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HARD BARGAIN FOR RESOLUTION APPLICANTS; NO SCOPE FOR WITHDRAWAL OF PLANS: SUPREME COURT

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INTRODUCTION

On 13 September 2021, the Supreme Court (SC), has delivered a judgment (SC Judgment) in the batch matter of Ebix Singapore Pvt. Ltd. v. Committee of Creditors of Educomp Solutions Ltd. and Anr., Civil Appeal No. 3224 of 2020, providing long overdue clarity on the status of a resolution plan under the Insolvency and Bankruptcy Code 2016 (Code) once it has been approved by the Committee of Creditors (COC) but is still pending approval of the National Company Law Tribunal (Adjudicating Authority/ NCLT). SC took a view that once COC approves a plan, it becomes binding on the resolution applicant and there remains no scope of withdrawal, even while the plan is pending approval before NCLT.

While SC has recognised that there are inherent delays in the process owing to several factors including bottlenecks at the stage of Corporate Insolvency Resolution Process (CIRP) admission, unsolicited and untimely late bids, as well as mutliplicity of litigation and urged NCLTs to expedite plan approvals in light of the spirit of the Code, however, it held that these factors cannot be a ground for a resolution applicant to seek exit from an approved resolution plan.

BRIEF BACKGROUND OF THE APPEALS:

SC dealt with a batch of 3 appeals filed by successful resolution applicants in 3 CIRPs, namely:

1. Ebix Corporation Singapore Pvt. Ltd. - the successful resolution applicant of Educomp Solutions Ltd, Civil Appeal No. 3224 of 2020,

2. Kundan Care- the successful resolution applicant of Astonfield (Kundan Care Appeal) in Kundan Care Products Limited vs Mr Amit Gupta and Ors, Civil Appeal No. 3560 of 2020, and

3. Seroco- the successful resolution applicant of Arya Filament in Seroco Lighting Industries Private Limited vs. Ravi Kapoor RP for Arya Filaments Private Limited & Ors., Civil Appeal No. 295 of 2021.

The successful resolution applicants, sought to withdraw/ modify their resolution plans on various grounds including financial hardship, material change in position of the

corporate debtor due to Covid-19, impact of ongoing investigations on the resolution process, and delay in approval of resolution plan. While sifting through the timelines and process laid down under the Code, SC held it to be impermissible for resolution applicants to withdraw or modify COC approved plans as the Code does not permit such withdrawals.

Questions answered by SC:

1. Whether a resolution plan is a contract?

   - Resolution plans are neither simpliciter contracts nor statutory contracts. Resolution plans are finalised on the basis of commercial negotiations which are completely governed by the Code.

   - Once a resolution plan is approved by the COC, it becomes binding on the COC and the resolution applicant.

   - The fate of all stakeholders is decided once the COC approves a resolution plan, which distinguishes a resolution plan from a bi-lateral contract.

2. Can a resolution applicant withdraw or modify a resolution plan pending approval before NCLT on the ground of change in circumstances?

   - The framework under the Code does not enable withdrawals or modifications of resolution plans, once they have been submitted by the resolution professional to the NCLT after their approval by the CoC.

   - The framework, as it stands, only enables withdrawal of insolvency proceedings by following the procedure detailed in Section 12A of the Code and Regulation 30A of the CIRP Regulations and in the situations recognized therein.

   - Once information memorandum is made available to the resolution applicants, they are assumed to have assessed the commercial operations and submit an informed plan.

   - While resolution applicants cannot unilaterally withdraw or modify resolution plan, however, in the Kundan Care Appeal, the SC, as a one-off instance, exercising powers under Article 142 permitted negotiations between the COC and the resolution applicant to modify the resolution plan. It is noteworthy that this was possible only because the COC opted for a re-negotiation.

3. Can resolution plans contain clauses giving walk-away rights in view of material adverse effect or condition precedent not being fulfilled?

   - The Code does not recognise walk-away rights under clauses of resolution plans.

   - Plans containing conditions for withdrawal or re-negotiation (including material adverse event (MAE) clauses, frustration, impossibility and delay clauses) may be viewed as not being feasible or viable.

4. Can NCLTs/NCLATs compel COC to re-negotiate with a successful resolution applicants?

   - NCLT cannot compel COC to negotiate further with a successful resolution applicant.

- The residual powers of the NCLT under the Code cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency.

CONCLUSION:

Until now there has been a clear outline of the process before approval of a resolution plan by the COC as well as the binding nature of a resolution plan upon approval by NCLT, but there was some ambiguity regarding withdrawal of resolution plans pending approval of NCLT. The SC Judgment provides some clarity on the process during the intervening period when a plan is pending approval of the NCLT.

In holding that resolution applicants have absolutely no right of withdrawal, the interests of creditors and stakeholders have outweighed the prejudice likely to be caused to a successful resolution applicant whose plan has been pending approval before NCLT for a considerable period of time for no fault of such bona-fide resolution applicants.

While conventional acquisition transactions universally contain clauses of contingencies and walk-away rights, such clauses are not being recognised as part of resolution plans. Resultantly, resolution applicants ought to now tread carefully in negotiating commercial terms with the COC as the door to exit an approved plan is no longer available. Further, only resolution applicants with high risk appetite may be willing to participate resulting in reduced participation in insolvency processes.

SC has however left the door open for the legislature to introduce a mechanism permitting withdrawal of resolution plans for legitimate reasons.

SC has also rightly reflected on the suggestion to provide a 45 days' timeline to invite comments from regulators or authorities before a resolution plan is approved by NCLT, in order to expedite approval of resolution plans which are contingent on regulatory approvals. An amendment to this effect may prove to be an effective step towards reduction of uncertainties for a successful resolution applicant post approval of a resolution plan.

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