bailout-plan-may-sign-a-mou-soon-119013101596_1.html> accessed 19 February 2020; Shrimi Choudhary, ‘SEBI Cloud on Etihad Open Offer Waiver For Jet Airways Shareholders’ *Business Standard* (New Delhi, 12 February 2019) <https://www.business-standard.com/article/companies/sebi-cloud-on-etihad-open-offer-waiver-for-jet-airways-shareholders-119021200028_1.html> accessed 19 February 2020

34 Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 10(1) (da)

35 Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing, 2016) 28

36 R3 – The Association of Business Recovery Professionals, ‘Pre-packaged Sales (“Pre-packs”)’ <https://www.r3.org.uk/media/documents/publications/press/Pre-packs_briefing.pdf> accessed 19 February 2020

37 See Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 453; V. Vilaplana, ‘A Pre-pack Bankruptcy Primer’ (1998) 44 *The Practical Lawyer* 33

38 Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 454

39 John D. Ayer et al, ‘Out-of-court Workouts Prepacks and Pre-arranged Cases A Primer’, (2005 April) *ABI Journal* <<https://www.abi.org/abi-journal/out-of-court-workouts-prepacks-and-pre-arranged-cases-a-primer>> accessed 19 February 2020

there is sufficient 'business justification' to do so. Such asset sales are called 'pre-plan sales', and they take significantly lesser time to conclude than traditional bankruptcy cases.⁴⁰

Much like in the USA, the practice of pre-packs is well established and widespread in the UK.⁴¹ In the UK, a pre-packaged administration involves a "a pre-arranged sale of the distressed business, which will be executed immediately after the formal appointment of the administrator".⁴² Crucially, the administrator, who is an officer of the court,⁴³ is empowered to execute the sale prior to obtaining the statutory approval of creditors.⁴⁴ Following the popularity of pre-packs in the USA and the UK, many other jurisdictions such as Netherlands, France and Germany have adopted similar pre-pack frameworks.⁴⁵

3.3 Advantages of Pre-Packs

If a pre-pack is introduced, it can maximize value by "combining the efficiency, speed, cost, and flexibility of workouts with the binding effect and structure of formal insolvency proceedings"⁴⁶ since it will involve out-of-court negotiations of resolution plans, but the approved resolution plan will receive the sanction of the Adjudicating Authority under the Code. There is evidence in some jurisdictions to suggest that the speed and reduction of formal procedures in pre-packs result in improvement in recoveries of at least some classes of creditors.⁴⁷ This is combined with relatively higher degrees of retention of employees during pre-

packs than during ordinary business.⁴⁸

The features of pre-packs that particularly serve to enhance values include:

Speed:

A pre-pack process is typically less time-consuming and cheaper than formal proceedings, as the resolution is negotiated and agreed before initiating the statutory resolution framework.⁴⁹ The speedy disposal of a pre-packaged case decreases the total cost involved in the process,⁵⁰ which is often key to saving small businesses that cannot withstand the costs of a prolonged insolvency,⁵¹ and helps in maximising value as discussed above.

Confidentiality:

In certain jurisdictions, such as the UK, one of the

The speedy disposal of a pre-packaged case decreases the total cost involved in the process, which is often key to saving small businesses that cannot withstand the costs of a prolonged insolvency, and helps in maximising value.

40 American Bankruptcy Institute, *Final Report of the ABI Commission to Study the Reform of Chapter 11* (2014), Pg. 83-87 <<https://abiorworld.com/s/vvirvcv5xv83aavl4dp4h>> accessed 19 February 2020

41 Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing, 2016) 29

42 A. Kastrinou and S. Vullings, 'No Evil is Without Good': A Comparative Analysis of Pre-pack Sales in the UK and the Netherlands', (2018) 27(3) *International Insolvency Review* 320, 321, <<https://www.wijnenstael.nl/media/cms/publications/No-evil-is-without-good-a-comparative-analysis-of-pre-pack-sales-in-the-UK-and-the-Netherlands-International-Insolvency-Review-2018.pdf>> accessed 19 February 2020

43 Insolvency Act, 1986, Schedule B1, Para 5

44 See *Re Transbus International Ltd*, [2004] 2 All ER 911; *Re T&D Industries plc* [2000] BCC 956

45 See Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing, 2016), Chapter 7

46 Jose M. Garrido, *Out-of-Court Debt Restructuring* (World Bank Study 2012), para 101 <<http://documents.worldbank.org/curated/en/417551468159322109/pdf/662320PUB0EPI00turing09780821389836.pdf>> accessed 19 February 2020

47 S. Frisby, 'A Preliminary Analysis of Pre-Packaged Administrations (Report to the Association of Business Recovery Professionals)' (2007) R3 - The Association of Business Recovery Professionals <<https://www.iiiglobal.org/sites/default/files/sandrafrisbyprelim.pdf>> accessed 19 February 2020

48 S. Frisby, 'A Preliminary Analysis of Pre-Packaged Administrations (Report to the Association of Business Recovery Professionals)' (2007) R3 - The Association of Business Recovery Professionals <<https://www.iiiglobal.org/sites/default/files/sandrafrisbyprelim.pdf>> accessed 19 February 2020. See: K. van Zweiten, *Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018), 494

49 Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 456

50 Rodrigo Olivares-Caminal *et al*, *Debt Restructuring*, (1st edn, Oxford University Press 2011), para 3.129

51 S. Frisby, 'A Preliminary Analysis of Pre-Packaged Administrations (Report to the Association of Business Recovery Professionals)' (2007) R3 - The Association of Business Recovery Professionals <<https://www.iiiglobal.org/sites/default/files/sandrafrisbyprelim.pdf>> accessed 19 February 2020

There is growing recognition of the need for a pre-pack process in India, with the Government acknowledging that it may help in reducing cost and delays. Further, a pre-pack process would provide greater certainty to the debt restructuring processes notified by the RBI by directly recognising their outcomes under the statute.

key features of a pre-pack sale is its confidentiality. This element of confidentiality prevents destruction of value that takes place on the proclamation of insolvency and is arguably one of the key advantages of pre-packs over formal proceedings, as it can contribute in preserving the going-concern value of the company.⁵²

Sanction of appropriate authority under the statute:

Unlike other kinds of out-of-court restructuring proceedings, a pre-pack operates within the fold of the statutory scheme, which makes the final outcome legally binding on all stakeholders. For example, under Chapter 11 of the United States Code (“**US Bankruptcy Code**”), the pre-pack plan has to be confirmed by the court which thereafter becomes binding on every concerned party. Similarly, pre-plan sales under the US Bankruptcy Code also requires the sanction of the Court to be effective. Thus, unlike an informal workout scheme, a pre-packaged plan is binding on all stakeholders, and is generally not susceptible to subsequent challenges after it has

been sanctioned. This certainty increases investor confidence and prevents the threat of non-compliance. Further, the exemptions applicable to a plan approved under the statutory scheme, such as exemptions from securities law requirements, also become applicable to a pre-pack plan, which increases certainty on the implementation of the plan.

There is growing recognition of the need for a pre-pack process in India. Following the enactment of the Code, the Government has acknowledged that it may help in “*reducing litigation cost and delays*” and may “*decongest the overburdened NCLTs.*”⁵³ Further, a pre-pack process would provide greater certainty to the debt restructuring processes notified by the RBI by directly recognising their outcomes under the statute.

3.4 Concerns regarding Pre-Packs

Despite the merits of pre-packs, it is important to highlight that pre-packs, especially in the UK, are often subjected to certain criticisms.

Capture of value by other stakeholders:

Specifically, there is a concern that since the process is typically confidential, and receives only the approval of secured creditors, there is not enough incentive to carry out extensive marketing that would be in the interests of all creditors, especially unsecured creditors.⁵⁴ Given this, the value due to unsecured creditors may be captured by other stakeholders.⁵⁵ The fear that value will be captured is exacerbated in cases where the pre-pack results in a sale to parties that are connected or related to the debtor. In these cases, the value due to unsecured creditors may be captured by connected parties, while the existing management regains its control without having to bear

52 Teresa Graham, ‘Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP’ (2014), para 7.7 <http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf> accessed 19 February 2020. However, the confidential nature of a pre-pack sale also makes it subject to criticisms.

53 Ministry of Corporate Affairs, Government of India, *Monthly Newsletter* (Vol. 13Z, November 2018), <www.mca.gov.in/Ministry/pdf/NovemberMCANewsletter_19122019.pdf> accessed 19 February 2020; the Ministry of Corporate Affairs has also sought public comments on, *inter alia*, pre-packaged insolvency resolution process under the Code. See MCA Notice dated 16 April 2019 <<https://ibbi.gov.in/webfront/Notice%20for%20inviting%20public%20comments%20on%20Code.pdf>> accessed 19 February 2020

54 Teresa Graham, ‘Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP’ (2014), paras 7.64, 7.65 <http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf> accessed 19 February 2020

55 S. Frisby, ‘A Preliminary Analysis of Pre-Packaged Administrations (Report to the Association of Business Recovery Professionals)’ (2007) R3 – The Association of Business Recovery Professionals <<https://www.iiiglobal.org/sites/default/files/sandrafrisbyprelim.pdf>> accessed 19 February 2020

the liability of repaying much of its older debts. This impression is exacerbated since the pre-pack deal is negotiated and drafted while the existing management of the company remains on board. Further, while an insolvency practitioner ultimately concludes a pre-pack arrangement, concerns have been raised that, in practice, valuations and marketing exercises are undertaken by the insolvency practitioner merely as check-boxing exercises.⁵⁶

Proliferation of bad businesses:

In cases where connected parties purchase the business of the debtor through a pre-pack sale, there is a concern that the lack of transparency results in the perpetuation of 'bad businesses' without allowing for a genuine restructuring or exit of the debtor.

Reengineering of balance sheets and proliferation of fraud:

In some cases, there are concerns that pre-packs are used by connected parties where the business is only technically insolvent and not actually insolvent, to benefit from the re-engineering of the balance sheet, especially to undercut their business rivals.⁵⁷ Critics also argue that in some cases a pre-pack is a "sham... to ditch debt", which could result in 'phoenixing' of companies "whereby companies are successively allowed to run down to the point of winding up, only to rise phoenix-like from the ashes as a new company formed and managed by an almost identical group of persons and utilising a company name similar to that under which the former company was trading."⁵⁸

There is evidence however that some of these criticisms are overstated. For instance, a study conducted by Andrea Polo observed that recoveries by unsecured creditors are not worse in pre-packs, including connected party pre-packs, than in alternative insolvency procedures. In fact, the study also demonstrates that connected party sales were used particularly by small companies in industries where the role of employees, reputation and intangibles is greater. Such companies would not survive in a public administration process due to their size and nature of assets, and would have to be liquidated, which would result in a significant loss of value. Given this, these companies, and their unsecured creditors are likely to have done better using the pre-pack mechanism than in any other process.⁵⁹

Additionally, as these criticisms are primarily levelled at the conduct of pre-packs in the UK, it is important to keep in mind that the financial markets in the UK and in India differ significantly. For example, unlike in India, firms in the UK tend to have highly concentrated debt structures.⁶⁰ Further, while Indian businesses tend to be promoter-driven, corporate ownership in the UK is generally characterised as being "widely dispersed".⁶¹ Given these differences, the concerns discussed above may not be entirely applicable in the Indian context. Additionally, as these concerns arise primarily out of the confidential nature of pre-packs, combined with the peculiar nature of administration proceedings in the UK—where a business sale can be completed with the consent of secured creditors alone—appropriate measures can be designed in the proposed framework to ensure that the feature of confidentiality does not trump the goal of value maximisation.

56 Teresa Graham, 'Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP' (2014), paras 7.64, 7.65, 7.78-7.81 <http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf> accessed 19 February 2020

57 Teresa Graham, 'Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP' (2014), para 7.46 <http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf> accessed 19 February 2020

58 Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 74

59 Andrea Polo, 'Secured Creditor Control in Bankruptcy: Costs and Conflict' (2012 Working Paper) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084881> accessed 19 February 2020. See also: K. van Zweiten, *Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018), 495

60 Giannetti, Caterina, 'Debt concentration of European Firms' (2015) MPRA Paper No. 63002 <https://mpra.ub.uni-muenchen.de/63002/1/MPRA_paper_63002.pdf> accessed 19 February 2020

61 See John Armour, Brian R. Cheffins, and David A. Skeel, Jr., 'Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom', (2003) 55 *Vanderbilt Law Review* 1699 <<https://scholarship.law.vanderbilt.edu/vlr/vol55/iss6/3>> accessed 19 February 2020; Balasubramanian, Bala N. and Anand, R., 'Ownership Trends in Corporate India 2001-2011: Evidence and Implications' (2013) IIM Bangalore Research Paper No. 419 <<https://ssrn.com/abstract=2303684>> accessed 19 February 2020

4. What does a Pre-Pack Look like in Other Jurisdictions?

Given the discussion above, there is a case to introduce pre-packs in India. In considering the form a framework enabling pre-packs should take, it may be relevant to have regard to the manner in which other jurisdictions enable or facilitate pre-packs.

4.1. USA

The US Bankruptcy Code recognises three forms of hybrid proceedings, namely pre-packaged bankruptcy proceedings, pre-arranged bankruptcy proceedings and pre-plan sales. In the following section, these modes of expedited bankruptcy proceedings are discussed in brief.

4.1.1. Pre-Packaged and Pre-Arranged Bankruptcies

Chapter 11 of the US Bankruptcy Code expressly allows pre-packs by providing that “a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan”⁶². Ever since the enactment of the Bankruptcy Reform Act of 1978, (which expressly allowed for creditors to vote for a reorganisation plan prior to filing a bankruptcy petition)⁶³ there has been a steady rise of pre-packaged and pre-arranged bankruptcies.⁶⁴ Pre-arranged and pre-packaged proceedings are considered to be more efficient than both the formal reorganisation proceedings under Chapter 11 of the US Bankruptcy Code and pure out-of-court restructurings.⁶⁵ For

one, pre-packaged and pre-arranged insolvency proceedings take substantially lesser time to be confirmed by the courts than traditional Chapter 11 proceedings.⁶⁶ In fact, the average time taken by courts to confirm a pre-packaged reorganisation plan and a pre-arranged reorganisation plan is merely two and four months respectively, while the average duration of traditional Chapter 11 cases is eleven months.⁶⁷ For another, pre-negotiated proceedings are relatively more immune from the problem of hold-outs than out-of-court reorganisations as they provide an opportunity to cram-down a plan on minority dissenting creditors.

The essential steps involved in successfully concluding pre-arranged and pre-packaged bankruptcy proceedings are discussed below.

4.1.1.1 Negotiation and Solicitation for Acceptance

Prior to filing a petition before the court, the debtor typically undertakes negotiations with interested parties and finalises the reorganisation plan.

In case of pre-packaged filings, subsequent to finalisation of the plan, the debtor circulates the negotiated plan with claim holders and interest-holders (“**interested parties**”) with a view to solicit their acceptance regarding the same. The plan is accompanied by a disclosure statement, the key objective of which is to enable an interested party

62 US Bankruptcy Code, Section 1126(b)

63 Elizabeth Tashjian, Ronald C. Lease, John J McConnel, ‘Prepacks: An empirical analysis of prepackaged bankruptcies’, (1996) 40 Journal of Financial Economics 135, 138

64 Gerard McCormack, *Corporate Rescue Law – An Anglo-American Perspective* (Edward Elgar Publishing, 2008)

65 Gerard McCormack, *Corporate Rescue Law – An Anglo-American Perspective* (Edward Elgar Publishing, 2008) 103

66 Elizabeth Tashjian, Ronald C. Lease, John J McConnel, ‘Prepacks: An empirical analysis of prepackaged bankruptcies’, Journal of Financial Economics 40 (1996) 135-162

67 Norman Kinell, ‘The Ever-Shrinking Chapter 11 Case’ <<https://www.esquireglobalcrossings.com/2018/08/the-ever-shrinking-chapter-11-case/>> accessed 19 February 2020

to make an informed decision on the plan.⁶⁸ While the disclosure statement need not be approved by the Court, it should comply with the applicable law governing the adequacy of such disclosure; if no such law is applicable, “adequate information” as defined under the US Bankruptcy Code should be provided.⁶⁹

In case of pre-arranged filings, the debtor would have negotiated the reorganisation plan with the some of the major interested parties prior to commencement of the formal proceedings.⁷⁰ However, the plan would not be formally circulated with all the impaired interested parties prior to filing. As a result, the disclosure statement accompanying the plan would require the approval of the Court. However, as the Court would be scrutinising and sanctioning its contents, it need not be compliant with the disclosure standards laid down in other applicable laws.

4.1.1.2. Acceptance of the Plan by Creditors

A Chapter 11 plan—including pre-packaged and pre-arranged plans—has to be accepted by every class of interested parties whose rights are impaired by the plan. A class of interested parties would comprise of creditors or shareholders whose claims or interests are “substantially similar” and every interested party belonging to the same class should be provided the same treatment under the reorganisation plan.⁷¹

For acceptance by a class of creditors, the plan should be accepted by “at least two-thirds in amount and more than one-half in number of the allowed claims”.⁷² Importantly, for calculating the numerical majority, the number of allowed claims would be considered as opposed to the number of creditors in the class; thus, a bondholder may cast separate votes for separate bonds held by her. Once the requisite majority is reached within a class, the entire class is deemed to

Pre-packs are considered to be more efficient than both Chapter 11 reorganisation proceedings and pure out-of-court restructurings: while they take substantially lesser time to be confirmed by courts than traditional Chapter 11 proceedings, they are relatively more immune from the problem of holdouts than out-of-court reorganisations.

have voted in favour of the plan, thereby binding the majority decision on all members of the class.⁷³

For acceptance by a class of shareholders, the plan should be accepted by at least two-thirds in amount of the total allowed interests of that class. Importantly, class of interested parties whose rights are not impaired by the plan would be deemed to have accepted the plan⁷⁴ and a class of interested parties, whose members do not receive or retain any property under the plan, would be deemed to have rejected the plan.⁷⁵

4.1.1.3. Filing Before the Court

Subsequent to finalisation of the plan—including solicitation of votes and acceptance by impaired classes of interested parties in case of pre-packaged filings—the debtor may file a voluntary Chapter 11 petition, along with applications for operational continuity (such as post-petition financing, right to use existing bank accounts, cash management systems etc.)⁷⁶

68 *Re Momentum Mfg. Corp.*, 25 F.3d1132 (2d Cir. 1994)

69 Section 1125(a)(1) of the US Bankruptcy Code defines ‘adequate information’ as: ‘information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records [...] that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan’

70 Ben Larkin *et al*, *Restructuring Through US Chapter 11 and UK Prepack Administration*, in Christopher Mallon & Shai Y. Waisman (eds), *The Law and Practice of Restructuring in the UK and US* (1st Edn., 2011), para 8.51

71 US Bankruptcy Code, Section 1122(a), Section 1123(a) (4)

72 US Bankruptcy Code, Section 1126(c)

73 American Bankruptcy Institute, ‘Commission to Study the Reform of Chapter 11, Final Report and Recommendations (2012-2014)’ 258 <<https://abworld.app.box.com/s/vvircv5xv83aavl4dp4h>> accessed 19 February 2020

74 US Bankruptcy Code, Section 1124, 1126(f)

75 US Bankruptcy Code, Section 1126(g)

76 Rodrigo Olivares-Caminal *et al*, *Debt Restructuring*, (1st edn, Oxford University Press 2011), paras 3.112-3.119

As a pre-plan sale does not require to be voted upon by every class of impaired interested parties, it is a much simpler, quicker and more certain process than the traditional Chapter 11 procedure.

4.1.1.4. Confirmation of the Plan

If the plan has already been accepted by each class of impaired interested parties, the Court would confirm the same if it complies with the requirements laid down in Section 1129(a), which includes requirements regarding the plan and the proponent of the plan being compliant with the provisions of the US Bankruptcy Code; the plan being made in good faith and not being forbidden by law; acceptance by every class of impaired interested parties; every dissenting impaired interested party receiving or retaining an amount not less than what she would have received or retained under liquidation; the confirmation of the plan not being likely to be followed by liquidation or further reorganisation; etc.

Alternatively, if the plan is not accepted by every class of impaired interested parties, the Court would confirm the plan if it complies with the confirmation requirements of Section 1129(a)—except the

requirement of a consensual acceptance by every class of impaired interested parties—and if the plan does not discriminate unfairly and is fair and equitable to each dissenting class of interested parties.⁷⁷

4.1.2. Pre-Plan Sales

In addition to pre-arranged and pre-packaged bankruptcy proceedings, Section 363 of the US Bankruptcy Code permits the debtor to expediently sell all or substantially all of its assets, without the “constellation of requirements” involved in a sale under a typical Chapter 11 reorganisation plan.⁷⁸ Significantly, a pre-plan sale does not require to be voted upon by every class of impaired interested parties. As a result, a pre-plan sale is a much simpler, quicker and more certain process than the traditional Chapter 11 procedure.

However, a pre-plan sale is not free from procedural constraints: prior to approval of a sale, the debtor is required to provide a notice to every interested party, to provide them an opportunity to object to the proposed transaction. Typically, at least a 21 days’ notice should be provided, unless the court, owing to the exigencies of a case, reduces the period of notice.⁷⁹ Subsequently, a hearing before the bankruptcy court takes place where objections from interested parties are heard by the bankruptcy court. However, a sale may be confirmed by the bankruptcy court without conducting an actual hearing, if the notice was adequate and if a hearing is not timely requested by an interested party or if there is insufficient time for conducting a hearing.⁸⁰

Importantly, Section 363 does not lay down any test or criterion for approving a pre-plan sale. Therefore, courts have adopted certain guidelines for approving

77 US Bankruptcy Code, Section 1129 (b); The US Bankruptcy Code does not lay down any test or guidance regarding whether a plan “does not discriminate unfairly”. Instead, the Courts have laid down various tests from time to time to determine the scope of unfair discrimination. In general, a plan would be considered unfairly discriminatory “if it provides greater value to a class of claims or interests with equal priority.” For a plan to be fair and equitable with respect to a dissenting class of unsecured creditors or shareholders, it should comply with the ‘absolute priority rule’, i.e., ‘the holder of any claim or interest that is junior to the claims of such [impaired] classes will not receive or retain under the plan on account of such junior claim or interest any property’. With respect to secured creditors, the plan would be considered fair and equitable if any one of the following three conditions are met. First, the plan may permit the secured creditors to retain their security interest to the extent of the allowed amount of their claims. Further, the secured creditors should receive deferred cash payments equivalent to at least the allowed amount of their claims, valued “as of the effective date of the plan”. Second, the plan may provide for the sale of the security interest, free of any encumbrances, with the secured creditors reserving a right to credit-bid in the sale to prevent sales below the fair value of such security interest. If such a sale is made to a third party, the creditors should either “receive the proceeds or security over the proceeds”. Lastly, the plan may provide the secured creditors an “indubitable equivalent of such claims” [See American Bankruptcy Institute, ‘Commission to Study the Reform of Chapter 11, Final Report and Recommendations (2012-2014)’ <<https://abiworl.d.app.box.com/s/vvircv5xv83aav14dp4h>> accessed 19 February 2020; Kenneth N. Klee, ‘All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code’, (1979) 53 American Bankruptcy Law Journal 133 <https://www.iiiglobal.org/sites/default/files/all_you_ever_wanted_to_know_about_cram_down_under_the_new_bankruptcy_code_by_k_klee_stutman_treister_glatt.pdf> accessed 19 February 2020; Nicolaes Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework* (1st edn, Oxford University Press 2019)]

78 Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing, 2016) 207

79 Robert M. Fishman and Gordon E. Gouveia, ‘What’s Driving Section 363 Sales after Chrysler and General Motors?’ (2010) 19 Norton Journal of Bankruptcy Law and Practice 351

80 Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing, 2016) 205-206

a pre-plan sale, although there are no universally held concrete standards for dealing with such sales.⁸¹ Earlier, such sales were restricted only to cases of emergency—where a delayed sale would cause irreparable loss to the creditors—out of fear that such pre-confirmation sales could undermine the safeguards that are otherwise applicable to Chapter 11 bankruptcy proceedings.⁸² However, subsequently courts have shifted away from the emergency standard, and have allowed pre-confirmation sales of all or substantially all of the assets of the debtor where it could be justified by a “good business reason”.⁸³

Section 363 does not prescribe the mode in which a sale should take place. Although typically a pre-plan sale involves a public auction and a public sale process, a private sale may also be permitted by the bankruptcy court in certain cases.⁸⁴ Owing to the flexibility in procedure, debtors often engage with a stalking-horse bidder prior to commencement of bankruptcy proceedings. This helps a prospective buyer to adequately conduct a due-diligence that is free from the constraints of a formal procedure and provides an assurance to the debtor against a “free-fall” bankruptcy.⁸⁵ After negotiating the primary bid with the stalking horse bidder, the debtor typically files for bankruptcy and seeks approval of the bidding procedure undertaken prior to commencement and requests for a public auction.⁸⁶

4.2 UK

Unlike in the USA, pre-packaged administration is not borne out of statutory provisions but is a “*practice that has evolved*”.⁸⁷ However, much like in the USA, pre-packaged administrations are widely prevalent.⁸⁸ For example, in 2017, as many as 356 pre-packaged administrations were reported, accounting for 28% of the total number of administrations concluded that year.⁸⁹ A pre-packaged administration has considerable merits: the speedy and confidential procedure plays a significant role in preserving the value of the company.⁹⁰ Some commentators argue that it also helps in the preservation of employment⁹¹ and retention of essential suppliers and key customers.⁹²

Typically the outcome of a pre-pack is rescuing the business of the company rather than saving the company itself.⁹³ Given that an administrator is primarily required to rescue the company itself,⁹⁴ there should be sufficient justification for opting for a pre-pack “*either because it is impossible to rescue the company or because such a sale will serve creditors better than any rescue efforts.*”⁹⁵ The administrator, is in fact, required to record the reasons for opting for a pre-packaged sale in light of every other alternative available to her.⁹⁶

81 Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing, 2016) 209-210

82 *In re White Motor Credit Corp.*, 14 B.R. 584, 4 Collier Bankr. Cas. 2d (MB) 1562 (Bankr. N.D. Ohio 1981); See William L. Norton III, *Norton Bankruptcy Law and Practice* 3d, § 44:17

83 *In re Lionel Corp.*, 722 F.2d 1063 (2d. Cir. 1983)

84 American Bankruptcy Institute, ‘Final Report of the ABI Commission to Study the Reform of Chapter 11’ (2014), 84 <<https://abiworld.app.box.com/s/vvirvcv5xv83aav14dp4h>> accessed 19 February 2020

85 Wachtell, Lipton, Rosen & Katz, *Distressed Mergers and Acquisitions* (2019) 56 <https://www.wlrk.com/files/2019/DistressedMergers_Acquisitions.pdf> accessed 19 February 2020

86 Wachtell, Lipton, Rosen & Katz, *Distressed Mergers and Acquisitions* (2019) 69-70 <https://www.wlrk.com/files/2019/DistressedMergers_Acquisitions.pdf> accessed 19 February 2020

87 Rodrigo Olivares-Caminal *et al*, *Debt Restructuring*, (1st edn, Oxford University Press 2011), 146

88 S. Frisby, ‘A Preliminary Analysis of Pre-Packaged Administrations (Report to the Association of Business Recovery Professionals)’ (2007) R3 – The Association of Business Recovery Professionals, 15-19 <<https://www.iiiglobal.org/sites/default/files/sandrafrisbyprelim.pdf>> accessed 19 February 2020

89 Pre-Pack Pool, ‘Pre-Pack Pool: Annual Review 2017’ (May 2018), <<https://www.prepackpool.co.uk/uploads/files/documents/Pre-pack-Pool-Annual-Review-2017.pdf>> accessed 19 February 2020

90 Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing, 2016) 89

91 Teresa Graham, ‘Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP’ (2014), paras 7.9-7.12 <http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf> accessed 19 February 2020

92 Ben Larkin *et al*, *Restructuring Through US Chapter 11 and UK Prepack Administration*, in Christopher Mallon & Shai Y. Waisman (eds), *The Law and Practice of Restructuring in the UK and US* (1st edn. Oxford University Press, 2011), para 8.83, 8.84

93 Sandra Frisby, ‘Insolvency Law and Insolvency Practice: Principles and Pragmatism Diverge?’ (2011) 64(1) *Current Legal Problems* 349, 378; Suzanne Brooker & Stacey Jones, ‘Pre-pack administration: selling a viable but failing business’, *The Gazette* (The Stationery Office) <<https://www.thegazette.co.uk/all-notices/content/100517>> accessed 19 February 2020

94 See Insolvency Act, 1986, Schedule B1, Para 3

95 Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing, 2016) 79

96 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, para 10 <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

A pre-packaged administration has considerable merits: the speedy and confidential procedure plays a significant role in preserving the value of the company. It also helps in the preservation of employment and retention of essential suppliers and key customers.

4.2.1 Negotiation of Sale

In practice, an insolvency practitioner—who would later be appointed as the administrator—is appointed as a business advisor at the time when the sale of the business or assets of the company is being negotiated with prospective buyers. The insolvency practitioner helps in the negotiation and arrangement of the rescue plan prior to the commencement of formal administration proceedings. In fact, insolvency practitioners are appointed at this stage to assist the existing management to seek “further funding for the company; consulting with the major creditors as regards their support to the likely options; and marketing the business and negotiating with prospective purchasers.”⁹⁷

Given that the pre-formal stage of a pre-pack typically involves the future administrator in the role of a

business advisor to the company and given that “substantial decision making of the whole process takes place”⁹⁸ during this stage, there could be a conflict of interest on the part of the insolvency practitioner. In order to avoid any such potential conflict of interest, the insolvency practitioner should “differentiate clearly the roles that are associated with an administration that involves a pre-packaged sale, that is, the provision of advice to the company before any formal appointment and the functions and responsibilities of the administrator following appointment.”⁹⁹ Further, she should ensure that an independent valuation is conducted and every potential bidder is considered during this stage.¹⁰⁰ As per the ‘Statement of Insolvency Practice 16: Pre-packaged Sales in Administrations’ (“SIP 16”),¹⁰¹ valuations of the company should be conducted by independent valuers who have adequate professional indemnity insurance.¹⁰² In addition to independent valuations, SIP 16 requires that the business of the company is sufficiently marketed in order to ensure that “the best available consideration is obtained for it in the interests of the company’s creditors as a whole”.¹⁰³ The marketing exercise conducted prior to a pre-pack sale should conform to certain essential principles: the business of the company should be “marketed as widely as possible proportionate to the nature and size of the business”, the marketing exercise should be conducted for “an appropriate length of time to satisfy the administrator that the best available outcome for creditors”, it should be conducted via online and other means of communication.¹⁰⁴ If the insolvency professional relies on any marketing exercise conducted by the management of the company prior to her association with the company, she should be “satisfied as to the adequacy and independence of the

97 Bo Xie, ‘Role of Insolvency Practitioners in the UK Pre-pack Administrations: Challenges and Control’ (2012) 21(2) International Insolvency Review 85

98 Bo Xie, ‘Role of Insolvency Practitioners in the UK Pre-pack Administrations: Challenges and Control’ (2012) 21(2) International Insolvency Review 85

99 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, para 5 <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

100 Insolvency Service, ‘Insolvency Code of ethics’ <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301397/ISCodeEthics.doc> accessed 19 February 2020

101 In order to address the concerns related to pre-packaged administrations in the UK, the Joint Insolvency Committee, which is a body of the recognised professional bodies and the Insolvency Service of the UK, had issued a ‘Statement of Insolvency Practice 16: Pre-packaged Sales in Administrations’ in 2009. These guidelines lay down the principles and standards to be followed by insolvency practitioners while conducting pre-pack sales, including requiring disclosure of material information of the sale to all the creditors of the company within a specified timeframe. While these guidelines may not be part of the statute-book, non-compliance with its standards and principles may lead to disciplinary or regulatory action against the insolvency practitioner concerned.

102 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, para 12 <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020; in the event that the insolvency professional relies on a valuation which is conducted by an entity which does not meet this criterion, the insolvency professional is required to record the reasons for doing so.

103 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, para 13 <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

104 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, Appendix <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

marketing undertaken”.¹⁰⁵ In the event that the insolvency practitioner does not comply with these standards, she is required to explain how her course of action resulted in the best possible outcome for the creditors.¹⁰⁶

4.2.2 Appointment of an Administrator

Once the terms of the transaction are finalised and the requisite arrangements for the sale have been undertaken, the insolvency practitioner—earlier appointed in the informal capacity of a business advisor—is formally appointed as the administrator, thereby initiating administration.¹⁰⁷ While the administrator can be appointed by the court upon the application of an affected stakeholder, the company¹⁰⁸ and any qualified floating charge holder¹⁰⁹ of the company are permitted to appoint the administrator without requiring an approval from the court. Thus, the administration process can be formally commenced through this “self-certifying route” without any interference from the court.¹¹⁰ Once appointed, the administrator generally executes the transaction very soon (including on the very same day) after her formal appointment as the administrator.¹¹¹

As an administrator, the insolvency practitioner is required to perform her duties in the interest of all the creditors of the debtor as a whole¹¹² and “as quickly and efficiently as is reasonably practicable.”¹¹³ Particularly, SIP 16 requires the administrator to disclose to the creditors “sufficient information such that a reasonable and informed third party would conclude that the pre-

packaged sale was appropriate and that the administrator has acted with due regard for the creditors’ interests.” (“SIP 16 statement”).¹¹⁴ Specifically, SIP 16 statement should disclose, *inter alia*, the extent of the insolvency practitioner’s involvement with the company prior to her appointment as the administrator, the identity of the purchaser (including any connection with the management, creditors or shareholders of the company), details of the sale consideration. Additionally, it should provide a “detailed narrative explanation and justification of why a pre-packaged sale was undertaken and all alternatives considered”.¹¹⁵ With respect to the marketing exercise undertaken, SIP 16 statement should highlight the marketing activities undertaken and the outcome of such activities. With respect to the independent valuation conducted by the insolvency practitioner, the disclosure should mention the identity and qualifications of the valuers along with a confirmation regarding their independence.¹¹⁶

SIP 16 statement should be provided at the earliest opportunity—ideally while notifying the creditors about the sale and in any event, within seven days of the sale—and it should also be forwarded to the government.¹¹⁷ However, it is important to note that the purpose of SIP 16 statement is not to provide the creditors with a right to oppose the sale; instead, such information may be used to challenge the administrator’s conduct.¹¹⁸

4.2.3 Role of Creditors

Ordinarily, the administrator is required to get a

105 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, Appendix <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

106 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, Appendix <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

107 Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue*, (Edward Elgar Publishing 2016) 72-78

108 Insolvency Act, 1986, Schedule B1, Para 22

109 Insolvency Act, 1986, Schedule B1, Para 14; a floating charge holder whose charge “relates to the whole or substantially the whole of the company’s property” and who is entitled to appoint an administrator or an administrative receiver under the debt instrument is accorded this right to an out-of-court appointment of an administrator.

110 L. S. Sealy, David Milman, *Annotated Guide to the Insolvency Legislation, Volume 2*, (Sweet & Maxwell, 2011) 538

111 Rodrigo Olivares-Caminal *et al*, *Debt Restructuring* (1st edn, Oxford University Press 2011), para 3.234

112 Insolvency Act, 1986, Schedule B1, Para 3(2)

113 Insolvency Act, 1986, Schedule B1, Para 3(2)

114 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, Para 6 <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

115 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, Para 16 <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

116 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, Appendix <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

117 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, Para 17 <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

118 See Insolvency Act 1986, Schedule B1, Paras 74 and 75, which gives a creditor or a member of the company the right to challenge the administrator’s conduct where the interests of such creditor or member is unfairly harmed or where the administrator is guilty of malfeasance.

statement setting out the proposals for achieving the purposes of administration approved in a meeting of the creditors of the company, prior to submitting it to the court.¹¹⁹ However, the courts have interpreted the relevant provisions of the Insolvency Act, 1986 to permit the administrator to “*sell the assets of the company in advance of their proposals being approved by creditors*”.¹²⁰ Therefore, the initiation of the administration process—marked by the appointment of the administrator—and the sale of the business or assets of the company can be achieved without requiring any approval from the court or the creditors of the company. However, it is practically impossible to dispose the assets or business of the company without the secured creditors consenting to release their security interest over the assets of the company.¹²¹ Therefore, in practice, the company generally consults with its secured creditors and obtains their consent before finalising the sale.

4.2.4 Special Requirements in case of Connected Parties

In case a sale to a connected party is envisaged, some additional requirements may need to be complied with.

Where a potential purchaser is a connected party, such connected party may, on a voluntary basis, approach a ‘pre-pack pool’ with an outline of the proposed plan and reasons for proceeding with the plan. A pre-pack pool consists of a “*pool of experienced business people*”¹²² and was established following the recommendations of an independent review of the pre-pack procedure by Teresa Graham.¹²³ Upon approaching the pool, a member of the pool would scrutinize the transaction and issue her opinion in a prescribed format, while maintaining the confidentiality of the transaction.¹²⁴ While the transaction can be proceeded with even if an unfavourable opinion is issued by the pool, the opinion of the pool member is required to be annexed to the SIP 16 statement.¹²⁵ Apart from approaching the ‘pre-pack pool’, the connected party purchaser may also voluntarily prepare a viability review laying down how the purchasing company would survive the succeeding twelve months and what it “*will do differently in order that the business will not fail*”¹²⁶. However, owing to their voluntary nature, the referral rate to the ‘pre-pack pool’ and the rate of submission of viability reviews have been “*disappointingly low*”¹²⁷ and they are often perceived as an ineffective mechanism for addressing the concerns regarding pre-packs.¹²⁸

119 Insolvency Act, 1986, Schedule B1, Paras 49-54

120 *Re Transbus International Ltd*, [2004] 2 All ER 911; See Rodrigo Olivares-Caminal *et al*, *Debt Restructuring*, (1st edn, Oxford University Press 2011), 149-151

121 A. Kastrinou and S. Vullings, ‘No Evil is Without Good’: A Comparative Analysis of Pre-pack Sales in the UK and the Netherlands’, (2018) 27(3) *International Insolvency Review* 320, <<https://www.wijnenstael.nl/media/cms/publications/No-evil-is-without-good-a-comparative-analysis-of-pre-pack-sales-in-the-UK-and-the-Netherlands-International-Insolvency-Review-2018.pdf>> accessed 19 February 2020; McDermott Will & Emery, ‘Pre-packaged sales in administration in the United Kingdom’ <<https://www.lexology.com/library/detail.aspx?g=237d4bec-0159-4328-a9d4-326ad68a61ab>> accessed 19 February 2020; Adrián Thery *et al*, ‘Spanish Sales of Business Units and UK Pre-Pack Sales Compared’ <<https://globalrestructuringreview.com/chapter/1194414/spanish-sales-of-business-units-and-uk-pre-pack-sales-compared>> accessed 19 February 2020

122 Teresa Graham, ‘Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP’ (2014), para 9.8 <http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf> accessed 19 February 2020

123 K. van Zweiten, *Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018), paras 11-39, 11-43

124 Teresa Graham, ‘Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP’ (2014), paras 9.7-9.9 <http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf> accessed 19 February 2020

125 Teresa Graham, ‘Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP’ (2014), paras 9.1-9.10 <http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf> accessed 19 February 2020

126 Insolvency Practitioners’ Association, ‘Statement of Insolvency Practice 16’, Appendix <<https://www.insolvency-practitioners.org.uk/download/documents/1318>> accessed 19 February 2020

127 Chris Umfreville, ‘Review of the Pre-Pack Industry Measures: Reconsidering the Connected Party Sale Before the Sun Sets’ (2018) 31(2) *Insolvency Intelligence* 58, 60

128 R3 – The Association of Business Recovery Professionals, ‘Evaluation of Industry Measures to Improve Transparency of Connected Party Pre-pack Administration Sales’ (2018) <http://vm1.r3.org.uk/media/documents/policy/consultation_subs/Pre-pack_Review_May_2018_R3_Comments_FINAL.pdf> accessed 19 February 2020

5. Recommendations for a Framework for Pre-Packaged Insolvency Resolution Process in India

Given the discussion above we propose that, in India, three types of pre-packaged processes should be allowed: a pre-packaged insolvency resolution process (“PPIRP”), a pre-arranged insolvency resolution process (“PAIRP”) and a pre-arranged sale (“PAS”).

In PPIRP and PAIRP, an insolvency professional will get appointed to oversee the process and ensure its procedural propriety. Resolution plans will be invited, negotiated and finalised prior to filing. However, the approval of the plan by the CoC will take place at different stages. The former contemplates cases where the negotiated and finalised resolution plan may be voted upon and accepted by the CoC prior to commencement of formal proceedings. Thus, PPIRP will be preferred in cases where the CoC comprises a relatively small group of financial creditors with a sufficient degree of homogeneity of interests such that the statutory threshold required for approving a resolution plan may be reached at the pre-commencement stage. In cases where the CoC cannot be convened without jeopardising the confidentiality of the process or where it is unlikely that the statutory majority would be reached in the pre-commencement stage, a PAIRP will be the preferred route. In PAIRP, the CoC will be constituted after an application for commencement of insolvency proceedings is filed with the Adjudicating Authority and the voting process will take place under the purview of the Adjudicating Authority. Since both options may be utilised in slightly different cases, giving both options will enable the optimal use of pre-pack processes.

In addition to PPIRP and PAIRP, a mode for quick sale of assets of the debtor is also proposed. In PAS, the insolvency professional may proceed to expeditiously sell all or substantially all the assets of the debtor, if

she is of the opinion that such a quick sale would be the most value maximising mode of resolving insolvency. Importantly, as PAS is being proposed only for time-sensitive cases that face an imminent danger of rapid value erosion, the insolvency professional will not be required to take the approval of the CoC prior to executing the sale. However, given that the profession for insolvency professionals is still at a nascent stage, this mode of pre-pack may be brought in place at a later stage.

The detailed features of each of these processes may be as follows:

5.1 Pre-Packaged Insolvency Resolution Process (PPIRP)

5.1.1 Appointment of an Insolvency Professional and Constitution of the CoC

Initiation of the PPIRP should commence with the appointment of a qualified insolvency professional. The insolvency professional may be appointed by the existing management of the corporate debtor, as long as it has not defaulted on its dues. This would incentivise promoters and managers to engage with their creditors at an early stage of default. Alternatively, any financial creditor, to whom a specified percentage of the outstanding debts of the debtor is owed, may also appoint the insolvency professional. However, to prevent any undue interference by creditors, a creditor should be permitted to initiate PPIRP only

PPIRP will be preferred in cases where the CoC comprises a relatively small group of financial creditors with a sufficient degree of homogeneity of interests such that the statutory threshold required for approving a resolution plan may be reached at the pre-commencement stage.

after the occurrence of an event of default.

An insolvency professional so appointed should be eligible to be appointed as a resolution professional for a CIRP of the corporate debtor.¹²⁹ Further, upon appointment, the insolvency professional should disclose her relationship with the corporate debtor, the financial creditors, prospective resolution applicants and the professionals appointed by her, as per the process laid down for the same under the Code for CIRP.¹³⁰

Upon being appointed, the insolvency professional should convene the CoC comprising the financial creditors of the corporate debtor. However, this may not be feasible in cases where the corporate debtor has multiple financial creditors from varied backgrounds. In such cases, the PAIRP may be employed, as discussed later.

5.1.2 Duties of the Insolvency Professional

The primary duty of the insolvency professional should be to ensure that the objectives of the Code are furthered during the pre-filing phase, and that the pre-pack process results in the maximization of value of the assets of the debtor, in the interest of the creditors as a whole. The insolvency professional should not only ensure that the resolution process being undertaken is not against

the stated objectives of the Code, but also ensure that the same is not violative of any of the provisions of the Code, except those which may not be applicable for a pre-packaged insolvency process. The insolvency professional should assess the financial position of the company and prepare an information memorandum for prospective resolution applicants. In this regard, the management and officials of the company should be obligated to provide necessary information about the company to the insolvency professional.

Like in the UK, one of the measures of ensuring accountability and transparency in the process could be to make the insolvency professional liable for not acting in good faith or causing malfeasance. Particularly, the insolvency professional should be liable for conducting an insufficient marketing exercise.¹³¹

5.1.3 Invitation of Plans

The insolvency professional should reach out to potential resolution applicants for submission of resolution plans for the corporate debtor. While the insolvency professional should maintain the confidentiality of the pre-packaged resolution process, wherever necessary, the insolvency professional should also undertake adequate marketing measures to ensure that the resolution plan offering the best possible consideration to every creditor is submitted. In this regard, certain minimum standards and principles for marketing may be devised by IBBI which should serve as a guide for the insolvency professional for the purposes of reaching out to potential bidders for the company.

5.1.4 Eligibility of Connected Persons to be Resolution Applicants

It is proposed that during the pre-packaged resolution process, promoters and any other connected persons of the corporate debtor should be permitted to submit resolution plans.¹³² This can incentivise existing

129 See Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 3

130 See Insolvency and Bankruptcy Board of India, *Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes* (IBBI Circular No. IP/005/2018) <[https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/Disclosures-Circular-12.01.2018%20\(1\)-1_2018-01-16%2018:26:45.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/Disclosures-Circular-12.01.2018%20(1)-1_2018-01-16%2018:26:45.pdf)> accessed 19 February 2020

131 While what constitutes a sufficient marketing exercise can only be determined on a case to case basis, the IBBI or the respective Insolvency Professional Agencies may frame guidelines in this regard.

132 However, it is acknowledged that in certain cases an account of the debtor may be classified as non-performing asset during the pre-pack process. Given this, it should be monitored whether, by permitting promoters and managers to participate in the PPIRP, there is any abuse of process or unjust enrichment.

promoters of a corporate debtor to meaningfully engage with its creditors at an early stage of distress. Once a CIRP is commenced under the Code, the existing promoters are removed from the company and disallowed to participate in the resolution process. Acknowledging the threat of losing control over the corporate debtor, existing promoters can be expected to not only cooperate with the creditors during the PPIRP but also submit a plan which is acceptable to them. This would be particularly useful in case of sectoral distress, where new persons may not be willing to submit a resolution plan for the corporate debtor. However, it is clarified that apart from connected parties, no other persons who are ineligible to submit a resolution plan under the Code should be permitted to be a resolution applicant under a PPIRP.

Further, when resolution plans are submitted by persons who are related to the corporate debtor, such plans should be subject to additional safeguards. For example, in case of connected party pre-packs, the CoC should be required to file a statement with the Adjudicating Authority outlining the reasons for approving a plan proposed by the existing management or any of its connected parties. Such statement should also highlight the alternatives which were considered by the CoC and explain how the accepted plan provides the maximum value to the creditors as a whole.

Another such safeguard could involve submitting such plans before an independent body of experts—like the ‘pre-pack pool’ of the UK—prior to placing them before the CoC. While in the UK, reference to the ‘pre-pack pool’ is voluntary, such a requirement may be made mandatory in India in cases where the prospective resolution applicant is ineligible under the Code to submit a plan. For every reference to the body, the resolution applicant should be mandated to pay upfront the fees for the same. As an additional measure, if a corporate debtor slips into financial distress shortly after acceptance of the plan, it may be prohibited from participating in a fresh PPIRP.

5.1.5 Minimum Requirement of a Resolution Plan

In order to ensure that interests of every creditor in the PPIRP is protected, the insolvency professional should ensure that the value of the accepted resolution

plan is not less than the current enterprise value of the corporate debtor. In this regard, the insolvency professional should employ independent and qualified valuers to ascertain the enterprise value of the corporate debtor, before inviting resolution plans. This can prevent the existing management from taking over the company at the expense of the creditors. Further, the insolvency professional should prepare a report on the feasibility of the proposed resolution plan which should be later submitted to the Adjudicating Authority.

5.1.6 Voting Process for Accepting a Resolution Plan

Ordinarily, the CoC should vote upon a plan in the same manner as under a CIRP. However, in cases where the CoC comprises solely of financial creditors who are regulated by the RBI, the existing mechanism for out-of-court resolution of debts devised by the RBI may be utilised for governing the voting process in a CoC.¹³³ However, in such cases, the voting threshold required for passing resolutions should be governed by the relevant provisions of the Code, as described below.

5.1.7 Voting Threshold for Accepting a Resolution Plan

The proposed resolution plan should be approved by the statutory threshold for approving resolution plans under the Code, because a pre-packaged resolution plan sanctioned by the Adjudicating Authority would be deemed to have been approved within the framework of the Code, despite being negotiated and approved by the CoC prior to commencement. Thus, for a resolution plan to be accepted by the CoC, 66% of all the financial creditors, by value, of the corporate debtor should vote in its favour.

5.1.8 Application to the Adjudicating Authority

It is proposed that the Adjudicating Authority is the appropriate body to approve a pre-packaged resolution plan because the Adjudicating Authority is envisaged as the “exclusive forum for firm insolvency and liquidation adjudication” with a view to “to ensure that the insolvency or bankruptcy resolution is being performed within the framework laid down by the

133 See Reserve Bank of India, *Prudential Framework for Resolution of Stressed Assets* (RBI Circular No. RBI/2018-19/203) <<https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11580&Mode=0>> accessed 19 February 2020

law”.¹³⁴ Further, while IBBI has been provided with certain quasi-judicial powers, its scope is limited to the entities regulated by it.¹³⁵ Therefore, subsequent to approval of the resolution plan by the CoC, the insolvency professional should file the plan, along with other relevant documents evidencing the procedural steps undertaken in the PPIRP, with the Adjudicating Authority. The insolvency professional should also file the feasibility report mentioned above and the opinion of the independent body of experts, if the resolution applicant is a connected party. The insolvency professional should also furnish the details of the escrow account where the consideration paid by the resolution applicant is deposited for the purposes of distribution among the creditors.

5.1.9 Public Announcement

The application to the Adjudicating Authority should be followed by a public announcement by the insolvency professional disclosing the necessary details of the PPIRP and the resolution plan. The public announcement should allow any affected stakeholder to file an application to challenge the PPIRP. However, such challenge should be restricted to any procedural lapse during the PPIRP and should not be related to the commercial decision of the CoC in approving the resolution plan. Apart from providing adequate information to object to the process of PPIRP, the public announcement should also facilitate the claims collection process for distribution of the plan proceeds. It should serve as a notice to anyone having unpaid dues against the corporate debtor to file their claims with the insolvency professional.

5.1.10 Approval by the Adjudicating Authority

Upon filing the application by the insolvency professional, the Adjudicating Authority should hear objections from the interested parties (if any) and pass an order approving the resolution plan. As in the CIRP,

the role of the Adjudicating Authority would be to ensure that the plan complies with the requirements of the Code, and not to decide on the substantive aspects of the plan. In any event, in order to add a further degree of certainty to the plan proposed under the PPIRP and to ensure that the time taken for approval is not so long that it undermines the use of the pre-pack mechanism completely, the Adjudicating Authority should be deemed to have approved the plan in the event that it fails to pass any order within a specified timeframe.¹³⁶ Even though the Supreme Court has struck down the applicability of mandatory time-lines on legal proceedings,¹³⁷ it is suggested that a provision for deemed approval of pre-pack plans would be necessary to ensure that pre-packs are indeed concluded swiftly, and to prevent cases where a pre-pack plan, which has already been approved by the CoC, fails to attain finality owing to delays in legal proceedings before the Adjudicating Authority or the Appellate Tribunal.¹³⁸ Consequently, a necessary concession would also be to limit the window of appeal from an order of the Adjudicating Authority sanctioning a plan: the delay and costs of holding the plan till disposal of appeals can outweigh the safeguard provided with a right to appeal.¹³⁹ Instead, to protect the interests of all stakeholders, robust and clear procedural steps should be devised for PPIRP, which would minimize the potential for abuse by the insolvency professional, the existing management or the creditors of the debtor. Additionally, specialised benches may be constituted in the Adjudicating Authorities for clearing pre-pack plans within the specified time-frame, after providing a reasonable opportunity of hearing to all affected parties.

5.1.11 Claims Collection and Distribution of Proceeds

An exhaustive claims collection process may not be feasible before the commencement of formal proceedings, if the pre-commencement phase is intended to be a confidential process. Therefore, in

134 Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) paras 4.2.2., 4.2 <http://ibbi.gov.in/BLRCReportVol1_04112015.pdf> accessed 19 February 2020

135 Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) para 4.1.4 <http://ibbi.gov.in/BLRCReportVol1_04112015.pdf> accessed 19 February 2020

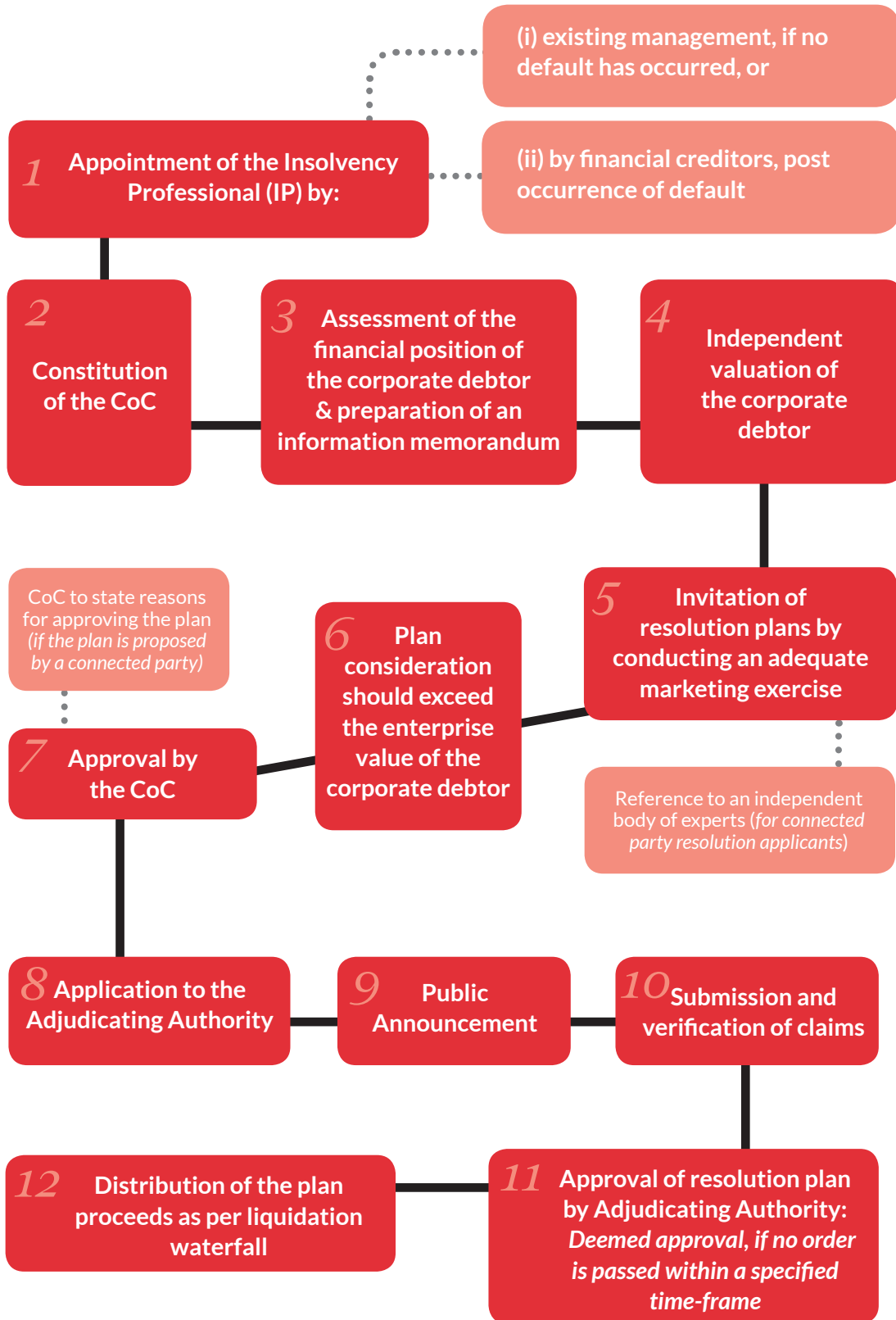
136 It is proposed that this time period be relatively short so as to enable a smooth and swift takeover of the corporate debtor by the resolution applicant. The concept of deemed approval is not a unique proposal; it is found in other statutes as well. See, for example, Section 25(7) of the Water (Prevention and Control of Pollution) Act, 1974, and Section 31(11) of the Competition Act, 2002

137 *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v Satish Kumar Gupta & Ors*, Civil Appeal Nos. 8766-67 of 2019. Decision date - 15 November 2019

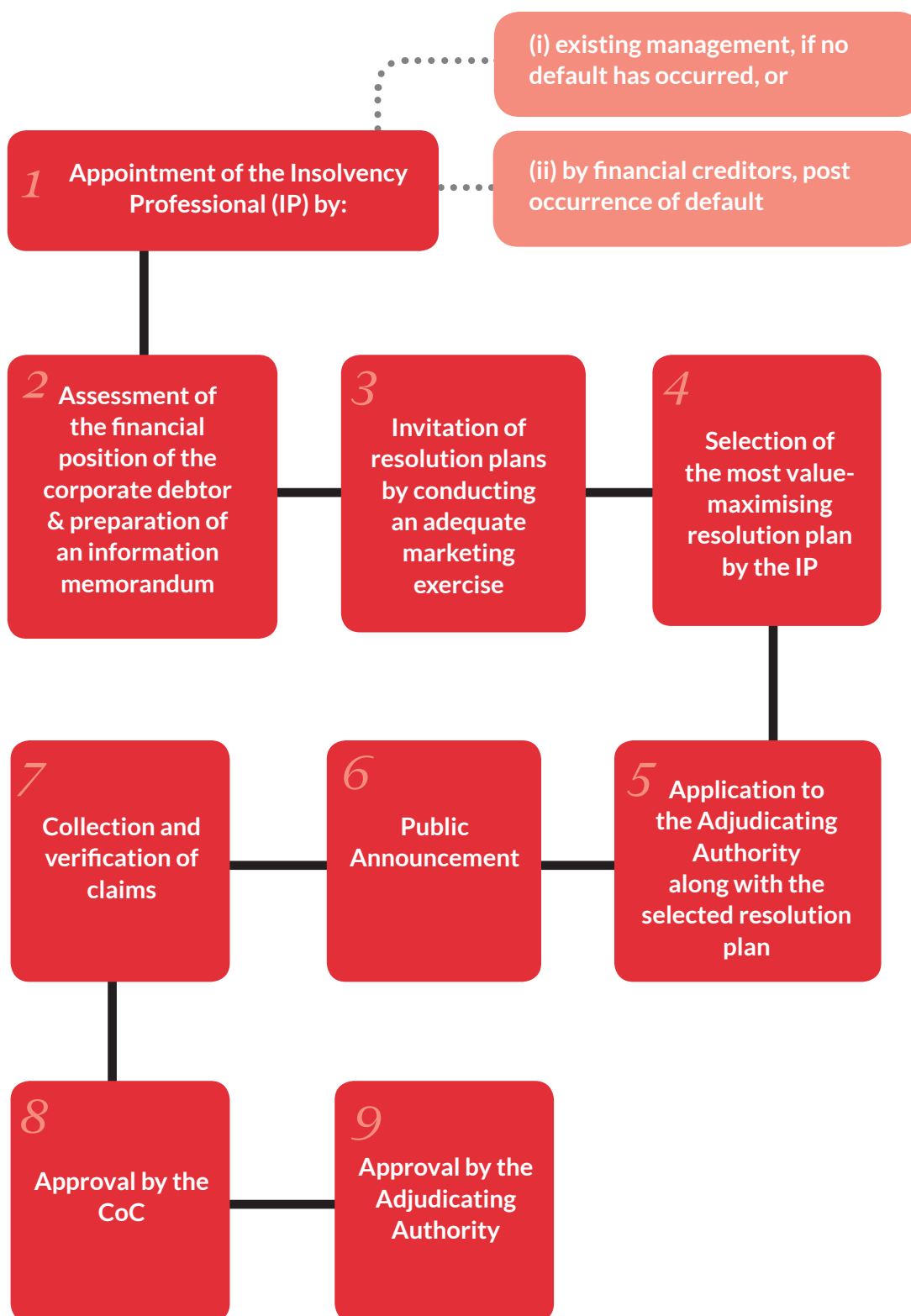
138 For example, in the CIRP of Essar Steel India Limited, it took more than 200 days after the CoC had approved the resolution plan, for the plan to be finally approved under Section 31 of the Code, owing to several objections filed by creditors against the plan.

139 Nicolaes Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework*, (1st edn, Oxford University Press 2019) para 8.04

Pre-Packaged Insolvency Resolution Process



Pre-arranged Insolvency Resolution Process



such a case, the process of collecting claims from every stakeholder having outstanding dues should commence after the public announcement has been issued. Further, as the resolution applicant would not be in a position to provide for the payments to various classes of creditors under the resolution plan, the proceeds from the plan should be distributed amongst various classes of claimants as per the waterfall mechanism provided under the Code for liquidation of a corporate debtor subject to any haircut taken by an assenting creditor.¹⁴⁰

5.2 Pre-arranged Insolvency Resolution Process (PAIRP)

In addition to the PPIRP, a framework for a PAIRP may be devised for cases when approval of the plan by the CoC outside the scope of the formal proceedings may not be feasible. For example, cases where the CoC is composed of multiple members from diverse backgrounds such that the efficiency and confidentiality of PPIRP would be disrupted if the plan has to be sanctioned by the CoC prior to filing of the application with the Adjudicating Authority, it would be favourable to follow PAIRP instead.

Like in PPIRP, the first step in a PAIRP should be the appointment of an independent insolvency professional. The insolvency professional should have the same duties under PAIRP as under the PPIRP. Primarily, the insolvency professional should seek out viable resolution plans from the market and work towards increasing the returns of the creditors as a class. The insolvency professional should also assess the financial position of the corporate debtor and prepare an information memorandum for prospective resolution applicants. Upon finding a plan which the insolvency professional believes is in the best interest of the creditors of the corporate debtor and being satisfied that such a plan would likely be accepted by the adequate majority of the CoC, the insolvency professional should file an application before the Adjudicating Authority for initiating formal proceedings under the Code. As with PPIRP, a public announcement should closely follow such application listing out, *inter alia*, the essential details of

In addition to the PPIRP, a framework for a PAIRP may be devised for cases when approval of the plan by the CoC, outside the scope of the formal proceedings, may not be feasible

the plan. Subsequent to the order of admission by the Adjudicating Authority and the public announcement, the insolvency professional should conclude the claims collection process in not more than 21 days from the date of commencement of proceedings.¹⁴¹ Thereafter, the insolvency professional should expeditiously convene a meeting of the CoC for formally considering the plan. If approved, the plan should be placed before the Adjudicating Authority for its approval as per the statutory process laid down for CIRP.

5.3 Pre-Arranged Sales (PAS)

In addition to PPIRP and PAIRP, an expedited mechanism for conducting a sale of assets of the debtor is also being proposed. Just like in a pre-plan sale in the USA and a pre-pack in the UK, a PAS would entail a sale of all or substantially all the assets of the debtor (or any of its undertakings), without the prior approval of creditors. The consideration received from such a sale would be distributed among creditors as per the liquidation waterfall under Section 53 of the Code. To ensure that PAS is conducted fairly and for the greater benefit of creditors, it should be conducted by an independent insolvency professional.

5.3.1 Justification for conducting PAS

PAS should be conducted only in limited cases when the prevailing circumstances justify an expedited sale that does not take the consent of creditors. Given this, PAS should be permissible only when it is clearly demonstrable that there would be significant deterioration of value if any other mode of insolvency

¹⁴⁰ See Insolvency and Bankruptcy Code, 2016, Section 53

¹⁴¹ This time period is in line with the model time-lines provided under Regulation 40A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

resolution—CIRP, PPIRP or PAIRP—is undertaken. For example, PAS may be considered for businesses that are highly dependent on their goodwill or human capital, as they may face severe financial hardships—by way of rapid loss of clients, suppliers or employees—if a drawn-out insolvency proceeding is commenced.¹⁴² Therefore, a PAS should be undertaken only when an independent insolvency professional, upon assessing the financial position of the corporate debtor and considering other relevant factors, feels compelled to conduct a quick sale, in light of the obvious benefits of such a sale over other lengthier alternatives.

5.3.2 Initiation of PAS

As discussed above, a PAS should be conducted by an independent insolvency professional. Just like in PPIRP and PAIRP, the existing management of the corporate debtor may appoint an insolvency professional to conduct a PAS, if it has not committed any default and creditors may initiate a PAS by appointing an insolvency professional, only after the occurrence of an event of default.

Before being appointed, the insolvency professional should determine if a PAS would be justified in the present case. To arrive at her decision, she must determine the financial position of the corporate debtor after assessing the financial statements of the corporate debtor and consult relevant market practitioners, domain experts, other players operating in the same market etc. As the determination regarding the necessity for a PAS is a crucial one, there should not be any time-constraints on the insolvency professional to make this determination.

5.3.3 Finalising the Sale

Once the insolvency professional is satisfied that a PAS would be necessary to safeguard the interests of creditors and that the benefits of such a sale would outweigh the potential risks of side-stepping some of the procedural requirements of a pre-pack or a CIRP, the insolvency professional should take over the management of the corporate debtor. In order to ensure that the existing management of the corporate debtor does not unduly influence the process, the existing board of directors of the corporate debtor should be replaced by the insolvency professional. In this regard, the insolvency professional may be vested with all the powers that are provided to an interim resolution

professional for running the corporate debtor during CIRP.¹⁴³ To this end, if required, the corporate debtor should pass relevant resolutions in a general meeting, modify existing shareholder agreements and amend its constitutional documents, in order to adequately empower the insolvency professional to manage the affairs of the corporate debtor without any interference from the existing management.

After being appointed, the insolvency professional should prepare an information memorandum for prospective buyers and conduct an adequate marketing exercise for the submission of bids. Just like in PPIRP, IBBI should provide clear guidelines for conducting a marketing exercise during a PAS. The insolvency professional should ordinarily ensure that a valuation of the corporate debtor is conducted by independent and qualified valuers. If such valuation is not feasible due to unavailability of relevant financial records or paucity of time, the insolvency professional should record reasons for the same. Nevertheless, just like in a PPIRP, the insolvency professional should ensure that the assets of the debtor are not sold for a value less than the enterprise value of the corporate debtor.

Once the highest bidder is identified, the insolvency professional should expediently conclude negotiations with it and finalise the necessary documentation required for closing the transaction.

5.3.4 Conclusion of Sale

After the determination of the highest bidder and finalisation of the transaction, an opinion from an independent body of experts may be sought, to ensure that the process undertaken by the insolvency professional is fair and in the best interests of the creditors.¹⁴⁴ Thereafter, the insolvency professional should execute the sale and publicly disclose the details of the transaction, including the mode and extent of marketing exercise undertaken, the rationale for conducting a PAS, the opinion of experts and other market players consulted etc.

The claims collection process should take place after the conclusion of the sale and the sale consideration should be distributed among creditors as per the liquidation waterfall under Section 53 of the Code.

142 Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 457

143 Insolvency and Bankruptcy Code, 2016, Section 17

144 See Section 5.1.4

Pre-Arranged Sales



5.3.5 Safeguards

Undoubtedly, the insolvency professional will play the most vital role in a PAS, as she, while acting on behalf of the interests of creditors, will have to determine if a PAS would be the most value-maximising option. Further, in light of the need for an imminent sale, she will also have to conduct the process swiftly while also undertaking a sufficiently wide marketing exercise that ensures the submission of the highest potential bid from the market participation. Therefore, the decisions taken and determinations made by the insolvency professional during a PAS will determine the rate of returns by creditors and the fate of the corporate debtor. However, unlike in the UK, the profession of insolvency professionals is relatively at its nascent stage. Further, the Code does not currently contemplate insolvency professionals to exercise the kind of discretion that will be required while conducting a PAS.

Given these, it is suggested that a PAS should be brought under the purview of the Code only after the profession of insolvency professionals has developed considerably such that creditors and other

stakeholders have confidence in the professional competence of insolvency professionals to conduct time-sensitive sales independently, efficiently and according to the core principles of the Code.¹⁴⁵

Further, while an insolvency professional will be expected to conduct a PAS keeping in mind the interests of the creditors, there is no formal scope for creditors to participate in the process and represent their views. Therefore, to be able to effectively conduct a PAS, an insolvency professional should have a considerably high degree of professional integrity and commercial acumen. Therefore, when a PAS is enabled under the Code, IBBI should only allow insolvency professionals, who have adequate professional experience and qualification, to conduct a PAS.

After the conclusion of sale, if the process followed by the insolvency professional is shown to be inadequate or if any instance of malfeasance is proved, the insolvency professional should be held personally liable by the Adjudicating Authority. IBBI may also initiate disciplinary proceedings to suspend or debar her licence. Additionally, the part of the sale consideration that is payable to the insolvency professional towards her fees and the expenses borne by her during the course of the sale, should be deposited in a separate escrow account. This would provide creditors with an *ex post* right to object to the sale before the Adjudicating Authority. If it is proved before the Adjudicating Authority that the assets of the corporate debtor were sold for inadequate consideration or that there was any procedural impropriety in the process, the Adjudicating Authority should be permitted to withhold the said amount—partly or wholly—and distribute it in favour of the creditors whose interests are prejudiced. On the other hand, in the absence of any evidence of wrongdoing, the Adjudicating Authority should allow the insolvency professional to collect her fees and recover the costs borne by her.

In addition to PPIRP and PAIRP, an expedited mechanism for conducting a pre-arranged sale is also being proposed, wherein the insolvency professional will be empowered to sell all or substantially all the assets of the debtor without the prior approval of creditors.

145 Ministry of Finance, *Interim Report of The Bankruptcy Law Reforms Committee* (2015) 79 <https://www.finmin.nic.in/sites/default/files/Interim_Report_BLR_C_0.pdf> accessed 19 February 2020 (“Pre-packaged rescue is a practice evolved in the UK and the US by which the debtor company and its creditors conclude an agreement for the sale of the company’s business prior to the initiation of formal insolvency proceedings. The actual sale is then executed on the date of commencement of the proceedings/date of appointment of insolvency practitioner, or shortly thereafter (and the proceeds distributed among the stakeholders in the order of priority). Until the Indian market for insolvency practitioners becomes sufficiently developed and sophisticated, it may not be advisable to allow such sales without the involvement of the NCLT”)

6. Implementation

There is no prevailing market practice and regulatory experience with respect to pre-packs in India as it was neither envisaged by the Code nor contemplated by any previous statute. Given this, the proposed framework for pre-packs should be implemented in a phased manner. Based on the industry feedback and the challenges faced during the initial phase, the framework may subsequently be made available to all kinds of corporate debtors.

As discussed above, PAS may not be implemented in the first phase, as it will require further development of the profession of insolvency professionals. Further, given that pre-packs are generally more prevalent amongst small and micro companies¹⁴⁶ and the fact that they tend to have a small number of financial creditors,¹⁴⁷ it is proposed that the pre-pack framework, comprising PPIRP and PAIRP, should initially be enabled for small debtors (such as micro and small enterprises), or debtors who do not have complicated debt structures.

The Code will have to be amended in order to enable pre-packs for corporate debtors. In this regard, new provisions laying down the process for conducting pre-packs may be inserted in Chapter IV of Part II of the Code, which currently provides for fast track CIRP. Further, existing provisions of the Code will have to be amended to permit pre-packs under the Code. For example, the definition of 'resolution plans' under Section 5(26) of the Code should be amended to include pre-packaged and pre-arranged resolution plans and sales. Further, a new provision should be inserted after Section 31 enabling the Adjudicating

Authority to approve a pre-packaged and a pre-arranged plan provided it fulfils the conditions laid down in the proposed framework. Similarly, for PAS, Section 31 will have to be amended to permit an insolvency professional to undertake a sale of assets at the pre-commencement stage.

In addition to amending the Code, regulations under the Code would also need to be amended to provide for the proposed framework for pre-packs. Particularly, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 should be amended to lay down the essential elements of the proposed framework. Alternatively, IBBI may formulate a fresh set of regulations for regulating pre-packs under the Code. Further, IBBI (Insolvency Professionals) Regulations, 2016 should be amended to enable and regulate insolvency professionals acting as resolution professionals in a pre-pack.

Given that a substantial part of a pre-pack would be concluded outside the purview of the Adjudicating Authority, the insolvency professional will play a central role in ensuring that the provisions of the Code are complied with. Therefore, it is proposed that IBBI may prescribe a higher degree of professional standard from insolvency professionals overseeing pre-packs. In this regard, IBBI may prescribe a separate selection process for registering such insolvency professionals. Alternatively, IBBI may require insolvency professionals to deposit performance bonds before being appointed in a pre-pack to ensure that they duly discharge their duties.

146 Teresa Graham, 'Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP' (2014), paras 7.3 <http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf> accessed 19 February 2020; INSOL International, 'Restructuring Options for MSMEs and Proposals for Reform' 24-25, <<https://www.insol.org/files/Special%20Report/MSME%20report.pdf>> accessed 19 February 2020

147 Ministry of Finance, *Interim Report of The Bankruptcy Law Reforms Committee* (2015) para 8.3 <https://www.finmin.nic.in/sites/default/files/Interim_Report_BLR0_0.pdf> accessed 19 February 2020

7. Conclusion

While the BLRC Report had identified the importance of a timely resolution by suggesting that “*speed is of essence for the working of the bankruptcy code*”¹⁴⁸, the Supreme Court has observed that “*one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process*”.¹⁴⁹ In light of this, the framework for pre-packs is being proposed to enable swift resolutions under the Code. However, as the Code does not envisage a pre-packaged insolvency resolution process, the proposed framework cannot be implemented without amending the Code and the rules and regulations prescribed under it. Once enabling provisions are introduced under the Code, the proposed framework can play a key role in reducing

the burden of Adjudicating Authorities under the Code and in resolving financial distress of firms in a timely and cost-efficient manner. However, it is important to note that the insolvency professional will play a crucial role in this framework as she will be responsible for balancing the interests of all the stakeholders and ensuring that no stakeholder, especially the promoters and secured creditors, unjustly enriches themselves by misusing the framework for PPIRP, PAIRP, or PAS. Therefore, to ensure that the insolvency professionals duly discharge their duties independently, their conduct should be regularly monitored and the IBBI should prescribe higher professional standards for insolvency professionals undertaking pre-packs.

148 Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) Executive Summary <http://ibbi.gov.in/BLRCReportVol1_04112015.pdf> accessed 19 February 2022

149 *Innoventive Industries Ltd. v ICICI Bank and Ors*, AIR 2017 SC 4084

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