

**“Pre - Packed Insolvency”  
A Cost Efficient Resolution  
Mechanism with the  
Binding Rigor of IBC**

**JULY**  
**2020**

Valuation  
Investment Banking  
Restructuring  
Transaction Services  
Transaction Tax



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# Executive Summary

# 1

## Executive Summary

- The erstwhile Distress Debt Resolution Mechanisms including CDR/SDR/S4A had proved to be inefficient in delivering desired results & cleansing Bank's Balance Sheets.
- IBC was introduced to replace the erstwhile mechanisms, however, it was soon found to be too aggressive, as most resolutions under IBC were taking place close to Liquidation Value.
- RBI then in June 2019, came out with a Prudential Framework for Distress Resolution, and now the options are open to lenders to use either or both the above resolution mechanisms.
- A more innovative mechanism for Distress Debt Resolution, which is prevalent in Western Countries is Pre-packaged insolvency or more colloquially, "**Pre-Pack**".
- In Indian context, you can say that **Pre-Pack** captures the best of both Worlds i.e. (a) the economic and low cost advantage of "June 2019 Circular", and (b) Legally Binding & Court Approval advantage of the IBC
- Under **Pre-Pack**, the terms of resolution are pre-negotiated and finalized prior to filing for insolvency with the court. After court approval, the plan gets implemented through IBC and is binding on all stakeholders.
- We hope that India too shall embrace this mechanism. In cases especially where S:29A is not yet triggered, **Pre-Pack** can be carried out much faster and is relatively less costly, as the existing promoter continues to be in control of business.

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## Executive Summary

- The Provisions under IBC along with the recent Court pronouncements on the interpretation of some of these provisions, now ensures that IBC provides the maximum safeguard to both the Lenders & Investors for resolving distressed CDs.
- Most prominent benefits under IBC, due to which, even through Debt Resolution is pre-negotiated under Pre-Pack, both Lenders & Investors are incentivized to proceed through IBC, are as follows:

### Safeguards from Resolution Applicants (RA/Investors) Perspective

#### A New Lease of Life to the Corporate Debtor (CD)

RA may be permitted for various reliefs and concessions as part of resolution plan, including:

Extinguishment of all Litigations against CD

Settlement of all Statutory dues

Waiver of all penalties and fines levied by various authorities including ROC, SEBI

Suspension of all investigations pertaining to the period prior to the approval of plan

All approvals for capital reduction is deemed to be obtained

Carry forward losses of CD under Income tax act are deemed to be allowed to the RA

# 1

## Executive Summary

### No Liability/Penalty/Prosecution against RA for Pre-Acquisition Offences

- **Section 32A of the IBC Code Provides Relief:** Any liability of CD for an offence committed prior to commencement of the CIRP shall CEASE.
- **No action can be taken against the property of CD** in relation to an offence committed prior to the commencement of CIRP.
- **Recent judgement,** Hon'ble NCLAT provided immunity to **JSW Steel (Successful Resolution Applicant for Bhushan Power)** by rejecting litigation related to seizing of assets by Enforcement Directorate (ED) under the Prevention of Money Laundering Act, 2002 (PMLA).

### Approved Resolution Plan is the Final Word – Period!!

- Section: 31 of IBC: If the resolution plan as approved by COC under S:30(4) meets the requirements as referred to S:30(2), such Resolution Plan shall be binding on the CD, its employees, members, creditors, including Govt. or any local authority to whom any amount is due, arising under any law for the time being in force.
- Recent Judgement, Hon'ble Rajasthan High Court allowed petition of Ultra Tech Cement (Successful Resolution Applicant of Binani Cement) seeking immunity against tax department demanding towards old tax dues. This decision upheld the provisions of section 31 of the code.

### Immunity for Seeking Approvals

- **Section 31 of IBC:** Provides that Resolution Applicant shall obtain necessary approval required under any law within a period of one year from the date of approval of the plan or within such period as provided for in such law, whichever is later.
- Whereas for restructuring outside IBC, there is no such immunity for approval related compliance. Instead, approvals are put in as a Condition Precedent, for restructuring to be effective.
- IBC provides this immunity, for business to continue without any hindrance.

# 1

## Executive Summary

### Safeguards from Committee of Creditors (Lenders) Perspective

#### Time Bound Process

Section 12 of the Code states that the CIRP shall be completed within a period of 180 days from the date of admission and AA can grant one-time extension of 90 days. These clear time lines give confidence to Lenders to resolve their distress assets.

#### Moratorium

**Section 13 & 14 of the Code** provides for moratorium on:

- Proceedings against CD in any court of law;
- transferring, encumbering or disposing off the assets of CD;
- foreclosure, recovery or enforcement of security interest under SARFESI Act, 2002;
- Recovery by owner or lessor of any property occupied by CD;

These moratoriums preserve the Going Concern ability of the CD, even when under Distress.

#### COC in Control

**Section 13 & 14 of the Code** provides for moratorium on:

- Resolution Plan approval process works on idea of “Creditors in Control”.
- As per provisions of the Code, Commercial Wisdom of CoC cannot be challenged in Court.

# 1

## Executive Summary

The Indian Insolvency Law has undergone several amendments since its inception in 2016 to keep pace with the changing landscape and pre-pack will be a major step in the direction of continuous evolution.

The workload of overburdened NCLT would be significantly reduced as there would be reduction in unnecessary pleas from stakeholders during proceedings.

The pre-packaged insolvency resolution scheme would drastically reduce the timeline for corporate insolvency resolution process thereby saving time, money and resources.

Recently, the insolvency law committee was reconstituted to deliberate on the functioning and implementation of the Code, and in this regard, the ministry of corporate affairs had invited comments on implementation of pre-pack in India. It was also recently reported that a panel headed by former SEBI chairman UK Sinha is deliberating on the framework and it is expected that legislation may soon follow.



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# What is Pre-Pack?

# 2

## What is Pre-pack?

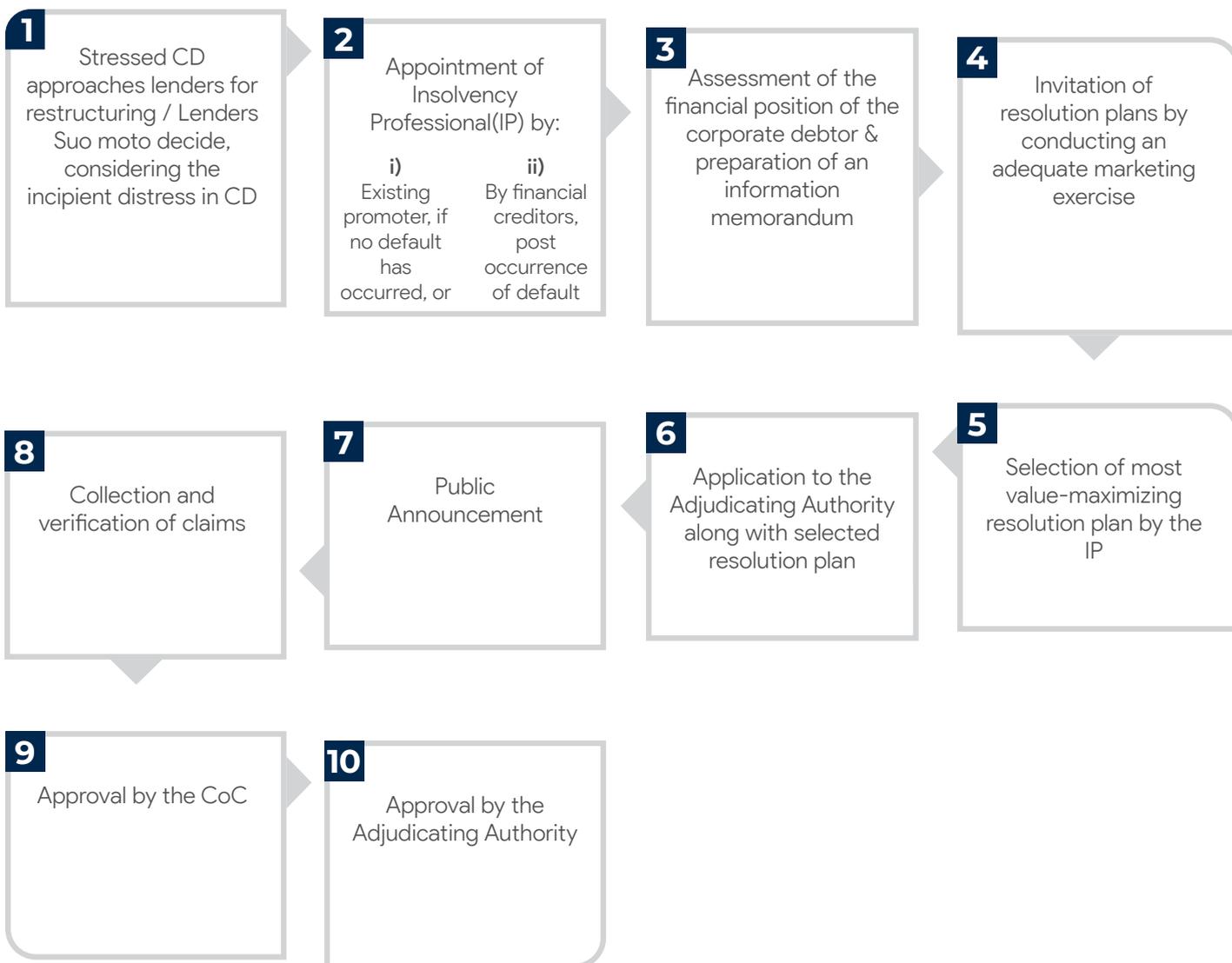
- A **“Pre-packaged Insolvency Mechanism”** “a troubled company and its creditors conclude an agreement in advance of statutory administration procedures” which “allows statutory procedures to be implemented at maximum speed.”
- Often, the resolution process under IBC can be unpredictable on account of suspense over availability of prospective resolution applicants, continuation of business of debtor, availability of interim finance, disagreement over valuations, potential litigation and delays. Pre-packs would offer additional benefits, such as, it would enable the corporate debtors and financial creditors to negotiate and agree on a plan to resolve the insolvency of the corporate debtor with a prospective resolution applicant, without first commencing the insolvency resolution process under the Code.
- In cases where such a pre-negotiated plan is submitted, the corporate debtor is allowed to remain in possession of the business, under the oversight of an independent insolvency professional, which helps in prevention of business disruption.
- Pre Pack is more prevalent in western countries. We hope that India too shall embrace this mechanism. In cases especially where S:29A is not yet triggered, Pre-Pack can be carried out much faster and is relatively less costly, as the existing promoter continues to be in control of business.

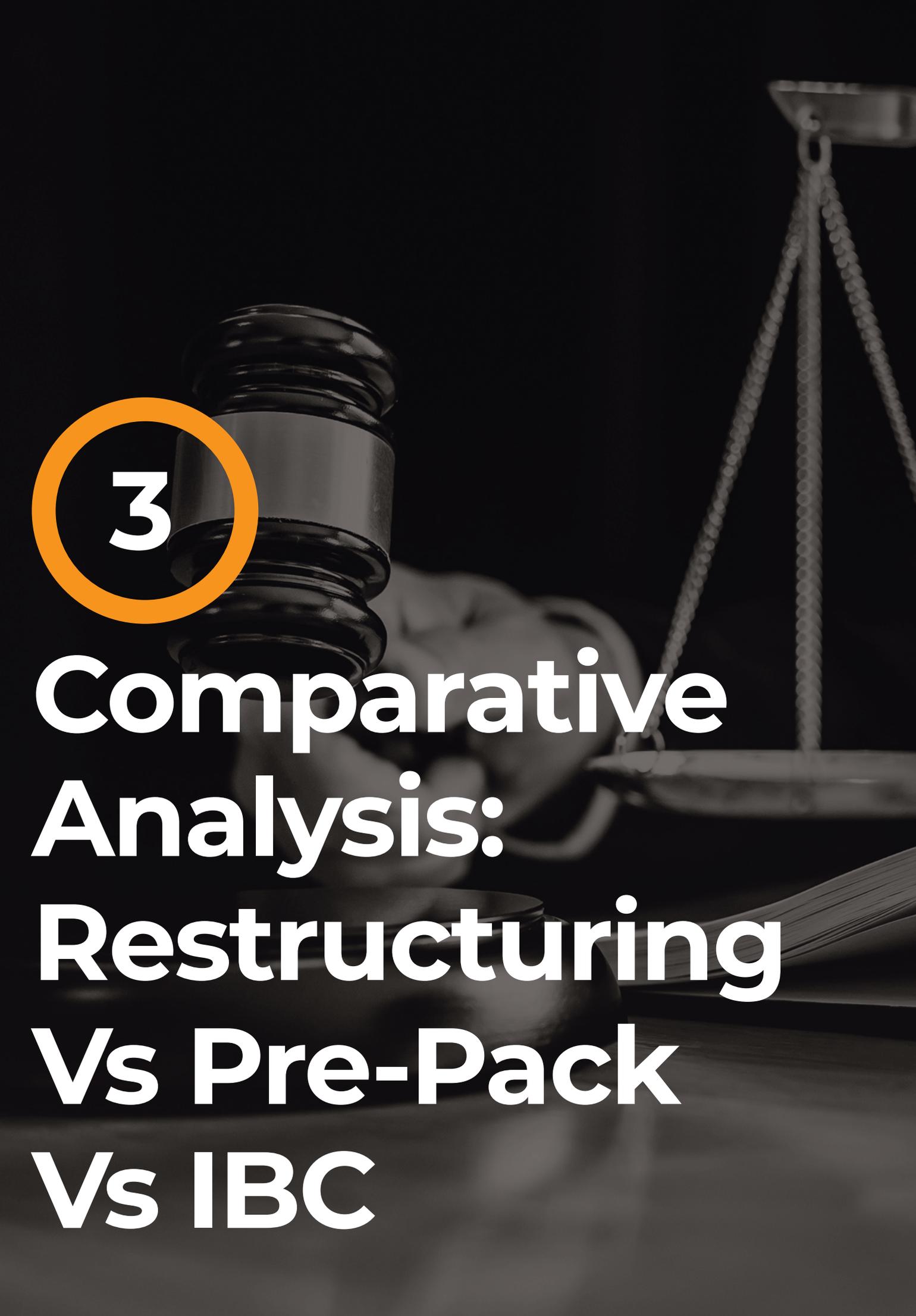


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## What is Pre-pack?

• A brief outline of the pre-pack plan can be described as follows:





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# **Comparative Analysis: Restructuring Vs Pre-Pack Vs IBC**

# Comparative Analysis: Restructuring vs Pre-Pack vs IBC

Parameters	Restructuring under RBI June 7 2019 Circular	Pre-Pack Resolution	IBC,2016
Parameters	Limited restraint	Limited restraint	Restraint
Extensive Resolution	Focus is on Bank Debt	Additional category of liabilities can also be resolved	Focus is on all liabilities including statutory liabilities – all stakeholders approach
Management Control	Remains with existing Management	Remains with existing management	Control moves to financial creditors through resolution professional
Cost	Low	Low	High
Process Time	Varies from medium to high	Varies from low to Medium	High
Availability of time for preparation of appropriate resolution	Generally available	Generally available	May not be available

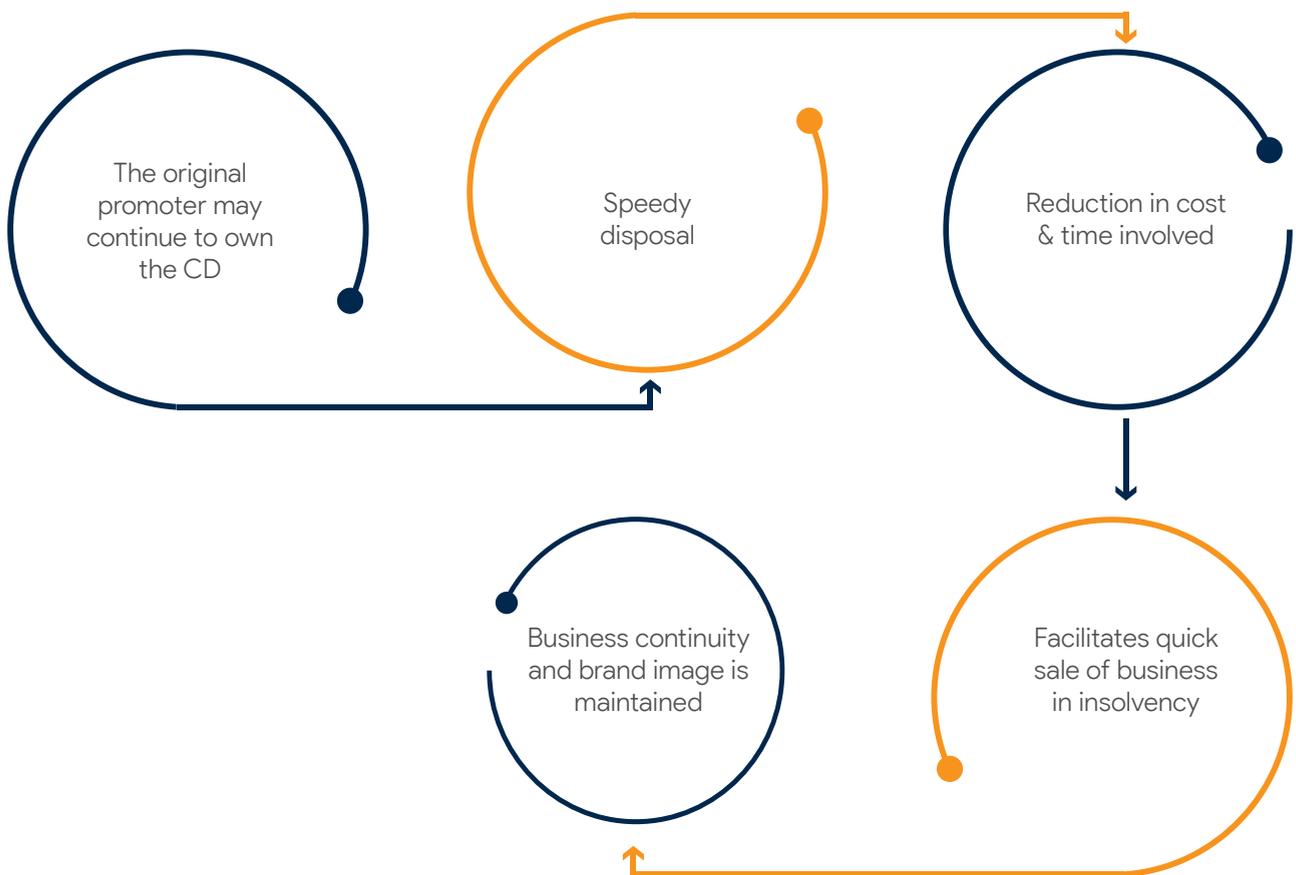


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# Advantages of Pre-Pack

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# Advantages of Pre-Pack



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# Advantages of Pre-Pack

Where a CD has not been an NPA for more than a year and Section:29A of the IBC is not yet triggered:

Company will be continued to be owned by **existing promoters** and that can result into saving of jobs as well as relationship with key suppliers and other stakeholders.

Existing Promoters can rope in **private equity or stressed asset funds to infuse liquidity** in the business as a part of restructuring

The **Promoter team can work with specialist turnaround and financial restructuring advisors** to conduct business diagnostic study, distress fund raising, strategic partner induction, restructuring plan preparations and negotiations with lenders.

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# Advantages of Pre-Pack

## Advantages under Pre-Pack whether or not Section 29A under IBC is triggered or not:

- The pre-pack plans can maximize value by **speedy disposal**, which also **reduces the total cost involved in the process**.
- Often, public announcement of insolvency news impacts CD's operations and creates a negative image among public at large. Pre-packs resolve this shortcoming as it often **avoids the adverse publicity**.
- When a company enters into insolvency, it can often take months for its creditors to receive any payment. Pre-pack administration **allows a business to free up cash and pay its creditors relatively quickly**.
- With a successful pre-packaged deal, the **relationship between Company and its creditors can often be protected**.
- As a large part of the pre-pack process takes outside the statutory process, confidentiality can be maintained which in turn **prevents value destruction**.
- As pre-pack plan needs **to be approved by court of law**, it is legally binding on all the parties along with being a out-of-court settlement, thereby combining the best of both worlds.

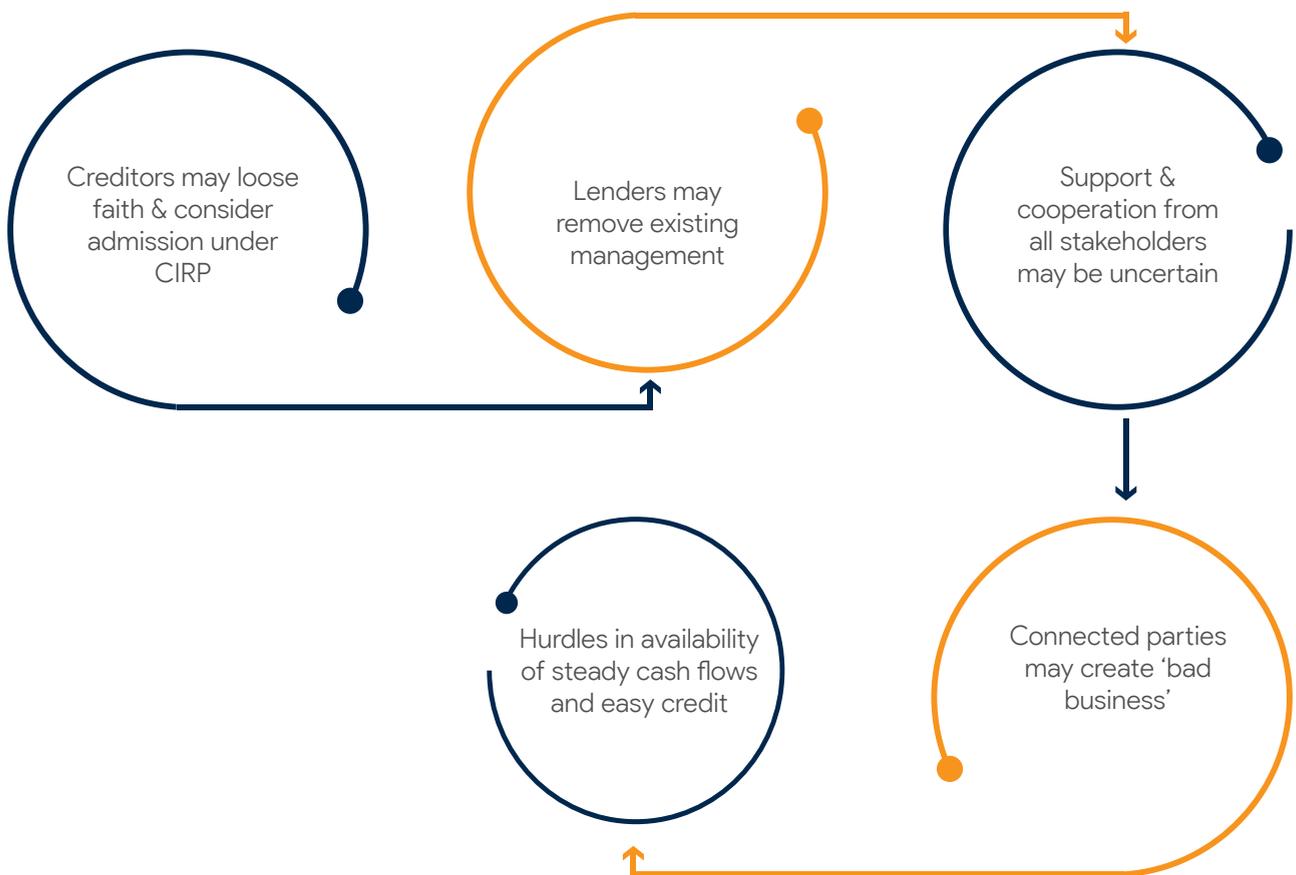


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# Concerns Regarding Pre-Pack

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# Concerns Regarding Pre-Pack



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# Concerns Regarding Pre-Pack

- An underlying risk is that the creditors might lose faith during pre-pack negotiations and consider admission under CIRP to seek price discovery.
- Further in cases of wilful default or fraudulent transactions, the lenders would prefer to change the management at the first instance and might immediately trigger CIRP.
- In cases where connected parties purchase the business of the debtor through a pre-pack sale, there is a concern that lack of transparency may result in creation of 'bad business' without allowing for a genuine restructuring or exit of the debtor.





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**Conclusion**

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## Conclusion

- The Indian Insolvency Law has undergone several amendments since its inception in 2016 to keep pace with the changing landscape and pre-pack will be a major step in the direction of continuous evolution.
- The workload of overburdened NCLT would be significantly reduced as there would be reduction in unnecessary pleas from stakeholders during proceedings.
- The pre-packaged insolvency resolution scheme would drastically reduce the timeline for corporate insolvency resolution process thereby saving time, money and resources.
- Recently, the insolvency law committee was reconstituted to deliberate on the functioning and implementation of the Code, and in this regard, the ministry of corporate affairs had invited comments on implementation of pre-pack in India. It was also recently reported that a panel headed by former SEBI chairman UK Sinha is deliberating on the framework and it is expected that legislation may soon follow.

# Services

## Valuation

- Business & Equity Valuation
- Valuation of Brands, Goodwill, Other Intangible Assets & Intellectual Property
- Valuation of Financial Securities, Instruments & Derivatives
- Valuation of Industrial Assets and Plant & Machinery
- Valuation of Real Estate
- Valuation of Infrastructure Assets & Specialized Assets
- Purchase Price Allocations (PPA) for Mergers & Acquisition (M&A)
- Impairment Studies for Tangible Assets
- Impairment Studies for Cash Generating Units, Intangible Assets & Goodwill
- Mines, Mineral Advisory and Valuation
- Valuation of ESOPs and Sweat Equity
- Valuation for Tax, Transfer Pricing and Company Law Matters
- Fairness Opinions
- Valuation under Insolvency & Bankruptcy Code (IBC)
- Determination of Swap Ratio under Mergers and Demergers
- Valuation of Inventory / Stocks and Debtors / Receivables
- Litigation and Dispute Valuation Services

## Risk Consulting

### Strategic Risk Advisory Services

- Techno Economic Feasibility Studies & Viability assessment
- Business Plan Review

### Technical Support Services

- Lender's & Investor's /Independent Engineer Services
- Technical Due Diligence, Technical Opinions
- Chartered Engineers Opinion & Certification
- Project Cost Investigation and Monitoring

### Agency for Specialized Monitoring (ASM)

- Term Loan, Working Capital and Cash Flow Monitoring

### Financial & Treasury Risk Advisory

- Assessment of risks – ALM, Credit, Market, Interest Rate & Liquidity Risk
- Asset Quality Review & Stress Testing
- Assessment of Expected Credit Loss

### Business Risk Advisory

- Internal audits, Process and Internal Financial controls review
- SOP, policies and Authority level matrix development
- Supply chain improvement and Working capital optimization
- Enterprise Risk Management
- Regulatory compliance review

## Dispute & Litigation Support

- Valuation Services
- Damages & Loss of Profit Analysis
- Independent Expert testimony
- Anti-trust & Competition Advisory
- Post-Acquisition Disputes, Joint Venture & Shareholder Disputes
- Civil & Construction Disputes, Real Estate Disputes
- Intellectual Property Rights Dispute

## Investment Banking

(Category 1 Merchant Bank)

- M&A Advisory:
  - Sell Side & Buy Side
  - Domestic & Cross Border
- Partner Search, Joint Ventures & Strategic Alliances
- Government Disinvestment & Privatization
- Fund Raising – Equity, Mezzanine, Structured Finance & Debt (Corporate & Project Finance)
- Distressed Investment Banking – One-Time Settlement, Priority and Interim Funding, Rescue Financing, and Buyouts
- Capital Market Advisory

## Transaction Services

- Buy side due diligence and closing due diligence
- Vendor due diligence and vendor assistance
- Setting up and managing dataroom
- Advice on sale and purchase agreements (SPA) and business transfer agreements (BTA)
- Assistance in deal negotiation

## Transaction Tax

### Deal Tax Advisory (Strategic, IBC, PE/VC)

- Tax Due-Diligence
- Tax Structuring
- Deal Negotiation Review
- Transaction Documentation Review
- Post-Deal Integration

### Corporate Restructuring

- Group Restructuring
- Financial/Capital Restructuring

### Succession Planning

### Holistic Implementation Support

- Merger/Amalgamation
- Demerger/Spin-off
- Capital Reduction
- Share Buyback
- Business Transfers
- Liquidation/Wind-up

## Restructuring

- Insolvency Professional Services
- Assistance in the preparation of Resolution Plan
- Independent Bid Evaluation of Restructuring Proposals
- Process Advisor
- Advisor to Committee of Creditors / Creditor Advisory
- CRO services – Chief Restructuring Officer
- Priority and Interim Funding
- Turnaround Advisory and Business Transformation
- Interim Management Services



# Contact Us

## Management

**Rajeev R. Shah**  
Managing Director & CEO  
+91 79 4050 6070  
rajeev@rbsa.in

**Manish Kaneria**  
Managing Director & COO  
+91 79 4050 6090  
manish@rbsa.in

**Mitali Shah**  
Managing Director  
+91 79 4050 6050  
mitali@rbsa.in

**Ravishu Shah**  
Managing Director  
Financial Advisory Services  
+91 22 6130 6093  
ravishu.shah@rbsa.in

**Ravi Mehta**  
Managing Director & Head  
Transaction Tax  
+91 22 6130 6052  
ravi.mehta@rbsa.in

**Chetan Khandhadia**  
Managing Director & Head  
Transaction Services  
+91 22 6130 6095  
chetan.khandhadia@rbsa.in

**Ajay Malik**  
Managing Director & Head  
Investment Banking  
+91 22 6130 6015  
ajay.malik@rbsa.in

## Project Team

**Darshan Shah**  
+91 79 4050 6074  
darshan.shah@rbsa.in

**Mahendra Pamnani**  
+91 079 4050 6072  
mahendra.pamnani@  
rbsa-advisors.com

**Durva Raval**  
+91 079 4050 6022  
durva.raval@rbsa.in

## India Offices

**Mumbai**  
1121, Building No. 11, 2<sup>nd</sup> Floor,  
Solitaire Corporate Park, Chakala,  
Andheri Kurla Road, Andheri (E),  
Mumbai - 400 093  
Tel: +91 22 6130 6000

**Delhi**  
2<sup>nd</sup> Floor, IAPL House,  
23 South Patel Nagar,  
New Delhi - 110 008  
M: +91 99585 62211  
Tel: +91 11 2580 2300

**Kolkata**  
9<sup>th</sup> Floor, KAHM Tower,  
13, Nellie Sengupta Sarani,  
Kolkata - 700 087  
Tel: +91 33 460 34731

## Global Offices

**Dubai**  
2001-01, Level 20, 48 Burj Gate Tower,  
Downtown, Sheikh Zayed Road,  
PO Box 29734, Dubai, UAE  
M: +971 52 382 2367  
+971 52 617 3699  
Tel: +971 4518 2608  
Email: dubai@rbsa.in

**Ahmedabad**  
912, Venus Atlantis Corporate Park,  
Anand Nagar Road,  
Prahladnagar,  
Ahmedabad - 380 015  
Tel: +91 79 4050 6000

**Bengaluru**  
104, 1<sup>st</sup> Floor, Sufiya Elite,  
#18, Cunningham Road,  
Near Sigma Mall,  
Bangalore - 560 052  
M: +91 97435 50600  
Tel: +91 80 4112 8593

**Hyderabad**  
202, 2<sup>nd</sup> Floor, Shangrila Plaza,  
Road No. 2, Opposite KBR Park,  
Banjara Hills,  
Hyderabad - 500 034  
M: +91 90526 60300  
Tel: +91 40 4854 6254

**Singapore**  
105 Cecil Street,  
# 22-00 The Octagon,  
Singapore - 069 534  
M: +65 8589 4891  
Email: singapore@rbsa.in