

SUPREME COURT UPHOLDS EQUITABLE VALUE MAXIMISATION UNDER THE INSOLVENCY AND BANKRUPTCY CODE

1. INTRODUCTION

Earlier this month, the Supreme Court of India (the “**Supreme Court**”) dismissed an appeal by a competing resolution applicant, asserting that the acceptance of UltraTech Cement Limited’s recent resolution plan to acquire the distressed Indian cement manufacturer, Binani Cement Limited (“**Binani Cement**”) violated the insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (the “**Code**”).

This alert looks at the circumstances surrounding the insolvency resolution of Binani Cement under the Code, the interests of competing resolution applicants and the reasoning of the National Company Law Tribunal (the “**NCLT**”), the National Company Law Appellate Tribunal (the “**NCLAT**”) and the Supreme Court in deciding the matter.

2. BACKGROUND

On July 25, 2017, the NCLT admitted an insolvency plea against Binani Cement and initiated the corporate insolvency resolution process. Thereafter, Dalmia Bharat Group (through its company Rajputana Properties Private Limited) (“**Dalmia**”) and UltraTech Cement Limited (“**UltraTech**”) had sent their resolution plans for consideration by the Committee of Creditors (the “**CoC**”).

On May 2, 2018, the Kolkata bench of the NCLT asked the CoC to consider the resolution plans submitted by Dalmia *and* Ultratech, even though it was not in accordance with the process and timelines set out by the CoC. After the judgment, the CoC considered and unanimously voted in favour of UltraTech’s resolution plan.

The CoC decided that after the deadline for submission of the resolution plans (which was February 12, 2018) had passed, they would *only* negotiate with the highest resolution applicant and *not* engage with other resolution applicants.

Dalmia was held to be the highest bidder and after negotiations with the CoC, Dalmia submitted its revised offer on March 7, 2018.

UltraTech then submitted a *revised* resolution plan on March 8, 2018. However, the CoC approved Dalmia’s resolution plan on March 14, 2018 without taking UltraTech’s revised resolution plan into consideration.

Thereafter, the NCLT directed the CoC to consider *both* the revised resolution plans submitted by Dalmia and UltraTech. Dalmia challenged this order of the NCLT in the NCLAT and thereafter, in the Supreme Court.

In the meantime, Binani Industries Limited, the parent company of Binani Cement, entered into an agreement with UltraTech to arrive at an out of court settlement to repay all the creditors and seek termination of the insolvency process. This led to questioning the eligibility of UltraTech given their contractual ties with the promoters of Binani. All of this stirred up various actions in the tribunals, and the NCLAT, in its judgment dated November 14, 2018 decided to take up all the related matters and address them.¹

3. THE JUDGMENT

The judgment discusses the objective of the Code and sets out certain guiding principles for the CoC on how to approach the resolution process. Given that resolution plans are complex financial structures that require analysis by commercial minds in order to *maximise* the value of the assets, they cannot be treated at par with a sale or auction where the only measure for value is the monetary value.

Resolution plans are expected to be structured, in the following order of priority. Firstly, for resolution; secondly, for value maximisation of the debtor's assets for *all* its creditors; and thirdly, to promote entrepreneurship, the availability of credit and balance the interests. The NCLAT has held this order of objective to be sacrosanct.

3.1. The Dalmia Plan

One of the main objectives of the Code is value maximisation. The premise of this value maximisation is that it is in the interests of *all* creditors and that it is also *equitable*. Under the Code, a two-thirds majority of the CoC is required to vote in favour of a resolution plan for it to attain approval and it cannot be that the resolution plan provides for some creditors to attain this approval at the cost of another stakeholder.

In the present case, the Dalmia resolution plan received approval from financial creditors holding 99.43% of the financial debt in the CoC, but financial creditors holding 10.53% of the financial debt, even while providing their consent recorded protests and alleged that they had not been dealt with equitably. While most financial creditors (including similarly placed financial creditors) were being paid 100% of their verified claims, only 72.59% of the verified claim of Export-Import Bank of India and 10% of the verified claim of the State Bank of India, Hong Kong branch, was provided for in the resolution plan.

Both of these were guarantees, and the NCLAT rejected explanations such as the underlying loan itself being a non-performing asset or insufficient due diligence as grounds for discriminating *between* financial creditors who are similarly placed.

¹ NCLAT judgment dated November 14, 2018 available at [https://ibbi.gov.in/webadmin/pdf/order/2018/Nov/14th%20Nov%202018%20in%20the%20matter%20of%20Binani%20Industries%20Ltd.%20Vs.%20Bank%20of%20Baroda%20&%20Anr.%20CA%20\(AT\)%20No.%2082-2018_2018-11-14%2017:12:47.pdf](https://ibbi.gov.in/webadmin/pdf/order/2018/Nov/14th%20Nov%202018%20in%20the%20matter%20of%20Binani%20Industries%20Ltd.%20Vs.%20Bank%20of%20Baroda%20&%20Anr.%20CA%20(AT)%20No.%2082-2018_2018-11-14%2017:12:47.pdf) and <https://nclat.nic.in/Useradmin/upload/744324065bebc1bd0ef4a.pdf>

3.2. Value maximisation by due consideration to all resolution applicants

At the outset, it should be noted that the Code does not look to set out the specific process of submission of the resolution plans. This gives more freedom to the resolution professional, the CoC, and the resolution applicants to tailor-make and maximise value, given the specific circumstances surrounding each case.

The objective, however, is *inviolable*, and the end goal as well as the process is required to be set out to serve the objective of the Code: value maximization within the timelines specified in the Code.

The judgment, while dealing with the manner in which the objective of the Code is expected to be met, sets out that as long as the resolution plan was provided within time and prior to the approval of the CoC, it is required to be considered, even if it at the cost of minor non-compliances with guidelines set out in a process document by the CoC.

4. INDUSLAW VIEW

The Code is a welcome consolidation and replacement of the previously scattered and cumbersome regime that governed insolvency resolution and liquidation. However, given that the Code is in its nascent stages, a number of nuances not directly contemplated in the new regime are being brought to the forefront and questioned.

Arguably, the Code itself has initiated a mind-shift in the prevailing attitude to insolvency and the practical importance of unlocking value from distressed assets in a time bound manner.

What is emerging, however (and demonstrated in the Binani Cement case), is a balance between the *procedure* and the acknowledgment of the Code as a commercial statute, achieving commercial outcomes.

Although the basic principles of insolvency resolution, such as the time bound period for resolution and the order or priority are mandatory, the Binani Cement case demonstrates a more flexible approach to the process itself, to ensure that the objectives of the Code are served.

In light of the fact that the Supreme Court of India has rejected the admission of the appeal on November 19, 2018, the NCLAT judgment ensuring value maximisation and the equitable treatment of financial creditors has prevailed.

Authors: Nishant Singh | Pooja Dadoo | Nikhil Bhat

Practice Areas: Corporate & Commercial | Insolvency & Restructuring | Litigation & Dispute Resolution

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