

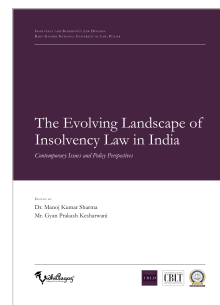
CHAPTER 5

From Ashes to Assets: Reimagining Phoenixing and Pre-Packs in India's Insolvency Framework

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CHAPTER 5

From Ashes to Assets: Reimagining Phoenixing and Pre-Packs in India's Insolvency Framework

ALISHA KHAN*

Insolvency frameworks in India, prior to the 2021 amendment, operated exclusively through the Corporate Insolvency Resolution Process (CIRP). The 2021 amendment introduced the Pre-Packaged Insolvency Resolution Process (PIRP), but its application is restricted to Micro, Small, and Medium Enterprises (MSMEs). A further amendment in 2018 introduced Section 240A of the IBC, exempting promoters of MSMEs from certain disqualifications under Section 29A. This paper examines how this legislative shift, brought in by the 2021 amendment together with the introduction of Section 240A, creates a potential loophole for MSMEs to exploit through phoenix activity. Phoenix activity — which may be technically legal or outright illegal but is commonly associated with the fraudulent re-acquisition of businesses by their own promoters — has created a regulatory space that enables promoters to re-acquire distressed businesses under PIRP with minimal scrutiny, often through undervalued resolution plans.

Part I of the paper argues that, despite the often minimal direct harm from MSME phoenixing given their limited assets and market presence, India's current complete disregard of this practice is problematic, particularly in light of cases involving larger entities like Essar Steel. This section therefore proposes a tailored regulatory framework for MSME phoenixing, asserting that accommodating controlled phoenixing or sales to connected parties within a broader economic framework can foster long-term wealth creation by supporting the notion of legitimate business failure.

Part II is concerned with the exclusivity of the amendment for MSMEs, rather than a liberal application of pre-packaged insolvency resolution processes to larger corporations as well. While the legislature's cautious approach stems from the possibility of misuse, market instability given the outsized impact of large corporations, and creditor harm, there is a complete disregard of possible positive outcomes such as job preservation, among others. The paper therefore proposes a carefully structured pre-pack regulatory framework to accommodate the merits of extending pre-packs to larger corporations, exploring how India can implement such a mechanism to harness the economic benefits while also safeguarding creditors and limiting liability evasion. The paper underscores how India's experience with MSMEs can serve as a regulatory sandbox, drawing inspiration from comparative models from the UK and Australia, where structured oversight of phoenixing — rather than outright prohibition — has proved successful.

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1 INTRODUCTION

India's insolvency framework has undergone a series of significant reforms since its inception, moving from complete reliance on the traditional Corporate Insolvency Resolution Process (CIRP) to a more efficient and inclusive toolkit in the form of the Pre-Packaged Insolvency Resolution Process (PIRP), introduced in 2021. In the aftermath of COVID-19, the country needed a more cost-effective, time-efficient, and accessible resolution path. The PIRP underscores the legislature's intentional departure from the usual creditors-in-control model, incorporating elements of debtor-in-possession while retaining creditor oversight. Yet its scope is seemingly narrow, confining itself exclusively to micro, small, and medium enterprises (MSMEs).

This reform did not occur in isolation. The earlier 2018 amendment to the Insolvency and Bankruptcy Code (IBC) introduced Section 240A, exempting MSMEs from disqualification under Section 29A. Together, these measures have created an environment in which promoters of MSMEs may re-acquire distressed businesses through PIRP without restriction — a dynamic that intersects directly with the controversial practice of phoenixing. While phoenixing can serve as a legitimate tool for preserving jobs and enterprise value when conducted transparently, its abusive form undermines creditor rights and public confidence.

This paper critically examines how the current framework creates a breeding ground for phoenixing activity, contrasting the treatment of MSMEs with that of larger corporations, and assessing whether the MSME exclusivity is justified. Drawing on comparative experiences from jurisdictions such as the UK and Australia, it analyses how targeted regulation — rather than blanket prohibition — can balance efficiency with accountability. By positioning India's PIRP as both a safeguard and a potential sandbox, the discussion extends to whether its benefits, particularly in job preservation, cost savings, and early intervention, merit expansion beyond the MSME sector, subject to robust oversight mechanisms.

2 PURPOSE OF THE PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (PIRP)

The IBC Amendment Ordinance of April 2021 was replaced by the Insolvency and Bankruptcy Code (Amendment) Bill 2021, introducing Chapter III, which solidified India's

transition from a creditors-in-control to a debtors-in-possession model.¹ However, this change is limited to MSMEs. The 2021 Amendment was introduced in the context of COVID-19, which precipitated widespread financial defaults and brought many businesses to a standstill; even though the pandemic has ended, similar circumstances persist due to rising global tensions.²

The introduction of PIRP aligns with the central objectives of the IBC, such as value maximisation of assets, reduction of litigation costs, and promotion of settlements. This is evident from the fact that 30,000 cases involving Rs 14 lakh crore of debt were settled over nine years, even before applications reached the National Company Law Tribunal (NCLT).³ Unlike the traditional CIRP, which operates within a 330-day statutory timeline, PIRP can only be initiated by the debtor and is designed to conclude proceedings expeditiously within 120 days.⁴ The process not only allows debtors to explore avenues that are cost-effective, less burdensome, and more flexible than court proceedings, but also permits them to retain possession and control over management throughout the resolution process.⁵

Thus, PIRP proposes a seamless amalgamation of out-of-court negotiations and formal proceedings before the NCLT. The reduced involvement of formal courts also addresses the limitations of the corporate insolvency process in India. In *Ruchi Soya Industries Limited*,⁶ the traditional CIRP approach led to a delay of approximately two years in obtaining approval for the resolution plan, highlighting the existing scarcity of resources, the substantial backlog, and systemic deficiencies. By comparison, Section 54K of the IBC under PIRP spares the debtor from the additional costs of a change in management, as it is a mutually agreed mechanism that allows the company to preserve the value of its assets and jobs, thereby ensuring goodwill and economic growth.⁷

¹ Hiteshkumar Thakkar & K. Agarwal, *Pre-Packaged — Integration of Debtor Centric Model with Creditor in Control Model: Indian Insolvency Regime*, 93 BANK QUEST 5, 5–16 (2022).

² Navolina Majumdar, *Pre-Packaged Insolvency Resolution Process for MSMEs — An Analysis*, Insights, KOCHHAR & CO., https://kochhar.com/wp-content/uploads/2021/10/Pre-packaged-Insolvency-Resolution-Process-for-MSMEs-An-Analysis_Insights_Indo-US-Desk_Dispute-Resolution_Oct-2021.pdf (last visited Aug. 8, 2025).

³ Crisil Ratings, *In Nine Years, IBC Helps Resolve Over Rs 26 Lakh Crore of Debt — Directly or Indirectly* (July 22, 2025), <https://www.crisilratings.com/en/home/newsroom/press-releases/2025/07/in-nine-years-ibc-helps-resolve-over-Rs-26-lakh-crore-of-debt-directly-or-indirectly.html>.

⁴ INSOLVENCY & BANKR. BD. OF INDIA, ANNUAL REPORT 2020–2021 (2021).

⁵ S. Deb & I. Dube, *Insolvency and Bankruptcy Code 2016: Revisiting with Market Reality*, 63 INT'L J.L. & MGMT. 125–46 (2021).

⁶ *Ruchi Soya Indus. Limited v. Joint Comm'r*, 2017 SCC OnLine Cal 6187.

⁷ Neeti Shikha & Urvashi Shahi, *Policy Inputs on Report of Subcommittee on Prepacks* (Centre for Insolvency and Bankruptcy, Indian Inst. of Corp. Affs. 2021), <https://iica.nic.in/images/Prepacks-in-India.pdf> (last visited Oct. 27, 2024).

3 SECTION 240A AND ITS EXEMPTIONS FROM SECTION 29A

While the debtor-in-possession principle at the core of PIRP is laudable for the preservation of MSMEs, its interaction with Section 29A requires re-examination. Under Section 29A, certain persons — including those disqualified from acting as directors and erstwhile promoters or management of a company — are barred from submitting a resolution plan under Section 30. The primary aim of this provision is to prevent those responsible for insolvency from participating in the resolution process.⁸ In *Chitra Sharma*, the Supreme Court observed that the legislative intent was to close the loophole and prevent backdoor entry, which could otherwise allow unscrupulous persons to be rewarded at the expense of creditors.⁹

Section 240A of the Code creates an exemption for MSMEs from Sections 29A(c) and 29A(h). This gives rise to the controversy surrounding the cut-off date, which is critical to availing the exemption under Section 240A.¹⁰ In *Hari Babu Thota*, the Supreme Court, while assessing the eligibility criteria under Section 29A, held that “the cut-off date for the application of Section 29A(c) would be the date of submission of the resolution plan.”¹¹ This case sets a precedent for the possibility, through textual interpretation, that erstwhile promoters may apply for an MSME certificate before the resolution process begins and obtain one during an ongoing CIRP. Critics contend that this reopens a “backdoor” previously closed by company law courts, as in *Digambar Anandrao Pingle*, where acquiring MSME status after the commencement of CIRP was held to be an improper attempt by suspended management to evade Section 29A’s strict prohibitions — prohibitions aimed at those who caused the corporate debtor’s financial difficulties — thereby threatening unjust enrichment at the expense of creditors.¹²

4 EMERGING CONCERNS: PHOENIXING RISKS

One of the few substantive discussions on phoenixing in India occurred when the possibility of such activity was considered by the Bankruptcy Law Reforms Committee (BLRC).¹³

⁸ Masad Khan, *MSME Exemption Under IBC: Closing the Loophole*, IRCCL (Jan. 28, 2024), <https://www.irccl.in/post/msme-exemption-under-ibc-closing-the-loophole>.

⁹ *Chitra Sharma v. Union of India*, (2018) 18 SCC 610.

¹⁰ *Id.*

¹¹ *In re Hari Babu Thota*, (2024) 242 Comp Cas 1; Masad Khan, *MSME Exemption Under IBC: Closing the Loophole*, INDIAN REVIEW OF CORPORATE & COMMERCIAL LAWS (Jan. 28, 2024), <https://www.irccl.in/post/msme-exemption-under-ibc-closing-the-loophole>.

¹² *Digambar Anandrao Pingle v. Shrikant Madanlal Zawar*, 2021 SCC OnLine NCLAT 1449; Masad Khan, *MSME Exemption Under IBC: Closing the Loophole*, INDIAN REVIEW OF CORPORATE & COMMERCIAL LAWS (Jan. 28, 2024), <https://www.irccl.in/post/msme-exemption-under-ibc-closing-the-loophole>.

¹³ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, IBC: EVOLUTION, LEARNINGS AND INNOVATION (2023), <https://www.iiipicai.in/wp-content/uploads/2023/10/IBC-Evolution-Learnings-and-Innovation.pdf>; INSOLVENCY

Given the limited domestic resources on this subject, the author has relied on existing frameworks and precedents from other jurisdictions.

Phoenix activity is not always objectively harmful; in some cases, it is genuine and entirely legal. However, many such cases are not undertaken to rehabilitate a failing enterprise but rather to exploit creditors by transferring vital assets to a New Company (NewCo) and placing the Old Company (OldCo) into insolvency proceedings. Since there is little left for creditors to recover from OldCo, the former management successfully avoids paying outstanding debts.¹⁴

To illustrate the distinction between legal and illegal phoenixing, consider two companies, A and B, both of which have significant outstanding liabilities but also hold valuable assets.

Company A appoints a neutral licensed insolvency practitioner who arranges a fair market-value sale of assets to a newly formed company (“NewCo”). The proceeds are paid into OldCo and distributed fairly among all creditors, including employees and the tax authority, before OldCo enters liquidation. This is a legitimate company rescue or pre-pack sale, conducted transparently to preserve jobs and maximise returns for stakeholders.

Company B’s directors — often acting on partial advice — transfer OldCo’s assets to a NewCo they also control, either at below-market prices or for no consideration, leaving OldCo with nothing. Creditors are left unpaid, and NewCo continues business using the same staff and premises. This is classic illegal phoenix activity, characterised by the transfer of assets “for little or no value” with the intent to defeat creditor interests.

Legal phoenixing is a fair and structured reset aimed at preserving value and providing returns to creditors. Illegal phoenixing is a covert scheme to evade debt and strip assets, giving rise to creditor disenfranchisement. The essential distinction lies in the deliberate intention to exploit the corporate form to the detriment of unsecured and secured creditors, the state, and competitive market conditions.¹⁵

A critical question surrounding corporate phoenixing is whether the practice is inherently harmful to creditors, even when undertaken without fraudulent intent. From a creditor’s perspective, the process may appear fundamentally problematic: valuable assets are transferred to a new, debt-free company, leaving the original entity unable to settle its liabilities, while the business owner preserves the enterprise under a new name.

LAW COMM., REPORT OF THE SUB-COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS 14–16 (Oct. 2020), <https://ibbi.gov.in/uploads/resources/24c7fc03cdffff69960ce374416fa646.pdf>.

¹⁴ Bhargavi Zaveri & Vinay Nair, *Promoter Buy-Back in Insolvency: Phoenixing in India*, OXFORD BUSINESS LAW BLOG (Dec. 6, 2017), <https://blogs.law.ox.ac.uk/business-law-blog/blog/2017/12/promoter-buy-back-insolvency-phoenixing-india>.

¹⁵ Helen Anderson et al., *Defining and Profiling Phoenix Activity* (Melbourne Law School, Dec. 10, 2014), https://law.unimelb.edu.au/files/dmfile/DefiningandProfilingPhoenixActivity_MelbourneLawSchool6.pdf.

However, this perspective often overlooks the practical alternative. The choice is rarely between phoenixing and the full repayment of debts; it is between phoenixing and terminal liquidation. Viewed through this lens, a legal and transparent phoenix transaction frequently emerges as the superior outcome for all stakeholders. It offers creditors a realistic prospect of partial recovery from the new, viable business — a prospect entirely extinguished in liquidation. Furthermore, this approach preserves enterprise value, saves jobs, and promotes entrepreneurial resilience, producing a far better socioeconomic result than a complete business collapse.

In legal phoenixing, through consent and fair value assessment of assets, debt can be restructured and operational creditors such as employees may continue in employment — even if not in precisely the same position they would have occupied had the company not failed. This approach has been shown to significantly preserve employment in the Netherlands and the United Kingdom.¹⁶

5 HOW THE CURRENT REGIME ENABLES PHOENIXING UNDER PIRP

The sub-committee's report on phoenixing risk explains that pre-packaged insolvency resolutions generally follow one of two paths.¹⁷ The first is a pre-pack sale, where the distressed company's business or assets are sold as a going concern to a third party or the existing owners. The second is a pre-pack reorganisation, which focuses on restructuring the company's existing debt and operations to restore financial viability.

The UK's pre-pack model is sale-oriented, which is fundamentally different from the reorganisation model employed by India's framework. Pre-pack sales carry a significant risk of phoenixing, as sales are generally made to connected parties — a feature that has attracted scrutiny and criticism from creditors.¹⁸ The Committee notes this distinction and, while cautioning against the possibility of phoenixing, emphasises that the risk is significantly lower under India's framework, since reorganisation is administered through a resolution plan with several safeguards, such as approval by over 66% of the Committee of Creditors (CoC) and a hybrid model combining debtor-in-possession with creditor-in-control.¹⁹

The Indian Insolvency and Bankruptcy Code (IBC) addresses the risk of illegal phoenixing differently for large corporations and smaller enterprises. For large companies,

¹⁶ Sandra Frisby, *A Preliminary Analysis of Pre-packaged Administrations*, in INSOL EUROPE ACADEMIC CONFERENCE 40–47 (2006).

¹⁷ INSOLVENCY LAW COMM., *supra* note 13.

¹⁸ Sandra Frisby, *A Preliminary Analysis of Pre-packaged Administrations*, in INSOL EUROPE ACADEMIC CONFERENCE 40–47 (2006).

¹⁹ Neil Kothari & Nidhi Agarwal, *Pre-Packaged Insolvency: A Maiden Affair to Rescue the MSME*, NLIU CBCL BLOG (Apr. 2, 2021), <https://cbcl.nliu.ac.in/insolvency-law/pre-packaged-insolvency-a-maiden-affair-to-rescue-the-msme/>.

Section 29A acts as a powerful deterrent by disqualifying promoters and related parties from bidding for the distressed company.²⁰

However, this critical safeguard is effectively neutralised for MSMEs.²¹ The 2018 amendment introduced Section 240A, which exempts MSMEs from the stringent requirements of Section 29A. While the BLRC initially downplayed the overall risk of phoenixing, this exemption creates a significant regulatory gap, potentially allowing such activity to occur within the MSME sector.²²

Section 240A(a) exempts MSME promoters from Sections 29A(c) and 29A(h), allowing them to submit resolution plans even if they defaulted on or guaranteed loans. Although Sections 29A(c) and 29A(h) are relaxed, other disqualifications under Section 29A — such as those relating to persons barred under company law, fraud, and preferential transactions — continue to apply. The exemption was included specifically to prevent liquidation arising from a lack of external bidders, recognising the importance of promoters in running MSMEs.

6 CASE EXAMPLES — IDENTIFYING PHOENIXING ACTIVITY

In India, the legal concept of phoenixing came under scrutiny most notably during the *Essar Steel* insolvency proceedings. The Essar group submitted a resolution plan for Essar Steel, leading to significant debate and litigation that ultimately reached the Supreme Court in *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*.²³ The case sparked public and judicial discourse around promoter participation, asset recycling, and the fair treatment of creditors — especially operational creditors — raising broader concerns about phoenix-like activity under the IBC, notwithstanding the legal safeguards of Section 29A.

These concerns are not unfounded. The BLRC Report, drawing from international experience including the UK's Graham Review, has flagged key structural issues in the pre-pack model that could enable phoenixing.²⁴ These include a lack of transparency in pre-pack sales, misuse of connected party transactions to shed debt, sub-optimal returns due to limited creditor oversight, and insufficient protections for operational and dissenting financial creditors. If left unchecked, these features create fertile ground for illegal phoenix activity.

²⁰ Insolvency and Bankruptcy Code, 2016, § 29A.

²¹ Sundar Sinha & Saurabh Tripathi, *Indian Pre-Packaged Insolvency Resolution Process for MSMEs: An Assessment* (IBC 2024 Working Paper), https://papers.xkdr.org/PDF/IBC2024/Sinha_Tripathi_IBC2024.pdf.

²² Insolvency and Bankruptcy Code, 2016, § 240A, *as amended by* The Insolvency and Bankruptcy Code (Amendment) Act, 2021.

²³ *Comm. of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 531.

²⁴ REPORT TO THE RT HON VINCE CABLE MP: GRAHAM REVIEW INTO PRE-PACK ADMINISTRATION (June 2014).

Comparable challenges have been addressed in other jurisdictions. In Australia, courts have explicitly classified phoenixing behaviour into distinct categories.

One of the most common categories involves selling assets to a new company without fair consideration while retaining control. In *Canadian Solar v. ACN* (2014),²⁵ the insolvent company's assets were transferred to a newly formed entity, AJK, which was controlled by the former director. No monetary consideration was paid, prompting the court to remark that the transaction bore the "appearance of a so-called 'phoenix' transaction."²⁶

A second category involves repeated corporate failures associated with a common director, even where deliberate fraud is not established. In *Re Quinlivan and ASIC* (2010), the director had been associated with approximately 70 companies, 15 of which had been wound up. Although there was no evidence of intent to defraud, the pattern of repeated insolvencies resulted in a five-year disqualification. Similarly, in the UK case of *Secretary of State for Trade and Industry v. McTighe* [1996],²⁷ the court upheld a director disqualification for multiple insolvencies despite the absence of proven fraud or intent.²⁸

The third category concerns the establishment of a new company to the detriment of operational creditors, particularly employees. In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v. Beynon* (2013), the director created a new company while liquidating the old one, effectively shifting employees to the new entity. This manoeuvre allowed employees to claim redundancy payments under a government scheme (GEERS) while the employer avoided liability. Although the director's intent was clear, the court was unable to hold the receivers accountable due to the absence of shared intention.²⁹

Courts have also recognised accessory liability for advisors and lawyers who assist directors in executing phoenix schemes. In *ASIC v. Somerville* (2009), a solicitor was found liable for aiding directors in breaching their duties by advising them to transfer company assets to new entities before placing the original companies into liquidation.³⁰ The court held that this amounted to knowing assistance in a breach of fiduciary duty.

7 BALANCING RISK: WHY MSME PHOENIXING MAY BE OVERLOOKED

Phoenixing remains a common practice worldwide wherever the limited liability corporate structure exists. It is essential to note, however, that no statutory framework has defined it

²⁵ *Canadian Solar v. ACN* 138 535 832 Pty Ltd, [2014] FCA 785 (Austl.).

²⁶ André Stephan Basson, *The Regulation of Corporate Phoenix Activity in South Africa* (2023) (Ph.D. dissertation, University of Johannesburg), <https://www.proquest.com/docview/3132876666>.

²⁷ *Re Quinlivan & ASIC*, [2010] AATA 689 (Austl.); *Sec'y of State for Trade & Indus. v. McTighe*, [1996] B.C.C. 965 (Eng.).

²⁸ VANESSA FINCH, *CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES* (2d ed. 2009).

²⁹ *Automotive, Food, Metals, Eng'g, Printing & Kindred Indus. Union v. Beynon*, [2013] FCA 143 (Austl.).

³⁰ *ASIC v. Somerville*, [2009] NSWSC 934 (Austl.).

as inherently illegal. Rather, it is the behaviour associated with phoenixing that may trigger liability across a range of legal areas, including insolvency law, corporate law, and employment law. Many economists characterise such activity as illegal on moral grounds;³¹ however, phoenixing is not always harmful or unlawful — if not undertaken to defraud, but rather to genuinely save the business, it may serve a legitimate purpose.³² It allows one honest, final attempt to transform a failing enterprise into a vehicle for innovation. This phenomenon is extremely common among MSMEs, given the volatility of market forces combined with the spirit of experimentation among new entrepreneurs.³³

The Neo-Schumpeterian theory of economics extends Joseph Schumpeter's original idea of creative destruction, arguing that innovation is not limited to technology but also encompasses organisational redesign, legal flexibility, and new business models. Under this framework, phoenix activity by MSMEs, if conducted within legal bounds, can be seen as a form of adaptive innovation rather than abuse, enabling struggling enterprises to restructure and survive in volatile markets.³⁴

Under this paradigm, phoenix activity, if lawful, can be seen not as a manipulation of the corporate form but as a type of adaptive innovation in response to systemic economic pressures. Neo-Schumpeterian theory embraces a broad conception of innovation, including organisational, institutional, and social innovation;³⁵ and under that conception, business restructuring would fall within the category of innovation. This realignment makes it possible to view legal phoenixing by MSMEs as economically productive, provided that regulators can distinguish entrepreneurial renewal from abusive insolvency cycles.

8 WHY PIRP SHOULD NOT BE RESTRICTED TO MSMEs

At a recent conference, the Deputy Governor of the Reserve Bank of India advanced a cogent argument for extending PIRP to all corporate borrowers, highlighting the constraints on its transformative potential.³⁶ He emphasised that waiting for a default to trigger insolvency proceedings is inefficient and, in most cases, counterproductive. Instead, lenders should be able to adopt a proactive approach supported by modern resolution mechanisms

³¹ V. Finch, *Corporate Rescue: A Game of 3 Halves*, 32 LEGAL STUD. 302 (2012).

³² Murray Roach, *Combating the Phoenix Phenomenon: An Analysis of International Approaches*, 8 E JOURNAL TAX RSCH. 90, 91 (2010).

³³ MICHAEL QUILTER, COMPANY LAW PERSPECTIVES 107 (2012).

³⁴ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 85 (1942).

³⁵ Horst Hanusch & Andreas Pyka, *Principles of Neo-Schumpeterian Economics*, 31 CAMBRIDGE J. ECON. 275 (2007).

³⁶ Our Bureau, *Extend Pre-Pack Insolvency Resolution Process to All Borrowers: RBI's M. Rajeshwar Rao*, HINDU BUS. LINE (Apr. 29, 2022).

like PIRP, which blend out-of-court negotiation with judicial finality.³⁷ He also noted the stark inefficiencies afflicting CIRP, particularly the average duration of 650 days from the filing of insolvency applications (far exceeding the 14-day limit stipulated in the Code). Such delays erode creditor rights and call into question the effectiveness of the Code. This concern is substantiated by the figure of 23,417 CIRP initiation applications — with an aggregate underlying default of approximately Rs 7 lakh crore — that were resolved even before admission.³⁸

This reflects and reinforces the observation that a substantial number of debts are settled before CIRP even commences. Promoters of defaulting debtors, in the absence of a PIRP framework, often prefer settling their outstanding dues through a settlement agreement akin to a resolution plan, thereby avoiding the need to go through CIRP entirely.³⁹

India's current insolvency regime suffers from regulatory fragmentation, with separate resolution frameworks applying to different classes of lenders. This disjointed approach impedes comprehensive resolutions. Without collective participation, any resolution attempt is likely to be incomplete, merely deferring systemic risk. PIRP therefore presents a promising mechanism capable of achieving higher participation and better outcomes.⁴⁰

Additionally, the need for a group resolution framework deserves emphasis, particularly given the prevalence of cross-obligations and guarantees among group companies in India. A default in one entity often precipitates cascading defaults across the group, amplifying credit risk. PIRP is therefore well-suited to address such scenarios through consolidated resolution plans.⁴¹

The need of the hour is for lenders to significantly improve their risk monitoring practices, with greater emphasis on periodic stress testing and dynamic provisioning. This paper underscores that sophisticated risk assessment — not reactive enforcement — is the foundation of a healthy credit ecosystem.⁴² Overall, it highlights the need for a forward-looking,

³⁷ Andreas Bauer et al., *Flattening the Insolvency Curve: Promoting Corporate Restructuring in Asia and the Pacific in the Post-COVID-19 Recovery* 18–20 (IMF Working Paper No. 2021/016, 2021), <https://www.imf.org/en/Publications/WP/Issues/2021/01/29/Flattening-the-Insolvency-Curve-Promoting-Corporate-Restructuring-in-Asia-and-the-Pacific-in-49997>.

³⁸ Wolfgang Bergthaler et al., *Tackling Small and Medium Enterprise Problem Loans in Europe* (IMF Staff Discussion Note No. 15/04, Mar. 30, 2015), <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Tackling-Small-and-Medium-Enterprise-Problem-Loans-in-Europe-42614>.

³⁹ Yasir D. Pathan, *Pre-Packaged Insolvency Resolution in India: A Comprehensive Analysis of PPIRP Under the IBC*, IBC LAWS (Mar. 11, 2025), <https://ibclaw.in/pre-packaged-insolvency-resolution-in-india-a-comprehensive-analysis-of-ppirp-under-the-ibc-by-yasir-d-pathan/>.

⁴⁰ Rukmini Roychowdhury & Rohaneel Mohite, *Pre-Packaged Insolvency Process for MSMEs*, MONDAQ (Nov. 15, 2021), <https://www.mondaq.com/india/insolvencybankruptcy/1132276/pre-packaged-insolvency-process-for-msmes>.

⁴¹ A. Das, A.K. Agarwal, J. Jacob et al., *Insolvency and Bankruptcy Reforms: The Way Forward*, 45 VIKALPA 115, 115–31 (2020).

⁴² A. Gurrea-Martinez, *The Rise of Pre-Packs as a Restructuring Tool: Theory, Evidence and Policy*, 24 EUR. BUS. ORG. L. REV. 93–116 (2023).

flexible, and institutionally backed insolvency regime, in which PIRP can play a critical role in preserving value, reducing systemic vulnerabilities, and accelerating time-bound recoveries in large corporate failures.

Another compelling argument is that India, as a growing economic force, cannot simply adopt international insolvency frameworks wholesale without acknowledging the UNCITRAL Legislative Guide's continued support for and endorsement of pre-packs. Moreover, the IMF, in its report titled "Orderly & Effective Insolvency Procedures" and the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes — specifically Principle B.42 — stress the benefits of pre-negotiated agreements for resolution.

9 COMPARATIVE MODELS OF PIRP

India's pre-pack framework is distinctive in that it was created through formal legislation, rather than evolving organically from judicial practice or industry usage.⁴³ Unlike the United States and the United Kingdom, where pre-packs developed through informal court guidelines and market-led practices respectively,⁴⁴ India enacted PIRP for MSMEs through statutory law. This means that while other frameworks around the world arose from practice, India's approach is a deliberate creation, subject to legislative scrutiny and built with the specific intent of addressing identified challenges.⁴⁵

Several countries established their pre-packaged insolvency frameworks before India, and many exist in materially different forms, exhibiting considerable variation in how they conceptualise and implement pre-packs and restructuring mechanisms.

As discussed earlier in this paper, the United Kingdom's pre-pack model is largely sale-oriented.⁴⁶ It allows for quick asset transfers, often to connected parties, before a formal insolvency filing is made, giving rise to a significant risk of phoenixing.

Singapore, by contrast, has adopted a more holistic approach through its Insolvency, Restructuring and Dissolution Act, which enhances schemes of arrangement by

⁴³ Ritika Goel & Aurelio Gurrea-Martínez, *The Rise of Pre-Packs as a Restructuring Tool: Theory, Evidence, and Policy* 6–7 (ILA Working Paper Series, 2022), https://insolvencylawacademy.com/wp-content/uploads/2022/09/The-Rise-of-Pre-Packs-as-a-Restructuring-Tool_-Theory-Evidence-and-Policy.pdf.

⁴⁴ Aurelio Gurrea-Martínez, *The Challenges and Opportunities of Pre-Packs as a Restructuring Tool*, CLS BLUE SKY BLOG (Apr. 24, 2024), <https://clsbluesky.law.columbia.edu/2024/04/24/the-challenges-and-opportunities-of-pre-packs-as-a-restructuring-tool/>.

⁴⁵ INSOLVENCY & BANKRUPTCY BOARD OF INDIA, *EXPLORING NEW PERSPECTIVES ON INSOLVENCY* (2021), <https://ibbi.gov.in/uploads/publication/599cf8fb50be73f518fca467311304db.pdf>.

⁴⁶ HOUSE OF COMMONS LIBRARY, *PRE-PACK ADMINISTRATIONS 1* (Mar. 4, 2021).

incorporating moratoria and cross-class cramdowns. This approach provides a flexible restructuring tool without necessitating a pre-packaged sale.⁴⁷

The European Union, through Directive (EU) 2019/1023, envisions a preventive restructuring framework that allows distressed businesses to reorganise at an early stage. Unlike the UK, the EU model is geared more towards reorganisation than sale, and it emphasises early intervention and debtor-in-possession regimes with appropriate checks and balances.⁴⁸

In certain jurisdictions such as Australia, the need for a separate pre-pack regime is arguably diminished by the presence of simplified insolvency frameworks tailored to MSMEs — an approach that echoes India's adoption of a distinct framework for MSMEs, though different in form. For instance, Australia's Corporations Act 2001 provides a streamlined process for small business restructuring without the full rigour of formal insolvency. Similarly, Myanmar has introduced reforms to support micro and small firms through simplified procedures.⁴⁹

While the methods vary, each jurisdiction attempts to balance speed and flexibility against the risks of insider abuse and loss of creditor confidence. India can draw important lessons from these models — both in terms of innovations worth adopting and risks to be guarded against.

10 WAY FORWARD

While pre-packs can preserve enterprise value and reduce the costs of financial distress, they also raise significant concerns — particularly regarding fairness, transparency, and the potential for abuse through connected party sales and phoenixing.

The BLRC Committee has flagged various international concerns, including lack of transparency, connected party sales, opinion shopping, and repeated failures by certain promoters. Addressing these risks requires India to go beyond procedural safeguards and embed robust structural checks.⁵⁰

An important counterbalancing mechanism is the Swiss Challenge process, designed to ensure fair asset valuation. Where a better plan is submitted than the base resolution plan

⁴⁷ Aurelio Gurrea-Martinez, *Insolvency Law in Emerging Markets: The Case of Singapore*, 18 BROOK. J. CORP. FIN. & COM. L. 55, 70–74 (2023); <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack-archived/edition-2/article/singapore#footnote-080>.

⁴⁸ Directive 2019/1023, Recital 30, at 6, EU Official Journal L 172/22 (June 26, 2019).

⁴⁹ <https://www.nortonrosefulbright.com/en-us/knowledge/publications/d66f08df/insolvency-law-reform-and-capacity-building-in-emerging-markets>; Aurelio Gurrea-Martinez, *Implementing an Insolvency Framework for Micro and Small Firms*, INT'L INSOLVENCY REV. (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715654.

⁵⁰ INSOLVENCY LAW COMM., REPORT OF THE SUB-COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS 14–16 (Oct. 2020), <https://ibbi.gov.in/uploads/resources/24c7fc03cdffff69960ce374416fa646.pdf>.

put forward by the promoter, the promoter is given the opportunity to match it. This promotes competitive bidding and disincentivises insider deals while simultaneously preventing creditor disenfranchisement. However, the effectiveness of the Swiss Challenge mechanism is highly contingent on the emergence of competing plans — a rarity in the case of MSMEs,⁵¹ which often operate in niche sectors and may be unattractive to third-party bidders. Hence, the practical value of this mechanism may be limited.⁵²

India's PIRP features a hybrid “debtor-in-possession with creditor-in-control” model.⁵³ The CoC also has the power to terminate the process in cases of misconduct, providing an oversight mechanism against mismanagement and asset stripping. While this hybrid mechanism and CoC oversight make a strong case for transparency and creditor protection, purely procedural safeguards can leave edge cases unaddressed. The following solutions are therefore proposed with a dual objective: curbing misuse without diluting the core strengths of the pre-pack model.

The most urgent concern is the limited scrutiny of promoters — particularly those with records of repeated failures or regulatory violations — which creates space for abuse under the guise of business rescue. Introducing mandatory scrutiny measures, modelled on the Australian precedent in *Re Quinlivan*, would ensure that habitual defaulters cannot cycle through insolvency processes without consequence.

Another critical step involves introducing minimum capitalisation rules requiring promoters who seek to re-acquire distressed businesses to demonstrate genuine financial commitment.⁵⁴ Without such an infusion, resolution risks becoming a paper transaction with no real capacity to stabilise the enterprise. Similarly, in cases involving connected party transactions, the burden of proof should be reversed, requiring promoters to affirmatively establish good faith, fair valuation, and compliance with fiduciary duties. Such a mechanism would both strengthen creditor confidence and discourage backdoor acquisitions.

Equally important is the issue of group insolvencies, where defaults in one entity often cascade across affiliated companies. Enhanced collateral requirements or cross-company guarantees would protect creditor recoveries and prevent opportunistic restructuring of one

⁵¹ Alexandra Kastrinou & Stef Vullings, “No Evil Is Without Good”: A Comparative Analysis of Pre-pack Sales in the UK and the Netherlands, 27 INT’L INSOLVENCY REV. 320, 326 (2018); VANESSA FINCH, CORPORATE INSOLVENCY LAW 462 (2009); Stephen Davies QC, *Pre-pack — He Who Pays the Piper Calls the Tune*, RECOVERY, Summer 2006, at 16.

⁵² Bhatt & Joshi Associates, *Pre-Pack Insolvency for MSMEs: Legal Loopholes in Speedy Resolution* (May 16, 2025), <https://bhattandjoshiassociates.com/pre-pack-insolvency-for-msmes-legal-loopholes-in-speedy-resolution/>.

⁵³ Economic Laws Practice, *Judicial Overreach and Commercial Wisdom: A Continuing Challenge in IBC from Kamineni to DHFL* (Apr. 8, 2025), <https://elplaw.in/wp-content/uploads/2025/04/Judicial-Overreach-and-Commercial-Wisdom-A-Continuing-Challenge-in-IBC-from-Kamineni-to-DHFL.pdf>.

⁵⁴ IndiaFilings, *Highlights of Companies Amendment Act 2015 — No Minimum Paid-Up Capital* (2015), <https://www.indiafilings.com/learn/highlights-of-companies-amendment-act-2015/>.

company at the expense of another — a gap clearly exposed by the *Essar Steel* proceedings.⁵⁵ In addition, the current Swiss Challenge mechanism, though designed to promote competition, is frequently ineffective for MSMEs where external bidders are scarce. Its reform — either by incentivising third-party participation or by developing alternative benchmarks for competitive fairness — is necessary to ensure that creditor interests are not sidelined in the name of expediency.

Taken together, these reforms suggest that the PIRP framework, conceived as an MSME-specific experiment, has the potential to evolve into a broader restructuring tool for India. By embedding structural safeguards such as promoter scrutiny, capitalisation thresholds, fair-value checks, and collateral requirements, PIRP can transition from an exception for small enterprises to a credible mechanism for larger corporate failures. A calibrated expansion in this direction would preserve the procedural efficiency of pre-packs while simultaneously addressing the fairness and transparency concerns that continue to limit creditor confidence in the system.

11 CONCLUSION

The Pre-Packaged Insolvency Resolution Process represents a significant opportunity for India's approach to corporate restructuring, providing statutory recognition for an expedited, hybrid model that combines out-of-court negotiations with formal insolvency adjudication. For MSMEs, PIRP has opened a practical and often necessary pathway to retain control, sustain operations, and achieve creditor-approved resolutions. However, the combination of Section 240A's exemptions and limited procedural safeguards also creates the potential for phoenixing — both in its legitimate, value-preserving form and in its abusive, debt-evading guise.

While the economic impact of MSME phoenixing may be modest compared to large corporate failures, and may even be beneficial to long-term wealth creation, ignoring its regulatory implications risks embedding vulnerabilities into the insolvency ecosystem. Comparative frameworks demonstrate that transparent oversight, connected party transaction scrutiny, minimum capitalisation requirements, and promoter background checks can meaningfully suppress abusive practices while closing potential loopholes. If incorporated into the Indian framework, these safeguards could both preserve the operational advantages of PIRP and strengthen creditor confidence.

Extending PIRP beyond MSMEs — as proposed by the Reserve Bank of India and supported by comparative evidence — is not without significant risk and potential pitfalls

⁵⁵ Shubham Jain, *Essar Steel and the Unsecured Creditors: Lessons for Group Insolvency in India*, 11 NUJS L. REV. 77, 93–95 (2018).

for creditors. Yet, a calibrated expansion using the MSME experience as a regulatory sand-box may yield the opportunity to institutionalise a faster, more predictable, and creditor-inclusive resolution culture. In doing so, India can position PIRP not as a narrow exception, but as a cornerstone of a modern insolvency regime.

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