

Insolvency and Bankruptcy Board of India
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14th September 2021

Subject: Judgment¹ dated 13th September, 2021 of the Hon’ble Supreme Court of India in the matter of Ebix Singapore Private Limited Vs. Committee of Creditors of Educomp Solutions Limited & Anr. [Civil Appeal No. 3224 of 2020 and other appeals]

The Hon’ble Supreme Court (SC) in its order dated 13th September, 2021 in the above case held that once the resolution plan is approved by CoC and submitted to AA after due compliance with the procedural requirements and timelines the successful resolution applicant cannot withdraw or modify the resolution plan. It reemphasized that the speed of resolution as contemplated in the Code is sacrosanct and the adjournments in the proceedings hamper the efficacy of the judicial process. It further held that the NCLT and NCLAT should be sensitive to the effect of such delays and should endeavor, on a best effort basis, to strictly adhere to the timelines stipulated under the Code and clear pending resolution plans forthwith. The Hon’ble SC made some important undernoted observations in the context of insolvency proceedings:

Sl. No.	Theme/Issue	Observation/Ruling	Para/Page No.
1.	Purpose of the Code.	(a) The IBC was introduced as a water-shed moment for insolvency law in India that consolidated processes under several disparate statutes. (b) A comprehensive and time-bound framework was introduced with smooth transitions between reorganization and liquidation, with an aim to inter alia maximize the value of assets of all persons and balance the interest of all stakeholders.	93/84
2	Speed is essence of resolution	(a) Adjudicating mechanisms were identified as one of the two important sources of delay which need to be equipped with the right resources. In order to respond to the rapid changes in the economy, the IBBI has been established to formulate regulations that dynamically detail the procedural norms of the working of the IBC with the necessary immediacy. It is also important for this Court, as a constitutional authority which determines questions of law concerning the IBC framework, to note that a rapid liquidation may sometimes be preferable to a protracted CIRP.	96/87

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		<p>(b) The law mandates the conclusion of the CIRP – including time taken in legal proceedings, within 330 days with a short extension to be granted only in exceptional cases. However, the Court has warned that this discretion must be exercised sparingly and only in the situations envisaged in Essar Steel case.</p> <p>(c) If the CIRP is not completed within the prescribed timeline, the Corporator Debtor (CD) is sent into liquidation. This understanding of the evolution of the law is critical to task of judicial interpretation. It cannot afford to be swayed by abstract conceptions of equity and ‘contractual freedom’ of the parties to freely negotiate terms of the Resolution Plan with unfettered discretion, that are not grounded in the intent of the IBC.</p>	<p>127/117-118</p> <p>128/119</p>
3.	Adjudicating Mechanism under the Code.	<p>(a) The procedure designed for the insolvency process is critical for allocating economic coordination between the parties who partake in or are bound by the process. This procedure produces substantive rights and obligations.</p> <p>(b) Upholding the procedural design and sanctity of the process is critical to its functioning. The interpretative task of the AA, Appellate Authority, and even this Court, must be cognizant of, and allied with that objective.</p> <p>(c) Any claim seeking an exercise of the Adjudicating Authority’s residuary powers under Section 60(5)(c) of the IBC, the NCLT’s inherent powers under Rule 11 of the NCLT Rules 2016 or even the powers of this Court under Article 142 of the Constitution must be closely scrutinized for broader compliance with the insolvency framework and its underlying objective.</p> <p>(d) The adjudicating mechanisms which have been specifically created by the statute, have a narrowly defined role in the process and must be circumspect in granting reliefs that may run counter to the timeliness and predictability that is central to the IBC.</p> <p>(e) Any judicial creation of a procedural or substantive remedy that is not envisaged by the statute would not only violate the principle of separation of powers, but also run the risk of altering the delicate coordination that is designed by the IBC framework and have grave implications on the outcome of the CIRP, the economy of the country and the lives of the workers and other allied parties who are</p>	<p>97/88</p> <p>97/88</p> <p>98/89</p> <p>98/89</p> <p>98/89</p>

		statutorily bound by the impact of a resolution or liquidation of a CD.	
4	Nature of a Resolution Plan.	<p>(a) There are broadly three stages: (i) the first stage is prior to and ends with the approval of the Resolution Plan by the CoC; (ii) the second stage is the interim period between the Resolution Plan's approval by the CoC and before its confirmation by the AA; and (iii) the third stage is after the approval of the Resolution Plan by the AA. In the first and third stage, the relationship between the parties is explicitly governed by the provisions of the IBC.</p> <p>(b) IBC does not specify whether Resolution Plans at the second stage of the process, i.e., in the intervening period of submission to and approval by the Adjudicating Authority, are pure contracts.</p> <p>(c) The power of the CoC to suggest modifications invariably entailed an element of negotiation with the Resolution Applicants, who would make suitable revisions and re-submit their Resolution Plans. The scope of a commercial bargain with the Resolution Applicants evinces a sense of a negotiated agreement that is arrived between the parties, which resembles an exercise of contractual freedom by the CoC and the Resolution Applicant.</p> <p>(d) If this court were to hold that CoC-approved Resolution Plans are indeed contracts, their provisions would still have to conform to the statutory provisions of the IBC. However, such an interpretation would entail that CoC-approved Resolution Plans are at the intersection of the IBC and the Contract Act. This would mean that certain principles of contract law, for example those relating to discharge, penalties, remedies and damages would become applicable to CoC-approved Resolution Plans.</p> <p>(e) The violation of the terms of the Resolution Plan does not give rise to a claim of damages, rather it leads to prosecution and imposition of punishment under Section 74 of the IBC. On the contrary, a CoC's withdrawal of the CIRP under Section 12A is coupled with a requirement of payment of CIRP costs, but no damages are statutorily payable to the Resolution Applicant, irrespective of the stage of the withdrawal.</p> <p>(f) Such features of a Resolution Plan, where a statute extensively governs the form, mode, manner and effect of approval distinguishes it from a traditional contract, specifically in its ability to bind those who have not consented to it. In the pure contractual realm, an agreement binds parties who are privy to the contract. In the context of a resolution Plan governed by the IBC, the element of privity</p>	<p>103/94</p> <p>108/98</p> <p>106/97</p> <p>107/97</p> <p>109/99</p> <p>110/100</p>

	<p>becomes inapplicable once the AA confirms the Resolution Plan under Section 31(1) and declares it to be binding on all stakeholders, who are not a part of the negotiation stage or parties to the Resolution Plan.</p>	
	<p>(g) Thus, insolvency law recognizes that parties can take benefit of such ‘incomplete contract’ to hold each other up for their individual gain. In an attempt to solve the issue of incompleteness and the hold-up threat, the insolvency law provides procedural protections i.e., “the law puts in place guardrails that give the parties room to bargain while keeping them from taking position that veer toward extreme hold up”.</p>	110/101
	<p>(h) The Resolution Plan even prior to the approval of the AA is binding inter se the CoC and the successful Resolution Applicant. The Resolution Plan cannot be construed purely as a ‘contract’ governed by the Contract Act, in the period intervening its acceptance by the CoC and the approval of the AA. Even at that stage, its binding effects are produced by the IBC framework. Thus, the ability of the Resolution Plan to bind those who have not consented to it, by way a statutory procedure, indicates that it is not a typical contract.</p>	112/102
	<p>(i) Certain stages of the CIRP resemble the stages involved in the formation of a contract. Echoes of the process involved in the formation of a contract resonate in the steps antecedent to the approval of a Resolution Plan such as: (i) the issuance of an RFRP may be equated to an invitation to offer; (ii) a Resolution Plan can be considered as a proposal or offer; and (iii) the approval by the CoC may be similar to an acceptance of offer. The terms of the Resolution Plan contain a commercial bargain between the CoC and Resolution Applicant. There is also an intention to create legal relations with binding effect. However, it is the structure of the IBC which confers legal force on the CoC-approved Resolution Plan. The validity of the Resolution Plan is not premised upon the agreement or consent of those bound, but upon its compliance with the procedure stipulated under the IBC.</p>	114/103
	<p>(j) There is lack of international consensus on the issue of whether instruments like CoC-approved Resolution Plans are contracts, prior to the Court’s sanction. In view of lack of clarity in BLRC Report and absence of any specific provision in the IBC or the regulations referring to a CoC-approved Resolution Plan as a contract, the SC declined to hold that CoC-approved Resolution Plans will be governed by the Contract Act and common law principles governing contracts, save and</p>	124, 125/111

	<p>except for the specific prohibitions and deeming fictions under the IBC. The statutorily-enabled room for commercial negotiation is not enough to over-power the other elements of regulation that detract from the view that CoC-approved Resolution Plans are contracts.</p>	
	<p>(k) CoC-approved Resolution Plans, before the approval of the AA under Section 31, are a function and product of the IBC’s mechanisms. Their validity, nature, legal force and content is regulated by the procedure laid down under the IBC, and not the Contract Act. The mechanism prior to submission of a CoC-approved resolution plan is subject to continuous procedural scrutiny by the IBC and cannot be considered as a simple contractual negotiation between two parties. The whole host of remedies such as liquidated and unliquidated damages, restitution, novation and frustration, unless specifically provided by the IBC, are not available to a successful Resolution Applicant whose Plan has been approved by the CoC and is awaiting the approval of the AA.</p>	125/112
	<p>(l) Common law remedies of withdrawal or modification on account of frustration or <i>force majeure</i> are not applicable to CoC approved Resolution Plans owing to the nature of the IBC.</p>	125/112
	<p>(m) If the intention was to view a CoC approved Resolution Plan as a contract, the principles of unjust enrichment would have been sufficient to address the issue and an amendment may not be considered necessary. A Resolution Applicant, as a third party partaking in the insolvency regime, seeks to acquire the business of the CD without the entirety of its debts, statutory liabilities and avoiding certain transactions with third parties. These benefits are a function of the coercive mechanisms of the IBC which enable a third party to acquire the assets of a CD without its liabilities, for a negotiated amount of the debt that is owed by the CD. The Resolution Plan is drafted in a way that it is implementable in the future and brings about a quietus to the CIRP. Enabling Resolution Applicants to seek remedies that are not specified by the IBC, by seeking recourse to the Contract Act would be antithetical to the IBC’s insolvency regime. The elements of contractual interpretation can be relied upon to construe the language of the terms of the Resolution Plan, in the event of a dispute, but not to re-fashion and distort the mechanism of the IBC altogether.</p>	125/113
	<p>(n) Thus, importing principles of any other law or a statute like the Contract Act into the IBC regime would introduce unnecessary complexity into the working of the IBC and may lead to protracted litigation on considerations that are alien to the IBC.</p>	125/114

		(o) Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC and the approval by the AA. Principles of contractual construction and interpretation may serve as interpretive aids, in the event of ambiguity over the terms of a Resolution Plan. However, remedies that are specific to the Contract Act cannot be applied, de hors the over-riding principles of the IBC.	125/115
5.	Statutory framework governing the CIRP.	(a) A legislative amendment that takes away the basis of a judicial finding is indicative of the strong emphasis of the IBC on its timelines and its attempt to thwart the prospect of stakeholders engaging in multiple litigations, solely with the intent of causing undue delay.	126/116
		(b) The evolution of the IBC framework, through an interplay of legislative amendments, regulations and judicial interpretation, consistently emphasizes the predictability and timeliness of the IBC. The legislature and the IBBI have been proactive to introduce amendments to the procedural framework, that respond to changes in the economy.	128/119
		(c) The statutory framework governing the CIRP seeks to create a mechanism for resolving insolvency in an efficient, comprehensive and timely manner. The IBC provides a detailed linear process for undertaking CIRP of the CD to minimize any delays, uncertainty in procedure and disputes.	143/132
		(d) This Court should proceed with caution in introducing any element in the insolvency process that may lead to unpredictability, delay and complexity not contemplated by the legislature.	143/134
6.	Withdrawal of the Resolution Plan by a successful Resolution Applicant under the Code.	(a) The CoC has been given wide powers under the IBC. It can direct the CD into liquidation any time before the approval by the Adjudicating Authority, under Section 33(2) of the IBC. Further, under Section 12A of the IBC the Adjudicating Authority may allow withdrawal of the application submitted under Sections 7, 9 or 10 of the IBC for initiation of the CIRP (i.e., initiation of the CIRP by the financial creditor, operational creditor and the corporate applicant, respectively) if the withdrawal is approved by the CoC. Dealing with the question whether a successful Resolution Applicant can retreat through the route provided under Section 12A of the IBC, a three judge Bench of this Court in <i>Maharashtra Seamless v. Padmanabhan Venkatesh</i> observed that, “the exit route prescribed in Section 12A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and	138/125-126

		<p>10 of the code”. However, this Court left the question whether a successful Resolution Applicant “altogether forfeits their right to withdraw from such process or not”, open for subsequent judicial determination.</p>	
		<p>(b) The analysis of the statutory framework governing the CIRP and periodic reports of the ILC indicates that it is a creditor-driven process. The aim of the process, in preferential order, is to: first, enable resolution of the debt by maintaining the CD as a going concern, in order to preserve the business and employment of the personnel; second, maximize the value of the assets of the CD and enable a higher pay-back to its creditors than under liquidation; and third, enable a smoother and faster transition to liquidation in the event that a time bound CIRP fails, in a bid to avert further deterioration of value.</p>	144/134
		<p>(c) The course of action, in refraining from the exercise of inherent powers to effect procedures and remedies that were not specifically envisaged by the statute, was explicitly affirmed by insertion of Section 12A which vested the CoC with the power to withdraw the CIRP or vote on such withdrawal, if sought by the CD. Significantly, no such exit routes have been contemplated for the Resolution Applicant.</p>	145/136
		<p>(d) The newly inserted and then unamended Regulation 30A (w.e.f. 4 July 2018) of the CIRP Regulations stipulated that withdrawal under Section 12A can be allowed through submitting an application to the IRP or RP (as the case maybe) before the invitation for EOI is issued to the public. However, on 14 December 2018, a two judge Bench of this Court, held in <i>Brilliant Alloys (P) Ltd v. S Rajagopal</i> that Regulation 30A is directory, and not mandatory in nature since Section 12A of the IBC does not stipulate a deadline by which a withdrawal from the CIRP can be made. On 25 January 2019, a two judge Bench of this Court in Swiss Ribbons case interpreted the true import of Section 12A and clarified that if the CoC is not yet constituted, a party can approach the Adjudicating Authority, which may in exercise of its inherent powers under Rule 11 of the NCLT Rules 2016, allow or reject an application for withdrawal or settlement. On 25 July 2019, the IBBI amended Regulation 30A in terms of this decision in interpreting Section 12A and now specifically provides the procedure under the IBC that relates to affecting a withdrawal under Section 12A before the constitution of the CoC.</p>	145/136

	<p>(e) It is clear that withdrawal of the CIRP is allowed only if it upholds the interests of the CoC, is time-bound, and takes into consideration how the expenses relating to the insolvency process up to withdrawal shall be borne.</p>	145/137
	<p>(f) Thus, even the exit under Section 12A of the CoC, which is not available to the Resolution Applicant, is regulated by procedural provisions indicating that the legislature has applied its mind to the timelines and costs involved in the CIRP.</p>	145/138
	<p>(g) This Court, in Maharashtra Seamless case had denied relief to a Resolution Applicant who had sought to invoke Section 12A to resile from its Resolution Plan. The nature of the statute indicates the clarity of its purpose – primacy of the interests of the creditors who are seeking to cut their losses through a CIRP. Traditional models and understandings of equity or fairness that seek reliefs which are misaligned with the goals of the statute and upset the economic coordination envisaged between the parties, cannot be read into the statute through judicial interpretation. While parties have the freedom to negotiate certain commercial terms of the Resolution Plan to gain wide support, their ability to negotiate is circumscribed by the governing statute.</p>	145/138
	<p>(h) A court cannot interpret the negotiated arrangements that are represented in the Resolution Plan in a manner that hampers the objectives of the IBC which is a speedy, predictable and timely resolution. The Resolution Applicant is deemed to be aware of the IBC and its mechanisms before it steps into the fray and consents to be bound by its underlying objectives.</p>	145/138
	<p>(i) A court may not be able to lay down such detailed guidance on how a mechanism for withdrawal, if any, may be provided to a successful Resolution Applicant without disturbing the statutory timelines and adequately evaluating the interests of creditors and other stakeholders, which is ultimately a matter of legislative policy.</p>	145/139
	<p>(j) Judicial restraint must not only be exercised while adjudicating upon the constitutionality of the statute relating to economic policy but also in matters of interpretation of economic statutes, where the interpretative maneuvers of the Court have an effect of transgressing into the law-making power of the legislature and disturbing the delicate balance of separation of powers between the legislature and the judiciary. Judicial restraint must be exercised in such cases as a</p>	146/140

		<p>matter of prudence, since the court neither has the necessary expertise nor the power to hold consultations with stakeholders or experts to decide the direction of economic policy.</p>	
		<p>(k) The absence of any exit routes being stipulated under the statute for a successful Resolution Applicant is indicative of the IBC’s proscription of any attempts at withdrawal at its behest. The rule of <i>casus omissus</i> is an established rule of interpretation, which provides that an omission in a statute cannot be supplied by judicial construction.</p>	147/141
		<p>(l) In the absence of any provision under the IBC allowing for withdrawal of the Resolution Plan by a successful Resolution Applicant, vesting the Resolution Applicant with such a relief through a process of judicial interpretation would be impermissible. Such a judicial exercise would bring in the evils which the IBC sought to obviate through the back-door.</p>	147/143
		<p>(m) Regulation 38(3) mandates that a Resolution Plan be feasible, viable and implementable with specific timelines. A Resolution Plan whose implementation can be withdrawn at the behest of the successful Resolution Applicant, is inherently unviable, since open-ended clauses on modifications/withdrawal would mean that the Plan could fail at an undefined stage, be uncertain, including after approval by the Adjudicating Authority. It is inconsistent to postulate, on the one hand, that no withdrawal or modification is permitted after the approval by the Adjudicating Authority under Section 31, irrespective of the terms of the Resolution Plan; and on the other hand, to argue that the terms of the Resolution Plan relating to withdrawal or modification must be respected, in spite of the CoC’s approval, but prior to the approval by the Adjudicating Authority. The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Applicant between the stage of approval by the CoC and the approval of the Adjudicating Authority.</p>	153/149
		<p>(n) The binding nature of a Resolution Plan on a Resolution Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant.</p>	153/149
		<p>(o) The statutory framework under the IBC has consistently attempted to avoid situations which may introduce unpredictability in the insolvency resolution process and has sought to make the process</p>	155/154

		<p>as linear as it can be.</p> <p>(p) A conditionality which allows for further negotiations, modification or withdrawal, once the Resolution Plan is approved by the CoC would only derail the time-bound process envisaged under the IBC.</p> <p>(q) If the legislature intended to allow withdrawals or subsequent negotiations by successful Resolution Applicants, it would have prescribed specific timelines for the exercise of such an option. The recognition of a power of withdrawal or modification after submission of a CoC-approved Resolution Plan, by judicial interpretation, will have the effect of disturbing the statutory timelines and delaying the CIRP, leading to a depletion in the value of the assets of a CD in the event of a potential liquidation.</p> <p>(r) Parties cannot indirectly impose a condition on a judicial authority to accept or reject its Plan within a specified time period, failing which the CIRP process will inevitably come to an end.</p> <p>(s) Whilst this Court has declared the position in law to not enable a withdrawal or modification to a successful Resolution Applicant after its submission to the Adjudicating Authority, long delays in approving the Resolution Plan by the Adjudicating Authority affect the subsequent implementation of the plan. These delays, if systemic and frequent, will have an undeniable impact on the commercial assessment that the parties undertake during the course of the negotiation.</p>	<p>155/154</p> <p>156/154</p> <p>179/170</p> <p>205/188</p>
7.	Conclusion.	<p>(a) The legislative intent of the statute cannot be overridden by the Court to render outcomes that can have grave economic implications which will impact the viability of the IBC.</p> <p>(b) The residual powers of the AA under the IBC cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency. The framework, as it stands, only enables withdrawals from the CIRP process by following the procedure detailed in Section 12A of the IBC and Regulation 30A of the CIRP Regulations and in the situations recognized in those provisions. Enabling withdrawals or modifications of the Resolution Plan at the behest of the successful Resolution Applicant, once it has been submitted to the AA after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will be</p>	<p>201/ 185</p> <p>202/185</p>

		<p>wholly unregulated by the statute. Permitting such a course of action would either result in a down-graded resolution amount of the CD and/or a delayed liquidation with depreciated assets which frustrates the core aim of the IBC.</p> <p>(c) If the legislature in its wisdom, were to recognize the concept of withdrawals or modifications to a Resolution Plan after it has been submitted to the AA, it must specifically provide for a tether under the IBC and/or the Regulations. This tether must be coupled with directions on narrowly defined grounds on which such actions are permissible and procedural directions, which may include the timelines in which they can be proposed, voting requirements and threshold for approval by the CoC (as the case may be). They must also contemplate at which stage the CD may be sent into liquidation by the AA or otherwise, in the event of a failed negotiation for modification and/or withdrawal. These are matters for legislative policy.</p> <p>(d) The existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC-approved Resolution Plans, at the behest of the successful Resolution Applicant, once the plan has been submitted to the AA. A Resolution Applicant, after obtaining the financial information of the CD through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the CD and submitted a considered proposal. A submitted Resolution Plan is binding and irrevocable as between the CoC and the successful Resolution Applicant in terms of the provisions of the IBC and the CIRP Regulations.</p> <p>(e) The NCLT and NCLAT should be sensitive to the effect of delays on the insolvency resolution process and be cognizant that adjournments hamper the efficacy of the judicial process. The NCLT and the NCLAT should endeavor, on a best effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans forthwith. Judicial delay was one of the major reasons for the failure of the insolvency regime that was in effect prior to the IBC. We cannot let the present insolvency regime meet the same fate.</p>	<p>203/186</p> <p>204/187</p> <p>205/189</p>
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