V. NCLT'S JUDICIAL INTERFERENCE: A HURDLE TO THE COMMERCIAL WISDOM OF COMMITTEE OF CREDITORS UNDER THE IBC

- Nipun Ninad Naphade*

ABSTRACT

Over several decades, the Government of India has introduced special legislations to govern complex areas of law, and special tribunals to adjudicate upon the matters arising therein. In this context, the Insolvency & Bankruptcy Code, 2016 (IBC) was introduced to replace ineffective laws like the Sick Industrial Companies (Special Provisions) Act, the Recovery of Debts Due to Banks & Financial Institutions Act, and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act. The new Code was a well-planned reform and made the process easier to some extent. However, the overlapping provisions and vague interpretation of certain aspects led to jurisprudential ambiguity. One such area was the liberty provided to the Committee of Creditors (COC) under the Act, in taking decisions or giving approval to a particular resolution plan. The dilemma of authority arose as the same plan would then require the approval of the National Company Law Tribunal (NCLT). The NCLT in some cases held that such a need for judicial approval meant that the commercial wisdom of the COC was not the sole deciding criteria in the resolution process, and the judicial wisdom of the Adjudicating Authority was intended to be employed before giving approval. This paper analyses the abovementioned ambiguity through an analysis of the bare provisions of the IBC, exploration of the opinions presented by government bodies, and an in-depth study of what various courts opined on the issue. The study attempts to explain how the IBC has fortified the position of the COC in order to protect the interests of the stakeholders and to increase the confidence of investors in the market.

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* The author is fourth-year student of B.B.A. LL.B. (Hons.) at Symbiosis Law School, Pune. Views stated in this paper are personal.

I. INTRODUCTION & LEGAL CONTEXT

A. Historical Background

The wave of privatisation & liberalisation around the world in the 1990s brought with it an equally widespread trend of corporatisation of entities.[1] Consequently, developing nations like India also saw corporatisation in various sectors of the economy, through entities with varying structures, sizes & objectives.[2] To regulate the presence of such companies, the government introduced laws on their formation, functioning & winding up. The Sick Industrial Companies (Special Provisions) Act[3] (**"SICA"**) designed for resolving insolvencies, was slammed for its long delays in assessing the viability of sick organizations since its inception

[1] AV Ramana, *The Imperative of Resilient Strategy for Businesses in 21st Century*, 10 (2) I. J. M. L., 29, 31, (2019).
[2] Aldous Michael & Kieran Conroy, *Navigating institutional change: An historical perspective of firm responses to pro-market reversals*, 27 (2) J. INTL. MGT., 1, 2, (2021).
[3] The Sick Industrial Companies (Special Provisions) Act, No. 1 of 1986, (India).

itself.[4] This was followed by the introduction of the Recovery of Debts Due to Banks and Financial Institutions Act (**"RDDBFI Act"**), for expedited resolution and recovery of debts for the benefit of financial institutions. An attempt to protect the interests of secured creditors was also made through the introduction of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**"SARFAESI Act"**).[5]

However, this multiplicity of laws, authorities and contradictory jurisprudence further complicated matters.[6] By the turn of the millennium, numerous financial scandals were discovered and investigated globally, and a majority of these scams involved the depiction of false facts in financial statements by companies that were deemed to be significant contributors to the economy.[7] This phenomenon was observed in India as well, creating new challenges for the regulatory regime in the corporate and financial sectors, and highlighting the complete lack of an expert body to comprehensively understand and adjudicate on intricate corporate matters.[8] Furthermore, the judicial framework of India was overburdened with litigation between companies, creditors, and regulatory authorities.[9] To reduce the pending legal burden and to simplify the resolution of financial and legal cases

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[4] Aparna Ravi, *The Indian Insolvency Regime in Practice Analysis of Insolvency & Debt Recovery Proceedings*, (Ind. Gandhi Inst. of Dev't Res., Working Paper No.027, 2015), http://www.igidr.ac.in/pdf/publication/WP-2015-027.pdf

[5] Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, No. 54 of 2002, (India).

[6] Anant Srijan, & Aayushi Mishra, *A Study Of Insolvency And Bankruptcy Code And Its Impact On Macro Environment of India,* 7 (3)*,* INTL. JOUR. ENGG. DEV. RES., 28, 35, (2019).

[7] Tareq Na & Hassan Younes, *Corporate governance: on the crossroads of meta-regulation and social responsibility,* 27 (3) J. FIN. CRI., 801, 802, (2020).

[8] Namita Rajput, *Shareholder types, corporate governance and firm performance: An anecdote from Indian corporate sector,* 7 (1) AS. JOUR. OF FIN. & ACC., 45, 46, (2015).

related to corporate debts, the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) was introduced.[10] One of the objectives of this law was to secure the rights of creditors of a company when such company was declared insolvent or bankrupt.[11] A creditor can be defined as any entity or person to whom a debt is owed by another person over a certain period of time.[12] Such a person may also be a party that can enforce the completion of an obligation, duty or contract, on the basis of a pre-decided agreement.[13] For instance, in India, in the case of *Nikhil Mehta & Sons (HUF) v. AMR Infrastructures Ltd.*,[14] the National Company Law Tribunal (**"NCLT"**) held that an agreement governing funds raised by developers under assured returns schemes amounted to a contract of commercial borrowing, and the buyers wishing to enforce the contract were to be treated as creditors. In common parlance, a creditor is owed his dues in a commercial or financial setting, where legal action can be enforced if such a debt is not settled within set conditions.[15]

B. Stakeholders in the insolvency processes

In the Indian context, in terms of their financial relations with a corporate entity, creditors have been defined under the Companies Act and the IBC as "any person to whom a debt is owed and includes a financial

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[9] Divya Singh Rathor, *Recovery of Non-Performing Assets in India-a tough row to hoe*, 2 (12) INTL. J. A. RES. WRI., 113, 115, (2020).
[10] Insolvency and Bankruptcy Code, No. 31 of 2016 (India).
[11] Ministry Of Finance, Gov't Of Ind., *The Report Of The Bankruptcy Law Reforms Committee: Rationale And Design*, 12 (2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.
[12] *Creditor,* BLACK'S LAW DICTIONARY, (4th ed. 1971).
[13] Mohr v. Minnesota Elevator Co., 40 Minn. 343, Murphy v. Jos. Hollander, Inc., 131 N.J.L. 165.
[14] (2017) SCC OnLine NCLT 219.
[15] State v. Ord State Bank, 117 Neb. 189.

creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder".[16] The IBC thus recognises multiple categories of creditors, which are divided into two groups based on the nature of credit involved: operational creditors and financial creditors.[17] The Code allows for greater involvement of financial creditors in the resolution process, because they are qualified for supporting a financial restructuring plan for the company concerned, and hence can expedite the proceedings.[18] The IBC defines a financial creditor as "any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to".[19] In order to organise and provide structure to financial creditors of a company, the code provides for the formation of a body of financial creditors, named 'Committee of Creditors' (**"COC"**), which allows them to discuss and vote on decisions related to the insolvency proceedings.[20] As per the provisions on the Corporate Insolvency Resolution Process (**"CIRP"**), the Resolution Professional (**"RP"**) appointed for the company is required to form a COC, comprised of all financial creditors of the corporate debtor[21].

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[16] Companies Act, No.18 of 2013, §. 2(10) (Ind); Insolvency & Bankruptcy Code, No. 31 of 2016, §. 3(10) (India).
[17] Aarohee Gursale & Sana Khan, *Financial Creditor & Operational Creditor under the Insolvency & Bankruptcy Code*, MONDAQ, (Jul. 7, 2017), https://www.mondaq.com/india/insolvencybankruptcy/607738/financial-creditor-and-operational-creditor-under-the-insolvency-and-bankruptcy-code-2016.
[18] Yogesh Mathur et al, *A Game Theoretic Analysis of the Relative Payouts to Operational Creditors and Financial Creditors from Bankruptcy Resolution in India*, 11 (2) A. J. L. ECO., 1, 2, (2020).
[19] Insolvency & Bankruptcy Code, No. 31 of 2016, § 5(7) (India).
[20] Nikhil Mehta & Sons v. AMR Infrastructure, CA. NO. 811(PB) 2018.
[21] Id, § 21(1) & (2).

The entire process of resolution is monitored and adjudicated upon by the NCLT,[22] which is a quasi-judicial body constituted by the Ministry of Corporate Affairs (**"MCA"**) to replace the Company Law Board and to handle disputes related to corporate entities under a variety of laws.[23] It is a settled position of law that the NCLT, being a tribunal created to simplify and expedite corporate legal disputes, is supposed to consider the interests of stakeholders on an equitable basis, while deciding on a case.[24] By inference, the NCLT is meant to give a decision that is conformant to the law and causes the least hardship to the parties involved.[25]

C. The process of Resolution: CIRP

The prime instrument of the NCLT in handling an insolvent company is the CIRP which is initiated[26] when a corporate debtor defaults on payment and a creditor or debtor files an application to that effect.[27] Upon acceptance of the application, the NCLT may pass an order declaring a moratorium on the disposal of assets, and an interim RP is appointed.[28] One of the duties of the interim RP is to form the COC, which consists of financial creditors of the corporate debtor.[29] In the case of *Kalparaj Dharamshi v. Kotak Investment Advisors Ltd,*[30] the Supreme Court explained that the

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[22] Srijan Anant & Aayushi Mishra, *A Study Of Insolvency And Bankruptcy Code And Its Impact On Macro Environment Of India*, 7 (3) I. J. E. D. R., 28, 30, (2019).
[23] Gayatri & Arya R., *A Study on the importance of NCLT in India*, 120 (5) INTL. J. P. APP. MATH., 41, 42, (2018).
[24] Parker Hannifin India Pvt Ltd v. Prowess International Pvt. Ltd., 226 KB (2017).
[25] Samiksha Pandey, *Balancing Interests of Stakeholders under the IBC (2016),* 2 (2) I. J. L. S. I., 406, 409, (2020).
[26] Insolvency & Bankruptcy Code, No. 31 of 2016, §.7 (India).
[27] Shasta Gupta, Resolution v. Liquidation Under IBC, 1 (2) CORP. GOV. INS., 20, 21, (2019).
[28] Insolvency & Bankruptcy Code, No. 31 of 2016, § 13 (India).
[29] *Id,* 18(c).
[30] (2021) SCC OnLine SC 204.

appointment of the COC is an important step in the CIRP since it is the sole body capable of deciding key economic questions of the debtor using proportional votes of financial creditors. In extension of this premise, the Supreme Court in *K. Shashidhar v. Indian Overseas Bank and Others*[31] reiterated that the COC was empowered by the IBC to decide upon the regular functioning of the corporate debtor during the CIRP, conduct regular meetings, supervise the working of the RP, and ratify any administrative decisions taken by the RP. Similarly, the court in the case of *Ghanashyam Mishra & Sons Pvt. Ltd v. Edelweiss Asset Reconstruction Company Ltd & Ors,*[32] recognised the COC's powers to seek an extension of time under IBC, evaluate the practicability of the corporate debtor's business, examine the effectiveness of future operations, make payments toward CIRP costs, and liquidate the corporate debtor immediately if it determines that the insolvency resolution is destined to fail.

The COC has a set of rights and obligations, including the creation of a restructuring plan to handle the financial structure of the debtor company, which is based on the advice received from the RP.[33] After a plan has been accepted and implemented towards the debtor company, the COC is also authorised to monitor the functioning of the debtor's business until the resolution plan is brought to completion. In such a scenario, it can be observed that there is not one, but rather two quasi-administrative bodies that monitor the resolution of the insolvency; the COC and the NCLT.

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[31] (2019) SCCOnline SC 257.
[32] (2021) 9 SCC 657.
[33] Insolvency & Bankruptcy Code, No. 31 of 2016, § 21 (India).

Each body has certain powers or duties as provided by the Code, although the NCLT is given judicial authority[34] as it is a statutory adjudicating body created for qualified dispute resolution by the MCA.[35] Against this backdrop, a long-disputed question rises again: Can there be a contest of validity between a commercial decision taken by the COC and a legal counter-decision given by the NCLT during a CIRP proceeding? This question has been touched upon in various judicial decisions in the past but was recently brought up again during an insolvency case of *In Re: Siva Industries and Holdings Ltd.* before the NCLT.[36] The issue arose when a resolution plan submitted by the COC was rejected by the NCLT on the grounds that it was ambiguous, and would defeat the provisions of the IBC.[37] In this context, the current paper shall analyse the extent of authority granted to the NCLT in matters of accepting a resolution plan proposed by the COC, based on legislative and judicial pronouncements, and international jurisprudence. To obtain a thorough understanding of the concepts of the COC, the role of the NCLT, the overall arrangement of the IBC, the paper shall conduct a brief review of existing literature in these areas, and identify a research gap to outline the analysis.

II. REVIEW OF LITERATURE

For the purpose of creating an outline for the current paper, a number of research studies from various academic institutions are analysed, and the

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[34] Id, § 60(1) & (2) (India).
[35] Charu Vinayak, *NCLT: A Single Roof For All Corporate Disputes*, 4 (7) INTL. J. ADV. RES., 2082, 2084, (2016).
[36] In re: Siva Industries and Holdings Ltd., (2021) 130 taxmann, 440.
[37] Agatha Shukla, *NCLT Bulldozed 'Building Restructure Plan': Orders insolvency instead*, SCC ONLINE, (Aug. 21, 2021), https://www.scconline.com/blog/post/2021/08/17/nclt-bulldozed-building-restructure-plan-orders-insolvency-instead/.

following observations are made. The observations are divided into specific themes that revolve around the topic at hand, such as the implementation of the IBC, the role of NCLT, the rights and remedies of creditors, and finally, the status of the law in foreign jurisdictions.

A. The implementation of IBC:

To begin with, the shift in India's approach towards insolvency laws is studied by Kumar, who infers that the IBC was introduced to consolidate the separate statutes governing the subject and to speed up the resolution of insolvencies.[38] This inference sets the foundation for the current paper since the conflict between powers of COC and NCLT is creating unnecessary delay in the CIRP, which is contradictory to the objective of speedy resolution under the IBC. Kumar observes that in its primary years, the Code has successfully functioned to provide relief to stressed assets, loans and corporate credit arrangements, although the question that whether this pace will be maintained in the future, remains unanswered.

While commenting on the reasons behind the IBC facing delays in processes, Das comments that the new Code has not been drafted while keeping touch with the ground realities of the corporate sector, and the Code does not show semblance to previous insolvency laws.[39] The authors examine various judgments delivered by Indian courts in this context and highlight the disconnect between the legislative intent and its socio-legal effect in reality. The implementation of the IBC and the issues that it raised

[38] Dhananjay Kumar, *The new Corporate Insolvency Regime in India: A Paradigm Shift*, 38 (4) AMER. BANK. INS. JOUR., 38, (2019).
[39] Abhiman das et al, *Insolvency and Bankruptcy Reforms: The Way Forward*, 45 (2) VIK., 115, (2020).

are analysed by Pryor and Garg, through a set of three criteria.[40] Their study concludes that the CIRP process provided under IBC falls short in protecting the rights of secured creditors due to interference and lack of procedural fairness. However, the study does not address the role of the NCLT in causing or preventing the insufficiency of fairness and the presence of hurdles. Singh and Thakkar present a more event-specific approach to analysing the IBC; they study the CIRP process in implementation during the Covid -19 Pandemic.[41] The authors explain that due to a decline in commercial success caused by the pandemic and lockdowns, the IBC mechanisms are being burdened with new insolvency disputes, and the NCLT is not capable of handling them in time.

B. The role of NCLT

The shift in insolvency regime is also studied at a macro level by Anant and Mishra, who interpret the growing number of cases filed before the NCLT as a display of growing faith in the efficiency of the IBC.[42] However, this interpretation is not connected to any causal factor, and the role of the NCLT in the resolution process remains unattended. The authors do not provide any substantial evidence to show that the success of the NCLT can be attributed to its efficiency in commercial dispute resolution or speedy disposal of cases. They do not address the occasions of unnecessary interference by the NCLT in CIRP and hence leave a research gap.

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[40] Scott Pryor & Risham Garg, *Differential Treatment among Creditors under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions,* 94 AM. BANKR. L.J., 123 (2020)

[41] Ram Singh & Hitesh Thakkar, *Settlements and Resolutions under the Insolvency and Bankruptcy Code: Assessing the Impact of Covid-19*, 69 (3) IND. ECO. JOUR., 568, (2021).

[42] Srijan Anant & Aayushi Mishra, *A study of insolvency & bankruptcy code & its impact on macro environment of India,* SAM, 1, (2018).

Meanwhile, Chatterjee makes a statistical survey of the effects of NCLT interference in the CIRP process and conclude that the lack of standardised format of orders by the NCLT creates obstructions in providing speedy judicial relief.[43] Unfortunately, the study fails to analyse the judicial and legislative developments that might affect the position of law in the current era. The power to issue such orders and their extent is studied by Mahajan, who concludes that the NCLT and the National Company Law Appellate Tribunal (**"NCLAT"**) do not possess inherent powers under the IBC to trespass beyond the boundaries set by the Code.[44] This study does not shed light on the rights of creditors that might get affected by such misuse of powers, and hence leaves a gap in analysis.

C. Rights and remedies of creditors

On the issue of rights of financial creditors, Vora and Attarwala contend that the level of inclusivity of creditors implemented under IBC shall increase with the passage of time, owing to the comprehensive nature of the Code.[45] A contemporaneous study by Pahwa analyses creditors' remedies and their effects on ease of doing business in India under the IBC regime and explains the ill effects of improper judicial control on the functioning of the COC. In this direction, Kattadiyil takes a statistical approach towards the effects of authoritarian obstacles on problem

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[43] Sreyan Chatterjee et al, *An empirical analysis of the early days of the Insolvency and Bankruptcy Code, 2016,* 30 N. L. S. I. REV., 89 (2018).
[44] Kahnav Mahajan, *Inherent powers of NCLT/NCLAT vis-a-vis IBC*, S. S. R. N., 1, 14, (2020).
[45] Chintan Vora & A. Attarwala, *Impact Of Insolvency And Bankruptcy Code & Emerging Horizons*, 7 (2) INTL. J. RES. MGT. SOC. SCI., 5, (2019).

resolution.[46] The statistics analysed in the paper conclude that most cases face delay due to rejection of resolution plan or disagreement in COC. On the issue of creditors' remedies and discretions, Kattadiyil delves into the topic of commercial experience of creditors towards value maximisation.[47] The study draws the conclusion that a COC decision is often multifaceted, and should not be questioned in terms of commercial viability. However, the study does not specify if the NCLT needs to increase or decrease its involvement in such a process. In this direction, Athota deals with the problem of a judicial retrogression towards the 'debtor-in-possession' model of insolvency regime, whereby the priority given to creditors' remedies is taken away. The author contends that such diversion can adversely affect creditors' rights and hence, must be curtailed.

D. Status of law in foreign jurisdictions:

To create a context for what a growing economy like India can expect from its insolvency laws, this paper probes research conducted in other jurisdictions around the globe. In the South-East Asian region, Lin provides an example out of the Chinese insolvency regime, dissecting the issues and probable areas of improvement via statistical study.[48] At the international level, the rights of a creditors' committee are analysed by Jokubauskas & Kirkutis, who emphasize on the importance of the representation of

[46] Dr. Binoy Kattadiyil*, Business re-engineering and restructuring under IBC,*9 (6) INTL. J. M. E. RES., (2020).
[47] Dr. Binoy J. Kattadiyil, *Commercial Wisdom Of Creditors For Value Maximization*, 9 (7) INTL. JOUR. MULTI. EDU. RES., 101, (2020).
[48] Shaowei Lin, *The Empirical Studies of China's Enterprise Bankruptcy Law: Problems and Improvements*, 27 (1) INTL. INS. REV., 77, (2018)**.**

creditors' interests in various jurisdictions.[49] They conclude that in an insolvency resolution program, the commercial interests of the creditors are of prime importance, and their vote on issues of asset disposal is quintessential. Meanwhile, Sarnakov delve into a situation where the debtor's property is insufficient and the factors that might turn the resolution process into one of bankruptcy and breakdown.[50] The authors study the situations in Russia, Germany and surrounding jurisdictions to prepare a cross-country understanding of insolvency. Their contribution assumes relevance as they offer insight into the status of insolvency law in various types of developed, developing as well as underdeveloped economies as well as civil and common law jurisdictions. They contend that despite having differences in the economic backgrounds or approaches to the codification of laws, unless there is a possibility of unfairness or dishonesty amongst members of the creditors' committee, there need not be judicial intervention in the execution of an approved plan in such countries.

Further discussion on creditors' involvement is presented by Bidin and Hussain, who compare the latest bankruptcy laws in Malaysia with developing nations such as South Africa, Malaysia and India, as well as developed nations like Australia and UK.[51] The study resonates with the idea that judicial intervention in matters of private commercial choices can reduce the efficiency of the process. In terms of the western position on bankruptcy laws, Minyano discuss whether the shift in judicial approach from debtor-in-

[49] Remigijus Jokubauskas & Mykolas Kirkutis, *Representation of Creditors in Corporate Bankruptcy Proceedings*, 1 (16) R. S. U. E. JOUR., 24, (2020).
[50] Sarnikov et al, *The problem of insufficient debtor's property during bankruptcy*, 118 S. H. S. CON., 1, (2021).

possession to creditor-primary model is successful in Spain.[52] Finally, the right of creditors to choose a rescue plan for insolvent businesses is probed by Van Zyl in the South African context.[53] The author concludes that a plan approved by the creditor should not be challenged judicially if the outcome is favourable to the insolvent company.

III. RESEARCH GAP AND HYPOTHESIS

Having set a background and context for research, the paper shall now provide a focal perspective on the research gap identified. The studies noted above provide a general understanding of the framework created under Indian insolvency laws and present an outline of the entities involved therein. Till date, the rights and powers of creditors have been discussed in light of their nature as financial or operative creditors. However, the extent of the enforceability of such powers has not been commented upon in detail. Furthermore, the level of consideration given to the opinion of the COC in India by the NCLT remains unanalysed. Accordingly, a research gap is identified for the purpose of analysis, whereby the importance of decisions taken by the COC needs to be inspected in light of the scrutinising power of the NCLT during insolvency proceedings.

In this direction, the following research questions are established:

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[51] Aishah Bidin & Nordin Hussin, *The New Law of Corporate Restructuring in Malaysia: Analysis of the Concept of Scheme of Creditors' Arrangements in Corporate Insolvency Proceeding*, 1 C. I. B. RE. GL. ECO., 153, (2019).
[52] María-del-Mar Camacho-Miñano et al, *On the Efficiency of Bankruptcy Law: Empirical Evidence in Spain*, 22 (3) INTL. INS. REV., 171, (2013).
[53] Ernest Wentzel Van Zyl, *Business Rescue Proceedings in South Africa: Some concerns from the perspective of Creditors*, UNIV. OF JOHAN., 2, (2018).

- Whether the COC can be relied upon to reach a decision using their commercial wisdom without interference from judicial or administrative authorities?

- Whether the NCLT has been empowered to question the commercial correctness of a decision taken by the COC with regards to a resolution plan?

- Whether the NCLT has been empowered to reject a decision of the COC on the basis of its commercial questionability during an insolvency proceeding?

Based on the literature reviewed and the gap in research identified, it is hypothesised that the IBC is a legislation aimed at securing the interests of vulnerable parties during insolvency or bankruptcy proceedings against corporate debtors. Accordingly, prime attention must be given to the decisions and interests of the parties involved. It is hypothesised that the commercial viability of the resolution should be prioritised in this matter, and the COC should be deemed the final authority for determining if a particular resolution plan is feasible to restructure a debtor financially. The only matter that requires attention from the NCLT in such a process is to assess whether the decisions of the COC comply with the law of the land. On the basis of such a hypothesis, the research questions mentioned above shall be analysed through the doctrinal study of the IBC and its provisions, the opinions provided by the executive wing of the government, and the interpretations made by the judiciary.

IV. ANALYSIS OF LEGISLATIVE PROVISIONS

The first agenda that requires scrutiny are the legislative provisions made for handling the rights of creditors, the functions of the COC, the responsibilities of the NCLT and the presentation of the resolution plan. The preamble to the IBC explains that the Act is meant to resolve insolvency matters in a time-bound manner, to maximise the value of assets, promote entrepreneurship and balance the interests of all stakeholders.[54] The Code defines Financial Creditor as, "A person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred".[55] These financial creditors make up the COC as arranged by the RP to take decisions together as a body.[56] These decisions, however, shall be subject to a requisite majority of 51% of the voting share of the members.[57] The RP requires approval of the COC before performing certain activities such as raising interim finance, creating security interests on the debtor's assets, changes in capital structure, etc. and thus, the COC is the apex approving authority in the CIRP process.[58]

More importantly, when a resolution plan is presented by an applicant and scrutinised by the RP, the IBC mandated that such plan must be presented before the COC for obtaining their approval.[59] The same provision explains that the COC may choose to approve such plan if it is satisfied that the plan caters to the requirements mentioned by the Code, such as implementation and supervision of the plan, provisions for the

[54] Insolvency and Bankruptcy Code, No. 31 of 2016, Preamble (Ind).
[55] *Id*, § 5(7).
[56] *Id*, § 21(1) & (2).
[57] *Id*, § 21(8).
[58] *Id*, § 28(1).

management of debtor's affairs, resolution costs, operational debts, and conformity to law.[60] If it believes that the CIRP process would take longer than what time period is provided for by the Code, the COC is empowered to instruct the RP to apply for an extension of time.[61] It can be thus inferred that the COC is constituted to ensure that the CIRP process occurs smoothly and that there is no activity or decision that may cause detriment to the creditors' interest.[62]

Moreover, the IBC mentions the part played by an Adjudicating Authority (**"AA"**) under various sections. Part II of the Code elaborates that for that part, any reference to the AA would connote the NCLT constituted under the Companies Act.[63] The AA is deemed as the judicial body to which an application for insolvency proceedings may be presented by persons specified in the Act, and the AA is empowered to accept or reject such application.[64] Another power granted to the AA is to admit or reject an application for initiation of the CIRP received from persons specified in the Code.[65] The AA then must cause a public announcement of such CIRP, enforce a moratorium under the CIRP, and appoint an interim RP.[66] The Code further awards the AA with the power to mandate compliance from parties involved to supply any information as requested by the RP.[67] Lastly, the Code requires that the RP should present the COC approved resolution

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[59] *Id*, § 30(3).
[60] *Id,* § 30(2).
[61] *Id*, § 12(2).
[62] Dayanand Murthy, *Revolutionary Inroads into the Insolvency and Bankruptcy Law in India,*9 IUP LAW REV., 32, 44, (2019).
[63] Insolvency and Bankruptcy Code, No. 31 of 2016, § 5(1) (India).
[64] *Id,* § 7.
[65] *Id*, § 9.
[66] *Id*, § 14 & 16.
[67] *Id*, § 19(3).

plan before the AA, which should then recheck if the plan so approved conforms to the requirements of the Code.[68] The same section also declares that if approved by the AA, the resolution plan is binding on the corporate debtor and stakeholders involved in the resolution plan. Thus, the NCLT has a wide set of powers to employ in the CIRP and is involved whenever a decision needs judicial approval.

The resolution plan itself is defined by the IBC as "a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II".[69] The plan must necessarily be based on an information memorandum that is to be created and provided by the RP.[70] It is worth noting that the choice of approving or rejecting a resolution plan, as granted to the RP, the COC and the NCLT (discussed above), must rest exhaustively on whether the plan covers the following points, and on no other point: Provisions for the payment of CIRP costs, repayment of operational debts, managing debtor's affairs post-approval, implementation and supervision of the plan, conformity to laws and requirements of the Insolvency Bankruptcy Board of India (**"IBBI"**).[71] Thus, additional requirements may solely be added by the IBBI, and the NCLT has no such powers of addition on its own in this matter.

[68] *Id*, § 30(6) & 31(1).
[69] *Id*, § 5(26).
[70] *Id*, § 30(1).
[71] *Id*, § 30(2).

V. JUDICIAL PRONOUNCEMENTS & THEIR INTERPRETATION

A. Authority of Company Courts

The jurisprudence on the topic of commercial wisdom of creditors against the judicial wisdom of the NCLT was initiated by judicial decisions as early as the 1990s. While deciding on the authority of company courts to criticise the decisions taken by shareholders of a debtor, in the case of *Miheer Mafatlal v. Mafatlal Industries Ltd.*, the Supreme Court provided certain points of consideration which formed the boundaries of the sanctioning court's scope of scrutiny.[72] These points included checking for compliance with respect to statutory procedure, majority vote, relevant data, substantive provisions of law or public policy, good faith, informed decisions, and just & fair actions. The court stated that an adjudicating authority could not command jurisdiction over a stakeholders' decision if these criteria were fulfilled.[73] Through this decision, the debate on primacy between judicial and commercial wisdom was contextualized in the Indian insolvency jurisprudence.

The origin of the NCLT's adjudicatory power was first questioned in the case of *Vivek Vijay Gupta (promoter Of Corporate Debtor) v. Steel Konnect India Pvt. Ltd. And Others*.[74] The bench observed that there was no express provision in IBC that permitted the AA to debate on the choices of the COC while rejecting a Resolution Plan.[75] The same reasoning was used to mandate through the IBC that the AA could not consider a resolution plan

[72] (1997) 1 SCC 579.
[73] *Id*, Para 31.
[74] C.P. (IB) No. 05/NCLT/AHM/2017.
[75] *Id*, Para 5.

if it was previously rejected by the COC.[76] This argument was borrowed from the judicial interpretation of IBC provided in the case of *Innoventive Industries Ltd. v. ICICI Bank*, wherein it was stated that the Parliament had empowered the COC to take decisions and the AA to check its legality and procedural consistency only.[77] In *Bhaskara Agro Agencies v. Super Agri Seeds Pvt. Ltd.*, the bench inquired into the question of law that was an AA permitted to discuss the viability or feasibility of a COC approved resolution plan[78]. The court explained that the COC was to be treated like a body of experts, & hence could not be challenged in matters of financial recovery.

B. Understanding Commercial Wisdom

The meaning of commercial wisdom of the COC was discussed in *State Bank of India v. Ushdev International Ltd.*, where the bench explained that "wisdom is an exercise of prudence based on knowledge, intelligence, brilliance and acumen-ship, and that the terminology 'commercial' is based upon data and figures".[79] This observation of the court was supported by its stance that commercial wisdom needed to be applied through the prudence of a common man with sufficient knowledge of the business. While delivering the verdict, the court explained that the AA was permitted to scrutinize the decision of the COC if it was visible that no prudence had been employed, and that if it is visible that a bad decision has been taken without even using common wisdom, the AA could reject the application thereafter.[80]

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[76] *Id*, Para 7.
[77] (2018) 1 SCC. 407.
[78] CA (AT) No. 380-2018.
[79] C.P. No. 1790/I&BC/(MB)/2017.
[80] *Id*, Para 35 & 36.

A landmark decision was given in *K. Sashidhar v. Indian Overseas Bank & Ors,* where the apex court presented its opinion on the topic.[81] One of the arguments presented was that the provision in Section 30(4) of the IBC is just advisory and not obligatory due to the inclusion of the term 'may'. The court noted that the phrase refers to the discretion of the COC to accept or reject the resolution plan. It was further noted that the legislation did not provide the NCLT with the power or competence to analyse or review the committee's commercial choices, much less to inquire into the justness of the dissenting financial creditors' rejection of the resolution plan.[82] Without court involvement, the IBC accords substantial significance to the COC's commercial judgement in ensuring that the resolution process is completed within the IBC's mandated deadlines. Additionally, the NCLAT's authority would be limited in this regard by S. 32 read in conjunction with S. 61(3).[83] Consequently, the IBC awarding jurisdiction and authority to the AA does not justify the NCLT's criticism of the COC's commercial decisions, such as approval or rejection of the resolution plan. The court noted that as stipulated in the IBC, the tribunals have restricted jurisdiction and cannot serve as sentinels of equity or possess plenary powers.[84] Thus, it can be inferred that NCLT's scope of inquiry and the reasons for interfering with the COC's decisions have been laid forth in the IBC itself, and cannot be widened by judicial discretion.

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[81] (2019) SCC Online SC 257.

[82] Karan Khanna et al, *Sashidhar v. Indian Overseas Bank and Ors. – Commercial Wisdom Reigns Supreme*, MONDAQ, (Mar. 19, 2019) https://www.mondaq.com/india/insolvencybankruptcy/790252/sashidhar-v-indian-overseas-bank-and-ors-commercial-wisdom-reigns-supreme.

C. The scope of COC's authority

The most profound revelation on this issue was made in the case of *Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta & Ors.,* which involved deliberations on prime questions such as the constitutional validity of the IBC, the structure of the CIRP, the time limits of the insolvency process and the scope and powers of the COC.[85] The court reaffirmed that the COC's commercial acumen in adopting a resolution plan by a majority vote must guide all subsequent choices, including the allocation of resolution plan revenues.[86] The court concluded that the NCLT had narrow quasi-judicial authority over the bulk of the COC's policy choices.[87] The court laid emphasis on the fact that while the COC retains ultimate autonomy over what to pay and how much to pay each class or subclass of creditors, the COC's decision must properly indicate its consideration of three crucial criteria: (a) ensuring that such corporate debtor remains solvent throughout the process; (b) optimising the worth of the debtor's assets; and (c) attempting to balance the needs of different stakeholders.[88] Thus, the AA is not permitted to intervene on the merits in the COC's financial judgments.

These findings were reiterated in a catena of judgments from the Supreme Court, various High Courts, and the NCLAT and NCLT benches themselves. In *Ghanashyam Mishra & Sons Pvt Ltd through the Authorized*

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[83] Insolvency and Bankruptcy Code, No. 31 of 2016, § 32 & 61 (India).
[84] *Id*, § 30 & 31.
[85] (2020) 8 SCC (531) 62.
[86] Maharashtra Seamless Ltd. Vs. K.K. Lakshminarayana & Ors., CA (AT)(Ins)No. 637 of 2018.
[87] *Id*, Para 18.
[88] *Id*, Para 41.

Signatory v. Edelweiss Asset Reconstruction Co Ltd through the Director & Ors, the court repeated its stand that the commercial choices of the COC were given paramount importance without judicial intervention.[89] The reason provided for the same was to ensure that the processes stated in the Code were completed in time without creating further branches of dispute.[90] Furthermore, it was the wisdom of majority creditors that would determine through negotiations with the applicant as to the manner of resolution to be adopted. One of the latest explanations was given in *Kalpraj Dharamshi & Anr v. Kotak Investment Advisors Ltd & Anr,* where the court declared that there was no ambiguity in the law and that the COC's majority decision regarding the commercial viability of a resolution plan reigned supreme.[91]

VI. EXECUTIVE AND ADMINISTRATIVE DEVELOPMENTS

For the purpose of understanding the administrative intent behind the provisions of IBC, this paper shall study the reports presented by the parliamentary committees of the Indian Parliament. The discussions therein and the interpretations that can be derived from such reports shall provide a fresh perspective on the matter.

A. Banking law reforms and impact on IBC

Towards the end of 2015, the Government of India created the Banking Law Reforms Committee (**"BLRC"**) to present data and recommendations on the state of insolvency proceedings in the country.[92]

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[89] 2021 SCC Online SC 313.
[90] *Id*, Para 142.
[91] C.A. No.847-848/2021.
[92] Shreya Damodaran, *Recent Insolvency and Proposed Bankruptcy Law Reforms in India*, 1 EM. MAR. RES. JOUR., 40, 41, (2016).

The report of the Committee provided a framework that helped the government visualise a new insolvency and bankruptcy law in the country.[93] In its contentions, the report suggested for the first time that there ought to be a creditors' committee to choose the final solution at the end of negotiations.[94] The report enunciated the fact that the act of choosing proposals of restructuring or liquidation was an entirely commercial decision and hence, was best left to the COC.[95]

In its analysis of the problems presented by stakeholders, the BLRC noted that whenever a corporate debtor defaults, numerous actions can be taken, but the ones suited best need to be selected to avoid a multiplicity of proceedings. The committee further states,

> The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.[96]

This text suggests that the committee has in unequivocal terms considered the COC as the supreme authority to select and implement business plans for its corporate debtor, without any external scrutiny in terms of financial or commercial feasibility. Such empowerment of the status of the

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[93] *Supra* note 10 at 3.
[94] *Id*, Para 5.3.1.
[95] *Id*, Para 5.5.7.
[96] *Id,* Executive Summary para 3.

COC creates an undisputable inclination of the law to be interpreted in favour of COC when challenged before the NCLT.

B. Special focus under Insolvency law

Then, in 2017, the MCA created an Insolvency Law Committee (**"ILC"**) to understand the issues faced by stakeholders under the newly enforced IBC 2016; which released its latest report in 2020.[97] The Committee noted that a large number of applications were being filed for initiation of CIRP, adding pressure on judicial infrastructure, which caused delays both at the stage of admission and during litigation in the CIRP.[98] It is a known phenomenon that delay in dispute resolution causes commercial uncertainty, employee turnover, raised resolution costs and is generally detrimental to the interests of stakeholders.[99] Thus, it is reasonable to infer that the committee realised that extended delays could infect the confidence of investors in the resolution system. The Committee agreed that the success of the Code needed to be measured in terms of its ability to resolve distress in a value-maximizing manner for all stakeholders, in a timely manner. The report went on to note the qualifying condition placed in the *Essar case* by the Supreme Court, whereby the COC must ensure that the interests of all stakeholders including operational creditors have been taken care of while approving a resolution plan.[100] It was also mentioned that the Code vests the

[97] MINISTRY OF CORPORATE AFFAIRS, GOV'T OF IND., REPORT OF THE INSOLVENCY LAW COMMITTEE, 3 (2020 - 2021), https://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf.
[98] *Id*, Para 2.2.
[99] Shasta Gupta, *Resolution vs Liquidation under IBC,* 1 (2) CORP. GOV. INS., 20, 25, (2019).
[100] *Id,* Para 10.6.

COC with critical commercial decision-making authority and obligations.[101] Most significantly, the COC is tasked with assessing the corporate debtor's viability and determining how its crisis will be handled.

The contentions of these two committee reports can be understood better with the help of contemporaneous data on insolvency proceedings in India. It has been priorly proved that with the introduction of the CIRP, the number of petitions for resolution plans has gone up significantly.[102] A multi-variable statistical analysis conducted by Kattyadiyil[103] was able to substantiate that the COC is able to accomplish a greater realizable value than what is presented by the applicant before the AA, with the inference that the commercial approach of COC is indeed based on knowledge and experience. It is but logical to infer that the AA under IBC needs to reduce interference in the matters where the sole authority to pick a resolution plan lies with the COC. Globally, a court is only allowed to intervene in a creditors' decision on proof of unfairness, damage to public policy, or material legal irregularity.[104] This phenomenon shall be discussed in the upcoming part of the analysis.

VII. INTERNATIONAL JURISPRUDENCE

Since insolvency and its resolution is a common phenomenon globally, it has been discussed extensively in policies of various countries as

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[101] *Id*.
[102] Sreyan Chatterjee et al., Watching India's insolvency reforms: a new dataset of insolvency cases, (Indira Gandhi Institute of Dev. Research, Working Paper No. 12, 2017) http://www.igidr.ac.in/pdf/publication/WP-2017-012.pdf.
[103] *Supra* note 46 at 8, page 105.
[104] Richa Saraf, *Role of the Adjudicating Authority in Considering a Resolution Plan,* INDIACORPLAW, (Dec. 8, 2018) https://indiacorplaw.in/2018/12/role-adjudicating-authority-considering-resolution-plan.html.

well as international organisations. The World Bank[105] as well as the Asian Development Bank[106] have provided basic guidelines on the inclusion of a creditors' committee in commercial decisions of an insolvency proceeding. The paper shall analyse the inclusion of such principles in the policies and laws of certain countries with sufficiently evolved insolvency regimes, to provide a wider perspective on the topic at hand.

A. The United States of America

In the US, a creditors' committee is formed under the provisions of the Bankruptcy Code,[107] to protect the interests of creditors. It has been judicially pronounced through the decision in *In re Adelphia Commc'ns Corp*[108] that the committee is empowered to perform such services as are necessary to serve the interests of creditors. The circuit court in this case also explained that the "committee owes a fiduciary duty to the class it represents, but not to the debtor, other classes, or the estate in commercial matters". This empowerment of the creditors' committee has been interpreted to suggest that the national policy on insolvency tilts towards ensuring the self-determination of creditors in matters of commercial decisions.[109] Furthermore, it has been explained in the case of *In re Baltimore*[110] that it is the duty and power granted to the creditors' committee to take decisions in the best interests of the debtor as well as creditors involved, and there need

[105] Principles C7.1 & C7.2, *Revised Principles for Effective Creditor Rights and Insolvency Systems,* World Bank & IMF, (2005).
[106] Para 4, *Insolvency Law Reforms in the Asian and Pacific Region,* Asian Development Bank, (2001).
[107] The United States Bankruptcy Code, 11 U.S.C. § 1102(b)(1).
[108] 544 F.3d 420, n.1, 2d Cir. (2008)
[109] Levent Boru, *Creditors Committee on the Ordinary Concordat,* 9 INONU UL REV., 341, (2018).
[110] 432 F.3d at 561 (2010).

not be any scrutiny of the decision unless the act is patently against the law or policy. In *Commodore Int'l, Ltd,*[111] it was declared by the court that a certain decision of the creditors' committee may not be challenged if it appears to be in the best interests of the bankruptcy estate and the resolution process.

B. The United Kingdom

In the UK, when a company is placed into administration, the administrator must invite the creditors to form a creditors' committee, made up of a minimum of three and a maximum of five nominated creditors of the corporate debtor.[112] The judicial acceptance of the commercial wisdom of the COC reigns from the decisions in *Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc*[113] and *Re International Tin Council,*[114] wherein the courts highlighted the cross-border effects of commercial decisions. It was held that the ability of a body of nominated or elected creditors of an entity would be the sole authority fit to take decisions in the economic interests of the entity. A similar decision in *Re Bank of Credit and Commerce International SA (No 10)*[115] held that it is in the interest of expeditious resolution that the judicial arms of the state do not question the plan adopted by a creditors' committee as long as the plan purports outcomes of a legally valid nature.

[111] 262 F.3d 96, 100, 2d Cir. (2001).
[112] Part 17, Insolvency (England and Wales) Rules 2016 (SI 2016/1024) (IR 2016).
[113] (2006) UK PC 26.
[114] (1987) UK Ch 419.
[115] (1997) UK Ch 213.

C. European Union

The conventional policy of the European Union[116] has tilted towards the empowerment of creditors' committees across member states. The most recent development in this regard is the substitution of the concept of "creditors' committees" with "creditors' classes", in an attempt to reduce the involvement of national courts situated in member states.[117] All 27 EU Member States are mandatorily required to implement laws in pursuit of the directive[118] enforced in this context, to alleviate the differences between the Member States with respect to the range of the processes necessary for debtors in financial constraints in order to restructure their business. In France, a new amendment[119] draft on insolvency law is conjectured[120] to implement these measures, because of which creditors will have a significant power to vote on the safeguard and reorganization plans, reducing the interference powers of French courts. Another jurisdiction that swiftly reduced court interference in commercial decisions[121] of the COC is the Netherlands through the amended 'Wet Homologatie Onderhands Akkoord'.[122] Thus, a global tilt in favour of empowering creditors' commercial interests and reducing adjudicatory interference can be observed.

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[116] Ellis Ferran, *The Place for Creditor Protection on the Agenda for Modernisation of Company Law in the European Union*, 3 EC. F. R., 178, 181, (2006).
[117] Hidde Volberda, *Crises, Creditors and Cramdowns: An evaluation of the protection of minority creditors under the WHOA in light of Directive (EU),* 17 (3) UT. L. R., 7, 18, (2021).
[118] DIR. EUR. (2019/1023).
[119] Order n°2021-1193 (2021) & Decree n°2021-1218 (2021).
[120] Laurre Perrin, *An Introduction to France's New Restructuring Laws*, 7 (72) NAT. L. REV., 1, 2, (2021).
[121] Emilie Ghio et al, *Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of the COVID-19 pandemic*, 30 (3) INTL. INS. REV. 427, 430, (2021).
[122] Dutch Bankruptcy Act, No.3 of 1893, (Net.).

VIII. SUGGESTIONS

Based on the analysis provided in prior sections, the paper shall now attempt to provide certain policy changes in the domain of commercial decisions of the COC.

The provisions of the IBC should be amended to strongly demarcate the area of law where the NCLT may intervene and inquire into the resolution plan. A slew of decisions by the Supreme Court have already highlighted such boundaries, and they need to be added to provisions of Section 31 of IBC, which discusses the contributory role of the COC and NCLT in accepting a resolution plan. The text of the Act must define and explain the term "Commercial wisdom of the COC" in order to provide finality to the conundrum.

The second policy suggestion would be the implementation of awareness programmes with respect to the Code of Conduct for the COC amongst the members of the NCLT, in order to sensitise them of the duties and authority of the COC. Such sensitisation can prove useful in avoiding future conflicts of the NCLT and the COC in matters that do not require judicial intervention in the CIRP.

The third and final suggestion towards the topic at hand would be the incorporation of pre-determined criteria into the IBC for the identification of practices of the COC that may violate the idea of public policy or the spirit of the insolvency law. Such criteria of thresholds, such as a percentage limit on 'cuts' to the resolution plan acceptable to stakeholders, can help the NCLT ensure a legally valid outcome of the CIRP without causing undue interference in economic matters of the corporate debtor. The provision of

pre-determined objective criteria for judicial interference will provide certain predictability to the law, and achieve the twin goals of increasing investor confidence through the speedy resolution of disputes, and creating a legal safeguard in the event of misuse of provisions by the COC.

IX. CONCLUSION

For many decades, India has struggled to maintain its image on the Ease of Doing Business Index presented globally. The new framework introduced by the IBC in 2016 involved a number of new entities and bodies meant to provide their specialised contribution in resolving the cases under the law. The concepts of information utilities, RPs, and COC were set forth so that responsibilities and powers involved in the procedure could be divided and the time taken to cover each aspect could be reduced to fit in the set timeline. In this context, the idea of the COC was meant to handle the commercial decisions necessarily taken to manage the affairs of a debtor's company while a restructuring process was put into action. The basis of such authority was the commercial wisdom that a group of financial creditors would ordinarily possess, considering their interests entangled in the debtor's business. The topic at hand, that is, the conflict between the judicial wisdom of the NCLT and the commercial wisdom of the COC arose due to the possible misconception that their approval was required on the feasibility of the plan. This was corrected by a catena of judgments from the Supreme Court and other adjudicating authorities. The opinion of the legislature and executive was made clear by reports presented by various government committees and provisions of the IBC itself.

In this light, the first question regarding whether a COC can be relied upon for a commercial decision is answered partially in the positive. The Act and its interpretation portray the COC as the supreme authority in commercial matters such as the selection of a resolution plan. Accordingly, the second research question is answered in the negative, as the NCLT has been in no way empowered to question the correctness of the commercial aspects of the COC's decisions. The third question of the paper, which is also the most relevant one, provides the greatest revelation, and the answer thereafter is again partially positive. Although the decision of the COC on the feasibility of a plan reigns supreme, the NCLT has been empowered to reject it if it appears to be insufficient to provide for the requirements enlisted in the IBC. Hence, if the plan so selected by a COC majority appears to be insufficient, or so incomplete no person of ordinary prudence would find it reasonably sufficient to cover the mandated requirements, NCLT has the option of rejecting it. Consequently, the hypothesis that the COC should be allowed to function without external interference, and that the NCLT should only monitor the legality and public policy involved in its decisions, is accepted.