
THE ROLE OF THE COMMITTEE OF CREDITORS UNDER THE IBC: COMMERCIAL WISDOM AND JUDICIAL REVIEW

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Introduction

The Insolvency and Bankruptcy Code, 2016 ("IBC" or "the Code") was introduced to consolidate India's disparate insolvency regime and offer a time-bound resolution to corporate insolvency.¹ A critical feature of the Corporate Insolvency Resolution Process ("CIRP") is the Committee of Creditors ("CoC") - a collective of the financial creditors of the corporate debtor that steps in as the new commercial controller of the debtor.

Under Section 21 of the IBC, the task of constituting the CoC - a body comprising all financial creditors of the corporate debtor - falls upon the Interim Resolution Professional.² Once installed, the CoC acquires plenary powers in facilitating insolvency resolution of the debtor, either by formulating a resolution plan to revive the company or by recommending that the company be liquidated. Section 28 of the Code explicitly bars the resolution professional from taking any of the actions mentioned therein, including raising interim finance, creating security interests, and related party transactions, except with the prior approval of the CoC.³ In its most prominent capacity, the CoC is vested with the power to approve a resolution plan by a resolution passed by at least 66% voting share of the creditors on the basis of its assessment of the viability of the plan.⁴

The power and function of the CoC, which has been described as its "commercial wisdom", vests primarily with its ability to take decisions on the fate of the corporate debtor. The underlying logic is that the CoC consists of financial creditors who are deemed to have the commercial acumen to assess if the resolution plan for the company is viable, and the courts or

¹ Insolvency and Bankruptcy Code, 2016, Preamble.

² Insolvency and Bankruptcy Code, 2016, s 21.

³ Insolvency and Bankruptcy Code, 2016, s 28.

⁴ Insolvency and Bankruptcy Code, 2016, s 30(4).

tribunals do not have the financial expertise to adjudicate on the viability of the plan. This principle has been recognised by the apex court in *K. Sashidhar v. Indian Overseas Bank*⁵ and was further expanded in *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*⁶, where the Court held that the jurisdiction of the Adjudicating Authority (NCLT) is restricted to Section 30(2) of the IBC, and of the Appellate Tribunal (NCLAT) is restricted to Section 32 read with Section 61(3) of the IBC, and therefore, they do not have the jurisdiction to entertain appeals against the commercial decisions of the CoC.

This article analyses the functional scope and powers of the CoC under the IBC, and the doctrine of commercial wisdom that protects its decisions from judicial review, alongside the various grounds identified by the courts for its review, and the loopholes they create.

Critical Issues & Question of Law

While the commercial wisdom doctrine has provided the CIRP with the speed and finality it needed, its application in practice has raised several grey areas that raise genuine questions of law.

(a) *No requirement to record reasons.* The CoC is not statutorily obliged to record reasons either for rejecting a resolution plan or for voting against resolution applicants.⁷ As courts have repeatedly held that it cannot go behind the business decision of the CoC,⁸ this creates the question - how can a dissenting creditor or rejected resolution applicant possibly challenge a decision the reasoning of which is not disclosed? This runs the risk of becoming a cloak for arbitrary or unjustified decisions rather than a recognition of financial wisdom.

(b) *Where does "commercial wisdom" end and "illegality" begin?* Courts have had trouble distinguishing between a commercially unwise decision (non-justiciable) and one which involves a "material irregularity" (justiciable). In *MK Rajagopalan v Dr Periasamy Palani Gounder*, the Supreme Court held that commercial wisdom could not be invoked to mask a resolution plan passed in violation of Section 29A eligibility norms.⁹ This raises a question of

⁵ *K. Sashidhar v. Indian Overseas Bank & Ors.* [(2019) 12 SCC 150]

⁶ *Committee of Creditors of Essar Steel v Satish Kumar Gupta and Ors* [2019] 16 SCR 275

⁷ Insolvency and Bankruptcy Code 2016, s 30(4); <https://cbcl.nliu.ac.in/insolvency-law/the-unresolved-conundrum-of-commercial-wisdom-of-committee-of-creditors/>

⁸ *K. Sashidhar v. Indian Overseas Bank & Ors.* [(2019) 12 SCC 150]; *Committee of Creditors of Essar Steel v Satish Kumar Gupta and Ors* [2019] 16 SCR 275

⁹ *M.K. Rajagopalan v. Dr. Periasamy Palani Gounder & Anr.*, 2023 INSC 486

law - is there a test, objective or otherwise, to distinguish between a "flawed process" and a mere "unfavourable outcome", or is the distinction being made ad hoc, on a case-by-case basis?

(c) *Steep haircuts going unchecked.* According to IBBI data, plans approved by the CoC in cases like Videocon Industries (95.85% haircut), Siva Industries (93.25%) and Zion Steel (99%) have allowed creditors to recover a fraction of their dues, yet courts have been unwilling to intervene because the plan fell within the parameters of Section 30(2).⁴ This raises the question of whether the "fair and equitable" requirement in Section 30(2) is being implemented in substance or in name.

(d) *Exclusion of operational creditors from voting.* Section 21(2) restricts membership of the CoC to financial creditors, excluding operational creditors who have substantial claims from voting.¹⁰ While *Swiss Ribbons v Union of India* upheld this as intelligible differentia under Article 14,¹¹ the question of law endures - does a purely financial creditor-driven CoC sufficiently satisfy the obligation under Explanation 1 to Section 30(2) to treat operational creditors "fairly and equitably", or does it place them at a structural disadvantage from the outset?

Analysis - Tracing the Judicial Trajectory

The commercial wisdom doctrine has evolved, through a series of Supreme Court decisions, to encompass various dimensions in which the CoC's autonomy is said to extend beyond judicial scrutiny.

K Sashidhar v Indian Overseas Bank established that the legislature had deliberately omitted any provision to challenge the "commercial wisdom" of individual financial creditors or collectively, rendering it non-justiciable before the NCLT or NCLAT.

Essar Steel provided a structural basis for the above by holding that the Adjudicating Authority's jurisdiction is restricted to Section 30(2) and the Appellate Tribunal's to Section 32 read with Section 61(3), thereby construing that courts may only look into the legality of the process, and never its wisdom.² It is noteworthy that in *Essar Steel*, the Court further allowed the CoC to form sub-committees for the purpose of negotiations so long as the ultimate

¹⁰ Insolvency and Bankruptcy Code 2016, s 21(2)

¹¹ *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India* (2019) 4 SCC 17

approval powers vested with the CoC as envisioned in Section 30(4) were not surrendered. Thus, any delegation of administrative functions to the CoC would be interpreted in its favour.

Kalpraj Dharamshi v Kotak Investment Advisors Ltd¹² went on to include timelines and procedure: the Court held that the CoC's decision to consider a resolution plan despite failure to comply with procedural timelines under the CIRP Regulations would not stand in the way of the CoC's commercial wisdom to decide which plan would maximise value.

Ebix Singapore Pvt Ltd v Committee of Creditors of Educomp Solutions Ltd¹³ took the doctrine in a new direction by holding that a resolution applicant may not unilaterally withdraw or modify a resolution plan submitted to the Adjudicating Authority, since no express provision in the IBC permits such withdrawal. Read together with Essar Steel, an argument invoking commercial wisdom may seek to prevent modification of the resolution plan by the resolution applicant or interference by the Adjudicating Authority with the resolution process. However, it is still bound to operate in the opposite direction as well by preventing the resolution applicant from modifying the resolution plan that it has submitted to the Adjudicating Authority.

MK Rajagopalan v Dr Periasamy Palani Gounder finally illustrates the extent to which the Court is willing to go in restricting the application of commercial wisdom: the Court held that a resolution applicant's invocation of commercial wisdom to justify a resolution plan involving a Section 29A-ineligible applicant would not prevail over the express statutory provisions.

Critique - Deference Without a Corresponding Duty

The doctrine's principal virtue, keeping the courts out of commercial decision-making, is its greatest vice for three interrelated reasons.

Firstly, there is no obligation on the CoC to document reasons for approving or rejecting a plan.¹⁴ As courts do not inquire into the CoC's decision at all, an irrational rejection would then become unassailable, even in a situation where a dissenting creditor or aggrieved resolution applicant is quite sure that the decision was capricious and had been taken on extraneous grounds.

¹² Kalpraj Dharamshi v Kotak Investment Advisors Ltd [2021] 2 SCR 677

¹³ Ebix Singapore Pte Ltd v Committee of Creditors of Educomp Solutions Ltd [2021] 14 SCR 321

¹⁴<https://cbcl.nliu.ac.in/insolvency-law/the-unresolved-conundrum-of-commercial-wisdom-of-committee-ofcreditors/>

Secondly, the CoC's members are overwhelmingly secured financial institutions whose interests may already be well-protected through security interests, and thus their incentive to negotiate the best possible outcome for the entire creditor estate (including unsecured and operational creditors) is less than it may appear given the "expert body" justification for the doctrine.¹⁵ The staggering haircuts approved without judicial scrutiny - Videocon Industries (95.85%), Siva Industries (93.25%), Zion Steel (99%)¹⁶ are all consistent with this hypothesis: a plan may pass the low threshold of Section 30(2) while leaving a large majority of creditors with a very bad deal.

And most fundamentally, the CoC owes no clear, judge-enforceable duty of care to the stakeholders affected by its decisions, unlike a company director whose decisions are subject to fiduciary-duty litigation or oppression and mismanagement remedies under the Companies Act, 2013. Courts, bound by the explicit language of Sections 30 and 32, cannot read such a duty into the IBC by interpretation, thus the accountability gap identified above is at present a legislative gap and not a judicial one.

International Comparison

India's CIRP has been compared to a "creditor-in-control" regime, as opposed to the "debtor-in-possession" ("DIP") nature of Chapter 11 of the US Bankruptcy Code which typically preserves incumbent management while creditors operate around them.¹⁷ This reflects a fundamental difference in the check-the-judiciary approach between the two regimes.

Under Chapter 11, a reorganisation plan cannot be cramdown on a dissenting class of creditors unless the plan meets the statutory "best interests of creditors" test (no creditor may receive less than it would have received in a Chapter 7 liquidation) and, for secured creditors, the "fair and equitable" standard requiring preservation of liens or payment of the present value of the secured claim.¹⁸ These are specific statutory pre-requisites for confirmation of the plan contained in the US Code itself, not simply procedural tests of adequacy.

¹⁵ <https://ibclaw.in/creditors-in-control-rethinking-the-committee-of-creditors-under-the-ibc-by-aaryan-pandit/>

¹⁶ 'Commercial Wisdom in CoC Decisions Under IBC' (National University of Study and Research in Law, Ranchi), citing IBBI data

¹⁷ <https://www.taxmann.com/research/ibc/top-story/105010000000026643/creditor-in-control-model-anddebtor-in-possession-model-of-insolvency-a-comparative-study-opinion>

¹⁸ <https://www.mondaq.com/india/insolvencybankruptcy/1784588/sophies-choice-the-entitlement-of-dissentingfinancial-creditors>

India's IBC, in its original form, contained no analogous express minimum entitlement for dissenting financial creditors. This lacuna was filled in through amendments to Section 30(2)(b) and subsequent judicial interpretation to read in a liquidation-value floor, and the 2026 Amendment has extended this to peg the statutory minimum to the lower of liquidation value and resolution-plan value, reportedly to deter creditors from merely dissenting to obtain a higher payout or force the debtor to liquidation.

The UK's traditional administration procedure, a creditor-in-control regime prior to the Corporate Insolvency and Governance Act 2020, falls closer to India's Pre-Amendment model than Chapter 11. Nevertheless, English courts have a slightly broader supervisory jurisdiction over an administrator's actions (including through unfair-harm claims under the Insolvency Act 1986) than Indian courts do over the CoC.

In short, India has borrowed the creditor-control approach of English administration practice but without the explicit, substantive minimum floor that is written into the U.S. statute. Instead, the Indian judiciary has developed an interpretive, incremental approach over time, which may reflect both its engagement with a developing jurisprudence in insolvency law and the potential downsides of transplanted Chapter 11 rules.

Conclusion

The Committee of Creditors takes a central position in India's insolvency regime, and the "commercial wisdom" doctrine has been the mechanism through which its centrality has been preserved from the potential obversion of tribunals not endowed with the ability to make financial assessments. As the article has sought to elucidate, the said doctrine has proven to be a successful limiting factor in ensuring that processes of CIRP are time-bound, and free of perpetual litigation on questions of commercial adequacy of CoC decisions. At the same time, this same principle has permitted the survival of a number of undesirable elements - unreasonable dismissal of resolution plans, disproportionate acceptances of haircut terms on the grounds of clearance of a bare statutory threshold, and a class of creditors with no voice in proposals that directly impact their debts.

Notably, the judiciary itself has displayed an evolving attitude towards the issue - from the blanket endorsement of K Sashidhar and Essar Steel, to the qualified interventions of MK Rajagopalan, it would appear as if the courts are seeking to balance between their responsibility

of ensuring just outcomes and the recognition of the limited role they play in the CIRP. A comparison to the statutory floors of Chapter 11 prove instructive in this regard, as the legislative intent behind the Indian Code is clearly different, with protections for stakeholders being granted through a more incremental process. As it stands, unless the legislature takes steps to address these concerns directly, the commercial wisdom doctrine will continue to be an evolving exception, filling up gaps left by statute, but remaining an inadequate solution nonetheless.