

The Post-CIRP Dilemma: Reconciling IBC's Core Principles

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ABSTRACT

The Insolvency and Bankruptcy Code, 2016 (IBC or Code), has revolutionised the Indian corporate insolvency landscape by embedding a proceduralist approach that prioritises creditor interests and the timely resolution of insolvency. However, the Code is currently faced with a conflict of objectives: the time-bound nature of the process, the supremacy of the commercial wisdom of the Committee of Creditors (CoC), and the resolution-centric ethos. These conflicts are particularly evident in the post-Corporate Insolvency Resolution Process (CIRP) stage. The Supreme Court's affirmation of the National Company Law Appellate Tribunal's (NCLAT) decision to uphold CoC decisions even in the post-CIRP stage has extended the scope of the CoC's authority, raising concerns about the potential dilution of the Code's time-bound nature. This paper delves into these complexities, examining the balance between commercial wisdom, judicial intervention, and the rights of individual

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creditors. This paper advocates for a comprehensive post-CIRP regulatory framework meticulously crafted and rigorously enforced by the Insolvency and Bankruptcy Board of India (IBBI) and National Company Law Tribunal (NCLT), as a necessity for safeguarding the rights of minority creditors while ensuring that judicial wisdom oversees and balances the commercial wisdom of the CoC.

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I. INTRODUCTION

The IBC marked the advent of the modern corporate insolvency regime in India. The Code subscribes to the school of thought of the proceduralists, which was championed by Thomas Jackson.¹ This school of thought emphasises the preservation of creditor interests and the recovery of debts. This perspective views insolvency primarily as a financial failure that necessitates strict legal measures to ensure that creditors are paid as much as possible. It focuses on upholding the existing property rights and prioritises the orderly liquidation of the debtor's assets to satisfy outstanding obligations. The central aim is to minimise losses for the creditors and maintain the integrity of financial transactions by enforcing rigorous repayment structures.² This Code is broadly in consonance with the prevailing thought of the proceduralists, wherein the absolute priority rule has been incorporated as the central feature for corporate insolvency. However, the Code promotes resolution over recovery, establishing a hierarchical objective framework wherein resolution, value preservation, and stakeholder balance constitute structural qualifications to proceduralist orthodoxy. This hybrid architecture departs fundamentally from Jackson's singular focus on creditor-driven collective action, incorporating internationalist concerns for economic preservation and multi-stakeholder fairness.³ The Code was enacted to provide a legal framework to address the rising issue of

¹ Thomas H Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 Yale LJ 857 <<https://www.jstor.org/stable/796070>> accessed 4 January 2025.

² Andrew Keay, *Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2021).

³ MS Sahoo and Anuradha Guru, 'Indian Insolvency Law' (2020) 45 Vikalpa, 69-78 <<https://journals.sagepub.com/doi/epub/10.1177/0256090920939809>> accessed 8 November 2025.

commercial defaults and provide an efficient resolution mechanism for distressed businesses.⁴ The core purpose of the IBC is to promote entrepreneurship, enhance the availability of credit, and ensure a time-bound resolution of insolvency⁵ while balancing the interests of all stakeholders, including creditors, debtors, and employees. By shifting control of distressed assets from debtors to creditors,⁶ the IBC has marked a significant departure from the previous protracted processes, favouring restructuring over liquidation,⁷ and optimising value for all parties involved. The Code has emerged as a pivotal tool in India's economic landscape, facilitating quicker and more effective insolvency resolution, thereby stabilising the financial system and fostering a more robust business environment.⁸

Despite the Code's impressive track record, it is not devoid of mischief. While the insolvency process is well-settled with respect to the approval of a resolution plan, conflicts arise in the post-CIRP stage among three

⁴ Shashank Sharma and Ajay Kumar Kansal, 'Insolvency and Bankruptcy Code, 2016 and Resolution Process: Retrospect and Prospect' (2022) 11 Vinimaya 23 <https://www.nibmindia.org/static/documents/Vol_XLIII_No_3_wGUZsDN.pdf#page=19> accessed 4 January 2025.

⁵ MS Gupta and JB Singh, 'Insolvency and Bankruptcy Code (IBC) in India: Impact on Recovery of NPAs by banks' (2020) 17 Bihar Journal of Public Administration 606 <<http://iipabiharbranch.org/upload/Complete%20BJPA%20Vol.%20XVII%20No.%202%20-%202020%20.pdf#page=167>> accessed 4 January 2025.

⁶ Vivek Kumar, 'Reforms Brought in the Insolvency Regime: The Insolvency and Bankruptcy Code, 2016' (2023) 5(2) IJLLR 1 <https://heinonline.org/HOL/Page?handle=hein.journals/injlolw11&div=505&g_sent=1&casa_token=&collection=journals> accessed 4 January 2025.

⁷ VK Singh, 'Modern Corporate Insolvency Regime in India: A Review' (2021) 7 NL Bus L Rev 22.

⁸ BJ Kattadiyil and BA Islamov, 'Analysis of Outcomes of IBC on Managing the Economic Development of India' (2021) 12 IJM 23 <https://www.academia.edu/download/70189899/IJM_12_07_003.pdf> accessed 4 January 2025.

fundamental principles of the Code: the time-bound nature of the process, the supremacy of the CoC, and the resolution-oriented nature of the Code. The Code stipulates a detailed timeline and enumerates a robust procedural framework for the CIRP stage while also meticulously demarcating the powers of CoC and Adjudicating Authority (**AA**). However, it is silent on the aforementioned aspects for the post-CIRP stage. The post-CIRP stage is equally important when it comes to ensuring that the seminal objective of insolvency resolution is adequately attained, as liquidation would ensue in the absence of effective implementation of a plan. This paper lays emphasis on the timely implementation of an approved resolution plan and the need for jurisprudential clarity on the authority of CoC in the post-CIRP stage vis-à-vis the protection of minority creditors.

II. THE INSOLVENCY PROCESS: TRAVERSING CORPORATE DEFAULTS

A. Initiating Corporate Insolvency Resolution

The Code introduced a framework allowing financial and other creditors to initiate resolution proceedings against a company by appointing an independent professional to take control from the board of directors when the company defaults on a debt exceeding rupees one lakh. This limit has been revised, under Section 4 of the Code, to rupees one crore with effect from 24 March 2020. The CoC, which is instrumental for the CIRP under the IBC. A CIRP can be initiated by a Financial Creditor (**FC**), an Operational Creditor (**OC**), or a Corporate Debtor (**CD**), provided a default takes place. In the early stages of the interpretation of the Code, discussions focused on defining the key concepts such as

default, the role of FCs, and the notice requirements.⁹ A significant development was the recognition of home buyers as FCs, allowing them to trigger the CIRP and thereby broadening the ambit category of individuals who qualify as FCs. This inclusion was affirmed in the *Pioneer Urban* case.¹⁰

B. The CoC: The Pillar of Decision-Making

The active involvement of creditors in the insolvency proceedings is a cornerstone of an effective insolvency system.¹¹ The CoC, formed by the Insolvency Resolution Professional (**IRP**) after verifying claims filed against the CD, plays a pivotal role in this process. The CoC, which includes all the FCs (who are not related parties to the CD) and OCs (in case of absence of non-related FC), assumes decision-making authority like that of a board of directors. Once constituted, the CoC exercises its commercial judgment¹² in guiding the actions of the Resolution Professional, who must seek its prior approval on significant decisions as mandated by Section 28¹³ of the IBC. This authority includes evaluating and approving resolution plans, subject to final ratification by the AA as outlined in the Sections 30 and 31 of the Code.¹⁴ Over time, Indian

⁹ Abhiman Das and others, 'Insolvency and Bankruptcy Reforms: The Way Forward' (2022) 45 Vikalpa, 115 <<https://journals.sagepub.com/doi/abs/10.1177/0256090920953988>> accessed 4 January 2025.

¹⁰ *Pioneer Urban Land and Infrastructure Ltd v Union of India* [2019] 8 SCC 416.

¹¹ Asian Development Bank, 'Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General Counsel on TA 5795-Reg: Insolvency Law Reforms' (2000) 1 Law and Policy Reform at the Asian Development Bank 10.

¹² *Vijay Kumar Jain v Standard Chartered Bank* [2019] 20 SCC 455.

¹³ Insolvency and Bankruptcy Code 2016, s 28 (**IBC**).

¹⁴ IBC, ss 30-31.

judicial bodies, including the NCLT¹⁵ and the Supreme Court,¹⁶ have consistently upheld the CoC's commercial wisdom as central to resolving the fate of the CD, reflecting a shift from earlier restructuring frameworks like Corporate Debt Restructuring and Strategic Debt Restructuring.

C. Adoption of Resolution Plans: Evaluating Feasibility and Viability

The Code, under Section 30(4), mandates that the CoC evaluate the viability and feasibility of a proposed resolution plan,¹⁷ as per a pre-determined evaluation matrix. If the CoC approves a resolution plan by a vote of at least sixty-six percent (66%), it must then be submitted to the AA for final approval.¹⁸ The AA's role is to confirm that the approved resolution plan meets the requirements stipulated in the Code. Upon approval by the AA, the resolution plan becomes binding on the CD, its employees, members, creditors, guarantors and relevant governmental authorities, including those owed statutory dues. The CoC's primary objective is to secure a viable resolution plan that can revive the insolvent company. However, determining who could be a Resolution Applicant became contentious when original promoters or directors of the CD began submitting resolution plans. This led to the introduction of Section 29A,¹⁹ which outlines disqualifications for resolution applicants. Despite attempts to circumvent these provisions, amendments have been made,

¹⁵ *Mohd Nazim Khan v Committee of Creditors of International Trenching (P) Ltd* [2021] SCC OnLine NCLAT 3773.

¹⁶ *Essar Steel India Ltd Committee of Creditors v Satish Kumar Gupta* [2020] 8 SCC 531.

¹⁷ IBC, s 30(4).

¹⁸ IBC, s 31.

¹⁹ Insolvency and Bankruptcy Code (Amendment) Ordinance 2017.

and the Supreme Court in *Arcelor Mittal*²⁰ established interpretative guidelines. While the CoC holds the authority to approve or reject resolution plans based on commercial wisdom, finality is achieved only with the AA's concurrence, ensuring compliance with Section 30 of the Code.²¹ Additionally, from the date of the resolution plan, the CD gains immunity from prosecution²² for offences committed prior to the commencement of the CIRP.

III. IDENTIFYING CONFLICTING PILLARS IN POST-CIRP STAGE

The aforementioned core pillars indicate that the Code prioritises the resolution of insolvency over the liquidation of entities and underscores the importance of respecting the decisions made by the CoC, all within a specified timeframe. However, these pillars are not perfectly synchronised, and they often come into conflict with one another. These conflicts are not merely confined to the CIRP stage; rather, they extend to the post-CIRP stage. Notably, the severity of these conflicts is exacerbated in the post-CIRP stage due to the prevailing sheer legislative void over regulations governing the post-CIRP stage.

The conflict of pillars in the CIRP stage is quite apparent and finds manifestation in several forms. For instance, while the CoC has the discretion to assess a business and vote for liquidation without inviting a resolution plan, this decision can undermine the IBC's goal of resolving insolvency. Conversely, there have been instances where the AA has instructed the CoC not to proceed directly with liquidation, which in turn, weakens the principle of commercial wisdom. Thus, it becomes evident

²⁰ *Arcelor Mittal India (P) Ltd v Satish Kumar Gupta* [2019] 2 SCC 1.

²¹ IBC, s 30.

²² IBC, s 32A.

that not every objective of the IBC can be fully realised in an absolute or pure form. One of the most challenging aspects of the IBC is its time-bound requirement, which is rarely adhered to in practice.²³ The Code is among the few laws in India that impose strict time limits on every stage of the process.²⁴ Generally, the overall period of 330 days should be adhered to. However, this deadline is seldom met,²⁵ primarily due to the numerous disputes that arise during the insolvency proceedings. A far more relevant consideration is what follows the adoption of the resolution.

The time-bound nature of the Code forms part and parcel of its long title and categorically reinforces that such an objective must be adhered to in the insolvency resolution process. Furthermore, the successful resolution of insolvency mandates that the plan is properly implemented, thereby making the time-bound nature of the Code equally pivotal for the post-CIRP stage. The time-bound resolution pillar not only engenders conflict between the objective of value maximization and the supremacy of commercial wisdom of CoC in the post-CIRP stage, but also raises a seminal question as to which entity is vested with the authority to rule on matters concerning conflict between the resolution-centric ethos and the time-bound nature of the Code. Given that the timeline for implementation of a resolution plan is determined by the CoC while

²³ Vaibhav Gattani and Dolly Chhabda, 'An Analysis of Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code 2016' (2023) 3(4) IJIRL 1 <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/injloitd5§ion=4> accessed 18 January 2025.

²⁴ *RPS Infrastructure Ltd v Mukul Kumar* [2023] 10 SCC 718.

²⁵ *Appu Hotels Ltd v Radhakrishnan Dharmarajan* [2023] SCC OnLine NCLT 1353.

approving the plan,²⁶ they have limited and qualified authority to control the time-bound nature in the post-CIRP stage. However, the pre-eminent question is whether the scope of this authority can be expanded to grant subsequent extensions for implementation of the plan.

IV. THE POST-CIRP PROCESS: STEERING COMPLEX SCENARIOS

The time-bound nature of the Code is explicitly stated in Section 12,²⁷ which stipulates a maximum of 330 days for the completion of the resolution process. This period, however, does not encompass the implementation of the resolution plan. It is assumed that the implementation timeline is pre-agreed and incorporated into the resolution plan itself.²⁸ Thus, once the plan is approved, its implementation is governed by the timeline specified within the plan. This raises the question: to what extent can the AA regulate this period?

To illustrate this point, consider an imaginary case of Company X Ltd, whose insolvency was procedurally resolved as per the time limit under Section 12. The resolution plan submitted by Alpha Ltd was duly approved by both the CoC and the AA. The plan outlined a phased payment schedule, with payments to be made in four distinct phases. Although the first phase was completed as scheduled, the Successful Resolution Applicant (**SRA**) subsequently failed to make the payments on the due dates. Now, let us consider three potential scenarios considering this situation:

²⁶ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016, reg 38 (**CIRP Regulations**).

²⁷ IBC, s 12.

²⁸ CIRP Regulations, reg 38.

- i. The SRA files an application with the AA requesting an extension of time for implementation. Can the AA grant such an extension, or would doing so undermine the approved plan and be considered a modification of the plan?
- ii. The SRA requests an extension of time from the Implementation and Monitoring Committee (**IMC**); the IMC, with the approval of the erstwhile CoC, refuses to grant the extension and passes a resolution to liquidate X Ltd. Is this resolution sufficient to initiate liquidation, or can the AA still grant an extension despite the resolution?
- iii. The SRA requests an extension of time from the IMC, which grants the extension with the approval of the erstwhile CoC. Is this extension binding on all creditors, or can individual creditors file an application with the AA for liquidation?

A. Scenario I: The possibility of time extensions

The fundamental question here is whether an extension can be allowed at all. The Supreme Court has emphasised that the sanctity of an approved resolution plan is paramount, and modifying it post-CIRP would compromise this sanctity.²⁹ Therefore, if an extension were considered a modification, granting it would never be permissible, regardless of any emergency or justifiable reason. Given that the primary purpose of the Act is to resolve insolvency, it seems appropriate to view an extension of time as distinct from a modification. This ensures that insolvency resolution remains the priority. This position was recently

²⁹ *Deccan Value Investors LP v Dinkar Venkatasubramanian* [2024] SCC OnLine SC 4075.

reiterated by the NCLAT in the case of *Ashok Dattatray Atre and Others v State Bank of India and Others*.³⁰ In this case, the NCLT Mumbai refused to allow an extension of time to the SRA, citing that such an extension would constitute a modification of the already approved plan, and consequently passed a liquidation order. On appeal, the NCLAT, relying on its judgment in *Tricity Premier Hearing Service Inc v State Bank of India and Others*,³¹ held that an extension of time for repayment does not amount to a modification of the plan. Furthermore, in this same judgment, the NCLAT clarified that the jurisdiction to grant such an extension falls within the purview of the AA and is within its inherent powers. Thus, it can be conclusively said that an extension of time for repayment does not amount to a modification of the plan, and such an extension can be granted by the AA. Therefore, between the principle of preserving the timeline and the resolution-centric approach, it is largely evident that the latter takes precedence over the former.

B. Scenario II: The CoC's Commercial Wisdom vs Judicial Oversight

It is pertinent to examine the second scenario to understand the significance of the commercial wisdom exercised by the CoC or the IMC following the approval of a resolution plan. Although the CoC can be dissolved and replaced by the IMC after the resolution plan is approved, the CoC can still be summoned and consulted if necessary.³² The second

³⁰ *Ashok Dattatray Atre and others v State Bank of India and others* [2024] SCC OnLine NCLAT 468.

³¹ *Tricity Premier Hearing Service Inc v SBI* [2022] SCC OnLine NCLAT 1399.

³² *Parker Hannifin India Pvt Ltd v Prowess International Pvt Limited* [2017] SCC OnLine NCLT 11998.

scenario involves a situation where the IMC/CoC files an application for liquidation because the SRA failed to comply with the plan within the pre-agreed timeframe. This scenario presents a conflict between the commercial wisdom of pursuing liquidation due to delays and the inherent goal of resolving insolvency. In such a case, the question arises whether the AA can override the commercial wisdom and grant an extension if it deems it appropriate. The Supreme Court addressed this issue in the case of *Kridhan Infrastructure Pvt Ltd v Venkatesan Sankaranarayan & Anr.*³³ In this case, there was a delay in implementing the approved plan, and the CoC, by a 99.28% vote, decided to apply for liquidation. Both the NCLT and the NCLAT approved the liquidation application. However, the Supreme Court ruled that liquidation should be the last resort in insolvency proceedings. The Court granted a three-month extension to the SRA and mandated the deposit of Rupees fifty (50) crores to demonstrate its intent to pay. This ruling confirmed that the AA has the authority to grant an extension even if the commercial wisdom of the CoC favours liquidation, provided the extension serves the purpose of resolving insolvency.

Nevertheless, it is important to recognise that courts will support a resolution-centric approach only to a certain extent, as the protection of one pillar of insolvency law should not come at the expense of others. In the instant case, despite granting a three-month extension, the Court found that no deposit was made by the SRA, propelling the court to pass an order for liquidation of the company. Therefore, it can be concluded that in the third scenario, the AA is not bound by the CoC's decision to

³³ *Kridhan Infrastructure (P) Ltd v Venkatesan Sankaranarayan* [2021] 6 SCC 94.

liquidate and may prioritise resolution over commercial wisdom in the post-CIRP process.

C. Scenario III: The Rights of Individual Creditors Post-CIRP

In the third scenario, two essential questions arise. The first is whether an individual creditor can apply for liquidation after the approval of the resolution plan. Since the insolvency process is creditor-driven, major decisions are made by the CoC to ensure fair treatment for all creditors. Before the resolution plan's approval, an individual creditor can only file for liquidation if they are part of the CoC and hold at least sixty-six percent (66%) of the voting rights, which essentially requires a special majority approval from the CoC.³⁴ However, this position changes post-CIRP of the resolution plan. According to Section 33(3) of the Act,³⁵ any person whose interests are affected by a contravention of the resolution plan may apply for liquidation. The central question, therefore, is whether the non-implementation of the resolution plan in a timely manner constitutes a contravention. Given that the law emphasises the timely resolution of insolvency,³⁶ and the law has also recognised the time value of money,³⁷ it can reasonably be deduced that an individual creditor may file for liquidation. In the third scenario, however, the situation is different because the CoC has granted an extension. Once an extension is given, a contravention under Section 33(3) would not be applicable. Thus, the issue is whether an individual creditor has any rights if the CoC, in its commercial wisdom, agrees to extend the

³⁴ IBC, s 33(2).

³⁵ IBC, s 33(3).

³⁶ *State Bank of India v Value Industries Limited* [2018] SCC OnLine NCLT 26067.

³⁷ IBC, s 5(8).

resolution timeline to facilitate the resolution of insolvency rather than moving towards liquidation.

This situation might appear to present a conflict between the time-bound nature of insolvency resolution on one side and the pillars of commercial wisdom and resolution-centric approaches on the other. If this is indeed the case, the AA might favour the resolution-centric approach, as suggested by the second scenario. For this to be accurate, it must be established whether the CoC or IMC has the authority to grant an extension. In the first scenario, it was confirmed that the AA has jurisdiction to grant extensions and possesses inherent power.³⁸ Therefore, for the earlier question to be answered affirmatively, the legal position would need to be adjusted so that both the AA and the CoC/IMC share the power to grant extensions. This would also imply that both have equal authority to deny extensions, which could negate the conclusion reached in the second scenario.

To understand the power of extension within the Act, it is essential to examine its overall structure, particularly in relation to the time-bound provisions. The entire resolution process, from the initiation of insolvency to the approval of the resolution plan, is governed by strict timelines. The central idea is to complete the process within 180 days, with the CoC having the option to request a one-time extension of up to ninety (90) days from the AA. Throughout the process, various activities such as convening the first meeting, calling for expressions of interest, dispatching the information memorandum, and approving a plan must occur within the statutory time limits specified in the regulations. This

³⁸ *Ashok Dattatray* (n 30).

framework indicates that the CoC does not possess unilateral authority to grant extensions. Instead, the authority to extend deadlines is solely within the jurisdiction of the AA. The CoC or IMC exercising such jurisdiction, to the exclusion of any individual's rights under the Act, should be considered a mischief that must be addressed. This judicial perspective is evident in the case of *Ebenazar Inbaraj Infonet Asia Pvt Ltd v Thirugnana Sambandham*,³⁹ where the NCLT observed that if the SRA fails to fulfil their obligations under the plan, it becomes the duty of the IMC to promptly apply for liquidation. Furthermore, the IMC does not have the power to negotiate or grant extensions. As per this judgement, only the AA has the authority to grant extensions, and if the AA deems liquidation necessary, it will issue a liquidation order. Although this judgment provides guidance, its legal position remains subject to confirmation by higher courts.

V. THE SUPREME COURT'S AFFIRMATION

An extremely important case in this regard has recently been decided by the Hon'ble Supreme Court.⁴⁰ In the recent case, S K Wheels Private Limited, a registered MSME and Maruti authorised dealer, entered the CIRP on 29 March 2019, under the IBC. The resolution plan submitted by Anil Kumar, the promoter and SRA, was approved by the CoC on 18 January 2020. Despite this approval, the SRA consistently failed to meet the obligations outlined in the Resolution Plan, citing difficulties such as the impact of the COVID-19 pandemic. This led to FCs, including Cosmos

³⁹ *Ebenazar Inbaraj Infonet Asia Pvt Ltd v Thirugnana Sambandham* IA (I.B. C) 308/2020.

⁴⁰ *Edelweiss Asset Reconstruction Company Limited v Anil Kumar & Ors* [2024] SCC OnLine SC 1774.

Bank, losing confidence in the SRA's ability to comply with the plan. As a result, they initiated liquidation proceedings in early 2022, with the Resolution Professional filing for liquidation on 8 April 2022. On 2 December 2022, a meeting of FCs was convened, during which a 69.04% majority voted to extend the time for the SRA to make the required payments. However, this decision was controversial and contested because it allegedly violated regulations by calculating the voting share based only on the members present and voting, rather than the full voting share of the FCs in the erstwhile CoC. Despite this extension, the AA, on 13 January, 2023, ordered the liquidation of the CD, citing the SRA's continued non-compliance with the Resolution Plan. The appellants preferred an appeal before NCLAT and contended that the AA erred in rejecting the extension of time for the completion of the resolution process and that such rejection was contrary to the commercial wisdom of the CoC. Upon considering the arguments, the NCLAT reversed the decision of the AA and granted an extension of time to the CD, thereby giving legal force to the resolution passed by the CoC for the grant of an extension. The Appellate Tribunal emphasized that the CoC, being a body composed of FCs with significant expertise in assessing commercial viability and feasibility, holds the primary responsibility for making key decisions in the CIRP. It categorically stated that the commercial wisdom of the CoC must not be interfered with, even in the post-approval stage, unless there is a clear violation of legal provisions or procedural impropriety. Subsequently, this decision of the NCLAT was challenged before the Supreme Court of India. The Supreme Court, after examining the submissions of all parties and the reasoning of the NCLAT, affirmed the appellate tribunal's view. It held that the judiciary should exercise restraint in substituting its judgment for the commercial wisdom of the

CoC, as long as the decision is in compliance with the Code and does not violate statutory mandates. Therefore, it can be conclusively stated that the judgment of NCLAT has attained finality. In previous judgements,⁴¹ it has been settled that the wisdom of the CoC is paramount before the adoption of a resolution plan, but this judgment embarks on a different journey altogether insofar as the grant of extension by the CoC is concerned in the post-CIRP stage. This extension is presented as a pragmatic recognition of CoC expertise and commercial acumen. However, this ostensibly coherent position obscures deeper logical, statutory, and jurisprudential fallacies that warrant rigorous scrutiny.

VI. LINGERING FALLACIES

The decision of the Supreme Court to affirm the decision of NCLAT has set a new legal position and has essentially extended the sanctity of commercial wisdom of the CoC to the post-CIRP stage. The NCLAT, in its judgment, has placed decisions made under the guise of commercial wisdom beyond the reach of the AA. However, this extension of commercial wisdom is logically flawed for the following reasons:

A. *That it is a Colourable Application of Power*

It is a settled principle of law that what cannot be achieved directly should not be achieved indirectly.⁴² In this case, the CoC chose not to liquidate the entity, effectively granting an extension by default. If such a decision is equated with granting an extension, it would constitute a colourable application of the law. Ideally, the CoC should not have the power to extend the time frame. However, one might argue that the time

⁴¹ *K Sashidhar v Indian Overseas Bank* [2019] 12 SCC 150.

⁴² *NHPC Ltd v State of Himachal Pradesh* [2023] SCC Online SC 1137.

period for implementing a resolution plan is not an inherent part of the CIRP. During the selection of a resolution plan, the CoC is free to choose a plan regardless of its implementation duration. Therefore, the approval of a plan with a five-year implementation phase should be considered equivalent to approving a plan with a three-year implementation phase that is later extended by two years. This argument is undermined by the fact that, although the CIRP process concludes with the approval of the resolution plan, the entity remains subject to the Code.⁴³ It would be logically flawed to suggest that the Code is not time-bound. If a plan with a three-year implementation period and a two-year extension were deemed equivalent to a five-year implementation plan approved by the CoC, it could lead to an indefinite extension of the time frame, thereby diluting the time-bound nature of the Code.

B. That it Violates the Provisions of the Legislation

Section 33(3) grants any person affected by the contravention of a resolution plan the right to apply for liquidation. If the CoC is given supremacy in deciding whether or not to liquidate, this power would be rendered ineffective, effectively depriving individuals of the rights conferred by the Act. The CoC's primary role is to select an appropriate resolution plan, and once the CIRP is completed, the CoC's role should end as well. Furthermore, according to Section 33(4), it is the AA's responsibility to determine whether a contravention has occurred and to decide on liquidation accordingly. Therefore, if the CoC decides not to liquidate, it also restricts the AA's power to decide on liquidation. In this

⁴³ *DBS Bank Limited Singapore v Ruchi Soya Industries Limited* [2024] SCC OnLine SC 3.

context, the judgment in *Ashok Dattatray Atre*⁴⁴ correctly asserts that an extension is not the same as a modification and that the power to grant extensions lies with the AA as part of its inherent authority.

C. That Commercial Wisdom is Not Absolute

The extent of commercial wisdom during the CIRP is well-regarded, as demonstrated in the *Essar Steel* case.⁴⁵ However, this extent does not carry over post-CIRP. In the *Kridhan Infrastructure* case,⁴⁶ the Supreme Court disregarded the commercial wisdom of the CoC regarding the liquidation of the company after the resolution plan had been approved. Logically, there should be parity of treatment for the decisions taken by the CoC in the post-CIRP stage. The underlying fallacy is that the judicial pronouncements reflect a dual standard whereby a CoC decision granting extension is considered as supreme, while not attributing supremacy to a CoC decision allowing liquidation of the company. The legislative intent to limit the CoC's role post-CIRP of the plan is evident in Section 33. This section pertains to initiating liquidation and, while it acknowledges the CoC's role, this is confined to the period before the resolution plan's approval. After approval, Section 33 ensures that everyone, including the CoC, is on equal footing by referring to "any person". Thus, in matters concerning the extension of time, it is judicial wisdom that should take precedence, aiming to balance the three essential pillars of the Insolvency and Bankruptcy Code.

⁴⁴ *Ashok Dattatray* (n 30).

⁴⁵ *Essar Steel* (n 16).

⁴⁶ *Kridhan Infrastructure* (n 33).

VII. REDEFINING POST-CIRP GOVERNANCE

The insolvency framework under the Code relies on a delicate balance between regulatory oversight, judicial intervention, and the commercial wisdom of FCs. However, structural gaps, particularly in the post-CIRP phase, raise concerns about the unchecked authority of the CoC and its broader implications for the insolvency process. While the commercial wisdom of FCs is a key component of the framework, its unregulated dominance can undermine the interests of other stakeholders. Against this backdrop, this analysis delves into the implications of these structural gaps on the insolvency process and underscores the imperative for immediate actions to safeguard the objectives of the IBC.

A. Recognising the Rights of Minority Creditors

The insolvency framework in India envisages a balanced division of power among three pivotal institutional mechanisms: IBBI, NCLT/NCLAT, and the CoC.⁴⁷ While each institution has distinct roles, the unchecked supremacy of the CoC in the post-CIRP stage poses significant risks to the objectives of the Code. Although liquidation is considered a last resort, the pursuit of revival should not come at the expense of the core principles of insolvency law. When the commercial wisdom of the CoC is determined by dominant FCs, the interests of minority and OCs are likely to be compromised. Dominant FCs may prioritise strategies that bolster their position even at the expense of other stakeholders involved. This skewed decision-making process can lead to outcomes that mirror the oppression and mismanagement witnessed under the Companies Act, where the powerful few override the interests of less

⁴⁷ Vivek Kumar (n 6).

influential stakeholders.⁴⁸ In such a scenario, the CoC's unchecked influence in post-CIRP decisions may marginalise minority and OCs.⁴⁹ An even more alarming scenario arises where a single creditor's sweeping majority voting power reduces collective wisdom to individual discretion. Therefore, it is imperative to institute regulatory safeguards that ensure balanced decision-making.

B. Application of Judicial Wisdom

Approval of a resolution plan is only part of the process. In the absence of proper oversight, FCs may prioritise their interests over fairness and equitable treatment. In a recent Supreme Court decision regarding the insolvency of Jet Airways,⁵⁰ the apex court ordered the liquidation of the airline after a prolonged five-year process—an outcome that arguably negates the IBC's objective of resolving insolvency in a timely manner. The apex court underscored that there are only a few provisions in the Code,⁵¹ dealing with the post-CIRP or implementation phase thereby laying emphasis on the need for introducing post-CIRP regulations to fill the legislative void. Furthermore, the Court criticised the NCLT and NCLAT for effectively functioning as mere rubber stamps. Considering these observations, the NCLT(s)/NCLAT should evaluate liquidation and extension requests not solely based on commercial wisdom but also with a view to upholding the collective interests of all stakeholders. The CoC's

⁴⁸ Sherin Rachel Santhosh, 'Oppression and mismanagement in a company: remedies and their limited use: way forward' (2022) 4(3) IJLLR 759.

⁴⁹ Hidde Volberda, 'Crises, Creditors and Cramdowns: An Evaluation of the Protection of Minority Creditors under the WHOA in light of Directive (EU) 2019/1023' (2021) 17(3) Utrecht Law Review.

⁵⁰ *SBI v Consortium of Murari Lal Jalan* [2024] SCC OnLine SC 3187.

⁵¹ IBC, ss 30-31.

unchecked authority in the post-CIRP phase, if left unregulated, risks undermining the very intent of the IBC.

C. Need for Regulatory Intervention

The IBBI, along with the NCLT(s) and NCLAT, shares the responsibility of ensuring that the CoC's decisions do not adversely affect the interests of other stakeholders. A blind deference to the commercial judgment of the CoC could further compromise the objectives of the Code. It is pertinent to note that in the United Kingdom, paragraph 74 of Schedule B1 to the Insolvency Act 1986,⁵² allows creditors to challenge an administrator's actions if those actions cause “unfair harm” to their interests. This provision ensures that, while administrators exercise their commercial judgment, they are prevented from making decisions that unjustly prejudice creditors. For example, in *Re London & Westcountry Estates Ltd*,⁵³ the court ordered administrators to assign a potential claim to a creditor after determining that their refusal had caused unfair harm by denying an opportunity for potential recovery. Developing a similar principle in India is equally important.

It is, therefore, incumbent upon the IBBI and NCLT/NCLAT to diligently discharge their respective duties. First, the IBBI must frame and notify appropriate regulations for the post-implementation phase that uphold the objectives of the Act while keeping the CoC in check. Thereafter, the NCLT(s)/NCLAT, as the custodians of the IBC, have an even greater duty to enforce these regulations. When commercial judgment begins to reflect the will of a powerful few rather than the collective interest, the

⁵² Insolvency Act 1986, sch B1, para 74.

⁵³ *In re London & Westcountry Estates Ltd* [2014] Bus LR 441.

tribunals must intervene. Relying solely on commercial wisdom cannot safeguard the legal objectives of the Act. By introducing comprehensive post-CIRP regulations and reinforcing judicial oversight, the insolvency resolution process can be steered toward fairness, collective wisdom, and ethical scrutiny.

VIII. CONCLUSION

Commercial legislation such as IBC are indeed to be looked at from a perspective different from that of other laws and the proactive approach of the judiciary in recognising the need and importance of commercial wisdom has helped in giving this law an appropriate structure. Commercial wisdom is important in so far as this Code is concerned but it should not be absolute. The essential difference between the CIRP and post-CIRP process is that for CIRP the time-limits have been provided expressly in the Code and even the commercial wisdom cannot bypass this limitation of time. This has been done because a time-bound resolution was one of the core objectives for bringing this Code and the legislators have been mindful of the same. In the post-CIRP scenario, the time factor is not governed by the act, and in such a case it becomes even more important for the judiciary to keep a constant vigil and make sure that the time-bound resolution aspect of the Code is adhered to. Mistakenly equating two different scenarios and giving similar powers to CoC is not the solution. The answer lies in concerted action on the part of The IBBI and NCLT(s)/NCLAT. The former must frame and notify appropriate regulations guiding the conduct of the CoC in the post-CIRP stage and defining their powers while the latter has the duty to ensure that the regulations so formed are not only thoroughly complied with but also systematically followed. The central legislature must also maintain

oversight over this evolving state of affairs and spring into action if the other two institutions fail to discharge their obligations adequately. This integral issue has not received sufficient jurisprudential clarity primarily because the idea of “commercial wisdom” has acquired a permanent space in the minds of people. Thus, the way forward lies in adopting a model of reasoned commercial wisdom that aligns with the appropriate regulations once notified by the IBBI and remains subject to robust judicial oversight in the post-CIRP process.