

CoC cannot reconsider a resolution plan when it is pending for final approval before the adjudicating authority

The National Company Law Appellate Tribunal, New Delhi (“NCLAT”) in the case of *Express Resorts and Hotels Ltd. v. Amit Jain, RP, Neesa Leisure Ltd. & Ors.*¹ has held that once the committee of creditors (“CoC”) has approved a resolution plan under the Insolvency and Bankruptcy Code, 2016 (“IBC”), it is binding between the CoC and the successful resolution applicant. The CoC cannot ask for the resolution plan to be remitted back for its reconsideration pending the approval of the resolution plan by the adjudicating authority (“AA”).

Brief Facts

1. The National Company Law Tribunal, Ahmedabad Special Bench (“NCLT”) admitted the corporate insolvency resolution process (“CIRP”) under the IBC against Neesa Leisure Limited (“Corporate Debtor”) vide an order dated April 26, 2019.
2. During the CIRP, the CoC received resolution plans from four prospective resolution applicants, namely Express Resorts and Hotels Ltd. (“Express Resorts”), Alchemist ARC Consortium, Pacifica (India) Project Pvt. Ltd. and Kundan Group. The Alchemist ARC Consortium subsequently withdrew its plan, and the three other resolution plans were put to vote.
3. The resolution plan of Express Resorts was approved by the CoC by a majority of 67.85% on October 27, 2020. The resolution professional issued the letter of intent to Express Resorts on November 7, 2020 and Express Resorts also submitted a performance bank guarantee on November 13, 2020. Consequently, the resolution professional filed an application before the NCLT for approval of the resolution plan.
4. Thereafter, certain prospective resolution applicants (“PRAs”) filed applications before the NCLT forwarding their proposal with a better offer.
5. Subsequently, the CoC (with more than 90% of the voting share) filed an application before the NCLT requesting for sending back the CoC approved resolution plan to enable the CoC to reconsider it along with the offers made by PRAs with a view to maximise the value of the assets of the Corporate Debtor.
6. The NCLT relied on the pleas taken up by the PRAs and the CoC that due to the Covid-19 pandemic, the PRAs could not come forward to give a good offer and after the pandemic, the PRAs have now approached the NCLT showing their willingness to submit a resolution plan for a higher value.

¹ Company Appeal (AT) (Insolvency) No.1158 of 2022, decided on February 9, 2023.

7. The NCLT sent back the CoC approved resolution plan for reconsideration by the CoC and further allowed the PRAs to submit their resolution plan for the CoC's consideration.
8. Aggrieved by the NCLT order, Express Resorts filed an appeal before the NCLAT.

Key Issue

The key issue before the NCLAT was whether the CoC can be allowed to reconsider its decision on a resolution plan which has already been filed before the AA for its approval.

Key arguments by the parties

Contentions of Express Resorts:

1. Express Resorts relied primarily on the judgment of the Supreme Court in *Ebix Singapore Pvt. Ltd. & Ors. v. Committee of Creditors of Educomp Solutions Limited & Ors.*² ("**Ebix Judgement**"). It was contended that in the Ebix Judgement, the Supreme Court held that once the resolution plan is approved by the CoC, it becomes binding *inter se* the CoC and the successful resolution applicant even while the resolution plan is pending approval of the AA. During this interim period, the CoC cannot have a change of heart and be permitted to reconsider its decision. Furthermore, permitting any intervention of applicant(s) who are willing to offer a higher amount vis-à-vis the CoC approved resolution plan would be against the scheme of IBC.
2. Express Resorts also relied on a previous case of the NCLAT in the matter of *Alok Kailash Saksena v. Associate Décor Ltd. & Ors.*³ where it was held that after a resolution plan has been submitted to the AA for approval, the CoC cannot consider other resolution plans. This judgement was affirmed in an appeal before the Supreme Court.
3. The cases relied on by the PRA/CoC were sought to be distinguished on grounds *inter alia* that in those cases the resolution plan was remitted back to the CoC on grounds of non-compliance under Section 30(2) of the IBC; whereas in the present case the resolution plan submitted by Express Resorts is legally compliant.

Contentions of CoC and PRA:

1. It was contended that the CoC had approved the resolution plan of Express Resorts during the time when COVID-19 pandemic was prevalent and the hotel sector, in which the Corporate Debtor is involved, was adversely impacted. However, during the pendency of the CIRP, normalcy was restored in the hotel business and that led to renewed interest in the CIRP of the Corporate Debtor. Certain applicants came forward and made higher offers and the same should be considered for the purpose of maximization of the value of the Corporate Debtor.
2. The CoC sought to distinguish the Ebix Judgement on the grounds that under that judgement, the Supreme Court held that a resolution applicant cannot withdraw from the resolution plan, whereas this was a case where the CoC was in favour of reconsidering the plan.
3. The other cases relied on by Express Resorts were sought to be distinguished on grounds *inter alia* that in those cases the courts/tribunals have held that the AA cannot pass an order directing an unwilling CoC to reconsider the resolution plan; whereas in the present case the CoC itself is in favour of reconsideration of the resolution plan given the change in the business conditions of the Corporate Debtor.

² 2021 (4) RCR (Civil) 282, decided on September 13, 2021.

³ Company Appeal (AT) (CH) (Ins.) No.172 of 2021, decided on September 19, 2022.

Findings and Rationale:

The NCLAT made the following observations:

1. While maximisation of value of the corporate debtor is admittedly an object of the CIRP, the same must be achieved within the timeline provided in the IBC.
2. The negotiations between the resolution applicant and the CoC are brought to an end after the CoC's approval of the resolution plan and the only conditionality that remains is the approval of the AA.
3. Once a resolution plan is approved by the CoC after following the provisions of the IBC, the said approval by the CoC must be respected and cannot be interfered with in exercise of judicial review by the AA.
4. The AA only has a limited jurisdiction to confirm or deny the legal validity of the resolution plan in terms of Section 30(2) of the IBC.
5. A CoC approved resolution plan is binding on the CoC and the CoC cannot be allowed to take a different stand before the AA, when an application for approving the resolution plan which has already been filed at the instance of CoC comes for consideration. The CoC may take a different stand if it points out any breach of procedure or manifest error in their approval of the resolution plan, which can be a ground to be pressed before the AA. However, that was not the case in the instant matter.
6. Once a resolution plan is approved by the CoC and is submitted before the AA for its approval, it is not open either to the CoC or any other applicant to claim that it is ready to offer a higher amount. Permitting any such intervention is against the scheme of the IBC and would result in permitting an unending process, since the situation of the corporate debtor may keep changing with the passage of time. After becoming aware about the financial offer in a resolution plan which has been approved by the CoC, any subsequent offer by any entity who did not participate in the process earlier cannot be entertained.

The NCLAT set aside the order of the NCLT and remitted the matter back to the NCLT to pass a fresh order in relation to the approval of the resolution plan of Express Resorts within 3 (three) months.

JSA Comment:

In the Ebix Judgement, the Supreme Court has held that once a resolution plan is approved by the CoC, it is binding *inter se* the CoC and the resolution applicant. The Ebix Judgement has been followed by the NCLAT in other cases⁴ as well where the NCLAT had to decide on whether the CoC can review new resolution plans after they had approved a resolution plan which was pending for approval of the AA.

The NCLAT's order re-iterates that once the CoC has approved a resolution plan and submitted it for approval to the AA, it cannot seek to revisit the same or review other plans on the grounds of maximization of value of assets of the corporate debtor. While maximization of value is an important criterion in a CIRP and the commercial wisdom of the CoC in approving or rejecting a resolution plan is also paramount, the NCLAT has given primacy to completion of the CIRP in a time bound manner to bring finality to the process.

⁴ *Steel Strips Wheels Ltd. v. Shri Avil Menezes, Resolution Professional of AMW Autocomponent Ltd. & Ors.*, Company Appeal (AT) (Insolvency) No. 89 of 2022, decided on April 18, 2022; *Kalinga Allied Industries India Private Limited v. Committee of Creditors (Bindals Sponnge Industries Limited) & Anr.*, Company Appeal (AT) (Insolvency) No. 689 of 2021, decided on December 19, 2022.

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