

Contemporary Changes In The Conventional Resolution Plan: Overview Of Recent Judgments And Amendments

written by Rajdev Singh | April 25, 2021



It is going to be six years since the Insolvency and Bankruptcy Code 2016 ("IBC") has come into effect. The law has faced several hits and misses since then. Many areas of IBC have emerged with interpretation and intervention by the Judiciary and the Legislature.

IBC was formed for timely resolution of Corporate Debtor's ("CD") default in paying off debts to its creditors. The CD is confronted with the CIRP through a bunch of creditors namely, the Committee of Creditors ("COC"). All claims received from the creditors are collated and managed by the Resolution Professional ("RP"). Interested parties or Resolution Applicant ("RA") submit their commercially viable plans for fulfilling the afore-mentioned perspective i.e. resolution of CD's debt.

The COC votes for the best and commercially suitable resolution plan. The approved resolution plan helps in the evolution of the CD into the new entity. Amidst the afore-mentioned tranquil issue, is a storm that unfolds with the creditors i.e. the issues orbiting in and around the resolution plan.

Resolution plan had been a debated topic of the recent past starting from ambiguity in the recent 2019 amendment to the Haircut faced by the creditors. The Hon'ble Apex Court had recently intervened and interpreted the issues to a larger extent.

Commercial Wisdom to prevail above Adjudicating Authority

The Hon'ble Apex Court^[1] while interpreting the justifiability of Commercial Wisdom of the COC whilst approval of resolution plan has explained the scope of Judicial Review of the Resolution Plan under Section 30(2) and 31 of IBC. It happened so that the Adjudicating Authority directed for certain modifications in the resolution plan concerning *"treatment of the dissenting financial creditor, provisioning of funds to clear unpaid fixed deposit holders, etc."*

The Apex Court while interpreting the provisions under Section 30(2) and 31 of IBC stated that the same is well defined and is restrictive in nature. It further held that the Adjudicating Authority cannot interfere or substitute on the commercial terms/aspects of the resolution plan. It added that such interference is solely confined within the purview of Commercial Wisdom granted to the COC. The Adjudicating Authority's interference is limited to shortcomings in the plan and direction to COC for reconsideration on the same but not on terms of resolution plan.

The practice of substituting Adjudicating Authority's wisdom with that of the COC's has been very customary. The Hon'ble NCLAT In the matter of Essar Steel v. Satish Kumar Gupta^[2] had directed for redistribution of the proceeds payable under the resolution plan thereby altering with respect to the claims

of the Operational Creditors. Thereafter, the Hon'ble Supreme Court interfered and held that *"it is impermissible for the NCLAT to alter the terms of the Resolution Plan by applying its own commercial wisdom, completely disregarding the will of the Committee of Creditors."*

However, the judgement of Jaypee Kensington has crystallised the law, thereby confirming that the Adjudicating Authority's interference is limited to shortcomings or statutory defects. Furthermore, the Adjudicating Authority cannot right away reject the plan, nonetheless, can direct the COC for reconsidering it on the said grounds.

The Adjudicating Authority will approve the resolution plan once the same runs into the requirements as spelt out under Section 30(2) of the IBC. The 2019 Amendment to the IBC had made the resolution plan binding on employees, members, creditors, guarantors and other stakeholders specifically the Central and State Government or any local authority involved.

Clean Slate Theory analysed - The insolvency and bankruptcy code 2016

The outcome of the aforementioned 2019 Amendment was elaborately discussed by the Hon'ble Supreme Court in *Ghanshyam Mishra v. Edelweiss Asset*

Reconstruction^[3]. The Hon'ble Court had referred to the clean slate doctrine and upheld that all claims as provided in the resolution plan once approved by the Adjudicating Authority shall stand frozen and binding on all class of persons enumerated under Section 30(1) of the IBC. It further reiterated that the Central and State Government or any local authority involved were covered earlier as well as now under the heading of "Other Stakeholders".

The Supreme Court in the lines of the recent amendment held the claims due to the Central or State Government or any local authority will fall under the heading of 'operational debt' and thereby covered by the definition of 'creditor'. The Hon'ble Apex Court looked behind the legislative intent of the IBC, wherein IBC was formed inter alia to permit the resolution process, whereby, the debts and liabilities of the CD would be reset to enable the new entity thus formed to start functioning in a clean slate which will further enable in reviving the business of the CD.

It can also be referred from the legislative documentary at the time of introduction of IBC before both the houses. The said statements are reproduced below:

"...There is a reset and then after the reset, the company is competitive once again and it goes forward and it becomes successful. That is what happens consistently in the United States. They go into bankruptcy, the liabilities are reset, they become competitive again and then thereafter they do fine..."

The Hon'ble Apex Court had earlier in several other judgements referred to the Clean Slate theory for better sustainment of the new entity, which if not followed, would result in unnecessary and uncertain claims popping up even after the amount involved in the resolution and restructuring the CD. The Hon'ble SC in *Swiss Ribbons v. Union of India & Ors.*^[4] had rightly stated that *"To achieve the said purpose, it is essential that creditors are barred from raising belated claims against the successfully Resolution Applicant who is trying to resuscitate the Corporate Debtor."*

Therefore, the Hon'ble Court added that all claims which do not form part of the resolution plan shall stand extinguished and no person would be entitled to initiate or continue any proceedings in relation to the same.

Before the disposition of this case, different High Courts had applied the Clean State theory differently with some allowing creditors to move

applications to labour courts or civil courts for the recovery of their dues and the Governments to collect the outstanding taxes even after the completion of the CIRP. For instance, in *Electrosteel Steels Ltd. v. State of Jharkhand*[5], the High Court of Jharkhand allowed the State Government to maintain an action for the collection of the outstanding VAT duty despite the fact that the claim was admitted and not made part of the resolution plan.

Conclusion

The decision of the Hon'ble Supreme Court will thus go a long way in protecting the successful Resolution Applicant from such undecided claims. The Hon'ble Court has provided three landmark pointers w.r.t. the confusion regarding resolution plan in the recent judgements. These pointers will help in resolution and thereby curtail multiple litigations popping up after the approval of the resolution plan. In short, the three-pointers being:

- Once resolution plan is approved, the same is binding on all creditors inclusive of the Central and State Government or any local authority and would be deemed frozen and crystallised.
- Upon the approval of the resolution plan, all debts/ claims which do not form part of the resolution plan stand extinguished. Additionally, no creditor or stakeholder is entitled to initiate or continue to claim for new or further claims, which was not approved in the Resolution Plan.
- The Adjudicating Authority cannot interfere or substitute on the commercial terms/aspects of the Resolution Plan and such interference is solely confined within the purview of Commercial Wisdom granted to the COC.

The legislative intent behind Section 31(1) of IBC is to ensure a fresh start for the new entity and to protect the Resolution Applicant from sudden and surprising claims. It is important to preserve the binding value of the resolution plan and thus, not allow subsequent challenges for the dues not forming part of the resolution plan. It has established and curtailed hydra head to appear in form of a fresh claim against the new entity subsequent to the approval of the resolution plan.

[1] Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd. Civil Appeal No. 3995 of 2020, Supreme Court of India.

[2] COC of Essar Steel v. Satish Kumar Gupta (2020) 8 SCC 531

[3] Ghanshyam Mishra v. Edelweiss Asset Reconstruction Civil Appeal No. 8129 of 2019

[4] Swiss Ribbons v. Union of India & Ors. (2019) 4 SCC 17

[5] Electrosteel Steels Ltd. v. State of Jharkhand, Jharkhand High Court, W.P.(T). No. 6324 of 2019

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