

The Concept of Prepack under IBC as Business Reorganization

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Introduction

Business doesn't only mean only Profit mean Profit but also Losses and Distress

A Distressed Asset Has a 'Life Cycle'

Its Value 'Declines' with Time, if Distress is 'NOT Addressed Quickly'

Distress is responded by own by improving its competitiveness

It may sit across a table with its stakeholders, either individually or collectively, to work out a plan to resolve stress



Introduction

Insolvency and Bankruptcy Code 2016 (IBC) was passed four years ago with objective

“to consolidate and amend the laws relating to reorganisation and insolvency resolution in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith and incidental thereto.” - Supreme Court (2018), Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta and Ors.

There are two court supervised statutory options, namely,

- (a) CIRP under the Code, and
- (b) scheme of compromise or arrangement (SoA) under the Companies Act, 2013, and

Two out-of-court options, namely,

- (a) the RBI's prudential framework for resolution of stressed assets and
- (b) informal understanding between a debtor and creditor,

Introduction

Basic of CIRP under IBC

1. In detail process of CIRP
2. Time is essence of all resolution and prolonged uncertainty may push the resolution both at CIRP as well as with CIRP debtor-in-possession' to 'creditor-in-control
3. An IP runs the CD as a going concern
4. The defaulter's paradise was lost. – Swiss Ribbon is lost
5. If debt is serviced, shareholders have complete control of the company and creditors have no say in how the business is run.



Introduction

Schemes under the Companies Act, 2013

Section 230 of the Companies Act, 2013 offers Scheme of Arrangement (SoA), which enables a company to restructure its liabilities and/or capital structure to turnaround the business, **with the approval of NCLT.**

Substantial body of rich **jurisprudence.**

It **can be applied** by creditor / Class of creditors or members or any class of them

Issues in Scheme under Companies Act 2013

- The absence of any calm period, like **moratorium** in case of CIRP, often leads to fast tracking of suits, proceedings, and enforcement actions by stakeholders against the company during the process;
- There is no time limit within which the process must be completed
- An SoA requires approval by three-fourths in value of creditors or members, which is challenging at times, as compared to threshold of 66% voting share of creditors under the Code;
- An SoA is binding on the company, all the creditors or class of creditors, members or class of members as the case may be.

Introduction

RBI's Prudential Framework

Prudential framework for early recognition, reporting and time bound resolution of stressed assets.

Demerits in this form of resolution

- The framework is available in respect of stress of a CD which has RBI regulated creditors
- Being out-of-court mechanism, the framework does not provide for breathing space in the form of a moratorium on suits, proceedings, and recovery actions against the CD during the restructuring;
- The plan binds only those FCs who are signatories to the ICA.
- The framework hinges on an ICA to provide that any decision by lenders representing 75% by value of total outstanding credit facilities and 60% of lenders by number shall be binding upon all the lenders.



Introduction

Feature	CIRP under the Code	Scheme under the Companies Act, 2013	RBI's Prudential Framework	Bilateral Negotiations
Available for	Companies, LLPs, and entities with limited liability	Companies	All entities with debt from RBI regulated lenders	All entities
Stress covered	Default above Rs.1 crore (other than COVID-19 defaults)	Pre and post default, including stress in group companies	Pre and Post default	Pre and post default
Initiation by	Debtor or a creditor	Company, a member, a creditor, or the liquidator	RBI regulated lenders	Debtor and creditors
Oversight of process	Insolvency Professional	X	X (Expert Committee for exposure > Rs.1500 crore with COVID-19 stress)	X
Debtor-in-possession	X	✓	✓	✓
Moratorium	✓	X	X	X
Interim finance with super priority	✓	X	X	X
Scope of resolution plan	Very wide	Wider	Only financial liabilities	Financial and operational liabilities
Cross-class cramdown	✓	X	X	X
Protection of OCs and dissenting FCs	✓	NA	NA	✓
Approval by stakeholders	66% FGs by value	75% creditors by value	75% of RBI-regulated FCs (and other voluntary signatories to the ICA) by value and 60% by number	100% consent of creditors or class of creditors
Regulatory benefits	More	Less	No	No
Court approval	✓	✓	X	X
Binding on	All stakeholders	Company and its creditors, members, and contributories	As per the terms of ICA	As per terms of the agreement
Liability of CD in respect of past offences	Ceases (Section 32A of the Code)	Continues	Continues	Continues
Time Limit	180 days	X	180 days (without additional provisions) for large accounts	X
Consequence of failure	Liquidation	X	X	X

Necessary for Prepack

The 'IBC Code' **Addresses Distress** only after 'Occurrence of a Default' and after the '**Stakeholders Decide**' to Address the Distress **through** CIRP.

Once an honest creditor-debtor relationship was restored on account of the Code, there would be a need to marry the insolvency framework with out-of-court settlement schemes. – Late. Arun Jaitley

Such sales could be allowed as part of an NCLT supervised scheme of arrangement and operationalized through rules at an appropriate stage.

After wider consultation with the stakeholders. Usually, pre-pack is a natural step in the evolution of insolvency regimes.

Benefits of Prepack

- *Faster resolution and cost effective:*
 - *Goodwill retention and value maximization:*
 - *Increases the possibility of resolution:*
 - *Less litigate prone and less reliance on courts*
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Eligibility of Application

- To be applied by a **Corporate Person only**
- There needs to be a Default
 - Section 3(12) “default” means non-payment of debt when whole or any part or instalment of the amount of **debt** has become due and payable and is not 1 paid by the debtor or the corporate debtor, as the case may be
 - Section 3 (11) “debt” means a liability or obligation in respect of a **claim** which is due from any person and includes a **financial debt** and **operational debt**
 - The Default has to be **Rs. 10 lakh**
- The Corporate Debtor needs to be **classified** as MSME u/s 7(1) of MSME Development Act 2006

Classification	Investment in P&M or Equipment		Turnover
Micro	< INR 1 Crore	&	< INR 5 Crore
Small	< INR 10 Crore		< INR 50 Crore
Medium	< INR 50 Crore		< INR 250 Crore

All enterprises registered as MSME prior to June 30, 2020 were re-classified as per limits mentioned above. For making application for PPIRP, a MSME must be registered with the Udyam (MSME) Registration Portal or other Govt. MSME Registration Agency.

Eligibility of Application

Eligible to submit resolution **us/s 29A**. However Section 29A is applicable to PPIRP – Baring clause **(c) and (h)** of Section 29A

Section 29A - *Persons not eligible to be resolution applicant*

- (a) is an **undischarged insolvent**;
- (b) is a **wilful defaulter** as per RBI
- (c) at the time of submission of the resolution plan has an account an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, **classified as non-performing asset** as per RBI guidelines.....
- (d) has been **convicted** for any offence punishable with **imprisonment** – (i) for two years or more under any Act specified under the Twelfth Schedule; or (ii) for seven years or more under any law for the time being in force.....
- (e) is **disqualified** to act as a director under the Companies Act, 2012.....
- (f) is **prohibited by the SEBI** from trading in securities or accessing the securities markets;
- (g) has been a promoter or in the management or control of a corporate debtor in which a **preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction** has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:.....
- (h) has **executed a guarantee in favour** of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part
- (i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India;
- (j) has a connected person not eligible under clauses (a) to (i)

SMA	Basis for Classification
Sub-Categories	
SMA-0	Principal or Interest Payment not Overdue for More than 30 Days but Account Showing Signs of Incipient Stress
SMA-1	Principal or Interest Payment Overdue Between 31-60 Days.
SMA-2	Principal or Interest Payment Overdue Between 61-90 Days.

Pre-Condition - Eligibility of Application

Precondition for applying Application

- ❑ **Not undergone PPRIP or CIRP** during last three years of Initiation date
- ❑ **Not undergoing CIRP**
- ❑ **Order for liquidation** is not passed u/s 33
- ❑ The members of corporate debtor have passed **Special resolution** or **¾ of total partners** have passed resolution approving the PPIRP initiation
- ❑ Declaration by **majority of directors or partner of Corporate debtor** make declaration that – (Form P6)
 - They shall file application for PPIRP within definite period not more than 90 days
 - The PPIRP is not initiated to defraud any person
 - The **name of insolvency professional** who is proposed and approved to be appointed as RP
- **Approval from Financials creditors >66%** in debt have to approve the initiation of PPIRP. (Form P4)

Appointment of Resolution Professional

- a. Before the application is moved for initiation
 - b. Corporate debtor to call for meeting of Financial creditor by a notice along with list of creditors in Form P2.
 - c. Financial creditor not being related parties to propose the name of Insolvency professional to act as Resolution professional (Form P3)
 - d. **>66%** in value in financial have vote his approval
 - e. Financial creditor with more **than 10%** value of debt can propose
 - f. Operational creditor if no Financial creditor – Mutatis Mutandis application if financial creditor
 - g. The Terms of appointment shall include
 - Fees payable u/s 54B (1)
 - Fees payable to him and expense to be incurred by him for conducting the process
 - Fees payable in case of vesting of management u/s 54J
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Initiation of PPIRP by Corporate Debtor

- File **Form 1** with Adjudicating Authority
 - Provide all **declaration, Special resolution and approval** of financial creditors
 - The **name and written consent of IP** to be appointed as RP (Form – P1) as approved by FC's who not related
 - Prepare **financial statements for past two years and provisional financial statement not older than 14 days** from date of filing application
 - **Prepare statement of affairs** not **older than 14 days** from date of filing application
 - Along With **requisite fee** and other Annexures
 - AA shall **within 14 days** of receipt of application either admit or reject based on its completion
 - PPIRP date **commencement starts** on admission of application and the process of PPIRP starts from admission date.
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Steps before filing initiation of PPIRP by Corporate Debtor

Negotiation with FC

Informally approve **Base resolution Plan** in confirmation to 54K

Special resolution / Resolution by majority by CD
Declaration by Majority of directors

Call for meeting of FC and choose the RP to be appointed along with Form P2
Submit declaration, Base resolution plan, Special resolution

Appoint RP Form P3
Approval for filing PPIRP (Form P4)
RP to file Form P8

File Form 1
File all declaration Special resolution
RP to file Form P8
Form 7 related to transactions Chapter III or fraudulent, wrongful trading

Fees of Resolution Professional

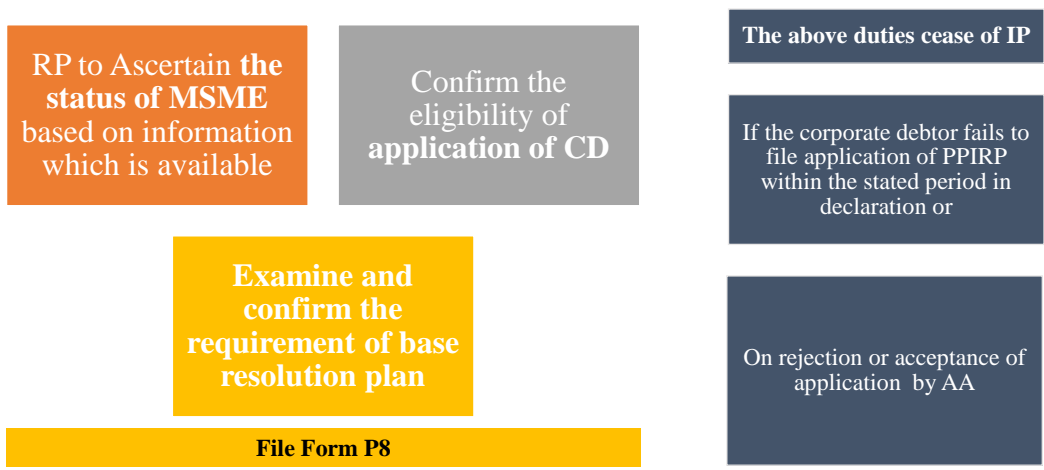
- Fees for acting as Insolvency Professional if the application is admitted u/s 54B
- Fees for acting as Insolvency Professional if the application is rejected u/s 54B - To be borne by Corporate debtor
- Fees and expense for conducting the PPIRP shall be determined
- COC shall have the power to restrict the fee and expense
- Fees for conducting the management of business in case of application of Section 54J



PPIRP resolution Process cost – Section 5(23C) and Regulation 6

- The amount of any interim finance and the costs incurred in raising such finance
 - the fees payable to any person acting as a resolution professional and any expenses incurred by him for conducting the pre-packaged insolvency resolution process during the pre-packaged insolvency resolution process period, subject to sub-section (6) of section 54F
 - any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern pursuant to an order under sub-section (2) of section 54J
 - any costs incurred at the expense of the Government to facilitate the prepackaged insolvency resolution process
 - fee payable to authorized representative under sub-regulation (5) of regulation 34
 - out of pocket expenses of authorized representative for discharge of his functions under section 25A;
 - any other cost directly relating to the process and approved by the committee
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Duties of Insolvency Professional / Resolution Professional – Section 54B



On Admission of PPIRP & Moratorium

AA authority on admission of PPIRP

- Declare moratorium
- Appoint Resolution professional
- Cause Public announcement (Form P9) – Within 2 days

What is Moratorium as per section 14?

Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

- (a) **the institution of suits or continuation of pending suits or proceedings** against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) **transferring, encumbering, alienating or disposing off** by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) **any action to foreclose, recover or enforce any security** interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (d) **the recovery of any property by an owner or lessor where such property** is occupied by or in the possession of the corporate debtor.

Section 14(2) (2A) – not applicable

Moratorium shall cease on which PPIRP period comes to an end

Time limit of PPIRP

Stage – 1 Pre-admission

Discussion about the **Base Resolution plan** with FC even before admission

Conduct of Audits/Convincing the FC

Preparing the case for submission and convincing

Definite period maximum is 90 days

Stage – 2 - Time for AA to admit or reject

14 days in normal

Rectify the defect by 7 days

Total – $90 + 14 = 104$

Stage – 3 Commencement of PPIRP

Submission of Resolution Plan by 90 days

Total – 194 days

Stage -4 Approval/Rejection of NCLT – 30 days

- Complete PPIRP within 120 days from PPIRP commencement date
- Within 90 days resolution plan needs to be filed with AA
- If no Resolution plan is approved by CoC within 90 days - then file for termination of PPIRP with AA
- AA to pass the approving or rejecting the Resolution plan within 30 days of receiving the resolution plan by RP
- No extension of time available to CD/RP

Duties of Insolvency Professional / Resolution Professional

confirm the list of claims submitted by the corporate debtor under section 54G, (Form – P10)

inform creditors regarding their claims as confirmed

maintain an updated list of claims

monitor management of the affairs of the corporate debtor;

Inform the committee of creditors in the event of breach of any of the obligations of the Board of Directors or partners, as the case may be, of the corporate debtor, under the provisions of this Chapter and the rules and regulations made thereunder;

constitute the committee of creditors and convene and attend all its meetings;

prepare the *information memorandum* on the basis of the preliminary information memorandum submitted under section 54G and any other relevant information

file applications for avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, if any

If no Resolution plan is approved by CoC within 90 days - then file for termination of PPRIP with AA

Duties of Insolvency Professional / Resolution Professional

What duties are missing from CIRP

take immediate custody and control of all the assets of the corporate debtor

represent and act on behalf of the corporate debtor with third parties , exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings

raise interim finances subject to the approval of CrC

appoint accountants, legal or other professionals

invite prospective resolution applicants (Not under all circumstances – Only when Base resolution plan is not approved or when it impairs operational creditor)

Powers to be exercised by Resolution Professional

access all books of account, records and information available with the corporate debtor;

access the electronic records of the corporate debtor from an information utility having financial information of the corporate debtor

access the books of account, records and other relevant documents of the corporate debtor available with Government authorities, statutory auditors, accountants

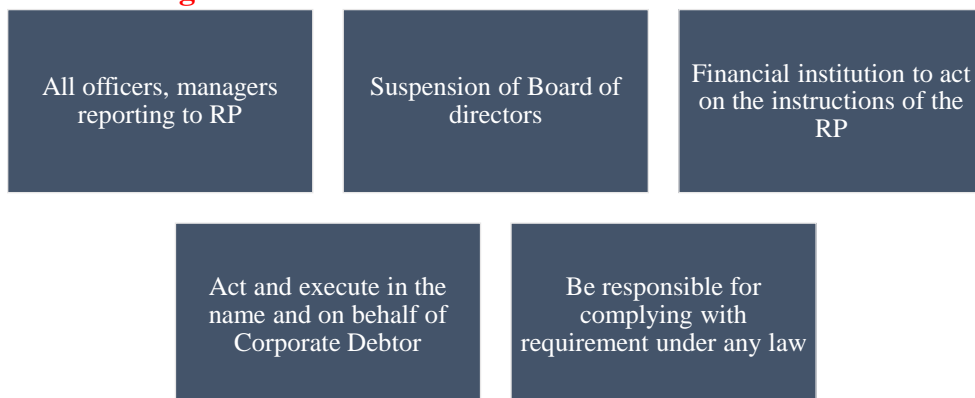
attend meetings of members, Board of Directors and committee of directors, or partners, as the case may be, of the corporate debtor

appoint accountants, legal or other professionals

Collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor and the existence of any transactions that may be within the scope of provisions relating to avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI.

Powers to be exercised by Resolution Professional

What Powers are missing from CIRP



In CIRP – Financial institution to act on the instructions of the RP

In PPIRP – Financial Institution shall furnish all information relating to the CD with RP

Claims and Preliminary Information memorandum

Within **two days** from PPIRP commencement date, CD has to provide

- Preliminary information memorandum containing information relevant for formulating a resolution plan (Refer Regulation – 40)

and

- List of claims along with details of the respective creditors, their security interests and guarantees (Form - P10)

Within **fourteen (14) days** of Commencement of PPIRP resolution professional shall finalise the information memorandum and submit it to members of the committee



Claims and Preliminary Information memorandum

Contents of Preliminary Information Memorandum

assets and liabilities with such description, as are generally necessary for ascertaining their values.

the latest annual financial statements;

audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year

a list of claims containing the names of creditors, the amounts of their claims and the security interest, if any, in respect of such claims

particulars of a debt due from or to the corporate debtor with respect to related parties;

Claims and Preliminary Information memorandum

Contents of Preliminary Information Memorandum

details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party

the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

the number of workers and employees and liabilities of the corporate debtor towards them;

other information, which the corporate debtor or resolution professional deems relevant to the committee.

Claims and Preliminary Information memorandum

Claims – Regulation 20

The corporate debtor shall submit a list of claims in Form P10 to RP

shall confirm the details received in Form P10 based on records

RP shall inform every creditor regarding its claims and seek objections

A creditor may submit objection along with supporting documents to RP

may call for such other evidence or clarification as he deems fit

RP shall consider every objection received and make suitable changes in form P10

RP shall maintain a list of claims in Form P10 and update it

Claims and Preliminary Information memorandum

Claims (Form P10) shall be

- a. available for inspection by the creditors, members, partners, directors and guarantors of the corporate debtor
- b. displayed on the website, if any, of the corporate debtor
- c. filed with the Board on electronic platform;
- d. Presented at the meetings of the committee, as and when updated.



Committee of Creditors

- a. CoC shall be constituted **within seven days** of commencement of PPIRP by RP based on list submitted u/s 54F
 - b. The first meeting of CoC shall be held **within seven days** of its constituents
 - c. Where the corporate debtor has no financial debt or all financial creditors are related parties, the committee shall consist of operational creditors, being not related to the corporate debtor
 - ten largest operational creditors by value
 - one representative elected by all workmen
 - one representative elected by all employee
 - d. The committee of creditors shall comprise all financial creditors of the corporate debtor – (section 21)
 - e. Related Party of Corporate Debtor shall not have any right of representation, participation or voting in a meeting of the committee of creditors:
 - f. Where a Person is a financial creditor as well as an operational creditor – then each of them shall be separately considered
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Committee of Creditors


- g. Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor
- h. Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors
- i. The committee of creditors shall have the right to require the resolution professional



Vesting of Management – Section 54J

Condition	Committee of Creditors	Adjudicating Authority	Application of section -
<ul style="list-style-type: none"> The affairs of the corporate debtor have been conducted in a fraudulent manner or There has been gross mismanagement of the affairs of the corporate debtor 	<ul style="list-style-type: none"> CoC may pass resolves to vest the management of the corporate debtor with the resolution professional by a vote not less than sixty-six per cent 	<ul style="list-style-type: none"> It shall pass an order vesting the management of the corporate debtor with the resolution professional 	<ul style="list-style-type: none"> sub-sections (2) and (2A) of section 14 section 17 Clauses (e) to (g) of section 18 sections 19 and 20 Sub-section (1) of section 25 clauses (a) to (c) and clause (k) of sub-section (2) of section 25 and

Management of Affairs of Corporate Debtor - Section 54H

- a. the management of the affairs of the corporate debtor shall **continue to vest in the Board of Directors** or the partners, as the case may be, of the corporate debtor, subject to such conditions as may be specified;
 - b. the Board of Directors or the partners, as the case may be, of the corporate debtor, **shall make every endeavour to protect and preserve the value** of the property of the corporate debtor, and manage its operations as a going concern; and
 - c. the promoters, members, personnel and partners, as the case may be, of the corporate debtor, **shall exercise and discharge their contractual or statutory rights and obligations** in relation to the corporate debtor, subject to the provisions of this Chapter and such other conditions and restrictions as may be prescribed.
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Approval of Resolution Plan

Some Basic definitions

- a. Section 5 (2A) “base resolution plan” means a resolution plan provided by the corporate debtor under clause (c) of sub-section (4) of section 54A
 - b. Section 5(25) “resolution applicant” means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25 2 [or pursuant to section 54K, as the case may be];
 - c. Section 5(26) “resolution plan” means a plan proposed by 3 [resolution applicant] for insolvency resolution of the corporate debtor as a going concern in accordance with Part II 4 [Explanation.- For removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger,
 - d. **basis for evaluation**, includes the parameters to be applied and the manner of applying such parameters, as approved by the committee, for evaluating a resolution plan to assign a score to the plan, and disclosed in the invitation for resolution plans.
 - e. **significantly better** in relation to resolution plan, means that the score of the resolution plan is higher than that of another resolution plan by a certain number or percentage, as approved by the committee and disclosed in the invitation for resolution plans
 - f. **tick size** means minimum improvement over another resolution plan in terms of score, as approved by the committee and disclosed in the invitation for resolution plans.
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Approval of Resolution Plan

- a. The corporate debtor shall submit the base resolution plan to RP within **two days** of commencement of PPIRP
- b. The resolution professional **shall present** it to the committee of creditors
- c. Resolution Plan **shall conform** to the requirements referred to in sub-sections (1) and (2) of section 30 and Section 30 (1), (2) and (5) shall apply mutatis mutandis
- d. Where the base resolution plan **impairs any claims** owed by the corporate debtor to the operational creditors
 - or
 - the committee of creditors **does not approve** the base resolution plan under subsection – the resolution professional shall invite prospective resolution applicants to submit a resolution plan or plans
- e. Then, the resolution professional shall publish brief particulars of the **invitation for resolution plans in Form P11** not **later than twenty-one days** from PPIRP commencement date
- f. Last date of submission of resolution must be **within 15 days** from date of publication for invitation of resolution plan

Approval of Resolution Plan

- f. RP with the approval of CoC may **lay down criteria based on complexity and scale of operations** of the business of the corporate debtor and such other conditions
 - g. The resolution professional shall provide to the resolution applicants,
 - the **basis for evaluation** of resolution plan or
 - the relevant information referred to in section 29
 - h. RP shall present to the committee of creditors all Resolution plans if they **confirm to requirement under section 30 (2)**
 - i. CoC shall evaluate the resolution plan and select the amongst them on basis of basis for evaluation
 - j. The resolution plan selected, is **significantly better than the base resolution plan**, such resolution plan may be selected for approval
 - k. If the resolution plan selected is **not significantly better than the base resolution plan** or such resolution plan is not selected for approval – then Base resolution Plan and other resolution plan compete with each by a tick size.
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Approval of Resolution Plan

- l. The above process of competing one needs to be completed by **48 hours**.
- m. The approval of resolution Plan shall be by vote of **not less than 66%** after considering its
 - feasibility and visibility,
 - the manner of distribution proposed,
 - taking into account order of priority amongst creditor as laid u/s 53(1)
- n. Resolution Professional shall submit** the approved Resolution plan to AA
- o. AA within thirty days of the receipt of** such resolution plan, by order, approve the resolution plan
- p. where the Adjudicating Authority has passed an order under sub-section (2) of section 54J
and
the resolution plan approved by the committee of creditors , does not result in the change in the management or control of the corporate debtor to a person who was not a promoter or in the management or control of the corporate debtor
 - rejecting such resolution plan
 - terminating the PPIRP
 - Order for liquidation
 - declaring that the pre-packaged insolvency resolution process costs, if any, shall be included as part of the liquidation costs

Termination of Resolution Plan

If resolution professional files an application with the Adjudicating Authority

- a. under the proviso to sub-section (12) of section 54K; or
- b. under sub-section (3) of section 54D,

the Adjudicating Authority shall, within thirty days

- terminate the pre-packaged insolvency resolution process;
and
- provide for the manner of continuation of proceedings initiated for avoidance of transactions under Chapter III or proceedings initiated under section 66 and section 67A, if any



Thank You

CA. Pramod Srihari, IP

