Insolvency and Bankruptcy Code: Resolution Plan Approved by the Committee of Creditors Cannot be Modified or Withdrawn

Recently, pursuant to its decision in *Ebix Singapore Private Limited v Committee of Creditors of Educomp Solutions Limited and Anr*.[1] ("**Ebix Singapore**"), the Supreme Court of India ("**Supreme Court**") extensively analyzed the status of a resolution plan approved by the Committee of Creditors ("**CoC Approved Plan**") but pending approval of the National Company Law Tribunal ("**NCLT**") under the Insolvency and Bankruptcy Code, 2016 (the "**Code**"). The Supreme Court observed that a CoC Approved Resolution Plan binds the Committee of Creditors ("**CoC**") and the Resolution Applicant ("**RA**") and reinforced the strength of the decision of the Committee of Creditors in favor of a resolution plan. The Supreme Court also, once again, clarified the scope of scrutiny of a CoC Approved Plan by the NCLT and consequently by that of the National Company Law Appellate Tribunal ("**NCLAT**").

BRIEF BACKGROUND: EBIX SINGAPORE CASE

In Ebix Singapore, the Supreme Court decided appeals arising from orders issued in applications filed by the successful RAs for withdrawal of the resolution plan on grounds *inter alia* of adverse impact of audit investigations and termination of contracts, financial stress on account of the continuing pandemic and pendency of the corporate insolvency resolution process ("**CIRP**") beyond the statutory period making the resolution plan commercially unviable for the RA. Before the matter reached the Supreme Court, the NCLT had permitted withdrawal of the CoC Approved Plan. In the appeal filed by the CoC, the NCLAT held that that: (i) once the CoC had approved a resolution plan, the NCLT has no jurisdiction to permit withdrawal of such CoC Approved Plan; and (ii) there is no specific provision in the IBC permitting withdrawal of a resolution plan.

[1] 2021 SCCOnline SC 707

STATUS OF A COC APPROVED PLAN

In order to conclude the binding force of a CoC Approved Plan and whether such a plan can be withdrawn or modified, the Supreme Court examined the legal nature of a CoC Approved Plan. The Supreme Court observed that while the Code expressly specifies that a resolution plan approved by the NCLT is binding on all stakeholders and its violation will attract penalty, the Code remains silent on whether a CoC Approved Plan is a pure contract and how far does it bind the stakeholders. The Supreme Court examined whether a CoC Approved Plan is a contract under the Indian Contract Act, 1872 ("**Contract Act**)" and observed that while the scope of commercial bargain between the CoC and a RA does give it a hue of a negotiated agreement, in essence, a resolution plan is a function and product of the Code's mechanism. Notably, the Code extensively governs the form, mode, manner and effect of approval as also guides the entire process governing the resolution plan from its preparation until its enforcement. The structure of the Code confers a legal force on a CoC Approved Plan and its validity, nature, content and legal force is regulated by the procedures prescribed under the Code. Therefore, a CoC Approved Plan cannot be termed as a contract governed by the terms of the Contract Act and common law principles governing contracts cannot be applied.

Further, the Supreme Court observed that there is no provision in the Code which stipulates a CoC Approved Plan to be a 'contract'. Therefore, a CoC Approved Plan cannot be treated as a statutory contract. The Supreme Court held that prior to approval by the NCLT, a CoC Approved Plan remains binding and irrevocable at least *inter se* the CoC and the RA. The peculiar nature of a resolution plan approved by the NCLT to bind non-consenting parties such as the non-consenting financial creditors, by way a statutory procedure differentiates it from a typical contract.

A COC APPROVED PLAN CANNOT BE MODIFIED OR WITHDRAWN

The Supreme Court held that absent a legislative provision, it cannot permit withdrawal of, or modifications to a CoC Approved Plan. The Supreme Court relying on its earlier decision[2] observed that the absence of exit routes for successful RAs under the Code indicates that the Code prohibits withdrawals by successful RAs. It further observed that the objective of the Code is speedy, predictable and timely resolution and a RA is deemed to be aware of the mechanism under the Code and by participating in a CIRP is bound by the underlying objectives of the Code. The Supreme Court noted that permitting withdrawals or modifications of a CoC Approved Plan would give way to

[2] Maharashtra Seamless v. Padmanabhan Venkatesh and Ors; (2020) 11 SCC 467

situations not contemplated under the Code and would make the resolution process indeterminate and unpredictable. Moreover, a resolution plan which can be withdrawn would not meet the criteria under Regulation 38(3) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the "**CIRP Regulations**") which mandates the plan to be feasible, viable and implementable.

LIMITED SCOPE OF SCRUTINY OF A COC APPROVED PLAN BY THE NCLT AND NCLAT

The Supreme Court held that negotiations between a RA and the CoC come to an end after the CoC's approval of the resolution plan. The NCLT has limited jurisdiction to confirm or deny the legal validity of a CoC Approved Plan in terms of Section 30(2) of the Code. If the requirements of Section 30(2) of the Code are satisfied, the NCLT must confirm the plan as approved by the CoC. As a corollary, the NCLATs scope of scrutiny also gets defined.

TIMELINE FOR COMPLETION OF CIRP MANDATORY

Numerous judgments of the Supreme Court have impressed upon the completion of CIRP in a time-bound manner. Pursuant to the amendments brought in by the Insolvency and Bankruptcy (Amendment) Act, 2019, the second proviso to Section 12(3) provides that the CIRP is required to be completed within 330 days, which includes the time taken in legal proceedings. The Supreme Court, in its judgment in *Committee of Creditors of Essar Steel India Limited through Authorised Signatory v Satish Kumar Gupta and Ors*.[3] held that the time period of 330 days may be extended once and only in exceptional circumstances.

In practice, the Supreme Court noted incessant delays in completing the CIRP. The Supreme Court noted that the Code was introduced as a comprehensive and time-bound framework with the aim to *inter alia* maximize the value of assets and balance the interest of all stakeholders. In Ebix Singapore, the Court once again emphasized that CIRP must mandatorily be completed within 330 days from the insolvency commencement date failing which the corporate debtor must should be sent into liquidation. Further, the Supreme Court observed that any extensions provided to the 330 days' period must only be in cases where the CIRP is near completion and serves the object of the Code. The Supreme Court remarked that NCLT and NCLAT cannot extend the CIRP timeline in furtherance of residual powers granted to them under the Code.

[3] (2020) 8 SCC 531

AUTHORS' VIEW

In the view of the authors, the decision of the Supreme Court in Ebix Singapore provides much needed clarity in relation to the legal status and nature of the CoC Approved Plan. This judgment aids in providing certainty and predictability of the outcome of an insolvency resolution process thereby furthering the objective of the Code. While the emphasis and direction to the NCLT to complete the CIRP within the prescribed timeline will encourage and boost the confidence of any potential RA; the inability of a RA to withdraw or modify its resolution plan on any ground after such plan is approved by the CoC will be a cause for concern in the mind of such a RA. However, this system works well for the CoC because the members of the CoC are assured that the RA cannot apply for withdrawal or modification of a CoC Approved Plan and the NCLT is under duty to issue its decision on the CoC Approved Plan within a set time line with limited scrutiny.

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