IBC Laws

Resolution Plans under Insolvency Code: Hooked, booked and cooked! – By Sahil Kanuga, Arjun Gupta and Aparimita Pratap

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Introduction

The COVID-19-induced economic recession has disrupted Indian businesses forcing many of them to shut down their operations. In times of economic uncertainties posed by the pandemic, one of the revival mechanisms for Indian companies is under the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). However, pandemic-related disruptions

have also had an impact on pending insolvency resolution processes under the IBC. Successful resolution applicants are facing immense difficulties to abide by the scheme proposed by them in their own resolution plans, owing to a multitude of reasons such as financial hardships, substantial changes in the position of the corporate debtor, gross amendments in the valuation of the business. In light of these factors and the changed economic scenario, the resolution applicants are forced to either reconsider their plan, or in certain situations withdraw the resolution plan altogether. This factual scenario led the adjudicating authority to consider a novel issue pertaining to the finality of a resolution plan which has been approved by the Committee of Creditors ("**CoC**") but is pending approval of the National Company Law Tribunal ("**NCLT**"). While determining the situation the Hon'ble Supreme Court in the matter of *Ebix Singapore Pvt. Ltd. v. Committee of Creditors of Educomp Solutions Ltd. and Anr.*,[1] observed that the NCLT cannot allow modifications and/or withdrawals of CoC-approved resolution plans once the plan has been submitted to the NCLT. This determination by the Apex Court affirming the finality of the resolution plan even when it is pending approval of the adjudicating authority, is bound to have far reaching implications on the insolvency regime in India.

Ebix Singapore Pvt. Ltd. Judgment of the Supreme Court

The Supreme Court reviewed the facts of the three different appeals, and held as under:

i. Under the current insolvency and bankruptcy regime in India, a successful resolution applicant cannot be allowed to further modify and/or withdraw CoC-approved resolution plans once the resolution plan has been submitted to the adjudicating authority;[2]
ii. IBC aims to preserve the interests of the corporate debtor and the CoC. A court cannot be allowed to construe the "*negotiated arrangements*" that have been agreed upon in the resolution plan, in a way that is contrary to the objectives of the IBC; that are prompt, foreseeable and provide for timely resolutions;[3]
iii. Once a resolution applicant has obtained the financial information of the corporate debtor and reviewed the information memorandum, it is presumed that the resolution applicant has analyzed the risks associated with the business of the corporate debtor;[4]

iv. The IBC and the CIRP Regulations prescribe that a resolution plan that has been submitted, is binding and irrevocable between the CoC and the successful resolution applicant. The process provides that the CoC issues a letter of intent to a successful resolution applicant intimating it that it has been selected as the successful resolution applicant. Subsequently, its resolution plan would be submitted for the approval of the adjudicating authority. In most scenarios, the successful resolution applicant is obligated to accept the letter of intent unconditionally;[5]

v. The Insolvency and Bankruptcy Law Committee released its report in March 2018, wherein it noted that adjudicating authorities were approving many conditional resolution plans due to reasons such as uncertainty on statutory clearances by authorities like the Competition Commission of India. Accordingly, the approval given by the adjudicating authorities were being treated as a "*single window approval*", in contravention of the object and purpose of IBC.[6]

Modification of Debt Repayment Plan: Position in Singapore

In Singapore, the Debt Repayment Plan as submitted by the debtor is examined by an Official Assignee, by convening a meeting of creditors under Section 291(2) of the Insolvency, Restructuring and Dissolution Act, 2018 ("**IRDA**"). Thereafter, the Official Assignee has the discretion to either approve the debt repayment plan as it is or subject to any modifications which he considers appropriate. It is pertinent to note that under Section 295 of the IRDA,[7] the Official Assignee can at any time on or after the effective date of a debt repayment scheme, modify the plan. However, prior to any modification to the plan, the Official Assignee has to provide notice in writing to the debtor and the creditors who have proved their debts under the debt repayment scheme and convene a meeting of creditors. Under section 295(3) of the IRDA, the Official Assignee has been given the power to modify the plan after having convened the meeting of creditors.

Modification of Debt Repayment Plan: Position in United States

In the United States, at any time after the confirmation and before "substantial consummation" of a resolution plan, the proponent of the resolution plan may modify the plan, if the modification of the plan meets certain requirements of the Bankruptcy Code.[8] Under Section 1127 of the Bankruptcy Code,[9] for a plan to be considered modified, the modification has to be confirmed by the Court wherein the Court has to

judge whether the "circumstances warrant such modification". The Court, after giving notice and conducting a hearing, confirms the validity of the modified plan. If the debtor is an individual, the plan may be modified post confirmation upon the request of the debtor, the trustee, the U.S. trustee, or the holder of an allowed unsecured claim to make adjustments to payments due under the plan.

Ramifications of the Verdict

While interpreting Section 31 of the IBC, the Apex Court has prescribed an absolute and rigid interpretation, in a manner that leaves no room for any exception. It is trite law that a statutory provision in a law such as the IBC, should be interpreted keeping in mind various factual situations that may arise.

Investment in a stressed company is in the nature of a business transaction, where a company acquires a stressed company, the only difference being that this process takes place under the IBC. The practical method of assessing the value of the company that is being acquired, requires to take into account the factual scenario, including the financial health of the company, at the time of the acquisition. In several cases of insolvency of a stressed company that have taken place since the advent of IBC, we have seen that after a resolution plan has been approved by the CoC, several material circumstances change from the time of approval by the CoC to the final implementation of the plan. The resolution applicant may face multiple litigations during the pendency of which the plan cannot be implemented. New information may come to light which may not have been made available to the applicant at the time of submission of the resolution plan, such as encumbrance on assets or lack of government approvals. Sometimes there may be unanticipated delays which occur due to huge pendency and backlog in the judicial system itself.

These changes may significantly alter or have the potential to significantly alter the value of the stressed company. If the Courts take a rigid stand and do not give any leeway to the resolution applicant even when there are justifiable reasons demonstrated, it may have long-term effects on the IBC regime in India. This judgement leaves absolutely no wiggle room/exit option to a resolution applicant if the resolution plan has been approved by CoC but is pending approval of the adjudicating authority. It may be

coercive to an unwilling resolution applicant, that may no longer have the requisite finances and/or ability to implement the resolution plan.

For the IBC regime to be successful in India, it is paramount that the IBC process has to be time bound. If resolution applicants are allowed to backtrack after the submission of a resolution plan, it may jeopardize the finality of a resolution process. However, this yardstick should not be used for situations involving unforeseen circumstances, due to which the resolution applicant will be unfairly prejudiced. In situations where there were forseeable circumstances based on which the resolution applicant is making a plea to withdraw its resolution plan, there are safety measures in place. For example, the bank guarantee and earnest money deposits made by the resolution applicant as security, would be seized by the resolution professional for the stressed company. But the same procedure should not be applied in *force majeure* situations, where there have been unforeseeable circumstances that have materially altered the position of the stressed company from the day of the submission of the resolution plan by the resolution applicant. Neither of the parties can be penalized in *force majeure* situations. This judgement also does not take into account *force majeure* situations and leaves a resolution applicant trapped even when the changed circumstances due to external circumstances could not have been predicted by its own due diligence. Unwilling resolution applicants who may not have the capacity to implement the resolution plan, will ultimately face the threat of liquidation themselves due to the changed dynamics of the business environment, that needed an amended scheme but was not allowed due to the rigidity of the law.

We can and should learn from matured jurisdictions such as the United States and Singapore, that have successful and time-tested insolvency regimes, which allow for the modification of resolution plans by the resolution applicant. Discerning investors might be disincentivized to take a bet on stressed companies if the insolvency regime resorts to extreme rigidity. This might also have the effect of reducing the pool of investors that are willing to invest in the stressed assets market. Therefore, it is imperative for the government and the regulatory authorities to amend the existing statutory framework which will allow modification to resolution plans in exceptional circumstances like a force majeure situation or a material adverse change in the circumstances of insolvency resolution of the corporate debtor, even after approval by the COC.

Reference

[1] Ebix Singapore Pvt. Ltd. v. Committee of Creditors of Educomp Solutions Ltd. and Anr., (2021) ibclaw.in 153 SC.

[2] Paragraph 204 of the judgement

[3] Paragraph 145 of the judgement

[4] Paragraph 204 of the judgement

[5] Paragraph 152 of the judgement

[6] Paragraph 155 of the judgement; Report of the Insolvency Law Committee, Ministry of Corporate Affairs (March 2018) available at https://ibclaw.in/report-of-the-insolvency-law-committee/

[7] **Section 295, IRDA:**

> **"Modification of Debt Repayment Plan –** (*1) Subject to sub-section (6), the Official Assignee may at any time on or after the effective date of a debt repayment scheme, of his or her own volition or at the request of —*
>
> *(a) the debtor to whom the scheme applies;*
>
> *(b) a creditor who is bound by the debt repayment plan under the scheme; or*
>
> *(c) a creditor, not being a creditor referred to in paragraph (b), who proves his or her debt under the scheme, modify the plan in such manner as the Official Assignee considers appropriate.*

(2) Before making any modification to the debt repayment plan, the Official Assignee must, by notice in writing to the debtor and all the creditors who have proved their debts under the debt repayment scheme, convene and preside at a meeting of creditors.

(3) Subject to subsection (6), the Official Assignee may, at or after the meeting of creditors, refuse to modify the debt repayment plan or may make such modifications to the plan as the Official Assignee considers appropriate.

(4) The debtor or any creditor who has proved a debt under the debt repayment scheme may, within such time and in such manner as may be prescribed, appeal to the Appeal Panel against the Official Assignee's decision under subsection (3) on the ground that the decision unfairly prejudices his or her interests.

(5) The Appeal Panel may determine the appeal by — (a) confirming the Official Assignee's decision; or (b) subject to subsection (6), making such or such further modifications to the debt repayment plan as it considers appropriate, and the decision of the Appeal Panel is final."

[8] Bankruptcy Code, 11 U.S.C. § 1127(b).

[9] Bankruptcy Code, 11 U.S.C.:

§1127. Modification of plan

(a)The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant

such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) *The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.*

(d) *Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.*

(e) If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to—

> *(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;*
>
> *(2) extend or reduce the time period for such payments; or*
>
> *(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.*

(f) (1) Sections 1121 through 1128 and the requirements of section 1129 apply to any modification under subsection (e).

(2) The plan, as modified, shall become the plan only after there has been disclosure under section 1125 as the court may direct, notice and a hearing, and such modification is approved."