Page 1445 - 1454

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 3

2020

Role of Adjudicating Authority in Approving/Rejecting Insolvency Resolution Plans with Global Practices

NAMAN KHATRI[1]

ABSTRACT

The research paper basically highlights the role of adjudicating authorities in Approving/rejecting the insolvency resolution plans while balancing the interest of stakeholders and this has been discussed in length through a series of landmark cases of India and abroad respectively. The paper explains about the role of Indian adjudicating authorities in balancing the interest of stakeholders and what can be adopted from the practices of adjudicating authorities in the US, U.K and Singapore respectively. Apart from this the primary focal point of the paper is to emphasize the role that Adjudicating Authority play before approving the resolution plan and that it must take into consideration the principles of fair and equitable interest and that there should be no unfair discrimination against a particular class of creditors and the objecting creditor must be given a chance to be heard by the Adjudicating Authority.

I. INTRODUCTION

The Code recognizes National Company Law Tribunal (the NCLT) constituted under Section 408 of the Companies Act, 2013 as Adjudicating Authority for the purpose of insolvency resolution and liquidation for corporate persons. Application for initiating insolvency resolution process or liquidation of corporate debtor shall be filed before the NCLT having jurisdiction over the place where registered office of the corporate entity is situated.

The Adjudicating Authority in India and abroad plays a significant role in approving or rejecting the resolution plan. The main role of Adjudicating Authority while approving or rejecting the resolution plan is to see that the interest of stakeholders is being balanced. It is the Adjudicating Authority overlooking the whole process to ensure that there is no prejudice to any class of creditors. When the principle of Balancing the interest of stakeholders comes in then the Adjudicating Authorities have to step in to achieve the objective and this is recognised by Adjudicating Authorities in other countries as well. The courts in many other

[1] Author is a Student at Amity Law School, Delhi, India.

 [ISSN 2581-5369]

countries on many occasions have by the way of their decisions time and again have stated about the principles of fair and equitable treatment and that there should not be any unfair discrimination with a class of creditors.

II. INDIAN JURISPRUDENCE

There are certain requirements which the Adjudicating Authority in India has to see before approving a resolution plan like in **Arcelor Mittal India Private Limited v. Satish Kumar Gupta[2].** The Apex Court deliberated on the extent to which the Adjudicating Authority can exercise the power under the provisions of Section 31, and the following observations were made:

- Once a plan is approved by the Committee of creditors, it is to be submitted to the Adjudicating Authority; and at that stage, a judicial mind is applied by the Adjudicating Authority, who then, after being satisfied that the plan meets (or does not meet) the requirements mentioned in Section 30, may either approve or reject such plan.
- The Adjudicating Authority, acting quasi-judicially, can determine whether the resolution plan violates the provisions of any law, including Section 29A of the Code, after hearing arguments from the resolution applicant as well as the Committee of creditors.

NCLT going into the reasonableness while approving the resolution plan

The NCLT on many occasions has gone into the reasonableness while giving its final approval to the resolution plan. The reasonableness when the question of protecting the rights of creditors comes in or when the justness factor of the rejecting class has to be considered.

In **Rajputana Properties Pvt. Ltd. v. UltraTech Cement Ltd[3]** the apex court upheld the NCLAT order and the case was that -

- Rajputana discriminated between Financial Creditors who are equally situated and did not balance the interest of Operational Creditors. The Supreme Court upheld NCLAT order approving Rs. 7,900 crore revised bid submitted by Ultra Tech Cement Pvt. Ltd. The bid of Ultra Tech was accepted as it was backed by 100 percent Operational creditors, unsecured creditors and secured creditors.
- NCLAT held that the plan of Rajputana was discriminatory and hence, rejected it. The reason behind rejection was that Rajputana's bid was against the main idea behind the

[2] Arcelor Mittal India Private Limited v. Satish Kumar Gupta, (2019) 2 SCC 1.
[3] Rajputana Properties Pvt. Ltd. v. UltraTech Cement Ltd, (2018) SCC 906.

 [ISSN 2581-5369]

code that is of maximization of the value of the assets of the debtor.

The NCLT though can only go to an extent questioning the resolution plan which includes the commercial decisions of the Committee of Creditors and what are commercial decisions has to be decided as per case to case basis and depends on many other surrounding factors. In the recent supreme court judgement in the case of **K. Sashidhar V. Indian Overseas Bank and Ors[4].** the supreme court clearly stated that National Company Law Tribunal has no jurisdiction and/ or authority to analyze or evaluate the decision of the Committee of Creditors (CoC) to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.

Positive note which much be added to K. Sashidhar judgment is that though the ADJUDICATING AUTHORITY has no authority to go into the question of analysing the decisions taken by Committee of Creditors but to balance the interest of all stakeholders the Adjudicating Authority has to intervene so that a certain class of creditor's interest are not jeopardized. In the case of **K. Sashidhar** the case was not addressed on the part of Operational Creditor's as there was no OC who was a party to the case. This judgement does not make all decisions or duties entrusted upon the CoC under the Code non-justiciable. As the control of a Corporate Debtor shifts to the creditors in insolvency, the decisions taken by the Committee of Creditors in the course of the resolution process impact and affect the rights of all stakeholders.

NCLT role in protecting the rights of operational creditors under the resolution plan

The insolvency and bankruptcy code of India has classified creditors into operational creditors and financial creditors.

Operational creditors are the ones who supply the goods and services to the corporate debtor whereas the financial creditors are the ones who finance the corporate debtor which includes secured financial creditors as well as unsecured financial creditors. On the other hand, major chunk of unsecured creditors consists of operational creditors.

The present position of operational creditors is that the Operational Creditors under the IBC do not stand on the same footing as that of the Financial Creditor's because while the Financial Creditor's form the part of the Committee of Creditors and have voting rights as well as they play an instrumental role in taking decisions relating to the Corporate Insolvency Resolution Process by exercising their voting rights, Operational Creditors are not provided with the voting rights and merely benefit from the CIRP by receiving their respective dues.

[4] K. Sashidhar V. Indian Overseas Bank and Ors, AIR 2018 SC 29181.

 [ISSN 2581-5369]

The operational creditors even after Section 24 (3) (c) of the Code, operational creditors are only allowed to send one representative if their aggregate dues are not less than 10% of the total debt. Such a representative of the operational creditor does not even have the right to vote in such meetings even though he/she is representing a class of creditors whose proportion of the total debt is not less than 10% of the total debt. Furthermore, if the debts owed to the operational creditors do not make up 10% of the total debt, then they are completely left out of the meetings of the Committee of Creditors.

The ADJUDICATING AUTHORITY through its various judicial pronouncements has ensured that the interest of all stakeholders is protected under the plan. In the matter of **Prowess International Pvt. Ltd. vs. Parker Hannifin India Pvt. Ltd.**[5], the NCLAT held: *"In the circumstances, instead of interfering with the impugned order, we remit the case to the Adjudicating Authority for its satisfaction whether the interest of all stakeholders have been satisfied''.*

Still the interest of OC's being jeopardized as –

- The NCLT should provide an opportunity to objecting creditors to be heard and the burden of proof shall lie on the one claiming it to be unfair and prejudiced as was held in **Sree Metaliks Ltd**. NCLT cannot condemn persons unheard. It requires the Tribunal to hear the other party, as was laid down in the case. Other concrete and workable solutions must be deliberated upon to improve the condition of OCs.
- It is not possible to hear all the objecting creditors especially when their numbers are very high but certain threshold has to could be there with regards to that.

III. GLOBAL PRACTICES

SINGAPORE INSOLVENCY LAW

A corporate debtor may commence a voluntary reorganisation under the Companies (Amendment) Act 2017 either via -

- a scheme of arrangement (a scheme) or;
- by way of an application for a Judicial Management order.
- In the former case, it is a debtor-in-possession process, and management retains control (albeit with court supervision), whereas in the latter case, a judicial manager is

[5] Prowess International Pvt. Ltd. vs. Parker Hannifin India Pvt. Ltd ,AT 2017 NCLAT 89.

appointed. The appointment of judicial managers renders the debtor's board of directors functus officio.

A scheme of arrangement is often preferable to a judicial management in various situations. These include:

- Where the company wishes to avoid publicity of its financial woes;
- Where the company directors are unwilling to cede control over the company to the judicial manager; and/or
- Where the company and/or the creditors seek to leverage the possible orders that the Court may grant in order to achieve their desired ends[6].

The following can apply for the scheme of arrangement -:

- The company itself
- Company creditors
- Company members
- The company's judicial manager
- The company's liquidator

When applying for a scheme, the applicant has to unreservedly disclose all material information to the Court. This is to assist the Court to decide how the creditors' meeting would be conducted.

Such material information includes any issues relating to a possible need to hold separate meetings for different classes of creditors. For example, where certain creditors have such different rights and interests from others that it will be inappropriate for them to consult each other on whether to vote for or against the proposed scheme.

Court approvals for enforcing the creditors scheme in Singapore

It was held in the case of **The Royal Bank of Scotland NV & Ors V. International Limited**[7] that the court must be satisfied of three matters before it sanctions a scheme:

- The statutory provisions must have been complied with;

[6] What is a Scheme of Arrangement, How it Works and How to Apply for One, Singapore Legal advice, (Last Modified July17, 2019), https://singaporelegaladvice.com/law-articles/scheme-of-arrangement.

[7] The Royal Bank of Scotland NV & Ors V. International Limited, [2012] SGCA 9.

 [ISSN 2581-5369]

- Those who attended the meeting were representative of the class of creditors or members and that the statutory majority did not coerce the minority to vote in their favour; and
- That the scheme is one which a man of business or an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve.

In this regard, the Court has been granted the power to approve a scheme, notwithstanding objections from dissenting classes of creditors, if:

- A majority in number of creditors, who were present at the meeting and are to be bound by the scheme, voted in favour of it;
- These creditors represented 75% in value of the debt claims; and
- The Court is satisfied that the scheme does not discriminate unfairly between 2 or more classes of creditors and is fair and equitable to each dissenting class.

Once the Court has approved of the proposed scheme, a copy of the Court's order must be lodged with Accounting and Corporate Regulatory Authority. The scheme will then be binding on all creditors.

Can courts look into the scheme of creditors in Singapore?

It was clearly stated by the Supreme court of appeal in the case of **S.K Engineering & construction Co ltd V. Conchubar Aromatics**[8] –:

"A scheme is a creditor-centric democratic instrument which is given effect by law. However, the nature of schemes inevitably give rise to issues of minority creditor protection. In order to prevent the tyranny of the majority, the court retains supervisory oversight of the scheme process. The Court of Appeal had certain misgivings about the debts of some of the creditors.

The courts will not simply rubber stamp schemes regardless of the underlying factual matrix and without sufficiently robust evidence in respect of certain creditor debts. The decision is a keen reminder for those promulgating schemes that Singapore courts will not allow the integrity of this highly effective restructuring tool to be compromised".

The Supreme court of Appeal in Singapore clearly stated that it is not a mere rubber-stamping authority and that they will look into the reasonableness of discrimination being meted out on a class of creditors. The court stated that it will look into the details of all the creditor debts

[8] S.K Engineering & construction Co ltd V. Conchubar Aromatics and another, (2017) SCGA 51.

and ensure that minority creditors rights are protected.

Singapore courts in protecting the rights of the objecting creditors

Singapore courts time and again ensured that the rights of objecting creditors are protected and applied the principle of fair and equitable treatment and that there should not be any unfair discrimination with any particular class of creditors.

In the famous case of **Daewoo Singapore Pte Ltd. V. CEL tractors Pte Ltd**[9] the Singapore court of appeal clearly stated that –

"After a scheme is accepted by the creditors, an objecting creditor can persuade the court to withhold its approval, or to approve it subject to such alternatives or conditions as it thinks fit. The objecting creditor would succeed if he can show that the creditors did not act bona fide for the benefit of the creditors or the company, or that the scheme is not fair and reasonable".

The principle of fair and reasonable treatment of creditors as well as unfair discrimination were also incorporated under the cram-down provisions adopted by Singapore from U.S Chapter 11 in the 2017 amendment in the Companies act.

It can be concluded that Singapore courts look into the principle of fair and equitable treatment of all classes of creditors so that there should not be any unfair discrimination.

UNITED STATES INSOLVENCY LAW (CHAPTER 11 OF THE U.S CODE)

Confirmation of a plan by court under Chapter 11 is given under section 1129(a) as –

- The plan complies with the applicable provisions of this title.
- The proponent of the plan complies with the applicable provisions of this title.
- The plan has been proposed in good faith and not by any means forbidden by law.
- Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

U.S Courts take if there is an Objecting class

Chapter 11 dictates that the entire class of creditors is deemed to have accepted the

[9] Daewoo Singapore Pte Ltd. V. CEL tractors Pte Ltd, *[2001] SGCA 53.*

reorganization plan if –

- it is accepted by creditors with at least two-thirds in amount and at least one-half of the number of allowed claims in the class.
- Also, the plan must be approved by at least one class of creditors who hold impaired claims. The holders of unimpaired claims are deemed to have accepted the plan.

What happens to a plan if there is an objecting class? (Cram-down provisions are there in U.S)

If at least one class of creditors vote to object, the plan can still be confirmed as long as the requirements are met. The basis of this confirmation is that the plan must be fair and equitable and should not discriminate against that class of creditors. The court must also find that the plan is feasible, it is proposed in good faith, and that the plan and its components have complied with Chapter 11. The plan then becomes binding and identifies how debts will be treated for the plan duration.

UK INSOLVENCY LAW

The Insolvency Act 1986 and the Insolvency Rules 1986 constitute the legislative framework of English insolvency law. On October 24, 2016 the latter rules were replaced by the Insolvency Rules 2016, which will come into force on April 6, 2017.

This framework is supplemented by other legislation, including the Companies Act 2006 (containing the statutory provisions relating to schemes of arrangement used in restructurings) and the Company Directors' Disqualification Act 1986, as well as by principles of the common law.

A 'company voluntary arrangement' (CVA) is an informal but binding agreement between a company and its unsecured creditors in which the company's debts are compromised. It may be used to avoid or supplement other insolvency procedures (e.g., administration or liquidation) and is supervised by an insolvency specialist (normally an accountant), who acts as a nominee.

Remedy to objecting creditors under the CVA

Under section 6 of the UK Insolvency Act which provides for challenge of decisions to be made by way of an application to the court, on grounds (alternative/cumulative as the case may be) that:

a) The CVA unfairly prejudices the interests of a creditor, member or contributory of the company;

b) There has been some material irregularity at or in relation to either of the meetings.

For material irregularity at, or in relation to, either of the meetings called to consider the CVA proposal. For example, the venue or date of the meeting was changed without proper notice to all creditors or there was a failure to supply the required information. Case-law suggests that to constitute a "material irregularity", the irregularity must be such as to possibly have affected the outcome of the meeting or that the CVA unfairly prejudices the interests of a creditor, member or contributory of the company. There is no single universal test for judging unfairness; the Court is required to consider all relevant factors.

Test of fairness under the CVA

As far as test of fairness is concerned there are certain guidelines set by the court to that regard via various landmark judgements such as –

In the case of **HMRC v. Portsmouth City Football Club**[10], the court considered the validity of a CVA by examining whether it contravened the general principles of insolvency law by unfairly giving preferential treatment. Several parameters were laid down to regard a CVA as unfairly prejudicial:

- When considering whether any disadvantage resulting from the CVA is unfair, the court will consider both "vertical" and "horizontal" comparisons;
- When considering the results of a "vertical" comparison, if creditors in general, or a specific class of creditors, stand to receive less in the proposed CVA than they would have in liquidation, the CVA is likely to be regarded as unfair;
- In relation to any "horizontal" comparison, the fact that the creditors were treated differently in something which would call for scrutiny, but any differential treatment does not automatically make the CVA unfair[11].

In the case of **Mourant & Co Trustees Ltd v Sixty UK Ltd (in Administration)**[12] the Court found that there had been unfair prejudice on the basis that it was difficult (if not impossible) to determine what sum would compensate the creditor (a landlord) for the loss of

[10] HMRC v. Portsmouth City Football Club [2011] BCC 149, [2010] BPIR 1123, [2010] EWHC 2013 (Ch).
[11] Richa Saraf & Ananya Raghavendra, Role of Adjudicating Authority in Approving/Rejecting Resolution plan, Last Modified : November 27,2018) , http://vinodkothari.com/2018/11/role-of-Adjudicating Authority-in-approving-rejecting-a-resolution-plan/.
[12] Mourant & Co Trustees Ltd v Sixty UK Ltd, [2010] EWHC 1890 (Ch).

the guarantee, the creditor should not be forced to accept the sum offered in the CVA.

IV. CONCLUSION

There is no statutory provision that enables a tribunal to oppose a plan on the grounds of unfairness against a particular class of creditors. The sole relief available to OC's is to approach the courts which will cause further delay. In **K. Sashidhar** case the supreme court of India judgment should also be considered from the point that when it comes to unfair treatment of a particular class of creditors then in that case the Adjudicating Authority has to step in to ensure that there is no unfair discrimination and the principle of fair and equitable treatment is applied. There are certain grounds on which the Adjudicating Authority can step in to ensure there is no unfair discrimination as the Adjudicating Authority is not a mere rubber-stamping authority.

The Adjudicating Authority before approving the resolution plan should consider the principles of fair and equitable interest and that there should be no unfair discrimination against a particular class of creditors and the objecting creditor must be given a chance to be heard by the Adjudicating Authority. The Adjudicating Authority in India should adopt these principles from Singapore, U.S and U.K.

However, even if we think practically not everyone will get everything of their dues but when the NCLT's starts considering the principle of fair and equitable treatment of the class of creditors which are being disadvantaged then achieving the objective of balancing the interest of all stakeholders would be better achieved by the Adjudicating Authority as they have the power of accepting/rejecting the resolution plans.

*****

 [ISSN 2581-5369]