

APP comments/suggestion on Recommendations of Sub-committee of ILC on Pre-packaged Insolvency Resolution Process

1. Claim collection and verification

Existing Stipulation under CIRP	Proposed Under Pre-Pack	APP Suggestion	Rationale for suggestion
<ul style="list-style-type: none"> • Interim Resolution Professional (IRP) calls for submission of claims • Onus to submit claim lies with respective creditor • Submission of wrong or misleading claim attracts penalty • IRP verifies each claim 	<ul style="list-style-type: none"> • Company to compile list of o/s claims (incl. contingent & future) - to be certified by Chairman/MD • RP seeks confirmation of claims from each creditor • Chairman/MD held personally liable in case of any omission of claim/material information and is subjected to criminal liability 	<ul style="list-style-type: none"> • Chairman/MD should not be subjected to criminal liability. Instead, in line with Companies act, penalty may be imposed for any deliberate misrepresentation • Company can provide list of claims (provisions and contingent) subject to best of its knowledge. Compilation of future and disputed claims should be excluded. 	<ul style="list-style-type: none"> • Company compiles list of claims (incl. provisions and contingent liabilities) as per books of account. However, ascertaining future/determination of disputed claims is impractical and should be excluded. • Further, books of account are already certified by directors, hence requirement of certification by Chairman/MD would be repetitive. • Moreover, verification/conformation of claim with creditors is carried out by RP • Notwithstanding above, Pre-pack allows creditors to submit claims once public announcement is made • Hence, subjecting Chairman/MD to criminal liability is an extraneous step and would discourage Pre-pack process. Instead, a penalty may be imposed in case of any deliberate misrepresentation

2. Information Memorandum

Existing Stipulation under CIRP	Proposed Under Pre-Pack	APP Suggestion	Rationale for suggestion
<ul style="list-style-type: none"> RP takes over the management of company during resolution process and compiles the IM 	<ul style="list-style-type: none"> Company to prepare draft IM which is certified by Chairman/MD RP prepares final IM Chairman/MD personally liable for omission or wrong information 	<ul style="list-style-type: none"> Chairman/MD should not be held personally liable for any future projections in IM Lenders should validate the future projections through TEV study 	<ul style="list-style-type: none"> In both process, RP prepares final IM. Company provides claim details to RP, and consequence for any deliberate misrepresentation are dealt with in respective section. However, Company cannot be held liable for any future projections Further, lenders are better positioned to decide on future projections and can get the same reviewed/validated through TEV study. Hence, subjecting Chairman/MD to personal liability for any future projections is an extraneous step and would discourage Pre-pack process

3. Timelines

Existing Stipulation under CIRP	Proposed Under Pre-Pack	APP Suggestion	Rationale for suggestion
<ul style="list-style-type: none"> 180 days + one time extension of 90 days 	<ul style="list-style-type: none"> 90 days from Insolvency commencement date for filing RP with NCLT 30 for approval by NCLT 	<ul style="list-style-type: none"> Time line for approval from NCLT may be extended from 30 to 60 days 	<ul style="list-style-type: none"> Due to limited bench strength, 30 days timeline for approval would be challenging Further, once application filing under CIRP resumes, existing benches would be overburdened, leading to further delays

4. Section 29A Compliance

Existing Stipulation under CIRP	Proposed Under Pre-Pack	APP Suggestion	Rationale for suggestion
<ul style="list-style-type: none"> Existing promoters are not eligible to submit resolution plan 	<ul style="list-style-type: none"> Pre-pack retains 29A compliance, barring existing promoters from submitting resolution plan 	<ul style="list-style-type: none"> Unless there is evident malfeasance or willful default by promoters, they should be allowed to submit resolution plan by providing a carve out u/s 29A (c) 	<ul style="list-style-type: none"> Committee has recognized that stress in account may not be due to fault of promoters, and could be due to extraneous factors beyond control of promoters. In such case, promoters should not be punished by excluding from submission of resolution plan. Unless there is malfeasance or willful default by existing promoters, they should be allowed to submit resolution plan. <ul style="list-style-type: none"> RBI maintains database of willful defaulters which may be utilized for this purpose. Further, implementation of Pre-pack process hinges on active participation of existing management. In fact they are better equipped in resolving the asset. Hence, exclusion of existing promoters from submission of resolution plan would defeat the very genesis of Pre-pack process, and process would not take off.

5. Swiss challenge

Existing Stipulation under CIRP	Proposed Under Pre-Pack	APP Suggestion	Rationale for suggestion
<ul style="list-style-type: none"> No provision, only open bidding 	<ul style="list-style-type: none"> In case base resolution plan reduces claims of operational creditor, then Pre-pack is subjected to Swiss challenge 	<ul style="list-style-type: none"> Since the intent of pre-pack is to provide opportunity to existing management to continue, Swiss challenge step should be done away with as one can arrive at the valuation based on the fair value of asset ascertained by the valuer. Alternatively, only undisputed OC claims should be considered for Swiss challenge process <ul style="list-style-type: none"> H1 bid should be at least 20% higher than promoter offer, for being eligible for Swiss challenge Promotors should be given Right to Match and once exercised, Swiss challenge process should conclude. 	<ul style="list-style-type: none"> Pre-pack process pivots on active participation of company/promoters. If existing promoters face risk of losing control of asset, then the process would fail to take-off. Alternatively, only undisputed claims of OC should be the basis for initiating Swiss challenge The objective of Pre-pack is maximization of creditor claims while allowing existing management to continue. Therefore, once financial creditor have approved promoters' RP, Swiss challenge process should be designed in such a way that OC claims are fulfilled to the extent of H1 bid. Swiss challenge process should not encourage unfair practices. Hence, minimum threshold for H1 bid to become eligible under Swiss challenge should be 20%

Please refer overleaf for suggested Swiss Challenge process

Suggested Swiss challenge process

