

Kluwer Competition Law Blog

Supreme Court Ruling Shakes Up Insolvency and Competition Approvals in India

Aniket Ghosh · Saturday, March 22nd, 2025

Introduction

In 2016, the Insolvency and Bankruptcy Code (*IBC*) was introduced, fundamentally changing how distressed businesses in India are restructured and how debt recovery is managed. The IBC has paved the way for significant corporate restructurings, including the high-profile acquisition of Essar Steel by ArcelorMittal and the impending acquisition and revival of Videocon Industries by the Vedanta Group.

A recent Supreme Court ruling in *Independent Sugar Corporation Ltd. v Girish Sriram Juneja & Ors.* has introduced new regulatory dynamics, particularly for acquisitions involving distressed companies that require approval from the Competition Commission of India (*CCI*).

The Supreme Court judgment alters the settled regulatory practices both in the context of insolvency processes and the CCI merger control. This piece discusses the key outcomes and its commercial implications.

Overview of the case and key outcomes

The case involved a dispute regarding the proposed acquisition of Hindustan National Glass (*HNG*) (one of India's largest glass manufacturers) by AGI Greenpac Ltd (*AGI Greenpac*) as part of a resolution plan under the IBC. HNG, a leading glass manufacturer, had entered insolvency proceedings. AGI Greenpac and Independent Sugar Corporation (*INSCO*) submitted bids to acquire HNG. Both acquisitions required approvals from the CCI.

AGI Greenpac's resolution plan received the approval of the committee of creditors (*CoC*) with 98% of the votes, *before* CCI approval. INSCO's resolution plan received 88% of the votes. Notably, the INSCO resolution plan had obtained the prior CCI approval.

INSCO challenged the CoC approval before the National Company Law Appellate Tribunal (*NCLAT*), stating that the CoC could not approve AGI Greenpac's plan pending CCI approval. The NCLAT held that the proviso to Section 31(4) of the IBC requiring CCI approval to be obtained prior to the approval of the CoC was discretionary. The requirement could be relaxed so long as the CCI approval was obtained subsequently.

INSCO also challenged the CCI's conditional approval of AGI Greenpac's proposed acquisition of HNG on various grounds including the absence of stakeholder consultation, and the approval being premised on incorrect market facts submitted by AGI Greenpac. The NCLAT upheld the CCI approval [order](#).

The Supreme Court overturned the NCLAT's decision.

The Supreme Court set the order of play for approvals from the CCI and CoC

The Supreme Court held that the approval from the CCI must be mandatorily obtained prior to the CoC approval. This ruling impacts the existing practice under which the CoC approves resolution plans prior to the receipt of CCI approval.^[1]

The Supreme Court held that the proviso to Section 31(4) of the IBC clearly mandates that the CCI approval must be obtained before the CoC votes on a resolution plan. The Supreme Court noted that while the CoC is required to exercise its commercial judgement and plays a vital role in the insolvency process, the law also recognizes the risks of anti-competitive transactions. To address competition concerns arising from the transaction, the CCI has the authority to approve, reject, or modify the terms of transactions. A conditional approval or rejection may substantially change the terms under which the CoC approved the resolution plan.

If the CoC approves a resolution plan before the CCI's review, any subsequent changes will not be examined by the CoC, meaning they could make decisions without having all the necessary information. This would be inconsistent with the law's intent and could lead to poor decision-making. Therefore, the Supreme Court invalidated the AGI Greenpac Resolution Plan. It also directed the CoC to reconsider the INSCO resolution plan.

Stakeholder consultation in CCI phase II review is mandatory

The Supreme Court also objected to the CCI's approval process as it noted that the CCI had not followed the procedure mandated by the Competition Act. Typically, under the Competition Act, any merger or acquisition in India that meets certain prescribed thresholds must get approval from the CCI. The CCI can review transactions in two stages.

Phase I is a 30-day initial review where the CCI assesses whether the deal could harm competition. If no major concerns arise, the deal is cleared. In case of concerns, the parties can propose remedies (e.g., asset sales or capacity commitments etc.) to address potential issues, allowing the deal to be approved subject to compliance. If competition concerns persist, the review moves to Phase II.

Phase II review is a more detailed investigation where the CCI analyzes the deal further and consults with third parties, like competitors and suppliers, to understand the deal's impact on the market. The process begins with a Show Cause Notice (**SCN**) as to why the deal should not be investigated further. The parties can respond to the SCN with reasons, evidence, and any proposed modifications to mitigate the CCI's concerns. If the CCI finds that the proposed modifications are sufficient, it may approve the deal subject to those modifications. If not, the CCI may put the

transaction out for public consultation. Based on these inputs, the CCI may block the transaction or impose further conditions to approve the deal to protect competition.

As a matter of practice, post issuance of the SCN, the CCI has usually accepted proposed modifications and cleared transactions *without* initiating a public consultations process even though it is required under the Competition Act.

In this case, the CCI's Phase I review of the AGI Greenpac-HNG resolution plan raised concerns about increased concentration in the glass manufacturing market. It formed a preliminary opinion that the AGI Greenpac-HNG acquisition could cause appreciable adverse effects to competition (AAEC).

The CCI issued a SCN to AGI Greenpac, but not the target. The CCI approved the transaction based on AGI Greenpac's response to the SCN and the voluntary modifications to the deal (including hiving off HNG's Rishikesh plant). The deal was not opened up for public consultations. This was in line with the CCI's prior practices.

The Supreme Court held that the scheme of Section 29 of the Competition Act is such that once the CCI issues a SCN indicating a *prima facie* opinion that the transaction can cause AAEC, the entire procedure including (i) sending the SCN to both parties (and not just the acquirer) and (ii) opening up the transaction to public for comments must be followed. The Supreme Court also observed that any deviation from this process can open CCI approvals up for legal challenge.

The Court observed that the active involvement of the target (HNG) in the CCI engagement process was particularly necessary in this case. This is because AGI Greenpac offered to divest HNG's Rishikesh plant to address competition concerns. It also observed that since the CCI had not undertaken a public / competitor consultation process for the AGI-Greenpac transaction, its approval can be legally challenged.

Observations on Conditional Approvals impacting the IBC process

The Supreme Court also noted that the conditional approval granted by the CCI is predicated on the future compliance by the acquirer-AGI Greenpac hiving off HNG's Rishikesh plant. It noted that the such conditional approvals run contrary to the IBC's stated objectives of finality and decisiveness.

Commercial Implications

The Supreme Court's observations on how conditional approvals from the CCI are contrary to the IBC's stated objectives of finality would have the following implications for stakeholders.

CoC

Going forward, it is likely that the CoC may hesitate from granting approvals to resolution plans that have been conditionally approved by the CCI subject to fulfilling certain conditions. This is

because such proposals would involve uncertainty and additional compliance burdens which may cause delays in the primary objective of the corporate insolvency process- debt recovery and operationalising of the distressed target. Such approvals may also be subjected to regulatory and legal challenges, in case the proposed acquirer does not ensure timely compliance. This would also be a factor that the CoC would have to consider apart from the commercial merit of the resolution plans.

Bidders / Acquirers

The CCI typically orders remedies or modifications in the acquisition plans in cases where the proposed transaction results in AAEC including high market concentration. Bidders / acquirers may have to factor in the likelihood of a potential conditional approval from the CCI and how that may reduce their likelihood of success before the CoC. They would also have to assess the compliance burdens and potential delays in the implementation of the transaction. As a result, we may see fewer resolution applications where the acquirer and distressed target create high market concentration, as the chances of success in such cases are lower.

CCI

Considering how conditional approvals do not align with the IBC's objectives, the CCI may have to be circumspect about ordering conditional approvals to transactions arising from the insolvency process. It is possible the CCI may rely on the failing firm defence^[2], in order to unconditionally approve such transactions. However, the CCI will have to weigh the potentially anti-competitive effects of the proposed transaction against the economic efficiencies / benefits of reviving the distressed target company.

Procedural Implications

Involvement of the target in acquisitions under Phase I Review

While the decision was rendered in the context of Phase II investigations, the Supreme Court's position on actively involving the target while reviewing an acquisition would also apply to the Phase I investigation process as the CCI merger control regulations, especially Regulation 14 uses similar terminology "*parties to combination*" throughout. This implies that going forward the CCI is obliged to actively engage with the target company. Any deviation from this position would likely render the CCI approval liable to legal challenge by third parties. Furthermore, active engagement with the target would add to the regulatory timeline and could push back the review timelines for the CCI, specifically in hostile takeovers (like Larsen & Toubro Group's hostile takeover of Mindtree Limited (now LTI Mindtree)).

Approvals granted without public consultation post a SCN can be challenged

The CCI will now have to follow the entire process including putting out all deals undergoing Phase II review for third party consultations. Further, as noted by the Supreme Court, approvals granted without following such a process can be legally challenged. This will have two major implications.

First, the CCI has cleared many transactions in the recent past where the acquirer / parties offered modifications after the issuance of the SCN, but without proceeding for public comments. All such prior approvals can be challenged by third parties. These include some significant landmark transactions that have impacted major sectors of the Indian economy.

Second, given the time consuming nature of a Phase II review, it is likely that we will see a lesser number of deals going into Phase II with more deals getting cleared at the Phase I stage itself based on any preemptive commitments / modifications offered by parties at that stage.

Conclusion

The regulatory burden on companies appears to have increased both in the context of the insolvency process and the CCI merger control process.

In IBC cases, the CCI will have to balance its objectives of ensuring fair competition in the market with the IBC's mandate of finality and quick revival of distressed target companies.

Further, in the context of the CCI merger control process, it would be interesting to see if disgruntled third parties / competitors of the parties that have obtained CCI approval for their deals without following the entire Phase II review process file legal challenges to such approvals.

Interestingly, AGI Greenpac has filed a review petition in the Supreme Court against the court's judgment. However, review petitions rarely succeed as they require an *error apparent on the face of the record* and this is a well reasoned judgment.

^[1] This is in line with the position adopted by the NCLAT in past precedents such as *Makalu Trading Ltd & Ors. v. Rajiv Chakraborty* 2020 SCC OnLine NCLAT 643; *Vishal Vijay Kalantri v. Shailen Shah* 2020 SCC OnLine NCLAT 1013.

^[2] The failing firm defence is a legal argument in competition law that allows an anticompetitive merger / acquisition if the firm being acquired is failing and there are no other options. The defense is used in competition law to balance the harm to competition from a merger versus the harm from a firm's failure.

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