English Restructuring Plans and Pre-packaged Plans under US Chapter 11: A Comparative Analysis and some inspiration from Indian insolvency law perspective

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1. INTRODUCTION

1.1. In distressed asset resolution and restructuring space, the term 'pre-pack' has received global attention, with different jurisdictions evaluating or implementing pre-pack framework, albeit in myriad fashion depending on the formal insolvency framework of the relevant jurisdiction. While there is no globally accepted definition of the term, the basic underlying principle of any 'pre-pack' contemplates consensually agreed terms and arrangement between the debtor and the relevant stakeholder(s), followed by implementation under the formal insolvency framework of the relevant jurisdiction. The basic tenet of any 'pre-pack' is value preservation and timely resolution with less comparable costs (in comparison to formal insolvency), which effectively helps to further the objective of maximization of value of assets of a corporate debtor and consequentially improves the likelihood of successful turnaround and prevents reputational hazard of formal insolvency. However, at the same time, pre-pack framework has been critiqued in different jurisdictions *inter alia* on account of lack of transparency, substantial involvement of management, impact on value maximization owing to bilaterally negotiated deals with largely unexplored market on valuation.[1] This being said, pre-packs are here to stay and different Governments have been taking measures to improve transparency and accountability. One of the most evolved jurisdiction with reference to a pre-pack framework is undoubtedly the United States of America ("US"), so much so that there are pre-packs in US, which are approved and implemented within a record period of 24 hours.[2]

1.2. A pre-pack administration in United Kingdom ("**UK**") generally envisages pre-agreed and negotiated arrangement between the administrator of the distressed company and the potential buyer for sale (of whole or part of the assets distressed company), which agreed arrangement is given effect to and implemented shortly after entering the administration proceedings. Although pre-pack have been used extensively in administration proceedings, there is no prescribed statutory framework for pre-packs and the jurisprudence has primarily evolved basis the judicial pronouncements.[3]

On the other hand, in June 2020, the UK Government enacted Corporate Insolvency and Governance Act 2020, to *inter alia* supplement the existing toolkit of insolvency and restructuring and introduced concept of a 'restructuring plan'.[4] While the jurisprudence in relation to restructuring plan has to some extent been drawn from the English scheme and is also in the process of evolving (including in relation to the cross-class cram down provisions), it has already gauged significant momentum in the restructuring space, with practitioners globally watching the space closely.

1.3. In this short paper, I propose to undertake a comparative analysis of the UK restructuring plan framework with US pre-pack model. The scope of this comparison is limited to key aspects which revolve around stakeholder payout and the principles adopted by the courts in US and UK in relation thereto. I have not gone into the granular procedural distinction which are jurisdiction centric. Finally, I have very briefly drawn a comparative from an Indian insolvency law perspective and have attempted to draw certain recommendations that may be considered from an Indian perspective basis the experience in US and UK.

2. UK RESTRUCTURING PLAN

2.1. *Gating conditions*

2.1.1. The framework for restructuring plan draws from the existing framework of schemes envisaged under the Companies Act, 2006. Similar to an English scheme, restructuring plans contemplates court supervised debtor-in possession model which permits a company to propose a compromise or arrangement with its creditors or members (or any class thereof).

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[1] Neil Devaney, *A Step in the Wrong Direction - UK and US Regulators Must Turn Their Attention to the Rise of Pre-Packaged Insolvencies*, International Financial Law Review 26, No. 4 (20 April 2007), 26-27.

[2] INSOL International Special Report, A Comparative Look at Pre-Packs in Selected Jurisdictions (June 2023).

[3] *Re Kayley Vending Ltd.* [2009] BCC 578; Jacqueline Ingram and Damilola Odetola, *United Kingdom: Core Elements of a Pre-Pack Administration,* Global Restructuring Review, The Art of Pre-Pack, Second Edition, (4 March 2022).

[4] Part 26A, Companies Act, 2006.

2.1.2. In terms of differences, while schemes are available to both solvent and insolvent companies, restructuring plan can only be presented by the company (i) that has encountered (or is likely to encounter) financial difficulties that are affecting (or may potentially affect) its ability to carry on business as a going concern; (b) the purpose of the restructuring plan is to is to eliminate, reduce or prevent, or mitigate the effect of the said financial difficulties.[5]

2.2. ***Cross-class cram-down conditions***

2.2.1. Another major distinction between an English scheme and a restructuring plan is availability of *cross-class cram down*[6] mechanism, which is similar to provisions under Chapter 11 plan and has substantially changed the landscape of UK insolvency and restructuring laws, including by adding another feather for being a preferred jurisdiction for cross-border insolvency matters.

2.2.2. In respect of cross-class cram down, the underlying principle is that the court can sanction a restructuring plan *even if* a dissenting class has not agreed to a restructuring plan, if the following two-fold conditions are met: (a) the court should be satisfied that if a restructuring plan is sanctioned, none of the dissenting creditors would be *any worse off* than they would otherwise be in the relevant alternative[7] (i.e., the most likely scenario in the event the restructuring plan is not sanctioned) ("***No-worse off Test***"); and (b) that at least one class of creditors or members (as the case may be) who would receive a payment or has a *genuine economic interest* in the company in the relevant alternative, has approved the restructuring plan by a majority of 75% by value ("***Genuine Economic Interest Test***").

2.2.3. In the landmark judgment of *Virgin Active*[8], the English High Court dealt with jurisprudential issues around the ability of the court to exercise jurisdiction in sanctioning a restructuring plan. In the said matter, only two out of seven classes approved the restructuring plan, with significant challenge by the landlords. While the *No-Worse off Test* was fairly met in light of the *relevant alternative* presented as administration proceedings, the concern was around Genuine Economic Interest Test and whether the court should exercise its discretion to sanction a restructuring plan. While sanctioning the restructuring plan, the court laid down certain key principles as follows: (a) weight should be given to the views of the *in-the money creditors*, in comparison to those creditors who would be *out-of the money* in the relevant alternative[9]; (b) restructuring plans cannot be used to alter or affect the proprietary rights of landlords, irrespective of them voting for or against a restructuring plan[10]; (c) market testing is not essential for conducting valuation as part of the restructuring process. In the said matter, the retention and continuity of the equity shareholders was also considered and upheld on the basis that the same was approved by the secured creditors and further the shareholders were infusing additional money.

2.2.4. The decision of *Virgin Active,* has been followed by a catena of judicial pronouncements, wherein the court examined the different facets of the two-fold test (i.e., No-worse off Test and Genuine Economic Interest Test).[11]

2.2.5. Recently, the court denied sanction of a restructuring plan, wherein the U.K. tax authority (i.e., HM Revenue and Customs) was sought to be bound through cross-class cram down provisions. In *Re Great Annual Savings Co Ltd.* (*"**GAS**")*[12], the restructuring plan provided for two-year deferred payment with 90% of haircut in respect of claim of tax authorities. The alternative

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[5] Section 901A, Part 26A, Companies Act, 2006.
[6] Section 901G, Part 26A of the Companies Act, 2006.
[7] As per Section 901G(4), relevant alternative is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.
[8] *Re Virgin Active Holdings Ltd, Virgin Active Ltd and Virgin Active Health Clubs Ltd.* [2021] EWHC 1246 (Ch).
[9] *See also Re Bluebrook Limited* (IMO) [2009] EWHC 2114 (Ch.) wherein the English court while sanctioning a scheme, which excluded the mezzanine creditors from getting the benefit under the scheme inter alia held it is not necessary for the company to consult unaffected class of creditors (or contributories), either because their rights are untouched or because they have no economic interest in the company. *See also*, *In Re Tea Corporation Ltd.* [1904] 1 Ch. 12.
[10] *See also Re Instant Cash Loans Ltd* [2019] EWHC 2795 (Ch) in relation to English scheme.
[11] *See In Re Deep Ocean* [2020] EWHC 3549 (Ch) wherein the court for the first time dealt with cross-class cram down provisions in a restructuring plan. *See also Re Hurricane Energy Plc.* [2021] EWHC 1759 (Ch) wherein the court was of the considered view that the relevant alternative of continuing trade, followed by decommissioning was a viable alternative and therefore rejected a plan that provided for the cram down of the company's existing shareholders.
[12] [2023] EWHC 1141 (Ch).

presented was administration and parent company liquidation, with expected returns for the tax authority for around 4.7%. However, the court was not inclined to consider the evidence presented in the alternative scenario, which was found questionable and ultimately the court was of the view that the *No Worse-off test* was not met.

2.2.6. Similarly, in *Re Nasmyth Group Ltd.("**Nasmyth**")*[13]*,* the English High Court refused to sanction a restructuring plan purely on discretionary grounds and inter alia observed that while tax dues can be crammed down the same has be substantiated with good reasons. In doing so, Justice Leech reiterated the principle laid down in *Re AGPS Bondco Plc.*[14] to assert that there is no presumption in favour of sanctioning a plan, simply because *No-worse off Test* and *Genuine Economic Interest Test* have been met and the courts must still exercise its discretion while sanctioning a restructuring plan.

2.3. ***The "fairness" test and the courts discretion***

2.3.1. While the statute prescribes the tests to be met by a scheme/plan which is approved by a requisite majority, the English courts ought not operate merely as rubber stamp, but have been accorded with discretion[15] to examine the terms on merits in each while sanctioning a scheme[16] (which has also been extended while evaluating a plan). One such criteria is where the court examines the fairness of the allocation of *restructuring surplus* in different classes.

2.3.2. This aspect was examined by the court in *GAS* wherein the court examined *overall balance and fairness of the proposed plan in light of the relative treatment of the different creditor classes.* In doing so, the court outlined the following indicative factors: (i) the existing rights of the creditors vis-à-vis the relevant alternative; (ii) additional contributions expected to be made by the creditor for successful implementation of the plan, including in relation any additional risk being undertaken by making available "new money"; and (iii) justifiability of the disadvantaged position under the plan in comparison the relevant alternative. Specifically, in the facts of the case, the court observed that the secured creditor's position was significantly improved in comparison to the tax authority, even though the secured creditors were not providing any *new money* nor were they subjected to any greater comparative risk, and ultimately, the plan was held to be not a fair one and was not sanctioned.

2.3.3. In distinction from the earlier rulings in *GAS* and *Nasmyth,* the English High court exercised it discretion to sanction the restructuring plan in *Prezzo*[17] and the held the same to be fair *inter alia* on the basis that the secured creditors provided new money and almost the entire restructuring surplus was being utilized to pay the tax authority. The said matter also contemplated deviation from the statutory priority wherein shareholders were not impaired. However, given that the shareholders were secured creditors and made substantial contribution in terms of the plan, such terms were not considered as unfair.

3. US PRE-PACK

The construct of pre-pack was codified in US way back in 1978 under Chapter 11 of the Bankruptcy Code, 1978 ("**US Bankruptcy Code**"), which inter alia permits filing of Chapter 11 plans by the debtor[18] and further permits votes solicited prior to the Chapter 11 filings to be counted towards confirmation of the plan.[19] Further, the Federal Rules of Bankruptcy Procedure (US Bankruptcy Rules) expressly permits voting on a reorganisation plan prior to the commencement of a case.[20] A pre-packaged Chapter 11 plan have grown popular in US as the same provides certainty to the process as the initiation of the process is based on the

[13] [2023] EWHC 988 (Ch).
[14] [2023] EWHC 916 (Ch).
[15] Paterson, Sarah, Judicial Discretion in Part 26A Restructuring Plan Procedures (January 24, 2022), <available at: https://ssrn.com/abstract=4016519> <last visited: 8 July 2023>.
[16] *Re Telewest Communications Plc* [2004] EWHC 1466 (Ch) 21.
[17] *Re Prezzo Investco Ltd.* [2023] EWHC 1679 (Ch).
[18] 11 U.S.C. Section 1121(a).
[19] 11 U.S.C. Section 1126(b).
[20] Rule 3018(b) of US Bankruptcy Rules.

consensual plan.[21] Recently, *In re Belk, Inc.*[22] a pre-packaged plan of reorganisation was filed by the debt, which restructured the facilities (without impacting the leases and contract and other business aspects) and the same was confirmed within 24 hours. In *Fullbeauty*[23] case, only a period of 20 hours lapsed between the filing and confirmation of the plan.

A pre-pack plan is subjected to same scrutiny and disclosure requirements as envisaged in relation to other Chapter 11 plans. Accordingly, similar to the principles covered in ***Section 2*** above (as laid down by the English courts), set out below are the certain salient features of the US pre-pack:

3.1. *Good faith filing*

3.1.1. Unlike in case of UK restructuring plan wherein one of the criteria is existing or expected financial difficulty of the corporate entity, Chapter 11 filing does not require there is no requirement for the debtor to be insolvent or facing financial difficulties for voluntary bankruptcy. Although, the courts will examine if the filing has been made in good faith.

3.2. *Best interest of creditors test*

3.2.1. In addition to soliciting the required votes, the pre-pack plan is required to satisfy the '*best interest of creditors test'* which contemplates that each impaired class (i.e., affected class) either: (a) accept the plan; or (b) as of the effective date of the plan receive or retain under the plan a value that is not less than the amount that such holder would have received/retained if the debtor were liquidated.[24]

3.3. *Absolute priority rule*

3.3.1. The *absolute priority rule*[25] was codified in the US Bankruptcy Code by a requirement that a plan being presented should be "fair and equitable" with respect to each class of claims that votes to reject the plan. [26] Emanating from the fair and equitable criteria is the rule of *absolute priority* which stipulates that "*creditors to be paid in full before any lower priority participant, such as an equity holder, may share in the assets of the reorganized entity".*[27] The exception to the absolute priority rule as has been laid down by some courts is *new value doctrine,* which is a corollary to the absolute priority rule if parties seeking to participate in the process bring in new capital.

3.4. *Cram down*

3.4.1. The US Bankruptcy Code provides for framework to cram down a reorganisation plan regarding dissenting creditors, subject to fulfillment of certain criteria. A plan rejected by an impaired class may still be confirmed, if the court can be satisfied that the plan does not discriminate unfairly against any impaired, dissenting class and the plan is fair and equitable. Different tests have been laid down for treatment of impaired secured, unsecured and with respect to class of interests to be considered as fair and equitable.[28] Associated with these tests, specifically in relation to the secured claims (which are relied heavily by the bankruptcy courts) is valuation of the creditor's interest in the collateral. [29]

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[21] Chris Howard, Presley Warner and Chris Beatty, *Restructuring Law & Practice*, Third Edition (2021).
[22] Case No 21-30630 (MI) (Bankr SD Tex 2021).
[23] *In re FULLBEAUTY Brands Holdings Corp*, 19-22185-rdd (Bankr SDNY).
[24] Section 1129(a)(7) of the US Bankruptcy Code.
[25] Section 1129(b)(2) of the US Bankruptcy Code.
[26] 175 A.L.R. Fed. 485 (Originally published in 2002), Special Commentary: Construction and Application of Absolute Priority Rule in Confirmation of Plan Under Chapter 11 of Bankruptcy Code of 1978 (11 U.S.C.A. § 1129(b)(2))
[27] *In Re Experient Corporation*, 535 B.R. 386 (Bankr. D. Colo. 2015).
[28] Section 1129 (b)(2)(A)-(C) of the US Bankruptcy Code.
[29] *In re Heritage Highgate, Inc*, 679 F.3d 132, 143 (3d Cir. 2012); *First S. Nat'l Bank v. Sunnyslope Housing LP (In re Sunnyslope Housing Ltd. P'ship)*, 859 F.3d 637, 643-45 (9th Cir. 2017); *Hous. SportsNet Fin., LLC v. Houston Astros, LLC (In re Hous. Reg'l Sports Network, LP)*, 886 F.3d 523, 528-31 (5th Cir. 2018).

4. A COMPARATIVE ASSESSEMENT

4.1. In terms of similarities, both Chapter 11 and UK restructuring plans are debtor-in control model which provides for court sanctioned plans and are used as a tool to restructure the debt of the different categories of creditors and shareholders and also have cross-border recognition and applicability (subject to meeting certain pre-requisites).

4.2. Another similarity with the US Chapter 11, which has been adopted (to some extent) by the UK restructuring plan model is cross-class cram down, albeit with substantial discretion with the courts to sanction a restructuring plan in addition to the gating conditions, which as can be seen from the cases cited above has been utilized by the courts based on prudent commercial and legal reasons. Having said that, for the cross-class cram down principle to be made applicable, the restructuring plan will have to meet the No Worse-off Test and the Genuine Economic Interest Test. Whereas, a pre-pack plan will have to meet the *fair and equitable* criteria and *best interest of creditors* test.

4.3. In terms of differences, one of the starkest differences between a UK restructuring plan and US pre-pack model (which emanates from the fair and equitable criteria) is that the former does not stipulate any express requirement of *absolute priority* rule.

4.4. In terms of timelines, US pre-packs, the time spent in the process after the bankruptcy petition is filed can be as short as 24 hours. In relation to the restructuring plans on the other hand, a plan that is not contested, the estimated time is approximately 8 weeks as a restructuring plan envisages at least two court hearings (convening and sanctioning). The case laws in relation to restructuring plan seems to suggest that substantial discretion has been vested with the English courts in sanctioning a restructuring plan, which is over and above the statutory stipulation. While, the decisions so far have aided to resolve the covid-impacted entities, the implication in longer run will have to be ascertained.

4.5. Lastly, assuming that pre-pack continues for a longer term as compared to the 24-hour golden period, there are benefits associated with automatic stay and rescue financing under the US Bankruptcy Code. Similar benefits are not available to a UK restructuring plan.

5. THE INDIAN PERSPECTIVE

5.1. The (Indian) Insolvency and Bankruptcy Code, 2016 ("**Indian Bankruptcy Code**") is the primary legislation governing insolvency resolution of corporate entities in India in case of payment default exceeding INR 10 million (approx. USD 12000), which is a creditor-in control model. The Companies Act, 2013 also lays down the statutory framework applicable in case of corporate debt restructuring by way of compromise, arrangements, mergers and amalgamations, which is similar to an English scheme. The Indian Bankruptcy Code was also amended in 2021 to provide for a pre-packaged insolvency resolution framework in relation to micro, small and medium enterprises as one of the measures to mitigate the economic distress caused by the Covid-19 pandemic. Pre-pack under the Indian Bankruptcy Code is a debtor-in-possession as opposed to the creditor-in-control model for corporate rescue.

5.2. Unlike in case of US and UK model, the Indian Bankruptcy Code primarily categorizes creditors into 'financial' and 'operational' creditors, depending on the nature of the 'debt' owed to such creditor. The term financial debt has been defined to mean debt disbursed against the consideration of time value of money (along with interest, if any) [30], while operational debt is defined as a claim in respect of the provision of goods and services (such as trade creditors) and includes employee claims and statutory/Government dues. Any creditor, not a financial or operational creditor, will be classified as other creditors. Unlike voting by individual class, the Indian Bankruptcy Code envisages voting on a resolution plan (which meets certain mandatory contents) only by a committee of creditors comprising of the unrelated financial creditors.

[30] Section 5(8) of the Indian Bankruptcy Code.

5.3. While Indian Bankruptcy Code has drawn inspiration from US and UK models to some extent, some of the distinguishing features are as follows:

(a) While resolution applicants have significant flexibility under the statute to submit a resolution plan with a structure and in a manner they deem fit, for a resolution plan to be compliant with the requirements of the Indian Bankruptcy Code, it must *amongst others* contemplate the payment of certain identified payments in priority, which are as follows:

(i) payment of debts owed to the operational creditors which shall *not be less than*: (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor; or (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in liquidation, *whichever is higher*. Such payments to the operational creditors must be made in priority to payments to financial creditors of the corporate debtor. Interestingly, under the liquidation waterfall, the Government dues fall after the secured creditors and therefore as operational creditors their payout would be linked to liquidation value after taking into account the payout to the secured creditors thereby limiting the grounds of challenge by government and statutory authorities (including tax authorities); and

(ii) as regards those financial creditors who: (A) were entitled to vote on the resolution plan (i.e., not related party); and (B) did not vote in favour of the resolution plan, payment of amounts which shall not be less than the amount to be paid to that creditor in the event of a liquidation of the corporate debtor. The payment of such an amount has to be paid in priority to payment to any approving financial creditors.

(b) Under the scheme of the Indian Bankruptcy Code, as far as negotiating the terms of the resolution plan and determining the manner of distribution of the payout under the resolution plan, the collectively commercial wisdom (as evidenced by votes of the requisite voting share) has been recognized as being supreme.[31]

(c) The Indian Bankruptcy Code also stipulates that the upon commencement of the proceedings, the powers of board of directors are vested in an insolvency professional and the existing management is suspended. Further, in terms of payout under resolution plan, generally the equity shareholders ends up getting NIL value and such impairment as such cannot be challenged since they equity and preference shareholders will rank in last under the liquidation waterfall and no mandatory payments are envisaged under the Indian Bankruptcy Code. Contrary to this, the Pre-pack insolvency model envisages a debtor-in control model. However, unlike in case of US model, the pre-pack process lays down the process that needs to be adhered (involving invitation, evaluation and approval of the resolution plan) which process can go upto 90 days or more in case of litigation.

(d) As regards timelines for the resolution process, the Indian Bankruptcy Code prescribes a timeline of 180 days from the date of the insolvency commencement date for the completion of the resolution process, which is extendable to 270 days with the approval of the adjudicating authority. The outer limit for completion of resolution process is 330 days for (inclusive of any extension of period of resolution process granted under and time taken in legal proceedings concerning the resolution process).

5.4. On a principle based analysis, while the stakeholder payout principles are evolved in India when it comes to resolution process (with limited grounds for challenge by the equity shareholders

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[31] *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors* 2019 SCC OnLine SC 1478. This position has been reiterated by the Supreme Court of India in the matters of *Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs . NBCC (India) Ltd. and Ors.,* (2021) 5 SCC 624; *Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited and Ors.,* (2021) 9 SCC 657; *Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Ors.*(2021) 11 SCC 467.

and other creditors), my assessment is that once pre-pack model is made applicable to entities other than MSMEs with debtor-in control model, it would be viable to seek reference from the experience of US and UK wherein the jurisprudence is significantly evolved for debtor-in control model. This would help the rescue process accomplish the maximization of value for stakeholders.

6. CONCLUSION

While the Chapter 11 plan and the restructuring plan have been extensively compared by various practitioners, we may not loose the sight of the fact that jurisprudence centric to the UK restructuring is still in the process of evolution. The precedents so far do reflect dynamic approach of the English courts, which balances existing jurisprudence on schemes as well the novel principles in light of cram-down provisions. At the same time, as highlighted above, the scope and extent of exercise of judicial discretion will have to be ascertained in longer run. At the same time, from the Chapter 11 pre-pack perspective, the evolved jurisprudence is something for the developing nations to consider.

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