STRATEGIC DISSENT IN INDIA'S CIRP: UNPACKING INCENTIVES, SYSTEMIC IMPACTS, AND THE QUEST FOR EFFICIENCY

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ABSTRACT

India's Insolvency and Bankruptcy Code, 2016 (*hereinafter*, "**IBC**") was designed with one of its core objectives being to balance stakeholder interests. When a Corporate Insolvency Resolution Process (*hereinafter,* "**CIRP**") is initiated, the Financial Creditors (*hereinafter,* "**FCs"**) get the driver's seat and the collective "commercial wisdom" of the Committee of Creditors (*hereinafter*, "**CoC**") is relied upon for a successful insolvency procedure. In the CoC, the FCs have a proportional voting share, and the FCs voting against a Resolution Plan that passes are afforded an array of statutory rights. These Dissenting Financial Creditors ("**DFCs**") get preferential rights that has power to be exploited. This dichotomy has given rise to strategic dissent, where creditors are capable of leveraging their protected position not merely for self-preservation but for preferential gain, mirroring the classic "holdout problem" in corporate finance and threatening the time and monetary efficiency IBC was designed to achieve.

This article posits that strategic dissent, supported by statutory initiatives and furthered by judicial ambiguity, poses a significant threat to the efficacy of the Corporate Insolvency Resolution Process (*hereinafter*, "**CIRP**"). It argues that the current framework, by creating a predictable difference between collective commercial outcomes and individual statutory allowances, incentivizes dissent that prolongs timelines, erodes asset value, and fosters litigation. The analysis traces the source of these incentives, examines oscillating judicial interpretations, and assesses the systemic impact on CIRP efficiency. Ultimately, this article argues that a durable solution necessitates a comprehensive review of the Code, drawing lessons from other jurisdictions with judicially supervised "cramdown" mechanisms to align the right of dissent with the overarching goal of resolution in a time-bound and equitable manner.

Introduction: The Dichotomy of Dissent in Collective Creditor Action

The IBC was enacted to provide India with a new era of creditor-in-control resolution as the primary driver of a time-bound, value-maximizing process, with its 'Commercial Wisdom' being held at its helm.[1] For any resolution plan to pass, the CoC has to approve it with a sixty-six percent approval vote, as highlighted in Section 30(4) of IBC.[2] Yet, this principle of majoritarian rule, depending upon the commercial wisdom of creditors, coexists with a robust statutory framework designed to protect the rights of dissenting creditors. While the right to dissent holds extreme importance in procedural fairness, the architecture of the IBC has inadvertently created avenues for its "*strategic* use". This occurrence, where FCs leverage their position in the CoC not only for self-preservation but also for preferential gain, threatens to undermine the very efficiency the Code was designed to achieve of maximizing debtors' asset value and time-bound resolution, mirroring the "Holdout Problem", going against the objectives of the IBC.[3]

The existing framework encourages actions that lengthen processes, devalue debtor's assets, and increase the likelihood of litigation. While the varying judicial interpretations have failed to establish a solid legal position, the origins of these misused incentives are within the provisions of the IBC. Recent regulatory changes made by the Insolvency and Bankruptcy Board of India (*hereinafter*, "**IBBI**") are inadequate to address the problem and the systemic effects of such dissent on CIRP efficiency. Ultimately, a durable solution requires a more fundamental recalibration of the Code, drawing lessons from the judicially supervised "cramdown" mechanisms employed in mature insolvency jurisdictions like the United Kingdom and the United States to align the right of dissent with the overarching goal of resolution.

The Genesis of Dissent in Statutory Protections and Economic Incentives

The architecture of the IBC contains an inherent and unresolved paradox. It simultaneously champions the supremacy of the CoC's collective commercial wisdom while providing

[1] Insolvency and Bankruptcy Board of India, Guidelines for Committee of Creditors (6 August 2024) <https://ibbi.gov.in/uploads/legalframwork/db3d7327523500331bd793bed7835ff2.pdf> accessed 16 September 2025.
[2] Insolvency and Bankruptcy Code 2016, s 30(2).
[3] Insolvency and Bankruptcy Board of India, *Theoretical Framework of Insolvency Law* (IBBI Research Paper, 2016) <https://www.ibbi.gov.in/uploads/resources/9ce9ccf9f114750879b68c8a33235ca6.pdf> accessed 16 September 2025.

powerful, individualized protections for those who dissent from it. This is not merely a procedural ambiguity but rather a core philosophical conflict that gives rise to strategic misuse for the preferential benefit of dissenting FCs. The CoC, comprising all FCs of the corporate debtor (*hereinafter*, "**CD**"), is the decision-making body in a CIRP. Its decisions, particularly the approval of a resolution plan, are taken by a vote of not less than 66% of the voting share of the FCs.[4] This requirement in itself creates a minority of FCs who may be outvoted.

To protect DFCs, the Insolvency and Bankruptcy Code (Amendment) Act, 2019, introduced a critical safeguard in Section 30(2)(b).[5] This amendment requires the resolution plan to provide for payment to DFCs of an amount that is not less than the amount they would be paid in the event of the CD's liquidation under the waterfall mechanism prescribed in Section 53.[6] Here, DFCs are defined as FCs who vote against or abstain from voting on an approved plan.[7] This protection is further underpinned by Regulation 38(1)(b) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which highlights mandatory content of a resolution plan to stipulate that DFCs shall be paid in priority to assenting FCs.[8]

The Holdout Problem

While intended as a shield against dominating majority decisions, this dual guarantee of a minimum liquidation value and priority in payment has created a powerful and potentially perverse incentive structure.[9] This legal framework directly facilitates the economic "holdout problem," where parties withhold consent from a value-creating transaction to free-ride on the participation of others and extract larger individual payoffs.[10] The benefit for an FC to dissent strategically becomes particularly acute in a common CIRP scenario where the DFC's share of the estimated liquidation value of the CD is higher than the realisable value offered under a resolution plan.[11]

[4] Insolvency and Bankruptcy Board of India, *Theoretical Framework* (n 3).
[5] Insolvency and Bankruptcy Code (Amendment) Act 2019, s 6.
[6] Insolvency and Bankruptcy Code 2016, s 53.
[7] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.
[8] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations 2020, reg 39(3).
[9]Brahmayya&Co, 'Protection of Dissenting Financial Creditors (March 2023)' <https://www.brahmayya.com/wp-content/uploads/pdf_attachments/582/Protection%20of%20Dissenting%20Financial%20Creditors.pdf> accessed 16 September 2025.
[10] Xiaobo Yu, 'A General Theory of Holdouts' (Paper presented at the North American Summer Meeting of the Econometric Society, June 2024).
[11] Brahmayya & Co (n 9).

"The liquidation value" is defined by the IBBI as an estimate of the realisable value of assets if the CD were liquidated on the insolvency commencement date.[12] However, CIRPs in India are frequently marked with delays, with a significant majority of cases far exceeding the statutory 330-day timeline.[13] This prolonged process invariably leads to the attrition of the CD's asset value. Consequently, a rational FC is often faced with two options at its disposal:

A. Assent to a resolution plan and accept a share of a diminished recovery value, or

B. Dissent and claim a legally required and guaranteed payout based on a higher, albeit hypothetical, liquidation value calculated at the start of the process.[14]

The law, which came into effect to protect the rights of the dissenters, can therefore actively reward them for dissenting, transforming a protective safety net into a strategic tool for arbitrage. This is further complicated by the fact that the valuation of assets, which forms the basis of the liquidation value, is itself an estimation process prone to disputes, adding another layer of uncertainty that can be exploited.[15]

Judicial variety in balancing CoC's Wisdom and DFCs' rights

The Indian judiciary has been engaged in a prolonged struggle to reconcile the conflicting principles of CoC supremacy and the statutory rights of DFCs. This tension has resulted in a series of oscillating judgments from the Supreme Court (*hereinafter*, "**SC**"), creating a landscape of legal uncertainty that has itself become a catalyst for litigation and strategic misuse.

The foundational jurisprudence of the IBC established by the SC in landmark cases firmly entrenched the doctrine of "commercial wisdom."[16] SC held that the CoC's decision to decide on a resolution plan is commercial, and the scope of judicial review by the Adjudicating

[12] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations 2020, reg 2(1)(k).
[13] Karunjit Singh and Aashish Aryan, 'In Five Years of IBC Regime, Lenders Took 61% Haircut on Claims, Show Data' *The Indian Express* (27 July 2021) <https://indianexpress.com/article/business/economy/ibc-regime-corporate-insolvency-resolution-indian-economy-7423869/> accessed 16 September 2025; Shivansh Mani Sharma, 'Delays in Corporate Insolvency Resolution Process: Has the IBC Met Its Purpose?' (2021) 2 Journal of Multi-Disciplinary Legal Research.
[14] Brahmayya & Co (n 9).
[15] Hemang Mankar and Mohak Agarwal, 'Dissenting Secured Financial Creditors and Section 30(2) IBC: Unravelling the Challenges in Computation of Liquidation Value' (*IBC Laws*, 18 August 2023).
[16] *K Sashidhar v Indian Overseas Bank* (2019) 12 SCC 150; *Essar Steel India Ltd Committee of Creditors v Satish Kumar Gupta* (2020) 8 SCC 531.

Authority is limited to ensuring the plan complies with the mandatory requirements of IBC, primarily Section 30(2).[17] The courts were explicitly barred from substituting their own judgment for the commercial acumen of the creditors, who were considered the best judges of the economic feasibility and viability of a resolution.[18]

SC reasoned that the CoC's commercial wisdom extended to determining the manner of distribution, and as long as the DFC received its minimum entitlement (liquidation value), it could not challenge the plan on the grounds that it was treated *pari passu* with other secured creditors who had assented.[19] This judgment was a strong affirmation of the CoC's collective authority over individual creditor interests.

However, this position was questioned by the SC's decision in *DBS Bank v. Ruchi Soya,* where the DFC had an exclusive first charge over certain assets and was offered a *pari passu* distribution with other creditors, which it argued was unjust.[20] SC observed that the purpose of the 2019 amendment to Section 30(2)(b) was to protect the autonomy of DFC/s and that the provision must be interpreted to ensure a DFC receives the monetary value of its security interest.[21] The SC noted a potential inconsistency with earlier precedents, which had emphasized equitable treatment and protection of dissenting creditors from disproportionate losses.[22]

Recognizing the conflicting judicial views and their profound implications, the Court referred the core question - whether a secured DFC is entitled to the full value of its security interest, overriding the CoC's commercial wisdom on distribution—to a larger bench. The unresolved conflict between judicial opinions has left the law in a state of flux. This uncertainty creates fertile ground for litigation, as DFCs are incentivized to challenge resolution plans in the hope of a favorable interpretation, thereby contributing directly to the very delays the IBC seeks to eliminate.[23]

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[17] *Kalpraj Dharamshi v Kotak Investment Advisors Ltd* (2021) 10 SCC 401; *Nandamuri Meena Latha v Immaneni Eswara Rao* 2024 SCC OnLine NCLT 3897 [19].
[18] K Sashidhar v Indian Overseas Bank (2019) 12 SCC [52] - [53].
[19] ibid.
[20] *DBS Bank Ltd. Sing. v. Ruchi Soya Indus. Ltd.,* (2024) SCC OnLine SC 3.
[21] 'Dissenting Financial Creditors and Resolution Plans under IBC: Division Bench of Supreme Court Refers Matter to a Larger Bench' (MetaLegal, 12 May 2024).
[22] *Jaypee Kensington Boulevard Apartments Welfare Association v NBCC (India) Ltd* (2021) 16 SCC 401; *Essar Steel India Ltd Committee of Creditors v Satish Kumar Gupta* (2020) 8 SCC 531.
[23] Kartikay Vyas and Jenul B Bhati, 'Dissenting Financial Creditors: The Unsettled Question' (*IBC Laws*, 24 March 2025).

Systemic Reverberations: The Impact of Dissent on CIRP Efficiency

The theoretical and legal uncertainty surrounding strategic dissent has tangible, detrimental consequences for the efficiency of the CIRP, which undermines the IBC's pillars of timely resolution and maximization of asset value.

The most immediate impact is on CIRP timelines. The IBC mandates a strict timeline of 180 days for the completion of a CIRP, extendable to a maximum of 330 days, including time spent in legal proceedings.[24] However, as of March 2024, the average time taken for CIRP completion was 679 days, more than double the statutory limit, with a vast majority of ongoing cases pending for over 270 days.[25] Disputes initiated by dissenting creditors are a significant contributor to these delays. The *Ruchi Soya* case is an excellent example, where the dispute over the DFC's rights prolonged the process for over five years from the commencement of CIRP. Litigation challenging the distribution mechanism in a resolution plan can stall the implementation of an already approved plan, creating a state of suspended animation for the CD.

This delay is not merely a procedural inconvenience; it is economically corrosive. The adage "time is money" is particularly true in insolvency, where the value of a distressed CD asset erodes rapidly with each passing day.[26] The resulting litigation causes delays, which in turn erode the going-concern value of the company. This makes the resolution plan less viable and widens the gap between the static liquidation value benchmark and the declining real-world value, ironically making liquidation, the outcome the IBC seeks to avoid, a more likely, and sometimes self-fulfilling, prophecy.[27]

The high rate of liquidation is a testament to these systemic failures. As of September 2024, liquidations (2,476) under the IBC regime significantly outnumbered successful resolutions (947).[28] While not all liquidations are attributable to strategic dissent, the adversarial friction and delays created by creditor infighting undoubtedly contribute to the failure of viable

[24] Insolvency and Bankruptcy Code 2016, s 12.
[25] Insolvency and Bankruptcy Board of India, *Record Resolutions by NCLT: Quarterly Newsletter of the Insolvency and Bankruptcy Board of India*, January–March 2024 (2024) <https://ibbi.gov.in/en/publication/21aa7620a9e809f7a20b432eec89888b.pdf> accessed 16 September 2025.
[26] Brahmayya & Co (n 9).
[27] Shivansh Mani Sharma, 'Delays in Corporate Insolvency Resolution Process: Has the IBC Met Its Purpose?' (2021) 2 Journal of Multi-Disciplinary Legal Research.
[28] Insolvency and Bankruptcy Code 2016 (n 25); Tushar Pundir and Riddhi Pandey, 'IBBI's May 2025 CIRP Reforms: A Critical Analysis of India's Evolving Corporate Insolvency Regime' (*Bar & Bench*, May 2025).

resolutions, pushing otherwise salvageable companies towards corporate death. This environment of uncertainty and prolonged litigation also acts as a deterrent to potential resolution applicants, who may be unwilling to invest time and resources in a process susceptible to being derailed by holdout creditors.

The Regulatory Response: IBBI's Quest for Equilibrium

IBBI has been cognizant of the challenges posed by DFCs. Through discussion papers and regulatory amendments, it has attempted to strike a better balance between protecting minority rights and deterring the misuse of strategic dissent. However, these interventions have largely focused on procedural fixes rather than addressing the underlying economic incentives.

In a June 2022 discussion paper, IBBI explicitly acknowledged that a situation where the liquidation value is higher than the resolution value creates a "perverse incentive" for creditors to dissent, undermining the objective of resolution.[29] This regulatory awareness culminated in the recent IBBI (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2025, notified in May 2025.[30] The centrepiece is a new proviso to Regulation 38(1), which addresses the treatment of DFCs in resolution plans that involve staggered payments.[31] It mandates that where payments are made in stages,

"…the financial creditors who did not vote in favour of the resolution plan shall be paid at least pro rata and in priority over financial creditors who voted in favour of the plan, in each stage."[32]

The objective of this amendment is to balance the legitimate rights of DFCs with the practical constraints of phased implementations, ensuring they are not unfairly disadvantaged by having to wait for their dues.[33] This move aims to enhance fairness and potentially reduce litigation from DFCs unhappy with deferred payment schedules.[34]

[29] Insolvency and Bankruptcy Board of India, Discussion Paper on Changes in the Corporate Insolvency Resolution Process to Reduce Delays and Improve Resolution Value (27 June 2022) 8–9.
[30] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations 2025.
[31] Insolvency and Bankruptcy Board of India, 'IBBI amends the CIRP Regulations' (Press Release IBBI/PR/2025/14, 30 May 2025).
[32] ibid.
[33] ibid.
[34] Vandana Tiwari, 'Maximizing Value, Minimizing Chaos: Unpacking IBBI's Fourth Amendments to CIRP Regulations, 2025' (*IBC Laws*, 5 June 2025)

However, while this regulatory response addresses the concern, i.e., the timing of payment, it fails to cure the underlying problem: the economic incentive to dissent based on a high liquidation value. Now, a creditor can dissent to not only claim a potentially higher payout based on the liquidation value benchmark but also be statutorily entitled to receive it *ahead* of the assenting creditors who are taking the commercial risk to revive the company. This creates a position where dissent is an even more financially attractive strategy. By providing an "easy way out," the amendment risks disincentivising cooperative behaviour, creating internal rifts within the CoC, and making it harder for resolution applicants to structure viable plans, which could ultimately impede the ability to reach the 66% approval threshold.[35] IBBI, in attempting to solve a problem of fairness, may have amplified the problem of strategic gaming.

Charting the Path Forward: Lessons from Abroad and the Need for a 'Cramdown' Framework

To break the current impasse and realign the right to dissent with the goals of resolution, India must look beyond procedural fixes and consider a more fundamental structural reform. Mature insolvency jurisdictions like the United States and the United Kingdom offer valuable lessons in how to manage dissenting creditor classes through sophisticated, judicially supervised "cramdown" mechanisms. The core difference in these approaches is the role of the judiciary: while India relies on a rigid statutory entitlement for individual dissenters, the US and UK empower the court with the discretion to bind a dissenting *class* to a plan based on holistic fairness tests, effectively shifting power from the individual holdout to a judicial arbiter.

In the United States, Chapter 11 of the Bankruptcy Code allows a court to confirm a reorganisation plan over the objection of a dissenting class of creditors—a process known as "cramdown."[36] This is permissible provided the plan "does not discriminate unfairly" and is "fair and equitable" to the dissenting class.[37] The "fair and equitable" standard typically requires adherence to the "absolute priority rule," meaning no junior class of creditors can receive any distribution until the senior dissenting class is paid in full.[38] This distinction between “junior” and “senior” classes is based upon priority such as whether the credit is secured or if the creditor is given priority by the law (for example, unpaid wages to employees would be considered a

[35] ibid.
[36] 11 USC § 1129(b).
[37] ibid.
[38] 11 USC § 1129(b)(2)(B)(ii).

"Senior credit.") This provides a structured, court-adjudicated pathway to overcome holdouts while ensuring a legally defined standard of fairness is met.

More recently, the United Kingdom, through the Corporate Insolvency and Governance Act 2020, introduced a new Restructuring Plan under Part 26A of the Companies Act 2006.[39] This powerful tool includes a "cross-class cramdown" mechanism, which allows a court to sanction a plan and bind dissenting creditor classes if two conditions are met. First, the court must be satisfied that the members of the dissenting class would be "no worse off" than they would be in the "relevant alternative" (which is typically liquidation). Second, the plan must have been approved by at least one class of creditors that has a genuine economic interest in the company (i.e., would receive a payment in the relevant alternative).[40] This gives the UK courts significant flexibility to approve a viable restructuring that maximises value for stakeholders as a whole, even in the face of opposition from an "out-of-the-money" or recalcitrant creditor class.[41]

Adopting a tailored cramdown framework in India would be a transformative reform. It would replace the current system of rigid individual entitlements, which encourages strategic gaming, with a flexible, court-supervised system designed to achieve a fair collective outcome. Such a mechanism would empower the NCLT to approve a viable resolution plan over the objections of a strategic holdout class, provided the plan ensures the dissenters are treated fairly (for instance, by meeting a "no worse off" test benchmarked to liquidation value). This would neutralise the holdout problem, preserve the CoC's role in commercial negotiations, and ultimately serve the IBC's primary objective of rescuing viable businesses.

Conclusion: Realigning Dissent with the Goals of Resolution

Strategic dissent within India's CIRP is not an anomaly but a predictable and rational response to the IBC's current design. IBC is caught in a fundamental conflict between its ambition for majoritarian, commercially-driven resolutions and its provision of rigid, individual statutory entitlements that can be leveraged for preferential gain. This analysis has demonstrated how the guarantee of liquidation value, particularly in a system plagued by delays and value erosion, creates a perverse incentive for creditors to dissent, transforming a protective right into a

[39] Corporate Insolvency and Governance Act 2020; Companies Act 2006, pt 26A.
[40] C Companies Act 2006, s 901G.
[41] Hammurabi & Solomon Partners, 'Restructuring vs. Liquidation: A Comparative Analysis of India and the UK' (H&S Blog, 26 May 2025) <https://www.hammurabisolomon.in/post/restructuring-vs-liquidation-a-comparative-analysis-of-india-and-the-uk> accessed 16 September 2025.

strategic weapon.

The systemic damage is clear and measurable: chronic delays that mock statutory timelines, destruction of enterprise value that makes resolution harder, and a climate of legal uncertainty, fueled by oscillating judicial pronouncements, that clogs the tribunals and deters investment in distressed assets. The recent IBBI reforms, particularly the priority payment for DFCs, represent a well-intentioned but ultimately superficial response. By addressing the timing of payment without neutralising the underlying economic incentive to hold out, the reforms risk exacerbating the very problem they seek to solve, making dissent an even more powerful and attractive strategy.

The path forward requires a paradigm shift. The focus must move from protecting individual dissenters with inflexible entitlements to empowering a judicial arbiter to approve a fair collective outcome. The introduction of a sophisticated, judicially supervised cramdown mechanism, inspired by the frameworks in the UK and US, is the most robust solution. Such a reform would equip the NCLT with the necessary authority to sanction a viable and equitable resolution plan over the objections of a strategic minority, thereby neutralising the holdout problem. This would not extinguish the right to dissent but would realign it with its proper purpose: to ensure fairness, not to secure preference. Only through such a fundamental legislative evolution can India hope to fulfil the IBC's foundational promise of efficient, value-maximising, and timely corporate rescue.