

Update

Supreme Court's decision in Jaypee matter clarifies various aspects under IBC

08 April 2021

In a landmark decision, the Supreme Court of India clarifies various facets of the Insolvency and Bankruptcy Code, 2016 while extending the corporate insolvency resolution process of Jaypee Infratech Limited.

Background

On 24 March 2021, a three-judge bench of the Supreme Court of India in the matter of *Jaypee Kensington Boulevard Apartments v NBCC India Ltd & Ors* did not approve the resolution plan submitted by NBCC India Limited (**NBCC**) for Jaypee Infratech Limited (**JIL**) and remanded the matter back to the Committee of Creditors (**CoC**) of JIL, to complete its corporate insolvency resolution process (**CIRP**) (**Judgement**) within 45 days, by inviting fresh/modified resolution plans from the resolution applicants who had previously participated in JIL's CIRP.

The Judgement discusses various important provisions of the Insolvency and Bankruptcy Code, 2016 (**Code**), including the jurisdiction of adjudicating authorities to modify a resolution plan, payments to dissenting financial creditors and also sets out guiding principles to a legally compliant resolution plan.

Brief Facts

(a) In 2003, Jaiprakash Associates Limited (**JAL**) was awarded the bid for development of the 'Taj Expressway Project' under a concession agreement (**Concession Agreement**) executed between Yamuna Expressway Industrial Development (**YEIDA**) and JAL.

(b) JIL was set-up as a special purpose vehicle by JAL for execution of the project and consequently all rights and obligations of JAL under the Concession Agreement were assigned to JIL.

(c) JIL availed loans from various banks/financial institutions for executing the expressway project. Further, as JIL was granted certain land parcels by YEIDA in lieu of the development of the project, JIL also raised monies from homebuyers for development of real estate projects on some of its land parcels.

(d) JIL started facing financial difficulties due to various factors. As a result, an application was filed by IDBI Bank under Section 7 of the Code for the initiation of JIL's CIRP which was admitted by the National Company Law Tribunal (**NCLT**) on 9 August 2017.

(e) During the CIRP of JIL various issues with respect to rights of homebuyers and avoidable transactions arose which were settled by the Supreme Court from time to time through separate judgements.

(f) Subsequently, the resolution plan submitted by NBCC was approved by 97.36% vote of the CoC. By an order dated 3 March 2020, the NCLT approved the resolution plan submitted by NBCC with certain modifications.

(g) Several appeals were preferred against NCLT's approval of the modified resolution plan before the National Company Law Appellate Tribunal (**NCLAT**) and the Supreme Court by way of special leave petitions (**SLPs**). To expedite the process, the Supreme Court transferred all pending appeals before the NCLAT to itself and clubbed all matters relating to approval of resolution plan of NBCC. On 24 March 2021, the Supreme Court delivered its Judgement in the matter.

Decision of the Supreme Court

(a) Supremacy of the CoC and the limited scope of review by Adjudicating Authority

In line with its previous judgement in the matter of *Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta & Ors*, the Supreme Court in the present case held that there is no scope for Adjudicating Authorities to interfere with the commercial decision of the CoC. If the Adjudicating Authority finds any shortcoming in the resolution plan, the Adjudicating Authority may send the resolution plan back to the CoC for re-submission (after satisfying the parameters delineated in the Code) but, it does not have the power to modify/amend the resolution plan approved by the CoC.

(b) Payments to Dissenting Financial Creditors

The resolution plan of JIL contemplated deferred payment to its financial creditors. The question before the Supreme Court was whether the dissenting financial creditors were required to be paid upfront, even if the resolution plan contemplated deferred payment to financial creditors.

The Supreme Court observed that dissenting creditors cannot be forced to continue with their exposure to the corporate debtor. In other words, in cases where the resolution plan provides for deferred payments to creditors, dissenting financial creditors ought to be paid in cash or be permitted to enforce the security interest held by them. Payment by way of equity/security or any other mode of money by which dissenting financial creditors continue to be attached with the corporate debtor would not fulfill the requirements of the Code.

(c) Modification of contracts and seeking reliefs

The terms of the resolution plan which were effectively modifying the contractual terms of the Concession Agreement were deemed unacceptable by the Supreme Court. The Court held that any alterations to the terms of the Concession Agreement would require consent from YEIDA, the concessionaire. The Court also noted that the terms of the Concession Agreement cannot be extended or altered by way of reliefs and concessions sought under the resolution plan.

(d) Extinguishment of rights of secured creditors (other than financial creditors)

The Supreme Court held that the rights of secured creditors (who are not financial creditors) cannot be extinguished under a resolution plan by way of reliefs and concessions and such secured creditors would have to be paid in accordance with the value and priority of security held by them, or their security interest would need to be discharged in accordance with principles of law relating to discharge of security interest.

(e) Rights of dissenting creditors belonging to a class of creditors

The Supreme Court observed that homebuyers of JIL fall in a 'class of financial creditors' and accordingly any decision of

that class taken by more than 50% of the voting share would bind all homebuyers/creditors in such class.

In other words, a dissenting creditor in a class would not be treated as dissenting financial creditor for the purposes of claiming upfront payment to dissenting creditors (refer to discussions in (b) above).

Conclusion

(a) The Supreme Court's Judgement effectively reiterates that the commercial wisdom of the CoC holds supremacy, and when a resolution plan does not conform with statutory parameters, the Adjudication Authority can only remit the matter back to the CoC and cannot undertake modifications to the plan.

(b) It would be essential for a resolution plan to provide upfront payment in cash to dissenting financial creditors. Further, secured creditors (who are not financial creditors) would have to be paid in accordance with the value and priority of security held by them or their security interest would need to be discharged in accordance with principles of law relating to discharge of security interest.

(c) In view of the Judgement, it would not be possible for the resolution applicant/CoC to unilaterally modify contracts by way of reliefs and concessions or by way of terms of the resolution plan. Instead, the resolution plan would need to provide a mechanism for obtaining requisite approvals/consents from the State/Central government authorities if they are the counterparties to such contracts.

If you require any further information about the material contained in this newsletter, please get in touch with your Trilegal relationship partner or send an email to alerts@trilegal.com. The contents of this newsletter are intended for informational purposes only and are not in the nature of a legal opinion. Readers are encouraged to seek legal counsel prior to acting upon any of the information provided herein.